IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side

Present:

The Hon'ble Justice Shekhar B. Saraf

G.A. No. 3 of 2021

In

C.S. No. 205 of 2017

AARYAN PROJECTS PRIVATE LIMITED

Versus

KLOWIN INFRASTRUCTURE PRIVATE LIMITED.

For the Plaintiff/Respondent : Mr. Abhrajit Mitra, Sr. Advocate,
Mr. Jishnu Chowdhury, Advocate,
Mr. Sankarsan Sarkar, Advocate,
Mr. Mehboob Rahman, Advocate,
Ms. Tahmina Aslam, Advocate,

For the Defendant/Petitioner : Mr. Rupak Ghosh, Advocate,
Mr. Nikunj Berlia, Advocate
Mr. Varun Kothari, Advocate

Last Heard on : August 11, 2022

Judgment on : August 30, 2022

Shekhar B. Saraf, J.:

1. The petitioner (the defendant in C.S. No. 205 of 2017) Klowin Infrastructure Private Limited had filed this application bearing G.A. No. 3 of 2021, praying for recalling or setting aside of the *ex-parte* decree dated June 12, 2019 passed by this Court. The application has

been filed under Order IX Rule 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'). The petitioner also prays for an order of injunction restraining the plaintiff to proceed in E.C. No. 393 of 2019 which has been filed pursuant to the *ex-parte* decree passed by this Court on June 12, 2019.

2. The facts of the matter are as follows:-

a) The plaintiff company and the defendant company entered into an agreement dated August 28, 2013 wherein both the parties were to jointly develop properties situated at Raipur. On August 28, 2013 the plaintiff company transferred an amount of Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) through Real Time Gross Transfer (RTGS) from an account maintained at ICICI Bank, Chowringhee Branch, Kolkata – 700016 to the defendant company's bank account.

b) Subsequently, based on a meeting between both the parties it was agreed that the defendant would look into the construction work and the plaintiff would lend a sum of Rs. 1, 35, 00, 000/- (Rupees One Crore and Thirty-Five Lakh Only) inclusive of Rs. 15, 00, 000/- (Rupees Fifteen Lakh Only) already paid to the defendant on August 28, 2013. The loan amount was offered for a period of 2 (two) years and interest to be calculated at the rate of 18% per annum.

c) After two years, the defendant failed to pay the due sum to the plaintiff company and also the defendant did not take any steps whatsoever with respect to the agreement dated August 28, 2013. Despite various attempts made by the plaintiff company through its advocate the defendant failed to repay the sum. At the time of contesting the instant suit the defendant did not enter appearance either in person or through its advocate. Due to such conduct of the defendant the suit was fixed for hearing as 'Undefended Suit' and thereafter an ex-parte decree dated June 12, 2019 was granted in favour of the plaintiff. This application seeks recalling of the same.

3. Mr. Rupak Ghosh, counsel appearing on behalf of the petitioner/defendant has made the following arguments:

a) The petitioner/defendant came to know of passing of the *ex-parte* decree dated June 12, 2019 by this court for the first time on January 5, 2021.

b) The petitioner/defendant was never aware of filing of the present suit at any given point of time on or before March 26, 2019. In this regard, the notice under Section 11 of the Arbitration and conciliation Act, 1996 dated March 18, 2019 and the reply of the plaintiff's advocate dated 26th March, 2019 have been presented.

c) The petitioner/defendant alleges that the then advocate of the defendant failed or neglected to take proper steps to follow up the proceedings in the instant suit wherein the ex-parte decree dated June 12, 2019 has been passed.

d) The petitioner/defendant states that it would appear clearly from the cause title of the instant suit that the defendant is described to have its registered office at *Plot No. 638, Urla Industrial Complex, Raipur, Chhattisgarh*, however, the said address of the petitioner/defendant has changed to *BSNL Office, Bidhansabha Road, Police Station-Morwa, Raipur, Chhattisgarh* based on an online application dated March 11, 2019, made before the Ministry of Corporate Affairs by the defendant. In this regard, documents from the Ministry of Corporate Affairs showing such application for change of address of the defendant have been presented.

e) The petitioner/defendant argues that the plaintiff was informed of such change of address via advocate's letter dated March 18, 2019, but, despite such knowledge of change of address of the defendant, the plaintiff deliberately did not take any steps for amendment of the plaint recording the correct address of the defendant.

f) It is submitted by the petitioner/defendant that the plaintiff got an order for substituted service under Order 5 Rule 20 of the CPC through publication of notice in the Central Chronicle newspaper and the whole suit has been tried, heard and disposed of on the basis of such substitute service. However, the petitioner did not come across any such advertisement which the plaintiff was supposed to make in terms of the order dated 13th December, 2018.

g) The petitioner argues that the respondent has committed deliberate fraud by not apprising the Court about the change of address of the petitioner back in March, 2019. Further, it is averred that the notice under Section 11 of the Arbitration and Conciliation Act, 1996 dated March 18, 2019 issued by the then advocate of the petitioner upon the respondent clearly mentioned its new address, the same has also been taken note of by the respondent and/or its advocate's letter dated 26th March, 2019 in paragraph 4 thereof.

