

(2009) 09 JH CK 0006
Jharkhand High Court
Case No: None

Karmi Devi		APPELLANT
	Vs	
Satendra Kumar Singh and Another		RESPONDENT

Date of Decision: Sept. 14, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 1, Order 9 Rule 13, Order 9 Rule 2, Order 9 Rule 3, Order 9 Rule 4

Citation: (2010) ACJ 1661 : (2011) 2 TAC 192

Hon'ble Judges: M.Y. Eqbal, J; Jaya Roy, J

Bench: Division Bench

Final Decision: Allowed

Judgement

M.Y. Eqbal and Jaya Roy, JJ.

This appeal is directed against the judgment and order dated 17.8.2007 passed by the Motor Accidents Claims Tribunal, Ranchi in Compensation Case No. 95 of 2005, whereby he has dismissed the claim case as being not maintainable and is barred by the principle of res judicata.

2. The facts of the case lie in a narrow compass.

The claimant-appellant earlier filed a compensation case being Compensation Case No. 205 of 1996 for grant of compensation on account of death of the deceased in a motor vehicle accident. The said claim case was dismissed in default and thereafter the claimant filed an application for restoration of Compensation Case No. 205 of 1996, which was registered as Miscellaneous Case No. 2 of 2002. In the said restoration application the claimant was required to remove certain defects but for non-compliance, the restoration application was also dismissed for default. The claimant-appellant, thereafter, filed a fresh application claiming compensation, which was registered as Compensation Case No. 95 of 2005. The said claim

application was opposed by the respondents raising the preliminary objection with regard to maintainability of the Compensation Case No. 95 of 2005.

3. Claims Tribunal, after hearing the parties, allowed the preliminary objection and held that the subsequent compensation case is not maintainable and is barred by res judicata. The Tribunal although held that Order 9, CPC (for short "C.P.C.") shall be applicable relating to claim case but dismissed the Compensation Case No. 205 of 1996 for non-filing of court-fee stamp. The Tribunal further noticed that the restoration application was filed under Order 9, Rule 4, C.P.C., which was dismissed for default. However, the Tribunal held that in the aforesaid premises a second claim case cannot be filed and the same is hit by the principle of res judicata.

4. We have heard Mr. Rajiv Anand, the learned Counsel appearing for the appellant and Mr. H.K. Singh, learned Counsel appearing for the insurance company.

5. In the background of the facts of the case, the important questions that fall for consideration are:

(i) Whether after the dismissal of the petition for restoration of suit under Order 9, Rule 4, C.P.C. a fresh suit is maintainable?

(ii) Whether after dismissal of the suit for default, a fresh suit is barred by res judicata?

6. Before answering question No. (i), I would first like to discuss the procedures provided under Order 9 of the Code of Civil Procedure.

7. Order 9 of the Code of Civil Procedure, 1908, deals with the procedure of appearance of parties and consequence of non-appearance. Rule 1 provides that on the day fixed in the summons for the appearance of the defendant, the parties shall be in attendance either in person or by their respective pleaders and the suit shall be heard. Rule 2 confers power to the court to dismiss the suit if it is found, on the date so fixed, summons could not be served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges. Rule 3 also confers power to the court to dismiss the suit when on the date so fixed the case is called on for hearing, neither party appears. In the aforesaid two circumstances where the suit is dismissed either for non-payment of court-fee or postal charges by the plaintiff or because of non-appearance of both the parties when the suit is called on for hearing, the remedy has been provided under Rule 4 of Order 9, C.P.C.

8. The power to dismiss the suit has also been provided in Rule 8 of Order 9, C.P.C. As per Rule 8 of Order 9, C.P.C, the court shall dismiss the suit when on the date fixed for hearing, the suit is called out, the defendant appears but the plaintiff does not appear, unless the defendant admits the claim, if the suit is dismissed under Rule 8, Order 9, C.P.C, the remedy provided after such dismissal is under Rule 9 of Order 9, C.P.C.

