

MANU/BH/0030/1959

Equivalent Citation: AIR1959Pat121, 1958(6)BLJR783

## IN THE HIGH COURT OF PATNA

Civil Revn. No. 62 of 1955

Decided On: 07.11.1958

Appellants:**Doma Choudhary and Ors.**

**Vs.**

Respondent:**Ram Naresh Lal and Ors.**

### Hon'ble Judges/Coram:

*Vaidynathier Ramaswami , C.J., Kamla Sahai and Kanhaiya Singh , JJ.*

### Counsel:

*For Appellant/Petitioner/Plaintiff: Dasu Sinha and Bindeshwari Prasad Sinha No. 1, Adv.*

*For Respondents/Defendant: D.N. Varma, Purnendu Narayan and Devakant Choudhary, Adv.*

### Overruled / Reversed by:

The Bihar State Electricity Board vs. Pawan Kumar Khetan and Ors., MANU/BH/0057/1978, Bajrang Rai and Ors. vs. Ismail Mian and Ors., MANU/BH/0074/1978

## JUDGMENT

### Kamla Sahai, J.

1. The principal point which requires consideration in this case is whether a Court can, in exercise of its inherent power set aside an order of dismissal for default of an application under Rule 9 of Order IX of the Code of Civil Procedure and restore the application.

2. The facts necessary to appreciate the points which have to be considered are these. The plaintiffs, who are the opposite party in this Court, filed Title Suit No. 19 of 1950 in the Munsif 1st Court at Sasaram. One of the dates fixed in the case was the 21st June, 1954. On that date, the defendants filed hazri, and the plaintiffs' pleader filed a petition for time, but that petition was dismissed. The parties were directed to get ready at once for hearing of the suit.

Later, the suit was called out; but no one responded on behalf of the plaintiffs. It was therefore, dismissed for default. On the 20th July, 1954, the plaintiffs filed an application under Rule 9 of Order IX of the Code for an order to set aside the dismissal of the suit. This was registered as Miscellaneous Case No. 20 of 1954. On the 4th December, 1954, that case was also dismissed for default.

On the same day, however, the plaintiffs filed an application under Section 151 of the Code for its restoration. This application was registered as Miscellaneous Case No. 37 of 1954. By an order dated the 13th January, 1955, the learned Munsif set aside the dismissal of Miscellaneous Case No. 20, and restored it. This application for revision

under Section 115 of the Code has been filed against that order. It has been referred to this Bench on account of conflict of authority in this. Court on one of the points which has to be decided.

**3.** Appearing on behalf of the petitioners. Mr. Dasu Sinha has put forward the argument that an appeal lies under Rule 1(c) of Order XLIII of the Code against an order rejecting an application under Rule 9 of Order IX in a case open to appeal, and that the appeal lies irrespective of whether the application is rejected on merits or is dismissed for default.

He has also contended that the Munsif had no jurisdiction to set aside the dismissal of the application in exercise of the Court's inherent power when the remedy by way of appeal was available to the plaintiffs, and that, by setting side the dismissal of the application, the learned Munsif has usurped the function of the appellate Court.

On the other hand, Mr. D.N. Varma appearing on behalf of the plaintiffs opposite party, stated at first that he was not ready for want of instructions. Later, however, he made some submissions. His argument is that no appeal lies against an order of dismissal for default of an application under Rule 9 of Order IX, though an appeal lies against an order whereby such an application is rejected on merits.

In support of this argument, he has relied upon Jagdish Narain Prashad Singh v. Harbans Narain Singh 2 Pat LJ 720: AIR 1918 Pat 612 and Bajit Lal v. Rameshwar Singh ILR 7 Pat 333: MANU/BH/0067/1928 : AIR 1928 Pat 335. He has also contended that a Court has inherent jurisdiction to do justice, and that it can restore an application under Rule 9 in exercise of that jurisdiction. He has referred to Banshidar Kanungo v. Nabab Khan MANU/BH/0242/1948 : AIR 1949 Pat 190 and Mt. Balmati Kuari v. Jagbandhan Nath MANU/BH/0127/1950 : AIR 1950 Pat 497 on this point. He has further submitted that, on merits, the case was rather hard for the plaintiffs, and the learned Munsif was right in restoring the application in Miscellaneous Case No. 20.