4. Mr. Abhrajit Mitra, Senior Advocate, counsel appearing on behalf of the respondent/plaintiff has made the following arguments:

a) The respondent/plaintiff states that the petitioner has blamed the advocate appearing on its behalf without any form of proof in support of the explanation. Thus, it is submitted that blaming

the advocate is not a good ground and the same should be rejected by this court.

b) The respondents/plaintiff avers that the writ of summons was served upon the defendant prior to amendment of the plaint and subsequent to the amendment of the plaint. As per Sheriff's report, on both occasions when the petitioner was served by speed post, the defendant refused service. It is submitted that such refusal amounts to good service and the counsel for the respondent has placed reliance on **N. Parameswaran Unni v. G. Kannan** reported in **(2017) 5 SCC 737** to support this argument**.** The relevant paragraphs of the judgement are mentioned below:

> *"13. It is clear from Section 27 of the General Clauses Act, 1897 and Section 114 of the Evidence Act, 1872, that once notice is sent by registered post by correctly addressing to the drawer of the cheque, the service of notice is deemed to have been effected. Then requirements under proviso (b) of Section 138 stand complied, if notice is sent in the prescribed manner. However, the drawer is at liberty to rebut this presumption.*
>
> *14. It is well settled that interpretation of a statute should be based on the object which the intended legislation sought to achieve:*

"It is a recognised rule of interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature. If an expression is susceptible of a narrow or technical meaning, as well as a popular meaning, the Court would be justified in assuming that the Legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its power invalid" [New India Sugar Mills Ltd. v. CST, AIR 1963 SC 1207].

15. This Court in a catena of cases has held that when a notice is sent by registered post and is returned with postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed [Jagdish Singh v. Natthu Singh, (1992) 1 SCC 647; State of M.P. v. Hiralal, (1996) 7 SCC 523 and V. Raja Kumari v. P. Subbarama Naidu, (2004) 8 SCC 774 : 2005 SCC (Cri) 393] . Though in the process of interpretation right of an honest lender cannot be defeated as has happened in this case. From the perusal of relevant sections it is clear that generally there is no bar under the NI Act to send a reminder notice to the drawer of the cheque and usually such notice cannot be construed as an admission of non-

service of the first notice by the appellant as has happened in this case.

16. Moreover the first notice sent by the appellant on 12-4-1991 was effective and notice was deemed to have been served on the first respondent. Further, it is clear that the second notice has no relevance at all in this case at hand. The second notice could be construed as a reminder of the respondent's obligation to discharge his liability. As the complaint was filed within the stipulated time contemplated under clause (b) of Section 142 of the NI Act, therefore Section 138 read with Section 142 of the NI Act is attracted. In the view of the matter, we set aside the impugned judgment of the High Court."

C) The respondent/plaintiff avers that substituted service under Order V Rule 20 of the CPC was done by newspaper publication of the amended plaint on December 23, 2018 pursuant to the order dated December 13, 2018.

d) The respondent/plaintiff argues that in the instant suit, it had filed an application being G.A. No. 3204 of 2017 under Order XII Rule 6 for judgement upon admission and another application being G.A. No. 1908 of 2018 for amendment of the plaint, both these applications were served upon the defendant but despite

having such knowledge he chose to stay away. Further, in G.A. No 3204 of 2017 an order dated January 18, 2018 was passed wherein it was recorded that in spite of service the defendant was not represented.

e) It is argued by the respondent that once a suit is transferred to the warning list of the undefended suits, the defendant cannot enter appearance without special leave being obtained from the Court. Reliance has been placed on the provisions of Chapter VIII Rule 17 and 19 of the Original Side Rules of this Court wherein the defendant has to file an application under Chamber Business of the Court praying for special leave to appear and contest the suit.

