IN THE HIGH COURT AT CALCUTTA

CIVIL REVISIONAL JURISDICTION

APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHAITALI CHATTERJEE DAS.

CO 2000 OF 2024

KAWALJIT SINGH JOHAR

VS

GIRISH KUMAR MISHRA & ORS.

For the Petitioners	**:**	**Mr. Sounak Bhattacharya, Adv.**
		Mr. Sounak Mondal, Adv.
For the Opposite Party No. 1	**:**	**Mr. Kushal Chatterjee, Adv.**
		Mr. Manish Shukla, Adv.
		Mr. Oishik Chatterjee, Adv.
		Ms. Ivi Banerjee
		Ms. Dipa Singhal, Adv.
Last heard on	**:**	**19.08.2025**
Judgement on	**:**	**29.08.2025**

CHAITALI CHATTERJEE DAS, J. :-

1. This revisional application is directed against an Order dated October 3, 2023 and Order dated 10.5.2024 passed by the learned judge 11th bench, City Civil Court at Calcutta in title suit No 455 of 2018. The case of the petitioner in a nutshell is that the Opposite Party No1 here in filed a suit for declaration against the present petitioner/defendant that he is entitled to use, enjoy and occupy the Office space at shop room number 9 in the ground floor of premises

number 2A, Ganesh Chandra Avenue, Kolkata – 70013, without any interference from the defendant and also prayed for a decree of permanent injunction restraining the defendant from alienating, transferring and disposing the said showroom to 3rd parties. In connection with the said suit, the plaintiff also filed an application under Order 39 Rule 1 & amp; 2 read with section 151 of the Code of Civil Procedure.

2. The case of the present petitioner being the defendant in the above mentioned suit is case that the plaintiffs were directed to put in requisites for service of summons by May 8, 2018, by virtue of an order dated April 12, 2018. The opposite party No1 moved an application on April 20, 2018 when it was detected that the defendant No.1 & 6 in the suit had filed a caveat before filing of the said suit, and as such they were required to be heard before passing the interim order. Accordingly, the direction was given to the defendant no.1 & amd 6 to file written objection to the said injunction application in the meantime. Subsequently on May 8, 2018, the present petitioner along with defendant no. 1 & 6 upon receipt of the copy of the injunction application had appeared in the said suit and filed written objection to the injunction application.

3. The Learned Court by an order dated August 27, 2019 recorded that the postal track report filed before the court by the present opposite party no.1 did not reflect whether summons have been served upon the defendant number 3,4 and 5 and again by an order dated December 11, 2019, directed the opposite party no.1 to take necessary steps to serve summons upon the defendant no. 3,4 & 5 through court bailiff which was not complied by the plaintiff . The Nazir of the concerned Court filed the report before the learned trial court on

March 5, 2020 disclosing that the defendant no.3,4 & 5 have not been served. On 30.11.2022, the Learned Trial Judge directed the Opposite Party no.2 here in to publish the summons in a daily newspaper circulating in the locality of defendant Numbers 3, 4 & 5 and further to file the draft publication on January 19, 2023. Accordingly that said notice was published in the newspaper Aajkal on February 22, 2023.

4. It is the case of the petitioner that all of a sudden without recording any reason the Learned Court by an order dated October 3, 2023 observed that the suit shall proceed ex-parte against all the defendant since the written statement was not filed. Immediately after that, the petitioner with the defendant no.1 & 6 jointly filed the application for recalling the order and to take out the suit from the ex-parte board and to direct the plaintiff to take steps for service of summons upon the defendant. Accordingly, an application for recalling was taken up for consideration and on May 10, 2024 the learned trial court rejected the said application holding that the defendant no.1 & 6 lodged caveat in connection with the suit, and accordingly, they entered appearance in the suit and the paper publication of the summons was published in a newspaper, namely Aajkal on April 7 2023 hence there is no ground to recall the order dated October 3, 2023.

5. Being aggrieved by the same the present revisional application has been filed. In course of argument, the learned advocate representing the petitioner relied upon a decision reported in[1] ***Sri Nath Agarwal versus Sri Nath***. It is submitted by the Learned Advocate that under Order 5 Rule 1 CPC, the summons are to be issued by the court after institution of suit requiring the

[1] 1981 SCC online ALL 445

defendant to appear before it on a particular date to be mentioned either for filing the written statement and appearance or for final disposal of the suit. It is based on the maxim Audi alterem partem. It is further submitted that the notice published in the newspaper clearly shows that the same was regarding disposal of the application under Order 39 Rule 1 & 2 read with Section 151 of Code of Civil Procedure Code and it was directed upon the defendant no.3, 4 & 5 to appear in the Court and it never meant for all other defendants. It is further submitted that the plaintiff never bothered to file the requisites along with the plaint despite giving specific direction by the Learned Court. The Learned Court noted that the legal representatives of defendant no.5 is already on record being defendant no.2 and the Learned Advocate for the defendant raised no objection against the prayer made under Order 22 Rule 2 CPC but surprisingly proceeded ex-parte against the defendant for want of written statement when no specific date to file written statement was fixed .

