

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

Writ Petition No. 79 of 2017

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Sushilkumar Mandanlal Ganediwal,
Aged 63 years, Occupation: Business,
R/o Allauddin Building, Begumpeth,
Hyderabad (A.P.) ..

PETITIONER

.. **Versus** ..

1. Vijaykumar Mandanlal Ganediwal,
Aged 65 years, Occupation: Business,
2. Narayanlal Madanlal Ganediwal,
Aged 61 years, Occupation: Business,
3. Kamalkumar Madanlal Ganediwal,
Aged 56 years, Occupation: Business,

All R/o Shrikrushna Kutir, 1-11-252,
Begumpet, Hyderabad (A.P.)
4. Ghanshyam Babulal Sahu,
Aged 48 years, Occupation: Business,
R/o Sakkarsath, Amravati ..

RESPONDENTS

Mr. Sawan Alaspurkar, Advocate for Petitioner.
Mr J.J. Chandurkar, Advocate for Respondent No.4.

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CORAM : MANISH PITALE, J.
DATE OF RESERVING JUDGMENT : DECEMBER 20, 2018.
DATE OF PRONOUNCING JUDGMENT : JANUARY 31, 2019

JUDGMENT

1. Rule. Rule made returnable forthwith. Heard finally

with the consent of the learned counsel appearing for the parties.

2. An interesting question arises in the present writ petition, as to whether the report of bailiff on a summons issued by a Court could be said to be public document under Section 74 of the Indian Evidence Act, 1872 and consequently placing certified copy of the same would amount to proof of contents thereof under Section 77 of the said Act.

3. The petitioner herein was the original defendant no.1 in a suit filed for declaration and possession. The respondent no.4 herein was added as defendant no.7 in the said suit but the suit abated against him. A counter claim had been filed on behalf of respondent no.4 in the suit about which the petitioner had no intimation or knowledge, as a result of which he failed to file any written statement to the same. The Court of Civil Judge, Senior Division, Amravati (trial court), allowed the counter claim filed by respondent no.4 and passed a decree against the co-defendants, including the petitioner herein.

4. It was the case of the petitioner that he came to know about passing of decree on counter claim filed by respondent

no.4 on 21.11.2009 and consequently on 28.11.2009 he moved an application under Order 9 Rule 13 read with Section 151 of the Code of Civil Procedure, 1908 (CPC), along with an application for condonation of delay. The petitioner led evidence in support of his case before the trial Court and he was also cross-examined at length. After the evidence of the petitioner and his witnesses was over, when the proceeding before the trial Court was posted for evidence of the respondents, without filing any affidavit on record, the respondent no.4 filed an application for production of document marked Exh.38. Along with the said application, certified copy of bailiff report dated 01.03.2006 was filed and on 26.08.2015, without calling for say/response of the petitioner, the trial Court allowed the application for production of the documents including the certified copy of the said bailiff report. On the same day, the trial Court passed an order on Exh.40, which was an application filed on behalf of respondent no.4 for exhibiting the said documents, including certified copy of the bailiff report. By the said order, the trial Court recorded that since the said documents were public documents, they were directly admissible in evidence and there was no need to file application for exhibiting the said documents. It was further recorded in the said order that all public documents be

marked as exhibited. It is relevant that the say/response of the petitioner was not called by the trial Court while passing the said order dated 26.08.2015 on Exh.40.

5. The petitioner filed an application marked as Exh.44 for de-exhibiting of the said documents, contending before the trial Court that the bailiff report could not be said to be a public document and that the burden was on the respondent no.4 to prove that there was valid service of summons on the petitioner and further that exhibiting the said document unfairly placed the burden on the petitioner to prove that he was not served with the summons.

6. By the impugned order dated 21.07.2016, the trial Court rejected the said application of the petitioner holding that the report of the bailiff was a public document, as it was in the prescribed proforma of the Court and it had seal and signature of the issuing authority as also the process server. It was further held that the copy on record was a certified copy issued by the trial Court itself and there was nothing wrong in the earlier order dated 26.08.2015 whereby the said bailiff report and the other documents, being public documents, had been directed to be exhibited. The petitioner has filed the

present writ petition challenging the said order passed by the trial Court. The order dated 26.08.2015 passed by the Trial Court on Exh.40 is also challenged in this writ petition.

