

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN

TUESDAY, THE 10TH DAY OF JANUARY 2012/20TH POUSHA 1933

WP(C).No. 27246 of 2010 (O)

OS.130/2008 OF PRINCIPAL SUB COURT,KOCHI

PETITIONER:

SUDHA CHANDRASEKHARAN.K.,
AGED 57 YEARS, W/O. CHANDRASEKHARAN
MARIAMCHERIL HOUSE, MANAMBILLI ROAD,
AYYAMPILLY.P.O, KOCHI TALUK.

BY ADV. SRI.BIJU ABRAHAM

RESPONDENTS:

- 1.SASIKALA, AGED 56 YEARS, W/O. SAHADEVAN,
MUKKANCHERRY VEEDU, NJARAKAL VILLAGE
NOW RESIDING AT KALLATHIL VEEDU,
PALLATHODE.P.O., ALAPPUZHA DISTRICT- 688 584.
- 2.ANANDAVALLI, D/O. GANGADARAN, AGED 51 YEARS,
MUKKANCHERRY VEEDU, NJARACKAL VILLAGE,
KOCHI, NJARACKAL P.O. - 682 505.
- 3.JIJI, W/O. SURESH, AGED 46 YEARS,
PUTHENPARAMBIL VEEDU, NAYARAMBALAM.P.O.-682 509.
4. VIJAYALAKSHMI, W/O. UNNI NAMBOODIRI,
C/O SUDHA CHANDRASEKHARAN, MARIAMCHEIL HOUSE
MANAMPILLY ROAD, AYYAMPILLY.PO., KOCHI TALUK- 682 501.
- 5.RAJANI MENON, W/O. VASUDEVAN, CHERRTHALA
MEDICAL COLLEGE, THIRUVANANTHAPURAM- 695 001.

R1 TO R3 BY ADV. SRI.T.H.ABDUL AZEEZ
ADV. SRI.K.P.MAJEED

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
10-01-2012, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

- EXT.P1 TRUE COPY OF THE PLAINT IN O.S.NO.130/2008 ON THE
FILE OF THE SUB COURT, KOCHI.
- EXT.P2 TRUE COPY OF THE WRITTEN STATEMENT FILED BY
THE FIRST DEFENDANT/PETITIONER IN O.S.NO.130/2008
ON THE FILE OF THE SUB COURT, KOCHI.
- EXT.P3 TRUE COPY OF THE JUDGMENT DATED 20.8.2008 IN
O.S.NO.130/2008 ON THE FILES OF THE SUB COURT,
KOCHI.
- EXT.P4 TRUE COPY OF THE APPLICATION FILED AS
I.A.NO.1559/2008 IN O.S.NO.130/2008 ON THE FILES OF SUB
COURT, KOCHI.
- EXT.P5 TRUE COPY OF THE COUNTER AFFIDAVIT FILED IN
I.A.NO.1559/2008 IN O.S.NO.130/2008 ON THE FILES OF THE
SUB COURT, KOCHI.
- EXT.P6 TRUE COPY OF THE ORDER DATED 3.7.2010 IN
I.A.NO.1559/2008 IN O.S.NO.130/2008 ON THE FILES OF THE
SUB COURT, KOCHI.

RESPONDENTS' EXHIBITS: NIL

//TRUE COPY//

AHZ/

K.T.SANKARAN, J.

W.P.(C) NO. 27246 OF 2010 O

Dated this the 10th day of January, 2012

JUDGMENT

The questions of law involved in this Writ Petition are the following:

(1) Whether a suit which was dismissed under Rule 5 of Order IX of the Code of Civil Procedure can be restored to file? (2) Whether the Court can dismiss a suit under Rule 5 of Order IX as against a defendant who was served with summons, for failure of the plaintiff to apply for fresh summons to the defendants who were not served with summons?

and (3) Whether Section 151 of the Code of Civil Procedure can be resorted to, to restore a suit which was dismissed under Rule 5 of Order IX of the Code of Civil Procedure?

