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MANU/BH/0074/1978

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

Civil Revn. Nos. 713 and 917 of 1970 and No. 396 of 1972

Decided On: 12.05.1977

Appellants:**Bajrang Rai and Ors.**
**Vs.**
Respondent:**Ismail Mian and Ors.**

**Hon'ble Judges/Coram:**
*K.B.N. Singh, C.J., S.P. Singh, S. Sarwar Ali, L.M. Sharma and Brishketu Sharan Sinha, JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: Kailash Roy, Binod Kumar Roy and Nawal Kishore Sharma, Advs. in Civil Revn. No. 713 of 1970, Bishwanath Agrawal, Adv. in Civil Revn. No. 917 of 1970 and K.D. Chatterjee, J.P. Singh and Sudarshan Choudhary, Advs. in Civil Revn. No. 396 of 1972*

*For Respondents/Defendant: Sankat Haran Singh and Beni Madhav Prasad Singh, Advs. in Civil Revn. No. 713 of 1970, Sudha Rani Jaiswal, Adv. in Civil Revn. No. 917 of 1970 and S.K. Sarkar and Devendra Kumar Sinha, Advs. in Civil Revn. No. 396 of 1972*

**JUDGMENT**

**K.B.N. Singh, C.J.**

**1.** All these three revision applications have been referred to a Full Bench of five Judges, as the correctness of the Full Bench decision of three Judges, in the case of Doma Choudhary v. Ram Naresh Lal MANU/BH/0030/1959 : AIR 1959 Pat 121) has been doubted in view of later decisions of the Supreme Court in the case of Mahanth Ram Das v. Ganga Das MANU/SC/0027/1961 : AIR 1961 SC 882), and in the case of Manohar Lal Chppra v. Rai Bahadur Rao Raja Seth Hira Lal MANU/SC/0056/1961 : AIR 1962 SC 527). All these three applications have been heard together and this judgment will govern all of them.

**2.** In all these three cases the question involved is whether an application under Section 151 is maintainable for restoring an application under Order IX, Rule 9, or Order IX, Rule 13 or an application under Order XLI, Rule 19 of the Civil P. C. (hereinafter referred to as the Code), which has been dismissed for default.

**3.** To appreciate the point involved, I shall state shortly the facts of the first case, namely, Civil Revision No. 713 of 1970. The petitioners in this civil revision application instituted Title Suit No. 8 of 1964 in the court of the Munsif, Buxar, for declaration that the sale deed dated the 13th Jan. 1940, in respect of 0.16 acre of land under Khata No. 102 of village Bhatsari, police station Brahampur, executed by Chabila Rai in favour of Hashim Mian, was forged, fabricated, illegal and void on the grounds stated in the plaint. The plaintiff-petitioners are the sons and grandsons of Gharbha-ran Rai and his brother Chhabila Rai. The defendant-opposite party filed a

written statement and their case was that Chhabila Rai was separate from the branch of Ramyad Rai and that the sale- deed executed by Chhabila Rai was a good transaction. The suit was dismissed for default on the 3rd July, 1969.