9. For better appreciation, Rules 4 and 9 of Order 9, C.P.C., are quoted below:

4. Plaintiff may bring fresh suit or court may restore suit to file.-Where a suit is dismissed under Rule 2 or Rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he 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, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

9. Decree against plaintiff by default bars fresh suit.-(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

10. The basic difference between the two provisions, i.e., Rule 4 and Rule 9 of Order 9, C.P.C. is that in the case where the suit is dismissed under Rule 2 or Rule 3 of Order 9, the remedy provided is under Rule 4 of Order 9, C.P.C. In case of such dismissal, the plaintiff either brings a fresh suit on the same cause of action or he may apply for setting aside the order of dismissal and for restoration of suit. Whereas if the suit is dismissed under Rule 8 of Order 9, C.P.C, the plaintiff cannot bring a fresh suit on the same cause of action. The only remedy available to the plaintiff is to move an application for setting aside the order of dismissal and for restoration of suit.

11. From bare reading of the aforesaid two provisions, i.e., Rule 4 and Rule 9 of Order 9, C.P.C, it is manifestly clear that under Rule 4 of Order 9, C.P.C, the legislature in express terms has not precluded the plaintiff from filing a fresh suit on the same cause of action in the event suit is dismissed under Rule 2 or Rule 3 of Order 9, C.P.C, whereas Rule 9 of Order 9 debars the plaintiff from filing a fresh suit in a case where the suit is dismissed under Rule 8 of Order 9, C.P.C. The only remedy provided for such dismissal is to file an application under Rule 9 of Order 9, C.P.C, for restoration of suit.

12. In the case of [Govind Prasad Vs. Har Kishen and Others](#), , a similar question arose for consideration as to the maintainability of the second suit. In that case, the suit filed by the plaintiff was dismissed under Order 9, Rule 3 of C.P.C, in consequence of neither party having appeared when the suit was called for hearing. The plaintiff-appellant tried to have the suit restored but the restoration application was dismissed. The plaintiff then brought a new suit upon the same cause of action. The learned Judge dismissed the suit holding that the same is not maintainable. In

the civil revision filed before Allahabad High Court, his Lordship Weir, J., following the earlier decision 39 IC 191 and 63 IC 239, set aside the order of dismissal of suit and held that a fresh suit on the same cause of action is maintainable.

13. In the case of [Mt. Balkesia and Others Vs. Mahant Bhagwan Gir and Others](#), a similar question came for consideration before a Division Bench of Patna High Court. In that case also taking the similar view his Lordship James, J. observed:

Mr. Khurshaid Husnain argues, in the second place, that the present suit should be regarded as barred by reason of the provisions of Order 9, Rule 4. Order 9, Rule 4, provides that where a suit is dismissed under Rule 2, or Rule 3, the plaintiff may bring a fresh suit, or he may apply for an order to set the dismissal aside. Mr. Khurshaid Husnain argues that these two provisions are mutually exclusive, so that if the plaintiff elects to avail himself of his right to apply to have the order of dismissal set aside, he is thereby precluded from availing himself of the right to institute a fresh suit. The only decisions in point which have been brought to our notice by Mr. Khurshaid Husnain are adverse to this argument: 63 IC 239 of Stuart, J. [Tulshi Singh and Another Vs. Sheosaran Rai and Others](#), of Daniels, J. and 50 All 837 of Weir, J., all of Allahabad High Court. In all these cases it has been held that the alternative provisions of Rule 4 are not mutually exclusive, and that a plaintiff whose application for a restoration of his suit has been dismissed is not precluded from instituting a fresh suit. I do not consider that any ground has been made out which justifies us in differing from the view expressed by the learned Judges whom I have named. It appears to us that a reasonable reading of the rule provides that the plaintiff may bring a fresh suit or he may apply for setting aside the dismissal. If he satisfies the court and obtains an order setting aside the dismissal, he proceeds with his original suit. If having applied for an order to set aside the order of dismissal, he fails to satisfy the court and his application is dismissed, he is left to his alternative remedy which is that he may, subject to the law of limitation, bring a fresh suit.

