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NEW INDIA ASSURANCE CO. LTD.

v.

R. SRINIVASAN

FEBRUARY 28, 2000

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[S. SAGHIR AHMAD AND D.P. WADHWA, JJ.]

Consumer Protection Act, 1986 : Sections 13, 14(3) and 30(2).

Tamil Nadu Consumer Protection Rules, 1988 : Rules 4(8), 8(8), 9(6).

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Code of Civil Procedure, 1908 : Order 9.

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Consumer Protection—Consumer—Dismissal of complaint for default—Dismissal of application for restoration of complaint—Filing of fresh complaint—Permissibility of—Insured—Filing of complaint before State Commission—Claim for damages in respect of insured vehicle—Complaint dismissed for default—Application for restoration of complaint also dismissed—Fresh complaint filed before District Forum—Held valid—Order 9, Rule 9(1) of Civil Procedure Code—Held inapplicable to the proceedings under the Consumer Protection Act.

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Court—Judicial or quasi-judicial body—Power to dismiss complaint for non-prosecution—Power to restore complaint on good cause being shown.

Rules of procedure—Object of—Interest of justice should not be defeated by Rule of Technicality.

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A complaint filed by the respondent before the State Consumer Disputes Redressal Commission, Madras, claiming damages in respect of the damage caused to his vehicle insured with the appellant-company was dismissed in default. An application filed for restoration of the complaint was also dismissed. Thereafter, the respondent filed a fresh complaint with the District Consumer Disputes Redressal Forum which allowed the respondent's claim. The appellant-company challenged this order before the State Commission, on the ground, *inter alia*, that a second complaint could not be legally instituted by the respondent as the first complaint, which was dismissed for default, was not restored. However, the State Commission dismissed the appeal. A revision preferred by the Insurance

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Company before the National Consumer Disputes Redressal Commission

was also dismissed. In appeal to this Court on the question whether the dismissal of the first complaint for default would operate as a bar to the entertainment of the second complaint :

Dismissing the appeal, this Court

HELD : 1. Rule 9(1) of Order 9 of Civil Procedure Code contains a prohibition that if a suit is dismissed in default of the plaintiff under Order 9, Rule 8, a second suit on the same cause of action would not lie under the Tamil Nadu Consumer Protection Rules, 1988. However, there is no provision parallel to the provision contained in Order 9 of Civil Procedure Code. That being so, the rule of prohibition contained in Order 9, Rule 9(1) Civil Procedure Code cannot be extended to the proceedings before the District Forum or the State Commission. The fact that the case was not decided on merits and was dismissed in default of non-appearance of the complainant cannot be overlooked and, therefore, it would be permissible to file a second complaint explaining why the earlier complaint could not be pursued which was dismissed in default. [1236-C-E]

2. A reading of Section 13 of the Consumer Protection Act, 1986 will show that powers which are available to a civil court under the Code of Civil Procedure have also been made available to the District Forum in respect of matters enumerated in sub-section (4) of Section 13. However, the provisions of Order 9 have not been made applicable to the proceedings, under the Consumer Protection Act. Thus, the Code of Civil Procedure has been applied to the proceedings under the Consumer Protection Act only to a limited extent. If the intention of the Legislature was to apply the provisions of Order 9 also to the proceedings under the Consumer Protection Act, it would have clearly provided in the Act that the provisions of Order 9 will also be applicable to the proceedings before the District Forum or the State Commission or, for that matter, before, the National Commission. If the Legislature itself did not apply the rule of prohibition contained in Order 9, Rule 9(1), it will be difficult for the Courts to extend that provision to the proceedings under the Act. [1233-E-F; 1234-B-D]

3. Every court or judicial body or authority, which has a duty to decide a lis between two parties, inherently possesses the power to dismiss a case in default. Where a case is called up for hearing and the party is not present, the court or the judicial or quasi-judicial body is under no obligation to keep the matter pending before it or to pursue the matter on

A behalf of the complainant who had instituted the proceedings. That is not
the function of the court or, for that matter, of judicial or quasi-judicial
body. In the absence of the complainant, therefore, the court will be well
within its jurisdiction to dismiss the complaint for non-prosecution. So
also, it would have the inherent power and jurisdiction to restore the
B complaint on good cause being shown for the non-appearance of the
complainant. [1237-A-C]

Narsing Das v. Mangal Dubey & Ors., ILR (5) Allahabad 183, applied.

