
(2019) 07 UK CK 0091

In the Uttarakhand High Court

Case No : Writ Petition (M/S) No. 266 Of 2014

National Insurance Company Limited

APPELLANT

Vs

Jagdish And Others

RESPONDENT

Date of Decision : 08-07-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 11, Order 9 Rule 2, Order 9 Rule 3, Order 9 Rule 4, Order 9 Rule 8, Order 9 Rule 9
Uttarakhand Motor Vehicles Rules, 2011 — Rule 2, Rule 3

Citation : (2019) 07 UK CK 0091

Hon'ble Judges : Sharad Kumar Sharma, J

Bench : Single Bench

Advocate : Lalit Belwal, Devesh Ghildiyal, Rajat Mittal

Final Decision : Allowed

Judgement

Sharad Kumar Sharma, J

The present writ petition arises out of a peculiar situation and an order dated 26th October 2013, whereby the Court of Additional District Judge/Sessions Judge, Vikasnagar, Dehradun while exercising his powers in MAC Case No. 167 of 2013, Jagdish v. Ramnath, while deciding Issue No. 2 has held that the subsequent Suit, instituted by the claimant-respondent No. 1 would be tenable, would not be barred by Section 11 of the Code of Civil Procedure, irrespective of the fact that in an earlier proceeding filed by way of MACT No. 145 of 2007, Jagdish v. National Insurance Co. Ltd., which was arising out of the same accident dated 25th May, 2007 and under the same circumstances and between the same set of parties, which was dismissed for want of prosecution under Order 9 Rule 8 of CPC on 10th November, 2008.

It is the case of the petitioner that respondent/claimant seeking recall of the order dated 10th November, 2008 has filed a restoration application, which was numbered as Miscellaneous Case No. 89 of 2008, which too was dismissed for want of prosecution on 27th August, 2010.

Later on, a restoration application for restoration of order dated 27th August 2010 was preferred being Misc. Case No. 41 of 2011, Jagdish vs. National Insurance Co. Ltd. and others, wherein the application filed by respondent No. 1 herein has sought to set-aside the order dated 27th August, 2010, passed in MACT No. 145 of 2017, Jagdish v. National Insurance Co. Ltd., by virtue of which the earlier restoration application being Misc. Case No. 89 of 2008 was dismissed in default. Admittedly, the subsequent order of dismissal of restoration application No. 41 of 2011 was an order, which was passed on merits after hearing the parties on 29th February, 2012.

As far as the order as passed on Misc. Case No. 41 of 2011, Jagdish vs. National Insurance Co. Ltd. and others, is concerned, which was rendered on 29th February, 2012, that has not been questioned nor challenged before any superior court, which was affirming the dismissal of the earlier restoration application dated 27th August, 2008. Rather to the contrary, instead of questioning the subsequent order dated 29th February 2012, dismissing Miscellaneous Case No. 41 of 2011, the respondent had preferred yet another Motor Accident Claim Petition being MACP No. 167 of 2013, Jagdish v. Ramnath, before the Court of Additional District Judge, Vikas Nagar, Dehradun, which has been entertained by the impugned order.

The ratio, on which the learned Motor Accident Claim Tribunal had permitted to entertain the subsequent Motor Accident Claim Petition being MACP No. 167 of 2013, Jagdish v. Ramnath and others was on the basis of a reference being made to certain judgements, which were rendered by the different High Courts in a different set of circumstances, for example; particularly, the reference which was made in relation to the Bhavani Travels v. Sarabjit Kaur & Ors case, as rendered by Punjab and Haryana High Court.

In that case, the issue which involved consideration was pertaining to the restoration and revival of a case to be decided on merits was considered on a premise of the wider principles that no litigant should be made to suffer on account of the mistake of the counsel. The said case was dismissed in default due to absence of the counsel to pursue the case. Later on it was held that the subsequent petition would be maintainable, because the earlier petition which was dismissed for want of prosecution it was not restored and hence the provisions of Order 9 Rule 4 CPC would come into play which gives latitude to the plaintiff to the proceedings that when a case is dismissed for want of prosecution under Rule 2 or Rule 3, the plaintiff may either apply for the restoration of the case or may prefer a fresh suit. But in the instant case, it is altogether a different situation which is subsisting. Court has held that it will be too harsh to deny a relief; due to counsel's mistake to pursue the case.

