SREENIVAS BASUDEV –Vs- VINEET KUMAR KOTHARI (2006)3 GLT 118, (2006)3 GLR 230 –AN APPRAISAL

By

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1. THE PREFACE

On the 7th day of April 2003 Sri Vineet Kumar Kothari instituted a suit for ejectment and recovery of arrear rent against M/S Sreenivas Basudev. In this suit registered as Title Suit No. 103 of 2003 summons fixing 14.05.2003 was served on M/S Sreenivas Basudev, the defendant on 28.04.2003. The defendant appeared on 09.07.2003 and eventually filed a Written Statement on 23.02.2004. The trial Court, that is, the Court of Civil Judge (Sr. Divn.) No.1, Guwahati refused to take the Written Statement on record by order dated 05.04.2004. The defendant's attempt at getting a review of that order failed on 26.09.2005. Undeterred by the rebuffs of 2004 and 2005 the defendant reached the High Court by way of a Writ Petition. By the judgment of the Writ petition dated 17.03.2006 reported as SREENIVAS BASUDEV V. VINEET KUMAR KOTHARI, (2006)3 GLT 118, (2006) 3 GLR 230 (hereinafter referred to as SREENIVAS), a Written Statement filed after about 300 days of the date of service got into the record after three years. The facts and the law that produced this result should make interesting study, understanding and appraisal. This Writing attempts to do as much. A combination of four factors, namely, ingenuity of the defendant, casualness of the Trial Court, inadequacy of the plaintiff and absence of the original records of the suit before the High Court resulted in the eventual success of the defendant. Before an analysis of these four factors is attempted a few further facts of the case needs to be noticed.

2. THE FACTS

The defendant was served with a summons on 28.04.2003 asking him to appear and answer the claim and further to file the Written Statement on 14.05.2003 as required under the law extant since 01.02.1977. He appeared on 09.07.2003 and filed a petition complaining that he did not receive the copy of the plaint and the documents relied upon by the plaintiff and as such could not file the Written Statement on that day. He prayed that the plaintiff may be directed to furnish the copy of the plaint and documents to the defendant. On this petition an order was recorded fixing 30.07.2003 for filing of the copy of the plaint and the

copy of the documents. This petition and the order dated 09.07.2003 and its follow up on 30.07.2003 is the foundation on which the defendant has built his case for the filing of a Written Statement involving a delay as long as 300 days. Certified copies of the above two crucial orders in the case have been perused.

3. THE DEFENDANT

The defendant did not appear on 14.05.2003 deliberately. His ingenuity however did not stretch to the extent of urging before the court on 09.07.2003 that because of non receipt of the copy of the plaint and the documents not to speak of filing the Written Statement he even could not appear on the date fixed in the summons that is, 14.05.2003. In his petition on 09.07.2003 he obviously kept silent about this deliberate neglect to appear for 56 days after receipt of the summons. He appeared instead on the very day of the receipt of the report of service. Is it coincidence ? As would appear from other factors considered later it cannot be by coincidence but by design. On the next date that is on 30.07.2003, the defendant received the copy of the plaint but not the copies of the documents filed with a list of documents attached. This is clearly recorded in the order dated 30.07.2003 in the record of the suit. He kept silent about the documents on 30.07.2003 but again urged non supply of the documents as the ground for not filing the Written Statement on 09.09.2003 by a petition. The court fixed 31.10.2003 for filing of the Written Statement. How the time from 31.10.2003 till 23.02.2004 when at long last the defendant filed the Written Statement was consumed has not been recorded in SREENIVAS. To know this certified copies of three more orders were perused. These orders are dated 18.11.2003, 05.01.2004 and 23.02.2004. On all these dates the Presiding Officer of the Court was absent. It is recorded in the Order dated 18.11.2003 that "there is no P.O.". Order recorded on the next date that is, 05.01.2004 says that "P.O. is not appointed" and the order recorded on 23.02.2004 says that "P.O. is not joined". On the first of the above date that is, 18.11.2003 the defendant did not even care to appear not to speak of filing any Written Statement as presumably fixed by the order dated 31.10.2003. On 05.01.2004 both parties were present through counsels. No Written Statement filed. On only 23.02.2004 without any accompanying application explaining the delay , the defendant filed the Written Statement. SREENIVAS at para 2(iii) says that in the review application the defendant narrated the sequence of events. It is not known whether either before the Trial Court or the High Court the defendant contended that from 18.11.2003 to 23.02.2004 because of the absence of the Presiding Officer he could not file the Written Statement. It is reasonable to assume that he did not so contend because he did in fact file the Written Statement on a day when the Presiding Officer was absent. This is the ingenious conduct of the defendant staring one in the face from the record of the suit against

