

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.536 OF 2016

Javed Ahmed Mohd. Tauheed Shaikh
Age 53 years, Occ. Business
residing at Flat No.1601-1602,
Zainab Tower, 16th Floor,
253-255 Maulana Azad Road,
Mumbai 400 008.

... Appellant.

-vs-

Atharali Muzafarali Khan
Age – 51 years, Occ. Business
residing at Flat no.802,
Dudhwala Complex, F wing,
Belasis road, Mumbai 400 008

... Respondent.

Ms Seema Sairnaik, Advocate with Shri Ameya Tamhane, Advocate for
appellant.

Shri V. R. Tripathi, Advocate of respondent.

CORAM : A. S CHANDURKAR, J.
ARGUMENTS HEARD ON : 26th NOVEMBER, 2018
JUDGMENT PRONOUNCED ON : 6th DECEMBER, 2018

ORAL JUDGMENT :

1. The original defendant in the Summary Suit filed by the respondent herein has filed this appeal challenging the order dated 07/04/2016 whereby the prayer made by him for setting aside the ex-parte decree dated 25/02/2015 in the Summary Suit filed by the respondent has been rejected.

2. The facts in brief are that the respondent filed Summary Suit for recovery of Rs.24,50,000/- with interest against the appellant. In that suit the appellant was served with the writ of summons on 19/06/2014 and the respondent filed his affidavit of service on record. As the appellant failed to enter appearance the suit proceeded ex-parte. By judgment dated 25/02/2015 the said suit was decreed. The respondent initiated execution proceedings. The appellant herein on 10/09/2015 filed a notice of motion with a prayer that the ex-parte decree passed in the Summary Suit be set aside. In the said application it was pleaded that only after being served with the warrant of attachment in the execution proceedings on 20/08/2015, the appellant got knowledge about said ex-parte decree. After going through the relevant record that was available with the appellant it was found that he was not served with the summons in the Summary Suit. He also pleaded as regards the events that occurred from 13/11/2014 till 20/08/2015. On these counts it was prayed that the ex-parte decree be set aside. This prayer was opposed by the respondent herein and by the impugned order the trial Court held that the grounds sought to be raised by the appellant for having the ex-parte decree set aside were not sufficient. The said notice of motion was accordingly dismissed. Being aggrieved the said order has been challenged in this appeal.

3. Shri Ameya Tamhane, learned counsel for the appellant

submitted that service of summons in the Summary Suit on the present appellant was not in accordance with the prescribed procedure. The original writ of summons that required to be filed on record was not so filed. He referred to the report submitted by the bailiff indicating service of the summons on the son of the defendant and pointed out overwriting in the said report to urge that the same was not free from doubt. The bailiff in question had not been examined and in view of the provisions of Rule 63 of the Bombay City Civil Court Rules, 1948 (for short, the said Rules) it could not be said that the service of summons on the appellant had been duly proved. It was then submitted that the appellant had assigned sufficient reasons for his unavailability from 13/11/2014 till 20/08/2015 as he had gone out of station. Considering the ex-parte nature of decree, the same was liable to be set aside as the writ of summons was not proved to have been duly served on the appellant. Hence it was submitted that the trial Court ought to have condoned the delay and ought to have set aside the ex-parte decree.

4. Shri V. R. Tripathi, learned counsel for the respondent supported the impugned order. According to him in the notice of motion moved by the appellant there was no statement made asserting that the appellant or his son were not duly served with the suit summons. The report of the Bailiff indicated the summons being served and accepted by the son of the

appellant. However, no affidavit of the son of the appellant was placed on record to deny such service. The learned counsel referred to the affidavit filed by the appellant in support of the notice of motion and submitted that according to the appellant he got knowledge about the said decree after going through records available with him. In absence of sufficient and cogent explanation being furnished by the appellant, the trial Court was justified in refusing to condone the delay and in dismissing the notice of motion. It was thus submitted that the impugned order did not call for any interference.

5. I have heard the learned counsel for the parties at length and I have also perused the documents placed on record. It can be seen from the record that after filing of the summary suit by the respondent, summons was issued to the present appellant. The report of the Bailiff as countersigned by the Deputy Sheriff indicates that the writ of summons was served at 2.40 pm on 19/06/2014 on the son of the appellant who was named therein. The address where the service was effected has also been mentioned therein. The report also indicates that the appellant's son was identified by the respondent herein. The respondent then filed his affidavit dated 13/08/2014 to substantiate the fact that writ of summons was duly served on the appellant. In his affidavit he has stated that the original writ of summons was misplaced by him and he could not trace out the same. This

affidavit of service was accepted by the trial Court which thereafter set the appellant ex-parte and proceeded to decide the suit.

6. Perusal of the report of the Bailiff indicates the name of appellant's son as well as the address where the said writ of summons was served. In the affidavit filed by the appellant in support of his notice of motion on 10/09/2015 there is no assertion that the person upon whom the writ of summons was served was not his son or that at the relevant time he was not available for accepting the writ. Further the address mentioned where the service was effected is identical to the address mentioned in the cause title of the present appeal. It is also not the case of the appellant that the address mentioned in the said report of the Bailiff was either incorrect or that it was not his address.

It was necessary for the appellant to have countered these two relevant aspects that have been mentioned in the Bailiff's report. However, conspicuously the appellant has not chosen to counter these two relevant aspects. It is thus clear that the appellant had no grievance with the statements in the Bailiff's Report that the summons was served upon his son at the address mentioned therein.

7. It is found that as the appellant did not dispute the averments made in the affidavit filed by the original plaintiff in the suit while seeking

setting aside of the ex-parte decree, the contention as urged by relying upon Rule 63 of the said Rules loses its significance. Under Rule 63 of the said Rules, the manner in which proof of service of summons has to be given has been laid down. In that regard the affidavit of the plaintiff who had accompanied the Bailiff for serving the writ of summons is on record and that affidavit is dated 13/08/2014. When that affidavit along with the service report are read together, it is seen both the documents corroborate the statements made therein. It is thus found that there was sufficient compliance of Rule 63 of the said Rules in the light of the affidavit of the plaintiff who had accompanied the Bailiff for effecting service on the appellant.

Similarly the reasons as mentioned by the appellant for the delay in moving the application for setting aside the ex-parte decree have not been found sufficient by the trial Court and rightly so. In paragraph 3 of the affidavit sworn by the appellant in support of the notice of motion, it has been stated that after going through the relevant record available with him it was found that the same was not served on the appellant. The manner in which he got knowledge about the same has not been specifically disclosed.

8. It is thus found that the trial Court after considering all the relevant aspects has found that there was no sufficient cause made out by the appellant for his failure to appear before the trial Court despite service of

the summons. In absence of any other statement being made by the appellant on oath so as to counter the assertions made in the affidavit filed by the plaintiff, no fault can be found with the order of the trial Court dismissing the said notice of motion.

9. In view of aforesaid, I find no reason to interfere with the impugned order. The Appeal From Order stands dismissed with no order as to costs.

JUDGE