

ORIGINAL CIVIL.

Before Buckland J.

1931

June 1, 2.

KEEN ROBINSON & CO., LTD.

v.

THE LILY BISCUIT COMPANY.*

Practice—Suit against firm—Service of writ of summons—Service upon a partner, if directions of Court must be taken before—Code of Civil Procedure (Act V of 1908), O. XXX, r. 3.

Where a writ of summons has in fact been served upon a partner of a firm, the service is not bad merely because directions of the Court, under Order XXX, rule 3, have not been first obtained.

International Continental Caoutchouc Compagnie v. Mehta & Co. (1) referred to.

APPLICATION to set aside *ex parte* decree.

The business of the defendant firm belonged to two brothers, Pratapchandra Set and Binaykrishna Set. Their respective sons, Prabodhchandra Set and Prakashchandra Set, were also concerned in the business as managers.

The writ of summons was served through the Munsif's Court at Sealdah and, in the affidavits of service, it is stated service was made on P. C. Set, the manager of the firm. In this application, Pratapchandra Set denied service on himself and has sworn an affidavit stating that the two managers were both absent from the place of business at the alleged time of service. The firm applied to have the *ex parte* decree against them set aside on the ground of non-service, or in the alternative, of improper service.

The Court found, as a fact, that Pratapchandra Set, a partner of the firm, had been served with the

*Application in Original Civil Suit No. 764 of 1931.

writ and then proceeded to discuss the law as stated below.

S. C. Bose (with him *S. R. Das*) for the applicants. Directions of the Court should have been obtained first. The words "as the Court may direct" does not appear in Order XLVIII A, rule 3 of the Rules of the Supreme Court in England. These words in Order XXX, rule 3, clearly show that directions must be taken to make the service good. In this connection see *International Continental Caoutchouc Compagnie v. Mehta & Co.* (1).

W. W. K. Page (with him *E. C. Ormond*) for the respondents. Directions of the Court are taken to make the service good. There can be no better service than service on a partner. In any event, the failure to take the directions of the Court is mere irregularity, not affecting jurisdiction and, therefore, that is no ground for setting aside the decree. See section 99 of the Civil Procedure Code. Even if section 99 does not directly apply, there is certainly no miscarriage of justice and the principle of the section should be applied to this case.

BUCKLAND J. This is an application made on behalf of the Lily Biscuit Company, under which firm name two persons, called Pratapchandra Set and his brother Binaykrishna Set, carry on business, for an order that an *ex parte* decree, made on 18th May, 1931, be set aside. The grounds of the application are that there was no proper service of the writ of summons as required by Order XXX, rule 3 of the Civil Procedure Code.

[After considering the evidence, the Court found as a fact that a partner of the defendant firm had been served with the writ of summons.]

A further question arises for decision, for it is contended by reference to Order XXX, rule 3, Civil Procedure Code, that directions of the Court should have been obtained, and that no directions having

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been obtained, which is the fact, the service is not a proper service within the meaning of the section. The rule says :

Where persons are sued as partners in the name of their firm, the summons shall be served either—

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India.

It is contended by Mr. Bose, on behalf of the defendant firm, that before service the plaintiffs should have obtained the directions of the Court whether the summons should be served upon a partner or in the manner prescribed by sub-section (b) and that if no such directions have been obtained the service is not in accordance with law, because it is only the service so directed and no other which can be deemed good service. I cannot take the view that the words "such service" in the last part of the section only refer to service for which the court has given a direction. I apprehend that it means service either in the mode prescribed by sub-section (a) or in the mode prescribed by sub-section (b) shall be deemed good service though power is reserved to the court to direct which mode of service shall be followed. But this does not exclude the question whether or not the directions of the court must first be obtained. I have been referred to my judgment in *International Continental Caoutchouc Compagnie v. Mehta & Co.* (1) in which I had occasion to consider the practice under Order XXX of the Civil Procedure Code. I then observed that it had been decided that under Order XXX, rule 3, the directions of the court must be obtained as to the method of service to be followed. Though I am confident that I should not have made so positive a statement without authority, no

authority has been cited to-day, but I am informed that there is an unreported judgment of Pugh J. on the point. The point, however, was in no way essential to the decision of the matter then under consideration and my statement made on that occasion should be regarded as *obiter*. The English Rule, Order XLVIII A, rule 3, is in substantially the same terms, but comparison is valueless for the words "as the court may direct" do not find a place in it and the need for them is avoided by the direct requirements of the rule.

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The point of substance is whether, when in fact a partner has been served but no directions of the court under Order XXX, rule 3, have been first obtained, such service may be deemed good service. Reference has been made to rule 5, but that does not affect the matter. Actually in this case, at the time of service, a notice under rule 5 was also served, but this is immaterial for the reason that the rule provides that, in default of notice, the person served shall be deemed to be served as a partner. It would, in my judgment, be contrary to all reason and common sense to hold that, where service has in fact been made upon a partner of a firm, the service is bad because the directions of the court under Order XXX, rule 3, have not been first obtained. Whether, where service has been effected at the principal place at which the partnership business is carried on within British India upon some person having at the time of service the control or management of the partnership business there without the directions of the court having been obtained, such service should be deemed good service is not a matter which I need consider, nor do I express any opinion with regard to it. Conceivably the words "as the court may direct" have been inserted for the purpose of enabling parties who are unable to effect service upon a partner to obtain the directions of the court to serve the writ of summons in the mode prescribed by sub-section (b), but no such question now arises and it is unnecessary to pursue it further.

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My attention has also been drawn to section 99, Civil Procedure Code, which provides that

No decree shall be reversed or substantially varied... on account of... any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court.

Where there has been no service at all or where there has not been service in the manner prescribed by law and such error or irregularity in service affects the jurisdiction of the court in regard to the defendant, clearly the section will have no application. But where, as I find to be the fact here, a partner has been served, even if the directions of the court ought to have been obtained under Order XXX, rule 3, the omission to obtain them is not in my judgment an error, defect or irregularity affecting the jurisdiction of the court in relation to the defendant firm.

It has not been suggested in argument, but it would seem that this section only applies to an appellate court and cannot be invoked upon an application such as this to the court which has made a decree to set it aside. Nevertheless, even if the plaintiffs are not entitled to rely upon the terms of the section as directly applicable, they are, in my opinion, entitled to refer to them as enunciating a sound principle to be followed, and, there is, to my mind, no gainsaying that if this matter is viewed in that light, this application must undoubtedly fail. The application will be dismissed with costs.

Application dismissed.

Attorneys for applicants : *Mullick & Palit.*

Attorneys for respondents : *Orr Dignam & Co.*

S. M.