

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

**WRIT PETITION NO. 6928 OF 2019**

Manoj Rajendra Gupta

vs.

Syd. Maqsoodali Syd. Sikandarali and another

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Office Notes, Office Memorandum of Coram,  
appearances, Court's orders of directions  
and Registrar's orders  
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Court's or Judge's orders

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Shri. A. A. Dhawas, learned counsel for the petitioner.  
Shri. D. R. Khapre, h/f. Shri. R. L. Khapre learned counsel for the  
respondent No.1

**CORAM : MANISH PITALE J.**

**DATED : 17/01/2020**

By this writ petition the original defendant has challenged order dated 02/04/2019, passed by the Court of Civil Judge Senior Division, Akot, Dist. Akola, whereby an application under Order 9, Rule 7 of the Civil Procedure Code (CPC) filed by the petitioner for setting aside an ex-parte order has been rejected.

2. The respondents (original plaintiffs) appeared in Court suo-motu and they were represented through counsel and therefore, this writ petition was heard finally.

3. The respondents filed a suit for recovery of amount of Rs.14,47,500/- against the petitioner in June 2017, in which summons were issued. The said

summons were served, as per the Bailiff Report, on the wife of the petitioner on 08/02/2018. Such a Bailiff Report is on record. Despite service of summons, the petitioner failed to appear before the Court and consequently on 18/03/2018, the Court below passed an order for the suit to proceed ex-parte against the petitioner. Thereafter, the respondents adduced their evidence in support of their claim in the suit and then on 26/04/2018, they filed pursis Exh.25 closing their evidence, after which the suit was fixed for final arguments.

4. At this stage on 24/08/2018, the petitioner filed an application under Order 9, Rule 7 of the CPC seeking setting aside the order dated 18/03/2018, whereby he was proceeded against ex-parte. The said application (Exh.20) has been rejected by the Court below by the impugned order date 02/04/2019.

5. Shri.A.A.Dhawas, learned counsel for the petitioner submitted that in the facts and circumstances of the present case, the Court below ought to have exercised jurisdiction under Order 9, Rule 7 of the CPC and that the order dated 18/03/2018, whereby the petitioner was proceeded against ex-parte, ought to have been set aside, in the interest of justice. It was submitted that although the summons were served on the wife of the petitioner, she did not inform the petitioner and that therefore, he was unaware about the same. The learned counsel for the petitioner submits that upon becoming

aware of the said proceeding, the petitioner moving the said application under Order 9, Rule 7 of the CPC on 24/08/2018.

6. It was submitted in the interest of justice, it would be appropriate that the dispute between the parties should be decided on merits and that therefore, the impugned order could be set aside and the petitioner could be granted an opportunity to file his written statement, in the interest of justice. It was submitted that under Section 151 of the CPC the Court below has powers to make such orders as may be necessary for securing the ends of justice or to prevent abuse of the process of the Court.

7. Shri. A. A. Dhawas learned counsel for the petitioner placed reliance on the judgment of the Hon'ble Supreme Court of India in the case of **Vijay Kumar Madan vs. R. N. Gupta, Technical Education Society 2002 (5) SCC 30.**

8. On the other hand, Shri. Digvijay Khapre, learned counsel appearing for the respondents, submitted that if the contentions raised on behalf of the petitioner were to be accepted, the requirement of Order 9, Rule 7 of the CPC would be rendered meaning less, because it was necessary for the petitioner to demonstrate that he had good cause for his previous non-appearance before the Court below. By inviting attention of this Court to the application filed on behalf

of the petitioner under Order 9, Rule 7 of the CPC, the learned counsel appearing for the respondents submitted that there was no pleading of any good or sufficient cause in the said application and that the same had been filed in a casual manner. It was submitted that the Court below had correctly appreciated the material on record to come to the conclusion that in the absence of bona fide and good cause shown by the petitioner, powers under Order 9, Rule 7 of the CPC, could not have been exercised. As regards imposition of appropriate condition for allowing the said application for his non-appearance, the learned counsel for the respondent No.1, placed reliance on judgment of the Hon'ble Supreme Court in the case of **Sangram Singh vs. Election Tribunal Kotah and anr.**, reported in **AIR 1955 SC 425** and judgment of Delhi High Court in the case of **Shri.Harinder singh vs. Shri. Kuldeep Singh**, reported in **2010 A I H C 3414**.

9. Heard learned counsel for the rival parties and perused the material on record. In the present case the main issue to be decided is, whether in the facts and circumstances of the present case, the petitioner has been able to show good cause for his previous non-appearance before the Court below, so as to demonstrate that the Court below erred in dismissing the application filed by the petitioner under Order 9, Rule 7 of the CPC for setting aside order dated 18/03/2018, whereby the Court below proceeded ex-parte against the petitioner.

10. In order to examine whether sufficient or good cause was made out by the petitioner, it would be necessary to peruse the application at Exh.20 filed on behalf of the petitioner. The relevant portion of the said application reads as follows :-

“1. That, the above said matter is before this Hon’ble Court. It is submitted that, the recently the above defendant learnt about the pendency of the present suit before this Hon’ble Court. As such the defendant engaged the counsel and made enquiry and got inspected the record of the present case and appeared promptly today.

2. Perusal of the record reveals that this Hon’ble Court has been pleased to proceeded exparte against the defendant relying on the relief Court. Thus the above defendant was aware of the present suit and such there was no occasion for him to appeared before the court due to bonafide reason on the fixed date does not matter could not have been proceeded exparte against the defendant.

