(1974) 07 BOM CK 0015

Bombay High Court (Nagpur Bench)

Case No: Appeal No. 251 of 1972

Venutai Motiram Ghongde		APPELLANT
	Vs	
Sadashiv Parashramji and two others		RESPONDENT

Date of Decision: July 18, 1974

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 20, 98, 99

Citation: (1974) MhLj 951

Hon'ble Judges: B.A. Masodkar, J

Bench: Single Bench

Advocate: J.N. Chandurkar, for the Appellant; G.G. Loney, for the Respondent

Final Decision: Allowed

Judgement

B.A. Masodkar, J.
The present appeal has been filed by the original plaintiff, whose suit has been held to be barred by the provisions of Order 9, rule 9, Civil Procedure Code.

2. The present plaintiff filed a suit for declaration on the basis of a title and seeking possession of field Survey No. 217/2, situated at Mouza Yeoli, district Amravati. She alleged that defendant No. 1, one Sadasheo, had practised fraud on her and made her sign a general power of attorney in his own favour which included power to transfer her property too. Accordingly, power of attorney was got executed from her on December 15, 1959. She further alleged that acting under the said fraudulent power of attorney, defendant No. 1 purported to execute a sale deed on January 12, 1960 in favour of defendant No. 2, one Bhaskar Bobde. It is her case that these two defendants further purported to lease the suit field to defendant No 3, who was real brother of defendant No. 1, under an alleged registered lease deed of July 19, 1960. She asserted, therefore, that her title was never lost and the defendant No. 3 was not the lessee of the field but was in Unauthorised occupation thereof. Amongst

other things, she claimed declarations as to her title and also a decree against defendant No. 3, for possession with consequential reliefs of mesne profits. To the claim in suit, all the defendants raised different pleadings including the plea that the present suit was barred under Order 9, rule 9, Civil Procedure Code, because of the earlier suit of the plaintiff based on the same cause of action being Regular Civil Suit No. 385 of 1961 having been dismissed on 7-3-1967. There were other issues including the issue of tenancy.

3. The first Court found in favour of the plaintiff holding that the earlier dismissal of the suit did not Ensure for the benefit of defendant No. 3. Accordingly, declaration was granted so also a decree for possession was made against defendant No. 3.

4. When the matter went before the appellate Court at the instance of defendant No. 3, the only issue that was agitated, as can be seen from the judgment under appeal, is the bar set up because of the provisions of Order 9, rule 9, to the tenability of the suit filed by the present plaintiff. The learned appellate Court found that the cause of action in the previous suit, i.e. Civil Suit No. 385/61 and the present suit, was the same. He further found that the dismissal of that suit on 7-3-1967 operated as total bar against the plaintiff in maintaining the present suit. In that view of the matter, the learned Judge allowed the appeal and dismissed the suit.

5. It is not in dispute that the earlier suit i.e. Civil Suit No. 335/61, was dismissed on 7-3-67 by the following Order:-

The plaintiff absent today inspite of the fact that the suit is fixed for hearing. The counsel is also absent. Suit is dismissed. Defendant No. 1 alone present. Plaintiff to pay costs of defendant No. 1 only.

It is not in dispute that to that earlier suit present defendant No. 2 and defendant No. 3 were also defendant-parties respectively. It cannot be disputed that on the date when the dismissal of that suit occurred, neither defendant No. 2 nor defendant No. 3 was present. Thus as a fact the suit was dismissed in the presence of defendant No. 1 and in the absence of defendants Nos. 2 and 3 who were arrayed in the same manner as in the present suit.

6. The learned Judge has found upon the cause of action that the present suit and the earlier suit is based on the same and identical cause of action. That reasoning has been reached after quoting the paragraphs from the respective plaints of both the suits. It is doubtful whether such a reasoning would be available, for it is obvious that the plaintiff was filing the suit against a trespasser alleging that his possession every day was wrongful. It may be possible to answer that the period after the dismissal of that suit, though the material facts may be identical, would furnish an additional cause of action that could be agitated by such a plaintiff in the present suit. However, leaving that part of the controversy and even on the assumption that both these suits were based on the same and identical cause of action, as is found by the learned Judge, the question that is submitted for decision in this appeal by

the learned counsel is whether the bar contemplated by Order 9, rule 9, of the Code of Civil Procedure, operated against the present plaintiff.

