2025 INSC 566

REPORTABLE

IN THE SUPREME COURT OF INDIA

EXTRA-ORDINARY APPELLATE JURISDICTION

Petition(s) for Special Leave to Appeal (C) No.11442/2023

AMRUDDIN ANSARI (DEAD)THROUGH LRS & ORS. Petitioner(s)

VERSUS

AFAJAL ALI & ORS. Respondent(s)

O R D E R

J.B. PARDIWALA, J.

1. This petition arises from the judgment and order passed by the High Court of Chhattisgarh at Bilaspur dated 24.10.2019 in Second Appeal No.424/2005 by which the Second Appeal filed by the respondents herein (original plaintiffs) came to be allowed and thereby, the judgment and order passed by the First Appellate Court reversing the decree passed by the Trial Court came to be set aside.

2. For the sake of convenience, the petitioners herein shall be referred to as the original defendants and the respondents herein shall be referred to as the original plaintiffs.

3. The facts giving rise to this petition may be summarized as under:

a. The history of this litigation goes something like this. In the first instance, the father of the original plaintiffs instituted a Civil Suit No.37A/1996 in the Court of Ld. Civil Judge, Ramanujganj, District- Sarguja, Chhattisgarh for declaration, cancellation of sale deed and a permanent injunction. It appears from the materials on record that the said suit came to be dismissed under the provisions of Order IX Rule 2 of the Civil Procedure Code, 1908 (for short "the C.P.C."). In such circumstances, the father of original plaintiffs preferred an application under Order IX Rule 4 for restoration of the suit. The said application under Order IX Rule 4 of the C.P.C. came to be dismissed. The matter was not carried further. The order passed by the Trial Court rejecting the application filed under Order IX Rule 4 of the C.P.C. attained finality.

b. Later, the original plaintiffs (legal heirs) instituted a fresh suit bearing No.27A/2001 in the Court of Civil Judge, 1st Class, Ramanujganj, Tehsil Paal, District-Sarguja, Chhattisgarh for the same reliefs.

c. The Trial Court framed the following issues:

> ***"1. Whether the Plaintiffs are having ownership right over the suit property mentioned in Appendix-A attached to the suit?***
>
> ***2. Whether the executed Sale Deed dated 19.12.86 is having no effect on the plaintiffs being fake, fabricated and illegal?***
>
> ***3. Whether the Plaintiffs are entitled for grant of a decree of permanent injunction against the defendants with respect to the suit land that the Defendant Nos.1,2,3, 4 and 5 themselves and their relatives, friends, servants and agents be restrained from claiming ownership or entering into the suit property or creating any hindrance thereupon?***

4. Whether daughters of Late Rahmat Ali are necessary parties to the suit?

5. Whether the principal of res judicata is applicable in the present suit?

6. Whether there is lesser court fee paid in the suit?

7. Relief and costs?"

d. All the aforesaid issues came to be answered in favour of the plaintiffs.

e. The original defendants being dissatisfied with the judgment and decree passed by the Trial Court challenged the same before the District Court in First Appeal. The First Appeal came to be allowed. The judgment and decree passed by the Trial Court was set aside.

f. Being dissatisfied with the judgment and order passed by the First Appellate Court, the plaintiffs went before the High Court in Second Appeal.

g. The High Court formulated the following three substantial questions of law for its consideration:

"i) "Whether the learned first Appellate Court was justified in holding that since the decree holder did not deposit the deficit court fees within the period allotted by the trial Court, the decree becomes in executable, is correct particularly in view of the fact that the deficit court fees has been deposited by the plaintiff/decree holder with the permission of the trial Court?"

ii) "Whether the finding. of the first Appellate Court that the instant suit was not maintainable in view of the doctrine to res judicata, is justified in the absence of any evidence that the earlier suit was between the same parties and for the same relief?"

iii) "Whether the finding of the appellate Court that the document titled as Vazib Dava of Ex.P.1, by which the patta holder Abdul Rajak has relinquished his right in favour of the plaintiffs could be ignored only on the ground that the same has not been proved by examining the attesting witnesses particularly in the light of the fact that the same has not been disputed by the defendants?"

h. The High Court, while allowing the Second Appeal answered all the three substantial questions of law referred to above in favour of the plaintiffs. The judgment and order passed by the First Appellate Court was set aside and the judgment and decree passed by the Trial Court came to be restored.

