

Ajay

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

WRIT PETITION NO. 2542 OF 2017

~~Maruti Mahadu Auti~~

Since deceased Through Legal Heirs

Vijaya Maruti Auti and Ors.

.. Petitioners

Versus

~~Sayaji Mahadu Auti~~

Since deceased Through Legal Heirs

Deepak Sayaji Auti and Ors.

.. Respondents

-
- Mr. Vilas Tapkir, Advocate for Petitioners.
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CORAM : MILIND N. JADHAV, J.

DATE : JANUARY 25, 2024.

P.C.:

- 1.** Heard Mr. Tapkir, learned Advocate for Petitioners.
- 2.** Present Writ Petition takes exception to the impugned order dated 19.08.2016 which is at Exhibit “G” - page No.71 of the Writ Petition.
- 3.** By virtue of this order, Application filed below Exhibit “90” came to be dismissed. The Suit is filed in the year 2001.
- 4.** Precursor to file Application below Exhibit “90” was an order dated 27.06.2016 passed by the learned Trial Court. By this order, the learned Trial Court recorded that the Plaintiff and his Advocate were absent and they did not take any steps to serve the Suit Summons on

Defendant No.1A to 1E and hence the Suit would stand dismissed against Defendant Nos.1A to 1E under Order IX Rule 5 of the Code of Civil Procedure, 1908 (for short “CPC”).

5. Being aggrieved, Petitioner/Plaintiff filed Application below Exhibit “90” for setting aside the order as also to place on record the fact that Defendant Nos.1A to 1C were actually served and an Application for taking out fresh Summons was already preferred by the Petitioner/Plaintiff before the Trial Court. Without considering the Application and the case of the Plaintiff, the learned Trial Court upheld the order dated 27.06.2016 on the specious ground that the provisions of Order IX Rule 5 of the CPC did not provide any remedy for setting aside and restoration of the dismissed suit and rejected the Application.

6. Mr. Tapkir, learned Advocate for the Petitioners would submit that the impugned order as also the order dated 27.06.2016 are both passed without considering the facts in the present case and on a complete misinterpretation of the provisions of Order IX Rule 5 of the CPC. He would submit that since Defendant Nos.1A to 1E were not served and hence Application for issuance fresh Summons dated 19.01.2016 was filed by the Plaintiff before the Trial Court and that Application was pending on the date of passing of the order dated 27.06.2016. He would fairly submit that since no one appeared on

behalf of the Plaintiff, on that date the impugned order came to be passed. He would next submit that the Roznama dated 24.01.2013 which is appended at page No.56 of the Writ Petition clearly records that Defendant Nos.1D and 1E were already served and the proof of service of Summons on these Defendants has been taken on record below Exhibit “50”.

7. In view of the above, he would submit that the impugned order is bad in law and deserves to be quashed as also the order dated 27.06.2016.

8. I have perused the pleadings in the present case and with the able assistance of Mr. Tapkir, perused the Roznama which is appended to the Petition.

9. It is clearly seen that in so far as Defendant No.1D and 1E are concerned, they have been served and the learned Trial Court has accordingly confirmed and recorded about the service on them. Hence, in so far as these Defendants are concerned, the order dated 27.06.2016 and the impugned order dated 19.08.2016 both are bad in law and deserve to be quashed and set aside.

10. In so far as Defendant Nos.1A to 1C are concerned, Application for issuance as contemplated under the provisions of Order IX Rule 5 of the CPC is also placed on record. Copy of that Application is appended at Exhibit “D” - page No.31 of the Writ Petition and I have

perused the same. Application is dated 19.01.2016 and seeks leave of the Court to issue fresh Summons on the unserved Defendants in view of the issue pertaining to their correct address. The Application also mentions the addresses of the concerned Defendants.

11. In view of the above, without considering the Application which was already filed and placed on record as also the fact that the Defendant Nos.1D and 1E were already served as recorded by the Trial Court below Exhibit “50”, both the orders dated 27.06.2016 and 19.08.2016 are quashed and set aside. Resultantly, the learned Trial Court is directed to issue fresh Summons in so far as the unserved Defendant Nos.1A to 1C are concerned and determine the Application dated 19.01.2016 in accordance with law and proceed with the trial of the Suit as expeditiously as possible.

12. There is one more reason to set aside the impugned order. The learned Trial Court holds that against the order passed under Order IX Rule 5 of the CPC, there is no remedy available to the party to set aside the order or restore the dismissal of the Suit as directed by the Court. With regard to this, Mr. Tapkir has placed on record a decision of the Full Bench of this Court in the case of *Hariba Tatyaba More (died) through L.Rs. And Ors. Vs. Dada Ekhatnath More and Ors.*¹ and would contend that the Full Bench of this Court has while answering the Reference with respect to interpretation of Sub Rule (1)

¹ WP No.896 of 2007 decided on 16.10.2019.

of Rule 5 of Order IX of the CPC held that in view of the provisions of Section 151 of the CPC, inherent powers can be exercised expressly or impliedly when the legislature has made no provisions for the consequences of a default.

13. The Full Bench Judgment holds that there is no express provision in the CPC for a Suit dismissed under the provisions of sub rule (1) of Rule 5 Order IX of the CPC to be restored but goes on to state that in such a situation inherent power under Section 151 of the CPC would be available.

14. In view of the above decision, the reasons given by the learned Trial Court while dismissing the Application filed below Exhibit “90” which is the impugned in the present Writ Petition cannot be sustained and hence the impugned order is quashed and set aside.

15. With the above directions, Writ Petition is allowed and disposed.

[MILIND N. JADHAV, J.]

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by AJAY
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