

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4831 OF 2015

- 1 Mohd.Haroon S/o Mohd. Haneerf
Age 58 years, Occupation : Service,
R/o Dargah Road, Beside Shad Hospital,
Parbhani.
- 2 Mohd.Moosa s/o Mohd.Haneerf
Age 54 years, Occupation : Business,
R/o Momin Mohalla, Parbhani.

..PETITIONERS
(Original Defendants)

-Versus-

- 1 Mohd.Younus s/o Mohd. Haneef,
Age : 60 years, Occupation : Business,
R/o Garib Nawaz Colony,
Near Ekminar Masjid, Darga Road,
Parbhani.
- 2 Mohd.Osman s/o Mohd. Haneerf.
Died through L.Rs.
 - (i) Mohd.Iliyas s/o Mohd. Osman,
Age : Major, Occupation : Service,
R/o Momin Mohalla, Parbhani.
 - (ii) Mohd.Akbar s/o Mohd. Osman,
Age : Major, Occupation : Service,
R/o Momin Mohalla, Parbhani.
 - (iii) Nikhat Begum w/o Mohd. Yunus,
Age : Major, Occupation : Service,
R/o Teacher Colony, Dargha Road,
Parbhani.
 - (iv) Mohd.Ayub s/o Mohd. Osman,
Age : Major, Occupation : Service,
R/o Momin Mohalla, Parbhani.

- 3 Mohd.Jamil s/o Mohd. Haneef,
Age : 62 years, Occupation : Business,
R/o Momin Mohalla, Parbhani.
- 4 Marayambi d/o Mohd. Haneef,
Age : 70 years, Occupation : Household,
R/o Momin Mohalla, Parbhani.
- 5 Rabiya Begum w/o Abdul Samad,
Age : 67 years, Occupation : Household,
R/o Momin Mohalla, Parbhani.
- 6 Anwar Sultana w/o Mohd. Yousuf Hasan
Age : 57 years, Occupation : Household,
R/o Peth Mohalla, Parbhani.

...RESPONDENTS

(Res.No.1 : Orig.Plaintiff and
Others : Orig. Defendants).

.....

Shri Girish K. Thigale (Naik), Advocate for the Petitioners.
Shri Meraj Khan h/f Shri A.S.Bayas, Advocate for Respondent No.1.

.....

CORAM : RAVINDRA V. GHUGE, J.

Reserved on : 21ST AUGUST, 2017

Pronounced on : 12TH SEPTEMBER, 2017

Judgment :

1 The Petitioners are aggrieved by the order dated 24.03.2015
by which the Trial Court has allowed Miscellaneous Application
No.17/2015 and restored Special Civil Suit No.30/2012 by setting aside
the order of rejection of the suit dated 11.12.2014.

2 Learned counsel for the Petitioner submits in brief as

follows:-

- (a) On 13.11.2014, the order of issuing summons in the suit was passed.
- (b) As the Plaintiff did not deposit copies and process fees, an order dated 03.12.2014 was passed by the Trial Court directing compliance.
- (c) As compliance was not made, by order dated 11.12.2014, the Plaint was rejected under Order VII Rule 11(f) of the Code of Civil Procedure, 1908.
- (d) Once a plaint is rejected under the above provision, the Trial Court has no power to restore the suit considering Order VII Rule 13.
- (e) If the suit would have been dismissed under Order IX Rule 2, the Trial Court had the power to restore the suit if an application for restoration was made under Order IX Rule 4.
- (f) The Miscellaneous Application for restoration of the plaint dismissed under Order VII Rule 11(f), was not maintainable.

3 Reliance is placed upon the judgment of the Jammu and Kashmir High Court in the matter of Abdul Rashid Rather vs. Ghulam Ahmad Ganai, AIR 2011 Jammu and Kashmir 29.

4 Specific reliance is placed on paragraphs 7, 8 and 9 of the said judgment, which read as under:-

- "7. *Section 2 (2) defines decree as under:-*
 (2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-
- (a) Any adjudication from which an appeal lies as an appeal from an order, or
 - (b) Any order of dismissal for default.
8. *It is clear from a plain reading of the above provision that an order rejecting a plaint under Order 7 Rule 11 CPC is a decree. Order 41 CPC provides for appeals from original decrees. In terms of Section 34 Civil Courts Act, 1920-AD, an appeal from a decree of a Sub-Ordinate Judge is to lie to the District Judge.*
9. *From a conjoint reading of aforesaid provisions it follows that an appeal from original decree passed by a Sub -Judge or a Munsiff is to be preferred in the form of a memorandum signed by the appellant or his pleader to the District Judge of the Judicial district. Order 43 CPC provides for appeals from orders. Though the Order 43 CPC while enumerating the orders passed under various Provisions of the Code makes mention of an order under Order 7 Rule 10 CPC returning a plaint to be presented to the proper court, it does not make mention of an Order under Order 7 Rule 11 CPC rejecting the plaint. The reason is obvious and not difficult to figure out. The order rejecting the plaint under Order 7 Rule 11 CPC in terms of Section 2 (2) CPC amounts to a decree and in terms of Order 43 CPC can be questioned through the medium of appeal before the Appellate Court in accordance with Section 34 of the Civil Courts Act*

