

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7829 OF 2022

Gautam Baban Shinde

... Petitioner

Versus

Baban Balu Shinde and Ors.

... Respondents

— —
Mr. Rahul S. Kadam for the Petitioner.
— —

CORAM : SHARMILA U. DESHMUKH, J.

DATE : August 4, 2023.

P. C. :

1. Heard.

2. The challenge in the petition is to the order dated 21st December, 2017 rejecting the petitioner's application to set aside the dismissal order dated 22nd July, 2023 as against the defendant no.9 under the provisions of Order IX Rule 5 of the Code of Civil Procedure, 1908.

3. Office noting indicates that the Respondent no.9, who is the contesting Respondent has been served, however, none appears for the Respondent no.9. Considering the limited controversy which is involved in the present proceedings, the petition is taken up for hearing.

4. The suit came to be dismissed as against the defendant no.9 under the provisions of Order IX Rule 5 of the CPC, as the summons was not served upon the defendant no.9 and no steps were taken by the Petitioner to complete the service of summons. The learned counsel appearing for the Petitioner submits that the rejection of the application is on the ground that the provisions of Order IX Rule 5 (2), provides an alternate remedy of filing fresh suit against the defendant. He submits that in exercise of inherent powers under Section 151 of the Code of Civil Procedure, 1908, the suit could have been restored. He draws support from the Full Bench decision of this Court in the case of ***Hariba Tatyaba More and others Vs. Dada Ekhatnath More and others***, reported in ***2019 (6) Mh.L.J. 511***.

5. Considered the submissions.

6. The facts which are narrated by the learned counsel for the Petitioner are not in dispute. Suit came to be dismissed against the Respondent no.9 under the provisions of Order IX Rule 5 of the CPC, which provides that 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 seven days from the date of the return made to the Court, to apply for the issue of a fresh

summons the Court shall make an order that the suit be dismissed as against such defendant.

7. In the present case, in the application seeking to set aside the order of dismissal, it is stated by the Petitioner that the summons had sought to be effected upon the defendant no.9 through the Court, within whose jurisdiction the defendant no.9 was residing and, as such, the plaintiff's Advocate was not aware of the report of the bailiff. It is further contended that subsequently due to ill-health he could not remain present.

8. Considering the averments made in the application, it cannot be said that the Petitioner has been grossly negligent in effecting the service upon the defendant no.9. The trial Court's order refuses to set aside the dismissal on the ground that the remedy is to file a fresh suit. The decision in the case of ***Hariba Tatyaba More*** cited supra, is squarely applicable to the present case, where this Court has held that there is no express prohibition in the Code for a suit dismissed under sub-rule (1) of Rule 5 of Order IX of the Code to be restored and in such a situation, the inherent powers under Section 151 of the CPC can be exercised to restore the suit.

9. In light of the law laid down by the Full Bench of this

Court, the refusal of the trial Court to exercise the jurisdiction warrants interference under Article 227 of the Constitution. In view of the explanation which has been provided in the application for non service summons upon the defendant no.9, the impugned order rejecting the application for setting aside the dismissal is hereby quashed and set aside.

10. By reason of impugned order being set aside the relief sought in the application for issuance of fresh summons to the defendant no.9 stands allowed. Writ Petition stands allowed.

(Sharmila U. Deshmukh, J.)