**4.** The first question which I propose to discuss is whether an appeal lies from an order, dismissing for default an application under Rule 9 of Order IX. An application under Rule 9 is filed when a suit is wholly or partly dismissed under Rule 8. That rule provides for dismissal of a suit when at the time of its being called on for hearing, the defendant appears and the plaintiff does not. It is under Rule 13 that a defendant may apply to a Court to set aside an ex parte decree which that Court has passed against him.

Under Section 104(1), an appeal lies from some orders including those passed under any of the rules when an appeal is expressly allowed by the rules and from no other orders. Rule 1 of Order XLIII enumerates the orders passed under the rules from which appeals lie. Under Rule 1(c), an appeal lies from "an order under Rule 9 of Order IX rejecting an application (in a case Open to appeal, for an order to set aside the dismissal of a suit."

Under Clause (d) of the same rule, an appeal lies from "an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte." The words of both these clauses are almost the same, the only difference being that one clause deals with the 'dismissal of a suit' and the other with 'a decree passed ex parte.'

There can, therefore, be no distinction in principle between the two clauses. If an

appeal lies under Rule 1(d) from an order dismissing an application under Rule 13 of Order IX for default, an appeal will also lie under Rule 1(c) from an order dismissing an application under Rule 9 of Order IX for default. I have made this clear because some of the decisions which have to be referred to relate to Clause (c) and some to Clause (d).

**5.** It seems to be manifest on a plain reading of Clauses (c) and (d) that there is no ground for discriminating between rejection of an application on merits and its rejection for default. The order which gives rise to an appeal is one whereby an application of the kinds mentioned in the clauses is rejected. Even if the application is dismissed for default, it is an order of rejection and hence appealable under either of the two clauses which may be applicable.

There is no reason at all to give a restricted meaning to the word 'rejecting' in the clauses by saying that it refers only to rejection on merits. If it is argued that there is no specific provision in the clauses regarding dismissal of an application for default, that argument can be countered by saying, that there is no specific expression in them even relating to rejection on merits. In the definition of 'decree' in Section 2(2), it has been expressly provided that a decree "shall not include (b) any order of dismissal for default."

The reason for exclusion of an order of dismissal for default of a suit is not far to seek. It seems clear that such an order has not been even the force of a decree because the legislature did not intend to make the order subject to an appeal but intended the Court which passed the order to act under Order IX or, where the circumstances did not bring the case under Rules 4 and 9 of that order, to act in appropriate cases in exercise of the Court's inherent power for the, purpose of setting aside the dismissal.

Had the legislature intended that the Court dismissing an application under Rule 9 of Order IX for default should itself have a general power to restore it on being satisfied that such restoration was necessary in the interests of justice, I do not see why it should not have expressly said so. It is not possible to read words which are not there in Clauses (c) and (d) of Rule 1 of Order XLIII.

**6.** There are numerous decisions and there is a conflict of judicial opinion on the point under consideration. The first reported decision of this Court is that in AIR 1918 Pat 612: 2 Pat LJ 720. From the facts stated in the report, it appears that a suit was dismissed for default under Rule 8 of Order IX. An application under Rule 9 was filed, and that was dismissed. An appeal was taken to this Court from that order.

Atkinson, J. delivered the judgment of the Bench, and Chapman, J. agreed with him. The argument that an appeal under Rule 1(c) of Order XLIII lay against an order dismissing a suit and not against an order dismissing an application to restore the suit prevailed. This is clear from an observation which may be quoted from the judgment:

"...-....inasmuch as the order in the case was not an order dismissing a suit but merely an, order dismissing a petition to restore the suit, no appeal lies,"

With great respect to the learned Judges, this view is obviously erroneous because Rule 1(c) of Order XLIII provides for an appeal against an order rejecting an application under Rule 9 of Order IX and not against an order dismissing a suit. Among the cases relied upon by their Lordships is an unreported decision of this

Court in Ramnandan Prasad Singh v. Lala Ramchandra Prasad, Mis. App. No. 239 of 1916 D/- 25-6-1917 : (reported in AIR 1917 Pat 593(1)).

That was an appeal in this Court against an order rejecting an application under Rule 4 of Order IX for setting side a dismissal of a miscellaneous case and not a suit. A preliminary objection was raised that no appeal lay against an order rejecting, an application under Rule 4. Sharfuddin, J. upheld this objection. Both his Lordship and Roe, J., appear further to have been of the view that Rule 9 of Order IX was applicable to a case of dismissal for default of a suit and not of a miscellaneous case.

