

(2011) 09 BOM CK 0142

In the Bombay High Court

Case No : Appeal No. 616 of 2011 with Notice of Motion No. 2813 of 2011 in
Notice of Motion No. 1819 of 2011 in Suit No. 4577 of 2000

Meena Ramesh Lulla and Others

APPELLANT

Vs

Shri Omprakash A. Alreja and Others

RESPONDENT

Date of Decision : 21-09-2011

Acts Referred:

Bombay High Court (Original Side) Rules, 1980 — Rule 84
Civil Procedure Code, 1908 (CPC) — Order 5 Rule 1(1), Order 7 Rule 10A, Order 7
Rule 9, Order 8 Rule 1, Order 9 Rule 2

Citation : (2011) 09 BOM CK 0142

Hon'ble Judges : Mohit S. Shah, C.J.;Roshan Dalvi, J

Bench : Division Bench

Advocate : Prachi Khandke instructed by M.P. Vashi and Associates, for the Appellant; Ujwala Sawant instructed by . D.S. Pranjpe for Respondent Nos. 1 to 3, Mr. Sandeep S. Kumbhar instructed by . H.H. Nagi for Defendant No. 2 and Mr. Nitesh Bhutekar for Defendant Nos. 4, 7 and 8 and Respondent Nos. 4 to 13, for the Respondent

Final Decision : Allowed

Judgement

Roshan Dalvi, J.—The Appeal is admitted and taken up for final disposal with the consent of the learned Counsel for the parties. The respective learned Advocates waive service of notice for final hearing. The Appellant has challenged the order of the learned single Judge dismissing the Plaintiff's Notice of Motion in the above suit which was for setting aside an order of dismissal of the suit for default passed by the learned Prothonotary and Senior Master of this Court.

2. A chronology of the events and dates since filing of the suit would be material to consider:

1. The suit was filed on 16 October 2000 against 13 Defendants for administration of the estate of the deceased father of some of the parties and for other incidental reliefs. The parties to the suit are family members of the children

of the deceased.

2. The Plaintiff applied for an ad-interim order in the interim application taken out by the Plaintiff on 22 November 2000.

3. Defendant No. 1 appeared before the Court. Defendant No. 2 filed an affidavit and appeared before the Court. Certain ad-interim relief was granted. Defendants 1 and 2 waived notice. Notice of Motion was made returnable after 8 weeks.

4. On 10 June 2002 an interim order was passed confirming the ad-interim order. Defendants 1 and 2 appeared through their Advocates before the Court when the Notice of Motion was disposed off. Thereafter the suit reached before the Prothonotary and Senior Master on 22 January 2008.

5. The Plaintiff and Advocates were absent. Defendant No. 2 was represented by his Advocate. Defendant No. 1 had expired. Though Defendant No. 2 was represented, it was stated that Defendant No. 2 was not served. Since the other Defendants were not represented it was not known whether the writ of summons was served upon them. The suit was dismissed for default.

3. The Plaintiffs applied for setting aside the said order. That application has been rejected essentially on the ground that the writ of summons was not served and also on the ground that the Plaintiffs did not appear before the Prothonotary and Senior Master.

4. It is contended on behalf of the Appellants that the Defendants 1 and 2 are the only real contesting Defendants. The other Defendants support the Plaintiffs. Defendants 1 and 2 were represented personally as also through their Counsel at the time of the hearing of the application for ad-interim reliefs as well as at the time of the hearing of the Notice of Motion. It is, therefore, contended that the writ of summons in the above suit was not even required to be served upon Defendants 1 and 2. Of course since the Plaintiffs defaulted in appearing before the Prothonotary and Senior Master of this Court and it was not noticed that the Defendants 1 and 2 had appeared earlier in the interim and ad-interim applications, the suit came to be dismissed for default. Such a suit can be restored upon cause being shown for non-appearance.

5. What is primarily agitated is that the learned Judge mainly considered the non service of the writ of summons for a period of 8 years since the filing of the suit and upheld the order of dismissal on that ground.

6. The writ of summons has to be served by the Plaintiffs upon each of the Defendants under Order V Rule 1(1) of the C.P.C., which runs thus:

1. Summons - (1) When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of service of summons on that defendant:

Provided that no such summons shall be issued when a defendant has appeared at the presentation of plaint and admitted the Plaintiff's claim:

7. The purpose and object of the service of the writ of summons must be first understood. It is only to give notice to the Defendants of the Plaintiffs' claim. It will enable the Defendant who otherwise has no such notice to appear and answer the Plaintiffs' claim. This is, therefore, not an ornamental or a ritualistic requirement. The exercise has not to be undertaken in each and every case without application of mind. When the object of notifying the Defendants of the Plaintiffs' claim is otherwise served, the service of the writ of summons would become a redundant formality taking up needless judicial time in passing directions for such service and causing avoidable expenses to the Plaintiffs in serving summons. It is, therefore, that when Defendants appear upon notice of the Plaintiffs to defend an application for ad-interim or interim relief either personally or through their Advocate they generally waive service. Once service is waived the service is not to be effected. In fact in this case service was waived when the ad-interim application was considered and the Notice of Motion was made returnable by the order passed on 22 November 2000 (though the order mentions the expression "waive notice" it is essentially the waiver of the service of the writ of summons).