1920. In the present case the petitioner instead of questioning legality of the order impugned in revision petition through the medium of an appeal in terms of Order 41 CPC, has come up in revision before this Court. The petitioner obviously has chosen a wrong remedy and a wrong forum to question order of the Trial Court dated 22.11.2005, whereby his plaint has been rejected. The petitioner can not press into service the law laid down in 1998 SLJ 22 : (AIR 1998 J and K 73) and 2004 (2) SLJ 553, for the reason that the controversy raised in the reported cases related to revision from an order appealable under Order 43 CPC. It was held that an order otherwise appealable in terms of Order 43 CPC may well be assailed through medium of a revision petition before the High Court and any curtailment on the power of the High Court being in-conflict with Constitutional power vested in the High Court of supervising the Court hierarchy to be invoked in appropriate cases of non exercise or illegal exercise of the jurisdiction vested by law in any Court, can not be taken away by the Code of Civil Procedure. The present case is not one of a revision petition having been filed against an order otherwise appealable under Order 43 CPC but a revision petition having been filed against an order amounting to decree within the meaning of Section 2 (2) CPC to be questioned only through medium of an appeal before Appellate Court; In order to not to prejudice the rights of the petitioner it would not be proper to comment on the merits of the case as such comments may influence Appellate Court, in the event an appeal is preferred by the petitioner against the order impugned in the present revision petition."

5 The Respondent has defended the impugned order and prays for the dismissal of this petition.

6 Considering the submissions of the learned Advocates for the respective sides, it is apparent that the contention of the Petitioners is that

the Plaintiff may either file a fresh suit under Order VII Rule 13 or may file an appeal before the Appellate Court for challenging the order dated 11.12.2014 by which the Plaint was rejected.

7 The High Court of Jammu and Kashmir in Abdul Rashid (supra) has concluded that an order passed by the Trial Court under Order 7 Rule 11 would amount to a decree under Section 2(2) of the Code of Civil Procedure.

8 Insofar as the contention of the Petitioner that an application for restoration is not tenable under Order VII Rule 13 is concerned, I do not find that there is any prohibition under Rule 13 by which it could be construed that the Plaintiff can only file a fresh suit and cannot seek restoration of the Plaint. It is further contended that akin to Order IX Rule 4 where the power to restore a suit dismissed under Order IX Rule 2 is available, there is no provision under Rule 13 for restoring a suit.

9 For ready reference, Order VII Rules 11 and 13 and Order IX Rules 2 and 4 are reproduced as under:-

Order VII. Plaint.

"11. *Rejection of plaint— The plaint shall be rejected in the following cases:—*

- (a) where it does not disclose a cause of action;*
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;*
- (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently*

stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9:

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]"

"Rule 13. Where rejection of plaint does not preclude presentation of fresh plaint— The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action."

Order IX : Appearance of parties and consequence of non-appearance.

"Rule 2 : Dismissal of suit where summons not served in consequence of plaintiff's failure to pay cost—

Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges, if any, chargeable for such service, or failure to present copies of the plaint as required by rule 9 of order VII, the Court may make an order that the suit be dismissed :

Provided that no such order shall be made, if notwithstanding such failure, the defendant attends in person or by agent when he is allowed to appear by agent on the day fixed for him to appear and answer."

"Rule 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."

10 It is trite law that unless there is an express bar in doing a particular thing, there cannot be an implied embargo as is contended by the Petitioner. Though Rule 13 of Order VII provides for an opportunity to the Plaintiff to file a fresh suit, it may not tantamount to an absolute bar in filing an application for restoration of the suit as no such prohibition is prescribed under Order VII.

11 Insofar as the impugned order is concerned, it does not indicate that the Plaintiff has invoked Section 151 of the Code of Civil Procedure. It also does not indicate that the Plaintiff has invoked Order VII Rule 13 for seeking restoration of the suit. The restoration application is equally silent about invoking any provision under the Code of Civil Procedure.

12 A case with similar set of facts fell for the consideration of this Court in the matter of Maharashtra State Electricity Board vs. Niranjan Alloys Steels Private Limited, Aurangabad, 2007 (2) Mh.L.J. 229.

