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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**  
+ CM(M) 784/2018 & CM APPL. 27848/2018  
SHAMSUDDIN ..... Petitioner

Through: Mr. Jabbar Hussain, Adv.

versus

ABDUL BARI ..... Respondent

Through: None.

**CORAM:**  
**HON'BLE MS. JUSTICE ANU MALHOTRA**

**ORDER**  
% **17.07.2018**

Vide the present petition, the petitioner assails the impugned order dated 14.05.2018 of the Court of the ADJ-02 (Central) whereby the application under Section 114 r/w Section 151 of the CPC seeking recalling of order dated 10.04.2018 in CS 209/17 filed on 27.04.2018 on behalf of the defendant i.e. the present petitioner, was declined, vide which the petitioner had assailed the order dated 10.04.2018 of the learned trial Court whereby appearance having not been entered on behalf of the defendant i.e. the present petitioner and the written statement having not been filed despite service on 03.08.2017, the right to file written statement of the defendant was closed with the matter having been renotified for plaintiff's evidence.

It has been submitted on behalf of the petitioner that the petitioner could not submit the written statement within time inasmuch as the son of the defendant i.e. the son of the present

petitioner Md. Ashlan, though he had received the process had not apprised the petitioner of the same and that the petitioner only learnt of the same on finding the same in some papers whereafter the application under consideration was filed before the learned trial Court.

It has been submitted on behalf of the petitioner that the petitioner would suffer unduly inasmuch as the petitioner would be unable to put forth his defence and would be able to make only legal submissions. *Inter alia* It has been submitted on behalf of the petitioner that vide the proceedings date 06.03.2017 of the ADJ-02 it had been observed to the effect that there was an issue of territorial jurisdiction, which was left open to be decided after appearance of the defendant and therefore, ordinary summons were issued with the process having thus not been issued under Order 37 of the CPC, 1908 as amended though the suit had been filed under Order 37 of the CPC.

A perusal of the impugned order indicates that it has categorically been observed therein to the effect that as to what papers had been searched by the petitioner was also not brought forth through the application that had been filed by the petitioner before the learned trial Court and that the petitioner had also, as per record, been served on 17.03.2017 through his nephew named Md. Sulaman though courier and dasti was not taken.

It has been submitted on behalf of the petitioner that there could have been personal service ordered in terms of Order 5 Rule 9A of the CPC, 1908 as amended also apart from service in terms of Order 5

Rule 9 of the CPC. It is essential to observe that service in terms of Order 5 rule 9A of the CPC is only in addition to service of summons in terms of Order 5 Rule 9 of the CPC which may so be directed by the Court. However, in the event of service being effected in terms of Order 5 Rule 9 of the CPC, the same amounts to sufficient service. In the instant case, there has been requisite service on the adult male member of the defendant's family i.e. his son, which is sufficient. At the outset, it had been submitted by the learned counsel for the petitioner that the age of the son of the defendant i.e. the son of the present petitioner was 18/19 years and it is now sought to be submitted that the age is not known presently.

Reliance is inter alia placed on behalf of the petitioner on the verdict of the Hon'ble Supreme Court in ***Sambhaji & Ors. Vs. Gangabai & Ors.*** reported in 2009 (1) RCR (Civil) 383 to contend that the provisions of order 8 Rule 1 of the CPC are directory and not mandatory and that the procedural law needs to be operated upon to and that the Court ought not to diverse itself from doing justice inasmuch as a procedural law not ordinarily be construed as mandatory and that the procedural law is subservient is and is in aid to justice. Reliance has also been placed on behalf of the petitioner on the verdict of the Hon'ble Supreme Court in ***Kailash Vs. Nanhku & Ors.*** (2005) 4 SCC 480 to similar effect.

It is essential to observe that the process in the instant case was delivered at the address of the petitioner on 17.03.2017 and though not on his own son but on a nephew and taking the same into account

apparently that he was not specifically a family member, service was once again ordered to be effected and service was then effected on the son of the petitioner on 03.08.2017. As rightly observed by the learned trial Court vide the impugned order, the petitioner did not even specify as to what papers he was in fact searching for. A perusal of the application before the learned trial Court indicates that even the name of the son was not specified neither in the application under Section 114 of the CPC filed by the petitioner nor through the affidavit and in reply to a specific Court query, it has now been submitted by the petitioner that the petitioner has two sons.

On a consideration of the submissions that have been made on behalf of the petitioner, it is held that there is no merit in the prayer made by the petitioner.

However, the petitioner/ i.e. defendant to CS No.209/17 is entitled to put forth contentions qua legal issues.

The petition and the accompanying application CM APPL. 27848/2018 are both thus declined.

Nothing stated hereinabove shall however amount to any expression on the merits or demerits of the case.

Copy of this order be sent to the learned trial Court.

**ANU MALHOTRA, J**

**JULY 17, 2018**

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