

Dilip Shashikant Kothari ... Plaintiff
versus
M/s. Turakhia Associates and Anr. ... Defendants

Mr. Shilpan Gaonkar with Mr. Nikhil Patil, for Plaintiff.
Mr. J. D'Silva, for Defendant No.2 and for Applicant in support.
None for Applicant in NMS No.1027 of 2012.

CORAM: S.J. KATHAWALLA, J.

DATE: 19th OCTOBER, 2015

P.C.:

1. The above Notice of Motion is taken out by Defendant No.2 inter alia seeking the following reliefs :

“(a) that the delay of 1189 days in taking out the above Notice of Motion be condoned;

(b) that the ex-parte decree dated 27th November, 2007 be recalled and set aside and the above Suit be restored to file in its original position for hearing in accordance with law by allowing the Defendant No.2 to defend the suit by filing Written Statement”;

2. It was earlier submitted on behalf of the Plaintiff before a learned Single Judge of this Court that since the claim in the Suit is below Rupees One Crore, the same is required to be transferred to the City Civil Court, Mumbai.

3. A similar argument was advanced before the Division Bench of this Court in the case of *Bharat Babulal Makwana and Ors., V/s. Narortam V. Sheth and Anr.*¹ In that case, the Suit was dismissed for default vide order dated 02-07-2003. A Notice of Motion was taken out by the Plaintiffs seeking restoration of the Suit, which was allowed by a learned Single Judge of this Court. The said order allowing the restoration of Suit was challenged by the original Defendant by way of an Appeal before the Division Bench of this Court. Before the Appeal Court, it was contended that a Notice was published by the Prothonotary and Senior Master on 14th September, 2012, informing the Advocates and parties appearing in person that by virtue of Sections 4 and 6 of the Bombay City Civil Court (Amendment) Act, 2012, read with Government Notification No.CCS. 2911.CR58.D.19 dated 28th August, 2012, certain suits not exceeding Rupees One Crore in value shall be transferred to the Bombay City Civil Court with effect from 1st October, 2012, and therefore the Notice of Motion filed before this Court was not maintainable and the same ought to have been filed before the City Civil Court. The contention raised by the Appellants / Defendants was rejected by the Division Bench of this Court in the Appeal filed by them by observing that the Suit itself was dismissed for default vide order dated 02-07-2003 and therefore, there was no question of notifying the Suit and consequently, transferring the same, in as much as, there was nothing pending on the file of this

¹ (2014) 6 Bom CR 426

Court as on 1st October, 2012. Thus, unless and until, the suit was restored to file, there was no question of notifying and transferring the same to the City Civil Court.

4. Admittedly, the above Suit is decreed on 27th November, 2007. The Suit being disposed of by an ex-parte decree dated 27th November, 2007, the question of transferring the same to the City Civil Court, Mumbai on 1st October, 2012 or thereafter, would not arise unless the ex-parte decree is set aside and the suit is restored to file.

5. In the Affidavit in support of the Notice of Motion, the Defendant No.2 has stated that he was not served with the Writ of Summons in the Suit and he came to know that the ex-parte decree was passed against him in the above Suit only when a Chamber Summons was taken out by the Plaintiff in execution and served on him on 02-03-2012.

6. The Plaintiff has filed his Affidavit-in-Reply dated 25-10-2012, wherein he has pointed out that an ad-interim Application was made in the above Suit before this Court on 10-07-1986 when the Defendant No.2 was represented by an Advocate, who had waived service. It is also pointed out that the said Notice of Motion was allowed in terms of prayer clause (c) by an order passed by this Court dated 17-10-1986, when the Defendant No.2 chose to remain absent. It is also submitted on behalf of the Plaintiff that the Clerk of the Plaintiff's Advocate has filed an Affidavit proving service of the Writ of Summons upon Defendant No.2, dated 09-02-2007, wherein he

has pointed out that the Writ of Summons was transmitted through RPAD to Defendant No.2 on 21-08-1986 by the Office of the Sheriff of Mumbai. However, neither the packet nor the acknowledged RPAD card was received by the Office of the Sheriff of Mumbai. Pursuant to a complaint, Department of Post addressed a letter to the Sheriff of Mumbai stating that the packet transmitted through RPAD bearing Receipt No.H-1144 addressed to the Defendant No.2 was delivered to the addressee on 22-08-1986. A copy of the attested copy of the addressee's receipt was also forwarded to the Office of the Sheriff of Mumbai. It is therefore submitted that the above Notice of Motion deserves to be dismissed.

7. The Defendant No.2 has also filed his Affidavit-in-Rejoinder dated 13-01-2013, interalia reiterating that the Writ of Summons was not served on the Defendant No.2 and that the Notice of Motion be allowed.

8. I have considered the submissions advanced by the learned Advocates for the parties. From the ad-interim order dated 10-07-1986, it is clear that the Advocate for Defendant No.2 has waived service of the Notice of Motion and not the Suit. The Plaintiff is therefore, bound to serve the Writ of Summons on the Defendant No.2 as provided under the Code of Civil Procedure, 1908. Admittedly, the Office of the Sheriff of Mumbai, has not received back the packet containing the Writ of Summons purportedly forwarded to Defendant No.2 and/or any acknowledgment from Defendant No.2. Though, the postal authorities have alleged that the article was

delivered upon Defendant No.2 on 22-08-1986 and the attested copy of the addressee's receipt is forwarded to the Sheriff of Mumbai, the said receipt does not bear the signature of Defendant No.2 and/or his agents or representative/s. Instead the postal authorities have only mentioned "sd/-" above the printed words "signature of addressee". Therefore, in my view, the Plaintiff has failed to establish that the Writ of Summons in the Suit was served on the Defendant No.2. In view thereof, the ex-parte decree against Defendant No.2 dated 27th November, 2007 is set aside and the Suit is restored to file against Defendant No.2. Since the claim in the Suit is below Rupees One Crore, office to forthwith forward the papers and proceedings to the City Civil Court, Mumbai, to enable the Court to proceed with the Suit against the Defendant No.2. The Notice of Motion is accordingly disposed of.

(S.J.KATHAWALLA, J.)