

MANU/BH/0093/1955

Equivalent Citation: AIR1955Pat370, 1955(3)BJR489

**IN THE HIGH COURT OF PATNA
FULL BENCH**

Misc. Judicial Case No. 607 of 1953

Decided On: 24.01.1955

Appellants:**Radhanath Jha**
Vs.

Respondent:**Bacha Lal Jha and Ors.**

Hon'ble Judges/Coram:

Das, C.J., Vaidynathier Ramaswami and Jamuar, JJ.

Counsel:

For Appellant/Petitioner/Plaintiff: Raghunath Jha, Adv.

For Respondents/Defendant: Govt. Adv.

JUDGMENT

Vaidynathier Ramaswami, J.

1. The question involved in this case is whether the petitioner could maintain an application under Section 151, Civil P. C., for the restoration of an appeal preferred in the High Court which was dismissed for default of payment of court-fee. The petitioner Pandit Radhanath Jha filed Second Appeal No. 956 of 1952 in the High Court against the decision of the Additional Subordinate Judge of Darbhanga on 15-9-1952. It was found by the Stamp Reporter that the court-fee on the memorandum of appeal was insufficient and also that the court-fees on the plaint and the memorandum of appeal in the lower appellate court were similarly insufficient. It was reported by the Stamp Reporter that the petitioner was liable to pay deficit court-fee of Rs. 309-6-0 for all the three Courts. On 11-8-1953, the High Court granted two months' time to pay the deficit court-fees due "failing which the memo of appeal will stand dismissed without further reference to a Bench." The petitioner did not pay the deficit court-fee within the time fixed and in consequence the appeal stood dismissed on 11-10-1953. Thereafter, the petitioner has made this application for restoration of the appeal under the provisions of Section 151, Civil P. C. The question for decision is whether such an application is competent.

2. In support of the application, Counsel for the petitioner relied upon the decision of the Full Bench in -- 'Ramkhelawan Singh v. Monilal Sahu', MANU/BH/0175/1939 : AIR 1939 Pat 678 (FB) (A). It was held in that case that an application to set aside an order dismissing an appeal for non-filing of the appellant's list within the time allowed could not be entertained under Order 47, Rule 1, Civil P. C. but could be entertained under Section 151, Civil P. C. But I do not think that the ratio of this case affords any assistance to the petitioner. The basis of the decision was that the appeal preferred to the High Court was dismissed not under any specific provision of the Code of Civil Procedure but one of the rules framed by the High Court, namely, Rule 23 of Chapter IX, Part II. It was observed by Fazl Ali J. (as he then was), who pronounced the opinion of the Full Bench, that there was no rule corresponding to

Order 12, Rule 19 of the Code of Civil Procedure and since there was an obvious lacuna, the High Court could act in its inherent jurisdiction and pass the requisite order for the proper administration of justice.

In the present case the material facts are wholly different. The appeal preferred to the High Court was dismissed for non-payment of deficit court-fee. The order of dismissal was made under the provisions of Order 7, Rule 11 read with Section 107(2), Civil P. C. It is settled, so far as this High Court is concerned, that Order 7, Rule 11 applies to the case of a memorandum of appeal -- See the decisions reported in -- 'Gajadhar v. Moti Chand' MANU/BH/0129/1940 : AIR 1941 Pat 108 (B) and -- 'Rampati Singh v. Shitab Singh', MANU/BH/0198/1938 : AIR 1939 Pat 432 (C). It is also clear that the dismissal of an appeal under Order 7, Rule 11 for non-payment of court-fee is tantamount to a decree under Section 2(2), Civil P. C, Reference should also be made in this connection to Order 20, Rule 3 which is in the following terms:

"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.'

In view of this provision it is clear that there is no jurisdiction in this Court to interfere with the order of dismissal of the appeal passed on 11-8-1953. In other words, the application filed on behalf of the petitioner for restoration of the appeal under Section 151, Civil P. C., is incompetent.