Their decision does not, therefore, support the view expressed in Jagdish Narain Prashad Singh's case : 2 Pat LJ 720 : AIR 1918 Pat 612 which appears clearly to have been wrongly decided and which must be overruled.

**7.** In ILR 7 Pat 333: MANU/BH/0067/1928 : AIR 1928 Pat 335 an application under Rule 9 of Order IX for setting aside the dismissal for default of a suit was itself dismissed for default, as in the present case.

Macpherson, J., who delivered the judgment, Adami, J. agreeing, repelled an argument that the dismissal of the suit was under Rule 4 (which appears to be a mistake for Rule 3), and held that it was under Rule 8. Following the decision in Jagdish Narain Prashad Singh's case. 2 Pat LJ 720: AIR 1918 Pat 612 however, their Lordships held that, as the Order of dismissal of the application under Rule 9 of Order IX was not an order rejecting an application to set aside the dismissal of a suit, no appeal under Rule I(c) of Order XIII lay against it.

They did not express any opinion of their own, and, though they stated that different views had been expressed in other High Courts, they followed the decision in Jagdish Narain Prasad Singh's case 2 Pat LJ 720: AIR 1918 Pat 612 as they felt bound by it. As the case which was relied upon was wrongly decided, I hold that Bajit Lal Pathak's case ILR 7 Pat 333: MANU/BH/0067/1928 : AIR 1928 Pat 335 was also wrongly decided in so far as this point was concerned. To that extent, that decision is also overruled.

**8.** In Kumud Kumar Bose v. Hari Mohan 21 Cal LJ 628: AIR 1916 Cal 391(1) an application to set aside an ex parte decree was dismissed for default. Sir Asutosh Mookerjee, who delivered the judgment of the Bench, held that an appeal lay against the order of dismissal, and observed that "it was immaterial that the application to set aside the ex parte decree had been dismissed, not on merits, but, for default".

A similar case came up before this Court in Mt. Bodhia v. Ram Chandra. ILR 6 Pat 474: (MANU/BH/0216/1927 : AIR 1927 Pat 240). Their Lordships, Adami and Scroope JJ. followed Kumud Kumar Bose's case 21 Cal LJ 628 : AIR 1916 Cal 391(1) (supra) and held that an appeal lay under Rule 1(d) of Order XLIII, although the application under Rule 13 of Order IX for setting aside the ex parte decree was dismissed for default and not on merits. The cases of Jagdish Narain Prashad Singh 2 Pat LJ 720: AIR 1918 Pat 612 and Bajit Lal Pathak ILR 7 Pat 333: MANU/BH/0067/1928 : AIR 1928 Pat 335 do not appear to have been brought to their Lordships' notice. The facts of Mufti Reazuddin v. Maheshanand, ILR 8 Pat 533 : (MANU/BH/0176/1928 : AIR 1929 Pat 529(2) ) were also similar.

Chatterji J. with whom Ross J. agreed, followed Kumud Kumar Bose's case 21 Cal LJ 628: AIR 1916 Cal 391(1) (supra), Mt. Bodhia's case : (MANU/BH/0216/1927 : AIR 1927 Pat 240 : ILR 6 Pat 474) (supra), and Pakari Pramanik v. Sarat Sundari Debya

37 Ind Cas 835: AIR 1917 Cal 588 and held that an appeal lay from an order rejecting an application under rule 13 of Order IX either on merits or for default. Chatterji J. attempted to distinguish Jagdish Narain Prashad Singh's case 2 Pat LJ 720: AIR 1918 Pat 612 but the distinction is not quite clear.

His Lordship appears to have been under the impression that the appeal in Jagdish Narain Prashad Singh's case 2 Pat LJ 720: AIR 1918 Pat 612 was from an order dismissing an application for setting aside an order of dismissal for default of an application under Rule 9 of Order IX, and said that the settled law was that such an application was not appealable. This impression appears to have been wrong on facts.