8. The service of the writ of summons is made alongwith a copy of the plaint together with its annexures. This would enable the Defendants to see a claim made by the Plaintiffs and the basis upon which suit claim is made. When a notice for an ad-interim or interim application is given to the Defendants a copy of the plaint along with its annexures is also served upon the Defendants. Nothing other than the copy of the plaint and the annexures is to be served along with the writ of summons. Consequently, the Defendant has full notice of the Plaintiffs' claim and is in full and complete position to set out his defence which the Defendant does in an interim or ad-interim application by way of an affidavit in reply. Hence the appearance by the Defendant is enough evidence to show service of the plaint and proceedings upon the Defendant. Once that is shown, it would be too technical to require the writ of summons itself to be served later.

9. A suit may be dismissed for want of service of the writ of summons under Order IX Rule 2 of the CPC which runs thus:

2. Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs. - Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the Court-fee or postal charges, if any, chargeable for such service, or failure to present copies of the plaint as required by rule 9 of Order VII, the Court may make an order that the suit be dismissed:

Provided that no such order shall be made, if notwithstanding such failure, the defendant attends in person or by agent when he is allowed to appear by agent

on the day fixed for him to appear and answer.

The above order makes specific provision for the contingency when the writ of summons need not be served so that the suit could not have been dismissed on that ground. That was upon the Defendant's appearance personally or through his Advocate in the suit.

10. It may be mentioned that Rule 84 of the Bombay High Court (Original Side) Rules also show the circumstances in which a writ of summons is seen to be served. Rule 84 runs thus:

R.84. Proof of service of Summons. - Unless the Court shall otherwise order, the service of a Summons to appear and answer shall be proved by the vakalatnama having been filed or when no vakalatnama has been filed, by evidence showing that the Summons was served in the manner provided by the Code of Civil Procedure....

11. The evidence of the vakalatnama of the Advocate of the Defendant itself would, therefore, show service of the summons upon the Defendant. The appearance by the Defendant at any stage of the suit is further such evidence. Filing of the affidavit in reply in an interim application is also such evidence. Consequently, when a suit comes up for hearing it would be material to see whether the writ of summons is actually served which can be evidenced by an affidavit of service, failing which it would be seen by the Vakalatnama of the Defendants' Advocate, the appearance of the Defendant, or any other proceeding filed or taken by the Defendant in the suit. Once any of these is shown the formal service of the writ of service cannot be insisted upon.

12. A similar aspect came up for consideration before another single Judge of this Court in the case of Vijaykumar Ramrang Chaudhar Vs. D.K. Soonawalla and Another, , in which the Court had to consider the allegation about non-service of the summons after the Defendant appeared, but had not filed his written statement. The Defendant applied for listing the suit for dismissal on the technical ground of non-service. The Defendant had appeared and had filed an application for time to file written statement. Ad-interim relief was granted to the Plaintiff. The Defendant had engaged 3 Advocates on record. His contention that the Advocates were represented only for the specific application in which they appeared was negated on the premise that there is no provision in the CPC or the High Court Rules for engaging an Advocate in respect of each separate interim proceedings. It was held that Rule 84 of the above Rules is itself sufficient to show that the summons were duly served or that the requirements stood dispensed with. This was in keeping with the purpose and object of the formality of service.

13. The reason behind the aspect of service can be deciphered also from the Order VII Rule 10-A of the C.P.C. It relates to return of the plaint to be filed in proper Court. Sub Rule 4(a) of the aforesaid Rule sets out the circumstances in which the summons for appearance in the suit can be dispensed with. The

aforesaid Sub Rule 4(a) runs thus:

(4) where the notice of the date for appearance is given under sub-rule (3), -

(a) it shall not be necessary for the Court in which the plaint is presented after its return, to serve the defendant with a summons for appearance in the suit, unless that Court, for reasons to be recorded, otherwise directs, and

(b) the said notice shall be deemed to be a summons for the appearance of the defendant in the Court in which the plaint is presented on the date so fixed by the Court by which the plaint was returned.

Hence it is seen that when the Defendant has notice that the Plaintiffs' suit is returned to proper Court for filing and is informed of the next date of appearance the service of the summons in the new Court would be rendered nugatory and consequently the notice itself is deemed to be the summons upon the Defendant.