C 4. A complainant may harass a party by repeatedly filing complaint
against him. He may file a complaint, draw the opposite party to the State
or National Commission and then have the complaint dismissed for
default. He may repeat the exercise again only to harass the defendant.
This practice, or to put it a little sternly, these tactics would be intolerable
for any authority under the Act. In such a situation, the District Forum or
the State or National Commission would not be helpless and it would be
D open to them to dismiss the fresh complaint on the ground of abuse of the
process available under the Act. They can, in that situation, legitimately
invoke the principles of Order 9 Rule 9 Civil Procedure Code. [1237-C-E]

E 5. The rules of procedure are intended to serve the ends of justice
and not to defeat the dispensation of justice. The respondent had suffered
loss which was squarely covered by the Policy of Insurance granted by the
appellant. His claim is not being questioned on merits and is being sought
to be defeated on the technical plea that on account of the first complaint
having been dismissed in default and the complaint having not been
restored, second complaint would not lie. The interest of justice cannot be
F defeated by this rule of technicality. Consequently, no interference is called
for with the orders passed by the District Forum, the State Commission
and the National Commission. [1237-F-H; 1238-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11439 of
G 1996.

From the Judgment and Order dated 27.2.96 of the National Consumer
Dispute Redressal Commission, New Delhi in R.P. No. 966 of 1995.

H P.K. Seth, Ms. Sheetal Sharma, Sudhir Kumar Gupta and R.K. Gupta
for the Appellant.

R. Sundaravaradan and R. Ayam Perumal for the Respondent.

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The Judgment of the Court was delivered by

S. SAGHIR AHMAD, J. Respondent, who was the owner of vehicle No. TN-67-1931, approached the State Consumer Disputes Redressal Commission, Madras (the 'State Commission', for short) against the appellant in respect of the damage caused to his vehicle, which was insured with the appellant. The claim for damages for Rs. 1,47,141.70 p. was filed some time in October, 1992. On February 8, 1993, the complaint was dismissed in default. Two days later, namely, on 10.2.1993, the respondent filed an application for restoration of the complaint, but the application was dismissed by the State Commission and the complaint was not restored.

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In April, 1993, respondent filed a fresh complaint against the appellant, but this complaint was filed with the District Consumer Disputes Redressal Forum, Kamarajar, Srivilliputhur, (the 'District Forum', for short) in respect of the aforesaid vehicle, for the same amount, viz. for Rs. 1,47,141.70 p.

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The claim was opposed by the appellant, who filed a written statement pleading, *inter alia*, that it had already settled the insurance claim of the respondent for a sum of Rs. 62,811 after scrutiny of the relevant papers and the survey report. This amount was offered to the respondent, who declined to receive the claim compensation and, therefore, in the particular circumstances of the case, there was no deficiency in service and the appellant was not liable to pay any damages under the Act nor could a claim be filed against the Insurance Company. It was further pleaded that in view of the fact that a similar complaint instituted by the respondent before the State Commission was dismissed in default and the Commission had also refused to restore it, a fresh complaint on the same cause of action was not maintainable.

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The District Forum, by its order dated 19.12.1994, allowed the claim of the respondent for a sum of Rs. 1,47,141.70 p. together with interest at the rate of 18 per cent from 26.11.1991. This order was challenged by the appellant before the State Commission, Madras, on the ground, *inter alia*, that a second complaint could not be legally instituted by the respondent as the first complaint, which was dismissed for default, was not restored. The State Commission, however, dismissed the appeal by its judgment

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- A dated 12.6.1995. The appellant, thereafter, filed Revision before the National Consumer Disputes Redressal Commission, New Delhi, which was dismissed on 27.2.1996.

- B The only question raised before us by the learned counsel for the appellant is that in view of the dismissal of the first complaint filed by the respondent, a second complaint on the same facts and cause of action would not lie and it ought to have been dismissed as not maintainable. It is contended that the second complaint was filed in respect of the same vehicle and for the same amount and against the same party from which damages were claimed earlier, and once the complaint was dismissed
- C though for default, a second complaint would not lie, specially as the application for restoration was also rejected by the State Commission.

- D Learned counsel for the respondent has, on the contrary, contended that by contending that a second complaint was not maintainable as the first complaint had been dismissed in default, the appellant was merely trying to invoke the rule of 'prohibition' contained in Order 9 Rule 9 CPC which is not applicable to the proceedings under the Consumer Protection Act. It is also contended that while the first complaint was filed against the Branch Manager, New India Assurance Company Limited, Sattur, the second complaint was filed against the Divisional Manager and Regional
- E Manager, as the Branch Manager had no right or power to settle claims of the value of Rs. 1 lakh and above, which jurisdiction was vested only in the Divisional Manager and the Regional Manager. It is contended that in view of there being new opposite parties, the dismissal of the first complaint for default would not operate as a bar to the entertainment of the second
- F complaint.