**4.** On the 5th July, 1969, an application under Order IX, Rule 9 of the Code was filed on behalf of the plaintiffs for setting aside the order of dismissal of the suit for default, which was registered as Miscellaneous Judicial Case No. 3 of 1969 (Annexure '1'), on the ground that on the 3rd July, 1969, Bhola Rai (petitioner No. 4) had filed Hazri on behalf of the plaintiffs, but, at about 1 P.M. he got severe pain ill his stomach and he rushed to a doctor, without meeting his lawyer or his clerk. After his condition improved, he came back to the court on that very date and learnt that the case had been dismissed for default. As ill luck would have it, this Miscellaneous Judicial Case No. 3 of 1969 was also dismissed for default on the 12th Sept, 1969. The petitioners then filed an application under Section 151 of the Code, on affidavit, for restoration of Miscellaneous Judicial Case No. 3 of 1969 (Annexure '2'), stating that on the 29th Aug. 1969, the date fixed in the Miscellaneous Judicial Case, Shivdhari Rai (petitioner No. 3), who attended the court, was told by the Bench Clerk that 13th Sept. 1969, had been fixed as the date in the case and when Shivdhari Rai attended the court on the 13th Sept. 1969, and filed Hazri on behalf of the petitioners, he was told by the Bench Clerk that his case had already been dismissed on the previous day, i.e., the 12th Sept. 1969, The petitioners' case is that on the 12th Sept. 1969, even the defendants were not personally present and as it has transpired, when the case was called out, the lawyer for the defendants-opposite party appeared and a Hazri was filed by the lawyer on behalf of the defendants and a petition for time was filed on behalf of the lawyer of the plaintiffs. (Copies of the petition for time and the Hazri have been filed as Annexures '4' and '5' respectively). The petitioners' case is that they were not guilty of any laches on their part as they had been misled by the Bench Clerk of the Court, as a result of which Miscellaneous Judicial Case No. 3 of 1969 was dismissed for default. The learned Munsif, without taking any evidence and without examining the Bench Clerk, dismissed the restoration petition, observing that the petitioners' remedy against the order of dismissal of their application under Order IX, Rule 9 of the Code was by way of an appeal, as the order was appealable under Order XLIII, Rule 1 (c), relying on the Full Bench decision of this Court in the case of Doma Choudhary MANU/BH/0030/1959 : AIR 1959 Pat 121) (supra). It is against this order that the above civil revision has been filed.

**5.** Mr. Kailash Roy, learned counsel appearing on behalf of the petitioners in this revision application, has submitted that the inherent power of the Court under Section 151 of the Code is not controlled by the provisions of the Code, Courts will refrain from exercising their inherent power only in such cases where there is express provision in the Code limiting its application, such as the one contained in Sub-section (2) of Section 105 of the Code etc. According to learned counsel, Section 151 does not confer any new power on the Court which it did not possess, but preserves the inherent power of the Court to pass appropriate orders for securing the ends of justice or to prevent abuse of the processes of the Court. Learned counsel further submitted that the remedy by way of appeal is not adequate in this case, inasmuch as the petitioners could not show before the appellate Court that they were misled by the Bench Clerk. This could be shown only by leading evidence before the trial Court, as in appeal, it was discretionary with the appellate court to allow to lead evidence or not. Learned counsel submitted that mere provision for appeal was not in itself sufficient in such cases to oust the jurisdiction of the Court under Section 151 of the Code. The question is, whether the remedy by way of appeal is an adequate remedy.

Learned counsel submitted that in view of the decisions of the Supreme Court reported in MANU/SC/0027/1961 : AIR 1961 SC 882 and MANU/SC/0056/1961 : AI 1962 SC 527, the Full Bench decision in the case of Doma Choudhary MANU/BH/0030/1959 : AIR 1959 Pat 121) (supra) is no longer a good law.

**6.** The short facts of Doma Choudhary's case (supra) and the principles decided therein may be stated. The plaintiffs, who were the opposite party in that case, had filed Title Suit No. 19 of 1950 in the Court of the 1st Munsif, Sasaram. On the 21st June 1954, a date fixed in the case, the defendants filed Hazri, but the plaintiffs' lawyer filed a petition for time, which was rejected and the parties were directed to get ready for hearing. Later, the suit was called out but as no one responded on behalf of the plaintiffs, the suit was dismissed for default on that very day. On the 20th July, 1954, the plaintiffs filed an application under Rule 9 of Order IX of the Code for setting aside the order of dismissal of the suit. This was registered as Miscellaneous Judicial Case No. 20 of 1954, and it was also dismissed for default on the 4th Dec. 1954. On the same day the plaintiffs filed an application under Section 151 of the Code for restoration of the Miscellaneous Judicial Case and this was registered as Miscellaneous Judicial Case No. 37 of 1954. On the 13th Jan. 1955, the Munsif set aside the order of dismissal of the Miscellaneous Judicial Case No, 20 of 1954 and restored the same. It was against this order that the defendants, Doma Choudhary and others filed a civil revision application, which was allowed by a Full Bench and the order of the learned Munsif, restoring Miscellaneous Judicial Case No. 20 of 1954, was set aside, holding that in absence of special circumstances which amount to abuse of the processes of the court, the court has no jurisdiction, in the exercise of its inherent power, to set aside the order of dismissal for default of an application under Order IX, Rule 9 and to restore the same. The ends of justice can be served, if the applicants follow the remedy by way of appeal.