14. We may mention that under the CPC as amended in 2002 as also 1999 the Defendant is required to file the written statement and answer the Plaintiffs' claim within 30 days of the service of the summons upon him under Order 8 Rule 1 of the CPC. That period may be extended for 90 days under the provisions to the aforesaid rule. However, in the interest of justice and upon the discretion of the Court this period is extended even further to enable the Defendant to have his defence considered on merits. If the Defendant has waived service (or as in this case notice, which is analogous to service) he would be required to file his written statement within 30 days from such waiver of service. Defendants 1 and 2 who appeared at the time the ad-interim and interim orders were passed on the Plaintiffs' Notice of Motion, did not file their written statement. Defendant No. 1 has expired since. Defendant No. 2 though represented by an Advocate made a grievance that the writ of summons was not served, but did not apply for time to file written statement before the Prothonotary and Senior Master. Had the Prothonotary and Senior Master been shown the waiver of service or even the factum of appearance by Defendants 1 and 2 personally or through their Advocate or even the filing of the Vakalatnama of the Advocate who appeared for Defendant No. 2 to the learned Prothonotary and Senior Master the observation with regard to non-service of the writ of summons could not have been made as the service would have been deemed to have been effected. The Advocate for Defendant No. 2 failed to do so. Consequently, it is seen that the Plaintiffs' suit came to be dismissed primarily for default of the Plaintiff's appearance on 22 January 2008 before the Prothonotary and Senior Master. Such an order of dismissal is, therefore, passed under Order IX Rule 8 of the CPC which runs thus:

8: Procedure where defendant only appears. - Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

15. Such an order may be set aside on an application of the Plaintiff upon showing sufficient cause for his non-appearance when the suit was called for hearing under Order IX Rule 9 of the CPC which runs thus:

9. Decree against plaintiff by default bars fresh suit. - (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

16. The application which came up for consideration by the learned Judge and which was disposed off under the impugned order is, therefore, an application simplicitor under Order IX Rule 9 of the CPC for restoration of a suit dismissed for default of the Plaintiffs' appearance when the Defendant No. 2 had appeared. It was for the learned Judge, to only consider the cause shown by the Plaintiff for non-appearance on the date of the dismissal of the suit.

17. The impugned order proceeds on the premise that the writ of summons was not served for 8 years and that the Plaintiff had not taken steps in that behalf. It states that the explanation given in the affidavit cannot be accepted. The impugned order does not show the reasons for non acceptance of the cause made out by the Plaintiff for the Plaintiffs' nonappearance on the date of the dismissal of the suit. It proceeds upon the footing that explanation is not given for non service of the writ of summons for 8 years. The learned Judge has also not noticed the fact of the waiver of the service of the summons upon the appearance by the Defendants in Court at the time of the grant of the ad-interim relief as also at the time of the grant of the interim relief to the Plaintiff. The learned Judge has not appreciated that the service was deemed to have been effected as per the aforesaid provisions. The Plaintiffs have explained in the affidavit in support of the Notice of Motion for setting aside the dismissal of order about how and why the writ of summons was deemed to have been served upon the Defendant Nos. 1 and 2 and how it was sought to be served upon the other Defendants. Consequently, the Plaintiffs have also shown that they have a good case on merits, that they have obtained interim order of injunction as also an order for disclosure of the assets and properties of their deceased father pending the suit and that the dismissal would cause them irreparable loss. Given the fact that despite waiver of service the written statement was not filed by the contesting Defendant No. 2, which the Court would allow the Defendants to file condoning the delay, if any, the Plaintiffs also deserved to be heard on merits of their claim. Consequently, the explanation relating to the service of the summons must be accepted and the suit must be restored to file as such a suit could not have been dismissed upon a mere technicality of want of the service of summons

as also for a mere default of appearance on a given date under the above circumstances.

18. Overemphasis upon the procedural requirements rather than considering the substance of the merits of the case of the parties would, as Justice Krishna Iyer came to observe, though in a different context, in paras 20 and 21 of his judgment in the case of Charles K. Skaria and others Vs. Dr. C. Mathew and others AIR 1980 SC 1230:

make procedure not the handmaid but the mistress and form not as subservient to substance but as superior to the essence.

19. The Notice of Motion in which the impugned order came to be passed has been taken out about 3 years after the order of dismissal came to be passed. The Plaintiffs have explained the said delay. It is their case that the Plaintiffs had filed an earlier Notice of Motion. In the meantime some of the Defendants expired. That Notice of Motion was disposed off with liberty to take out a fresh Notice of Motion by impleading the heirs of the deceased Defendants, which the Plaintiffs did. The Counsel on behalf of the Plaintiff stated that if the suit is restored to file the amendments with regard to bringing the heirs of the deceased on record can be carried out.

20. Under the aforesaid circumstances we deem it proper to hold that the service of the writ of summons was admitted to have been effected or was waived. In any event when the defendant appears either personally or through Advocate at any stage of the suit service must be deemed to have been effected.

21. The appeal is, therefore, allowed. The impugned order dated 25 August 2011 of the learned trial Judge in Notice of Motion No. 1819 of 2011 is set aside.

22. The delay of 160 days in filing the Notice of Motion is condoned. Accordingly, Notice of Motion No. 1819 of 2011 is allowed. The suit is restored to file. Consequently, the order dated 22 January 2008 of the Prothonotary & Senior Master of this Court by which the suit was dismissed for default, is set aside. Accordingly Suit No. 4577 of 2000 is restored to file. The interim orders passed during the pendency of the suit stand revived.