3. A similar view was expressed by a Division Bench of the Patna High Court in -- 'Rameshwerdhari Singh v. Sadhu Saran', MANU/BH/0049/1923 : AIR 1923 Pat 354 (D). In that case the plaintiff had failed to make good the deficit court-fee due on the plaint and thereupon the Subordinate Judge rejected the plaint but later on restored the suit under Section 151, Civil P. C. Against this order, the defendants applied to the High Court and it was held by the Division Bench that the 'Subordinate Judge had no power to restore the suit by virtue of its inherent jurisdiction. This case was followed with approval by another Division Bench in a recent case in -- 'Mahanth Ram Das Chela v. Ganga Das', 1954 BLJR 600 (E).

It was held in that case that the Court has no power under Section 151, Civil P. C., to restore an appeal which was dismissed for default of payment of court-fee in the memorandum of appeal.

4. Indeed, Fazal Ali, J. (as he then was), who pronounced the opinion of the Full Bench in MANU/BH/0175/1939 : AIR 1939 Pat 678 (A), held in a subsequent case, namely, Civil Rev. Case No. 2 of 1943 Pat (F), that the principle of the Full Bench case did not apply where an appeal which had been dismissed for failure to pay deficit court-fee was sought to be restored and that in such a case the petitioner must apply under Order 47, Rule 1, Civil P. C. The same view has been expressed by Agarwala, J., who was also one of the Judges constituting the Full Bench in MANU/BH/0175/1939 : AIR 1939 Pat 678 (A). In -- 'Ganga Prasad v. Sm. Girja Devi' MANU/BH/0233/1948 : AIR 1949 Pat 366 (G), Agarwala, C. J., expressed the view that a plaint which was rejected, for non-payment of court-fee could not be restored by an application under Section 151 and the proper procedure for restoration was by way of review on payment of proper court-fee. Agarwala C. J., observed that the Full Bench case was not a case of dismissal for non-payment of deficit court-fees but was a case of dismissal for non-filing of plaintiff's list.

5. Counsel for the petitioner referred in support of his argument to the case of -- 'Mt.

Bibi Aliqunnissa v. Md. Shafique' MANU/BH/0093/1950 : AIR 1950 Pat 358 (H) which is a decision of Reuben and Jamuar JJ. In that case, a second appeal had been dismissed because the appellant had not filed the deficit court-fee due on the plaint and the memorandum of appeal in the lower appellate, court. It was held by the Division Bench that an application under Section 151, Civil P.C., for restoration of the appeal was maintainable. Reference was made to the Division Bench case in MANU/BH/0049/1923 : AIR1923 Pat 354 (D) and also in MANU/BH/0233/1948 : AIR 1949 Pat 366 (G), but these cases were distinguished on the ground that they were cases

"in which a plaint was dismissed for default in paying the deficit court-fee on the plaint itself."

It was also observed by the Division Bench that the High Court should not have passed an order of dismissal of the second appeal but should have passed an order of dismissal of the suit and the appeal itself should have been dismissed on the ground of having become infructuous in consequence.

In my opinion, the decision of this case is not authoritative. The learned Judges who decided that case were bound by the authority of the decision of the Division Bench in MANU/BH/0049/1923 : AIR 1923 Pat 354 (D) for the material facts in both the cases were almost identical. It is true that in MANU/BH/0093/1950 : AIR 1950 Pat 358 (H) the second appeal was dismissed for default, but in substance the order of the High Court was tantamount to an order of dismissal of the suit for failure to pay deficit court-fee. I see no reason why the 'ratio decidendi' of MANU/BH/0049/1923 : AIR 1923 Pat 354 (D) was not applicable. I, therefore, consider (with great respect) that the decision of the Bench in MANU/BH/0093/1950 : AIR 1950 Pat 358 (H) does not lay down the correct law. In this connection, I should state that in Second Appeal No. 503 of 1947 (Pat) (I), a Division Bench consisting of Shearer and Reuben JJ., held that an appeal which, was dismissed for non-payment of court-fee could not be restored by an application made under Section 151, Civil P. C. In taking this view, the learned Judges who constituted the Division Bench relied upon the authority of MANU/BH/0049/1923 : AIR 1923 Pat 354 (D).

6. For these reasons, I hold that the application preferred on behalf of the petitioner under Section 151, Civil P. C., for restoration of the appeal should be dismissed as incompetent. Counsel for the petitioner submitted that the application may be treated as an application for review and prayed for a month's time to pay the deficit court-fee. I would grant one month's time to the petitioner to pay the deficit court-fee, failing which the application will stand dismissed without further reference to "the Bench.