His Lordship expressed disagreement with the rule laid down in Bajit Lal Pathak's case ILR 7 Pat 333: MANU/BH/0067/1928 : AIR 1928 Pat 335 but did not consider it necessary to refer the case to a Full Bench as Clause (c) and not Clause (d) of Rule 1 of Order XLIII was dealt with in that case. In my opinion, the distinction pointed out by him was without any real difference because, as I have already mentioned, it is not possible to accept that one principle will apply in the case of Clause (c) and a different principle will apply in the case of Clause (d). Although I differ with great respect from some of the reasons given by Chatterji. J., there can be no doubt that the proposition laid down in Mt. Bodhia's case : (MANU/BH/0216/1927 : AIR 1927 Pat 240 : ILR 6 Pat 474) and Mufti Reazuddin's case : (MANU/BH/0176/1928 : AIR 1929 Pat 529(2) : ILR 8 Pat 533) that an appeal lies under Rule 1(c) or 1(d) of Order XLIII from an order rejecting either on merits or for default an application under Rule 9 or Rule 13 of Order IX respectively is correct.

**9.** There are decisions of most of the other, High Courts in which the same view has been taken; but I need refer only to two of them. In a Full Bench decision of the Bombay High Court in Narayan Putapa v. Vaikunt Subaya, MANU/MH/0325/1926 : AIR 1927 Bom 1, it was held that an appeal lay under rule 1 (d) of Order XLIII from an order the effect of which was that an application for setting aside an ex parte decree stood rejected.

In a recent Full Bench decision of the Assam High Court in Madanlall Agarwalla v. Tripura Modern Bank Ltd. AIR 1954 Ass 1 a large number of decisions of different High Courts were reviewed and discussed. In that case, an application under Rule 13 of Order IX for setting aside an ex parte decree was dismissed for default. Thereafter, an application under section 151 was filed for restoration of that application. The Additional Subordinate Judge heard the evidence of some of the applicant's witnesses but did not give him an opportunity to examine one witness for whose examination he had prayed for adjournment. The learned Subordinate Judge refused to restore the previous application on a consideration of the evidence which was recorded.

It was against that order that a petition for revision was filed in the High Court. Their Lordships considered both the two questions which arise for decision in this case, namely, (1) whether an appeal lies against an order of dismissal for default of an application under Rule 9 Or Rule 13 of Order IX; and (2) whether the Court can, in exercise of its inherent power restore an application under either of those two Rules which is dismissed for default.

I will refer to their views on the second question when I discuss that question. So far as the first question is concerned, Sarjoo Prosad C. J. and Deka J. held that, irrespective of whether an application under Rule 9 or Rule 13 was dismissed on

merits or for default, an appeal lay under Rule 1(d) of Order XLIII from that order, I may usefully quote some observations of Sarjoo Prosad C. J. which are as follows:

"The learned Advocate General is right in contending that Rule 13 of Order 9, Civil Procedure Code, does not in terms provide for dismissal of the application on merits just as much as it does not provide for dismissal of the application for default .....The right to dismiss, therefore, has to be gathered by necessary implication. In Other words, if the Court is not so satisfied, it should be 'a fortiori' held that the Court can reject the application whether on merits or on account of default. The argument is based upon the principle that if the Court has power to allow the application on the terms of the section, it has necessarily the power also to reject it. If, therefore, it can be argued that the dismissal of the application under Order 9, Rule 13 on merits is appealable under Clause (d) of Order 43, Rule 1, Civil Procedure Code, it could as well be argued that the dismissal of the application for default is similarly appealable. There is undoubtedly much substance in this contention and in my opinion it should prevail."

So far as I can see, Ram Labhaya J. expressed a contrary opinion on the basis of two grounds. The first ground was that Rule 13 of Order IX did not contain any provision relating to dismissal for default, and hence such a provision could not be read into that rule. His Lordship himself stated that an order of dismissal for default of an application under Rule 13 of Order IX was undoubtedly "an order rejecting the petition". Rule 1(d) of Order XLIII requires only the rejection of such an application in order to make the order appealable.

With great respect, therefore, I am unable to see why the order rejecting the application under Rule 13 of Order IX should not be held to be an order contemplated by Rule 1(d) of Order XLIII simply because it is dismissed for default. The second ground was that an appeal would be an illusory remedy because the appellate Court could not act unless and until full facts were placed before it. A party cannot be held to have no right of appeal simply because he is not likely to obtain relief unless, he satisfies the appellate Court by affidavits or otherwise that, on the facts of the case, the dismissal of the application filed by him under Rule 9 or Rule 13 of Order IX was wrong or unjustified.