14. Agreeing with the view his Lordship Rowland, J. has observed:

Rowland, J.-I agree. With reference to the argument that the dismissal of a suit under Order 9, Rule 3, Civil Procedure Code, may, coupled with the dismissal of an application for rehearing, operate to preclude the plaintiff from suing again on the same cause of action, I would like to add a few words. It seems to me that Section 9, Civil Procedure Code, is fatal to the appellants' argument. This section declares that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. That is subject to such provisions as those of Section 11 which bars suits on matters already judiciously decided between the parties or of Order 9, Rule 9, which precludes a plaintiff from suing again on the same cause of action where his suit has been dismissed under Rule 8, that is to say on appearance of the defendant and in the absence of the plaintiff. In the absence of some such provision as that with which Order 9, Rule 9 commences, a dismissal under Order 9, Rule 3 would still, in my opinion, not

operate to preclude the plaintiff from suing again even if Order 9, Rule 4 did not expressly save his right of suit. Rule 4 in effect does not create but declares the right of bringing a fresh suit while at the same time permitting the plaintiff in the alternative to proceed with his original suit. The former option the plaintiff has as of right; the other option is available to him only if he can satisfy the court that he had sufficient cause for non-appearance or other default which led to the dismissal of the suit. On the other points I have nothing to add.

15. In the light of the provisions contained in Order 9 and the law discussed hereinabove, it can be safely concluded that in case of dismissal of suit under Order 9, Rule 4, C.P.C. the plaintiff has both the remedies of filing of fresh suit or application for restoration of the suit. If he chooses one remedy he is not debarred from availing himself of the other remedy. Both these remedies are simultaneous and would not exclude either of them.

16. The next question, i.e., question No. (ii), that falls for consideration is as to whether after dismissal of suit in default under Rule 2 and Rule 3 of Order 9, C.P.C, a fresh suit is barred by the principle of res judicata.

17. The principle of res judicata is based on the common law maxim *nemo debet bis vexari pro una et eadem causa*, which means that no man shall be vexed twice over the same cause of action. It is a doctrine applied to give finality to a lis. According to this doctrine, an issue or a point once decided and attains finality, should not be allowed to be reopened and re-agitated in a subsequent suit. In other words, if an issue involved in a suit is finally adjudicated by a court of competent jurisdiction, the same issue in a subsequent suit cannot be allowed to be re-agitated. It is, therefore, clear that for the application of principle of res judicata, there must be an adjudication of an issue in a suit by a court of competent jurisdiction.

18. The term "judgment" has been defined in Section 2(9) of the CPC which means a statement given by a Judge on the grounds of a decree or order.

19. The term "decree" has been defined u/s 2(2) of the CPC which reads as under:

(2) "Decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include:

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

20. From a plain reading of the term "decree", it is manifestly clear that to constitute a decree, there must be a formal expression of an adjudication which conclusively determines the right of the parties with regard to all or any of the matters in

controversy in the suit, but the decree shall not include any adjudication from which an appeal lies as an appeal from an order or any order of dismissal for default. It is, therefore, evidently clear that a dismissal of a suit or application for default particularly under Rule 2 or Rule 3 of Order 9, C.P.C., is not the formal expression of an adjudication upon any right claimed or the defence set up in a suit. An order of dismissal of a suit or application in default is also not appealable order as provided under Order 43 of the Code of Civil Procedure. If we read Order 43, C.P.C., we will find that orders passed under Order 9, Rule 9, C.P.C. or Order 9, Rule 13, C.P.C., are made appealable but an order passed under Order 9, Rule 4, C.P.C. is not appealable. It is, therefore, clear that an order of dismissal of a suit or application in default under Rule 2 or Rule 3 of Order 9, C.P.C, is neither an adjudication or a decree nor it is an appealable order. If that is so, such order of dismissal of a suit under Rule 2 or Rule 3 of Order 9, C.P.C, does not fulfil the requirement of the term "judgment" or "decree", inasmuch as there is no adjudication. In my considered opinion, therefore, if a fresh suit is filed, then such an order of dismissal cannot and shall not operate as res judicata.

21. Having regard to the points decided hereinbefore, the impugned order passed by the court below is absolutely erroneous in law and is, therefore, set aside. This appeal is, therefore, allowed and the matter is remanded to the Tribunal with a direction to hear and decide the compensation case on merit.