The procedure which the District Forum has to follow while trying a complaint is indicated in Section 13 of the Act which, *inter alia*, provides as under :

- G "13. Procedure on receipt of complaint -

(1)

(2)

- H (3)

(4) For the purposes of this section, the District Forum shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely : A

(i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath; B

(ii) the discovery and production of any document or other material object producible as evidence:

(iii) the reception of evidence on affidavits; C

(iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;

(v) issuing of any commission for the examination of any witness; and D

(vi) any other matter which may be prescribed."

The above will show that powers which are available to a civil court under the Code of Civil Procedure have also been made available to the District Forum in respect of matters enumerated in Sub-section (4) of Section 13. E

The provisions of Order 9 have not been made applicable to the proceedings under the Consumer Protection Act. Order 9 deals with appearance of parties and consequence of non-appearance. It is provided by Rule 2 of Order 9 that if the plaintiff was found to have not taken any step for service upon the defendant, the suit would be dismissed. Rule 3 contemplates dismissal of suit for non-appearance of the parties. If the suit is dismissed under Rule 3 on account of non-appearance of the parties, it would be open to the court to set aside the order by which the suit was dismissed and to restore the suit to its original file. Rule 4 also enables the plaintiff, whose suit was dismissed under Rule 3, to bring a fresh suit. But where the suit is dismissed under Rule 8 for non-appearance of the plaintiff, though the defendant is present, it will not be possible for the plaintiff to bring a fresh suit in respect of the same cause of action on F G H

- A account of the prohibitions contained in Sub-rule (1) of Rule 9 of Order 9. But it will be open to the Court to recall the order and restore the suit. It is this Rule which is being relied upon by the counsel for the appellant in support of his contention that the complaint filed by the respondent having been once dismissed and the restoration application having also
- B been rejected, it was not open to him to file a fresh complaint on the same cause of action against the appellant.

- C We have already indicated above that the Code of Civil Procedure has been applied to the proceedings under the Consumer Protection Act only to a limited extent. If the intention of the Legislature was to apply the provisions of Order 9 also to the proceedings under the Consumer Protection Act, it would have clearly provided in the Act that the provisions of Order 9 will also be applicable to the proceedings before the District Forum or the State Commission or, for that matter before the National Commission. If the Legislature itself did not apply the rule of prohibition
- D contained in Order 9, Rule 9(1), it will be difficult for the Courts to extend that provision to the proceedings under the Act.

We may point out that Section 14(3) of the Act which provides as under :-

- E "14(3). Subject to the foregoing provisions, the procedure relating to the conduct of the meetings of the District Forum, its sittings and other matters shall be such as may be prescribed by the State Government."

- F clearly contemplates that the procedure relating to the sittings of the District Forum and "OTHER MATTERS" shall be such as is prescribed by the State Government.

Sub-section (2) of Section 30 of the Act provides as under :

- G "30(2). The State Government may, by notification, make rules for carrying out the provisions contained in clause (b) of sub-section (2) and sub-section (4) of section 7, sub-section (3) of section 10, clause (c) of sub-section (1) of section 13, sub-section (3) of section 14, section 15 and sub-section (2) of section 16."

- H In exercise of the powers conferred by Sub-section (2) of Section 30,

quoted above, the State Government of Tamil Nadu made the Tamil Nadu Consumer Protection Rules, 1988. Sub-rule (8) of Rule 4 provides as under:

"(8) If during the proceedings conducted under section 13, the District Forums fixes a date for hearing of the parties, it shall be obligatory on the complainant and opposite party or its authorised agent to appear before the District Forum on such date of hearing or any other date to which hearing could be adjourned. Where the complainant or his authorised agent fails to appear before the District Forum on such day, the District Forum may in its discretion either dismiss the complaint for default or decide it on merit. Where the opposite party or its authorised agent fails to appear on the day of hearing the District Forum may decide the complaint *ex parte*."

Similarly, Sub-rule (8) of Rule 8, relating to the procedure before the State Commission, provides as under :

"(8) If during the proceedings conducted under section 13, State Commission fixes a date for hearing of the parties, it shall be obligatory on the complainant and opposite party or his authorised agent to appear before the State Commission on such date of hearing or any other date to which hearing could be adjourned. Where the complainant or his authorised agent fails to appear before the State Commission on such day, the State Commission may in its discretion either dismiss the complaint for default or decide it on merits. Where the opposite party or its authorised agent fails to appear on the day of hearing, the State Commission may decide the complaint *ex parte*."

