

	RCS No. 43/2019
	<i>Shailaja Vs. Ramchandra and others</i>
	CNR No. MHSI080006512019

Order below Exh. 49

1. This is an application filed by the plaintiffs under Section 148 and 151 read with Order 9 Rule 5(1)(c) of the Civil Procedure Code for setting aside dismissal of suit against the defendant No.2 and 8 and for extension of time for service of summons to the said defendants. Perused, application, say of defendants and entire record. Heard, the learned counsel for plaintiff and learned counsel for defendant No. 4 to 6.

2. Before switching over to the averments and contentions of the parties, it is necessary to have a bird eye view of the factual circumstances of the matter. This suit is instituted for the relief of partition and separate possession in respect of suit properties against the defendants. It is averred by the plaintiffs that the present suit was posted for service of summons to the defendants. However, due to Covid-19 pandemic and illness of plaintiffs it was become impossible for the plaintiffs to take necessary steps in the suit. Thereafter, on 06.12.2023, this Court has dismissed the suit against defendant No.2 and 8 for default of the plaintiff. Therefore, it is necessary for the plaintiff to serve suit summons to the said defendant No.2 and 8. Therefore, plaintiff prayed for setting aside order of dismissal of suit against the defendant No.2 and 8. He also prayed for extension of time for service of suit summons to the said defendants.

3. Per contra, learned counsel for defendant No. 4 to 6 filed

their say at Exh.51 and thereby strongly opposed the present application. He contended that dismissal of suit cannot be set aside. The provision contained in Order 9 Rule 5(1)(c) of the Civil Procedure Code is not applicable to the case in hand. The reasons mentioned in the applicable are not justifiable. He further submitted that application is not tenable and plaintiff has to institute fresh suit.

4. The learned counsel for the plaintiff invited my attention towards the following judgments. I have gone through the said judgments. All these judgments are relating to extension of time under Section 148 of the Civil Procedure Code.

- A. *Nashik Municipal Corporation ..vs.. R.M. Bhandari & Anr., reported in 2016 AIR (SC) 1090.*
- B. *Sumita Arvinda Apte & Anr ..vs.. Ajay Pandhurang Potdar, reported in 2006 (2) Mh.L.J. 509.*
- C. *Subhash Ganpat Charwande and Others ..vs.. Ambarsingh Kanhiram Charwande, reported in 2021 DGLS (Bom.) 410.*
- D. *Nitin ..vs.. Waman and Others, reported in 2022 DGLS (Bom.) 1268.*

5. The record shows that this suit is instituted for the relief of partition, separate possession and perpetual injunction in respect of the suit properties. It transpires from the record that this suit is proceeded *exparte* against the defendant No.1, 3 and 7. The defendant No.4 to 6 have failed to file their written statement on record. The suit summons were issued to the defendant No.2 and 8. However, they are returned unserved. Thereafter, the plaintiffs have failed to take necessary steps for service of summons to defendant No.2 and 8. Consequently, this suit is dismissed by the order below Exh.1 dated 06.12.2021 passed by

my learned predecessor.

6. This suit is dismissed under Order 9 Rule 2 of the Civil Procedure Code against the defendant No.2 and 8 due to non serving of summons in consequence of plaintiffs to take necessary steps. As per Order 9 Rule 4 of the Civil Procedure Code, dismissal of the suit can be set aside, if the plaintiff satisfies the Court that there was sufficient cause for such failure as is referred to in Rule 2, or for his non-appearance, as the case may be. As per Order 9 Rule 5(c) of the Civil Procedure Code the Court may extend the time for making application for issuance of fresh summons to the defendant. In the case in hand, suit is already dismissed against defendant No.2 and 8. Consequently, the provision contained in Order 9 Rule 5(c) of the Civil Procedure Code is not applicable in the case in hand.

7. It prima facie appears from the record that the defendant No.2 and 8 are the necessary parties to the suit. It is submitted by plaintiff that due to *Covid-19 pandemic* and illness of plaintiffs it was become impossible for the plaintiffs to take necessary steps in the suit. They have failed to contact their learned counsel. Therefore, in my considered opinion, plaintiffs were precluded from appearance and taking necessary steps for service of summons to defendant No.2 and 8, due to sufficient reason. It goes without saying that it is in the interest of the State that every litigation should attain its finality as per the Law, as early as possible. Considering nature of the suit and relief prayed for, it will cause great injustice to the parties if the dismissal of the suit is not set aside, as the aggrieved party may put the other in fresh round of litigation.

8. Thus, the conspectus of the above discussion is that, the application at Exh. 49 deserves to be allowed, in the interest of justice. Hence, I pass following order -

ORDER

1.	The application Exh.49 is hereby allowed.
2.	The dismissal of suit against defendant No.2 and 8 is hereby set aside.
3.	Issue fresh suit summons to defendant No.2 and 8.

Dated : 15.03.2023

(T.H.Shaikh)
Civil Judge Junior Division,
Kankavli.