

(2000) 01 BOM CK 0027

In the Bombay High Court

Case No : Civil Revision Application No. 958 of 1991

Vishwanath Satwaji Gaikwad

APPELLANT

Vs

Laxman Abaji Kawale and Others

RESPONDENT

Date of Decision : 29-01-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 5(1), Order 9 Rule 5(2), 151

Citation : AIR 2000 Bom 307 : (2000) 3 ALLMR 525 : (2001) 2 CivCC 550 : (2000) 4 MhLj 498

Hon'ble Judges : V.K. Barde, J

Bench : Single Bench

Advocate : Milind Patil, for A.H. Joshi, for the Appellant; K.S. Naik, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Barde, J.—The petitioner had filed Regular Civil Suit No. 299/1985 in the Court of Civil Judge (Junior Division), Ambad, against the present three respondents. In the said suit, the plaintiff failed to take proper steps for service of summons on defendant No. 2 i.e. present respondent No. 2 and, therefore, the learned Civil Judge dismissed the suit as against defendant No. 2, as per the provisions of Order IX, Rule 5 of the CPC (hereinafter referred to as "the Code" for the purpose of brevity).

2. The plaintiff thereafter filed an application requesting that the order be recalled and the suit be restored as against defendant No. 2 also. However, the learned Civil Judge rejected that application by his order dated 25-4-1990. Here, it should be noted that the suit as against defendant No. 2 was dismissed under Order IX, Rule 5 of the Code and not as against defendants Nos. 1 and 3. However, the plaintiff had filed second application dated 4-4-1990 for restoration of the suit as against defendant No. 3 also. But the learned Counsel for the petitioner states that it was application filed through mistake and no relief is required with respect to defendant No. 3.

3. The learned Counsel for the petitioner has argued that, no doubt, the plaintiff had failed to take steps. When the summons issued to defendant No. 2 returned unserved. However, it was not a deliberate mistake. The advocate for the plaintiff, therefore, had filed application on 22-2-1990 for recalling the order and for restoration of the suit as against defendant No. 2 also. It is also argued that the learned Civil Judge could have passed the order by exercising powers u/s 151 of the Code. But the learned Civil Judge has failed to exercise the inherent jurisdiction and merely on technicalities, the matter is decided by the learned Civil Judge.

4. The learned Counsel for the respondents has argued that when the plaintiff had failed to take steps within prescribed time, then the Court had no option but to dismiss the suit as against the defendant with respect to whom the plaintiff had failed to take steps. There was no need to file any application for restoration, As per provisions of Sub-rule (2) of Rule 5 of Order IX of the Code, the plaintiff could have filed fresh suit, subject to the law of limitation. In view of this specific provision, under Sub-rule (2), the Civil Court has no jurisdiction to exercise any inherent powers u/s 151 of the Code. It is, therefore, prayed that this revision petition be dismissed.

5. It is necessary to bring on record certain facts which are not disputed. This summons issued to defendant No. 2 was returned unserved on 7-10-1989. The matter was posted on 21-11-1989 for plaintiff to take steps. The plaintiff failed to take steps and, therefore, the matter was posted on 8-1-1990 for taking steps. Again the plaintiff had failed to take steps and, therefore, matter was fixed for passing order on 22-2-1990 and, on that day, the suit as against defendant No. 2 was dismissed as per the provisions of Order IX, Rule 5 of the Code. The application filed on that day by the plaintiff was also rejected.

6. The provisions of Order IX, Rule 5(1) of the Code, as it was applicable in the State of Maharashtra, at that time, were as follows :--

"Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of two months from the next hearing of the suit to apply for issue of a fresh summons, the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that-

(a) he has failed, after using his best endeavour to discover the residence of the defendant who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit.

7. It means that when the summons is returned unserved, the plaintiff has to take steps within the period of two months for issuing fresh summons to the

defendant or he has to apply for extension of time within the said period of two months on any of the grounds mentioned in Clauses (a), (b) and (c) mentioned above. However, if the plaintiff fails to take steps for issuance of fresh summons, or to make an application for extension of time within the period of two months, the Court has to dismiss the suit against such defendant on whom summons could not be served.

8. While considering the provisions of Section 99A of the CPC (Act XIV of 1882), which were similar to the provisions of Order IX, Rule 5 of the Code of Civil Procedure, 1908, their Lordships of this Court, in the case of Byaharimal Sukalal v. Satya Valad Babu, (1901) 3 BLR 402 have observed :

"Both the conditions in Section 99A must be satisfied, i.e. plaintiff must both apply within a year and satisfy the Court that he has used diligence or else the suit must be dismissed."