It also laid down the following propositions of law:

> (1) An appeal lies under Order XLIII Rule 1 (c) or (d) of the Code from an order rejecting an application for default under Rule 9 or Rule 13 of Order IX, respectively, as on a plain reading of Clause (c) and (d) of Order XLIII, Rule 1, there is no ground for discriminating between rejection of an application on merits and its rejection for default.
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> (2) 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 of the Code was wrong or unjustified.
>
> (3) 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.
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> (4) 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. 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 express provisions 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 processes of the court.

It is the correctness of the decision of this Court that where an application under Order IX Rule 9 or Rule 13 of the Code is dismissed for default and an appeal is provided against such order, the court has no inherent power under Section 151 of the Code to set aside the order of dismissal, except under circumstances which amount to abuse of the processes of the Court, which has been challenged before us.

**7.** In the case of Mahanth Ram Das v. Ganga Das, (MANU/SC/0027/1961 : AIR 1961 SC 882) the Supreme Court was concerned with a situation where, while allowing the appeal of the appellant, this Court passed a peremptory order fixing the period for payment of deficit court fee for the trial court and the High Court, in default thereof the appeal would stand automatically dismissed. The appellant filed an application for extension of time, before the time fixed had run out, offering to pay Rs. 1,400 out of Rupees 1,987 and odd, demanded as court-fee, as he could not arrange for the entire amount due to unavoidable circumstances. But, as no Division Bench was sitting during the summer vacation of the High Court, this application came up for hearing before a Division Bench after the period fixed for payment of deficit court-fee had expired. This Court rejected the application and also a sub- sequent application under Section 151 of the Code, stating that the proper remedy was by way of review. The appellant thereafter filed another application under Section 151, read with Order XLVII, Rule 1 of the Code, which was also dismissed. Reversing the order of this Court, and setting aside the orders of dismissal, the Supreme Court observed as follows:--(at p. 884):--

> "But we are of opinion that in this case the Court could have exercised its powers first on July 13, 1954, when the petition filed, within time was before it, and again under the exercise of its inherent powers, when the two petitions under Section 151 of the Civil P. C. were filed. If the High Court had felt disposed to take action on any of these occasions, Sections 148 and 149would have clothed them with ample power to do justice to a litigant for whom it entertained considerable sympathy, but to whose aid it erroneously felt unable to come."

It was also observed as follows (at p. 883):

> "Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed. For example it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time, but was set upon and robbed by thieves the day previous, he could not ask for extension of time,

> or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians. Cases are known in which Courts have moulded their practice to meet a situation such as this and to have restored a suit or proceeding, even though a final order has been passed. We need cite only one such case, and " that is Lachmi Narain v. Balmukund ILR Pat 61: MANU/PR/0059/1924 : AIR 1924 PC 198)."

This decision, though not on all fours on the question that falls for decision in this case, nevertheless, it emphasises the wide amplitude of the inherent powers of the Court.

**8.** In the case of Padma Sen v. State of Uttar Pradesh MANU/SC/0065/1960 : AIR 1961 SC 218) the question raised was about the power of the court to issue a Commission in exercise of its powers under Section 151 of the Code in the circumstances not covered by Section 75 and Order XXVI of the Code and the Supreme Court held that the court can issue commission in such circumstances. It will be relevant in this context to refer to Section 75 of the Code, which reads as follows:--

> "75, Subject to such conditions and limitations as may be prescribed, the Court may issue a commission-
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> (a) to examine any person;
>
> (b) to make a local investigation;
>
> (c) to examine or adjust accounts; or,
>
> (d) to make a partition."