The relevant provisions of the Civil Procedure Code have to be construed, and the question whether a party has a right of appeal from a certain order must be decided on such construction. The right of appeal is a creature of statute and can neither be conferred nor taken away on a consideration of the question whether the remedy will or will not be convenient or adequate.

**10.** The next question which requires consideration is whether the learned Munsif had jurisdiction, in exercise of the Court's inherent power, to set aside the dismissal for default of Miscellaneous Case No. 20 and to restore it. Section 151 of the Code has not created any new power but has preserved the power to act in the ends of justice and to prevent abuse of the processes of the Court which the Courts had been exercising from before. As observed by their Lordships of the Judicial Committee while discussing section 13 of the Civil Procedure Code in *Gokul Mandar v. Pudmanand Singh* ILR 29 Cal 707 (PC)

"the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go

outside the letter of the enactment according to its true construction."

It is impossible, however, for the Civil Procedure Code or for any statute to provide for all matters which may arise or the entire variety of situations which may have to be dealt with.

The inherent power has been preserved in order to enable the Courts to deal with matters and situations which are not covered by any specific provision of the Code. It is, therefore, neither practicable nor desirable to define the limits or to enumerate the circumstances in which this power can be exercised. As, however, the power is, of necessity, very wide, the Courts have to be very cautious and vigilant in exercising it. It may also be safely laid down that the Court has no inherent power to override expressions of the Code.

Further, in the absence of some special circumstances which amount to abuse of the process of the Court, it cannot grant a relief in exercise of its inherent power when the ends of justice can be served by another remedy provided by the Code which is available to the party concerned. The mere fact that the procedure for following the other remedy is longer or more costly will not entitle the Court to disregard this rule because its order will not be necessary either "in the ends of justice or to prevent abuse of the process of the Court."

**11.** I now proceed to examine some of the decisions. The question for decision before a Full Bench in *Abdul Karim v. Allahabad Bank, Ltd.* AIR 1917 Cal 44 was whether the power of remand of the appellate Court was limited to the case specified in Rule 23 of Order XLI. It was held that the appellate Court could remand a case in exercise of its inherent power if justice required it and if the case was not one covered by that rule; but it was made clear that a Court could not exercise inherent power until it was satisfied that specific provisions of the Code were insufficient to meet the ends of justice in the case. This decision was followed by a single Judge of this Court in *Delho Hansda v. Charani Hansda* MANU/BH/0121/1953 : AIR 1953 Pat 341. *Sinha J.* held in that case that remand, by the lower appellate Court in exercise of its inherent power was unsustainable because rule 25 of Order XLI of the Code fully covered the case. He observed:

"If there is a specific provision laid down in the statute, the Court cannot make use of its inherent powers which can be resorted to only in cases where there is no provision of law to meet a particular case.

In that view of the matter, I am of the opinion that the Court below had no jurisdiction to act under the inherent powers of the court under Section 151, Civil Procedure Code."

**12.** The point for consideration of the Full Bench case of *Neelaveni v. Narayana Reddi* ILR 43 Mad 94: AIR 1920 Mad 640 was whether a Court had inherent power to set aside an ex parte decree passed by itself. It was held that it had no such power. I may quote with profit some observations of *Seshagiri Ayyar J.* at page 105 (of ILR Mad): (at p. 644 of AIR) of the report which are as follows:

"Section 151 has been introduced for the simple reason that no Code can exhaustively deal with the procedure for exercising every power which a Court of Justice is competent to exercise; and the language of the section shows that it should be availed of only where a power which has been exercised has not been provided for in the Code. As was pointed out by the

Judicial Committee in ILR 29 Cal 707 (PC)(supra) the essence of the Code is to be exhaustive upon the matters for which it provides. This language was employed no doubt with reference to Section 13 of the Code of Civil Procedure. It is equally applicable to Order IX, Rule 13. The Legislature has provided a mode by which ex parte decrees can be set aside. As I pointed out already there is no necessity for invoking the principle of the remedy ex debito justitiae, because in all conceivable cases excepting a case like the present in which the lower Court has made no attempt to confirm itself to any rule or precedent, the party aggrieved can obtain justice by resorting to the proper procedures."

