PROMODE BASUMATARY –Vs- CIVIL JUDGE (Sr. DIVISION) No.1, 2005 (4) GLT 584- A CRITIQUE

BY

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Promode Basumatary is the defendant in Money Suit No.291/2000. He at first successfully extricated himself from the burden of an exparte decree in the Suit on 24.08.2004 on the ground of non service of summons on him. But the success was short-lived because within forty days thereof he was saddled with an Order of exparte hearing because of his absence in the suit on two successive dates. On the date fixed for exparte hearing that is on 02.12.2004, he filed an application under Section 151 of the Code of Civil Procedure to set aside the order of exparte hearing. This time the Court rebuffed him by an order rejecting his prayer. Promode Basumatary reached the High Court by way of Writ Petition (Civil) No. 1303/2005 which resulted in the Judgment PROMODE BASUMATARY –Vs- CIVIL JUDGE (Sr. Divn.) NO.1 AND ANOTHER, 2005 (4) GLT 584 (hereinafter BASUMATARY). The Judgment throws up a unique and interesting question of law relating to service of summons in a Civil Suit. This writing attempts an examination of the validity of the answer provided by BASUMATARY to the question indicated above.

ANALYSIS OF BASUMATARY

1.1. In the Petition No. 3123/04 filed on 02.12.04 under Section 151 CPC to set aside the order for exparte hearing the only ground mentioned is that he was not served with summons in the Suit. The Trial court rejected the petition giving two reasons. Firstly, since he initiated and

participated in the proceedings under order IX Rule 13 CPC to set aside the earlier exparte decree in the Suit he had knowledge of the Suit. Secondly, the trial Court held the petition under Section 151 CPC to be not maintainable in view of the existence of a specific provision under Order IX Rule 7 CPC covering the matter.

1.2. Taking up the second reason first the High Court held that the label or the nomenclature of the petition is immaterial if power is otherwise there to pass the order. Para 12 of the Judgment quoted hereunder clinches this point.

> **"In the instant case the source of power is traceable with specific provisions made in the CPC for setting aside the Order for exparte hearing. Once the same is established, an application for invoking the said power and jurisdiction making mention of a provision which may not be strictly applicable, ipsofacto will not render the petition not maintainable. Even otherwise also, Section 151 CPC.....**
> **..... However, this power will not be exercised in conflict with any of the powers expressly or by implication conferred by the provision of CPC. Order IX Rule 7 CPC does not in any way come in conflict with Section 151 CPC."**

As in the petition in the submissions before the High Court as well it was contended "that it was incumbent on the Court to issue fresh summons/notice to the defendant/petitioner after the suit was restored for fresh trial." On this ground the High Court at para 15, 16 and 18 of the Judgment respectively held thus :-

"One can legitimately argue that after setting aside of the exparte judgment and the restoration of the suit to original stage, necessary formalities towards issuance of summons/notice as envisaged under the provisions of the CPC will have to be followed. There is no dispute that no fresh summons/notice was sent to the defendant/petitioner" (Para 15)

" However, having regard to the plea of the defendant/petitioner that he was not served with summons/notice and also the plaint, I am of the considered opinion that the defendant/petitioner should be given another opportunity.....(Para 16)

"Although under the given circumstances, a presumption can be drawn regarding the knowledge of the petitioner about the plaint and the dates fixed in the suit, but such a presumption, in my considered opinion cannot result in conviction so as to hold that the defendant/petitioner was served with summons/notice alongwith the plaint". (Para 18)

The judgment also says that "the decision on which Mr. Baruah, learned counsel for the defendant/petitioner placed reliance also finds support in respect of the contentions raised by the defendant/petitioner."

Thus on the primary ground that no fresh summons was served on the defendant after he got the exparte decree set aside the High Court allowed the writ petition and Money Suit No. 291/2000 got a fresh lease of life in the year 2005.

THE CASES RELIED ON

2. At para 6 of the Judgment there is a list of cases relied on by the learned counsel for the defendant/petitioner. These cases are 1(2002)5 SCC 30 (Vijay Kumar Mandal –Vs- R.N. Gupta Technical Education Society 2. (2002)5 SCC 377 (Sushil Kumar Sabharwal –Vs- Gurpreet Singh. 3. (2002)4 SCC 697 (Deoraj –Vs- State of Maharastra). 4. AIR 1955 SC 455 (Shiromoni Gurdwara Prabandhak Committee –Vs- Lt. Sardar Raghubir Singh and Ors. 5. AIR 1994 Bombay 141 (Jagadish Balwantrao Abhyankar –Vs- State of Maharastra.