whose possible tactics the Supreme Court cautioned the Courts in KAILASH Vs NANKHU. AIR 2005 S.C. 2441 and which has been copiously quoted in SREENIVAS .

4. THE TRIAL COURT

Rule 338 of the Civil Rules and Orders reads thus :-

> **" The Order-sheet may be Written by an officer of the Court at the dictation of the Presiding Judge, who however shall sign as soon as possible after it is so Written and be responsible for the correctness of the entries in it. <u>Important Orders or Orders which call for the exercise of judicial discretion or discrimination should always be drawn up in the presiding Judge's own hand</u>."**

Translated into English the order dated 09.07.2003 is this **:-**

> **"The advocate for the plaintiff has filed Hazira. Summons has been returned after service. The defendant's advocate through Petition No. 5599/03 accompanied with Vakalatnama informs that copy of the plaint has not been received and prays for copy of the plaint and documents. Fix 30.07.2003 for filing of copies of plaint and documents."**

Only last sentence as above is the operative part of the order. What precedes that last sentence is record of facts. The order says nothing as to whether the petition mentioned there is granted or rejected. From experience one can say that it is not unusual to record the entire order by the Bench Assistant leaving a small space to be filled up by the Judge in his own hand to use words like "granted, allowed, rejected, dismissed". From the content and tenor of the above order it is not unreasonable to presume that the entire order is by the Bench Assistant and the Judge simply signed it. Before 01.07.2002 it would have not created such a havoc. But after the coming into force of the Code of Civil Procedure (Amendment) Act of 1999 and 2002 the order on petition No. 5599/03 requires judicial determination and exercise of judicial discretion and should have been recorded by the Judge himself even without the mandate of KAILASH (Supra) which came only on the 6th of April 2005. The trial court probably did not even see the application not to speak of applying its mind to it and then passing a judicial order on it. Had the court done so presumably the court would have to look at the return of summons. Acceptance of service of summons again is a judicial act. To perform this act it would be necessary to look at the declaration/affidavit of the process server. From little of the proceedings

in the suit as can be gathered from SREEENIVAS and the certified copies of the order dated 09.07.2003 it would not be unreasonable to presume that the trial court did not even care to see the summons far less its backside containing the report of the serving officer. In the suit a summons fixing 14.05.2003 has been returned on 09.07.2003. Should this not alone have struck the Court as something odd when the Nazarat is only 10 or so yards away from the Court room in the same building ? Did the Court know the date of service ? This knowledge is surely essential to fulfill the mandate of Order VIII Rule I and Order V Rule 1 of the Amended Code. The defendant in the suit has come up with a plea that he did not receive the copy of the plaint. Law after 01.07.2002 in this regard is as follows :