**13.** In another Full Bench decision of the Madras High Court, *Alagasundaram v. Pichuvier*, MANU/TN/0456/1929 : AIR 1929 Mad 757, the District Munsif restored an application under Rule 100 of Order XXI of the Code which had been dismissed for default. It was held that Order IX could not be applied by virtue of Section 141 of the Code to such a proceeding, nor could the Court set aside its own order of dismissal for default in exercise of its inherent power when remedy by way of a separate suit was available to the aggrieved party. Wallace J., who delivered the judgment of the Bench observed:

"I think we should not be justified in laying down any general principle that an ordinary civil Court has inherent power to set aside its own order and to interfere in any case in which it thinks a failure of justice has occurred when the aggrieved party has another remedy by which it can be set aside, even though the remedy is not as summary or as cheap."

**14.** Beevor J. sitting singly, expressed a similar view in *Kishun Prasad v. Hardwar Singh* MANU/BH/0090/1945 : AIR 1946 Pat 184. He held in that case that an application under Rule 9 of Order IX would but an application under Section 151 would not lie for setting aside an order of dismissal for default of that part of the plaintiff's claim which was not admitted by the defendant.

**15.** In *Kameshwar Singh v. Ram Prasad* : (MANU/BH/0176/1952 : AIR 1952 Pat 478 : ILR 31 Pat 737) some of the defendants filed an application under Rule 13 of Order IX for setting aside ex parte preliminary and final decrees. Subsequently, they filed two applications under Sections 151 and 152, praying in effect that the decree for mesne profits should be set aside. The Subordinate Judge held that the persons who had filed those applications had full knowledge of the suit and also of the proceeding for ascertainment of mesne profits, and he further held that the application under Rule 13 of Order IX was barred by time.

Purporting to act under Sections 151 and 152 of the Code, however, he vacated the decree for mesne profits passed by his predecessor against the applicants. Their Lordships Das and Ramaswami JJ, (as they then were), held that the Court could not

"override the express provisions of law by a resort to inherent powers under section 151, Code of Civil Procedure, nor can the Court ignore the specific provisions for dealing with a case by a resort to inherent jurisdiction either under Section 151 or Section 152, Code of Civil Procedure."

Das J. made some observations with which I respectfully agree and which are as follows:

"If the decree was erroneous, the procedure for getting the decree vacated

was by way of an appeal from the decree. If there was any error apparent on the face of the record, the proper procedure was to file an application for review within time. If a fraud was committed which vitiated the decree, it was open to the opposite parties to bring an action on that basis to set aside the decree. If fraud was committed on the court, the position might have been different and in an appropriate case the inherent jurisdiction of the Court might be invoked..... There has been no abuse of the process of the Court in this case which would require to be prevented or remedied by a resort to the inherent power of the Court. I do not think that section 151 or section 152, Code of Civil Procedure, can be used in the way it has been used by the learned Subordinate Judge."

**16.** I may now refer to some cases in which different views to some extent appear to have been expressed. In *Ganesh Prasad v. Bhagelu Ram* MANU/UP/0178/1925 : AIR 1925 All 773, an application to restore an application under Rule 9 of Order IX, which was dismissed for default, succeeded in the lower Court. A revision application was placed before a Division Bench consisting of Sulaiman and Daniels JJ. Both the learned Judges delivered separate judgments., Daniels, J. expressed the opinion that Order IX could be applied by virtue of section 141 of the Code of Civil Procedure to a proceeding of the kind which was before him but section 151, could in any case, be applied because a man prevented by circumstances beyond his control like accidentally breaking his leg could not be left without a remedy.

It is well settled now that section 141 of the Code does not make Order IX applicable to a proceeding started under Rules 4, 9 or 13 of Order IX. In fact, Sulaiman J. followed *Ramghulam Singh v. Sheo Deonarain Singh* 4 Pat LJ 287: AIR 1922 Pat 121 and held that Order IX did not apply to a proceeding started under that very Order for setting aside an ex parte decree. He, however, held that an application for setting aside a dismissal for default or an ex parte decree could be restored by exercise of inherent power under section 151.

