

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.3706 OF 2021

Gajanan s/o Bhikaji Bhatarkar

Vs.

Anil S/o Balmukund Bharuka

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. A. M. Tirukh, Advocate for petitioner.

CORAM : AVINASH G. GHAROTE, J.

DATE : 27/09/2021

Heard Mr. Tirukh, learned Counsel for the petitioner.

2. The petition challenges two orders passed by the learned Trial Court, firstly the order below Exh.26, whereby a bailiff report placed on record which was marked as Exh.24 during the course of cross-examination of the original defendant (applicant in M.J.C. for setting aside an ex-parte decree) was sought to be de-exhibited, which application at Exh.26 has been rejected and secondly the order below Exh.27 praying for recasting or re-framing of the issue.

3. Mr. Tirukh, learned Counsel for the petitioner has been unable to point out any provision which permits the Court to de-exhibit a document, once exhibited. In this case, it is submitted that while exhibiting the document during the cross-examination of the original defendant, objection was raised, which was rejected, whereupon the document was exhibited. That

being the position, I do not see that there is any infirmity in the impugned order. The objection, that it is not a public document, has now been taken care of, by permitting the original defendant to summon the bailiff, who had given the said bailiff report. It is settled position of law that mere marking of a document does not dispense with the proof of the same and merely because a document may have been termed a public document that would not deter from the original nature of the document and perhaps considering this position, the original defendant has been permitted to summon the bailiff, who has written the said bailiff report.

4. Reliance place on the Judgment in the case of **Sushil Kumar Mandanlal Ganediwal Vs. Vijay Kumar Mandanlal Ganediwal, 2019 (3) Mh. L. J. 721** in support of the plea for de-exhibiting the document is clearly misplaced, as the Court has not held that a document once exhibited can be de-exhibited. It has held that the bailiff report is not a public document and required to be proved in a manner as envisaged by law. There cannot be any dispute in the proposition, which is the reason why the learned Trial Court has permitted issuance of summon to the bailiff, who has written the said bailiff report.

5. Insofar as the order below Exh.27 is concerned, learned Counsel submits that in an application for setting aside ex-parte decree filed by the original defendant, the burden to prove that there was valid service, ought to be upon the original plaintiff/non-applicant. Equally the burden to prove that there was no

service also ought to be upon the original plaintiff/non-applicant. The issue to frame or casting the burden upon the original defendant to prove non service of the summon according to the learned Counsel has been incorrectly framed, which requires either to be corrected or new issue is required to be framed.

6. In my considered opinion, when the original defendant filed an application under Order 9 Rule 13 of CPC for setting aside ex-parte order decree the burden to prove that there was no service of summon, which is alleged by the original defendant, would be upon the original defendant, who makes that allegation and not otherwise, in view of which the rejection of the application at Exh.27 cannot be faulted with.

7. The Writ Petition, therefore, is without any merits and accordingly dismissed. No costs.

JUDGE