This section undoubtedly lays down that subject to such conditions as may be prescribed, the Court may issue a Commission. The expression 'prescribed' (underlined by me) means, 'prescribed by Rules', and the relevant rules on the point are contained in Order XXVI of the Code. An argument was advanced before the Supreme Court that the powers of the Court must be found within the four corners of the Code and when the Code has expressly dealt with the subject matter for appointment of Commission in Section 75, the court cannot invoke its power under Section 151 of the Code and thereby add to its powers. Rejecting this contention, their Lordships of the Supreme Court observed as follows (at p. 219):--

> "The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code, They are complementary to those powers and, therefore, it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature."

Learned Judges of the Supreme Court put two limitations on the exercise of the inherent powers, i,e,, (i) it is not in any way in conflict with what has been expressly provided in the Code, and (ii) it is not against the intentions of the Legislature. The Supreme Court, however, in that case set aside the order of appointment of Commissioner not because the court had no power to appoint the Commissioner in the circumstances not covered by Section 75 and Order XXVI of the Code, but due to the fact that the power was exercised not with respect to matters of procedure but

with respect to a matter affecting the substantive rights of the plaintiffs.

**9.** Similar question about the powers of the court also came in for consideration before the Supreme Court in the case of Manohar Lal Chopra v. Seth Hiralal MANU/SC/0056/1961 : AIR 1962 SC 527). In that case, one of the questions raised was that whether the Court could issue interim injunction in exercise of the inherent power when there was specific provision in the Code for its issue under Section 94, read with Order XXXIX of the Code. Relevant provision of Section 94 of the Code may usefully be referred to:--

> "In order to prevent the ends of justice from being defeated the court may, if it is so prescribed-
>
> xx xx xx
>
> (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold."

The relevant 'prescribed' rules, with regard to the issue of injunctions are contained in Order XXXIX. As in the earlier case, so also in this case, an argument was advanced that the provision of Section 94(c) makes it clear that interim injunction could be issued only if the provision for their issue is made in the rules contained in Order XXXIX. There was difference of opinion on the question between the different High Courts, The Supreme Court, however, agreed with the view expressed by some of the High Courts that the Court had inherent jurisdiction to issue temporary injunction in circumstances not covered by Order. XXXIX and observed as follows (atp. 532):--

> "There is no such expression, in Section 94 which expressly prohibits the issue of a temporary injunction in circumstances not covered by Order XXXIX or by any rules made under the Code. It is well settled that the provisions of the Code are not exhaustive, for the simple-reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression 'if it is so prescribed' is only this that when the rules prescribe the circumstances in which the temporary injunction can be issued, ordinarily, the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court's exercising that jurisdiction and the Court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so. It is in the incidence of the exercise of the power of the court to issue temporary injunction that the provisions of Section 94 of the Code have their effect and not in taking away the right of the court to exercise its inherent power,"

With regard to the scope of Section 151 of the Code, the Supreme Court also observed as follows;--

> "The section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for

> the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it."

Their Lordships, while quoting with approval the observations made in the case of Padma Sen (supra) with regard to inherent powers, also observed as follows (at p. 533):--

> "These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in Section 151 itself. But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the Legislature. This restriction, for practical purposes, on the exercise of those powers is not because those powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the Legislature for orders in certain circumstances is dictated by the interests of justice."

**10.** In the case of Ramchand and Sons Sugar Mills Pvt. Ltd., Barabanki v. Kanhayalal Bhargava MANU/SC/0263/1966 : AIR 1966 SC 1899), considering the earlier decisions of the Supreme Court, Subba Rao, J. (as he then was) outlined the scope of the inherent powers of the court under Section 151 of the Code as follows (at p. 1900):--

> "The inherent power of a Court is in addition to and complementary to the powers expressly conferred under the Code. But that power will not be exercised if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions. Whatever limitations are imposed by construction, on the provisions of Section 151 of the Code, they do not control the undoubted power of the court conferred under Section 151 of the Code to make a suitable order to prevent the abuse of the process of the Court."

