

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6002 OF 2014

Vimalbai Dilip Patil,
Age :22 years, Occu. Nil,
R/o At/Post Chaugaon,
Taluka & Dist. Dhule

..PETITIONER
(Orig. Plaintiff)

VERSUS

1. Pitambar Dhanraj Patil,
Age : 55 years, Occu.Agril.,
2. Banubai Pitambar Patil,
Age : 50 years, Occu. Household,
Both R/o At/Post Chaugaon,
Taluka & Dist. Dhule
3. Hirabai Bhagwan Patil,
Age : 25 years, Occu. Household,
R/o Hatti Khurd, Tq. Sakri,
Dist. Dhule
4. Sangitabai Shamrao Patil,
Age : 24 years, Occu. Household,
R/o At/Post Khandlay,
Tal & Dist. Dhule
**(Respondents No.2 to 4 deleted
as per Court's order dated
25th August, 2014)**
5. Dwarkabai Trambak Wagh,
Age : 50 years, Occu. Nil,
R/o At/post Nikumbe,
Taluka & Dist. Dhule
(Dismissed as per order
dated 02.04.2012 passed by
learned 2nd Jt. C.J.J.D.
Dhule)

6. Jitendra Pandit Patil,
Age : 21 years, Occu. Education,
R/o At/post Chaugaon,
Taluka & Dist. Dhule

..RESPONDENTS
(Orig. Defendants)

Mr S.B. Bhosale, Advocate holding for Mr Shailesh P. Brahme, Advocate
for petitioner;
Mr Mukul Kulkarni, Advocate for respondents no.1, 5 & 6

CORAM : N.W. SAMBRE, J.

DATE : 7th April, 2015

ORAL ORDER :

The petitioner/plaintiff impleaded defendants no.5 and 6 to the suit at the concluding stage, as the Trial Court so permitted in Regular Civil Suit No.67 of 2008 and upon his request caused summons to defendants no.5 and 6. Defendant no.6 accepted the summons, however, defendant no.5 has refused the same as is apparent from the report dated 25th November, 2011. Defendant no.5 rather has challenged the authority of the Court by not permitting the said Court Officer to paste the copy of the summons on the part of her house.

2. As a consequence thereof, the provisions of Order V, Rule 19 of the Code of Civil Procedure (hereinafter referred to as the "Code", for the sake of brevity) will come into play, which read thus :-

"19. Examination of serving officer :- Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been

verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit. “

3. The learned 2nd Joint Civil Judge Junior Division, Dhule noticed that the summons of defendant no.5 was returned unserved vide Exh.78 on 24th November, 2011 and since the petitioner/plaintiff did not take steps to serve defendant no.5, dismissed the suit against the said defendant by an order dated 2nd April, 2012.

4. An application for review, at the behest of the petitioner, i.e. Exh.97, also suffered the same fate. Thus, the present petition.

5. As is rightly pointed out by the learned Counsel appearing on behalf of the petitioner/plaintiff that Rule 19 of Order V of the Code casts a duty on the Court to conduct an enquiry in the matter, as according to him, the Bailiff's report and the examination of the said Bailiff along with Exh.78 depicts that defendant no.5 has not only refused to accept the summons but also not permitted the said Court Officer to affix a copy of the suit summons on the outer door or some other conspicuous part of her house.

6. The aforementioned conduct of defendant no.5 perhaps was lost sight of by the learned Trial Court while passing both the orders, is the submission made by the learned Counsel for the petitioner.

7. Mr Kulkarni, learned Counsel appearing on behalf of respondents no.1, 5 and 6 would urge that the petitioner was not diligent in pursuing the suit before the Trial Court and urged that the least that was expected of the petitioner/plaintiff was to apply before the Court for issuance of fresh summons, in the wake of above referred report of Bailiff. In support of his contentions, he has placed reliance on Order IX, Rule 5 clause (1) (b) of the Code. In addition to above, he would further urge that the application for review moved by the present petitioner was also time barred. As said application ought to have been moved within a period of thirty days as provided under Article 122 of the Limitation Act. Thus, he prayed for dismissal of the present petition.

8. Having considered rival contentions of the parties and upon perusal of the Bailiff's report dated 25th November, 2011 and his evidence recorded on 13th March, 2012 by the 2nd Joint Civil Judge Junior Division, Dhule in support thereof, least that was expected of the Court below was to apply provisions of Rule 19 of Order V of the Code to the facts of the case, which casts a duty on the said Court to make enquiry in the matter

of service of summons. It is required to be noted that the said Rule operates independently *qua* the claim brought before the Court by the parties, either plaintiff or defendant, as the Rule *prima facie* casts a duty on the Court to take recourse to the procedure provided therein.

9. Perusal of both the orders reflects complete ignorance of aforesaid provision while passing the orders impugned herein.

10. It is also required to be noted that the Court below has proceeded to interpret the report and evidence of the Bailiff to the detriment of the petitioner by either not reading the evidence in its entirety or by misreading the same.

11. Though Mr Kulkarni has raised the objection *qua* conduct of the petitioner, however, in view foregoing observations, particularly having regard to language of Order V, Rule 19 of the Code, which casts a duty on the Court, in my opinion, the conduct of the present petitioner, in the case in hand, will hardly be of any importance as Rule 19 operates independently *qua* the claims to be brought before the Court by the parties in relation to the issue or service of summons. The moment an eventuality is brought to the notice of the Trial Court, which is required to be dealt with in accordance with Rule 19, the conduct of the petitioner will be hardly of any consequence. The case in hand, in my opinion, is squarely covered

by the said provision.

12. Apart from above, though Mr Kulkarni raised an objection to the tenability of the review petition being barred by limitation, in my opinion, even if the said proceedings are ignored and the original order passed by the Trial Court on 2nd April, 2012 is tested, the same is not sustainable as it runs contrary to the very record of the Trial Court and provisions of Rule 19 of Order V of the Code.

13. From the above referred conduct of defendant no.5, the only inference that could be drawn from the evidence is that defendant no.5 was served with the suit summons.

14. In the light of foregoing discussion, I pass following order :-

The orders dated 2nd April, 2012 and the order dated 19th August, 2013, passed by 3rd Joint Civil Judge Junior Division, Dhule, below Exh.97, in Regular Civil Suit No.67 of 2008, is quashed and set aside.

Regular Civil Suit No.67 of 2008 stands restored against defendant no.5 and the Counsel for defendant no.5 has understood that the service of suit summons on the said defendant is complete.

Writ Petition stands allowed in above terms with no order as to costs.

(N.W. SAMBRE, J.)

amj