The last of the above cases relating to the label of the application, being one under Section 151 CPC, has been dealt with by the High Court in some detail. But the other four cases have not been considered in detail except to say that they support the contention of the learned counsel for the defendant/petitioner. Before anything else it will be worthwhile to have a look at the other four cases. The two cases listed at Sl. No. 3 & 4 namely (2002)4 SCC 697 and AIR 1955 SC 455 have not the remotest connection with the point regarding requirement of service of summons urged by the learned counsel. (2002) 4 SCC 697 is a Judgment in a criminal case relating to murder and AIR 1955 SC 455 deals only with the provision of Punjab Sikh Gurdwars Act, 1925 without even once mentioning the CPC or any question of service of summons. Apparently there has been some mistake somewhere.

In (2002)5 SCC 30 only one aspect of Order IX Rule 7 that is the extent of court's power to put the defendant on terms fell for

consideration. The Court held that terms should not be such that would put the defendant in a position worse than if he had not filed the application under Order IX Rule 7 . No question of requirement of service of summons after setting aside of the exparte decree arose in that case.

(2002) 5 SCC 377 is a case relating to setting aside of exparte decree under Order IX Rule 13. It dealt with the mode and proof of service of summons. No question as in BASUMATARY was raised there as regards the requirement of fresh service of summons after setting aside of the exparte decree. The case could be more appropriately cited in support of setting aside of the experte decree in BASUMATARY and not in support of setting aside of the exparte order of hearing of the suit that followed the setting aside of the exparte decree.

THE LAW

3. The substantive provision of service of summons is in Section 27 of the CPC and the procedure for service of summons has been prescribed in Order V of the CPC. The opening words of Section 27 and Order V Rule 1 are the same and they are :-

> **" When a suit has been duly instituted, a summons may be issued to the defendant."**

Provisions as to how a suit is instituted and when it is duly instituted have been made in Section 26 and Order IV of the CPC. Next Rule 5 of Order IX provides for issue of fresh summons if the original summons is returned unserved and finally Order IX Rule 6(1)(C) provides for issue of a notice of a fresh date to the defendant if the original summon was served on the defendant but not in sufficient time to enable him to appear on the day fixed in summons. Thus there is no provisions in the CPC requiring a fresh summons notice after successful termination

of a proceeding under Order IX Rule 13 initiated by the defendant himself. Indeed there are provisions pointing to the contrary. Rule 9 and 13 of Order IX CPC provide that after setting aside a dismissal for default and/or setting aside an exparte decree in a suit the Court "shall appoint a day for proceeding with the suit".

APPLICATION OF THE LAW

4. Unfortunately none of the above provisions appear to have been placed before either the Trial Court or the High Court. Even so, the Trial Court obeyed the mandate of Order IX Rule 13 when the Court passed the Order dated 24.08.04 in the Money Suit No. 291/2000 by fixing 15.09.04 for appearance of the parties.

In para 13 of BASUMATARY operative part of the Order disposing of the proceeding under Order IX Rule 13 has been excerpted. From the excerpt it is obvious that Money Suit No.291/2000 was duly instituted and summons was duly issued as required under Order V Rule 1. The Court accepted service wrongly as it turned out. On the initiative of the defendant that decree was set aside. The stage for issue of summons on the law as narrated above is over once for all since no question within Rule 5 or Rule 6(1) (c) of Order IX CPC arose in the case. The learned counsel for the defendant was able to persuade the High Court to accept his submission that the defendant only appeared in the proceedings under Order IX Rule 13 and not in the Suit. In the Civil Rules and Orders one can read the following :- "Proceedings under the Civil Procedure Code for the restoration of a Suit or Appeal or for review of judgment, are proceedings in the suit or appeal and must form part of the record relating thereto." Though the above does not mention specifically proceedings for setting aside an exparte decree in practice no distinction is made and need not be made. The record of Misc.(j) Case No. 57/2003 under Order IX Rule 13 formed part of the record of Money Suit No. 291/2000. In such

circumstances it is difficult to countenance an argument that the defendant represented by his learned counsel did not know of the order passed in the Suit. There is also such a thing in law as "constructive knowledge". Such knowledge constructive or otherwise would not have availed the plaintiff if law still required a summons to be issued. But law as indicated does not provide for any such requirements.

INTERPRETATION OF THE LAW

5. The question raised and answer provided in BASUMATARY has been described as Unique because a search for a case law where the question has been directly raised and answered proved futile. But there are decisions interpreting Order V Rule 1 CPC which shade indirect light on the problem.