Neither of the two learned Judges considered whether an appeal lay from the order of dismissal for default of the application under Rule 9 of Order IX for setting aside the dismissal for default of the suit, and, it so, whether the plaintiffs could pursue the remedy under the inherent power of the Court instead of the remedy by way of appeal. With great respect, therefore, I find it difficult to agree with that decision.

**17.** In *Sarat Krishna Bose v. Bisweswar Mitra* MANU/WB/0182/1926 an application under Rule 9 of Order IX was dismissed for default, and an application under the same rule for setting aside that: dismissal was dismissed as being incompetent. Their Lordships held that "where there is no provision in the Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration' of which it exists, the provision of section 151 may and should be resorted to".

In that case also, their Lordships did not consider whether an appeal lay from the order of dismissal for default of the first application. If they had held that an appeal lay, they could not take the view that there was "no provision in the Code expressly providing for a remedy". I, therefore, respectfully differ from their decision.

**18.** The facts in the case of *Mt. Kapura Kuer v. Narain Singh*, MANU/BH/0184/1948 : AIR 1949 Pat 491 were that the Court ordered restoration of an application under Rule 13 of Order IX, which had been dismissed for default, upon payment of ten

rupees as cost to the plaintiff., The plaintiff accepted the cost, and thereupon the application under Rule 13 was restored. The plaintiff then moved this Court in revision, and it was held by their Lordships, Sinha and Mahabir Prasad JJ. that the petitioner in this Court, having accepted the amount of cost awarded to her as a condition precedent to the restoration of the application, was "estopped from challenging the legality or the propriety of the order made by the Court below".

This was sufficient to dispose of the case; but their Lordships expressed the view that, in very exceptional cases, the court has inherent jurisdiction to restore an application under Rule 13 of Order IX after it has been dismissed for default. If I may say so with respect, the proposition appears to be correct as a general rule; but, as their Lordships have themselves said, their observation is obiter.

**19.** The facts of the case of MANU/BH/0127/1950 : AIR 1950 Pat 497, which Mr. D.N. Varma has cited, were quite different. What happened was that, under a compromise decree passed by this Court in an appeal from a partition suit, the case was remitted to the Court below for ascertaining the net income of the family properties regarding which the suit was brought. After the remand, a pleader commissioner was appointed, and he did not ascertain the net income but ascertained the mesne profits for six years in direct contravention of the consent decree. The Subordinate Judge accepted the report and passed an ex parte final decree.

An application under Section 151 was filed on behalf of one of the defendants, and, after hearing the parties, the Subordinate Judge allowed the application on the ground that there had been a gross mistake on the part of the pleader commissioner, and that miscarriage of justice had taken place. It was held by a Bench of this Court consisting of Kamaswami and Narayan JJ. (as they then were) that the lower Court had rightly acted in exercise of its inherent jurisdiction, and that no interference was called for. It is clear that there was an abuse of the process of the Court in that case, and it was, therefore, held that the lower court was right.

**20.** I now come back to the case of AIR 1954 Assam 1 (FB). All the three learned Judges agreed in that case that the application under S, 151 was entertainable, and they remanded the case to the Court below for disposal on merits after examining the witness whom the applicant had been-unable to examine for want of opportunity. Ram Labhyaya J., who was of the view that no appeal lay against an order of dismissal for default of an application under Rule 9 or Rule 13 of Order IX, indicated that the remedy by way of appeal and the remedy by way of resort to inherent power of the Court were not "cumulative". He expressly stated:

"..... where an appeal lies, an application under Section 151 would not be competent. Nor will the Court have any jurisdiction to set aside its order in the exercise of its inherent powers".

Sarjoo Prosad C. J., however, observed:

"I, however, agree that in most of these cases, the right may be merely illusory and an appeal may not be a suitable remedy at all because the petitioner was prevented from presenting his case before the Court. .... If the appellate court were to decide the matter by affidavits or make an order on enquiry, it would mean, in other words, adopting the same procedure as the original Court itself could have done by giving a chance to the petitioner to show that there was sufficient cause for the default. The appeal in all such cases will be converted to all intents and purposes into a

petition for restoration of the application under Order IX, Rule 13, Civil Procedure Code. Instead of leading to a duplication of procedure, the purpose, therefore, would be better served by giving an opportunity to the petitioner by the original Court itself to show cause for his absence. I cannot bring myself to believe that the law would disfavour such a procedure, and since there is no specific provision for it, this can only be done by an application under Section 151, Civil Procedure Code."

