

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

NOTICE OF MOTION NO.3153 OF 2010
IN
SUIT NO.3270 OF 2008

Shri S B Kambli & Anr.	...	Plaintiffs
Vs.		
Shri Ismail Khan	...	Defendant

Mr. Leo Ronald Castelino, Adv. for plaintiffs.

CORAM : MRS. ROSHAN DALVI, J.
DATE : 7th September, 2015.

P.C. :

1. This Notice of Motion is taken out for restoration of the suit to file. The Notice of Motion does not show whether the suit has been dismissed and on which date it was restored.

2. The suit has been filed in 2008. The writ of summons in the suit was issued on 18th December, 2008. The writ of summons has not been served.

3. Affidavit in support of the Notice of Motion shows that the writ of summons bearing No.3270 / 2008 was transmitted through office of the Sheriff of Bombay on 26th December, 2008 for serving the defendant and was returned with the remark 'left'. The advocate of the plaintiff cannot show this fact. Only a copy of the summons to answer plaint and a copy of the letter of the plaintiffs earlier advocate dated 24th December, 2008 addressed to the Sheriff of Bombay is shown. This does not show that the writ of summons was transmitted

by post on 26th December, 2008 or was returned with the remark 'left'. It is not understood how the plaintiff can make such a statement without the document to show the actual transmission by post viz. the postal slip and the return of the document with the remark 'left' without showing the actual parcel so returned.

4. It is the plaintiffs' case that one of the plaintiffs was ill and thereafter went to his village and did not prosecute the suit. The plaintiffs' advocate applied for withdrawal of the suit and it was allowed to be withdrawn before the Prothonotary and Senior Master of this Court. The plaintiff No.1 himself wrote a letter to his advocate on 28th January, 2010 requesting him to withdraw the suit. The plaintiffs' advocate produced it before the Prothonotary and Senior Master showing the intention of the plaintiffs to withdraw the suit and for placing it on board for withdrawal and for refund of court fee. Thereafter the suit was allowed to be withdrawn for want of prosecution on 7th May, 2010 by the then Prothonotary and Senior Master.

5. Counsel on behalf of the plaintiffs argued that the suit could not have been allowed to be withdrawn by the Prothonotary and Senior Master upon the application made in that behalf by the advocate of the plaintiffs. That application was made upon the specific written direction of the plaintiffs. Counsel on behalf of the plaintiffs drew the Court's attention to three rules of the High Court Original Side.

Rule 87 relates to the dismissal of the suit if summons is not served within six months.

(This suit could have been otherwise dismissed under this rule)

Rule 163 relates to the dismissal or unconditional withdrawal of the suit if it is settled between the parties upon an application made by a party to the suit with the consent of the other parties.

(The Prothonotary and Senior Master may allow a party to withdraw by himself also since there is no bar for such withdrawal. While the power of allowing withdrawal in the above circumstances is expressly granted, the power of withdrawal upon application, being under similar unilateral circumstances, may be implied and is, in fact, often exercised.)

Rule 986 relates to rejection of the plaint for non-removal of office objections.

(This rule do not apply in this case)

6. It may be mentioned that the writ of summons, not having been served, even if the suit is pending, it would not be allowed to be served at such a distance of time when the defendant would not be expected to have kept any record of the defence in the suit as the suit would be barred by the law of limitation if filed now.

7. Upon the plaintiffs' written instructions and upon the application of the advocate of the plaintiffs the suit was allowed to be withdrawn for want of prosecution. The plaintiff actually did not prosecute the suit for whatever reasons which are stated in affidavit in support of the application. Hence the suit can be withdrawn. It would be allowed to be withdrawn either by the Court or by the Prothonotary and Senior Master. There is no bar upon the

Prothonotary and Senior Master for allowing withdrawal of the suit for want of prosecution upon an application by the plaintiffs advocate which is upon the written instructions of the plaintiff. There is no case made for restoring the suit allowed to be withdrawn five years ago.

8. Nevertheless this application was taken out for such restoration by the same advocate about 9 months after the suit was withdrawn. The delay of 119 days is sought to be condoned.

9. Once the Notice of Motion is taken out it is required to be served. The service of the Notice of Motion is not shown. The Notice of Motion was sought to be served by registered post on 13th January, 2010. Notice of Motion is returned by postal authorities with the remark 'left'. Thereafter service by affixation was not made. The Notice of Motion came to be dismissed for want of prosecution on 3rd April, 2012. It has been restored on 23rd September, 2014. Thereafter there has been no attempt of service of this Notice of Motion.

10. A praecipe dated 8th July, 2015 shows that an attempt of service is made when the defendant was shown to have left the premises. That is two months prior to today. Despite praecipe the plaintiff did not serve Notice of Motion. An order came to be passed in the above Notice of Motion on 15th July, 2015 under which the plaintiff was directed to serve the Notice of Motion initially personally, and if not served after three attempts, by affixation. The Notice of Motion is sought to be served upon defendant by registered post on 19th August, 2015. The endorsement on the Notice of Motion

shows that the defendant has left.

11. The Court has seen a strange procedure. The plaintiff has sought to serve the Notice of Motion by publication without any order of the Court and even prior to the aforesaid service by post made on 19th August, 2015 and affidavit of service dated 7th August, 2015 is filed showing service by publication. No such affidavit can be countenanced or accepted. The Notice of Motion is yet not served. The attempted service made on 19th August, 2015 has resulted in the fact being sent back with the endorsement 'left'.

12. Even if the defendant is stated to have been left premises. The plaintiff was directed to serve by affixation. The service is not made. The Notice of Motion is yet not served.

13. No order in the Notice of Motion can be passed even on merits. An order of withdrawal of the suit passed upon the application of the plaintiffs' advocate made upon the written instructions of the plaintiff either by the Court or by the Prothonotary & Senior Master cannot be set aside. Hence the Notice of Motion is dismissed on merits. The suit remains withdrawn.

14. The two packets sent by the plaintiffs advocate to the defendant which are returned with the remark 'left' sent on 13th January, 2010 and 19th August, 2015 showing incomplete service are taken on record. A copy of summons to answer plaint along with a copy of the praecipe which dose not show that the summons was also served is also taken on record.

15. The suit remains withdrawn.
- 16 Notice of Motion as also suit are disposed of accordingly.
17. Record & Proceedings shall be sent back to the record department.

(ROSHAN DALVI, J.)

C E R T I F I C A T E

Certified to be true and correct copy of the original signed order.