It was also held in that case that although no penal provision is found in Order XXIX, Rule 3, of the Code, where a director required to appear in court fails to do so, as in Order IX, Rule 12, Order X, Rule 4, Order XI, Rule 21, Order XVI, Rule 20 and Order XVIII, Rules 2 and 3, there is nothing in Order XXIX of the Code, which expressly or by necessary implication precludes the exercise of inherent powers by the Court under Section 151 of the Code. The court could make suitable consequential orders under Section 151 of the Code as may be necessary in the ends of justice or to prevent the abuse of the process of the Court.

**11.** In the case of Newabganj Sugar Mills Co. Ltd, v. Union of India MANU/SC/0045/1975 : AIR 1976 SC 1152), Krishna Iyer, J., quoting from the Theoretical Basis of Inherent Powers Doctrine (Text-Jim Carrigan published in National College of the State Judiciary U.S.A.), observed as follows:--

> " 'The inherent power has its roots in necessity and its breadth is co-

extensive with the necessity' -- certainly, we cannot go against any statutory prescription."

**12.** Mr. Shankat Haran Singh, learned counsel appearing on behalf of the opposite party in Civil Revision No. 713 of 1970, has urged that in view of the decisions of the Supreme Court in the cases of Ramkarandas Radhavallabh v. Bhagwandas Dwarkadas MANU/SC/0286/1964) and Nain Singh v. Koonwarjee MANU/SC/0426/1970 : AIR 1970 SC 997), the decision in the case of Doma Choudhary MANU/BH/0030/1959 : AIR 1959 Pat 121) (FB) (supra) is still a good law. The submission of the learned counsel is that as an appeal is provided against an order of dismissal of an application under Order IX, Rule 13, under Order XLIII, Rule 1 (c), that is the remedy provided by the Legislature and the application under Section 151 of the Code is by implication excluded.

**13.** Order XLIII, Rule 1 (c) of the Code reads as follows:--

> "1. An appeal shall lie from the following orders under the provisions of Section 104, namely-
>
> xx xx xx
>
> (c) 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."

It may be mentioned here that similar is the provision of Clause (d) of Rule 1 of Order XLIII of the Code for appeal against an order rejecting an application under Order IX, Rule 13 of the Code.

**14.** In the 1st decision relied upon by the learned counsel (MANU/SC/0286/1964 : AIR 1965 SC 1144), the question was as to whether an application under Section 151, for setting aside an ex parte decree under Order XXXVII, Rule 2, can be entertained. That Order lays down a special summary procedure for decision of suits based on negotiable instruments and is applicable to the High Court of Fort William at Calcutta, Madras and Bombay, i.e. the then three Presidency High Courts. There is a specific provision in that Order for setting aside ex parte orders, as contained in Rule 4. The provisions of Rule 4 read as follows:--

> "4. After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit."

It was in view of this express and specific provision that a decree could be set aside under special circumstances that the Supreme Court held that Section 151 of the Code was not applicable. The Supreme Court, relying on the decision in the case of Manohar Lal MANU/SC/0056/1961 : AIR 1962 SC 527) (supra) held as follows:--

> "The inherent powers are to be exercised by the Court in very exceptional circumstances, for which the Code lays down no procedure. This is a well recognised principle, Rule 4 of Order XXXVII expressly gives power to a Court to set aside a decree passed under the provisions of that Order. Express provision is thus made for setting aside a decree passed under Order XXXVII and hence if a case does not come within the provisions of that rule, there is no scope to resort to Section 151 for setting aside such a decree."

This decision does not support the contention of Mr. Singh. On the other hand, it relies on the decision in the case of Manohar Lal (supra), a decision of three Judges, which, I have already referred to, and on which the petitioners have relied.