Here, in the instant case, when the initial suit was dismissed for want of prosecution on 10th November 2008 and thereafter the restoration was also rejected on 27th August 2010 for want of prosecution, the distinction which was involved in the present case was that it was the second restoration application

which was registered as Miscellaneous Case No. 41 of 2011, Jagdish vs. National Insurance Co. Ltd. and others, which was dismissed on merits by the Court by an order dated 29th February 2012, hence the dismissal in these circumstances will fall to be a dismissal as contemplated under Order 9 Rule 9 CPC, which does not give a liberty to the claimant/respondent to reinitiate the proceedings by instituting a fresh suit as the subsequent rejection was on merits against which no relief was sought before Superior Court by the claimant.

The learned Court below had made a reference to the judgement rendered by Jharkhand High Court, reported in 2010 ACJ 1661, Karmi Devi v. Satendra Kumar Singh and another. The said judgement was dealing with the principle that once the case is dismissed for want of prosecution and there is no adjudication on merits of the matter, then in case if any subsequent suit is filed by invoking under Order 9 Rule 4 CPC, the principles of res judicata will not come into play for the reason that earlier dismissal was not on merits of the matter. There cannot be any dispute on this preposition law as it flow from interpretation of Order 9 Rule 4 of C.P.C.

The learned counsel for the respondent/claimant had made reference to a judgement rendered by the Division Bench of Allahabad High Court as reported in 2009 (2) T.A.C. 967 (All.), U.P.S.R.T.C., Lucknow and another v. Smt. Deepkali, wherein the first appeal from order, which was preferred by the claimants before the Motor Accident Claim Tribunal, Lucknow was dismissed for want of prosecution. The said dismissal made by the learned Motor Accident Claim Tribunal, Lucknow was never sought to be restored and rather the claimants in the said case has proceeded to institute yet another suit before the Motor Accident Claim Tribunal, Faizabad on the same set of facts. This is not the circumstances in the present case because in the instant case, the application for restoration seeking to restore the earlier dismissal in default was rejected on merits on 29th February 2012, which has attained finality; as the same has not been challenged by the claimants.

Meaning thereby, the situation which was prevailing in the said case was altogether a different situation, where the earlier dismissal in default was never sought to be recalled and a fresh claim petition was filed before a different Court.

This is not the situation which is prevailing in the instant case, because here consciously, subsequent restoration application, seeking to recall the earlier order dated 10th November, 2008 by restoration application No. 41 of 2011 was dismissed on merits and the said order of dismissal dated 29th February 2012 has attained finality, because the same was not put to challenge by the respondent/claimant before any other Forum rather after the dismissal of the second restoration application on merits on 29th February 2012, the respondent No. 1 has preferred to file yet another claim petition being MACP No. 167 of 2013, Jagdish v. Ramnath.

The argument of the learned counsel for the petitioner is that the instant case

will not fall to be a case within the ambit of provisions contained under Order 9 Rule 4 CPC but would be cased within the ambit of Order 9 Rule 9 of CPC, which has been made applicable in view of the provisions contained under the Uttarakhand Motor Vehicle Rules 2011, particularly as per the provisions of Rule 2 to 3. Order IX Rule 4 and 9 of CPC read as under:-

"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.

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 the suit.

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

Rules 2 and 3 of the Uttarakhand Motor Vehicles Rules, 2011 read as under:-

"2 (1) In these Rules, unless there is anything repugnant in the subject or context :

(a) "Act" means, the Motor Vehicles Act, 1988 (Act No. 59 of 1988);

(b) "Additional Transport Commissioner" means, an officer appointed as such by the State Government.

(c) "Approved Agent" means a person authorized by the Principal to do an act or acts on his behalf and appointed as such by means of a writing executed by the Principal in the presence of either a Magistrate or Notary Public appointed under the Notaries Act, 1952, and includes a legal practitioner authorized by him in this behalf;

(d) "Motor Vehicles Inspector" means a person appointed as such by the Transport Commissioner and posted as Assistant Regional Inspector at the headquarters of each region or sub-region.

(e) "Assistant Regional Transport Officer" means an officer appointed as such by the State Government and posted at the headquarters of each region or sub-region.

