

ORIGINAL CIVIL.

Before Rankin J.

1921

June 29.

HARJIBANDAS GORDHANDAS

v.

BHAGWANDAS PURSRAM.*

*Ex parte Decree—Setting aside of ex parte decree—Service of summons—
Suit against firm—Civil Procedure Code, 1908, O. XXX, rr. 3, 5—
Leave to serve by registered post—High Court Rule, Ch. VII. r. 11.*

On an application to set aside an *ex parte* decree obtained against a firm which had been sued in the firm name and served as such, with the leave of Court, by registered post, it was alleged by the applicant that the summons was not duly served and that the firm had long ceased to carry on business as such firm but was being wound up by the applicant:—

Held, that the suit could be brought against the firm in its firm name even though it be a dissolved firm provided only that the liability arose at a time when the firm was in existence. The only way, however, in which, under Order XXX, r. 3 of the Civil Procedure Code the writ of summons can be served in such a case is by serving it either upon a partner or by serving it at the principal place at which the partnership business was carried on in British India upon a person having at the time of service the control or management of the partnership business.

Held, further, that where Rule 11 of Chapter VIII of the High Court Rules is applied, it is necessary that it should be so applied as to comply with Order XXX, r. 3, that is to say, in such a case the registered letter should be addressed to and served upon some particular individual alleged to be a partner or to have control of the business.

APPLICATION.

The facts of the case are as follows:—On the 9th day of February 1921, Harjibandas Gordhandas a mercantile firm carrying on business in Calcutta instituted a suit against the firm of Bhagawandas Pursram, a mercantile firm doing business at Kushtia in the district of Nadia, praying *inter alia* for a decree for Rs. 30,956-3-6 on the basis of a

* Application in Original Civil Suit No. 470 of 1921.

commission agency account which had been adjusted on the 9th July 1918. In the plaint it was stated that the partners of the defendant firm were Kanhyalal, Bansider, Santalal, Srimutty Kamli and Parbhulal. The summons was issued on the 21st February. In the affidavit of the Sheriff's peon it was stated that the defendant firm (Bhagawandas Pursram) were served according to an order of the Court, dated the 25th February 1921, by registered post whereby a copy of the writ of summons with a Nagri translation was sent in a cover to Kushtia. The Sheriff's peon stated further that the said cover reached the defendant firm but it was refused and was returned to Calcutta on 1st March 1921 and had been made part of the record. The suit was decreed *ex parte* on the 10th of May 1921. On the 7th of June 1921 an application was made by Mussammatt Kamli Vaishyani (Srimutty Kamli) the sole surviving representative of the defendant firm to set aside the said decree. One Bungsidar, who claimed to be acquainted with all the facts of the case, swore an affidavit on her behalf in which he stated that Mussammatt Kamli Vaishyani was the sole surviving representative of the firm of Bhagwandas Pursram, being the widow of Golap Roy Agarwalla who was the son of Pursram. Bhagwan was the father of Pursram. Both were dead. That the firm had ceased to carry on business for more than two years and that she was collecting the outstandings of the business and that suits had been instituted in her name. It was also stated that she resided at the same place in Kushtia where the firm used to be located and where they had carried on business for about 8 or 10 years, and that she came to know about a fortnight ago of the said *ex parte* decree. It was further stated that the registered envelope was never delivered at the place where the

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firm had been located and where she lived. Though it contained the remark "addressee refused to accept the same" it was denied that she or any one else on her behalf had made this endorsement. It was stated further that there was a good defence to the suit inasmuch as there was a duly registered deed of release in favour of the defendant firm, dated 18th of October 1919 in respect of the alleged claim.

Mr. B. K. Ghose (with him *Mr. Langford James*), for the defendant, submitted that the summons was not duly served. The terms of Order XXX, r. 3 of the Civil Procedure Code had not been complied with. The service of summons should have been upon a partner of the firm or upon some person specifically named in the address on the envelope who had the control of the business.

Mr. N. N. Sircar (with him *Mr. K. P. Khaitan*), for the plaintiff, submitted that the service was good and that the Court had given leave to serve the defendant firm by registered post.

RANKIN J. In this case an application is made to set aside the *ex parte* decree and the ground of the application is that the writ of summons was not duly served, it being further alleged on the part of the applicant that the institution of the suit did not come to her notice or to the notice of the persons acting for her until the decree had been passed.

The suit is against a firm in its firm name. The allegation of the applicant is, first of all, that the business carried on under the name or style of Bhugwandas Pursram was a business of which her husband during his life-time was the sole possessor. She says that before this action was brought she herself merely carried on that business for the purpose

of collecting outstandings and that in point of fact the firm, if it can be correctly called a firm, had ceased to carry on business as such some considerable time ago. What the facts are as to that in this case it is quite impossible for one to determine upon the cross-contradictions in the affidavits. According to the plaintiffs, the firm is a firm of which a good many people still living are partners.

The summons was sent by registered post. So far as that service goes, there is a further important point, that the applicant adduces evidence to show that it is not true that the summons was in fact delivered by the postal peon to the only address that the firm had had.

Now, a suit can be brought against a firm in its firm name even if it be a dissolved firm provided only that the liability arose at a time when the firm was in existence. When it comes to the question of service, however, in such a case as that, it is important to remember that by the rules—Order XXX, r. 3, the only way in which such writ can be served is by serving it either upon a partner or by serving it at the principal place at which the partnership business is carried on in British India on a person having at the time of service the control or management of the partnership business. If the partnership business no longer exists and the firm has been dissolved, it is obvious that the only method under rule 3 which is open, is to serve upon a partner, that is to say, upon one of the individuals whom you are charging as liable as principals. By rule 11, Chapter VIII of the High Court Rules, there is a provision for service by registered post provided an order is obtained by a Judge or Master—“Where the defendant resides within the jurisdiction of another Court, the summons to appear and answer may, where so directed by a Judge or by the Registrar or Master,

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be addressed to the defendant at the place where he is residing and sent by the Sheriff to him by registered post." It does seem to me that if that rule is going to be applied to a case where the suit is brought against a partnership firm in its firm name, it is necessary that it should be so applied as to comply, at all events, with the substance of Order XXX, rule 3—that is to say, in such a case the registered letter should be addressed to some particular person alleged to be a partner or to have control, and it should be served by registered post upon such a person. In this case what happened was that an order was obtained to send the letter by registered post to the defendant firm at the address where it was thought to be still carrying on business. It seems to me that the applicant has satisfied me that the service in this matter has not been strictly correct, and I must, therefore, issue an order to set aside the *ex parte* decree. It will be for the plaintiff under the circumstances to consider very seriously, as a result of these affidavits, whether it would not be better to amend and charge the particular persons whom they intend to make liable; but that is a matter upon which it is not necessary for me to say anything now. What I propose to do is to make the costs thrown away, and the costs of this application to depend upon the ultimate result of the re-trial.

A. P. B.

Attorneys for the plaintiff: *Khaitan & Co.*

Attorney for the defendant: *S. M. Dutt.*