2. Petitioner is the first defendant in O.S.No.130 of 2008 on the file of the Court of the Subordinate Judge of Kochi. The suit was filed by respondents 1 to 3 for declaration of title over the plaint B W.P.(C) NO.27246 OF 2010 :: 2 ::

schedule property by adverse possession and for a permanent prohibitory injunction. The first defendant was served with summons. However, defendants 2 and 3 were not served with summons. The Court granted time to the plaintiffs to take steps. They did not comply with the same. On the ground that no steps were taken, the trial court dismissed the suit for default on 20.8.2008.

3. On 30.8.2008, the plaintiffs filed I.A.No.1559 of 2008 under Rule 9 of Order IX and Section 151 of the Code of Civil Procedure to restore the suit which was dismissed for default. The first defendant opposed the application. It was contended that the suit was dismissed under Rule 5 of Order IX of the Code of Civil Procedure and therefore, the only remedy available to the plaintiffs is to file a fresh suit.

4. The court below allowed I.A.No.1559 of 2008 as per Ext.P6 order dated 3.7.2010, which reads as follows:

"Heard both sides. Considering the interest of justice, I am of the view that this application can be allowed.

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In the result, I.A. allowed and the suit restored to file and suit posted to 2.8.2010."

This order is under challenge in this Writ Petition.

5. Sri.Biju Abraham, the learned counsel for the petitioner, submitted that when a suit is dismissed under Rule 5 of Order IX CPC, the only remedy of the plaintiff is to file a fresh suit and he cannot make an application to restore the suit. Restoration is possible only in a case where the suit is dismissed under Rules 2 and 3 of Order IX, as provided under Rule 4 of Order IX CPC. The counsel also submitted that Section 151 of the Code of Civil Procedure also cannot be invoked in a case where a suit was dismissed for default under Rule 5 of Order IX of the Code of Civil Procedure. He relied on the decision of the Allahabad High Court in Paritosh Chandra v. Devki Nand and others (1962 A.L.J. 268).

6. Smt.Ayisha, learned counsel appearing for respondents 1 to 3, submitted the following: The court below was not justified in dismissing the suit as against the first defendant who was served W.P.(C) NO.27246 OF 2010 :: 4 ::

with summons. At best, the Court could dismiss the suit as against defendants 2 and 3. The erroneous order passed by the court below was recalled by the order impugned and such an order cannot be interfered with under Article 227 of the Constitution of India. The learned counsel submitted that the provision for filing a fresh suit as provided under sub-rule (2) of Rule 5 of Order IX CPC is an enabling provision and Rule 5 does not bar an application for restoration. Even assuming that there is no provision for restoration of a suit dismissed under Rule 5, the Court can exercise its inherent power under Section 151 of the Code of Civil Procedure. The learned counsel relied on the decision in Salem Advocate Bar Association, Tamil Nadu v. Union of India (AIR 2005 SC 3353) to contend that the period of seven days mentioned in Rule 5 of Order IX CPC is not mandatory but only directory.

7. For the sake of convenience, Rule 5 of Order IX of the Code of Civil Procedure is extracted below:

"5. Dismissal of suit where plaintiff, after summons returned unserved, fails for seven days to apply for fresh summons.-- (1) Where, after a W.P.(C) NO.27246 OF 2010 :: 5 ::

summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of seven days from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officer, to apply for the 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 endeavours 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. (2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit."

Rule 5 of Order IX of the Code of Civil Procedure as originally stood W.P.(C) NO.27246 OF 2010 :: 6 ::

provided for a period of three months for the plaintiff to apply for issue of fresh summons. The period of three months was shortened to one month by the CPC Amendment Act of 1976 and to seven days by the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999), which came into force on 1.7.2002. In Salem Advocate Bar Association, Tamil Nadu v. Union of India (AIR 2005 SC

3353), the Supreme Court held that the period of seven days mentioned in Rule 5 of Order IX CPC is clearly directory.