7. The provisions of the CPC as far as Order 9 is concerned, deal with appearance of parties and consequences of non-appearance. Rule 1 enjoins on all the parties to appear on the day fixed in the summons, Rule 2 provides for dismissal of suit where summons is not served in consequence of plaintiff''s failure to pay costs, Rule 3 for dismissal of the suit when neither party appears when the suit is called for hearing and when there is such a dismissal either under Rule 2 or Rule 3, Rule 4 enables the Court to restore the suit. Rule 5 provides for dismissal of suit for inaction of the plaintiff for three months. Procedure when plaintiff only appears and defendant does not appear is provided for in rule 6. That provides how the Court may proceed ex parte to the defendant. Rule 7 permits defendant to satisfy the Court and consequently enables the Court to set aside the ex parte order. Rule 8 deals with the procedure when the defendant only appears and plaintiff is absent. It is provided that on that day if the defendant admits the claim the Court may proceed to pass the decree or may dismiss the suit in its entirety or with respect to remainder. Rule 9 provides for the remedy as well creates a bar for filing a fresh suit. Rule 10 deals with the procedure where there are several plaintiffs and one or more of them is not in attendance, while Rule 11 deals with cases where there are more than one defendant and one or more of them are absent when the case is called. Rule 12 is again enabling the parties who were not in attendance under Rule 10 or 11 to seek redress upon proof of sufficient cause.

8. These provisions of the rules right from Rule 1 to Rule 12 indicate that there could be cases where there are more than one defendant and in such cases it is permissible for the Court by virtue of Rule 11 to proceed with the suit with respect to those defendants who do not appear on the date of hearing. This spread-over of the provisions take into account several contingencies enabling the Court to proceed with the suit when the parties arrayed to a suit or cause are not present. Rule 10 and 11 are both indicative of the contingency when there are more plaintiffs or more defendants and the procedure in case when there is non-attendance by one or more of them. Dismissal of suit is permitted under Rule 2, Rule 3 as well under Rule 8. It is obvious on the analysis of these provisions that there can be a dismissal of the suit in part and a decree in part. Similarly, there can be wholesale or entire dismissal of the suit as is clear from the above said provisions.

9. Now the relevant rules of Order 9 on which the controversy centres may be extracted:

Rule 3. Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

* * * *

Rule it. Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Rule 9(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.

In these rules, it has to be observed that the word "defendant" is indicative of both singular as well as plural, so also the word "plaintiff". Rule 3 does not use the word "defendant" or "plaintiff", but speaks of "party", thereby meaning either of the persons arrayed as plaintiff or defendant. Under Rule 8, which will have to be read along with the other enabling provisions like Rules 10 and 11, the word "defendant" may reach each and every person arrayed as a defendant, so also the word ""plaintiff" may reach each and every party or person arrayed as plaintiff. It is obvious that if one of the persons arrayed as plaintiff is present the terms of Rule 8 are not answered. It is only Rule 10 that would govern the procedure of the suit. Similarly, when there are more than one person as defendants arrayed in a suit in their own right it is obvious that the terms of Rule 8 will be answered in their favour if every one of them is present and the plaintiff is absent. This has to be the logical conclusion because of the procedure envisaged by Rule 11. It is possible when there are more defendants than one to conceive of an order by the Court either to make a decree on their admission or to make an order against those defendants who do not appear as is contemplated by the terms of Rule 8 as well of Rule 11. In other words, even in the absence of the plaintiff and in the presence of one of the defendants Rule 8 permits on his admission a successful passing of a decree in favour of even the absent plaintiff, but as far as the absentee defendants are concerned the power enabling is in Rule 11, i.e. to treat the suit ex parte to those who have not appeared. If however the plaintiff is also absent and some of the defendants too are not present it follows that the Court can make an order dismissing the suit by reference to Rule 3. It is therefore clear that in these procedural stages there can be an effective decree on the admission of one of the defendants being present because of Rule 8 and there can be effective dismissal of the suit because of the default of the plaintiff as against those who are not present when the suit is called for hearing.