Observations & Analysis

5. I have heard the counsel appearing for the respective parties and perused the materials on record.

6. The learned counsel for the petitioner/defendant has prayed for the setting aside of the *ex-parte* decree under O.IX, R. 13 of the CPC. Therefore, it would be prudent that the relevant provisions are reproduced which provides as follows:

13. ***Setting aside decree ex parte against defendant.—*** *In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:*

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further than no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation. —Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of an any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.

7. As is evident from a bare reading of the provision of law extracted above, O.IX, R.13 envisages two particular conditions, either of which if fulfilled, warrants an interference by the Court to set aside an *ex parte* decree; these conditions are:

a) *Either the defendant satisfies the Court that the summons was not duly served upon him,* ***or***

b) *The defendant was prevented by any sufficient cause from appearing when the suit was called for a hearing.*

8. Moreover, in a decision of the Supreme Court in ***Bhivchandra Shankar More -v- Balu Gangaram More*** reported in (2019) 6 SCC 387, while also relying on the dictum of ***Bhanu Kumar Jain -v- Archana Kumar*** (2005) 1 SCC 787 as was done in ***Neerja Realtors Pvt. Ltd. -v- Janglu (Dead) through Legal Representative*** (2018) 2 SCC 649, the Court had ruled on the 'substantive scope' of Order IX Rule 13 as follows:

> *"11. In an application filed under Order IX Rule 13 CPC, the Court has to see whether the summons were duly served or not or whether the defendant was prevented by any "sufficient cause" from appearing when the suit was called for hearing. If the Court is satisfied that the defendant was not duly served or that he was prevented for "sufficient cause", the court may set aside the ex- parte decree and restore the suit to its original position."*

9. It is the case of the petitioner that the writ of summons was not duly served upon him by the respondent. Therefore, the natural progression would be to examine if the facts exist to show that the writ of summons was not duly served upon the petitioner.

10. The respondent/plaintiff had filed a suit titled C.S. 205 of 2017 on September 08, 2017 and that the service of writ of summons of this suit was attempted by the process server through Learned District Judge, Raipur on February 10, 2018. The Deputy Sheriff's report dated May 03, 2018 records the remark "*could not be served upon the defendant as the company had left premises about 3 years ago*". Whereas, with regards to the service through speed post with A/D, the report mentions the packet was received in the Sheriff's office with remark as – "*undelivered packet marked refused*".

11. The respondent/plaintiff moved an amendment application dated July 10, 2018 seeking amendment of the plaint (being G.A. No. 1908 of 2018 in C.S. 205 of 2017), the service of the amendment application was returned with the endorsement "*item delivery attempted addressee moved*".

12. Thereafter, substitute service of amendment application was permitted and the same was duly published in newspapers on August 24, 2018 containing prayers of the amendment application.

13. The amendment application was henceforth allowed by this Court on September 13, 2018 and that the original writ of summons of the amended plaint and one duplicate copy of the writ of summons along with one copy of plaint was despatched through the office of the Sheriff on October 09, 2018 to the learned District Judge, Raipur. However, the Sheriff's office did not receive back the original writ of summons or any service report from the said Court. Whereas, the service made through Speed Post with A/D was returned and received by the office of the Sheriff on November 12, 2018with the endorsement "*undelivered packet marked insufficient address*".

14. Subsequently, the respondent/plaintiff was allowed substituted service by this Court on December 13, 2018 and the same was published on December 23, 2018 advertising the prayers of the amended plaint. In the meanwhile, the respondent/plaintiff also got a fresh writ of summons along with copy of plaint despatched through by registered speed post with A/D on January 18, 2019. The same was returned and received by the office of Sheriff on February 06, 2019 with the endorsement "*undelivered packet marked as refused*".

15. Whereas, an attempt for service of the writ of summons along with copy of plaint was made by the Sheriff's office through Learned District Judge, Raipur on February 12, 2019, and the same was returned with remarks as "*could not be served upon the*

petitioner/defendant Company due to non-existence at stated address". Therefore, as it is evident from the facts above, the petitioner/defendant company could not be served the amended plaint and the writ of summons of such plaint each time.