6. Per contra argument, advanced on behalf of the learned advocate representing the opposite party argues that the suit was filed against the defendant no.1 to 5 who are the directors of M/s Jayco exports, Private Limited that is the defendant no. 6 That apart defendant number 1 to 5 are the members of the same family. It is an admitted fact that defendant number 1 & 6 filed caveat before filing of the said suit, which was detected when the present petitioner intended to move the injunction application and accordingly direction was given to them to file the written objection. Secondly, after the interim order was passed, pursuant to the direction of the Learned Court, the publication was made in the daily newspaper whereby it was clearly mentioned that the defendant number 3,4 and 5 are to appear before the court on fixed date and

may file written statement as well as written objection if any against the instant suit as well as the injunction application and in default, the suit and injunction application will be heard and determined ex-parte in accordance with law, despite that the defendants did not file the written statement. The learned advocate relied upon a decision of the coordinate bench of this Court dated January 21, 2015 in C.O no. 34 of 2015 ***Chittanku Ranjan Das vs Swati Das & ors.*** in this regard.

7. After hearing the contentions of both the Learned Advocates and going through the order impugned the seminal issue to be decided, is that whether the service of summons as mandated under Order 5 Rule 1 of the Code of Civil Procedure can be said to be waived if no date is fixed by the Court recording the appearance in the suit and fixing the date for filing written statement.

8. The defendant No1 & 6 appeared on the basis of a caveat lodged under Section 148-A of the Code of Civil Procedure. Before delving into the bottom of the case, it is necessary to look into the specific provision as enumerated under Code of Civil Procedure. Order 5 Rule, 1 of code of civil procedure; When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any within 30 days from the date of service of summons on that defendant.;

Provided that no such summons shall be issued when a defendant has appeared at the presentation of plaint and admitted the plaintiffs claim; Provided further that where the defendant fails to file the written statement within the said period of 30 days, he shall be allowed to file the same on such other day as may be specified by the Court, for reasons to be recorded in

writing, but shall not be later than 90 days from the date of service of summons.

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear

a) in person, or

b) by a pleader duly instructed, and able to answer all material questions relating to the suit, or

c) by a leader accompanied by some personable to answer all such questions.

(3) Every such summons shall be signed by the judge or such officer as he appoints, and shall be sealed with the seal of the Court.

9. Therefore, from the above, the conclusion can be arrived at that service of summons on the defendant is a mandatory requirement of the provisions, except where the defendant appeared at the presentation of the plaint and admits the plaintiff's claim. In this case, the learned advocate representing the petitioner argued that the plaintiffs did not put the requisites as mandates in the Code of Civil Procedure, and therefore the mandatory provision was not complied with, and the summons were never served upon the present petitioner so in a strict sense the petitioner had no knowledge about the suit . It is seen from the record that the opposite party no.1 that is the plaintiff moved the injunction application on April 20, 2018 when it was detected that a caveat has been filed on behalf of defendant no. 1& 6 accordingly, direction was given to the plaintiff to serve the notice upon the defendant no. 1 & 6 to file written objection to the injunction application. Subsequently, after the

order of injunction was granted the present petitioner along with defendant no. 1 & 6 after receiving the copy of the injunction application had appeared and filed written objection to the injunction application. Order 39, rule 3 of code of civil procedure is mandatory provision, whereby the court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party;

Provided that, where it is proposed to grant an injunction without giving notice of the application to the Opposite Party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant-

a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with-

i) a copy of the affidavit filed in support of the application

ii) a copy of the plaint; and

iii) copies of documents on which the applicant relies, and

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.

