

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 242 OF 2016

JAGANNATH DAGDU AVHAD
VERSUS
SHAMRAO @ GANNPAT DAGDU DALVI AND OTHERS

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Advocate for Petitioner : Shri Jaju Nikhil S.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: December 13, 2017

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PER COURT :-

1. By this petition, the petitioner seeks to challenge the order dated 21.1.2015, by which, the suit has been dismissed as against defendant Nos. 2 to 4 under Order IX Rule 5 of the Civil Procedure Code ("CPC") (Bombay Amendment).

2. All the respondents have been served. However, no appearance has been entered either through an Advocate or in person. By the ad-interim order dated 8.1.2016, this Court has stayed the trial Court proceedings. On 14.7.2017, since none appeared for the respondents, the matter was adjourned only to enable them to participate in this proceeding.

3. I have considered the submissions of the learned Advocate for the petitioner, who has taken me through the 13 grounds,

formulated by him, in the petition. Issue is as regards passing an order of dismissal of the suit for having not taken steps against the unserved defendants, under Order IX Rule 5 of the CPC.

4. Order IX Rule 5 (Bombay Amendment) reads as under:-

"5. (1) Dismissal of suit where plaintiff after summons returned unserved fails for two months to apply for fresh summons. -- Where, after a summons has been issued to the defendant or to one of several defendants, and returned unserved, the plaintiff fails, for a period of two months from the next hearing of the suit to apply for issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that -

(a) he has failed, after using his best endeavour to discover the residence of the defendant who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit."

5. On 19.8.2014, the summons were returned unserved as against defendants 2 and 3. The summons were returned unserved

as against defendant 4 on 17.9.2014. Considering the effect of Sub-Rule (1) under Rule 5, a period of two months has to be computed from the next date of hearing in the suit following the date on which the summons were returned unserved. If the plaintiff satisfies the Court that despite his best efforts he was unable to move the Court for re-issuance of summons within the period of two months, the trial Court would be within its powers to extend such a period.

6. The record reveals that on 16.8.2014, the plaintiff had moved application Exhibit 11, praying for re-issuance of summons to the defendants 1 to 4. By order dated 16.8.2014, the trial Court directed re-issuance of suit summons, as prayed. It appears that fresh summons were not issued. Yet, on 6.11.2014, the plaintiff moved application Exhibit 13 for seeking extension of time and the same was granted till 25.11.2014. As defendants 2 to 4 were not served, the trial Court has finally passed the impugned order on 21.1.2015.

7. The Honourable Apex Court in the matter of Salem Advocate Bar Association, Tamil Nadu vs. Union of India [AIR 2005 SC 3353], has considered the effect of non-service on the litigating sides. Considering the said issue under Order IX Rule 5 of the CPC, it is concluded that the said provision is directory in nature.

8. In the matter of Shri Sanand Textile Industries Ltd. Vs. M/s Naranji Peraj Transport Co. [AIR 1996 Gujarat 107], the High Court of Gujarat has concluded that Order IX Rule 5 of the CPC has drastic consequences as an order passed thereunder results in the dismissal of the suit. The said provision, therefore, has to be considered to be directory in nature.

9. In the instant case, though Exhibit 11 was filed on 16.8.2014 for reissuing summons to all the defendants, no orders were passed by the trial Court, according to the petitioner. However, a copy of Exhibit 11 placed before the Court, which is marked as Exhibit "X" for identification, indicates that the trial Court had directed re-issuance of suit summons, as was prayed. The plaintiff should have brought this aspect to the notice of the trial Court on 6.11.2014, 25.11.2014 and 19.12.2014 in the event any notice was not issued pursuant to the order passed on Exhibit "X". No doubt, it appears that the plaintiff has been casual while dealing with the said aspect of the matter. However, if the impugned order is sustained, the plaintiff would face the imminent risk of the rejection of his suit, since defendants 2 to 4 were not served.

10. Considering the above, this petition is partly allowed. The

impugned order dated 21.1.2015 is quashed and set aside and RCS No.205 of 2014 is restored to the extent of defendants 2 to 4 on the following conditions:-

(A) Since none has appeared for the respondents in the matter, the petitioner shall deposit an amount of Rs.3,000/- as costs with the Advocate Association's Bar Library of Bombay High Court, Bench at Aurangabad on/or before 15.1.2018.

(B) Copy of the receipt of payment shall be produced before the trial Court on/or before 20.1.2018.

(C) Application for re-issuance of summons to defendants 2 to 4, with proper addresses shall be submitted on/or before 20.1.2018 or the plaintiff may request the trial Court for liberty to serve these defendants by substituted service through publication of the notice in the largest circulated Marathi Daily News Paper, Ahmednagar Edition.

(D) If any of the above directions are not complied with, this order shall stand recalled, the petition shall stand dismissed and the order dated 21.1.2015 impugned in this petition, shall stand restored w.e.f. 22.1.2018.

(RAVINDRA V. GHUGE, J.)

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