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CR-510-2025

IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE G. S. AHLUWALIA

ON THE 13th OF MAY, 2025CIVIL REVISION No. 510 of 2025*KAMLESH BABU SHAKYA**Versus**RAKESH BABU SHAKYA AND OTHERS*

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Appearance:

Mr. Santosh Agrawal - Advocate for petitioner.

Mr. Harish Dixit - Senior Advocate assisted by Mr. Nimesh Hardeniya
- Advocate for respondent No. 1 / plaintiff on advance notice.
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ORDER

This revision under Section 115 of CPC has been filed against the order dated 30.04.2025 passed by Second Additional Sessions Judge, Gohad, District Bhind passed in MCA No. 25/2022.

2. It is really surprising that the Presiding Officer was exercising the civil jurisdiction but still he has signed the order in the capacity of Second Additional Sessions Judge, Gohad, District Bhind. Either the concerning Presiding Officer is not aware of distinction between civil jurisdiction and criminal jurisdiction or he is negligent in signing the orders.

3. The facts necessary for disposal of this revision in short are that respondent / plaintiff filed a civil suit. On 17.05.2006, a direction was given to the respondent / plaintiff to pay the process fee for service of notice on defendant No. 3. However, the process fee was not paid. Thereafter, on



26.08.2006, an application was filed by the respondent / plaintiff seeking permission to pay the process fee which was allowed. In spite of that, process fee was not paid. On 26.08.2006, 25.09.2006, 16.11.2006, and 23.12.2006, process fee was not paid for service of notice on defendant No. 3. On 25.01.2007, neither plaintiff nor his counsel was present. Even the process fee was not paid. Accordingly, trial Court dismissed the suit by holding as under :-

"अतः आज वादी भी उपस्थित नहीं है अतः प्रकरण वादी की अनुपस्थिति में एवं तलवाना पेश न करने के कारण निरस्त किया जाता है।"

It appears that after 10 years, respondent / plaintiff filed an application under Order 9 Rule 4 CPC along with Section 5 of the Limitation Act. The application filed under Section 5 of Limitation Act was rejected and, consequently, application filed under Order 9 Rule 4 CPC was also dismissed as barred by time.

4. Being aggrieved by the said order passed by the trial Court, respondent / plaintiff preferred miscellaneous appeal which was registered as MCA No. 25/2022. Said miscellaneous appeal was allowed by order dated 22.07.2022 passed by Additional Judge, Gohad, District Bhind to First Additional District Judge, Bhind and the delay in filing the application under Order 9 Rule 4 CPC was condoned and the matter was remanded back to the trial Court to decide the application filed under Order 9 Rule 4 CPC on merits.

5. Being aggrieved by the said order, petitioner preferred Civil Revision No. 451/2022 which was allowed by Co-ordinate Bench of this



Court by order dated 03.10.2024 and the matter was remanded back to the appellate court to decide the question of maintainability of the appeal and then, to decide the appeal on merits without getting influenced by the previous order dated 22.07.2022. Thereafter, it is the case of petitioner that by impugned order dated 30.04.2025, appellate court has held that although the suit was dismissed on account of non-payment of process fee but since the plaintiff was not present and two of the defendants were present, therefore, the suit can be presumed to have been dismissed under Order 9 Rule 8 CPC and thus, the application which was filed by the respondent / plaintiff under Order 9 Rule 4 CPC can be considered as an application filed under Order 9 Rule 9 CPC and, therefore, appeal filed by the respondent / plaintiff against the rejection of his application for restoration of the civil suit under Order 43 Rule 1 (c) of CPC is maintainable. Present civil revision has been filed against this findings given by the appellate court with regard to the maintainability of the appeal under Order 43 Rule 1 (c) of CPC.

6. Challenging the order passed by the Court below, it is submitted by Shri Agrawal that on 25.01.2007, the suit was dismissed on account of non-payment of process fee. Since the suit was not fixed for hearing, therefore, it cannot be said that the suit was dismissed under Order 9 Rule 8 CPC. Accordingly, it is submitted by Shri Agrawal that the findings recorded by the appellate Court that it can be presumed that the suit was dismissed under Order 9 Rule 8 CPC is bad in law and thus, such finding is required to be set aside.

7. Per contra, it is submitted by counsel for respondent that merely



because the suit was not fixed for hearing, it cannot be said that the suit was not dismissed under Order 9 Rule 8 CPC. Since the suit was dismissed in entirety, therefore, it has to be treated as dismissal under Order 9 Rule 8 CPC. However, it was fairly conceded by Shri Harish Dixit - Senior Advocate that he is not in possession of any judicial pronouncement to support his contention.

8. Heard counsel for parties.

9. It is always expected from the Designated Senior Advocate that he would take his argument to a logical end. Merely by saying that the suit might not be listed for hearing but every dismissal has to be treated as dismissal under Order 9 Rule 8 CPC, without any further reason or judgment in support of his contention, is not expected from the senior advocate. A Designated Senior Lawyer is not expected to give his verdict, but he has to support his contention either by elaborating his contentions supported by provision of law or by precedents.

10. Be that whatever it may.

11. Except saying that the level of argument by Designated Senior Advocate was much below than what was expected, nothing more is required to be said.

