

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

WRIT PETITION NO. 1991 OF 2019

Harish Shishupalji Sawalkar

Vs.

Yavatmal Zilla Parishad Shikshak Sahakari Patsanstha, Darwha

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr. Abhijit Deshpande, Advocate for petitioner.

Mr. O.A. Ghare, Advocate for respondent.

CORAM : MANISH PITALE J.

DATE : 18.04.2022.

By this petition, the petitioner has challenged order dated 28.06.2018, passed by the Court of Joint Civil Judge Senior Division, Darwha, whereby an application filed Order 9 Rule 13 of the Code of Civil Procedure (CPC) has been allowed in favour of the respondent.

2. The petitioner filed a suit bearing Special Civil Suit No.17/2013, against the respondent seeking a decree of specific performance of agreement dated 27.04.2010, executed between the parties for sale of two pieces of land situated in Darwha, District Yavatmal. The suit summons, according to the petitioner, were duly served on the respondent. There was no appearance on

behalf of the respondent despite service of summons and accordingly, the trial Court proceeded with the matter and ultimately, by judgment and decree dated 19.08.2014, the suit was decreed in favour of the petitioner.

3. The respondent filed an application under Order 9 Rule 13 of the CPC claiming that the suit summons were not duly served on the respondent and that therefore, the application deserved to be allowed and an opportunity deserved to be granted to the respondent to contest the suit on merits.

4. This application was opposed on behalf of the petitioner. The parties led oral and documentary evidence in support of their respective stands. By the impugned order, the said application stood allowed. The Court below gave a finding that the suit summons were not duly served on the respondent as per the record available and considering the evidence led by the rival parties. On the basis of the said positive finding given in favour of the respondent, the application stood allowed.

5. Upon the petitioner approaching this Court by filing the present petition, notice was issued and interim stay was granted in favour of the petitioner.

Thereafter, during the pendency of the petition, Liquidator came to be appointed on the respondent-Society, due to which amendment of the cause title had to be carried out.

6. Pursuant thereto, learned counsel for the respondent filed Vakalatnama before this Court. A submission was made by the learned counsel who filed Vakalatnama on behalf of the respondent that in view of the appointment of the Liquidator and in terms of the provisions of the Maharashtra Co-operative Societies Act, 1960, there was a technical difficulty on the part of the counsel to appear in the matter as appropriate permission was required from the Competent Authority to contest the petition. This Court is not impressed with this submission and the petition is taken up for consideration.

7. Mr. Abhijit Deshpande, learned counsel appearing for the petitioner invited attention of this Court to the contents of the application filed under Order 9 Rule 13 of the CPC. Thereafter, attention of this Court was invited to the acknowledgment dated 21.12.2013, issued by the Office of the respondent-Society regarding receipt of suit summons. Emphasis was also placed on report of the Bailiff, which recorded

that suit summons were indeed served on the office of the respondent-Society on 21.12.2013.

8. Thereafter, learned counsel for the petitioner referred to the evidence on record, particularly the cross-examination of the witness who appeared on behalf of the respondent-Society. It was submitted that vital documents including registers of the relevant date were withheld from the Court and yet in the impugned order, a finding was rendered that the respondent-Society was not duly served with suit summons. On this basis, it was submitted that the impugned order deserved to be set aside.

9. On the other hand, Mr. Ghare, learned counsel appearing for the respondent submitted that the Court below had taken a reasonable view on the basis of the evidence and material on record. It was recorded that the Society had more than 2000 members and the implications of the *ex parte* decree were too serious to be ignored while considering the application under Order 9 Rule 13 of the Code of Civil Procedure. It was submitted that respondent-Society would have an opportunity to contest the matter on merits and since the Court below had taken a reasonable view in the matter, no interference was warranted.

10. This Court has heard the learned counsel for the rival parties and perused the material on record. The Court below was expected to reach satisfaction on the basis of the evidence and material on record that the suit summons were not duly served or that the respondent-Society was prevented by sufficient cause from appearing in the proceedings before the trial Court. In order to arrive at such satisfaction under Order 9 Rule 13 of the CPC, the Court was expected to give an opportunity to the rival parties to lead oral and documentary evidence on record and to issue necessary directions so as to come to a considered conclusion on the question as to whether the suit summons were duly served on the respondent-Society or not.

11. A perusal of the material on record shows that according to the respondent-Society, there were certain difficulties with the then President of the Society, due to which he was eventually removed and this was a contributory factor in the Society not being able to represent its cause before the trial Court in the suit for specific performance filed by the petitioner. The petitioner had specifically relied upon an acknowledgment issued by the office of the respondent-Society and report of the Bailiff to assert that on 21.12.2013, the suit summons were duly served and

that therefore, there was no substance in the contentions raised on behalf of the respondent.

12. A perusal of the material on record indeed shows signature and rubber stamp on the acknowledgment in question and the report of the Bailiff asserting that on 21.12.2013, the suit summons were duly served. It appears that the respondent-Society took a stand that the suit summons were not duly served. While supporting its contentions the Society placed oral and documentary evidence on record, but, a perusal of the cross-examination of the witness who deposed on behalf of the Society, shows that it was conceded that there were employees even though in temporary capacity who were engaged to receive documents on behalf of the Society. It was stated that although the register pertaining to outward and inward of the relevant dates was in existence, but admittedly a copy of the same was not placed on record. It is also relevant that the Court below recorded in its order dated 13.07.2017, that an administrator was appointed and yet unauthorized persons were conducting the affairs of the society. In this backdrop, by the said order the administrator was asked to remain present. Roznama produced on record does show that the said direction was not pursued by the Court below.

13. While considering such oral and documentary evidence on record, the Court below surprisingly noted that copies of the relevant muster rolls were not of much importance. This, despite the fact that in cross-examination the witness who appeared on behalf of the respondent-Society had conceded that such registers indeed existed, but they were not placed before the Court.

14. In view of such material on record, it was incumbent upon the Court below to have issued necessary directions to the parties for producing records in order to ascertain as to whether there was sufficient material to reach satisfaction that the suit summons were not duly served upon the respondent-Society as claimed in the application under Order 9 Rule 13 of the CPC. Instead of giving appropriate directions in the matter, the Court below proceeded to record the positive finding in paragraph 16 that record did not show that the respondent-Society was duly served with suit summons.

15. This Court is not satisfied with the nature of enquiry conducted and the reasoning given by the Court below, while allowing the application under Order 9 Rule 13 of the CPC filed on behalf of the respondent-

Society. A further enquiry to reach proper satisfaction was expected on the part of the Court below.

16. In view of the above, this Court is of the opinion that the writ petition deserves to be partly allowed and a direction is necessary in the facts and circumstances of the present case to the Court below to consider the application filed by respondent-Society after issuing appropriate directions or granting proper opportunity to the parties to lead detailed evidence in order to reach a considered conclusion regarding satisfaction about service or otherwise of the suit summons on the respondent-Society.

17. Accordingly, the writ petition is partly allowed. The impugned order is quashed and set aside. The Court below is directed to reconsider the application under Order 9 Rule 13 of the CPC filed on behalf of the respondent-Society.

18. The Court below shall grant opportunity to the rival parties to lead further evidence in the matter and it shall consider issuing appropriate direction for perusing the relevant records to reach its satisfaction regarding the suit summons having been duly served or not on the respondent-Society.

19. The Court below shall decide the matter expeditiously and in any case within a period of **six months** from today.

JUDGE

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