- (f) "Assistant Transport Commissioner" means an officer appointed as such by the State Government and posted at Dehradun.
- (g) "Central Rules" means the Central Motor Vehicles Rules, 1989.
- (h) "Deputy Transport Commissioner" means an officer appointed as such by the State Government and posted at Dehradun.
- (i) "Form SR" means a Form appended to these rules;
- (j) "Hill Road" means all roads within Pithoragarh, Champawat, Almorah, Bageshwar, Rudraprayag, Chamoli, Uttarkashi and Tehri-Garhwal districts, tahsil Chakrata of Dehradun district and those portions of Nainital and Garhwal district which lie on the north of the base of foothills directly from Tanakpur in the east via Kathgodam, Ramnagar in the west and all roads beyond municipal limits of Dehradun city towards Mussoorie;
- (k) "Non resilient" in relation to a tyre of motor vehicle, means a tyre which is neither "Pneumatic" nor "resilient"
- (l) "Passenger" means a person traveling in a public service vehicle, but shall not include the operator, the driver or the conductor or an employee of the operator of the public service vehicle traveling in the bona fide discharge of his duties in connection with the public service vehicle;
- (m) "Transport Tax Officer-1" means an officer appointed as such by the Transport Commissioner and posted at every region or sub region or check post.
- (n) "Transport Tax Officer-2" means an officer appointed as such by the Transport Commissioner or an official of the Transport Department not below the rank of Transport Tax Officer-2 who is authorized by the Transport Commissioner for this purpose.
- (o) "Pneumatic Tyre" means a Tyre containing air inserted by mechanical pressure;
- (p) "Region" means the territorial jurisdiction of a Regional Transport Authority as specified by the State Government as specified under sub-section (1) of Section 68.
- (q) "Senior Motor Vehicles Inspector" means an officer appointed as such by the Transport Commissioner and posted at the headquarters of each region or sub region.
- (r) "Regional Transport Officer" means an officer appointed as such by the Government and posted at the headquarters of each region under the Transport Department;
- (s) "Resilient" in respect of tyre of a motor vehicle or trailer, means a tyre not being a pneumatic type made of Indiarubber;

- (t) "Schedule" means a schedule appended to these rules;
- (u) "Section" means a section of the Act;
- (v) State means state of Uttarakhand.
- (w) "State Government" means the State Government of Uttarakhand.
- (x) "Sub-region" means the territorial limits of a revenue district; or any other territorial limit specified by the State Government.
- (y) "Transport Commissioner" means an officer appointed as such by the State Government;
- (z) "Identical Officer" means an officer of the Transport Commissioner organization who is substantially appointed on such post whose pay scales are equal.
- (2) Word and expressions used in the Act and the Central Rules and not defined in these Rules shall have the meanings assigned to them in the Act and the Central Rules.

3. The licensing authority shall be the Regional Transport Officer or the Assistant Regional Transport Officer or, such Senior Motor Vehicle Inspector or Motor Vehicle Inspector of the Transport Department as is authorized by the Regional Transport Officer or the Assistant Regional Transport Officer to perform the duties of a licensing authority under this chapter or in case of emergency, the reasons of which shall be recorded in writing, any other officer of the Transport Department who possesses the qualifications prescribed for motor vehicles inspector and is authorized by the Transport Commissioner for this purpose."

Learned counsel for the petitioner submits that the instant case will be falling to be within the ambit to the provisions contained under Order 9 Rule 8 CPC, which has to be read in consonance to the provisions contained under Order IX Rule 8 CPC, which bars the institution of a fresh suit, which reads as under:-

"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."

Thus, this Court is also of the view that this case is absolutely distinctly based on a distinct set of circumstances, what was involved in the rulings cited by the claimant, where the first restoration application was dismissed in default, which was sought to be recalled by the second restoration application and the second restoration application was rejected on merits of the matter on 29th February 2012, which has attained finality, as has not been challenged by the claimant.

The recourse available to the petitioner would have been that he ought to have challenged the second rejection order dated 29th February, 2012 of his second restoration application which was passed on merits rather than instituting a fresh proceedings of the Motor Accident Claim Tribunal by way of a MACP No. 167 of 2013, Jagdish v. Ramnath, which was yet again based on the same set of facts and circumstances which otherwise has attained finality by rejection of the second restoration application on merits on 29th February, 2012.

This is a ratio on which the reliance has been placed by the Court below in the impugned order dated 26th October 2013, pertaining to the applicability of the principles of res judicata and pertaining to the institution of the subsequent suit is altogether based on a distinct fact and circumstances, which would not apply in the instant case so far the limitations which are imposed by the second order dated 29th February 2012 which has not put to challenge by respondent No. 1 before any superior court.

In that view of the matter, this Court is of the view that the order of rejection would fall to be an order within the ambit of the provisions contained under Order 9 Rule 9 to be read with Order 9 Rule 8 of CPC and hence since it does not give any liberty to institute a fresh proceeding, of which the restoration stood rejected and the application for restoration too has been dismissed on merits on 29th February, 2012.

Consequently, the writ petition is allowed and the impugned order dated 26th October 2013, as passed in MACT No. 167 of 2013, Shri Jagdish v. Ramnath is quashed and as a consequence thereto, the proceedings of the case is held to be not tenable in the light of the order dated 29th February 2012, rendered in Miscellaneous Case No. 41 of 2011, Jagdish vs. National Insurance Co. Ltd. and others.

Thus, writ petition succeeds. However, there would be no order as to cost.