

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 2089 OF 2014

Canara Bank. ... Petitioner.
Versus
Mr. Arvind Krishna Chavan & anr. ... Respondents.

Mr. Virendranath B. Tiwari, advocate for petitioner.

**CORAM : SMT.SADHANA S. JADHAV,J
DATE : NOVEMBER 27, 2017**

P.C.:

1 Heard the learned Counsel for the Petitioner. None appears for the respondent Nos. 1 and 2 although they are duly served.

2 Rule. Rule made returnable forthwith.

3 The Petitioner herein happens to be a body corporate constituted under The Banking Companies (Acquisition & Transfer of Undertakings) Act, 1970. The petitioner is the plaintiff in Special Civil Suit No. 69 of 2007, which was a recovery suit seeking recovery

of an amount of Rs. 1,33,596/- as on 28/2/2008 with further interest at the rate of 13.75% per annum from the date of filing of the suit till the Judgment. There was also prayer for attachment before judgment. The suit was filed on 1st March, 2008. On 13/6/2008 the court had received the report of issuance of summons. The application below Exh. 5 was filed. The plaintiff had not taken any steps for service of summons and hence by an order dated 23/6/2009 Civil Judge, S.D. Kalyan was constrained to dismiss the suit as contemplated under Rule 5 Order 9 of the Code of Civil Procedure, 1908. The plaintiff had then filed an application on 19/1/2011 seeking setting aside the said order. It was submitted in the said application that Mr. Shakti Ramakant Upadhyay, Junior advocate of M/s. V.B. Tiwari and company had enrolled in the Bar Council of Maharashtra on 1st April, 2010 and had joined the office of V.B. Tiwari on 17/8/2010 i.e. after institution of the suit. He could not attend the duties diligently and therefore, the plaintiff could not take steps.

4 It appears that on 28/12/2010 upon enquiry for the first time the plaintiff had learnt that the suit was dismissed. There was delay of 575 days in filing misc. application seeking restoration of the suit. No reasons were assigned for the condonation of delay. The fact that junior advocate had not attended the suit, did not inspire the confidence of the court as it was not plausible explanation expected from a body corporate. The application was also filed by advocate Shakti Upadhyay for condonation of delay. The court had observed that notice in the said application was unserved in the month of August, 2011 and the plaintiff had not taken steps to secure presence of the opponent. The plaintiff had neither filed any application seeking direction to serve upon the defendants. Hence, on 31/7/2013 misc. application seeking restoration was also dismissed.

5 The petitioner herein had filed Misc. Civil Appeal before the district judge on 25/9/2013. The Appellate Court had rejected said Appeal. The learned Appellate Court had rightly observed that the petitioner herein had filed an application under Order 9 Rule 9 of

CPC. However, the same was not served on the other side and therefore, the learned Appellate Court had rightly held that the appeal was not maintainable under Order 43 Rule 1(c) of the Code of Civil Procedure, 1908.

6 The order 9 Rule 9(1) of CPC contemplates that -

“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 c 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.

Order 9 Rule 13 contemplates that-

“13. Setting aside decree ex parte against defendant.- In any case in which a decree is passed ex parte against a defendant,

he may apply to the court by which the decree was passed for an Order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an Order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be sent aside as against all or any of the other defendant also:

Provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation : Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule of setting aside the ex parte decree.”

Order 9 Rule 2 reads as under :

“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.”

7 The provisions of Order 9 are mandatory in nature. The application does not disclose any plausible explanation for the omission on the part of the plaintiff not to have served the summons on the defendants. In view of this, the order passed by the trial court on 31/7/2013 dismissing Misc. Application No. 42 of 2011 thereby confirming of an order dated 8/11/2013 passed by District Judge-1, Kalyan did not call for any interference.

8 The learned Counsel for the Petitioner has filed on record the certificate issued by Dr. Anirudh Trivedi stating therein that the advocate representing the plaintiff had undergone by-pass surgery on 16/6/2013. Certificate is issued on 22/7/2013. It is pertinent to note that the application seeking restoration was filed on 10/1/2011 and the order under Order 9 Rule 2 was passed on 31/7/2013. In fact, advocate Shakti Upadhyay could have demonstrated before the court that advocate representing the plaintiff has undergone by-pass surgery on 16/6/2013. It appears that on 31/7/2013 also none appeared for the plaintiffs and therefore, the court has rightly dismissed. Hence, the petition being sans merit deserves to be rejected.

9 Rule is discharged. The petition stands dismissed.

(SMT. SADHANA S. JADHAV,J)