

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5161 OF 2018**

Pavan Kumar Nath	...Petitioner
Versus	
The State of Maharashtra & Anr.	...Respondents

Mr. Abhinav Chandrachud a/w Mr. A. A. Siddiquie i/b A. A. Siddiquie & Associates for the Petitioner

Ms. Vaishali Nimbalkar, A.G.P for the Respondent No.1-State

Mr. Mayur Khandeparkar a/w Mr. M. A. Shah and Mr. Hemang Jariwala i/b Auroma Law for the Respondent No. 2

CORAM : REVATI MOHITE DERE, J.
MONDAY, 16th DECEMBER 2019

P.C. :

1 Heard learned counsel for the parties.

2 By this petition, the petitioner has impugned the order dated 3rd April 2018 passed by the learned Judge, City Civil Court, Greater Mumbai, by which, the learned Judge was pleased to dismiss the petitioner's Notice of Motion No. 917/2016, which was filed for setting aside the ex-parte judgment and order dated 21st December 2015 passed in Summary Suit No. 3189/2012.

3 Learned counsel for the petitioner submits that the writ of summons was not served on the petitioner/original defendant, as contemplated by Order XXXVII Rule 3 of the Code of Civil Procedure ('CPC'). He submits that there is also non-compliance of Rule 76 of the Original Side Rules as well as Rule 51 and Form 5 of City Civil Court Rules. He submits that as there was no service of writ of summons, the procedural right of the petitioner to appear and contest the summary suit was taken away. Learned counsel relied on the affidavits filed by the Bailiff and the endorsement made on the said report with respect to service of summons as well as the affidavit filed by the registered clerk of M/s. Kulkarni and Associates. He submits in the affidavit of service filed by Manoj Gamre, registered clerk of M/s.Kulkarni and Associates, although it is mentioned that he had sent the writ of summons to the petitioner/defendant by speed post and has annexed the copy of the track report to the said affidavit, the forwarding letter of M/s.Kulkarni and Associates dated 27th April 2012 only mentions enclosing of notice of motion and plaint in the summary suit.

4 Learned counsel for the respondent No.2 opposes the petition. He submits that no interference is warranted in the impugned orders. He

submits that the allegation of the petitioner that writ of summons was not served upon him, as a result of which, he could not appear before the Court to defend the case, is false, baseless and contrary to the facts on record. He submits that it is not a case where the petitioner has never appeared in the matter or had no knowledge of the proceedings/suit being initiated against him for recovery of money. On the contrary, he submits that a bare perusal of the Roznama would demonstrate that the petitioner has filed several Notices of Motion in the said suit which were admittedly dismissed by the Court and as such, the petitioner now cannot say that he was not aware of the suit filed against him for recovery of money and that the same needs to be defended. Learned counsel for the respondent No. 2 relied on the affidavit of service of the registered clerk of M/s.Kulkarni and Associates as well as the Bailiff's affidavit, which demonstrates that writ of summons was served upon the petitioner. He submits that the affidavit in proof of service along with the documents filed by the Bailiff clearly demonstrates the service of writ of summons being completed upon the petitioner. He submits that infact, the acknowledgment annexed to the service affidavit bears the seal and signature of an employee working with the petitioner and as such there is no merit in the submission of the petitioner that he was not served with the writ of summons. He submits that the petitioner has made every possible attempt to delay and prolong the matter and as such defeat

the object of expeditious disposal of the summary suit. He submits that the petitioner has failed to give any bonafide, just and reasonable explanation for not appearing and defending the summary suit for about four years despite having been duly served, despite being well aware of the pendency of the said suit against him. He submits that the Notice of Motion filed by the petitioner for setting aside the ex-parte order and judgment is nothing but to further create hurdles and delay the execution proceedings filed by the respondent No.2 for execution of the decree against the petitioner.

5 Perused the papers. The respondent/original plaintiff had filed a summary suit under Order XXXVII of CPC in this Court being Summary Suit No. 1012/2012. The said summary suit was for recovery of an amount of Rs. 83,60,935/- with interest. Subsequently, by virtue of enhancement of pecuniary jurisdiction, this Court transferred the said summary suit to the City Civil Court, Mumbai in 2012. Writ of Summons was issued to the petitioner/original defendant on 26th April 2012. On 6th July 2012, Manoj Gamre, a registered clerk of M/s.Kulkarni and Associates (advocates for the respondent/original plaintiff) filed an affidavit of service stating as under :

“1) I say that M/s Kulkarni & Associates, Advocate for Plaintiff, made request to serve the Writ of Summons of aforesaid suit to the Defendant at the address mentioned in the Writ of Summons. Accordingly, I have sent the Writ of

*Summons of aforesaid suit to the Defendant by Speed Post on 27/04/2013. Hereto annexed and marked as **Exhibit 'A'** and **Exhibit 'B'** are the copies of the letter dated 27/04/212 (sic 27/04/2012) and **Exhibit 'C'** is the copy of the Postal Receipt dated 27/04/212 (sic 27/04/2012).*

*2) I say the I have sent the Writ of Summons to the Defendant by Speed Post and envelope containing the Writ of Summons sent to the Defendant was delivered on 02/05/2012 at appropriate address. **Hereto annexed and marked as Exhibit 'D'** is a copy of Track Report No. EMI95783541N and Track Report No.EM195783555 in respectively."*

6 Although the affidavit of service mentions service of writ of summons, the letter annexed to the affidavit of service mentions only copies of the notice of motion and plaint in summary suit and there is no reference to the writ of summons. The tracking report was annexed to the said affidavit. The affidavit of service by Kisan Naik, Clerk and Bailiff, Sheriff of Mumbai, reads as under :

"1) I say that M/s Kulkarni & Associates, Advocate for Plaintiff, has made a request to issue the Writ of Summons of aforesaid suit to the Defendant at the address mentioned in the Writ of Summons. Accordingly, I have sent the Writ of Summons of the aforesaid suit to the Defendant at the address mentioned in the Writ of Summons. Accordingly, this office sent the Writ of Summons of aforesaid suit to the Defendant by Registered Post A.D. on 26/04/2012.

