

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (227) No. 182 of 2016

Sheikh Rasul Siddiqui S/o Sheikh Siddiqui, Aged About 49 Years R/o In Front Of Masjid, Tikrapara, Doundilohara, Tahsil Doundilohara, District Balod, (Chhattigarh)

---- Petitioner

Versus

Smt. Mamta Fapre W/o Manrakhan Halba, R/o Village Bijora, Tahsil Doundilohara, District Balod, (Chhattigarh)

-----Respondent

For Petitioner:	Shri PP Sahu, Advocate.
For Respondent:	Shri HB Agrawal, Senior Advocate along with Shri Pankaj Agrawal.

Single Bench: Hon'ble Shri P. Sam Koshy, J
Order On Board

12.5.2016

1. The present Writ Petition has been filed challenging the impugned order dated 17.2.2016 passed by the 2nd Additional District Judge, Balod in Miscellaneous Civil Appeal No.4/2015. Vide the said impugned order, the District Judge has rejected the Miscellaneous Appeal preferred by the Petitioner under Order 43 Rule 1(c) of CPC challenging the order dated 22.9.2015 passed by the 1st Civil Judge, Class-1, Balod in Miscellaneous Case No.64/2014.

2. Brief facts of the case are that the Respondent/Plaintiff had preferred a Civil Suit for eviction against the present Petitioner/Defendant which was registered as Suit No.2-A/2011. The said suit proceeded ex parte against the Petitioner/Defendant and an ex parte judgment has been passed on 6.7.2012. Immediately when the Petitioner came to know about the ex parte judgment

and decree, he moved an application under Order 9 Rule 13 CPC which was registered as MJC No.64/2014. However, pending the MJC before the Court below, the sister of the Petitioner got seriously unwell and had to be hospitalized and after some time, she had even expired also. On account of the said demise, the Petitioner could not attend the hearing on 22.7.2014 and on which date, MJC No.64/2014 which was an application for setting the ex parte judgment and decree got dismissed in default. Immediately thereafter on 19.9.2014, the Petitioner preferred an application under Order 9 Rule 9 CPC praying for setting aside of the ex parte order of dismissal of the MJC in default on 22.7.2014. However, the Court below i.e. the Civil Judge, Class-1, on 22.9.2015 passed an order holding that the application under Order 9 Rule 9 CPC is not maintainable on account of the fact that the proceedings under Order 9 Rule 13 CPC registered as Miscellaneous (Judicial) Civil Case would not fall within the definition of a suit under the provisions of CPC and therefore, rejected the application under Order 9 Rule 9 CPC. In addition, the Court below has also held that there was no application for condonation of delay in filing of the application under Order 9 Rule 9 CPC.

3. The said order dated 22.9.2015 was put to challenge under Order 43 Rule 1(c) CPC before the 1st Additional District Judge, Balod wherein the Miscellaneous Civil Appeal was registered as 4/2015.

4. The Lower Appellate Court also, taking the same view as has been held by the Trial Court vide the impugned order dated 17.2.16 relying upon judgment passed by the Supreme Court in 2005 (3) M.P.L.J 3 (Bhanu Kumar Jain vs. Archana Kumar and another) had rejected the Miscellaneous Civil Appeal leading to the filing of present Writ Petition.

5. Learned Counsel for the Petitioner submits that it is a case where both the Courts below have totally lost sight of the fact that the proceedings under Order 9 Rule 13 CPC would also definitely fall within the definition of a suit as is evident from Section 141 CPC, which for ready reference, reads as under:-

“141. Miscellaneous Proceedings.- The procedure provided in this Code in regard to suit shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.”

6. He further relies upon the judgment of Calcutta High Court in AIR 1981 Calcutta 81 (Hazi Rutam Ali vs. Emamnuddin Khan and Others) wherein also in an identical set of facts, the Court below in paragraph-5, in very categorical terms, had held that once when the proceedings under Order 9 Rule 13 CPC is dismissed for default, the option left for the Defendants would be either to challenge it in an Appeal or to prefer an application under Order 9 Rule 9 CPC and in the event if an application under Order 9 Rule 9 CPC is filed, the same is fully maintainable. For ready reference, the relevant portion of the said judgment is reproduced below:-

“5.....It has been held in this case that a proceeding in court in respect of an application under Order 9, Rule 9 is a proceeding in a court of civil jurisdiction within Section 141. An application under Order 9, Rule 9 of the Code of Civil Procedure is not an interlocutory application. By its nature an application under Order 9, Rule 9 is an independent application and it is registered as an independent Misc. Judicial case. Hence an application lies to restore the application which was dismissed for default which application had been made for setting aside the dismissal of a suit for default. It has been further held that there is nothing in the wordings of Order 43, Rule 1 (c) of the Civil Procedure Code to restrict it to rejection on merits. The words “rejecting an application” are comprehensive enough to include dismissal for default, rejection in any

other situation whatever. Thus, an appeal lies under Order 43, Rule 1 (c) from an order dismissing for default or on merits, an application under Order 9, Rule 9. When an application is made for an order to set aside the dismissal of a suit and such an application is rejected by an order under Order 9, Rule 9, Civil Procedure Code, in terms, it falls under Order 41, Rule 1 (c). Now when a suit is decreed ex parte and an application under Order 9, rule 13 is dismissed for default and an application is made to set aside the dismissal, it would attract the provisions of Order 9, Rule 9 it is in view of the amended provisions of Section 141 C.P.C. When an application under Order 9, Rule 13 is dismissed for default, both the remedies are available to the applicant. He can apply for restoration under Order 9, Rule 9 CPC or he may appeal under Order 43, Rule 1 (c). Thus, side by side, two remedies are open to him.”

7. Opposing the Petition, Learned Counsel for the Respondent submits that the two Courts below have not committed any illegality or infirmity while rejecting the application based on *Bhanu Kumar Jain vs. Archana Kumar* and another (*supra*) wherein the Supreme Court has specifically held that once when the application under Order 9 Rule 13 CPC is dismissed, the only option left with the concerned person is to challenge the same in an Appeal under Order 43 Rule 1(c) CPC and that proceedings under Order 9 Rule 9 CPC would not be tenable.

8. Having considered the rival contentions put forth and after going through the two judgments of the Hon'ble Supreme Court, it would clearly reflect that, that was a case where the application under Order 9 Rule 13 CPC was adjudicated upon on merits got dismissed for the reason that the Defendants had failed to show good and sufficient cause for their absence whereas in the judgment of the Calcutta High Court, the facts of the case are

similar and identical to the facts of the present case where the application under Order 9 Rule 13 CPC was dismissed in default and as such there was no adjudication of such proceedings on merits.

9. In the absence of any adjudication on merits, the Calcutta High Court had taken a view that since it was not decided on merits, the proceedings under Order 9 Rule 9 CPC would be the remedy available to the defendants.

10. In the opinion of this Court, the judgment of the Hon'ble Supreme Court relied upon by Learned Counsel for the Petitioner, would not be applicable in the instant case rather the ratio laid down therein is distinguishable to the facts of the present case. However, the ratio and principles laid down by the Calcutta High Court appears to be more sound and proper when compared to the facts of the present case and therefore in the opinion of this Court, both the orders passed by the Courts below are not sustainable and therefore deserve to be and are accordingly set aside.

11. The matter is sent back to the Court of 1st Civil Judge, Class-1 to decide the application under Order 9 Rule 9 CPC on merits.

12. With the aforesaid observation, the instant Writ Petition is allowed.

Sd/-
(P. Sam Koshy)
JUDGE