

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2679 OF 2014

Digambarrao Vitthalrao Jadhav

.. **Petitioner**

Versus

Shankar Vitthal Jadhav

.. **Respondent**

Shri Balaji S. Shinde, Advocate for the Petitioner.

Shri Pravin B. Rakhunde, Advocate for the Respondent / Sole.

CORAM : S. V. GANGAPURWALA, J.

DATE : 11th December, 2017

PER COURT :

1. Mr. Shinde, learned advocate submits that appeal filed by the petitioner is dismissed as not maintainable. The suit was dismissed in default under Order 9 Rule 4 of the Code of Civil Procedure, 1908. The petitioner / plaintiff could not remain present in the court because of his ill health. He was suffering from dysentery and minor heart problem. According to the learned advocate, the court below has taken a very hyper technical approach.

2. Mr. Rakhunde, learned advocate for the respondent opposes the contention of the petitioner and submits that the petitioner had consistently remained absent. Even wrong reason was given for adjournment. The claim of plaintiff is not believable. The certificate produced by the petitioner is false. The plaintiff had not taken any treatment in Rural Hospital, Umari on 5.7.2011. The courts have properly construed the provisions and have rightly passed the orders dismissing the suit, application for restoration and the appeal. No error has been committed by the courts below.

3. It appears that the suit is for simpliciter injunction. The suit came to be dismissed under Order 9 Rule 4 of the Code of Civil Procedure, 1908. On the date fixed for evidence the plaintiff and defendant both were absent. It appears that the certificate produced by the petitioner did not inspire confidence in the court. The statement of the applicant was not supported by any medical evidence. It is a matter of record that the petitioner was not admitted in the Rural Hospital, Umari and was not examined on the said date.

4. It appears that the petitioner was unwell and did not appear in the court. Even the defendant was absent. The suit was for simpliciter perpetual injunction. Order 9 Rule 4 of the Code of Civil Procedure Code, 1908 permits filing of fresh suit, of course if the same is within limitation. The cause of action to file a suit for perpetual injunction is *de die in diem*. On a fresh cause of action a fresh suit for perpetual injunction can always be filed. Considering the fact that the defendant was absent and that petitioner was suffering from dysentery at the relevant date, though he was not admitted in the hospital, it would be proper if the suit is decided on merits.

5. The petitioner has deposited Rs.5,000/- (Rs. Five Thousand only) in this court on 9.5.2014 . The petitioner shall deposit further Rs.5,000/- (Rs. Five Thousand only) within a period of four (4) weeks from today. The respondent – defendant is entitled to withdraw the amount of Rs.10,000/- (Ten Thousand only). On deposit of the total amount of Rs.10,000/- (Rs. Ten Thousand only) as stipulated above, the impugned order passed by the Trial Court in an application under Order 9 Rule 4 and

the order dated 5th July, 2011 dismissing the suit for default are quashed and set aside. The amount of Rs.5,000/- (Five Thousand only) deposited in this court is allowed to be withdrawn by the respondent. The remaining amount of Rs.5,000/- (Five Thousand only) shall be deposited within four (4) weeks in the Trial court where the suit was pending.

6. The writ petition is accordingly allowed. No costs.

[S. V. GANGAPURWALA, J.]

marathe/Dec.17