4. In such circumstances referred to above, the original defendants are before this Court with the present petition.

5. We heard Mr. Mr. Abhinav Jaganathan, the learned counsel appearing for the original defendants (petitioners) and Ms. V. Mohana, the learned Senior Counsel appearing for the respondent Nos.1 and 2 respectively (original plaintiffs).

6. The learned counsel appearing for the defendants (petitioners) has three-fold submissions to canvass before us.

First, according to him, the second suit itself was not maintainable. He would submit that once an application under Order IX Rule 4 of the C.P.C. stands rejected and if such order is not challenged before the higher Court and attains finality, then a second suit for the same cause of action and for the very same relief is not maintainable. His second submission is with respect to the evidentiary value of the document *i.e.* Wajib Dava (Exhibit P-1). According to him, the Wajib Dava of 1952 could be said to be hit by Section 54 of the last principles of Mohammedan Law read with Section 6(a) of the Transfer of the Property Act, 1882. He would also submit that being an unregistered document, the same could not have been read into evidence for the purpose of establishing a valid title over the property. Thirdly, according to the learned counsel the fresh suit filed by the plaintiffs could be said to be hit by the doctrine of *res judicata.*

7. On the other hand, Ms. V. Mohana, the learned Senior Counsel appearing for the plaintiffs would submit that no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned judgment and order. She would submit that the High Court is right in taking the view that the suit was maintainable and was not hit in any manner by the provisions of Order IX Rule 4 of the C.P.C. As regards the document *i.e.* Wajib Dava (Exhibit P-1), she submitted that the same has been very well

considered by the High Court in all respects. In such circumstances referred to above, the learned Senior Counsel prayed that there being no merit in the petition, the same may be dismissed.

ANALYSIS

8. Having heard the learned counsel appearing for the parties and having gone through the materials on record, two questions fall for our consideration:

i) Whether after the dismissal of the petition for restoration of suit under Order IX Rule 4 of the 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*?

9. Order IX Rule 4 of the C.P.C. reads thus:

> ***"ORDER IX -Appearance of parties and consequence of non-appearance***
>
> ***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."***

10. It appears that the High Court placed reliance on a decision of the Privy Council in *Bhudeo* vs. *Musammat Baikunthi*[1]. In the said decision, the Privy Council took the view that the two remedies prescribed under Order IX Rule 4 of the C.P.C. are not mutually exclusive. The Privy Council looked into the prefix "or" and ultimately held as under:

> ***"1. The point raised is whether the two remedies allowed to a plaintiff whose suit has been dismissed under Order IX, Rule 2 or 3, namely, the remedy of bringing a fresh suit or applying to have the dismissal set aside, are mutually exclusive. The words of Order IX, Rule 4, are materially the same as the words of Section 99, Act XIV of 1882, upon this point. The wording is not very happy. The use of the word "or" presents many difficulties. In spite of the fast that the word "or" is used and in spite of the fast that the remedy of bringing a fresh suit is placed first and the remedy of having the order set aside is plated second, I am of opinion that the lower Appellate Court is right. I cannot read into the words of the section the meaning that when a person, in good faith believing his suit to have been wrongfully dismissed, comes into Court to have that order set aside and fails to succeed, that person insure the penalty of not being permitted to bring another suit upon the same facts. The selection of the remedy of bringing a fresh suit involves the plaintiff in the necessity of paying a fresh Court-fee and a man would naturally wish to take his chance of getting his suit restored and avoiding payment of a fresh Court-fee. It does riot seem likely that it was the intention of the Legislature that if be took this chance, he was to be deprived of all other remedy in event of failure. The whole of the argument on the side of the appellant practically rests upon the use of the solitary word "or," and I do not think that there is sufficient force in that argument to support the appellant's contention. I, therefore, dismiss this appeal with costs."***

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1 **(1921) 63 I.C. 239**

11. We are in respectful agreement with the view taken by the Privy Council as regards the interpretation of Order IX Rule 4 of the C.P.C.

12. There is one another reason to take the view that a fresh suit is maintainable even after the rejection of the application filed under Order IX Rule 4 of the C.P.C., keeping in mind Order IX Rule 8 and Order IX Rule 9 respectively of the C.P.C.