8. Rule 5 provides for extension of the period of seven days in the contingencies mentioned in clauses (a) to (c) of sub-section (1). In the present case, the plaintiffs did not make any application or make a request to the Court for extension of time. The question is whether the Court can dismiss the suit as against all the defendants including defendant No.1 who was served with summons. In the present case the first defendant was served with summons and she had filed written statement. Rule 5 of Order IX specifically provides that the Court shall make an order that the suit be dismissed as against such defendant. The expression "as against such defendant" would take away the jurisdiction of the Court to dismiss W.P.(C) NO.27246 OF 2010 :: 7 ::

the suit under Rule 5 of Order IX as against a defendant who was served with summons. Dismissal of a suit under Rule 5 of Order IX is dismissal for default. There could be no dismissal for default if a defendant was already served with summons. However, quite erroneously, the Court dismissed the suit for default as against all the defendants.

9. An application was made by the plaintiffs for restoration of the suit within thirty days from the date of dismissal. The court below thought that in the interests of justice, it was necessary to allow the application. The question is whether the Court has jurisdiction to entertain and allow such an application. Rule 5 does not provide that an application for restoration can be maintained by the plaintiffs. In the case of dismissal of the suit under Rule 2 or Rule 3 of Order IX of the Code of Civil Procedure, Rule 4 specifically provides for two remedies to the plaintiffs: (1) to file a fresh suit, subject to the law of limitation; and (2) to file an application for setting aside the dismissal. Such a provision for making an application for setting the dismissal aside is not provided under Rule 5. On the other hand, Rule 5 only provides for a fresh suit, subject to the law of limitation. Does it W.P.(C) NO.27246 OF 2010 :: 8 ::

mean that the Court has no power at all to restore the suit which was dismissed for default under Rule 5? I do not think that the Court is precluded from restoring a suit dismissed for default under Rule 5 of Order IX of the Code of Civil Procedure. As held in Salem Advocate Bar Association's case, the period of seven days mentioned in Rule 5 is not mandatory but only directory. If so, the plaintiffs could satisfy the Court that any of the contingencies under clauses (a) to (c) in sub-section (1) is made out, in which event, the Court need not dismiss the suit against a defendant who was not served with summons. The only purposive interpretation that could be placed is that the Court has inherent power to restore the suit which was dismissed under Rule 5 of Order IX of the Code of Civil Procedure. The provision entitling the plaintiffs to file a suit, subject to the law of limitation, is only an enabling provision and it does not exclude the inherent jurisdiction of the Court to restore a suit which was dismissed for default under Rule 5 of Order IX CPC. In a case where the suit was instituted on the last day of limitation, if the suit is dismissed for default under Rule 5 and if it were to be held that under no circumstance an application for restoration is maintainable, it would work out great hardship to the plaintiff. W.P.(C) NO.27246 OF 2010 :: 9 ::

10. The Allahabad High Court in *Paritosh Chandra v. Devki Nand and others* (1962 A.L.J. 268), held thus:

"... For the dismissal of a suit under R.5 only one remedy has been given in Sub.R.(2) and that is of bringing a fresh suit subject to the law of limitation. There is no provision in that rule for the restoration of the case. In cases of dismissal under R.8 only one remedy of restoration has been provided under R.9 while it has been specifically laid down that the plaintiff shall not be entitled to bring a fresh suit. According to this scheme when there is no remedy of restoration provided for dismissal of suits under R.5 the court would not be justified to restore the suit in its inherent jurisdiction. In restoring the suit the court will be exercising jurisdiction not vested in it and the restoration cannot be justified. If the plaintiff has any remedy it is by way of a fresh suit but of course subject to the law of limitation..."

With respect, I am not inclined to agree with the interpretation made by the Allahabad High Court particularly in the light of the shortening of the period in Rule 5 of Order IX from three months to one month by the CPC Amendment Act, 1976 and from one month to seven days by the CPC Amendment Act, 1999.