7. Mr. Sawan Alaspurkar, the learned counsel appearing for the petitioner, submitted that the trial Court committed a grave error in treating the bailiff report in the present case as a public document under Section 74 of the aforesaid Act. It was submitted that the said document did not fall within the description of public documents under Section 74 of the said Act because a bailiff report could not be said to be a document forming an act or record of acts of sovereign authority, official body or a tribunal. It was submitted that the portion of the document forming summons issued by the Court stating the name of the Court and bearing the seal of the Court could be said to be a public document, but report of the bailiff on the reverse of the said document did not form part of a public document as defined under Section 74 of the said Act. It was submitted that when the petitioner had come out with a specific case that he was never served with the summons, the burden was clearly upon respondent no.4 to prove that service had been effected on the petitioner and that it was for respondent no.4 to discharge the burden by proving the bailiff

report and examining the bailiff to prove the fact of service of summons on the petitioner, as per procedure known to law. It was submitted that if production of certified copy of the bailiff report amounted to proof of contents thereof under Section 77 of the said Act, the entire burden would unfairly and wrongly be shifted to the petitioner. The learned counsel for petitioner relied upon judgments of the Hon'ble Supreme Court in the case of **Sushil Kumar Sabharwal .vs. Gurpreet Singh - (2002) 5 Supreme Court Cases 377** and judgment of High Court of Punjab and Harayana in Prem **Singh .vs. Bal Kishan and others (Order dated 15.09.2014 in CR No. 4660 of 2013)**, judgment of Nagpur High Court in the case of **Manbodh .vs. Hirasai - AIR 1926 Nagpur 339**, judgment of this Court in the case of **Smt. Shamlata Manohar Raut .vs. Vishweshwara Tukaram Giripunje - AIR 2008 Bombay 155** and judgment of Allahabad High Court in **Radhey and another .vs. Board of Revenue, U.P. - AIR 1990 Allahabad 175**.

8. On the other hand, Mr. J.J. Chandurkar, learned counsel appearing for the respondent no.4 in the present case contended that the trial Court was justified in treating the certified copy of the bailiff report as public document under

Section 74 of the said Act. It was submitted that the report of the bailiff regarding service of summons on the petitioner formed an act of an official body and it was certainly a record of the act of the bailiff, who served summons on the petitioner, as directed by the Court. On this basis, it was submitted that the trial Court was justified in allowing the public document i.e. the bailiff report to be placed on record and production of certified copy of the said bailiff report as proof of contents of the said public document. It was submitted that since the bailiff went with the summons to serve the petitioner, on the directions and official act of the trial Court, the report written by the bailiff on the reverse of the summons clearly formed part of a public document as defined under Section 74 of the said Act. The learned counsel placed reliance on judgment of the Hon'ble Supreme Court in the case of **Jaswant Singh .vs. Gurdev Singh and ors. - Civil Appeal No. 8879-8880 of 2011 dated 21.10.2011.**

9. In the present case, the whole emphasis of the petitioner is on the fact that he was never served with summons issued by the trial Court and that, therefore, decree passed on counter claim filed by respondent no.4 deserved to be set aside and the claim of respondent no.4 was required to

be decided afresh by giving a fair and proper opportunity to the petitioner to contest such claim made by the respondent no.4. This was the thrust in the application filed on behalf of the petitioner under Order 9 Rule 13 of the C.P.C. In a situation like the one in the present case, the proof of service of summons on the petitioner assumes great significance. The finding rendered by the Court on the aforesaid issue would decide whether the application of the petitioner was to be rejected or that an opportunity was to be granted to the petitioner to demonstrate that the claim of respondent no.4 was untenable. The central issue in such a case, as to the status of the bailiff report being a public document under Section 74 of the said Act, becomes crucial and if the contents of the said document are proved only by production of certified copy thereof, the burden falls entirely on the petitioner to then show that the said document could not be relied upon by the trial Court to hold against him.

10. In order to examine as to whether the bailiff report could be said to be a public document under Section 74 of the said Act, it would be necessary to refer to the relevant provisions pertaining to public documents and their proof under the aforesaid Act. These provisions are as follows:-

74. **Public documents.**—The following documents are public documents :—

(1) Documents forming the acts, or records of the acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, 1[of any part of India or of the Commonwealth], or of a foreign country; 1[of any part of India or of the Commonwealth], or of a foreign country;"

(2) Public records kept 2[in any State] of private documents.

76. **Certified copies of public documents.**—

Every 1public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies. Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

77. **Proof of documents by production of certified copies.**—Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

11. There cannot be any doubt that once a document qualifies to be a public document under Section 74 of the said Act, production of certified copy thereof amounts to proof of contents of the said document under Section 77 of the said Act.