In SRI NATH AGARWAL –Vs- SRI NATH AIR 1981 Allahabad 400 the defendant appeared in response to a notice of an application for attachment before judgment and prayed for time to file objection. Time was granted. Objection was filed on the adjourned date. Date of hearing of the application for attachment before judgment and the objection was fixed and by the same order the defendant was asked to file the Written Statement in the Suit. The Written Statement was accordingly filed and deposit was made in order to avail the relief against eviction under Section 20(4) of the U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act 1972. The deposit to avail the relief has to be made at the first hearing of the Suit. The Explanation to the Sub-section (4) says that "the expression first hearing means the first date fixed for any step or proceeding mentioned in the summons served on the defendant". The trial court denied the relief to the defendant and decreed the suit for eviction. The High Court in para 5 of the Judgment considered at length the provisions of Order V Rule 1 CPC and held that summons may be waived by conduct of the defendant and further proceeded to hold thus :

> **"..... it must be deemed that the defendant has waived the right to have a summons served on him. This can be seen from the record and the subsequent conduct of the party. The same legal position will arise when a party sou motu appears before the Court before actual service of summons either himself or through the Counsel. In such a case if some date is fixed for filing of Written Statement and for hearing of the suit it would rather be too technical a view to take that service of summons in the ordinary course is still to be insisted upon and to hold that further proceeding in the Suit would take place only thereafter. This is neither the purpose nor the way to look at various provisions of the CPC."**

The above has been said in connection with the facts of a suit where no summons at all in apparently flagrant breach of the provisions of Order V Rule 1 CPC was issued and served.

In SIRAJ AHMAD SIDDIQUI –Vs- PREM NATH KAPUR (1993)4 SCC 406 before a Three Judge Bench of the Supreme Court SRI NATH AGARWAL (Supra) was cited. In para 14 of the Judgment of the Supreme Court the Court considered the said Judgment of the Allahabad High Court, excerpted amongst others the portion quoted above and held thus in para 15 :

> **" We are in agreement with the ratio of the Judgment in so far as it says that when time is fixed by the Court for the filing of**

> **the Written Statement and the hearing, theses dates bind the defendant, <u>regardless of service of summons.</u>" (***Underlining supplied***).**

Lastly, the following digest of a decision of the Allahabad High Court reported in (1999) 35 ALL LR691 lends assurance to the point sought to be made in this critique of BASUMATARY. Unfortunately, the full report could not be read as the journal could not be availed of by the writer. The digest is as follows ;

> **"Order 5 of the Code is not attracted every time the suit is restored except as provided in different provisions of Order 9. If it was the intention that service of summons of the Suit would be necessary after restoration in that event the express provision empowering the Court to appoint a day for proceeding with the Suit would not have been included. The very inclusion of such an expression, it expressly precludes the application of Order 5 in that**
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> **effecting fresh service of summons on the defendant after exparte order is set aside.**

It is surprising that even on the second reason (See page1.2) that is the interplay between the provision of Order IX Rule 7 CPC and Section 151 CPC the most relevant decision by a Three Judge Bench of Supreme Court that is ARJUN SINGH –Vs- MOHINDRA KUMAR, AIR 1964 S.C. 993 was not pressed despite its mention in (2002)5 SCC 30, a case relied on by the defendant/petitioner's Counsel. Paragraph 18 and 19 of

ARJUN SINGH (Supra) contain a detailed discussion on the interplay between the provisions of Order IX Rule 7 CPC and Section 151 of CPC. The following two statements of law at para 19 excerpted below speaks loud and clear on this aspect :

> **" It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates".**
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> **" Thus every contingency which is likely to happen in the trial vis-à-vis the non-appearance of the defendant at the hearing of the suit has been provided for and O. IX R. 7 and O. IX R. 13 between them exhaust the whole gamut of situations that might arise during the course of the trial. If thus provision has been made for every contingency, it stands to reason that there**

is no scope for the invocation of the inherent powers of the Court to make an Order necessary for the ends of justice"

It is undoubted that label of an application is not material but its contents are. The application described as one under Section 151 CPC does not mention any "good cause" within Order IX Rule 7 save and except repeatedly harping on the alleged violation of Rule 1 of Order V CPC, a ground law as shown above, would not countenance. The supposed ends of justice cannot cut across law that is provision of Order IX Rule 13 mandating the Court to appoint a day for further proceeding with the Suit. Thus the application appears to be not only bereft of the correct label but also lacks correct materials within Order IX Rule 7 CPC.

THE CONSEQUENCE AND CONCLUSION

6. The air is thick with loud concern for speedy justice. BASUMATARY does not subserve the ends of speedy justice. BASUMATARY has the potential of perpetuating a Civil Suit indefinitely. The saying fortune favours the brave potentially can be turned into a case of the law favouring the knave if service of summons, a tricky business as it is, is held to be required even after the initial institution of the Suit as in BASUMATARY. The three excerpts from BASUMATARY quoted at para 1.2. above are per-incuriam. The sooner it is so declared by the High Court the better.