> **A suit shall not be deemed to be duly instituted unless the plaint is presented in duplicate and unless the plaint complies with the rules in Order VI and order VII. See Order IV. Summons shall only be issued when the suit has been duly instituted. A summons shall be accompanied by a copy of the plaint. Rule 9 of the Order VII requires the Court to direct the plaintiff to file copies of plaint for all the defendants in a Suit within seven days of the order of service of summons and on its breach the plaint shall be rejected under Order VII Rule 11(f). On top of it there is the presumption in law that judicial and official acts have been regularly performed. The process-server is an officer of the Court. In a particular case a summons may still be served in breach of the newly designed legal provisions. For that a case has to be made out . Was the petition verified ? Was it supported by an affidavit ? The answer is not known to this writer.**

KAILASH (Supra) has cautioned the Courts to beware of the "proverbial delaying tactics" of the defendant. A plea of non receipt of copy of plaint is often the commonest in the repertory of such tactics. Drawing on experience one can say that perhaps if the court had cared to read the report of the process server on 09.07.2003 it would have told a different story. Although the Rules in the Code and the Civil Rules and Orders do not require the process-server to state in his declaration about delivery of the copy of plaint there are process-servers who even state in the Report that summons has been delivered alongwith the copy of the plaint. There are also defendants who state in the receipt signed by him whether copy of the plaint was received or not. Translated into English the Order dated 30.07.2003 reads thus :-

> **"The advocate of the plaintiff has filed Hazira and with the list of documents photocopy of documents have been filed. The advocate of the defendant has filed Hazira and received**

the copy of the plaint. Fix 09.09.2003 for filing of the Written Statement.

Four words in the above order have been written in English. The words are "document" "photo" "copy", and "receipt". Probably the same hand that wrote the order dated 09.07.2003 was at work again. One can hardly expect a Judge to use the word "receipt" instead of the word "receive". Thus probably, the time granted upto 09.09.2003 to file the Written Statement was by the Bench Assistant.

The casualness and the non application of mind Writ Large on the orders narrated above, had however been washed away by the order dated 05.04.2004 whereby the Written Statement was not accepted and the validity of which is the core question in SREENIVAS.

5. THE PLAINTIFF

The Trial Court's casual approach to the entire matter as narrated earlier could have been, if not entirely to a large extent, transformed into active judicial interest in the proceedings in the Suit had the plaintiff been alert. The plaintiff could have urged the court to look at the service report, could have pointed out the delay between the date of service and the date of appearance and the delay in submitting the service report by the Nazarat. Beyond filing Hazira the plaintiff seems to have left everything to the Court. On the crucial date itself the ground shown for non filing of the Written Statement in the petition should have been contested by having the record put up before the Trial Judge much before it was put up before the Judge for his signature only. The plaintiff remained a silent spectator. Toping everything else that has been narrated so far one finds from para 2(iii) of SREENIVAS that the plaintiff stated in his objection to the review application "that since no documents had been relied upon by the plaintiff as a part of the plaint, the same was not supplied to the defendant". This, when the documents as directed by the order recorded on 09.07.2003 had been filed in the Court on 30.07.2003 as indicated earlier, is an amazing statement from the plaintiff and reflects utter callousness and inadequacy of a much higher degree than that of the Trial Court. The plaintiff failed to point out to the Courts that the defendant who from the date of appearance made much of non supply of the documents eventually could file the Written Statement without receiving the documents, which shows the hollowness of the ground shown in petition filed on 09.07.2003. The plaintiff also failed to contend and point out to the High Court that any order directing acceptance of the Written Statement would be in flagrant breach of the circumscriptions designed for condonation of delay in filing the Written Statement by the Supreme Court in KAILASH (Supra) because on 23.02.2004 the Written Statement was filed without any application making out a case for acceptance as mandated by KAILASH

(Supra). Thus by his inadequacy the plaintiff contributed to his defeat in the High Court.

6. THE HIGH COURT

SREENIVAS rests on twin pillars, one factual and the other legal. The original record of the suit was not before the High Court. Had that record been submitted in the Writ petition before the High court, despite the inadequacy of the plaintiff /respondent indicated earlier, the non existence of the factual basis for the eventual order of the High Court would have been apparent. As indicated earlier the order dated 30.07.2003 quoted at para 4 is explicit that the documents requested has been filed in obedience to the order recorded on the previous date fixed that is 09.07.2003.

