

ORISSA HIGH COURT

Narendra Kishore Das

Vs

Banamali Sahu Dibakar Sahu Firm

A.F.O.D. No. 61 of 1948

(Ray, C.J. and Panigrahi, J.)

25.04.1949

JUDGMENT

Ray, C.J.

1. This appeal is directed against an order of the Subordinate Judge of Cuttack refusing to set aside an ex parte decree. The suit was a Money Suit by the res p. against more than four Defendant of whom deft. 2 is the applt. before us. Deft. 1 is the elder brother and is stated to be the Manager of the joint family of Defendant 1, 2 and 3. Deft. 4 is a Muhammadan gentleman who was impleaded on the ground that he was one of the patnrs of the partnership business in relation whereto the liability in favour of the pltf. is said to have arisen. Defta 5 and 6 were some of the servants of the partnership concern. The suit was contested by deft. 4 and he was released from the liability on the finding that he was not a patnr. of the concern. Deft 1, while residing at Puri. the place where he ordinarily resides now-a-days away from the family house at Cuttack, was personally served with summons which he acknowledged. Deft. 3 is the son of deft. 1. The two Defendant (Defendant 2 and 3) could not be personally served with the regular summonses accompanied with copies of plaint addressed to them. The report of the Serving Officer was that the copies of summonses had been tendered to them; but they having understood the purport thereof refused to acknowledge and thereupon they were hung at the sadr door of their residence. I could not quite understand how could deft. 3's ordinary residence be at Cuttack when his father deft. 1 was ordinary residing at Puri. Deft. 3 was admittedly at the time a student of Jadavpur Engineering College. Under the circumstances, as is expected, the learned Subordinate Judge did not accept the report as to the mode of service of the serving Officer and declared the same to be unsatisfactory calling upon the pltf. to take further steps for fresh service. The fresh service that was ordered by the Ct. was a registered Post Card. This Post Card is said to have been tendered to the applt. before us and refused. Thereafter, the suit was set down ex parte against Defendant 1, 2 and 3. The suit travelled through a long course on account of contest by deft. 4 and was finally disposed of about a year after. The decree was ex parte as against Defendant 1, 2 and 3

and one of dismissal as against defts 4, 5 and 6. The Defendant 1, 2 and 3 by separate applns. filed, sought to have the ex parte decree set aside under Order 9 Rule 13 which met with refusal by the Sub. ordinate Judge. Hence this appeal by the deft. 2.

2. The learned Subordinate Judge, after considering the evidence of the Postal Peon (witness 2 for the opp. party), has come to the finding that the post card was tendered personally to Narendra Kishore Das. I have gone through the evidence of this witness and there is much to be said against his testimony. He is a peon under suspension regarding delivery of an Insured Parcel for about nine months by the time when he deposed. The point, however, that has to be considered in this appeal is whether the post card, in question, is an effectual substitute for the regular service of summons. Order 5 Rule 17 lays down the various alternatives that have to be adopted for effecting personal or other service of summons accompanied with copy of plaint on a deft. the validity of which depends upon the Ct's. pronouncement of its genuineness and credibility. As I have said in this case, the Ct. pronounced the Serving Officer's report as unsatisfactory. Then comes R. 20 of the Order into operation which provides:

"Where the Ct. is satisfied that there is reason to believe that the deft. is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Ct. shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house and also upon some conspicuous part of the house (if any) in which the deft. is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Ct. thinks fit."

3. The last mode of service, namely, "or in such other manner as the Ct. thinks fit", no doubt, gives the Ct. the jurisdiction to have the service of summons through registered post. But the question reduces itself to this what that summons should be? Should it be anything different from what it ought to be within the meaning of Rule 1, Order 5 of the Code and the Form prescribed in App. B (No. 1)? Sub-rule (3) of Rule 1, Order 5, provides:

"Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Ct."

According to App B (No. 1), the summons besides giving adequate particulars of the suit and the date fixed for either disposal or for settlement of issues, will purport to be one addressed by the Ct. or under the authority of the Ct. The latter requirement is to be fulfilled by insertion of the following words or their equivalent: "Given under my hand and the seal of the Ct., this day of 19 Judge." Until this is done it cannot be a summons within the meaning of law. This post card, though it contains some particulars about the date fixed for the suit and the nature of the suit, including by whom and against whom it is brought, bears nothing to say that it is signed by the Judge or under his authority. In the first summons, which could not be satisfactorily served, but

which is on a printed form, the words are "Ambhar Swakshyar O Adalatar Mohar Krame Sana 1946 Masiha 9 Masar Ta 11 Rikhe Diagala". Underneath, there is a signature of the Sheristadar indicating that he is the person appointed by the Ct. to sign. Such indication is made by words : "By Order Sheristadar". Besides on the very face of it, it contains a seal, the impression from which reads 'Seal of the Ct. of the Subordinate Cuttack'. Mr. B. N. Mohanti, appearing for the opp. party, invites our attention to a seal on the reverse of the post card (the side in which the address is written) which is to the effect "Sub. Judge's Ct. Cuttack Filed 19-11-1946". This, however, cannot take the place of the Seal of the Ct. This is only a date-stamp of the Office indicating the date when any particular document or paper is filed in Ct. Besides, this is not a part of the summons too. The entire summons is on the front page of the post card, which as I have said, does not either contain the signature of the Judge or that of any other Officer appointed by him in that behalf nor the seal of the Ct. Even if one is there, namely, the seal of the Ct. if the other is not there, it does not amount to a summons. The rule requires both.

4. It is well settled in principle that a party's knowledge of the institution of a suit is not sufficient so long as he is not effectively served with summons of the suit. He may from various circumstances or after his own enquiry come to know that a suit has been filed against him, but he is entitled to expect service of summons from Ct. Till that is done, you cannot fix him with the liability of ex parte decree and cannot refuse his appln. to set aside the said decree on the ground that there is good reason to believe that he knew of the suit. Therefore, even if we believe that this post card was tendered to the applt. (Narendra Kishora Das) and he refused it, yet there was nothing in it to show that it was a summons addressed by a Judge of the Ct. commanding him to appear in Ct. and answer to a cause against him.

5. Under the circumstances, we are of opinion that in this case, it cannot be held that the summons has been served upon him in accordance with law. It should be proper to state here that service by post may be adopted as a supplementary mode of service, but it shall not, by itself, take the place of service of summons, particularly, in a case where there was no attempt to serve the Defendant with summons personally as in this case in which the peon's report was not believed by the Ct.

6. In consideration of what I have said above, I should set aside the ex parte decree in the suit, as a whole, and restore the suit to its file as against defts 1, 2 and 3. The appeal is allowed. The applt. however, in the special circumstances of the case, shall pay costs of this Ct. to the pltf. Respondent

Panigrahi, J.

7. I agree.

Appeal allowed.