**15.** The other decision relied upon by Mr. Singh is in the case of Nain Singh v. Koonwarjee MANU/SC/0426/1970 : AIR 1970 SC 997). The question that fell for consideration before the Supreme Court was whether the correctness of an order of remand under Order XLI, Rule 23, not challenged by way of appeal under Order XLIII, Rule 1 (u) could be interfered with in exercise of the inherent jurisdiction of the Court in an appeal from the decree passed after the remand order. The Supreme Court held that in view of the specific provision under Section 105(2) the order of remand could not be challenged. The relevant provision of Section 105 reads as follows:--

> "(2) Notwithstanding anything contained in Sub-section (f), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

It will be useful to refer to the observations of the Supreme Court in this regard:--

> "Under the inherent power of Courts recognised by Section 151, C.P.C., a Court has no power to do that which is prohibited by the Code. Inherent jurisdiction, of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words, the Court cannot make use of the special provisions of Section 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same."

This decision also, therefore, does not support the contention of Mr. Singh and it is also in line with the other decision referred to by me. On the other hand, it has also been observed therein that the 'specific provision' should be such as 'would meet the necessities of the case'. If the mere provision for appeal would have been a sufficient answer, in that case the Supreme Court would have said so and not laid emphasis on Sub-section (2) of Section 105 of the Code.

**16.** It will be useful, at this stage, to refer to a Supreme Court decision, relied upon by Mr. K. D. Chatterjee appearing on behalf of the petitioners in Civil Revn. No. 396 of 1972, who has also advanced arguments similar to those advanced by Mr. Shankat Haran Singh, the details of which I will discuss later. He has submitted that in case of restoration of an application dismissed for default, be it under Order IX Rule 13 or under Order . XLI Rule 19 (it is with the last provision that Mr. Chatterjee is concerned), we have a complete Code and it is not a matter of speculation. He has relied on the decision in the case of Arjun Singh v. Mohindra Kumar MANU/SC/0013/1963 : AIR 1964 SC 993), In this case, after an ex parte hearing, the case was adjourned for judgment and an application under Order IX Rule 7 was filed by the defendant for a rehearing. The question was, whether that application was maintainable, or, even if not maintainable, that could well be a good petition under Section 151 of the Code, The Supreme Court held that after the ex parte hearing, the case was fixed for judgment and nothing was left to be further heard, and, as such, Order IX, Rule 7, had no application. It was further observed that after judgment, the remedy was an appeal under Order IX Rule 13 and not under Section 151 of the

Code. It was in that context that, after considering the provisions of Order IX Rr. 1 to 7 and 13, the Supreme Court observed-

> 'Thus every contingency which is likely to happen in the trial vis-a-vis the non-appearance of the defendant at the hearing of a suit has been provided for and Order IX Rule 7 and Order IX Rule l3 between them exhaust the whole gamut of situations that might arise during the course of the trial."

With regard to the inherent powers, it was observed as follows (at p. 1003):--

> "It is common ground that the inherent power of the Court cannot over" ride the express provisions of the law. In other words, if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates."

This decision also is of no assistance to Mr. Chatterjee. It does not lay down anything different from what has been laid down by the Supreme Court in its earlier decisions, already discussed. What is emphasised is that that matter with regard to the non-appearance of the defendant at the hearing of a suit has been exhaustively dealt with and not in relation to dismissal of an application under Order IX Rule 9 or Rule 13 of the Code.

**17.** On a consideration of the aforesaid Supreme Court decisions, the following propositions emerge:--

> (1) The inherent powers of the Court are very wide and are not in any way controlled by the provisions of the Code.
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> (2) They are in addition to the powers specially conferred on the Court by the Code and the Courts are free to exercise them.
>
> (3) The only limitation put on the exercise of the inherent powers is that when exercised, they are not in conflict with what has been expressly provided for, or those exhaustively covering a particular topic, or against the intention of the Legislature. These limitations are not due to the fact that the inherent power is controlled by the Code, but because it should be presumed that the procedure specifically provided for orders in certain circumstances is dictated by the interests of justice.
>
> (4) Inherent powers are to be exercised where specific provisions does not meet the necessities of the case.

