

## Pampanna and Others Vs Bheemanna

**Court:** KARNATAKA HIGH COURT (DHARWAD BENCH)

**Date of Decision:** March 16, 2016

**Acts Referred:** Civil Procedure Code, 1908 (CPC) - Order 14 Rule 14, Order 14 Rule 2, Order 14 Rule 2(2), Order 43 Rule 1(d), Order 6 Rule 4, Order 9 Rule 13, Order 9 Rule 9, Section 24

**Hon'ble Judges:** P.S. Dinesh Kumar, J.

**Bench:** Single Bench

**Advocate:** V. Vidya, Advocate, for the Appellant; Gode Nagaraj, Advocate, for the Respondent

**Final Decision:** Allowed

### Judgement

P.S. Dinesh Kumar, J.

1. Though this matter is listed for admission, with consent of both learned counsel, it is taken up for final disposal.

2. This second appeal is directed against the judgment and decree dated 5.7.2014, in R.A. No. 130/2013, on the file of II Addl. Senior Civil

Judge, Ballari.

3. Heard Smt. V. Vidya Iyer, learned counsel for the appellant and Sri Gode Nagaraja, learned counsel for the respondent/caveator.

4. Respondent had instituted a suit in O.S. No. 132/2010 for declaration and injunction in respect of agricultural property measuring 2 acres 54

cents in Sy. No. 227/A of Gosbal village, Siraguppa taluk. The said suit was decreed by judgment and decree dated 9.9.2011. The appellant

presented Miscellaneous Petition No. 10/2011 under Order 9 Rule 13 of CPC. The said petition was dismissed, vide order dated 6.12.2012, on

the ground of delay. The said order was challenged in Miscellaneous Appeal No. 2/2013 and the same is pending adjudication on the file of II

Addl. Senior Civil Judge, Ballari. During pendency of the Misc. Appeal, the appellant instituted another suit in O.S. No. 79/2013 with a prayer to

set aside the judgment and decree in O.S. No. 132/2010 and other consequential reliefs. This suit was resisted by filing written statement. The trial

Court, after framing issues, took up issue No. 5 as a preliminary issue and decided the same by an order dated 3.12.2013 and held that the suit

was not maintainable in view of the bar contained in Order 43 Rule 1(d) of CPC. Consequently the suit was dismissed. The said judgment and

decree was challenged before the lower appellate Court in R.A. No. 130/2013. By the impugned judgment and decree, the lower appellate Court

has allowed the said appeal with costs and remanded the matter to the trial Court for fresh disposal on all issues on merit. Hence, this appeal.

5. Smt. V. Vidya Iyer, learned counsel appearing for the appellant contended that the lower appellate Court misdirected itself in coming to a

conclusion that the suit was maintainable, even though the respondent had opted to file a Miscellaneous Petition under Order 9 Rule 13 of CPC

and pursuing further proceedings subsequent thereto. According to her, the petitioner could not have instituted suit in O.S. No. 79/2013 when

M.A. No. 2/2013 is still pending adjudication. On this solitary ground she prays for allowing this appeal.

6. Per contra, Sri Gode Nagaraja, learned counsel appearing for the respondent strongly supporting the judgment of the lower appellate Court

submitted as follows:

(a) That the appellant had obtained the judgment and decree in O.S. No. 132/2010 by playing fraud;

(b) Under Order 14 Rule 2 of CPC, a Court is required to pronounce judgment on all issues. In the instant case, the trial Court has taken up and

answered only issue No. 5 and the same runs counter to the intent and purport of Order 14 Rule 2 of CPC and the same has been rightly rectified

by the lower appellate Court. Therefore there is no error in law requiring interference in this appeal;

(c) That under Order 6 Rule 4 of CPC particulars are required to be given in a suit. He contended that in the instant suit fraud has been played by

the appellants in obtaining the decree and therefore, the Court ought not to have decided the suit without the parties adducing evidence;

7. He placed reliance on the judgment of Hon"ble Supreme Court in the case of Mahesh Yadav and another v. Rajeshwar Singh and others,

reported in , (2009) 2 SCC 205 and adverted to head note and paragraph Nos. 15 and 16 of the said judgment and contended that the

respondent, who had suffered a judgment and decree in O.S. No. 132/2010 had an option to exercise either to file a Miscellaneous Petition under

Order 9 Rule 13 of CPC or a separate suit. Further, he contended that a plain reading of the said paragraphs make it clear that the respondent can

choose both remedies simultaneously which he has rightly done so.

8. He also placed reliance on the judgment of a Division Bench of this Court in the case of Abdul Rasheed and others v. Smt. Huligemma and

others, reported in , 2011 (1) KCCR 660 (DB). He referred to paragraph No. 4 of the said judgment and contended that the trial Court was not

justified in treating issue No. 5 as a preliminary issue.

9. The trial Court has answered issue No. 5 only and dismissed the suit as not maintainable. The lower appellate Court has framed following three

points for its consideration

(i) Whether the trial Court has justified in dismissing the suit on giving findings on preliminary issues?

(ii) Whether the order passed by the trial Court needs to be interfered? If so, to what extent?

(iii) To what relief and decree the parties are entitled?

10. It answered the first point in the negative and second point in the affirmative. Reasons recorded by the lower appellate Court to reverse the

judgment of the trial Court is that when a party in a suit alleges fraud, the same has to be proved by him by adducing cogent evidence. In a

Miscellaneous Appeal, the said question of fraud cannot be raised as the purview is limited and a full fledged trial is required to prove the alleged

fraud. On this line of reasoning, the lower appellate Court has allowed the appeal.

11. In the light of pleadings and rival contentions urged before Court, the point that falls for consideration is whether the respondent could have

initiated two parallel proceedings, i.e., one under Order 9 Rule 13 of CPC and other by filing a separate suit simultaneously?

