

learned Judge of the Civil Civil Court, Borivali Division, Dindoshi (Branch), Mumbai in Notice of Motion No. 2621 of 2010 in Suit No. 1534 of 2009. By that order, the learned trial Judge rejected the Motion taken out by defendant No.1 under Order 7 Rule 11 of C.P.C. for rejecting the plaint.

3. In support of this petition, Mr.Singh strenuously contended that earlier predecessor-in-title of respondent No.1 had instituted S.C.Suit No. 3931 of 1995. He submitted that on 18/02/1997, the matter was adjourned to 20/03/1997 for ex-parte decree as no written statement was filed till date. On 31/07/1997, written statement was filed and the same was taken on record. Parties were directed to file affidavit of documents and complete inspection and discovery. It was adjourned to 01/09/1997. On 01/09/1997, the plaintiff and his advocate were absent. Defendant No.1 was present and his advocate was absent. On the request of defendant No.2, suit was adjourned for framing of issues to 20/10/1997. On 11/06/1998, matter was adjourned to 24/06/1998. On 24/06/1998, advocate for the defendants had produced letters dated 08/09/1997 and 30/06/1997 which were taken on record. In view of these letters, suit was listed for dismissal on 29/06/1998. On 29/06/1998, the learned trial Judge dismissed the suit in default in view of roznama dated 24/06/1998. In short, Mr.Singh submitted that S.C.Suit No. 3931 of 1995 was dismissed in default. Mr.Singh

further submitted that suit was dismissed in default as contemplated under Order 9 Rule 8 of C.P.C. In terms of Order 9 Rule 9 of C.P.C., plaintiff did not take out proceedings for recalling order dated 24/06/1998. Instead, the successor-in-title of the plaintiff instituted S.C. Suit No. 1534 of 2009. He submitted that the comparison of prayers in the Suit of 1995 and Suit of 2009 clearly shows that identical reliefs are sought. Defendant No.1, therefore, took out Notice of Motion for rejection of plaint on the ground that the subsequent Suit is not maintainable and is liable to be dismissed. He submitted that the plaintiff instituted present suit on the same cause of action on which entire suit was dismissed in default. The suit is also barred by principles of resjudicata and barred by law of limitation. He submitted that the learned trial Judge only considered whether the suit is barred in view of Order 9 Rule 9 of C.P.C. The learned trial Judge, however, did not deal with the contentions raised as regards resjudicata and bar of limitation. He, therefore, submitted that the impugned order is liable to be set aside.

4. On the other hand, Mr.Murthy supported the impugned order. He submitted that defendant No.1 has taken out this Motion under Order 7 Rule 11 of C.P.C. While considering the proceedings under Order 7 Rule 11 of C.P.C., the Court has to see averments made in the plaint and cannot travel beyond the plaint and if from the averments of the plaint, it is found that suit is barred by law, then

alone, plaint can be rejected. If there is any slightest doubt and the point is arguable, the plaint cannot be rejected under Order 7 Rule 11(d) of C.P.C. In support of this proposition, he relied upon the decision of this Court in the case of *Elmano Menino Dias Vs. Archbishop* **2008(5) Mh.L.J 18**. He further submitted that earlier suit was not fixed for hearing. He submitted that if the suit was not fixed for hearing, the learned trial Judge was not justified in dismissing the suit in default under Order 9 Rule 8 of C.P.C. He further submitted that earlier suit was not decided on merits and therefore, principle of resjudicata is not applicable. Finally, he submitted that no useful purpose will be served by remitting the matter to the trial Court on the point of bar of limitation as the said issue is to be considered only on the basis of the averments in the plaint and in the plaint, plaintiff has explained that aspect.

5. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. Order 9 Rules 8 & 9 of C.P.C. 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.

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.

(emphasis supplied)

6. Perusal of the Order 9 Rule 8 of C.P.C. shows that 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. We are not concerned with rest part of Rule 8 of Order 9. In the present case, a question is whether the earlier suit was called out for hearing on 24/06/1998 when order of dismissal in default was passed. In the case of *Sham Lal Vs. Atma Nand Jain Sabha*, AIR 1987 Supreme Court 197, the Apex Court held that the first date of hearing of the suit indicates that it can never be earlier than the date fixed for the preliminary examination of the parties and the settlement of issues. The Apex Court held that the expression “first date of hearing of the application” have to be interpreted in a manner which will promote the object of the Act. It is day when the Court applies its mind to the case, which ordinarily would be at the time when either the issues are determined or evidence is taken. It is not in dispute in the earlier suit was adjourned for framing of the issues. No material is brought on

record to indicate that issues were framed or evidence was taken. In view thereof, in my opinion, basically, the learned trial Judge was not justified in dismissing the suit in default under Order 9 Rule 8 on 24/06/1998. In view thereof, submission advanced by Mr.Singh that only remedy available to the plaintiff was to comply Order 9 Rule 9 of C.P.C. does not advance his case as basically the learned trial Judge was not justified in dismissing the suit in default when it was not fixed for hearing. As noted earlier, suit was also dismissed in default. In other words, suit was not decided on merits. I, therefore, do not find any merit in the submission of Mr.Singh that suit is barred by provisions of resjudicata.

7. That brings me to the next submission of Mr.Singh that the learned trial Judge did not deal with the contention advanced by defendant No.1 that suit is barred by limitation. I find merit in the submission of Mr.Singh. Perusal of the impugned order indicates that the learned trial Judge did not advert to this aspect at all. Mr. Murthy undoubtedly tried to submit that no useful purpose will be served by remitting the matter only on this point as plaintiff has sufficiently explained issue of limitation in the plaint. Issue of limitation has to be decided only with reference to the averments made in the plaint. Having regard to the fact that the learned trial Judge has not adverted to this aspect at all, in my opinion, in the interest of justice, the impugned order deserves to be set aside for

deciding the issue of limitation. In other words, findings recorded by the learned trial Judge that the suit is not barred under Order 9 Rule 9 of C.P.C. as also is not barred by the principle of resjudicata are upheld. The Motion is remitted to the trial Court only for deciding whether the suit is barred by law of limitation as contended by defendant No.1. Hence, rule is made absolute in the aforesaid terms. The impugned order is modified and the learned trial Judge is directed to decide issue of limitation only.

8. It is made clear that I have not examined question of limitation. All the contentions of the parties in that regard are expressly kept open. Liberty is reserved to the parties to apply for expeditious disposal of the Motion.

(R. G. KETKAR, J.)