3. In view of the above, immediately after getting the knowledge, the above defendant has appeared before this Court and is moving the exparte on dated 18/03/2018 passed by this Court below Exhibit – 1 against the defendant from the above it can be seen that, the defendant has made out good cause for set aside the expare order passed against the defendant. Even otherwise, the suit by the plaintiff is totally false. The valuable right of the above defendant is involved in the matter. The defendant is diligent

and wants to contest the matter by tooth and nail. Considering the above fact and circumstances, this Hon'ble Court may kindly be pleased to set aside the the exparte order passed against defendant below Exh.1 by allowing in the present application in the interest of justice and equity and fair trial of the proceeding great prejudice and great loss would be caused to the defendant in case exparte order passed against the defendant is not set aside. An affidavit is filed in support of the application.”

**11.** There is no dispute about the fact that the petitioner appeared before the Court below on 24/08/2018, when said application under Order 9, Rule 7 (Exh.20) was filed. There is also no doubt about the fact that summons were served in terms of the procedure recognized by law on the petitioner (defendant) on 08/02/2018. The contention raised on behalf of the petitioner that his wife did not inform him about the service of summons and therefore, he was unaware about the proceedings before the Court below, cannot be accepted, because in terms of the Rules pertaining to the service of summons under Order 5, Rule 15 of the CPC and in view of the Bombay amendment to the same, it is a recognized position in law and if the summons are served on an adult member of the family of the defendant, it is deemed that there is proper service on the defendant.

**12.** In the present case it is not disputed that summons were indeed served on the wife of the

petitioner as per the Bailiff Report dated 08/02/2018. In these circumstances, the petitioner was expected to show good and sufficient cause in the application filed at Exh.20, as to why despite service of summons on 08/02/2018, he failed to appear before the Court below leading to the order dated 18/03/2018, whereby he was proceeded against ex-parte.

**13.** A perusal of the above quoted portion of the application at Exh.20 filed on behalf of the petitioner shows that there is no cause, much less sufficient or good cause, shown by the petitioner for his non-appearance before the Court below. It is this aspect which has been emphasized by the Court below in the impugned order at paragraph 5, while rejecting the application Exh.20. The learned counsel appearing for the petitioner could not demonstrate as to how the findings rendered by the Court below in the face of the contents of the application Exh.20, could be said to be erroneous or unsustainable.

**14.** In this situation, learned counsel appearing for the petitioner submitted that the Court below could have exercised power under Section 151 of the CPC and that even this Court would exercise writ jurisdiction in the interest of justice to allow the application of the petitioner, by imposing suitable conditions regarding costs or other such terms.

**15.** In this regard, reliance was placed on the judgment of Hon'ble Supreme Court in the case of **Vijay**

**Kumar Madan vs. R. N. Gupta, Technical Education Society** (supra), particularly paragraph 7 thereof, wherein the Hon'ble Supreme Court has emphasized that a Court can impose reasonable conditions while exercising power under Order 9, Rule 7 of the CPC and that such conditions ought not to be of a nature where they would place the defendant in a situation worse off than what he would have been if he had not applied under Order 9, Rule 7 of CPC. In the facts of that case, the Hon'ble Supreme Court found the conditions imposed, while exercising power under Order 9, Rule 7 of the CPC were unreasonable. But, it is significant that in the said case, the Trial Court had found that the defendants had been able to assign good cause for previous non-appearance before the Court as their counsel met with an accident, due to which he could not appear before the Trial Court on a particular date. Having found sufficient and good cause made out by the defendants, the Court had imposed certain conditions which were then found to be unreasonable by the Hon'ble Supreme Court.

16. Therefore, it becomes clear that the question of imposing costs or other such terms on the defendant would arise only after the defendant has been able to show in the first place that he had good and sufficient cause for his previous absence in the proceedings. In the present case, there is not even a shred of material placed on record on behalf of the

petitioner to show good or sufficient cause for his previous non-appearance. In such circumstances, only by seeking to invoke sympathy of the Court, arguments were made by the learned counsel appearing on behalf of the petitioner to claim that the petitioner could be permitted to place his written statement on record, so that the dispute between the parties could be decided on merits. But, the contentions raised on behalf of the petitioner cannot be accepted, because this Court will first have come to a conclusion that the findings rendered by the Court below in the impugned order dated 02/04/2019, particularly in paragraph 5 thereof, are erroneous and unsustainable. It has to be found on the material on record in the form of said application filed under Section Order 9, Rule 7 of the CPC, on behalf of the petitioner, that sufficient or good cause was indeed made out by the petitioner for his previous non-appearance, so as to exercise power under Order 9, Rule 7 of the CPC. But, this Court is of the opinion that the petitioner has not been able to place any material on record to support the contention that good cause for his previous non-appearance was demonstrated.

17. It would be inappropriate to proceed on the basis that even when no such good cause was shown, the Court below under Section 151 of the CPC or this Court in writ jurisdiction could hold in favour of the petitioner, only to show sympathy or on the principle that the dispute between the parties ought to be decided on

merits. If the said approach is adopted, provisions like under Order 9, Rule 7 of CPC and other such requirements of law, would have no meaning.

**18.** In view of the above, it is found that the petitioner has not been able to make out a case in his favour. Accordingly, the writ petition is dismissed.

**JUDGE**