

WA 291/2009

14BEFORE

HON'BLE THE CHIEF JUSTICE MR J CHELAMESWAR

HON'BLE MR JUSTICE HRISHIKESH ROY

Heard Mr R Sarma, learned counsel for the appellant. Also heard Mr AM Mazumdar, learned senior counsel appearing for the respondent.

The appellant is aggrieved by a judgment of a learned Single Judge dated 27-8-09 in WP(C) No.2276/2009. The appellant was the 4th respondent in the WRIT PETITION. The case of the appellant is that he was served with the rule nisi on 2-9-09 and on the very next day on 3-9-09 he entered appearance in the said writ petition through a counsel and on a subsequent enquiry the appellant came to know that the writ petition itself had been disposed of on 27-8-09.

The learned Judge while disposing of the writ petition took note of the fact that while the notice to the appellant (4th respondent in the writ petition) was dispatched on 22-6-09 the acknowledgement card had not been received back by the Registry. The learned Judge, therefore, drew a presumption that the notice on the appellant was duly served as contemplated under Order 5 Rule 9 of the CPC.

We have verified with the Registry to cross check the correctness of the assertion made by the appellant that he received the rule nisi only on 2-9-09, a fact which could have been easily established from the A/D card. But unfortunately even on today the A/D card has not been received by the Registry. This fact appears from a note of the Registry dated 24-9-09.

In the circumstances, since the presumption under the above mentioned provision is only a rebuttable presumption, we see no reason to reject the averments made by the appellant that he had received the rule nisi on 2-9-09. We, therefore, are of the opinion that the appellant was denied of an opportunity to defend his case before the learned Single Judge.

The judgment under appeal is set aside. The matter is remitted back to the learned Single Judge for disposal after hearing all the parties. The appellant shall file his affidavit, if any, in the writ petition by 18-10-09 and the writ petition itself shall be listed for hearing before the appropriate Bench on 20-10-09. The appeal stands disposed of.