A plaint was rejected under Order VII Rule 11. An application was filed by the Plaintiff praying for restoration of the plaint. The Trial Court exercised its inherent powers under Section 151 and allowed the application for restoration. In the Writ Petition before this Court, it was concluded that though there may be cases wherein an alternate remedy may be available, it would not bar the exercise of Section 151.

13 The conclusions of this Court in the MSEB case (supra) in paragraphs 15 to 18 read as under:-

- "15. *It need not be reiterated that the respondent/plaintiff had not disputed the liability to pay additional court-fees demanded. He had gained time under orders of the Court. The proviso appended to Order 7 Rule 11 C.P.C. does empower the Court to grant adequate time and to allow payment of additional court-fees in order to avoid failure of justice. There was no adverse issue involved regarding interpretation of the Court Fees Act. Mr.Gangapurwala for the respondent/plaintiff would submit that the main intention of the petitioner is to push the plaintiff to seek appellate remedy with a view to pay same court-fees on two occasions. For, the plaintiff has already deposited the court-fees of which refund would be quite less. Secondly, even if appeal is allowed then also the plaintiff will be again required to pay the same court-fees about which he had not raised any a dispute. He would also point out that lot of time is already spent on the intricacies of the procedural aspect. He would submit, therefore, that in all fairness and to avoid abuse of process by the petitioner, the impugned order deserves to be maintained.*
16. *In Mahanth Ram Das v. Ganga Das, AIR 1961 SC 882, the Apex Court held that the Court can extend time Under Sections 148, 149 and 151 to pay deficit*

court-fees. The relevant observations may be quoted as below:-

"Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians."

17. *In my opinion, there may be cases wherein the alternative remedy though available to a party may not be necessarily resorted to if there is only a procedural requirement to adopt the same. There may be a gray area where inspite of provision for a separate remedy in the C.P Code, it can be gathered that such alternative remedy does not necessarily debar the exercise of inherent powers Under Section 151 of the C.P.C. The available remedy may not be so exhaustive. The use of inherent powers in teeth of such separate provision in the Code is a self imposed restriction evolved by the Courts. Ultimately, the inherent powers are available to do justice. In the present case, not only that the litigation is likely to be protracted if the respondent is asked to seek remedy by way of appeal but that there will be unnecessary financial burden on him. The petitioners' main thrust appears to see that the Respondent shall suffer the ordeal of yet another round of litigation by seeking appellate remedy as well shall also be put under financial pressure. In the peculiar circumstances of the present case, the exercise of inherent powers by the trial Court cannot be stamped as arbitrary, capricious or perverse.*
18. *I am inclined to hold that the time could be extended*

by the trial Court irrespective of the fact that the remedy of appeal was also available. For, it was just a formality to prefer an appeal inasmuch as the plaintiff had not raised any question related to interpretation of the Bombay Court fees Act or the Suits Valuation Act. Secondly, the plaintiff submitted the application immediately after he came to know about bouncing of the cheque. There was no substratum available to say that the cheque was returned only because cash amount was not at his credit. His statement on affidavit was not controverted in this context and moreover, the plaintiff had expressed willingness to deposit the deficit court-fees immediately without demur. The impugned order has not caused any prejudice to the rights of the petitioner. The rejection of the application would have, on the other hand, caused grave injustice to the plaintiff as he would have been put to excessive financial burden without a very serious lapse on his part. Normally, when there is express provision in the C.P.C. then the powers Under Section 151 C.P.C. may not be invoked. Still, however, such remedy must be of exhaustive character and the relevant provision should be such that there is express or implied prohibition on the exercise of powers Under Section 151 of C.P.C. The intention of the legislature can be gathered from proviso appended to Rule 11 of Order 7. Considering the purport of the proviso and peculiar facts of the instant case, there appears no serious error committed by the trial Court while exercising the inherent powers Under Section 151 of the C.P.C. There is no perversity committed by the trial Court in this behalf. It follows, therefore, that interference by this Court in exercise of the supervisory jurisdiction under Article 227 of the Constitution of India is not called for."

14 In the light of the above and by considering the hardships that the litigating Respondents would suffer, if they are relegated to an

alternate remedy available, that too after the impugned order restoring the suit was passed on 24.03.2015, I am of the view that the ends of justice would be defeated.

15 Considering the above fact situation, the exercise of jurisdiction by the Trial Court under Section 151 of the Code of Civil Procedure for the restoration of the suit, cannot be termed as being perverse or erroneous or would cause grave injustice to the Petitioner herein, in the light of the law laid down by the Honourable Apex Court in the cases of *Syed Yakoob v/s K.S.Radhakrishnan*, AIR 1964 SC 477 and *Surya Dev Rai v/s Ram Chander Rai*, AIR 2003 SC 3044.

16 This Writ Petition is, therefore, dismissed. Rule is discharged.