**18.** Judged in the light of the aforesaid propositions, it is manifest that, where an application under Order IX Rule 13 has been dismissed for default, merely on account of the fact that an appeal could be preferred against the order of dismissal for default of such application under Clause (d) of Rule 1 of Order XLIII, that provision is not such, which could be said to bet a prohibition against entertaining an application under Section 151 of the Code for restoring an application under Order IX Rule 13 of the Code. Under the scheme of the Code), where there is provision for appeal that

does not necessarily bar other remedies for setting aside a decree. For example, Section 96provides for appeal from a decree, unless it is expressly barred. It also provides for an appeal from an original decree passed ex parte. Nevertheless, provision has been made under Order IX Rule 13 for setting aside such ex parte decree. The aggrieved party can also apply for review of a decree on the grounds mentioned in Order XLVII. He can also institute a suit for setting aside the decree on the ground of fraud. Therefore, provision for appeal against dismissal for default of an application under Order IX Rule 9 or Rule 13 or under Order XLIII could notbe said to expressly or impliedly bar filing of an application for restoration of an application under these Rules, the reason being, as I have already mentioned, that in such cases, the party concerned without leading further evidence, will not be able to satisfy the Court that the order of dismissal for default of an application filed under Order IX Rule 9 or Rule 13 should be set aside and the application restored. Provision for appeal in such cases will be illusory, as the parties will not be entitled to lead any evidence before the appellate) court as a matter of right. Order XLI Rule 27 specifically lays down that the parties to an appeal shall not be allowed to adduce additional evidence, but, if the appellate court requires any document to be produced or any witness to be examined, to enable it to pronounce judgment, or for any other substantial cause, it may allow such evidence to be given.

The following observations of their Lordships of the Judicial Committee in Parsotim Thakur v. Lal Mohur Thakur MANU/PR/0037/1931 : AIR 1931 PC 143), made while examining the provisions of Order XLI Rule 27 (1) (b), may be usefully reproduced in this context:

> "Under Clause (1) (b) it is only where the appellate court 'requires' it (i.e., finds it needful), that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment or for any other substantial cause, but in either case, it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but, 'when on examining the evidence as it stands some inherent lacuna or defect becomes apparent'."

To the same effect is the observation of their Lordships of the Supreme Court in the case of Arjan Singh v. Kartar Singh MANU/SC/0087/1951 : AIR 1951 SC 193), in which case the above decision has been relied on.

**19.** Such being the position, mere provision for appeal will not at all be an efficacious remedy but will be an empty formality in cases where the appellate court does not allow any additional evidence to be given. The trend of the decisions of the Supreme Court unmistakably shows that only in such cases where the remedy provided in the Code is such as can meet the necessities of the case, inherent powers of the court may not be exercised. Therefore, I have no doubt in my mind that the decision in Doma Choudhary's case MANU/BH/0030/1959 : AIR 1959 Pat 121) (FB) (supra) that, where an appeal is provided even when the remedy is not efficacious, it will bar the exercise of inherent powers, except in cases where there is abuse of the process of the court, is no longer good law, in view of the decisions of the Supreme Court, discussed above.

**20.** It may also be mentioned that in the case of Hari Lal Singh v. Jalim Singh ILR (1970) Pat 97 (FB)), where the memorandum of a second appeal was rejected for non-payment of deficit court-fee, it was held that an application under Section 151 of

the Code was maintainable, in spite of the fact that the amendment made by this Court in Order XLVII Rule 1 provided for review of an order of dismissal of an appeal on account of non-payment', in spite of due diligence, of court-fee within the time allowed by the court. Relying upon the decision of the Supreme Court in the case of Manohar Lal MANU/SC/0056/1961 : AIR 1962 SC 527) (supra) it was observed that in spite of the provision for review, it cannot be said that it has exhausted the scope of the powers of the court to grant relief, so as to exclude the powers of the court given under various sections, i.e., Section 151, read with Sections 148 and 149 of the Code.