13. Order IX Rule 8 of the C.P.C. reads thus:

> ***"8. Procedure where defendant only appears— 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."***

14. Order IX Rule 9 of the C.P.C. reads thus:

> ***"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 suit.***

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

15. The plain reading of Order IX Rule 4 of the C.P.C. does not bar the filing of a fresh suit, of course, subject to limitation and if that were the intention, we might have found in it a provision similar to that in Order IX Rule 9 of the C.P.C. referred to above, which states that where a suit is dismissed under the Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action.

16. The basic difference between the two provisions i.e. Rule 4 and Rule 9 of Order IX CPC is that in the case where the suit is dismissed under Rule 2 or Rule 3 of Order IX, the remedy provided is under Rule 4 of Order IX of the 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 IX of the 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.

17. From bare reading of the aforesaid two provisions i.e. Rule 4 and Rule 9 of Order IX of the C.P.C., it is manifestly clear that under Rule 4 of Order IX of the C.P.C., the legislature in express term 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 IX of the C.P.C., whereas Rule 9 of Order IX debars the plaintiff from filing a fresh suit in a case where the suit is dismissed under Rule 8 of Order IX of the C.P.C. The only remedy provided for such dismissal is to file an application under Rule 9 of Order IX of the C.P.C. for restoration of suit.

18. In the case of *Govind Prasad* v. *Har Kishen* reported in AIR 1929 Allahabad 131, 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 IX Rule 3 of the C.P.C., in consequence of neither party having appeared when the suit was called for hearing. The plaintiff-appellant 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 the Allahabad High Court, the learned Judge Weir, following the earlier decisions (39 I.C.191 and 63 I.C.239), set aside the order of

dismissal of suit and held that a fresh suit on the same cause of action is maintainable.

19. In the case of *Mt. Balkesia* v. *Mahant Bhagwan Gir* reported in AIR 1937 Patna 9, a similar question came for consideration before a Division Bench of the Patna High Court. In that case also taking the similar view the learned Judge James, observed:

> ***"Mr. Khurshaid Husnain argues, in the second place, that the present suit should be regarded as barred by reason of the provisions of O.9, R. 4. O.9, R.4, provides that where a suit is dismissed under R. 2, or R. 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 I C 239 of Stuart, J., A I R 1926 All 678 of Daniels, J., and.50) All 837 of Weir, J., all of the Allahabad High Court. In all these cases it has been held that the alternative provisions of R.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 a 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."

20. Agreeing with the view, the learned Judge Rowland, has observed:

"Rowland, J.—I agree. With reference to the argument that the dismissal of a suit under O. 9, R. 3, Civil P. C., 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 S. 9. Civil P.C., 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 S. 11 which bars suits on matters already judiciously decided between the parties or of O. 9, R. 9, which precludes a plaintiff from suing again on the same cause of action where his suit has been dismissed under R. 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 O. 9, R. 9 commences, a dismissal under O. 9, R. 3 would still, in my opinion, not operate to preclude the plaintiff from suing again even if O. 9, R. 4 did not expressly save his right of suit. R. 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 the non-appearance or other default which led to the dismissal of the suit. On the other points I have nothing to add."

21. In the light of the provisions contained in Order IX and the law discussed hereinabove, it can be safely concluded that

in case of dismissal of suit under Order IX Rule 4 of the 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.

22. 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 IX of the C.P.C., a fresh suit is barred by the principle of *res judicata*.

23. 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 attends 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.

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

25. The term "decree" has been defined under Section 2(2) of the C.P.C. 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."***

26. 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 IX of the 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 XLIII of the C.P.C. If we read Order XLIII C.P.C., we will find that orders passed under Order IX, Rule 9 of the C.P.C. or Order IX Rule 13 of the C.P.C. are made appealable, but order passed under Order IX Rule 4 of the 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 IX of the 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 IX of the C.P.C. does not fulfill the requirement of the term "judgment" or "decree", inasmuch as there is no adjudication. In our considered opinion, therefore, if a fresh suit is filed, then such an order of dismissal cannot and shall not operate a *res judicata*.

27. So far as the document Wajib Dava (Exhibit P-1) is concerned, we are convinced with the line of reasoning assigned by the High Court.

28. In view of the aforesaid, we see no good ground to interfere with the impugned judgment passed by the High Court. In the result, this petition fails and is hereby dismissed.

29. Pending application(s), if any, shall stand disposed of.

……J.
(J.B. PARDIWALA)

……J.
(R. MAHADEVAN)

NEW DELHI.
22 APRIL 2025.