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11. Rule 8 of Order IX of the Code of Civil Procedure provides for dismissal of the suit when the plaintiff does not appear and the defendant appears. Rule 9 of Order IX CPC provides that where a suit is dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But, the plaintiff may apply for an order to set the dismissal aside. If an application under Rule 9 of Order IX CPC is dismissed, the plaintiff may file an appeal under Rule 1(c) of Order XLIII. Similarly, if an *ex parte* decree is passed against a defendant, Rule 13 of Order IX provides for making an application to set aside the *ex parte* decree. Rule 1(d) of Order XLIII provides for an appeal against an order under Rule 13 of Order IX rejecting an application. Where a dismissal of the suit under Rule 2 of Order IX CPC on the failure of the plaintiff to pay court fee or postal charges for service of summons can be set aside by filing an application under Rule 4 of Order IX CPC, it would be very harsh to hold that the plaintiff cannot apply for restoration of the suit dismissed for default under Rule 5. True, the Legislature did not specifically provide for such a remedy in the Code of Civil Procedure. There is no specific bar also. It is well W.P.(C) NO.27246 OF 2010 :: 11 ::

settled that when a power is to be exercised by a civil court under an express provision, the inherent power cannot be taken recourse to. It is also well settled that the inherent jurisdiction of the Court under Section 151 of the Code of Civil Procedure cannot be exercised so as to nullify the specific provisions of the Code of Civil Procedure. Inherent power of the Court saved under Section 151 of the Code of Civil Procedure can be exercised by the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. When there is a specific remedy available to a party, he has to take recourse to such remedy and he cannot resort to Section 151 of the Code of Civil Procedure. However, when there is no specific provision dealing with the

subject and there is no specific bar for entertaining an application, I do not think that the Court would lack its inherent power to restore a suit which was dismissed for default under Rule 5 of Order IX of the Code of Civil Procedure.

12. In *Chandrika Singh v. Parsidh Narayan Singh and others* (AIR 1960 Patna 504), the Patna High Court held that an application for restoration of an application under Rule 4 of Order IX W.P.(C) NO.27246 OF 2010 :: 12 ::

of the Code of Civil Procedure is maintainable. In that case, the suit was dismissed under Rule 3 of Order IX CPC. An application was filed by the plaintiff under Rule 4 of Order IX CPC for restoration of the suit. That application was dismissed for default. The plaintiff filed an application under Section 151 of the Code of Civil Procedure for restoration of the application under Rule 4 of Order IX CPC. It was contended that Section 151 could not be invoked by the plaintiff. The Patna High Court negated that contention and it was held that the application under Section 151 of the Code of Civil Procedure was maintainable.

13. In the present case, the Court dismissed the suit under Rule 5 of Order IX even as against the first defendant who was served with summons. The dismissal of the suit as against the first defendant was patently illegal. The said illegality could be corrected suo motu by the Court. The power under Article 227 of the Constitution also can be exercised to correct such a patent mistake affecting jurisdiction of the Court. If the dismissal of the suit as against the first defendant is to be set aside, it is only proper to grant an opportunity to the plaintiff to take out fresh summons to W.P.(C) NO.27246 OF 2010 :: 13 ::

defendants 2 and 3 as well. Though the court below did not say in the order impugned that dismissal of the suit was set aside on the ground that the dismissal as against the first defendant was illegal, the court below thought that interests of justice demand that the suit should be restored. I am of the view that the order impugned should be allowed to stand, also on the ground that the dismissal of the suit as against the first defendant was quite illegal and without jurisdiction.

For the aforementioned reasons, I do not find any ground to exercise the jurisdiction under Article 227 of the Constitution of India, to interfere with the order passed by the court below. The Writ Petition is, accordingly, dismissed.

(K.T.SANKARAN) Judge ahz/