It is unfortunate, and the plaintiff contributed to his misfortune in GOOD measure, that the High Court had to start with an admitted position that the documents have not been supplied because of the absence of the original records of the Title Suit No. 103 of 2003. Once the factual basis would have been found to be non-existent the High Court would not have gone into legality or otherwise of the order for supply of copies of documents relied on by the plaintiff to the defendant.

In SREENIVAS, the High Court quoted copiously from para 27, 41, 42, 43, 44 and 45 of KAILASH (Supra). It appears that the most relevant of the excerpts, for purposes of the case, are those in para 42 and 43 where the Supreme Court had laid great stress upon the requirement of making out a case for acceptance of a Written Statement delayed beyond 90 days by the defendant by a Written Application preferably supported by an affidavit to convince the Court that "the prayer of extension was founded on grounds which do exist". Having noticed at length the legal principles governing the acceptance of a delayed Written Statement the High Court appears to have failed to apply them. There is no indication anywhere in SREENIVAS as to how the mandate of KAILASH (Supra) as contained in para 42 and 43 thereof and quoted in SREENIVAS has been fulfilled. Nor is there any indication in SREENIVAS that in the facts and circumstances of the case before the High Court the mandate is not applicable unless one reads what has been stated in para 36 of SREENIVAS as sufficient answer to the point. In KAILASH (Supra) the Supreme Court, alive to the object behind the provisions and conscious of delaying tactics of the defendant, in its anxiety not to "be misunderstood as nullifying the entire force and impact – the entire life and vigour –of the provision" of Order VIII Rule 1 C.P.C. carefully designed certain circumscriptions within which the power of relaxing the time frame has to be exercised. SREENIVAS by what has been stated at para 36 appears to have provided the defendants one more tool in the armoury of delaying tactics.

The existence of the power itself and its exercise in the facts and circumstances of a particular case are distinct matters. In KAILASH (Supra) the Supreme Court first determined by interpretation the existence of the power of relaxation and also exercised that power in the Election Petition before the Supreme Court. "The entire force and impact –the entire life and vigour –of the provision" can be nullified not only by interpretation as to existence of the power but also in its exercise. It appears from what has been stated in para 36 of SREENIVAS that the latter contingency has happened in the case. This perhaps could have been avoided even without the original records. Para 36 would certainly be read to the subordinate Judiciary by the defendants as a precedent and not as observations prompted by the facts and circumstances of that particular case.

The High Court seems to have been concerned more about the supposed flouting of orders by the plaintiff whereas concern should have been to determine whether the defendant has made out an exceptional case a la KAILASH (Supra). With this it is time to turn to the other pillar that is the legal one on which SREENIVAS is founded.

7. THE LAW.

Submissions of the counsels of the parties before the High Court have been summarized in para 4, 5 and 6 of SREENIVAS. There is no mention of any inherent power or of Section 151 C.P.C. in the said summary. Perhaps in the writ petition inherent power or Section 151 C.P.C. has been advanced as a foundation for the legality of the power to supply of copies of documents relied on in the plaint to the defendant. After considering the provisions of Order VII Rule 14 the High Court concluded in effect in para 25 of SREENIVAS that the said provisions do not require furnishing of the copies asked for and directed by the order recorded. Then relying on MANOHARLAL CHOPRA –VS RAI BAHADUR RAO RAJA SETH HIRALAL, AIR 1962 S.C. 527 parts of which has also been excerpted the High Court found a power to direct supply of documents relied on in the plaint to the defendant in Section 151 C.P.C. This interpretation and application of the provisions of Section 151 C.P.C. is the core of SREENIVAS.