12. If we consider the facts of this case, then, it is clear that from 17.05.2006 till 25.01.2007, the process fee for service of notice on defendant No. 3 was not paid. On 25.01.2007, even the plaintiff or his counsel were not present. Accordingly, suit was dismissed in the absence of the plaintiff as well as on the ground of non-payment of process fee. Dismissal of suit on



the ground of non-payment of process fee would certainly be a dismissal under Order 9 Rule 2 CPC and the application under Order 9 Rule 4 CPC would be maintainable for restoration of the suit. Admittedly, no appeal under Order 43 Rule 1 CPC is maintainable against an order passed under Order 9 Rule 4 CPC.

13. Now the only question for consideration is as to whether absence of plaintiff on 25.01.2007 would automatically bring the dismissal of suit under Order 9 Rule 8 CPC or not ?

14. Order 9 Rule 8 CPC 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."

From the plain reading of this section, it is clear that "when the plaintiff does not appear when the suit is called on for hearing". Therefore, suit cannot be dismissed under Order 9 Rule 8 CPC unless and until it is fixed for hearing.

15. Although it is submitted by Shri Dixit that non-payment of process fee has to be treated as hearing but he did not bring even a single judgment to support his contention.

16. Meaning of "Hearing" has been defined in the case of **Khoobchand Swaroopchand and Another Vs. Kashiprasad Parmanand and Others** reported in 1986 MPLJ 52 :-

"11. Rule 105(2) of Order XXI also contemplates dismissal of



applications but only when the applicant does not appear when the case is called for hearing. The meaning of the word 'hearing' has been explained in many cases in relation to dismissal of suits under Order IX. In Maung Ahmin v. Maung Saung', while fixing the suit for evidence of parties, the Court directed process-fee and a list of witnesses to be filed by a date mentioned in the order-sheet. The plaintiff failed to pay process-fee and also failed to file the list of witnesses. On account of these failures, the Court dismissed the suit for default. Explaining the meaning of the words 'hearing,' the Court observed that it refers to hearing of the case by the Court and does not include the disposal of routine matter which is within the power of the Court. The Court held that a date fixed solely as the last day on which a list of witnesses may be filed is not a date fixed for 'hearing.

12. In Rambabu v. Bhagirathprasad the words 'hearing of suit' were examined in the light of earlier decisions and this Court held that when a suit is merely fixed for considering an interlocutory matter, it cannot be aid that the suit is fixed for hearing. In that case after framing of the issues, the Court fixed the case for submission of a list of witness of the parties. On that day the plaintiffs submitted a list of their witnesses and also submitted an application under rule 10 of Order XIII, a copy of which was supplied to the defendant and the case was adjourned to a date for reply and arguments on the said application. On that date neither the defendant nor his counsel appeared. Therefore, the Court proceeded ex parte and after recording ex parte evidence, fixed the case for delivery of judgment. Before delivery of judgment, the defendant made an application to set aside the ex parte proceedings inter alia submitting that since the case was not fixed for 'hearing', the Court had no jurisdiction to proceed ex parte. The Court held that before proceeding ex parte on failure of a party to appear what is necessary is that the date should have been for hearing of the suit.

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18. In my opinion, the date on which the execution application was dismissed for default of appearance of the decree-holder, namely, 21-8-1979 was not a date fixed for 'hearing' within the meaning of rule 105. It was a date awaiting report as to execution of the warrant which was supposed to be issued on submission of a list of moveable property by the decree-holders within three days of the earlier order dated 21-7-1979. Consequently, the dismissal of execution application on 21-8-1979 was not under rule 105(2) of Order XXI of the Code of Civil Procedure, and, therefore, the provisions of rule 106 are not attracted. The dismissal of the execution application in default of appearance on 21-8-1979 is referable inherent powers of the Court."

17. Under these circumstances, by no stretch of imagination, it can be said that when the suit was fixed for payment of process fee and as the suit



was dismissed on account of non-payment of process fee, even then it can be treated as dismissal under Order 9 Rule 8 CPC.

18. Accordingly, it is held that once the suit was not fixed for hearing, therefore, it cannot be treated as a dismissal under Order 9 Rule 8 CPC.

19. Furthermore, the appellate court has also decided the question of jurisdiction in a very slipshot manner. Merely by saying that the dismissal can be treated as dismissal under Order 9 Rule 8 CPC, nothing more was mentioned. Therefore, it is clear that even the appellate court conveniently ignored the word "hearing" as mentioned in Order 9 Rule 8 CPC.

20. Be that whatever it may.

21. Since the suit was not fixed for hearing and it was only fixed for payment of process fee for defendant No. 3 and as plaintiff had not paid the process fee for more than one and a half year for issuance of notice to defendant No. 3, this Court is of the considered opinion that the suit was dismissed under Order 9 Rule 2 of CPC. Respondent / plaintiff had rightly filed the application under Order 9 Rule 4 CPC and by no stretch of imagination, said application could have been considered to be an application under Order 9 Rule 9 CPC.

22. Accordingly, the appellate court committed a material illegality by holding that the appeal filed by respondent / plaintiff against the rejection of his application under Order 9 Rule 4 CPC was maintainable. As a consequence thereof, order dated 30.04.2025 passed by Presiding Officer in the capacity of Second Additional Sessions Judge, Gohad, District Bhind (whereas he was exercising his civil jurisdiction) in MCA No. 25/2022 is



hereby set aside.

23. The appeal filed by respondent / plaintiff under Order 43 Rule 1 CPC is hereby dismissed as not maintainable.

24. Civil revision succeeds and is hereby **allowed**.

(G. S. AHLUWALIA)
JUDGE

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