10. The petitioner appeared after the order of injunction granted, and in terms of the provision, he received the copy of the plaint and all documents and

there with along with the injunction application. During pendency of the proceeding when the learned court gave the direction on 12 December, 2019 to the plaintiff to take necessary steps to serve summons upon the defendant Nos 3, 4 & 5 through the Court bailiff, the plaintiff applied for substituted service upon them. The order of the learned Court reveals that an application under Order 22 Rule 2 of Code of Civil Procedure was filed intimating that defendant no.5 died on April 18, 2021 and the legal representatives of defendant no. 5 is already on record being defendant no.2. That apart the Learned Court further record that the advocate for the defendant raised no objection against the prayer. Accordingly, the prayer was allowed considering the defendant no. 2 as the legal representative of the defendant no. 5. The question remains in the above circumstances when the defendant no.2 was very much present before the Court and was served with all the required document considered as legal representative of defendant No. 5, never prayed for time to file written statement to controvert the allegations as mentioned in the plaint, but skilfully waited till summon is served upon them in compliance with Order 5 Rule1 of CPC. The decision as relied upon by the Learned Advocate representing the opposite party passed by a coordinate bench of this court in C. O number 34 of 2015, ***Chiku Ranjan Das versus Swati Das and others*** dated January 21, 2015 observed that:-

> *'the legislative intend behind incorporating the provisions for service of summons is to afford the defendant an opportunity to contest, which is akin to the principal of audi altered partem. Rule 2 of Order 5 which is again substituted by Civil Procedure Court. (amendment) Act, 1999 mandates every summons to be accompanied by a*

copy of the plaint. The object is to make the defendant aware, the claims made in the suit on the facts and law and inures the defendant to put his defence, both facts and law. Under Rule 5 Order 5 of the code, the court shall issue the summons either for settlement of issues or final disposal of the suit. If the said provisions are construed with the legislative intend, the summons are required to be served to make the defendant aware of the relief claimed against him on the facts incorporated there in and to enable him to put his defence to enable the court to determine the dispute involved therein. The aforesaid proposition is not free from an exception. There may be a situation where the defendant voluntarily appears and prayed for time to file written statement. In such case, it may be implied that the defendant has waived the service of summons and the limitation shall start from the date of appearance.'

11. In the said case it was further observed that there may be another situation where the defendant appeared at the interlocutory stage say when a caveat is lodged under Section 148A of the Code but did not seek for time to file the written statement .In such event, it shall not amount to waiving the service of summons unless the court records the appearance of the defendant and passed the order. No service of summons should be served and such appearance is treated as an appearance upon service of summons. In such eventuality, it would frustrate the legislative intend if the Court has to waive the service return of the summons which shall further cause the delay in disposal of the suit. The object for timely and speedy disposal of the civil suit is behind the amendments to be brought in 1999 and 2002 in the Code of Civil Procedure. It is seen from the above decision that in the said case the

Trial Court rejected an application filed by the defendant No. 2 to accept the written statement. The suit was filed on 18th November, 2013 and the application for injunction was moved on 20.11.2013. The defendant No. 3 was on caveat and appeared in the said application. The defendant no.2 filed the revisional application was not on caveat and a service was directed to be effected upon the other defendant, including the petitioner under order 39, Rue 3(a) & (b) of CPC. The petitioner appeared on December 19, 2013, prayed for time to file written objection to the injunction application which was further extended and it was fixed on 4th April, 2014. On 13th May, 2014 the petitioner prayed for extension of time to file written statement and the written statement was filed on 16th July, 2014 within 120 days. Therefore, the co-ordinate bench was of the view that the written statement was filed within the stipulated time period.

12. In the instant case, the defendant no.2 though present, while an order of intimation recording death of defendant no. 5 was accepted and appeared in the suit after receiving the copy of the injunction application along with plaint never prayed time to file the written statement and the matter was fixed for ex-parte hearing. Here, question of not being informed about the content of the plaint does not arise and neither he appeared pursuant to filing of caveat. That in terms of the direction of the court, a paper publication of the summon and injunction notice was published in the daily newspaper Aaj kal on April 7, 2023, despite that the defendant no.2 that is the petitioner herein did not take any step to record his appearance in the suit and prayed for time to file the written statement. The entire period of silence on the part of the petitioner

compels this Court to draw an adverse presumption against the petitioner that such delay was caused with an intention to drag the proceeding further.

13. In the present days when the Courts are being flooded with the pending cases and the delay in disposal of cases having a severe impact in the minds of the litigant for having expeditious relief from the court of law, this mind-set of the petitioner to drive the proceedings on mere technicalities cannot be appreciated. In the decision as relied upon by the learned advocate representing the petitioner in ***Srinath Agarwal (Supra)*** the meaning of the word summons of the suit was discussed. The summon is issued by the court after institution of suit recording the defendant to appear before it on a particular date mentioned there in either for filing the written statement and appearance or for final disposal of the suit. It is based on the maxim, audi altered partem i;e hear the other side or no one should be condemned unheard. The policy appears to be that some method should be evolved to inform the defending party about the claim made by the plaintiff and the date fixed for appearance of the defending party. It was further observed in paragraph 8.

