APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C.J., Woodroffe and Mookerjee JJ.

KASSIM EBRAHIM SALEJI

v.

JOHURMULL KHEMKA.*

1915

Nov. 25.

Summons, service of—Substituted service—"Due and reasonable diligence"—Practice—Appeal from order refusing to set aside ex parte decree—Civil Procedure Code (Act V of 1908), O. V, rr. 12, 17: O. IX, r. 13—Costs.

For substituted service of summons to be effective, it is essential that the requirements of the rules of the Code should be strictly observed.

Knowledge of the institution of the suit, derived by the defendant *aliunde* is not sufficient in the absence of proper service of the summons.

Where the serving officer on three separate occasions went to the place of business of the defendant's firm, under the erroneous belief that it was his ordinary place of residence, and asked for the defendant and, on not finding him, posted a copy of the writ of summons on the outer door of the premises :—

Held, that this was not sufficient service. Proper enquiries and real and substantial effort should be made to find out when and where the defendant is likely to be found.

Cohen v. *Nursing Dass Auddy* (1) followed.

APPEAL by the defendant Kassim Ebrahim Saleji from the order of IMAM J.

This was an appeal from an order refusing to set aside an *ex parte* decree.

On the 18th July 1914, a suit was instituted by Johurmull Khemka against the defendant for the specific performance of an agreement for the sale of the premises No. 98, Harrison Road, in Calcutta. The

* Appeal from Original Civil No. 17 of 1915 in suit No. 872 of 1914.

(1) (1892) I. L. R. 19 Calc. 201.

1915

KASSIM EBRAHIM SALEJI v. JOHURMULL KHEMKA.

defendant did not enter appearance and the matter came on as an undefended cause. In the affidavit of service of summons sworn by Sitaram, a gomasta of the plaintiff, and Ishak the Sheriff's peon, it was deposed that Sitaram knew the defendant and the house and premises No. 1, Amratollah Street in Calcutta, "where the defendant ordinarily lives and resides," and that on the 1st, 3rd and 4th August 1914 the respondents went to the premises for the purpose of serving the writ of summons, and called aloud the defendant's name, but did not find the defendant or any agent empowered to accept service, or any adult male member of his family and thereupon, on the 4th August, a copy of the writ together with a Bengali translation thereof was affixed to the outer door of the premises. On the 9th December an *ex parte* decree was passed against the defendant.

On the 17th February 1915, the defendant filed a petition praying for an order that the *ex parte* decree should be set aside and the suit restored on the ground that the writ of summons had not been served on him. The defendant alleged that he came to know of the decree, only on receipt of a letter from the plaintiff's attorney, dated the 22nd January 1915. The defendant further deposed that he never resided at No. 1, Amratolla Lane, and that the premises were the place of business of the firm of Ebrahim Soleman Saleji and Co., of which firm he was a partner.

The defendant's petition was supported by the affidavit of a *durwan* employed on the premises who denied that any one called out the defendant's name at the premises on the 1st, 3rd or 4th August 1914.

In his affidavit, in reply, the plaintiff alleged that on the 27th July 1914 his attorney wrote and sent a letter to the defendant's attorney intimating the institution of the suit and enquiring whether the latter would

accept service on behalf of the defendant, and that no reply was received thereto. In a further affidavit, Ishak deposed that on each of the three days that he went to the premises he enquired of the *durwan* at the gate (whose name he did not know) whether the defendant was inside the house and was informed that the defendant was not present; he thereupon entered the office room and made the same enquiry of a Mahomedan gentleman (whose name he did not know) and on receiving a similar reply, he called out the name of the defendant aloud. On the 3rd day Ishak affixed the writ of summons in the presence of the *durwan*.