16. It is to be noted here that even when the service of writ of summons through Court as well as Registered Post was pending, the respondent/plaintiff company managed to get the suit transferred to the undefended list on February 04, 2019 itself. A suit may be transferred to as 'undefended suit' in terms of Chapter IX Rule 3 of the Rules of the High Court at Calcutta (Original Side), 1914 which is reproduced below as follows –

> **"***3. Where written statement is not filed, suit may be transferred to the Peremptory Undefended List.– Except as provided by Chapter X, rule 27, (a) where the written statement of a sole defendant is, or the written statements of all the defendants are, not filed within the time fixed by the summons, or within such further time as may be allowed, or (b) where one or more of several defendants has or have failed to enter appearance, and the other or others has or have entered appearance but failed to file a written statement within the time fixed by the summons or further time allowed, or (c) where a defendant, who having obtained an order for transfer of a suit to this Court under section 39 of the Presidency Small Cause Court*

Act (XV of 1882), and having been directed under the provisions of section 40(2) of that Act to file a written statement, has failed to file the same within the time fixed, the suit shall, unless otherwise ordered by the Judge, Registrar or Master, upon requisition by the plaintiff in writing to the Registrar and production of a certificate showing such default, be transferred to the peremptory list of undefended suits."

From the above Rule, it is patently clear that the instant suit could not have been transferred to the peremptory list of undefended suits by suppressing the material fact that the service of writ of summons and the plaint were pending and consequently incomplete.

17. It is axiomatic that any petitioner (in this case the respondent/plaintiff) has to approach the Court with 'clean hands' based on good faith and has to produce before the Court all material facts that are relevant for adjudication of the said matter. The principle of *uberrima fides* – abundant good faith – as stated in ***The King -v- The General Commissioners for the purpose of the Income Tax Acts for the District of Kensington*** reported in ***(1917) 1 KB 486*** applies in the present case. A litigant who does not bring on record the relevant true facts before the Court, does not deserve to get any relief from the Court.

18. As authored by Ruma Pal, J. in ***S.J.S. Business Enterprises (P) Ltd.– v- State of Bihar and others*** reported in ***(2004) 7 SCC 166***, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. The relevant portion has been extracted below:

> *"13. As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material from the consideration of the court, whatever view the court may have taken....."*

19. In a well-known Calcutta High Court case in ***Chittaranjan Das vs. Durgapore Project Ltd. & Ors.*** reported in ***(1994) 99 CWN 897*** [Coram: Satya Brata Sinha and Basudeva Panigrahi, JJ.], the Court observed:

> *"64. Suppression of a material document which affects the condition of service of the petitioner, would amount to fraud in such matters. Even the principles of natural justice are not required to be complied with in such a situation. It is now well known that a fraud vitiates all solemn acts."*

20. It is the contention of the petitioner that the respondent was not entitled to the *ex-parte* decree dated June 12, 2019. I have no hesitation in saying that the doors of justice would be closed for a litigant whose case is based on false hood or suppression of material facts. Anyone who approaches the Court must give full and fair disclosure of all the materials.

21. From the materials on record, it is apparent that the petitioner/defendant could not be served through the Court with the original plaint, the amended plaint and the writ of summons of the amended plaint as it was not present in the address as mentioned in the service. This is also buttressed by the fact that that the petitioner/defendant gathered knowledge about the pendency of this instant suit only when it received a reply dated March 26, 2019 from respondent/plaintiff's advocate in response to its legal notice dated March 18, 2019 invoking Section 11 of the Arbitration and Conciliation Act, 1996. Therefore, it would be correct to state that all the service were being made to the incorrect address and/or insufficient address denying the petitioner/defendant the basic right to present and defend its case.

As far as the speed posts with A/D are concerned, the same were also returned with remarks such as 'addressee moved' and 'insufficient address'. In any case, this Court would rely more on service through Sheriff's office by way of personalized hand-delivery of

such documents by the process server over the service through speed post.

22. In view of the above discussions, I am satisfied that the original plaint, the amended plaint as well the writ of summons for the amended plaint could not be duly served upon the petitioner/defendant company, and consequently, the petitioner/defendant was prevented from appearing in the instant suit. In addition to this, an order to transfer this suit to undefended list was secured from this Court by way of suppression of material facts. In my opinion, there has been an abuse of process of Court on part of the respondent/plaintiff to have suppressed the said material facts to secure transfer of the instant suit to the undefended list.

23. Accordingly, this application bearing G.A. No. 3 of 2021 seeking the recalling/setting aside of the *ex parte* decree in C.S. No. 205 of 2017 dated June 12, 2019 is hereby allowed. There shall be no order as to costs.

24. As the defendant in the suit is aware of the suit proceeding now, service of writ of summon is dispensed with. The defendant is directed to file its written statement within 45 days. I make it clear that no extension of time would be granted for filling of written statement

without specific orders obtained from this Court in accordance with law.

25. Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SHEKHAR B. SARAF, J.)