

S K Jain vs Maini Scaffold Systems on 21 January, 2019

Author: Manmohan

Bench: Manmohan

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS(05) 2222/2013

S K JAIN Plaintiff
Through: Mr. S.S. Lingwal, Advocate.

versus

MAINI SCAFFOLD SYSTEMS Defendant
Through: Mr. Ankit Sibbal, Advocate with
Mr. Prashant Neal and Mr. Himanshu
Singh, Advocates for defendants No.1
and 2.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

ORDER

% 21.01.2019
I.As. 2086-2087/2018

While I.A. 2086/2018 has been filed on behalf of the defendant No.1 and 2 for setting aside ex parte order/judgment and decree dated 15 th January, 2015, I.A. 2087/2018 has been filed for stay of execution proceedings.

In the present applications, it has been averred that the defendants- applicants came to know about the present suit for the first time upon receipt of the notice of the execution petition from the Court of ADJ-01, District South-East, New Delhi.

It is further averred in the applications that the learned Joint Registrar while passing the order dated 13th February, 2014, wherein he had noted that the defendants stood served, committed an error in appreciating that the tracking report of Indian Post clearly mentions "Delivery attempted:

unclaimed".

Learned counsel for plaintiff states that the service report using the expression "unclaimed" amounts to service. In support of his contention, he relies upon a

judgment of the Coordinate Bench of this Court in Ajay Jain Vs. Rajat Sharma, CM(M) 777/2012, wherein it has been held as under:-

"9. With regard to the notice of demand dated 18.4.2011, the same was stated to have been sent by the respondent by registered post as also by the courier. It was undisputed that the envelopes sent by registered post bear the correct addresses of both the petitioners and were returned "unclaimed". The learned counsel for the petitioners sought to argue that what was contemplated was the service of notice and not issuing of notice under proviso (a) to Section 14 (1) and further that the notice was returned as "unclaimed" as distinct from „refused . In this connection, a reference to Section 27 of the General Clauses Act will be useful. The Section reads thus:

"27. Meaning of service by post. - Where any central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

10. There is no dispute that envelopes bear the correct addresses of the petitioners. It is also borne from the findings of the ARC that the notices were sent by registered A.D. with acknowledged due at the correct addresses. Thus, the notices can be deemed to have been served on the petitioners, unless it was proved otherwise by them. There being nothing to the contrary brought on record by the petitioners to discharge the burden to rebut the aforesaid presumption, the notices received „unclaimed would be deemed to be served upon the petitioners. The dictionary meaning of the word "unclaimed" is „not claimed or „not having been claimed . This would be amounting to nothing but refusal. Thus, there is no significant difference in the words „unclaimed or „refused for the purposes of drawing a presumption of service contemplated under Section 27 of the General Clauses Act. In addition to the notices sent by registered post, which returned unclaimed, the notices were also got issued by courier services. This was nowhere denied or controverted by the petitioners. In any case, the service of notice by the courier also stands established from the statement of the respondent. It can be noted here that the service of process by courier and other modes has also been recognized by way of Notification No. 70/Rules/DHC dated 09.02.2011."

A perusal of the Part-II-B file reveals that a report of the DTDC, a courier agency, is on record. The said report states that the courier was served on defendant No.3 on 18th December, 2013.

Since defendant No.3 was a partner of defendant No.1, it will be a case of deemed served on the partnership firm. A Coordinate Bench of this Court in Dena Bank Vs. Refrigeration & Air-conditioning Enterprises & Ors., 2000 (56) DRJ (Suppl) 599 has held as under:-

"In order to appreciate rival contentions Rule 3 of Order 30, CPC reproduced below which reads as under:--

"3. Service.- Where persons are sued as partners in the name of their firm, the summons shall be served either-

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within (India) upon any person having, at the time of service, the control or management of the partnership business there, as the court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without (India);

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within (India) whom it is sought to make liable.

