

APPELLATE CIVIL.*Before Holmwood and Chapman JJ.*

INTU MEAH MISTRY

1914

v.

May 15.

DARBUKSH BHUIYAN.*

Summons—Service of summons—Indian Marine Service—Civil Procedure Code (Act V of 1908) O. V, rr. 15, 17 and 27—Ex parte decree—Officer or mechanic in the employ of the Indian Marine.

Under the Civil Procedure Code an officer or mechanic in the employ of the Indian Marine is subject to exactly the same rules as any other person as regards service of summons. They come within the operation of rules 15 and 17 of Order V. of the Code of Civil Procedure.

APPEAL by Intu Meah Mistry, the petitioner.

This appeal arises out of the order of the Subordinate Judge of Chittagong rejecting the appellant's application to set aside an *ex parte* decree passed on the 28th of July 1909.

It appears that this litigation began in 1907 and that a decree was passed on the 14th of March 1908 in favour of 5 persons among whom the appellant was defendant No. 2. But upon appeal the Subordinate Judge reversed the Munsif's decision and found against the defendants. The defendant No. 1 who is proved to be joint with the defendant No. 2, preferred an appeal to the High Court and that appeal was summarily dismissed. During the pendency of the appeal in the High Court, defendant No. 2, the present appellant, applied to the Subordinate Judge to have his appeal re-heard by him. The Subordinate

* Appeal from Original order, No. 49 of 1912, against the order of J. M. Sarkar, Subordinate Judge of Chittagong, dated Dec. 16, 1911.

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Judge held that he had no jurisdiction to entertain the application. On appeal to this Court a Divisional Bench held that the Subordinate Judge had jurisdiction to decide the matter and he, accordingly on the 16th of December 1911 decided against the application made by defendant No. 2.

In his application the defendant No. 2 stated that he was employed as driver in H. M. S. *Rob Roy* and that he was all along away at Rangoon and that he had no knowledge of the institution of any appeal.

Aggrieved by the order of the Subordinate Judge defendant No. 2 appealed to this Court.

Babu Bepin Behari Ghose (with him *Babu Probodh Kumar Dass* and *Babu Khitish Chandra Chakravarti*), for the appellant, submitted that the appellant having admittedly been at Rangoon, no notice of the appeal in question was served upon him. The serving officer did not exercise the due and reasonable care required of him. Referred to O. V., rr. 11 and 17 of the Code of Civil Procedure: *Sakharan Bhaskar v. Padamkar Mahadeo* (1).

[HOLMWOOD J. What is the special procedure for service of summons upon a person belonging to the Indian Marine Service?]

There is no provision in the Code regarding the service of summons upon members of the Indian Marine Service. The serving officer did not make any enquiries from the members of the appellant's family as to where he was then residing.

His address could easily have been ascertained and notice duly served upon him.

Babu Surendra Nath Guha, for the respondent, submitted that the present application for rehearing was not a *bona fide* one. The defendant No. 1, who

(1) (1906) I. L. R. 30 Bom. 623.

appeared and contested the appeal, was joint with defendant No. 2. He set up a false story that he was separate from his brother. At the time of the service of notice appellant's wife, brother and nephew were residing at the ancestral house. Referred to O. V, r. 15 of the Code of Civil Procedure. According to r. 15 the service was a good service. There was no special provision for service of notice upon officers of the Indian Marine, and, therefore, rule 15 applied.

Regarding the meaning of the word residence, see *Kumud Nath Roy Chowdhury v. Jotindra Nath Chowdhury* (1). The defendant No. 2 was in correspondence with defendant No. 1 and his wife, and it would be impossible to believe that he had no notice of the appeal.

Babu Bepin Behari Ghose, in reply.

HOLMWOOD AND CHAPMAN JJ. This is an appeal from the order of the Subordinate Judge of Chittagong rejecting the appellant's application to set aside an *ex parte* decree of the 28th July 1909.

It appears that this litigation began in 1907 and that a decree was passed on the 14th March 1908 by the Munsif in favour of 5 persons among whom the appellant was the defendant No. 2. But upon appeal the learned Subordinate Judge in the Court below reversed the Munsif's decision and found against the five defendants. The defendant No. 1, who is proved to be joint with the defendant No. 2, preferred an appeal to the High Court and that appeal was summarily dismissed. The defendant No. 2, the present appellant, applied to the learned Subordinate Judge during the pendency of the appeal in the High Court to have his appeal re-heard by the Subordinate Judge.

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The Subordinate Judge held that he had no jurisdiction to entertain the application. On appeal to this Court a Divisional Bench of this Court held that he had jurisdiction to decide the matter and he was the best person to decide it. He has accordingly on the 16th of December 1911 decided against the defendant No. 2's application. The grounds which he has given appear on the face of them to be good, for it would appear from what he states not only that the provisions of the law contained in Order V, rules 15 and 17, were complied with, but that the learned Judge satisfied himself that the defendant No. 2 had an opportunity of appearing, inasmuch as he was in communication with his wife, brother and nephew during his absence at Rangoon both before and after the service.

One new factor has arisen in the case, namely that in his application in this case he states that he is employed as a *mistry* or engine-hand on H. M. S. "Rob Roy," and it may therefore be that he belongs to the Indian Marine Service. It is a curious fact that by rule 27 of Order V, officers belonging to his Majesty's Military or Naval forces or his Majesty's Indian Marine Service are excluded from the discretion which is given to the Court of serving notice on public officers or servants of a Railway Company or local authority through the head of their office if that course is most convenient. There is a further rule (rule 28) that where the defendant is a soldier, the Court shall send summons for service to his Commanding Officer. In this state of the law the only conclusion we can come to is that the officer or mechanic in the employ of the Indian Marine is subject to exactly the same rules as every other person under the Code, and we cannot therefore go beyond the provisions of rules 15 and 17 in this case.

It is urged that there was no proper enquiry, and if the peon had made the least enquiry from the other members he must have learnt that defendant No. 2 had gone back to Rangoon to join his employment. This might have some substance if defendant No. 2 had succeeded in establishing what he sought to establish viz., that he had separated from his brother, defendant No. 1, and from the other defendants after the Munsif's decision and that he had adverse interest to his brother, defendant No. 1. But in this he appears to have put forward a false story, and the Subordinate Judge in the lower Court has clearly found that his story is false. That being so, there is no other alternative but to accept the theory that defendant No. 1 did accept service on behalf of his brother although he refused to sign the notice. That notice was duly posted up, as is found, upon the office-room door of the place where the family ordinarily resided, and at the time living in that house were the wife, the brother and nephew of the defendant No. 2, and all these persons had correspondence with the defendant No. 2 during the time that the negotiations for the prosecution of the appeal were going on. It is therefore impossible for us to hold that the defendant No. 2 had not in fact notice of this appeal, and his continuous attempts to have this case re-opened, which has been going on for many years and when he is exactly in the same boat with his brother defendant No. 1, do not appear to be *bona fide*. For these reasons, the appeal is dismissed with costs,

S. K. B.

Appeal dismissed.

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