

(2002) 07 BOM CK 0101

In the Bombay High Court

Case No : Notice of Motion No. 685 of 2002 in Suit No. 762 of 1980

State Bank of India

APPELLANT

Vs

Kumar Apparel Industries and Others

RESPONDENT

Date of Decision : 26-07-2002

Acts Referred:

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

Citation : AIR 2003 Bom 128 : (2002) 4 ALLMR 682 : (2003) 1 BomCR 335 : (2003) 2 CivCC 660 : (2002) 4 MhLj 909

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : K.F. Merchant, instructed by Little and Co, for the Appellant; Cyrus Ardeshir, instructed by Mulla and Mulla and C.B. and Caroe, for the Respondent

Judgement

S.A. Bobde, J.—This Notice of Motion is taken out by the plaintiffs for setting aside an order passed by this Court purporting to dismiss the suit for non-prosecution.

2. On 29th November, 2001 this suit appeared on the daily board for framing Issues. The advocate for the plaintiffs appeared before the Court. He, however, stated that he is not ready to go on with the matter. The Court did not find any valid reason for his saying so. The learned single Judge therefore dismissed the suit for non-prosecution.

3. The plaintiffs applied for restoration of the suit under Order IX, Rule 9 of the Code of Civil Procedure, 1908, which reads as under:--

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.

4. In the alternative, the learned Counsel for the plaintiffs submits that he is entitled to reinstatement of the suit under Order IX, Rule 4 of the Code of Civil Procedure, which reads 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.

5. The only question before me is whether in the circumstances of the case the plaintiffs are entitled to move an application for setting aside the order for dismissal under Order IX, Rule 9 of the Code of Civil Procedure, 1908. I find that the answer must be in the negative.

6. Mr. Ardeshir, learned Counsel for the defendants strongly opposes the Notice of Motion under Order IX, Rule 9 in view of what appears to be a settled position of law. In brief the contention of the learned Counsel for the defendants is that the learned single Judge did not dismiss the suit for non-appearance of the plaintiffs. Admittedly the plaintiffs appeared through his advocate. The advocate was however not ready to go on with the matter. Therefore, according to the learned Counsel Order IX, Rule 9 of the CPC is not attracted because a plaintiff is entitled to apply for an order to set aside a dismissal upon satisfying the Court that there was sufficient cause for his non-appearance. This being a case where the plaintiffs appeared, Order IX, Rule 9 has no application. I find that the learned Counsel for the defendants has rightly pointed out the position in law settled by this Court in the year 1928 and followed thereafter. Other Courts seem to have taken the same view. Mr. Ardeshir, learned Counsel for the defendants has rightly relied on a decision of this Court in *Ramchandra Pandurang Naik v. Madhav Purushottam Naik*, reported in ILR 16 23. In that case the advocate had appeared and asked for an adjournment. The Court had, however, dismissed the suit. It rejected the argument that the application for adjournment cannot be treated as retirement from the case nor as default of appearance. That was a case in which the Appellant's pleader stated his inability to proceed with the case and the Court had dismissed the appeal as for default. This Court held that the District Judge had no jurisdiction to make an order dismissing the appeal for default since it was not a case for non-appearance. Thereafter the same question appears to have arisen before the Allahabad High Court in *Chiranji Lal v. Kundan Lal and Ors.*, reported in ILR 20 All 294. In that case the Vakil, who appeared before the Court, told the Court that he was unable to argue the case; the appeal

was accordingly dismissed. An application was then presented to the learned Judge who heard and decided the case praying that the appeal might be restored to its original number and heard in its ordinary course. The order passed was "This case cannot be reinstated. It was not dismissed for default. Rejected." The contention before the Division Bench of the Allahabad High Court was that under the circumstances the case must be considered to be one which was practically dismissed for default and so treated. The Allahabad High Court relying on the judgment of this Court in Ramchandra Pandurang Naik (supra) took the view that the learned Vakil came forward with instructions in his hands and said he was unable to argue his case on the ground that the brief had come to his hands so late that he could not prepare to argue the case. The Allahabad High Court took the view that it could not be taken to be a case where there was a default for appearance.

7. Similarly, the issue appears to have arisen before the Madras High Court in Gopal Goundar Vs. Amnujammal, . That was a case where the plaintiffs Counsel reported "No instructions", but the plaintiff was present in Court. The District Munsiff, however, dismissed the suit. The question before the Madras High Court was whether such a dismissal enable the plaintiff to take it up in appeal as an appealable order or whether he should have filed an application under Order IX, Rule 9 of the CPC for setting aside the ex parte dismissal . The Madras High Court after following an earlier Division Bench decision of that Court reported in Dakshinamoorthi v. Ponnusami, reported in AIR 1949 Mad. 78 took the view that if the plaintiff was present, he must be taken to have appeared on the date when the suit was dismissed. The effect of the judgment was that such a dismissal of the suit seems to be under Order XVII, Rule 3 and not under Order IX, Rule 9 of the Code of Civil Procedure.

8. I am in respectful agreement with the aforesaid view of this Court, the Allahabad High Court and the Madras High Court.

9. Even otherwise on a plain construction of scheme of Order IX, Rules 8 and 9 of the Code of Civil Procedure, it is clear that those provisions apply only where the defendant appears and the plaintiff does not appear. The phrase "does not appear" must be given its plain and natural meaning and cannot include a case where advocate appeared as is in this case but cannot or refuse to go on with the matter. It makes no difference if the matter is considered under Order IX, Rule 3 of the Code of Civil Procedure, which reads as follows :--

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

10. This suit is also not attracted in the present case since this is not a case where neither party appeared when the suit was called out for hearing. The dismissal of the suit cannot be taken to be one under this rule.

11. This takes us to the next submission raised by the learned Counsel for the

defendants. His submission is that since the matter was listed on the board for framing of Issues, the matter could not have been dismissed at all. According to the learned Counsel this is due to the fact that Order XIV casts a duty on the Court to frame and record Issues. Therefore, the lack of willingness of the plaintiffs Counsel to go on with the matter is of no consequence and the Court was duty bound to frame issues nonetheless. I do not find any merit in this submission. Order 14, Rule 1(5) of the Code of Civil Procedure, reads as follows:--

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under Rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

On a plain reading, it is clear from this rule that though it is the Court which must frame the Issues, the Court is required to do so after examination under Rule 2 of Order X and after hearing the parties or their pleaders. There could be, and indeed there are suits where the pleadings and the documents are voluminous enough for the Court to require Counsel to assist it in framing Issues. In fact Sub-rule (5) requires the Court to hear the parties or their pleaders before proceeding to hear and record the issues. In the circumstances, I uphold the objection on behalf of the defendants that the plaintiffs are not entitled to make any application for restoration of the suit under Order IX, Rule 9 or Order IX, Rule 4 or the Code of Civil Procedure. The plaintiffs are certainly at liberty to resort to such remedy as may be available to them in law.

12. In the result, the Notice of Motion is dismissed with costs.

13. P. A. to give ordinary copy of this order to the parties concerned.