All the provisions of Order 9 thus take into account several stages and contingencies wherein such orders could effectively reach the controversy and could be disposed of when parties required to prosecute the cause do not appear.

10. Therefore while considering the terms of Rule 9 all these possibilities must be present to one''s mind. That provision permits the plaintiff, firstly, to apply for restoration of his suit; secondly, it prohibits such a plaintiff from bringing a fresh suit in respect of the same cause of action if his earlier suit or cause was dismissed under Rule 8. This prohibition will not be attracted obviously if the dismissal of the suit is under any other rule. It is ample to state that there could be dismissal of suit as I have indicated above under the other rules of Order 9. Those are not within the bar engrafted in Rule 9 itself. It is well-settled principle of construction that when prohibitions are to be construed and applied those must be construed strictly and there is no scope for enlarging the inhibitions by implying meanings to the clear words used by the legislature. Therefore, it is only when the suit is wholly or partly dismissed under Rule 8 the inhibition spoken of by Rule 9 would arise against the plaintiff and in no other cases. The phrase "under rule 8" leads to only conclusion that the bar that can be set up is only referable to the consequence of dismissal under Rule 8 of Order 9.

11. It is therefore always necessary to find out whether a particular cause was dismissed either wholly or partly having resort to the power conferred by Rule 8 or it answers dismissal contemplated by any other rule of the present Order. If there is a possibility that such a cause is dismissed having recourse to any other rule of the order, the prohibition would stand automatically lifted notwithstanding the mention of rule in the body of the order. Such orders require of necessity to be construed in the context of the powers given by the rules and contingencies contemplated and consequences conceived. Mere mention of a particular rule may not be decisive of the penalty indicated by Rule 9 of Order 9 of the Code. In fact and in substance such dismissal should answer the state of affairs of Rule 8 and non else.

12. Now as the facts have been found, and which arc not in dispute in the present appeal, to the earlier suit there were impleaded more than one defendant. The plaintiff was the same and identical. When on March 7, 1967 the suit was called for hearing the plaintiff was absent and out of three defendants only defendant No. 1 was present. Under Rule 8 if that defendant had admitted any claim, the Court could have passed a decree against him upon such admission and if such admission related to the part only, the decree could be for that part and the other part of the suit, i.e. the remainder would stand dismissed. If however there is no such admission, the defendant being present, the suit against him for the default of the plaintiff would stand dismissed. Thus under Rule 8 three consequences arc indicated in the absence of the plaintiff and in the presence of defendant which will take in one defendant out of several being (i) dismissal of suit in the presence of the defendant for default of the plaintiff, (ii) decree in favour of the absent plaintiff on

admission of the entire claim by the defendant present and (iii) partial decree and partial dismissal of the suit of the absentee plaintiff, upon partial admission of the suit claim by the defendant present. It is to the dismissal indicated by (i) and (iii) the bar of Rule 9 would clearly apply for those are dismissals under Rule 8. These provisions may now be contrasted with Rule 3 and Rule 11 of Order 9. Under the former dismissal of suit is indicated when both plaintiff and defendant are absent. Against absentee parties the dismissal of cause is clearly reached under that provision. However under Rule 11 Court is permitted to proceed when one or more out of several defendants do appear and is enabled to make suitable order at the time of pronouncing judgment against the absentee defendants. Thus in the absence of some of defendants cause can still proceed. So also by virtue of Rule 6 cause can be proceeded ex parte to defendant in default. When out of several plaintiffs one or more appear and rest do not, Rule 10 indicates the mode and manner of proceeding with the cause. The power to proceed under several rules particularly as is given by Rules 3, 8 and 11 together, the earlier order can only mean that the suit of the plaintiff stood dismissed in default against the absentee defendants under Rule 3 while his suit stood dismissed against the present defendant under Rule 8 and as plaintiff was not present nor the cause could be proceeded as indicated by Rule 11 of the Code. That is the plain result of the earlier order that was made in Civil Suit No. 385 of 1961.