On the 3rd March 1915, IMAM J. dismissed the application, observing as follows:—

"This application is for setting aside an *ex parte* decree passed in a suit that was undefended. The defendant in his sworn petition has stated that the service of summons on him had not been effected and in consequence of the deficiency of service he could not be present at the trial of the suit. The affidavits of Sitaram a servant of the plaintiff, and the bailiff are positive in their statements that the summons had been taken by the bailiff in the company of the plaintiff's servant to premises No. 1, Amratolla Street, where the defendant carries on his business and on the defendant not being found in spite of search made on three consecutive days service was effected by affixing the summons at the outer door of the house. It appears that soon after the institution of the suit the plaintiff's attorney Babu Debi Prosad Khaitan communicated the fact of the institution of the suit to Mr. J. C. Dutt the attorney on behalf of the defendant in the present matter enquiring of him if he would accept service of summons on behalf of the defendant who had been his client in the matter out of which the suit had arisen. To that letter Babu Debi Prosad Khaitan received no reply, but it has been acknowledged by the assistant of Mr. J. C. Dutt that the letter was received and copy of it was forwarded to the defendant. In the petition no reference to the receipt of the letter has been made and no admission as to the knowledge of the defendant concerning the institution of the suit has been made. The petition merely refers to the fact of the passing of the decree and reading it carefully one comes to the conclusion that all reference to any knowledge concerning the institution of the suit has been advisedly avoided. On behalf of the petitioner only one ground for setting aside this *ex parte* decree has been urged and that is that the summons had

1915

KASSIM EBRAHIM SALEJI v. JOHURMULL KHEMKA.

not been duly served. The question resolves itself into one consideration only namely whether the summons had been served or not, and for this the affidavits of Sitaram and Ishak come to furnish a sufficient answer. I see no reason to disbelieve the statement these two persons have made in their affidavits; in fact there is every indication of their truthfulness. The application is dismissed with costs."

From this order the defendant appealed.

Mr. B. C. Mitter (with him *Mr. S. C. Roy*), for the appellant.

Mr. H. D. Bose (with him *Mr. K. P. Khaitan*), for the respondent.

Mr. Bose took the preliminary objection that the appeal did not lie. He contended that the High Court in its appellate jurisdiction can entertain an appeal from the Original Side only by virtue of section 15 of the Letters Patent, and not under powers conferred by the Civil Procedure Code. An order refusing to set aside an *ex parte* decree was not a judgment within section 15 of the Letters Patent. Order XII, r. 1 applies only to appeals to the High Court from Mofussil Courts: *Hurrish Chunder Chowdhry* v. *Kalisundari Debi* (1), *Toolsee Money Dassee* v. *Sudevi Dassee* (2), *The Justice of the Peace for Calcutta* v. *The Oriental Gas Co.* (3).

[Their Lordships not being prepared to admit the preliminary objection, it was not pressed further.]

Mr. B. C. Mitter. The learned Judge was in error and should have set aside the *ex parte* decree under Order IX, rule 13 of the Code on the ground that the summons was not duly served. The requirements of Order V, rule 17 were not satisfied for service to be affected by substituted service: *Cohen* v. *Nursing Dass Auddy* (4). Knowledge of the institution of the

(1) (1882) I. L. R. 9 Calc. 482.
(2) (1899) I. L. R. 26 Calc. 361.
(3) (1872) 8 B. L. R. 433.
(4) (1892) I. L. R. 19 Calc. 201.

suit derived by the defendant *aliunde* did not dispense with the necessity of proper service.

Mr. Bose. The usual practice was followed in attempting to serve the defendant personally, and on failing to find him substituted service was resorted to. The requirements of the Code have been substantially fulfilled. Under rule 17 of Order V of the new Code, substituted service can be effected equally well at the defendant's place of business as at his residence. The defendant was well aware of the institution of the suit before the decree was passed.

SANDERSON C.J. This appeal is from an order made by Mr. Justice Hassan Imam on the 3rd of March in this year, in which he refused to set aside a decree for specific performance of an agreement between the plaintiff and defendant. The decree was made on the 9th of December 1914, and it was made *ex parte*, the defendant not being present or taking any part in the proceedings. Then in consequence of a letter which was dated the 22nd January 1915, and written by the plaintiff's solicitor to the defendant, an application was made to Mr. Justice Imam to set aside the decree on the ground that the writ of summons had not been served upon the defendant. The learned Judge refused to set aside the decree and this is an appeal from his judgment.

Now, the service was supported in the first instance upon an affidavit in the usual form which is to be found at page 15 of the paper book, in which one Sitaram who was employed by the plaintiff and another, Ishak, who was in the employ of the Sheriff of Calcutta, swore that they had been to the defendant's house where he ordinarily lived and resided on the 1st, 3rd and 4th day of August, that they could not find him there; that they could not see any adult male

1915

KASSIM EBRAHIM SALEJI v. JOHURMULL KHEMKA.

SANDERSON C.J.

member of his family, that they had called out his name in the usual way but got no response and that thereupon the writ had been posted upon the premises, and it was upon that affidavit of service that the learned Judge of the Court of first instance proceeded to give his decree.

