

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

924 WRIT PETITION NO.14863 OF 2023

USHA BHASKARRAO MANVATKAR AND ANOTHER
VERSUS
MAESH BHASKARRAO ALIAS WAMAN MANVATKAR
AND ANOTHER

...
Advocate for Petitioners : Mr. Patil Milind M. (Beedkar)

...

CORAM : SHAILESH P. BRAHME, J.

DATE : 06th DECEMBER, 2023

PER COURT :

1. Heard learned counsel for the petitioners.
2. The petitioners have taken exception to the order dated 03.07.2023, below Exhibit 54 passed in RCS No. 26 of 2019. The petitioners are the original defendant nos. 1 and 2. The respondent no. 1 has filed RCS No. 26 of 2019 for declaration and possession against the petitioners as well as present respondent no. 2 / defendant no. 4.
3. Pertinently, one Mr. Mangesh alleged son of Bhaskarrao Manwatkar has been impleaded as defendant no. 3. A controversy involved in this petition pertains to the validity of the service of summons on the defendant no. 3.
4. As the defendant no. 3 is not a party to present petition, he is referred to as a defendant no. 3 by the original status. He resides in Australia.

5. The summons were issued by the Trial Court and all the parties except defendant no. 3 appeared before the Trial Court. The petitioners have reservations regarding the procedure followed in serving summons. On the basis of the documents Exhibit 45 to 47 which are placed on record by the petitioners, the Trial Court passed order on 04.02.2022, to proceed against defendant no. 3 ex-parte.

6. The petitioner no. 1 is the mother of petitioner no. 2 and the defendant no. 3 – Mangesh. The petitioners have appeared in the suit in response to the summons. The petitioners attempted to point out to the Trial Court by submitting pursis at Exhibit 48 that there was no proper service of summons. An objection was taken for the order passed on 04.02.2022. On 08.03.2022, an order was passed stating that necessary orders would be passed below Exhibit 1. However, no order was passed.

7. The petitioners again submitted application Exhibit 54 pointing out that there is no valid service of summons and no order below Exhibit 1 was ever passed. On 03.07.2023, an order was passed by the Trial Court stating that the defendant no. 3 should apply to set aside the order against him. The said order is under challenge.

8. Learned counsel for the petitioner submits that the procedure as contemplated by Order V Rule 26 and 26-A of CPC has not been followed. There is no valid service of summons on the defendant no. 3 who resides abroad. It is submitted that consequent order dated

04.02.2022, proceedings ex-parte against defendant no. 3 is also illegal. The defendant no. 3 and present petitioners have a joint interest. It is the duty of the petitioners to bring it to the notice of the Court regarding the validity of the service of summons.

9. Learned counsel for the petitioner has referred to Exhibit 44 to 46, to demonstrate that there is want of service of summons as contemplated by Order V Rule 26 and 26-A of CPC. There was no commissioner's report. He further submits that as the suit is to proceed ex-parte against defendant no. 3, prejudice would be caused to petitioners. Learned counsel has vehemently objected the order dated 08.03.2022 as well as impugned order dated 03.07.2023. It is pointed out that no orders are passed below Exhibit 1. He would submit that this is material irregularity of the procedure which is causing prejudice to the petitioners.

10. The defendant no. 3 resides abroad. For serving summons a procedure under Order V Rule 26 and 26 – A of CPC, is required to be followed. On the basis of Exhibit 44 to 46, learned Trial Judge held that there was due service of summons on defendant no. 3. Consequently on 04.03.2022, order was passed to proceed ex-parte against defendant no. 3. The petitioners are defendant nos. 1 and 2. Though, they are close blood relatives of defendant no. 3, the suit has been defended by them in their individual capacity. There is nothing on the record to show that the

petitioners / defendant nos. 1 and 2 are representing the interest of defendant no. 3.

11. It is impermissible for the petitioners to espouse the cause of the defendant no. 3. The petitioners have not placed any material on record to disclose that some steps are taken by them to intimate the defendant no. 3 regarding pendency of the suit or its status. It is not their case that despite efforts the defendant no. 3 is not responding. They could have informed the defendant no. 3 about the proceedings to safeguard joint interest.

12. Defendant no. 3 is the son of petitioner no. 1 and real brother of petitioner no. 2. There is nothing on the record that the relationship of the petitioners and defendant no. 3 are strained or the petitioners are unable to contact defendant no. 3. There is every reason to infer that defendant no. 3 has knowledge of the pendency of the proceeding and despite that he is not appearing in the matter.

13. If the defendant no. 3 appears before the Trial Court and points out illegality or irregularity in service of summons, the Trial Court can look into it in at appropriate stage.

14. Learned Judge should have passed order below Exhibit 1 in pursuance of the orders below Exhibit 48 or 54 but no prejudice can be said to be caused to the petitioners due to the lapses. I have held that petitioners cannot maintain application 48 or 54. I am not prepared to

interfere in the impugned orders or the proceedings. I do not find that there is any patent illegality or error of jurisdiction to exercise supervisory jurisdiction. Writ petition is disposed of.

[SHAILESH P. BRAHME, J.]