From PADAM SEN –Vs- THE STATE OF UTTAR PRADESH, AIR 1961 S.C. 218 of 27.09.1960 to JET PLY WOOD (P) LTD. AND ANOTHER –VS- MADHUKAR NOWLAKHA AND OTHERS, (2006) 3 SCC 699 of 28.02.2006 the Supreme Court had spoken on umpteen occasions on the nature, scope and the manner of exercise of the inherent powers enacted in Section 151 C.P.C. Language of the pronouncements may vary, as it must depending on the variance in the facts of the different cases before the Supreme Court but the core of the declaration of the law has remained the same throughout. Indeed the

declaration of the law is the same as done pithily by the celebrated Justice Sir Ashutosh Mukharjee in SASHI BHUSAN –Vs- RADHA NATH, 20 Cal.L.J 433 long ago. The core principle is this. In matters with which the Code does not deal , the Court will exercise its inherent power to do that Justice between the parties which is warranted under the circumstances and which the necessities of the case require. On any point specifically dealt with by the Code the Court cannot disregard the letter of enactment according to its true construction.

Even MANOHAR LAL (Supra) parts of which has been quoted in SREENIVAS does not lay down anything contrary to the above statement of law. At para 27 of MONOHARLAL (Supra) of 16.11.1961 one reads the following :

> **(A) "***The inherent powers are to be exercised by the Courts in very exceptional circumstances, for which the Code lays down no procedure***".**

Again at para 39, :

> **(B) "***The suit at Indore which had been instituted later, could be stayed in view of S.10 of the Code. The provisions of that section are clear definite and mandatory. A Court in which a subsequent suit has been filed is prohibited from proceeding with trial of that suit in certain specified circumstances. When there is a special provision in the Code of Civil Procedure for dealing with the contingencies of two suits being instituted recourse to the inherent powers under S.151 is not justified".*

Few other samples from Judgments of the Supreme Court in support of the principle of law long ago laid down by Justice Sir Ashutosh Mukherjee are these –

From PADAM SEN (Supra) dated 27.09.1960 :

> **"…… it must be held that the Court is free to exercise them for the purposes mentioned in S.151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognized that the inherent power is not to be exercised in a manner which will be contrary or different from the procedure expressly provided in the Code".**

From NAIN SINGH –Vs- KOONWARJEE, AIR 1970 S.C. 997 dated 02.04.1970 **–**

> **"The High Court has misconceived the scope of its inherent power. Under the inherent power of Courts recognized by S.151 C.P.C, a court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provision should be followed and inherent jurisdiction should not be invoked. In otherwords the court cannot make use of the special provisions of Section 151 where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same.**

From STATE OF ORISSA AND ANOTHER –Vs- SAROJ KUMAR SAHOO, (2005) 13 SCC 540 dated 07.12.2005 **–**

> **"All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution all such powers as are necessary to do the right and to undo a wrong in the course of administration of Justice on the principle of "quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potests" (when the law gives a person anything, it gives him that without which it cannot exist)".**

Lastly from JET PAYWOOD (Supra) dated 28.02.2006 **–**

> **"There is no doubt in our minds that in the absence of a specific provision in the Code of Civil Procedure providing for the filing of an application for recalling of an order permitting withdrawal of a suit, the provisions of Section 151 can be resorted to in the interest of justice. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the Court can come to its aid to act ex debito justitiae for doing real and substantial justice between the parties".**

In SREENIVAS after reaching the conclusion that provisions of Order VII Rule 14 C.P.C. do not enjoin supply of copies of documents to the defendant, the High Court did not pose the question ; is the Code "silent regarding a procedural aspect". Nor was any search made for any other provision to "meet the necessities of the case". In the Code there are ample procedural provisions whereby and whereunder the defendant could have, if he was serious about the need for the documents to prepare the Written Statement, obtained production inspection and taking of copies of the same. The provisions are those of Order XI Rule 14, 15, 16, 17 and 18. The procedure in Rule 14 is the simplest of all. It requires an application on affidavit and if satisfied about the necessity of the documents the Court would pass an order usually in Form No. 6 in Appendix-C to the Code of Civil Procedure. There is no restriction on the power of the Court to allow the party who obtains such an order to take copy of the documents produced and inspected instead of allowing only to take notes of the contents of the documents.