Both the above Rules, namely, Sub-rule (8) of Rule 4 and Sub-rule (8) of Rule 8, relate to the original proceedings instituted either before the District Forum or before the State Commission. Sub-rule (6) of Rule 9 provides as under :

"(6) On the date of hearing or any other day to which hearing may be adjourned, it shall be obligatory for the parties or their authorised agents to appear before the State Commission. If appellant or his authorised agent fails to appear on such date, the

A State Commission may, in its discretion, either dismiss the appeal or decide it on the merit of the case. If the respondent or his authorised agent fails to appear on such date, the State Commission shall proceed *ex parte* and shall decide the appeal *ex parte* on merits of the case."

B This Rule is in identical terms with Sub-rule (8) of Rule 4 and Sub-rule (8) of Rule 8. Under this Sub-rule, the appeal filed before the State Commission against the order of the District Forum, can be dismissed in default or the State Commission may in its discretion dispose it of on merits. Similar power has been given to the National Commission under C Rule 15(6) of the Rules made by the Central Government under Section 30(1) of the Act. These Rules do not provide that if a complaint is dismissed in default by the District Forum under Rule 4(8) or by the State Commission under Rule 8(8) of the Rules, a second complaint would not lie. Thus, there is no provision parallel to the provision contained in Order D 9. Rule 9(1) CPC which contains a prohibition that if a suit is dismissed in default of the plaintiff under Order 9, Rule 8, a second suit on the same cause of action would not lie. That being so, the rule of prohibition contained in Order 9, Rule 9(1) CPC cannot be extended to the proceedings before the District Forum or the State Commission. The fact that the case was not decided on merits and was dismissed in default of non-appearance of the complainant cannot be overlooked and, therefore, it would be permissible to file a second complaint explaining why the earlier complaint could not be pursued and was dismissed in default. E

F But that is not the end of the matter. Mahmood, J. in his dissenting judgment in the Full Bench case of *Narsing Das v. Mangal Dubey & Ors.*, ILR 5 Allahabad 163, observed :

G "The Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle, prohibitions cannot be presumed, and in the present case, therefore, it rests upon the defendants to show that the suit in the form in which it has been brought is prohibited by the rules of procedure applicable to the Courts of justice in India." H

We only intend to invoke the spirit of the principle behind the above *dictum* in support of our view that every court or judicial body or authority, which has a duty to decide a lis between two parties, inherently possesses the power to dismiss a case in default. Where a case is called up for hearing and the party is not present, the court or the judicial or quasi-judicial body is under no obligation to keep the matter pending before it or to pursue the matter on behalf of the complainant who had instituted the proceedings. That is not the function of the court or, for that matter, of judicial or quasi judicial body. In the absence of the complainant, therefore, the court will be well within its jurisdiction to dismiss the complaint for non-prosecution. So also, it would have the inherent power and jurisdiction to restore the complaint on good cause being shown for the non-appearance of the complainant.

We cannot also lose sight of the fact that a complainant may harass a party by repeatedly filing the complaint against him. He may file a complaint, draw the opposite party to the State or National Commission and then have the complaint dismissed for default. He may repeat the exercise again only to harass the defendant. This practice, or to put it a little sternly, these tactics would be intolerable for any authority under the Act. In such a situation, the District Forum or the State or National Commission would not be helpless and it would be open to them to dismiss the fresh complaint on the ground of abuse of the process available under the Act. They can, in that situation, legitimately invoke the principles of Order 9 Rule 9 C.P.C.

In the instant case, the vital fact of there being an insurance cover in favour of the respondent is not disputed. The loss suffered by the respondent is not disputed and the claim of the respondent is also not questioned. The only point urged before the State Commission as also before the National Commission and, for that matter, before us is that on account of the first complaint having been dismissed in default and the complaint having not been restored, the second complaint would not lie. The interest of justice, in our opinion, cannot be defeated by this rule of technicality. The rules of procedure, as has been laid down by this Court a number of times, are intended to serve the ends of justice and not to defeat the dispensation of justice. The respondent had suffered loss which was squarely covered by the Policy of Insurance granted by the appellant. Since his claim is not being questioned before us on merits and is being sought

A to be defeated on the technical plea referred to above, we are not prepared to interfere with the orders passed by the District Forum, the State Commission and the National Commission, particularly as it is stated before us that the whole of the claim amount has already been paid to the respondent.

B Finding no merits in the contention raised by the counsel for the appellant, we dismiss the appeal but without any order as to costs.

T.N.A.

Appeal dismissed.