
(1950) 03 BOM CK 0006

In the Bombay High Court

Case No : O.C.J. Appeal No. 41 of 1949 and Suit No. 959 of 1945

Mohanlal Bechardas

APPELLANT

Vs

The Bombay Life Assurance Co. and Others

RESPONDENT

Date of Decision : 08-03-1950

Acts Referred:

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

Citation : AIR 1950 Bom 355 : (1950) 52 BOMLR 375

Hon'ble Judges : Chagla, C.J.;Coyajee, J

Bench : Division Bench

Advocate : H.M. Seervai and M.M. Desai, for the Appellant; M.L. Maneksha and P.N. Bhagwati for respondent Nos. 1 to 6 and 8, for the Respondent

Final Decision : Dismissed

Judgement

Chagla C.J.

1. This is an appeal from a judgment and decree of Bhagwati J. dismissing the plaintiff's suit and the dismissal came about under the following circumstances. The plaintiff had filed the suit for a declaration that the increase in the capital of defendant 1 company, which was intended to be brought about by a resolution to be passed at the meeting of the company, was not in the interest and for the benefit of the company, and allegations were made in the plaint that the directors were acting mala fide in bringing about such an increase in capital. An application was made before Blagden J. for an injunction restraining the defendants from passing such a resolution pending the hearing of the suit. Blagden J. did not grant the injunction, but ordered that while the company might proceed with the consideration of the resolution if such a resolution was passed, the company should not act on that resolution pending further orders. Therefore, a meeting was held and the resolution was carried increasing the capital of the company on 19th July 1945. The plaint was then amended on 27th January 1949, and in the amended plaint a declaration was sought from the Court that the resolution which was passed on 19th July 1945, was invalid and

inoperative, and in para. 184 of the plaint an averment was made that the voting rights in respect of 384 shares could not be exercised for reasons mentioned in paras. 10 and 11 of the plaint, and on that the plaintiff submitted that the resolution was invalid and inoperative. The suit came on for hearing before Bhagwati J. on 8th July 1919. An application was made by counsel for the plaintiff for adjournment of the suit on the ground that one Naval Kishore Bharatiya, a material witness for the plaintiff, was ill and could not attend the Court on that day. There was some discussion between the learned Judge and counsel as to whether Mr. Bharatiya was a material witness, and the learned Judge took the view that in view of the fact that the resolution of the company had been passed on 19th July 1945, and as that resolution was not challenged on the ground that the resolution was ultra vires or in fraud of the company, Bharatiya was not a material witness, and therefore the suit should not be adjourned. Thereupon counsel for the plaintiff applied for a further amendment of the plaint. The learned Judge refused the application for amendment on the ground that the plaintiff was trying to resuscitate a suit which appeared to the learned Judge to be dead in view of the passing of the resolution by the company and in view of the plaint not having been properly amended in the first instance. Thereupon, the learned Judge passed an order rejecting the application for amendment and also refusing the application for adjournment. Thereupon counsel for the plaintiff asked for leave to withdraw his appearance. The Court granted that leave and counsel withdrew his appearance. Thereupon the Court dismissed the suit with costs.

2. Now, Mr. Manecksha has raised a preliminary point that no appeal lies from this order of the learned Judge. We have to be satisfied that the order passed by the learned Judge is a judgment within the meaning of Clause 15 of the Letters Patent. What the learned Judge did was to act under the provisions of Order 9, Rule 8. That rule makes it incumbent upon the Court to dismiss a plaintiff's suit when the plaintiff does not appear at the hearing. It is a dismissal which is for default of appearance or non-prosecution, and Rule 9 of that Order gives a remedy to the plaintiff whose suit has been dismissed for default, and that remedy is that he can apply to the Court to set aside the dismissal and if he satisfies the Court that there was sufficient cause for his non-appearance then the Court may set aside the dismissal. Under the Code no appeal lies from an order made under Order 9, Rule 8. No appeal also lies if the Court under Order 9, Rule 9, sets aside the order of dismissal. But an appeal lies if the Court refuses to set aside the dismissal. The question is whether an appeal lies under Clause 15 of the Letters Patent from an order made by a Court under Order 9, Rule 8. In our opinion, no such appeal lies because no order is made by the Court under Order 9, Rule 8, which affects the merits of the case by determining rights or liabilities between the parties. All that a Court or a Judge does under Order 9, Rule 8 is to give effect to the provision of the law which requires him to dismiss a suit when the plaintiff is absent. He does not judicially determine the rights or merits of the questions before him. His dismissal is not based upon the

consideration that the plaintiff's suit is bad or that the plaintiff is bound to fail on the merits of the case. It is merely because the plaintiff is not present at the date of the hearing that the Court dismisses the suit and therefore it is clear that such a dismissal is not a judgment within the meaning of Clause 16 of the Letters Patent. The law gives the plaintiff an adequate remedy, as I have pointed out, under Order 9, Rule 9, and that is the only remedy which the plaintiff has whose suit has been dismissed for default.

3. Mr. Seervai has argued that inasmuch as the learned Judge has given reasons in dismissing his application for amendment and his application for adjournment he is entitled to come to the Court of appeal because those reasons would bind him and therefore he is entitled to challenge those reasons. It is true that in the course of his judgment Bhagwati J. has expressed his opinion as to the merits of the case. He has taken the view that as the plaint stood the plaintiff's suit was liable to be dismissed. But the order that he passed was only an order refusing the application for amendment and refusing the application for adjournment and any decision on the merits of the case was not called for passing those two orders. The matter would have been very different if after the application for amendment and the application for adjournment had been refused an issue had been raised as to whether the plaint disclosed any cause of action and on that issue the learned Judge had held that the plaint did not disclose any cause of action and dismissed the suit. Then the decision of the learned Judge would have been on the merits of the case. As the matter stands, the decision of Bhagwati J. dismissing the plaintiff's suit is not based upon the plaint not disclosing a cause of action, but upon the fact that counsel for the plaintiff withdrew and as there was no appearance for the plaintiff the learned Judge was bound to dismiss the plaintiff's suit for non-prosecution. Therefore, it is clear that there is no judicial determination whatsoever as to the merits of the case by the learned Judge, and in the absence of any judicial determination it is impossible to say that the merits of any question have been affected by determination of rights or liabilities. Mr. Seervai has also attempted to argue that the order made by the learned Judge was not under Order 9, Rule 8. That contention, in our opinion, is not tenable because the notes of the learned Judge make it perfectly clear that after the application for adjournment and amendment of the plaint was refused counsel for the plaintiff obtained leave from the Court to withdraw and in fact withdrew, and the only object for withdrawing was that the matter should proceed ex parte under Order 9, Rule 8. Therefore, the order made by the learned Judge is under Order 9, Rule 8, and it is an order of dismissal of a suit for default of appearance of the plaintiff. Under the circumstances, we must uphold Mr. Manecksha's contention that the order of the learned Judge is not a judgment within the meaning of Clause 15 of the Letters Patent and no appeal lies from that order.

4. The result is that the appeal fails and must be dismissed with cost. Undertaking given by the respondents on 25th July 1949 discharged.