Order 30 deals with suits against firms and against the persons carrying on business in the names other than their own. Rule 3 provides the mode of service where the persons are sued as partners in the name of their firm. It envisages that in such a case the service of summon on the firm can be made upon any one or more of the partners or at the principal place at which the partnership business is carried on. It specifically states such a service "shall be deemed to be a good service upon the firm so sued". In this case, in addition to the defendant No. 1/firm, its partners have also been impleaded as parties to the suit. They were present when the Local Commissioner visited the office/factory premises to prepare inventory. They signed inventory memos. They did not appear in the Court on the date fixed. They had to be served again. They appeared through their Advocate, sought time to file the written statement. Thereafter, they did not file any written statement and were proceeded ex-parte. Summons sent at the registered office of the firm were returned with remark "office closed". Thus suit is not in the name of the firm alone, its partners have also been impleaded as parties. They were duly served. They have chosen not to contest the proceedings. In *Topanmal Chhotamal v. M/s. Kundomal Gangaram & Ors.*, AIR 1960 SC 388, the Supreme Court on examination of Order 21 Rule 50(1) and Order 30 Rule 3 summed up the law on the subject and held as follows:--

"The gist of the said provisions may be stated thus: A decree against a firm can be executed (i) against the property of the partnership, (ii) against any person who has appeared in the suit individually in his own name and has been served with a notice under Rule 6 or 7 of Order XXX of CPC, (iii) against a person who has admitted on the pleadings that he is or has been adjudged a partner, or

(iv) against any person who has been served with notice individually as a partner but has failed to appear. The decree against the firm can be executed against the personal property of such persons."

The Supreme Court in *Gajendra Narain Singh v. Johnmal Prahlad Raj*, AIR 1964 SC 581 observed that where a defendant is served as partner and he appears without protest, his appearance must be deemed to be on behalf of the firm. It was held:--

"Where a person is served with summons as a partner of the defendant firm and he files an appearance without protest, his appearance must be deemed to be on behalf of the firm. And unless the Court permits him to withdraw the appearance initially filed, it continues to be an appearance under Rule 6 of Order 30 on behalf of the firm." (emphasis supplied) It bears repetition that summons sent by registered post for service on defendant No. 1 at the given address were returned with the remark "office locked". Defendants 2 and 3 were duly served under Rule 6 Order 30 as partners of the firm. Initially when the Local Commissioner was appointed to prepare the inventories, the factory and the office premises of the firm were found locked and the commission could not be executed. Subsequently, when Local Commissioner was authorised to break open the locks defendant 2 and 3 participated in the proceedings and signed the inventories. Thereafter they were represented by a lawyer in the Court who took time to file the written statement. Defendants 2 and 3 were served as partners of the firm-defendant No. 1. If they are avoiding to contest the proceedings, it is their choice.

Learned counsel for contesting defendant in support of her arguments had placed reliance on *M/s. Sitaram Ramavtar v. M/s Lohiya Murlidhar Meghraj*, AIR 1975 Rajasthan 121, *M/s. Ganeshilal Ramkumar and Anr. v. Jhangiram Lilaram*, AIR 1974 Bombay 101 and *Kewalchand and Anr. v. Satyanarain and Anr.*, AIR 1990 Rajasthan 49. The observations made in these cases are not applicable to facts of the present case.

For the foregoing reasons application is allowed; defendant No. 1/firm would be deemed to have been duly served. No fresh summons need be issued for service on the firm. IA stands disposed of."

In view of the clear position as explained above, the defendants No.1 and 3 are deemed to have been served.

In any event, the defence set up by the defendants-applicants that they came to know about the pendency of the present suit only when they were served by way of a notice in the execution petition issued by the Court of Sh. Gurvinder Pal Singh, ADJ-01, District South-East, New Delhi, is not correct, inasmuch as on 04th January, 2017 they had appeared in the execution petition before this Court and prayed for transfer of the execution petition to the District Court.

With the aforesaid observations, present applications are dismissed.

MANMOHAN, J JANUARY 21, 2019 js