There, u/s 99A, the period of one year was prescribed. Now, under Order IX, Rule 5 of the Code, the period of two months is prescribed. However, same principle will have to be made applicable and if the plaintiff fails, either to ask for fresh summons to the defendant or to ask for extension of time for issuance of fresh summons, on any of the grounds mentioned in Sub-clauses (a), (b) and (c), the Court has no option but to dismiss the suit as against the defendant whose summons is returned unserved and the plaintiff has failed to take steps within the period of limitation of two months.

9. In the present case, there was no application by the plaintiff for issuance of fresh summons to defendant No. 2 within the period of two months from 7-10-1989 or even within the period of two months from 21-11-1989, the next date fixed by the Court in the matter. Even then, the matter was fixed for orders by the Court on 22-2-1990. By that date also, no steps were taken by the plaintiff and, therefore, the learned Civil Judge passed the order of dismissal of the suit as against defendant No. 2, as per provisions of Order IX, Rule 5 of the Code.

10. It is also worth noting that in the application given on 22-2-1990, the plaintiff had not given any specific reason as to why the steps could not be taken within the period of two months. The only ground mentioned by the plaintiff in the application dated 22-2-1990 is that the plaintiff could not get the information about the date. This shows that the plaintiff himself was altogether negligent in proceeding with the matter. When the plaintiff had engaged an Advocate and the matter was repeatedly adjourned after return of summons without service, for four months, the plaintiff did not pay attention to it.

11. If all these circumstances are looked into, then I do not think that the learned Civil Judge could have, exercised inherent jurisdiction u/s 151 of the Code, to come to the rescue of the plaintiff and to grant him further time in the matter.

12. It also has to be noted that Sub-rule (2) of Rule 5 of Order IX of the Code makes a clear provision that the plaintiff can file a fresh suit subject to the law of limitation. That means, the plaintiff was not without any remedy. He could have filed fresh suit against defendant No. 2 provided the same was within the period of limitation, and in such circumstances, there was no need for the Court to exercise inherent jurisdiction u/s 151 of the Code to set aside the order of dismissal of the suit as against defendant No. 2. If the suit claim of the plaintiff had been within the period of limitation on the said date, then he could very well have proceeded against defendant No. 2 by filing fresh suit and if the suit claim of the plaintiff had gone out of the period of limitation on the said date, then the Court cannot bring such claim within the period of limitation by exercising Inherent jurisdiction u/s 151 of the Code.

13. The learned Counsel for the petitioner has relied upon the ruling of the Orissa High Court, in the case of Padmalaya Panda Vs. Masinath Mohanty, . However, in the said matter, the provisions of Order VII, Rule 11 of the Code were being considered and not the provisions under Order IX, Rule 5 of the Code were being considered and, therefore, the observations made in the said decision of the Orissa High Court cannot be of any help to the plaintiff.

14. Because of the dismissal of the suit, under Order IX, Rule 5 of the Code, the situation is brought on like this, that there is no suit instituted against such defendant and, therefore, the provisions of Sub-rule (2) makes it clear that the plaintiff can file a fresh suit subject to the provisions of law of limitation. Because of this peculiar provision, under Sub-rule (1) and Sub-rule (2) of Rule 5 of Order IX of the Code, it has to be held that the Court cannot exercise inherent jurisdiction and set aside the order of dismissal of the suit as against such defendant.

15. The Apex Court, in the case of Arjun Singh Vs. Mohindra Kumar and Others, , has observed in para 19, as follows :--

"It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words, if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter, the inherent power of the Court cannot be Invoked in order to (sic) out across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates."

16. The provisions of Order IX, Rule 5, Sub-rule (1) and Sub-rule (2) prohibits the Court from exercising inherent jurisdiction. A remedy is provided under Sub-rule (2) in case, the suit is dismissed by the Court. Thus, there is implied prohibition against the use of inherent jurisdiction of the Court.

17. It is already pointed out that the application presented by the plaintiff for

setting aside the order of dismissal of the suit as against defendant No. 2 is not disclosing any reasonable or sufficient cause. On the contrary, it clearly indicates that the plaintiff had altogether neglected to take proper steps within the prescribed period. So, from factual aspect also, in the present case, the Court had no ground to exercise inherent jurisdiction. The application, therefore, was rightly rejected by the learned Civil Judge.

18. In the result, Civil Revision Application No. 958/1991 is dismissed. The order passed by the learned Civil Judge (Junior Division), Ambad, on 25-4-1990, below Exhibits 37 and 38, in Regular Civil Suit No. 299/1985; is confirmed. Rule is discharged. The interim relief granted by this Court is vacated. No order as to costs.