13. If this is the demonstrable result bearing upon the dismissal of the first suit, it cannot be said that such dismissal of the first suit as far as the Absentee defendants were concerned was under Rule 8 and they could set up the bar of Rule 9 of Order 9. Logically following therefore, the preclusion involved and enacted by Rule 9 would operate against that dismissal of the suit which was in the presence of defendant No. 1 for it was under Rule 8 and none else.

14. Similar such view appears to have been taken by this Court in Damu Diga v. Vakrya ILR 44 Bom. 767 where Justice Crump treated the matter differently with respect to the defendants appearing and non-appearing. When the suit was dismissed in the presence of certain defendants while the plaintiff was absent, the matter was treated as governed by Rule 8, while when the defendant was absent so also the plaintiff, though in the same cause, the matter was treated as one falling under Rule 3. In Bukharam v. Ramji 10 NLR 39 the Additional Judicial Commissioner''s Court of Central Provinces construed these rules almost under identical circumstances as answering two different provisions. It was found that an order dismissing a suit in default at the hearing where the plaintiff and all the defendants except one were absent should be construed as one passed partly under Order 9, Rule 3, and partly under Order 9, Rule 7, and the bar of Rule 9 would enure to the benefit of that defendant who was present and not in favour of defendants who were absent. The learned Additional Judicial Commissioner sought support for that reasoning from the Calcutta decision reported in Dona Ram v. Raghu Nath Pandit (1905)10 CW Notes 40, where the Court had occasion to consider the

provisions of Chapter VII of the Code in a controversy where res judicata was pleaded as a bar to the subsequent action. In the subsequent suit where there were more defendants a decree was passed against one of them and the suit was dismissed against the other defendants, it was observed that if both the parties were absent at the date of hearing the suit would have been dismissed u/s 98 of the Code, and u/s 99 a fresh suit would be maintainable subject to the law of limitation. Thus the provisions of section 98 analogous to Rule 3 were treated to reach when none of the parties is available when the case is called for hearing. In Mukundi Singh v. Parbhu Daval (4) the Allahabad High Court alluding to these authorities has taken the view that the word "defendant" in Rule 8 of Order 9 was indicative of the particular defendant who was present in the Court. The matter of absentee defendant was governed by Rule 3. In Gopi Ram Bhottica Vs. Jagarnath Singh and Others, the Patna High Court was considering the terms of Order 9, Rule 9, where the plaintiff had brought the subsequent suit claiming through the earlier plaintiff whose suit had been dismissed under Order 9, Rule 8. There also it appears that the earlier suit was dismissed in the presence of one of the defendants. The trial Court had found that as far as the defendant in whose presence the suit was dismissed, there was a bar of Order IX, Rule 9. The Court after considering the submissions with respect to the phrase "same cause of action" on the controversy that was agitated in that appeal maintained the dismissal of the suit against the defendant who was present in the earlier suit. Though Gopiram Case is not a direct authority on the point at issue in the present appeal, it subserves the need of an illustration. In Tarit Bhusan Rai and Another Vs. Sri Sri Iswar Sridhar Salagram Shila Thakur by Krishna Chandra Chandra and Others, the High Court of Calcutta was considering the provisions of Order IX, Rule 9, and the inhibitions contained therein and had occasion to observe that the provisions imposed a disability upon plaintiff whose suit had been dismissed as he was precluded from bringing a fresh suit in respect of the same cause of action though it did not enact a rule of res judicata in favour of the defendant. The suit was dismissed in default of the next friend of an idol and the Court ultimately found that the person was not having power and that did not bar the subsequent suit. Tarit Bhusan''s case for the purpose of present controversy can be looked into to find out one more aspect of the same principle that by virtue of the bar contained in Rule 9, there is no res judicata in favour of the defendants but a prohibition against the plaintiff, both being different in principle and doctrine.