As against these observations, Deka J., while dealing with the argument that no adequate relief could be obtained from the appellate court, stated:

"This is undoubtedly an argument that has some force, but, on the other hand, it can be said that the appellate Court might decide the case on affidavit or might even examine the witnesses or in a suitable case might send down the case to the lower court for recording of the evidence in the matter. This of course would be a lengthy process and might be a costlier remedy, but when the statute provides that an appeal lies against the order refusing to set aside an ex parte decree, we cannot distinguish the cases where those applications were dismissed for default of the petitioners." With great respect to the view expressed by Sarjoo Prosad C. J., I am of opinion that, where the Code provides for an appeal from a certain order, it cannot be held that the original Court can set aside the order in exercise of its inherent jurisdiction merely on account of the consideration that the appeal will be a more costly or more lengthy remedy. This opinion is fully supported by the Full Bench decision of the Madras High Court in MANU/TN/0456/1929 : AIR 1929 Mad 757 (supra), and the observations of Deka, J., which I have quoted, show that he was of the same view.

I do not wish to lay down that a court cannot act in exercise of its inherent power at all in setting aside or modifying an order passed by itself; but it is manifest that, as I have already observed, it can do so when special circumstances amounting to abuse of the process of the Court, exist; for instance, where there is a gross mistake of the kind committed in MANU/BH/0127/1950 : AIR 1950 Pat 497, (supra) or where there is a fraud committed upon the Court itself as referred to in ILR 31 Pat 737: (MANU/BH/0176/1952 : AIR 1952 Pat 478) (supra), it can certainly act in exercise of its inherent jurisdiction.

No such inherent power can be exercised, however, if the effect of the order will be to takeaway the very basis of an appeal which is pending before a higher Court. This is clear from MANU/BH/0242/1948 : AIR 1949 Pat 190, which Mr. D.N. Varma has himself cited. In that case, an appeal was filed against a preliminary decree. While the appeal was pending, the decree-holder applied to the Court under Section 151 for restoration of the suit to a stage before the preliminary decree was passed. A single Judge of this court held that the court had no jurisdiction to grant that application because the entire basis of the appeal pending in the appellate court would disappear.

**21.** I may further mention that a court cannot set aside an order which has the force of a decree or which is appealable as an order, even though an appeal is not actually pending, unless, some special circumstances like gross mistake or fraud upon the Court exist. This follows from Rule 3 of Order XX which reads:

"3. The judgment shall be dated and signed by the Judge in open court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by Section 152 or on review."

This was the view taken in Rameshwardhari Singh v. Sadhu Saran, MANU/BH/0049/1923 : AIR 1923 Pat 354, in which the plaint was rejected under Rule 11 (c) of Order VII, and the rejection of the plaint amounted to a decree as defined in Section 2(2) of the Code. This decision was followed by another Division Bench of this Court in Ram Das Chela v. Ganga Das 1954 BLJR 600. As a different view was expressed in Mt. Bibi Aliqunnissa v. Md. Shafique, MANU/BH/0093/1950 : AIR 1950 Pat 358, the point was referred for decision to a Full Bench in Radhanath Jha v. Bacha Lal Jha, MANU/BH/0093/1955 : AIR 1955 Pat 370.

Their Lordships approved of the decisions in the cases of Ramashwardhari Singh and Mahanth Ram Das Chela, and held that an application under Section 151 of the Code of Civil Procedure did not but an application for review lay against an order whereby an appeal was dismissed for non-payment of deficit Court-fee.

**22.** No special circumstance has been shown in this case. There was no abuse of the process of the Court. The ends of justice could be served if the petitioners follow the remedy by way of appeal against the order dismissing for default Miscellaneous Case No. 20. As this remedy was available. I hold that the learned Munsif had no jurisdiction to restore the miscellaneous case in exercise of the Court's inherent power. It may also be said that, by doing so, he usurped the function of the appellate Court. In this view of the matter, it is unnecessary to discuss the merits of the case.

**23.** The result is that the learned Munsif's order cannot be upheld, and it is set aside. The application is allowed with costs: hearing fee Rs. 32/-.

**Vaidynathier Ramaswami, C.J.**

**24.** I agree.

**Kanhaiya Singh, J.**

**25.** I entirely agree.

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