Now, it turns out that the defendant did not reside at the premises, which are mentioned in the affidavits namely, No. 1, Amratolla Lane, in Calcutta. What took place was that these two men, whose names I have already mentioned, one in the employ of the plaintiff and the other in the employ of the Sheriff of Calcutta, went to the place where the defendant carried on business with his partner, and tried to find him there on the days in question, that the bailiff went into the business premises and saw somebody seated on a chair on each occasion, who told him that the defendant was not at that time at the place, and that then having cried aloud his name three times he posted the writ of summons upon the premises. The question is whether that is sufficient service. I may say at once that in one sense I regret that we have to allow this appeal because I have not much doubt in my mind, speaking for myself, that the institution of these proceedings did come to the knowledge of the defendant, and I do not think that the defendant has any merits in this application. But that is not the question. If I were to decide that what was done in this case was sufficient service of the writ, it might be taken as a precedent on other occasions. Inasmuch as I do not consider that what was done in this case was sufficient service, it would not be right for us to say that it was sufficient service, because we are strongly of opinion that the defendant knew of the issue of the writ. In my judgment, where it is a question of substituted service, and the defendant has not been served person-

ally, it is most essential that the requirements of the rules should be strictly observed in all respects.

Now, the rules which are material to this matter have already been referred to and I only intend to refer to them quite shortly. The first is Order V, r. 12 which says, "wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient." Now, in this case there is no doubt that service upon the defendant was not made personally, nor was it made upon an agent empowered to accept service. It is quite true that a letter was written by the plaintiff's attorney to a gentleman who was acting in respect of the dispute about these premises on behalf of the defendant, but that does not empower him to accept service, and unless he has authority from his client to accept service and does accept service, the mere fact that plaintiff's attorney writes to the defendants' attorney saying, "Will you accept service," and he receives no reply, in my opinion, is not sufficient. Therefore, it does not come within r. 12.

The next rule which is really material is Order V, r. 17. That has already been read by Mr. Bose, but I will read it again in part for the purpose of making my judgment intelligible. It says ". . . . . Where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to the Court . . . . . ." Now, the question in

1915

KASSIM EBRAHIM SALEJI v. JOHURMULL KHEMKA.

SANDERSON C.J.

this case is whether the facts as set out in two or three affidavits which have been referred to by Mr. Bose, show that the serving officer used all due and reasonable diligence. In my opinion it would be dangerous for this Court to hold that the facts set out there show that all due and reasonable diligence was used. One must remember that the first affidavit represented that the serving officer had gone to the defendant's dwelling house and tried to find him on three separate occasions, that he could not find him or any adult male member of the family and that he then proceeded to call out, outside the house, the name of the defendant and then posted a copy of the writ upon the premises of the defendant. This is one thing. But it turns out that a very different matter occurred. The serving officer went to the defendant's place of business, where he carries on business with his partner. There is no mention in the affidavit that the defendant resides there. In fact the defendant swears that he does not ordinarily reside there and, I am not prepared to hold that merely going to a man's place of business on three separate days,—a place of business, where he carries on business with other partners and where he may or may not be on these particular days or at the particular time of the day—and merely asking for him and then when he does not find him, posting a copy of the writ on the outer door of the premises is sufficient service. I may adopt the very excellent common sense rule laid down by one of my predecessors, Chief Justice Sir Comer Petheram. It is this : he says, " It is true that you may go to a man's house and not find him, but that is not attempting to find him. You should go to his house, make enquiries and if necessary follow him. You should make enquiries, to find out when he is likely to be at home and go to the house at a time when he can be found. Before service like this can be

effected it must be shown that proper efforts have been made to find out when and where the defendant is likely to be found—not as seems to be done in this country to go to his house in a perfunctory way." I lay stress upon the words perfunctory way: *Cohen* v. *Nursing Dass Auddy* (1). Now those are the words used by Chief Justice Sir Comer Petheram when he was dealing with a case where service was attempted to be made on a man at his dwelling house. I think that remark will apply *à fortiori* to this case where service was effected in a perfunctory manner by going to a man's place of business where he carries on business with a partner and where he may be or may not be on those days. As has been said, it is a very good rule to follow that proper enquiries and real and substantial effort not in a perfunctory way should be made to find out when and where the defendant is likely to be found.