12. Learned counsel for the respondent has strongly relied on Order 14 Rule 2 of CPC, to contend that the Court is required to pronounce

judgment on all issues. Order XIV Rule 2 of CPC reads as follows:

2. Court to pronounce judgment on all issues--(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject

to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on

an issue of law only, it may try that issue first if that issue relates to--

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other

issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

13. It is to be noted that Order XIV Rule 2(2) of Code of Civil Procedure permits a Court to decide an issue of law first. The question before the

trial Court in the instant case was the maintainability of the second suit when the respondent-defendant had filed a Miscellaneous Petition under

Order 9 Rule 13 of CPC for setting aside the judgment. The said Miscellaneous Petition having been dismissed on the ground of delay, the

respondent had pursued it further by filing a Miscellaneous Appeal in 2013. Thus, the respondent was pursuing one of the remedies open to him

and half way through he digressed and filed the instant suit. Therefore in my view, the submission that Court is required to answer all issues under

Order XIV Rule 2 is saved by Order XIV Rule 2(2) which permits the Court to first decide an issue touching upon question of law. Hence this

ground does not lead the case of the respondent any further.

14. The respondent has placed reliance on paragraph No. 4 of the judgment in the case of Abdul Rasheed (supra) and the same reads as follows:

4. The plaintiffs/appellants, have admitted in the plaint the fact of filing of O.S. No. 61/1973 in Munsiff Court, Gangavathi against Hulugappa, for

the title and possession. The said Court held that, it has no pecuniary jurisdiction and returned the plaint, on account of which, plaint was

withdrawn and refiled in the Court of Civil Judge (Sr.Dn.), Raichur and was numbered as O.S. 30/1976 which was transferred to the Court of

Civil Judge (Sr.Dn.), Koppal on its establishment, wherein it was registered as O.S. No. 12/1978. On a petition being filed under Section 24

CPC, the suit was withdrawn and transferred to the Court of Civil Judge (Sr.Dn.), Raichur and was numbered as O.S. 91/1980. On the

establishment of a new District i.e., Koppal, the suit was transferred to the Civil Judge Court at Koppal, wherein it was registered as O.S.

151/1985 and the same was dismissed for non prosecution on 20.08.1986. Plaintiffs filed restoration petition under Order 9, Rule 9 CPC which

was registered as Misc. Case 99/1986 on the file of Civil Judge (Sr.Dn.), Koppal. Restoration petition as dismissed as not pressed, allegedly on

account of subsequent events as narrated in para 8 of the plaint.

15. In the above case, Division bench of this Court has dealt with Order 14 and held in above terms. However it is to be noted that issues No. 10

to 12 which were subject matter in the said case, were not pure questions of law and did not fall under Rule 2(2) of order 14 of CPC. In contrast,

in the instant case, the question of law is as to whether parallel remedies could have been exercised by the respondent. Hence, on facts, the

judgment relied upon by the respondent, is not applicable in this case.

16. The paragraphs No. 15 and 16 in the judgment of the Hon"ble Supreme court in the case of Mahesh Yadav (supra), relied upon by the

learned counsel for the respondent read as follows:

15. The proviso appended to Order 9 Rule 13 of the Code of Civil Procedure postulates that when an ex parte decree has been passed against

some of the defendants and it is necessary to set aside the entire decree, the Court is not powerless to do so. If an application for setting aside the

ex parte decree was maintainable at the instance of the appellants, we fail to understand as to why a separate suit was required to be filed. When

an ex parte decree is passed, the defendant may have more than one remedy. He may file a suit contending that the decree was obtained

fraudulently. He may file an application under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree. He may prefer

an appeal from the ex parte judgment and decree. In a given case, he may also file a review application.

16. In *Bhanu Kumar Jain v. Archana Kumar* this Court held: (SCC p. 797, para 26)

26. When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the

ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule

13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex

parte decree passed by the trial court merges with the order passed by the appellate court, having regard to

Explanation appended to Order 9

Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does

not suggest that the converse is also true.

It was, however, observed: (SCC p.797, para 28)

28. It is true that although there may not be a statutory bar to avail two remedies simultaneously and an appeal as also an application for setting

aside the ex parte decree can be filed; one after the other; on the ground of public policy the right of appeal conferred upon a suitor under a

provision of statute cannot be taken away if the same is not in derogation or contrary to any other statutory provisions.

17. A plain reading of the above extracted portion of the judgment indicates that the defendant who had more than one remedy, could exercise the

same by either filing a suit contending that the decree was obtained fraudulently or by filing an application under Order 9 Rule 13 of CPC for

setting aside ex parte decree.

18. As noted hereinabove, the incontrovertible fact in this case is that the respondent had exercised his option of filing a Miscellaneous Petition

under Order 9 Rule 13 of CPC. Upon its dismissal, on 6.1.2012 on the ground of delay, he pursued it further by filing Miscellaneous Appeal No.

2/2013 and the same is said to be pending as on date. Having exercised one of the remedies of filing a suit, in my considered view the respondent

could not have instituted another suit in O.S. No. 79/2013 during pendency of Misc. Appeal No. 2/2013. In case two divergent views emerge in

Misc. Appeal and the instant suit, it would lead to absurdity. Thus, in my view, a defendant in a suit cannot avail of both remedies namely filing an

application under Order IX Rule 13 of CPC and also to institute a separate suit simultaneously. In the circumstances, no exception can be taken to

the judgment and decree passed by the trial Court. Consequently the judgment and decree of the lower appellate Court deserves to be set aside.

19. In the result, the appeal merits consideration and is accordingly allowed. The judgment and decree of the lower appellate Court is set aside

restoring the judgment of the trial Court. No costs.