If the bailiff report in the present case can be said to be a document forming an act or record of the act of a sovereign authority, in this case the trial Court, it would certainly qualify to be a public document and, therefore, production of certified copy of the said document before the trial Court would be sufficient to prove the contents of the same. If that be so, there is nothing more for the respondent no.4 to prove and the entire case of the petitioner of not being served with summons would stand annihilated. Therefore, it is contended vehemently on behalf of the petitioner that the bailiff report cannot be said to be a public document and that it is for the respondent no.4 to examine the bailiff to prove the same and that the burden lies entirely on the respondent no.4 to prove the bailiff report by procedure known to law, like any other document.

12. In the case of **Jaswant Singh .vs. Gurudev Singh** (supra), relied upon by the learned counsel for the respondent no.4, it was held by the Hon'ble Supreme Court that a compromise that had merged into a decree of the Court had become part and parcel of the decree and hence it was a public document in terms of Section 74 of the said Act and production of certified copy of the same amounted to proof of

contents thereof under Section 77 of the said Act. In the case of **Sushil Kumar Sabharwal .vs. Gurpreet Singh** (supra) relied upon by the learned counsel for the petitioner, on facts, the Hon'ble Supreme Court found that summons were not served and the process server when examined as a witness had deposed in contradiction to the contents of the reports prepared by him. In this situation, it was held by the Hon'ble Supreme Court that the Courts below were wrong in proceeding on the basis that the appellant had been served with process. The judgments relied upon by the learned counsel for the petitioner in the case of **Prem Singh .vs. Bal Kishan, Manbodh .vs. Hirasai** and **Smt. Shamlata .vs. Vishweshwara** (supra) have held that the bailiff must be produced before the Court in the witness box to prove the service of summons, that the plaint is not a public document and it must be proved in the ordinary way, that certified copy of a plaint could not be said to be proof of the contents thereof and that report of a Naib Tahsildar was not a public document under Section 74 of the Act, because it was an expression of his own impression on the basis of spot inspection.

13. In this context, a few more judgments are relevant. The Madhya Pradesh High Court in the case of **Jagdish Prasad**

.vs. Daulatraam - (2011) 3 ML LJ 100 has held that endorsement and report of a bailiff (process server) on the reverse of a warrant of possession stating that order of the Court had been carried out by delivering possession to the plaintiff was undoubtedly a public document and production of certified copy thereof was sufficient proof of the contents of the document in terms of Section 77 of the Evidence Act. Similarly, in the case of **Balku .vs. King Emperor - AIR 1925 Oudh 183**, the Court held that delivery of possession in execution of a decree was undoubtedly an act of a Court and report made to the Court by an Officer that its order had been carried out was undoubtedly a public document under Section 74 of the said Act. On the other hand, the Jharkhand High Court in the case of **Junul Surin .vs. Silas Munda - AIR 2008 Jharkhand 82**, has held that there is a distinction between record of the Court and the record of the act of the Court. It has been further held that a report, even if prepared in discharging official duty with regard to possession, cannot be a public document so that report of possession is taken as conclusive. It has been held that the document issued under the seal of the Court is a public document but report of the process server cannot be said to be a public document.

14. The aforesaid judgments of various High Courts clearly show that there is a divergence of opinion as to whether a document, like a bailiff report in the present, case can be said to be a public document under Section 74 of the said Act. Having considered the views taken by various High Courts, as noted above, this Court finds that treating a bailiff report of service of summons as in the present case, to be a public document under Section 74 of the said Act, would not be in consonance with law. This is because the report of a bailiff, as in this case, on the reverse of the document of summons issued by the Court is nothing but his opinion about service of summons or otherwise on the person to whom the summons have been issued by the Court. Although, it may be an official act, the report itself submitted by the bailiff in pursuance of the summons issued by the Court, cannot be said to be an act of the Court or record of an act of the Court, to qualify as a public document under Section 74 of the said Act. The judgment relied upon by the learned counsel for the respondent no.4 in the case of **Jaswant Singh .vs. Gurdev Singh** (supra) is clearly distinguishable because in the said case the compromise had merged into a decree of the Court , passed by the Court in pursuance of the said compromise. Therefore, a compromise which was part of a decree passed by the Court,

being an act of the Court, qualified to be a public document and production of certified copy thereof was enough to prove the contents of the same. In this context, this Court respectfully agrees with the view taken by the Jharkhand High Court in the case of **Junul Surin .vs. Silas Munda** (supra) and consequently the bailiff report in the present case cannot be treated as a public document under Section 74 of the said Act. The relevant portion of the said judgment of the Jharkhand High Court in the case of **Junul Surin .vs. Silas Munda** (supra) reads as follows:-