Ordinarily discovery and inspection is resorted to after filing of the Written Statement. But the language of the Rules do not contain any restriction regarding the stage when such procedures may be adopted. The Court always has the power to exercise the discretion to allow or reject , regard being had to the stage of the application. These procedures being not frequently resorted to authorities answering the specific question whether discovery and inspection is permissible before filing of the Written Statement are rare. However, RAM HARI DE Vs NIRANJAN KRISHNA DAS & CO 50 C.W.N 846 and ANDHRA BANK Vs NARENDRANATH, AIR 1956 A.P. 115 contain positive answers to the question indicated above.

The upshot is that the order recorded on 09.07.2003 containing the direction to supply documents clearly falls foul of the law emanating from the Supreme Court indicated above. The order to that extent is without jurisdiction. Both the pillars on which SREENIVAS is founded – that is the factual and the legal-are non est the former by reason of its being non existent the latter by being per incuriam.

The excerpt from PADAM SEN (Supra) contains the phrase "against the intention of the Legislature". As an illustration of the phrase one may say that the solitary Statutory Form of summons requiring summons to be accompanied by the copy of the document on which the plaintiff sues, that is FORM No. 4 in Appendix B to the Code had been amended with effect from 01.02.1977 by removing the aforesaid requirement. This seems to be indicative of the intention of Legislature that the defendant is not entitled to be supplied with copy of a document on which the plaintiff sues. To allow supply of copy of the documents of the second category that is documents relied on in the plaint as directed

by order dated 09.07.2003 will be in the teeth of the intention of the Legislature. Section 151 cannot sustain the order.

The core issue in SREENIVAS having been dealt with as hereinbefore some peripheral matters of law indicated in SREENIVAS remain to be considered.

8. THE PERIPHERIAL MATTERS

Order VII Rule 14 quoted and considered in SREENIVAS mention two classes of documents. The first class comprises documents whereupon the plaintiff sues. The second class comprises documents on which the plaintiff relies. In the case the four documents mentioned in para 29 of SREENIVAS are only evidentiary. The plaintiff has not sued upon those documents. By the use of a different phraseology like "suit based on documents" a bit of confusion has been created. The Limitation Act, 1963 contains quite a number of suits described as suits on which the plaintiff sues as indicated in Order VII Rule 14. Article 28 to 39 of the Limitation Act, 1963 indicate some among them. Suits for cancellation of documents and to declare a document as forged are others of that class.

The excerpt from SALEM ADVOCATE BAR ASSOCIATION, T.N. Vs UNION OF INDIA, AIR 2005 S.C. 3353 at para 12 of SREENIVAS can also be found quoted in RANI KUSUM –Vs KANSHAN DEVI, AIR 2005 S.C. 3304 at para 17 of the Judgment of the Supreme Court which seems to suggest that those are contents of the Report of the Committee yet to be finally settled by the Supreme Court on receipt of the Report of the Central Government as directed in para 54 of SALEM ADVOCATE (Supra).

9. THE REMEDY

SREENIVAS deserves a review both on facts and on law. About power of review in such matters there is no doubt after A.I.R 1963 S.C. 1909. After 01.02.1977 there is also no doubt that the procedural restrictions under Section 114 C.P.C in this regard will not be applicable. Can in the circumstances there be a sou motu review ? In A.I.R 1988 S.C. 1531 the Supreme Court spoke about sou motu power of review of the Supreme Court. No authorities speaking about sou motu review by the High Court in the circumstances as in SREENIVAS are known. Other possible remedies like the intervention of a Larger Bench or the Supreme Court lie only in the uncertainty of distant future.