Under these circumstances I think that although, as I have said before, I have no sympathy with the defendant, but having regard to the fact that if we allowed this service to pass we might be approving something which would be taken as a precedent which in my opinion should not be taken as a precedent, I think that the appeal should be allowed and we will hear Mr. Mitter on the question of costs.

(After discussion.) We think that the proper order in this case is that the appeal will be allowed upon the undertaking by Mr. Mitter that no further service of the writ will be necessary. The suit will of course be restored.

The costs of the application before Mr. Justice Imam to set aside the decree will be costs in the cause and each party will bear the costs of this appeal;

(1) (1892) I. L. R. 19 Calc. 201.

1915

KASSIM EBRAHIM SALEJI v. JOHURMULL KHEMKA.

any costs if already paid by the appellant will be refunded.

WOODROFFE J. I agree that the appeal should be decreed. As there is no question in this case that the respondent did not go to the house of residence, it cannot be said that all due and reasonable diligence was used to find the defendant. The fact that the plaintiff went to the house where summons was posted under the impression that it was the defendant's place of residence which it was not, indicates an intent and knowledge that the defendant was likely to be found at his place of residence though in fact no search was made there. That the defendant had otherwise knowledge of the institution of the suit is highly probable. But that is not sufficient, if service is not formally proved.

I would like to add that the decision referred to by the Chief Justice, *Cohen* v. *Nursing Dass Auddy* (1) was followed by Sir Lawrence Jenkins C.J., and myself in an unreported decision in appeal from Order No. 75 of 1912, dated the 28th November 1913.

MOOKERJEE J. I am of opinion that the order of Mr. Justice Imam cannot be supported. The question for determination is, whether the appellant as an applicant who seeks to set aside a decree made *ex parte* against him has satisfied the Court within the meaning of r. 13 of Order IX, of the Code that the summons in the suit was not duly served upon him. The answer depends upon the true construction of rr. 12 and, 17 of Order V. Rule 12 recognises the fundamental proposition that whenever practicable service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case

(1) (1892) I. L. R. 19 Calc. 201.

service upon such agent shall be sufficient. The present case does not fall within the exception, as it is not suggested that the defendant had an agent empowered to accept service. The notice given to Mr. Dutt, who had acted as his attorney on a previous occasion, was also clearly insufficient, and reliance has not been placed thereon in support of the order under appeal. The question consequently arises whether service was made in fulfilment of the requirements of r. 17. That rule—I quote only so much of it as is relevant for our present purpose—provides that where the serving officer, after using all due and reasonable diligence, cannot find the defendant, he shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides, or carries on business, or personally works for gain. Here the plaintiff caused the notice to be affixed on the house at No. 1 Amratolla Lane. The plaintiff erroneously assumed that the defendant ordinarily resided there; as a matter of fact it was not his residence; but in that house business was carried on by a firm whereof the defendant was a partner. In these circumstances, can we say that the plaintiff used all due and reasonable diligence to find the defendant; if he did not, the service in the mode in which it was effected was not in fulfilment of the requirements of the Code. In my opinion, the answer must be in the negative. I am not prepared to affirm the proposition that if the plaintiff makes no effort whatever to find the defendant in the place where he ordinarily resides and not finding him where he carries on business along with others, affixes the summons upon a conspicuous part of the business premises, the requirements of the Code are satisfied: *Cohen* v. *Nursing Dass Auddy* (1). Indeed,

(1) (1892) I. L R. 19 Calc. 201.

1915

KASSIM EBRAHIM SALEJI v. JOHURMULL KHEMKA.

MOOKERJEE J.

the plaintiff has not proceeded on the theory that it was permissible under the law to serve summons in this manner. He acted on the footing that the defendant actually resided in the premises to which the summons was taken. He now discovers that he was under a misapprehension, and is consequently driven to maintain a position which is absolutely untenable. There is thus no escape from the conclusion that the summons was not duly served. It has finally been argued that there are ample indications that the defendant was aware of the institution of the suit against him. But this is plainly of no real assistance to the respondent, for if the summons was not duly served, as I hold it was not, the defendant is entitled under Order IX, r. 13 to have the *ex parte* decree set aside as against him. Consequently this appeal must be allowed and the application to set aside the *ex parte* decree granted.

Appeal allowed.

Attorney for the appellant: *J. C. Dutt.*

Attorney for the respondent: *D. P. Khaitan.*

J. C.