15. It is unnecessary to emphasize the distinction between the doctrine of res judicata and certain statutory prohibitions on the right to sue though such distinction is vital and in the body of the CPC assumes great significance while applying different principles. Upon proof of res judicata it is cleat that the defendants can non-suit the plaintiff by pointing out to the earlier judgment if the matter had been directly or constructively decided once for all by competent Court on earlier occasion. While the prohibition enacted by Rule 9 is not based on earlier adjudication and does not partake in the nature of res judicata as was found in Tarit

Bhusan''s case (supra) for it is a consequence or is in the nature of penalty which feeds back the concept that law frowns upon those who seek to vex others more than once. That itself furnishes an additional ground to hold that that prohibition would enure to the benefit of that defendant who was present and as such ready to proceed when the case was called for hearing.

16. That is how it appears from the earliest life of this Code that the provisions of Rule IX and the prohibition contained therein have been understood by the different Courts and there is no reason whatsoever to take any other view of the matter. The prohibition which disables the plaintiff from bringing the suit is limited therefore to the suit that was dismissed under Rule 8 as against the defendant who was present at the hearing and it does not reach to those defendants who were absent when the case was called.

17. However, the learned counsel appearing for the respondent submits that this construction of the words of Rule 9 overlooks vital phrase contained in that rule which prohibits the plaintiff from suing in respect of the same cause of action. He submits that once there is a dismissal referable to Rule 8, plaintiff''s rights are for closed with respect to the suit involving same facts or bundle of facts giving rise to the same cause of action. It is immaterial, according to the learned counsel, who were the parties and what relief was sought by the plaintiff in the earlier suit. He tries to take assistance for his submission by referring to the provisions of section 20 of the Code and pressed in aid the words and its amplitude contemplated by that provision with respect to reliefs which can be given by the Court under the Code. He submits, if it is once established that the suit stood dismissed, though partly with reference to Rule 8 and it involved the same set of facts which are being brought forward by the subsequent suit, then the fact who was present and who was not present at the earlier stage of the dismissal of the suit is absolutely irrelevant. It is his contention that prohibition should be read in this light. Its vigour should not be whittled down by construing the same in the manner which will enable the plaintiff to bring successive actions. The learned counsel goes on to submit that there is a policy underlying the prohibition enacted by Rule 9. The plaintiff who absented himself when the suit was dismissed is not in a position which can be said to be equitable and may have one or several grounds for non-appearance. Except as permitted by Rule 9, he should not be allowed to have a second chance of filing a fresh action on the same cause of action.

18. Now all these submissions of the learned counsel have a plausible look; but it has to be remembered that the terms of Order IX are all part of the procedural enactments and while construing them an attempt should be to further the remedy and suppress the mischief. To the extent the defendant who was present and as such prepared to further the progress of the case and the plaintiff was absent, the law inhibits any fresh action To the extent however the defendant was absent, it is plain that the same said result is neither contemplated nor can be canvassed even

on equitable grounds for the defendant was also in default. Though the cause of action may be the same, the earlier dismissal clearly is not res judicata. It is still a dismissal in default of the plaintiff and in presence of a given defendant. It is further not possible to accept the contention of Mr. Loney that there cannot be any dismissal of suit by the same order both under Rule 8 as well as Rule 3. I have already indicated in the earlier analysis that different circumstances and contingencies may lead to different results and that may by itself answer the different provisions of the rules.

19. In the result, therefore, the dismissal of the entire suit because of bar under Order IX, Rule 9, by the appellate Court cannot be upheld. The order under appeal, therefore, will stand set aside and the matter would be remitted back to appeal Court. The said Court will now proceed to decide the appeal on its own merit in the light of the position of law and its result in the present controversy as stated above.

20. The appeal thus succeeds and is allowed, but there would be no orders as to costs.