

**(1999) 07 PAT CK 0124**  
**In the Patna High Court**  
**Case No : C.R. No. 1969 of 1997**

Gopi Nath Mishra

APPELLANT

Vs

Bank of India and Others

RESPONDENT

**Date of Decision :** 29-07-1999

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 3, Order 9 Rule 4, Order 9 Rule 8, Order 9 Rule 9

**Citation :** (2000) 2 PLJR 520

**Hon'ble Judges :** S.N. Jha, J

**Bench :** Single Bench

**Advocate :** Naresh Dikshit, for the Appellant; Jagdish Pd., for the Respondent

**Final Decision :** Dismissed

## Judgement

S.N. Jha, J.—The Defendant first party of Money suit No. 34/94 of the court of 5th Subordinate Judge, Bhagalpur is aggrieved by the order dated (sic)3.5.97 by which Misc. case No. 12/95 filed by Plaintiff-opposite party has been allowed and the suit has been restored.

2. The suit was dismissed for default on 24.11.95. On 22.12.95 the Plaintiff filed the aforesaid Misc. case for its restoration. Treating the petition under Order IX, Rule 4 CPC the Misc. case was allowed without issuing notice and giving opportunity to the Defendant to contest the case.

3. The submission of the counsel for the Defendant-Petitioner is that the court below committed error of law in treating the petition filed for restoration under Order IX, Rule 4 Code of Civil Procedure. Relying on a decision of this Court in the case of Deosaran Prajapat v. Banwarilal and Ors. 1990 BBCJ 234 : 1990 (1) PUR 558, it was contended that after the written statement is filed by the Defendant, the suit can be restored only under Order IX, Rule 9 Code of Civil Procedure.

4. The only point for consideration is whether in the facts of the present case

Rule 8 of Order IX CPC was applicable so as to warrant dismissal of the suit itself. It is undisputed position that Rule 9 becomes applicable only when dismissal is under Rule 8. It would be useful to quote Rule 8 of Order IX as under:

Rule 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.

The key words of the above Rule for the purpose of this case are "when the suit is called on for hearing". Counsel for the Plaintiff submitted that in the present case, the suit was not fixed for hearing, that is, for evidence, it was rather, fixed for hearing on an interlocutory application.

5. It is true that the date for settlement of issues and all subsequent dates fixed thereafter technically in the eye of law are dates for hearing but every such date is not meant for examination of witnesses, i.e. for evidence in the suit. The usual practice is to mention this fact in the order sheet. One can take notice of the fact that before the suit comes for final hearing, i.e. for evidence, interlocutory applications of different types, such as, injunction, receivership, appointment of pleader Commissioner etc. come up for consideration. Can the suit, itself be dismissed in default of the party where it is fixed for hearing on an interlocutory application on the premise that after the written statement is filed and the issues have been framed, the suit was fixed for hearing? No doubt, in case of adjourned dates for every default coming within the ambit of Order 17, Rule 3 CPC the court is empowered to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such order as it thinks fit. In my opinion, it would be taking a too technical view of the matter if the suit itself is dismissed even though it is coming for hearing on some interlocutory matter. In a given case, this may cause serious prejudice and result in injustice. The proper course in such cases, according to me, would be to dismiss the interlocutory application rather than the suit itself.

6. In the present case, the Plaintiff is a public limited banking company seeking recovery of money on the basis of documents. Since the recovery of public money is involved, I am inclined to think that by restoring the suit to its original file, the court below has done justice. The order does not warrant any interference.

7. In the above premises, this revision is dismissed.