Das, C.J.

7. I agree and wish to add a few words about the decision in MANU/BH/0093/1950 : AIR 1950 Pat 358 (H), a decision on which Mr. Raghunath Jha has greatly relied. That decision, so far as I have been able to understand it, proceeds on the basis that the necessary court-fees on the memorandum of second appeal presented to this Court were paid. What was not paid, however, was the deficit court-fee in the courts below. The attention of their Lordships was drawn to the decision in MANU/BH/0049/1923 : AIR 1923 Pat 354 (D) and MANU/BH/0233/1948 : AIR 1949 Pat 366 (G), and also to Misc. Judicial Case No. 178 on 1948 (Pat) (J) and Second Appeal No. 503 of 1947 (Pat) (I), They distinguished those decisions on the ground that in some of them the

plaint itself was dismissed for default in paying the deficit court-fees and in others the deficit in court-fees was on the memorandum of appeal. In that view of the matter their Lordships did not consider the effect of Order 7, Rule 11, Clauses (b) and (c), Civil P. C.

It is now settled by a number of decisions of this Court that Rule 11, of Order 7 applies to memoranda of appeals by reason of the effect of Section 107(2), Civil P. C. In MANU/BH/0093/1950 : AIR 1950 Pat 358 (H), their Lordships referred to Section 12, Clause (ii), and Section 10, Clause (ii), Court-fees Act, and pointed out that the correct order would have been to dismiss the suit for failure to pay deficit court-fees on the plaint and then dismiss the appeal as infructuous. This was not, however, done, and the appeal itself was dismissed for failure to make good the deficit court-fees payable in the Courts below. Their Lordships chose to interpret the order on its own terms and treating it as an order of dismissal for default, they held that an application under Section 151, Civil P. C. was maintainable.

8. I say this with great respect] but the distinction which their Lordships drew is not very clear to me. In any view, it is manifest that the decision which their Lordships gave in MANU/BH/0093/1950 : AIR 1950 Pat 358 (H) is no authority for holding that where the memorandum of appeal presented to this Court is dismissed for failure to pay deficit court-fee, an application under Section 151, Civil P. C., is maintainable.

Jamuar, J.

9. The point arising for decision is whether an application under Section 151, Civil P. C., is competent for the restoration of an appeal preferred in the High Court and dismissed for default of payment of the requisite court-fee, or whether the appropriate remedy is by way of an application for review under Order 47, Rule 1 of the Code on paying the proper court-fee on such application. In the present case, the appeal has been dismissed for default of payment of the court-fee on the memorandum of appeal filed in this Court as also the court-fee on the plaint and the memorandum of appeal in the lower appellate Court.

10. Mr. Raghunath Jha for the petitioner in the present case has contended that an application under Section 151, Civil P. C., is maintainable, and has relied upon certain decisions and orders of this Court. For the opposite contention also, reliance has been placed by the Government Advocate on some other decisions of this Court. On the question debated before us, there is undoubtedly conflict of authority.

11. Since I was a party to a Division Bench decision of this Court in MANU/BH/0093/1950 : AIR 1950 Pat 358 (H), upon which much reliance was placed by Mr. Jha for the petitioner, it becomes necessary to say a few words in connection with that case. That was a case where the Court-fee on the memorandum of appeal filed in the High Court had been paid, but the deficit court-fee on the plaint and the memorandum of appeal in the lower appellate Court was not paid. The appeal to the High Court, however, stood dismissed for default of payment of the court-fee, as directed, on the plaint and the memorandum of appeal in the Court below. No reference was made in the course of the argument in that case to Order 7, Rule 11 or to Section 107(2), Civil P. C. the argument was with reference to Section 12(ii) and Section 10(ii) of the Court-fees Act, and there was no appearance on behalf of the other side to place the opposite view.

12. In the present case we have had the advantage of listening to arguments in support of both the view-points, and, on further consideration, I agree that, in order

to restore such an appeal dismissed for default of payment of the requisite court-fee, the remedy lies in an application for review under Order 47, Rule 1, Civil P. C., on payment of the requisite court-fee.

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