2) I say that this office sent the Writ of Summons to the Defendant by India Post. The Envelope containing the Writ of Summons sent to the Defendant was delivered on

*17/05/2012 at appropriate address. **Hereto annexed and marked as Exhibit 'A'** is a copy of R.P.A.D No. H882 i.e. Original Acknowledgment Card.”*

7 On page 59, is the acknowledgment received by the Bailiff, on which there is a seal of the petitioner's company. The petitioner accepts the seal on the said acknowledgment, however, disputes the signature on the said acknowledgment. The service report annexed has a remark “defendant not served”. Much capital is made by the learned counsel for the petitioner that writ of summons was not served on the petitioner. However, it is pertinent to note that in the affidavit in support of the Notice of Motion No 917/2016 filed by the petitioner shows that the petitioner has accepted the seal appearing on the acknowledgment card, being of his office, however, disputes the signature on the said A.D. Card, as not being of any of its employee. Dishonesty and malafides of the petitioner are writ large and are evident from his participation in several proceedings/notices of motion filed by him, showing knowledge of the pendency of the summary suit against him. It is pertinent to note that when the matter was transferred to the City Civil Court, the petitioner filed a criminal application being Criminal Application No. 569/2012 in this Court, challenging the order of issue process under Section 138 of the Negotiable Instruments Act. The order dated 29th August 2012, by which the application was dismissed, clearly

reveals that the petitioner was aware of a suit being filed as against him under Order XXXVII CPC. Similarly, the petitioner had filed a Notice of Motion being Notice of Motion No. 673/2013 for revocation of leave under Clause XII of the Letters Patent, which was dismissed by the City Civil Court, Mumbai. The said order dated 30th July 2013 passed by the City Civil Court, Mumbai records that the petitioner had failed to prefer notice of motion seeking condonation of delay in entering appearance. Even the Notice of Motion No. 3723/2013 preferred by the petitioner for setting aside the order dated 30th July 2013 in Notice of Motion No. 673/2013 was dismissed vide order dated 24th December 2013. While dismissing the said Notice of Motion No. 3723/2013, the learned Judge observed that inspite of writ of summons duly served, the petitioner failed to appear within ten days or apply under Order XXXVII Rule 3 sub-rule (7) of CPC and hence, the suit to proceed ex-parte. Despite the said orders, the petitioner preferred another notice of motion being Notice of Motion No. 459/2014 for setting aside affidavit of service and for initiating perjury action. The said notice of motion was also dismissed by the City Civil Court, Mumbai, vide order dated 11th August 2015. The Court has observed that the petitioner had admitted receipt of plaint by speed post. Thereafter, as the petitioner failed to appear in the summary suit, the said summary suit was decreed ex-parte on 21st December 2015 in favour of the respondent No.2. Pursuant thereto,

the respondent No.2 preferred Execution Application No. 5/2016 for executing the decree dated 21st December 2015 before the learned Civil Judge, Senior Division at Nainital, Uttarakhand. On 29th September 2017, the petitioner withdrew the Civil Writ Petition No. 4224/2016 preferred by the petitioner challenging the order dated 11th August 2015 dismissing his Notice of Motion No. 459/2014. On 29th September 2017, the petitioner filed Notice of Motion No. 917/2016 for setting aside the decree. The said notice of motion was dismissed by the learned Judge, City Civil Court, Greater Mumbai vide order dated 3rd April 2018. Hence, this petition.

8 It is pertinent to note that during the pendency of this petition, this Court dismissed the petitioner's Civil Writ Petition No. 3481/2016 challenging the order dated 24th December 2013, dismissing Notice of Motion No. 3723/2013. A perusal of the facts in the present case clearly reveal that the petitioner had appeared before the learned City Civil Court, Greater Mumbai, and had filed several notices of motion before the learned Judge. This clearly shows that the petitioner was aware of the summary suit filed against him right from the inception i.e. from 2013 till 2015, when the summary suit was decreed. In the order dated 30th July 2013 passed by the learned Judge, City Civil Court, Greater Mumbai, the learned Judge had clearly observed that the petitioner had not entered his appearance within

ten days from the date of receipt of writ of summons as provided under Order XXXVII Rule 3 of CPC nor had filed any vakalatnama or appearance memo in the notice of motion. The conduct of the petitioner is well recorded in the said order. At no point of time from 2013 till 2015, the petitioner had made any grievance that the writ of summons was not served upon him. Infact, the petitioner had appeared and participated in the summary suit, by filing several notices of motion, as set out in the aforesaid paragraphs. The conduct of the petitioner throughout appears to be malafide, with an intent to delay and prolong the matter and as such defeat the object of expeditious disposal of the summary suit. It is not a case where the petitioner was not aware of the proceedings and an ex-parte decree is passed against him.

9 Considering the aforesaid, no ground is made out for interference in the impugned order. The impugned order cannot be said to be either illegal or perverse. Accordingly, the petition is dismissed.

REVATI MOHITE DERE, J.