> *8; it is significant to note that in sub clause (1) of rule one, the word 'may' has been used instead of the word "shall', it is because it is not necessary to issue summons in all cases. In cases covered by the provider where the defendant makes his appearance at the presentation of the plaint and admits the claim, no summons need to be issued. So also, if the defendant is a person of such rank as, in the opinion of the Court, requires service in the form of a letter, the court can direct dispensing with issue of summons to him. A proviso now in 1976 to Order five, rule*

one, CPC as provide to the existing proviso also shows that when defendant appear after the summons has already been issued, he can be directed by the court to file his written statement on the date of his appearance. The entire scheme of the Civil Procedure Code in this regard aims at only one thing to obtain the presence of the defendant to a claim and to provide full information about the nature of the claim made against him and also of the date when he is supposed to appear in court to answer the claim. If the defendant party appears before the court after the registration of the suit, and he is informed about the nature of the claim and the date fixed for reply there, it must be deemed that the defendant has waived the issuance of summons".

14. In the said case, it was further observed by the Supreme Court that.

"It is not possible for me to countenance a situation in which the defendant though present in the Court and on all dates fixed there in, is still allowed to insist that unless proper summons be served upon him he should be deemed to be unaware of the proceeding:".

In this case, I am clearly of the opinion that the order sheet dated 11.9.1978 itself should be treated to be a summons to the defendant for the purposes of explanation to section 20(4) of U.P act number xiii of 1972, because from this, he got intimation of filing of the written statement as also for final hearing of the suit. It is this date which must be treated to be the date of first hearing of the suit within the meaning of Section 20.(4) read with explanation to the section.

15. In the instant case, it is alleged that no summons were served upon the defendant No. 2, but on 30.11.22 on the prayer of the plaintiff the Learned Court directed the plaintiff to publish the summons and accordingly the summon was published on February 22, 2023. Fixing the date on 26th day of April 2023 for appearance as well as for filing written statement by defendant no 3 & 4 and they appeared by filing vakalatnama and prayed for time to file written statement. So in terms of the decision the time should begin under order 8 Rule 1 of the code from this date. Since the defendant no 2 appeared and make his presence in the suit no direction was given to serve summon on him. The defendant also belong to the same family member so after that also he did not take any step to appear in the suit. Therefore utter negligence on the part of the petitioner to delay the proceeding is well established .At this stage it is necessary to discuss the role played by the Learned Court when admittedly no summon under order 5 rule 1 CPC was served upon the defendants.

16. It is expected that in most cases the defendants in a suit will try to adopt all the tools to prolong the litigation and it was an usual practice to take adjournment for umpteen numbers to file written statement and in order to restrict the said tendency as per recommendation of law commission the provision was amended restricting the time to file written statement within 30 days which under no circumstances to be extended up to 90 days. In the decision of ***Salem Advocate Bar Association v Union of India*** reported in[2] where the interpretation of the word 'shall' was discussed and held the provision of order 8 Rule 1 of code of civil procedure is mandatory. So the

[2] (2005) 6 SCC 344

defendant if appears without any summons and admits the claim of the plaintiff then the serving of summons upon him is not mandatory but otherwise service of summon upon the defendant is mandatory provision and unless his appearance is recorded by the learned court after specifying the date of filing the written statement the stipulated period to file written statement cannot be calculated. In the case of ***Sri Nath Agarwal (supra)*** it is observed that 'It is not meant as a measure of punishment if he fails to appear but then it is the duty of the court to see that the party is aware of the date fixed in the suit. In the light of the above observation the negligence on the part of the petitioner though found is well established but in view of the mandatory provision being violated the role played by the court also cannot be appreciated as the Court never recorded his appearance and fixed a date to file W.S. Hence such order is liable to be set aside so far this petitioner is concerned.

17. In view of the above discussion, the revisional application stands allowed subject to payment of cost of Rs. 25000/- to be paid to the plaintiff in the account number to be furnished by the plaintiff within a week from the date of the uploading of this order in the website before the Learned Trial Court.

18. The petitioner is further directed to file the written statement within a period of fortnight from this date before the learned trial court and the learned court will accept the same provided the costs is paid within time as stipulated by this court . In default of the above condition the Court is given liberty to proceed with the suit as ex-parte.

19. Urgent certified copy if applied by any of the parties to be supplied subject to observance of all formalities.

(CHAITALI CHATTERJEE DAS, J.)