

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.67 OF 2015

IN

SUIT NO.883 OF 2013

M/s. Unique Integrated Transport &
Management Consultancies P. Ltd.

...

Plaintiff

Vs.

G M Limaye & Ors.

...

Defendants

Dr. Kishan K Khanna, Adv. for plaintiff / applicant.

Mr. Kirti Munshi, Adv. i/b. Mr. Sameer K Sawant, Adv. for
defendants.

CORAM : MRS. ROSHAN DALVI, J.

DATE : 9th April, 2015.

P.C. :

1. This Notice of Motion is taken out for an order against the defendant Nos.1 and 2 to furnish security for their appearance. The plaintiff sued on 7th October, 2014. The plaintiff claims that the defendants could not be served for two months and that service of the writ of summons was effected on 29th January, 2014 by personal service through bailiff. The defendant would claim that the writ of summons was served on 6th February, 2014. The plaintiff has produced the writ of summons with the endorsement of the bailiff.

2. The plaintiff would further claim that the written statement was not filed by the defendants. The notings of the suit would show that on 18th March, 2014 the defendants were absent when the plaintiff's advocate represented the plaintiff and the directions for filing the written statement was passed on 4th July, 2014 failing which the suit would be listed as undefended suit. In the meantime the plaintiff took out a Notice of Motion and applied for urgent relief which was then not granted.

3. On 4th July, 2014 the Prothonotary and Senior Master of this Court recorded that the defendant Nos.1 to 3 were directed to file written statement but have not filed so and hence transferred the suit against them to the list of undefended suits.

4. On the very next day defendants took out two chamber orders for setting aside that order and for allowing them to file the written statement.

5. This came to be allowed by the Prothonotary and Senior Master on 23rd July, 2014 when the parties were represented and the plaintiff's advocate stated that he had no objection for setting aside the order dated 4th July, 2014 transferring the suit to the list of undefended suits subject to payment of adequate costs. Cost was, therefore, granted to plaintiff in sum of Rs.5,000/- which has been paid.

6. It is argued on behalf of the plaintiff that as per Order 8 Rule 1 of the CPC the Supreme Court had mandated further time to file written statement to be given only upon recording reasons in writing if the written statement is not filed within a period of 30 days of the service of the summons. However, in this case the plaintiff accepted that the written statement could be filed by the defendants if cost was paid which was granted and paid.

7. It is also argued on behalf of the plaintiff that the Prothonotary and Senior Master should not have granted additional time because the plaintiff's Notice of Motion was pending and served upon the defendants.

8. If that was so, the plaintiff should not have consented to setting aside the order dated 4th July, 2014 upon the payment of adequate cost. That having been done these arguments cannot be made.

9. Having so done, the plaintiff would contend that the act of the plaintiff in not being able to serve the writ of summons for two months and later of the defendant not filing the written statement in time but obtaining further time from the Prothonotary and Senior Master would show that the defendant would defeat and delay the plaintiff's claim and are, therefore, liable to furnish security for their appearance.

10. The security for appearance of the defendant could be called upon in the circumstances prevailing in Order 38 Rule 1 of the CPC. Under that provision if the defendant with intent to delay the plaintiff's claim or avoid the process of the Court obstructed or delayed the execution of any decree that may be passed against him and for that purpose absconded or left the jurisdiction of the Court or removed his property from the jurisdiction of the Court so as to obstruct or delay the execution of the decree that may be passed against the defendant in the suit, the Court may grant security of his appearance.

11. The service of the writ of summons does not show that the defendant obstructed or delayed such service. The bailiff's endorsement of personal service upon the writ of summons shows the service sought to be effected for the first time when the defendant was pointed out by the representative of the plaintiff to the bailiff and was

served and acknowledged service. Hence that does not show that the defendant did anything to delay the plaintiff's claim or avoid any process of the Court to be served upon.

12. The non filing of the written statement was for a period of months before the suit was transferred to the suits of undefended clauses and soon thereafter was allowed to be filed and has been filed. Even such delay in filing the written statement would not impute any intent upon the defendant to defeat the plaintiff's case.

13 The consent of the plaintiff to filing of the written statement by the defendant upon payment of adequate cost would nullify whatever effect the delay of the writ of summons caused.

14. The affidavit in support of the plaintiff's Notice of Motion would show that the defendant "unconsciously admitted" whilst stating that due to the business trip there was delay in filing written statement. This also would not show that the defendant would make himself scarce upon the business trip.

15. Consequently this is not a case where security for appearance of the defendant is required to be taken.

16. Consequently the Notice of Motion is misconceived and it is dismissed with costs of Rs.5,000/-.

(ROSHAN DALVI, J.)