“9. There is distinction between the record of the Court and the record of the act of the Court. It is only record of act of the Court which is a public document. A report even if prepared in discharging official duty with regard to possession cannot be a public document so as to report of possession is taken as conclusive. The report in relation to possession cannot be taken as statutory report. What is stated in the report however has to be proved if the same is not accepted by other side. For example if a summon for settlement of issue or disposal of suits is issued under the seal of the Court directing the defendants to appear on a particular date this part of the summon, no doubt is a public document but the report of the process server with regard to service of summon made on the back of the report or on a separate sheet cannot take place of a public document. If the party disputes the report and the service of summons then the report has to be proved. Similarly, if a writ of attachment or writ for affecting delivery of possession is issued by the judicial or quasi judicial authority directing the officer or bailiff to effect delivery of

possession then the report of the officer or bailiff certifying the execution of writ for delivery of possession cannot be taken as a public document and therefore, report of the officer effecting delivery of possession has to be proved.”

15. This Court respectfully disagrees with the views of the Madhya Pradesh High Court in **Jagdish Prasad .vs. Daulatram** (supra) and the High Court of Oudh in **Balku .vs. King Emperor** (supra).

16. It is also relevant that in the present case the petitioner has come to the Court with a specific case that he was never served with summons and that, therefore, the counter claim of respondent no.4 decreed *ex parte* against him was not sustainable. The respondent no.4 denied the said stand taken by the petitioner and sought to rely upon the bailiff report to claim that the petitioner had been served with summons and that, therefore, the application filed by him under Order 9 Rule 13 of the C.P.C. was liable to be rejected. Therefore, it was the respondent no.4 who was asserting that the petitioner was served with summons and he was asserting the existence of the fact of service of summons on the petitioner, by relying upon the aforesaid bailiff report. Applying Section 101 of the said Act, the burden in such a

situation clearly was on respondent no.4 to prove the existence of the fact of service of summons on the petitioner, on the strength of the said bailiff report. The burden could not be said to be discharged by the respondent no.4 by merely producing certified copy of the said bailiff report written on the reverse of the summons, but it was for the respondent no.4 to have examined the bailiff to prove the existence of the fact of service of summons on the petitioner, on the strength of the said bailiff report. The petitioner could then cross-examine the said witness (bailiff).

17. But, if the report of the bailiff was to be treated as a public document, there was nothing for the respondent no.4 to do, but to produce a certified copy of the same and then claim that he had proved his stand. This would be contrary to the requirement of Section 101 of the aforesaid Act, which reads as follows:-

*101. **Burden of proof.**—Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

18. Thus, it becomes clear that the burden to prove

clearly was on the respondent no.4 in the facts of the present case. Only the contents of the summons issued by the Court, consisting of name of the Court, name of the parties, seal of the Court and the returnable date stated in the summons could be said to be a public document. The report written by the bailiff on the reverse of the said document could certainly not be said to be a public document under Section 74 of the said Act. Yet, the trial Court passed the order dated 26.08.2015 allowing the production of the documents, including the bailiff report, by the respondent no.4 and passed the impugned order dated 26.08.2015 below Exh.40 holding the said documents to be directly admissible in evidence as public documents and marking them as exhibits. The trial Court also erred in passing the impugned order dated 21.07.2016 below Exh.44 rejecting the application of the petitioner for de-exhibiting the said documents including the bailiff report. It is also surprising that the trial Court did not even call for the say/response of the petitioner while passing the order, whereby production of the documents was allowed and while passing impugned order dated 26.08.2015, whereby the documents including the said bailiff report, were treated as public documents and accepted. This was clearly erroneous, thereby rendering the impugned orders unsustainable and liable to be quashed and set aside.

19. In the light of the above, the present writ petition is allowed and the impugned orders are quashed and set aside. The application Exh.44 is allowed. It is held that the bailiff report sought to be placed on record and exhibited as public document cannot be treated as a public document and that it will have to be proved by respondent no.4 in accordance with law.

20. Rule made absolute in the aforesaid terms with no order as to costs.

(Manish Pitale, J.)

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halwai/p.s.