**21.** Our attention has also been drawn to some decisions of other High Courts on the point. In the case of Kunj Be-hari Das v. Chanchala Das MANU/OR/0010/1966), following the decisions of the Supreme Court in the case of Manohar Lal MANU/SC/0056/1961 : AIR 1962 SC 527) (supra) and Arjun Singh MANU/SC/0087/1951 : AIR 1951 SC 193) (supra) it has been held that the powers of the court under Section 151 of the Code can be invoked for restoration of a proceeding under Order IX, Rule 13, dismissed for default, and the decision in Doma Choudhary's case MANU/BH/0030/1959 : AIR 1959 Pat 121) (FB) has been held to be incorrectly decided. The Court of the Judicial Commissioner at Tripura has taken the same view in the case of Asrab Ali v. Abdul Gaffar AIR 1966 Tri 2. In the case of Laxmi Investment Co. v. Tara Chand MANU/MH/0108/1968 : AIR 1968 Bom 250), relying on the provisions of Section 141 it has been held that an order of dismissal of an application filed under Order IX Rule 9 for restoration of an appeal dismissed for default can be set aside under the inherent powers of the Court. It may be mentioned that both the Orissa High Court and the Bombay High Court, in the decisions referred to above, had taken aid of Section 141 of the Code. However, in view of the decision of the Supreme Court in the case of Ramchandra Agrawal v. State of Uttar Pradesh MANU/SC/0088/1966 : AIR 1966 SC 1888), it is not necessary for me to go into the question whether aid of Section 141of the Code could be taken in such cases.

**22.** In view of the decisions of the Supreme Court, I have no manner of doubt that the decision in the case of Doma Choudhary MANU/BH/0030/1959 : AIR 1959 Pat 121) (FB) in so far as it lays down that an application under Section 151 of the Code is not maintainable to set aside an order of dismissal of an application under Order IX Rule 9, or Rule 13, in cases other then those which amount to abuse of the process of the Court, is no longer a good law and must be deemed to have been overruled.

**23.** In view of my decision above, Civil Revision No. 713 of 1970 has to be allowed. There is also some substance in the contention of Mr. Kailash Roy, that the ground for restoration of the application being that the petitioners were misled by the Bench Clerk of the Court about the date fixed in the case, the dismissal of the case amounted to abuse of the process of the Court, and therefore, on the principle laid down in Doma Choudhary's case, also the revision petition should be allowed. In the result, Civil Revision No. 713 of 1970 is allowed, the order under revision is set aside and the case is remanded to the learned Munsif for disposing of the application under Section 151 of the Code in accordance with law.

Civil Revision No. 917 of 1970

**24.** Civil Revision No. 917 of 1970 is directed against an order dated the 16th June, 1970, of the learned Munsif, Sitamarhi, dismissing an application under Section 151 of the Code as not maintainable for restoring an application under Order IX K. 13 of the "Code, for setting aside an ex parte decree, which was dismissed for default. In

view of my decision above, in the earlier case, it is not necessary for me to mention the facts of the case in detail. It may be mentioned that in this case also learned counsel appearing on either side have adopted the arguments made in the first case. Accordingly, Civil Revision No. 917 of 1970 is allowed and, in view of the finding recorded by the Court below that the petitioners have shown good grounds for setting aside the order of dismissal of Miscellaneous Judicial Case No. 4 of 1969, the order dated the 16th June, 1970 dismissing Miscellaneous Judicial Case No. 4 of 1969 is set aside and the case is restored to its file for disposal in accordance with law.

Civil Revision No. 396 of 1972:

**25.** Civil Revision No. 396 of 1972 is by the plaintiff-petitioner, directed against an order dated the 7th Feb. 1972 of the Additional Subordinate Judge, Patna, restoring Miscellaneous Judicial Case No. 3 of 1970, which was dismissed for default. This is a converse case and arises under the following circumstances.

**26.** Title Appeal No. 151 of 1965, filed by Bhagwan Singh, opposite party No. 1, was dismissed for default and an application under Order XLI, Rule 19, was filed by the said opposite party for restoration of that appeal before the learned subordinate Judge, which was registered as Miscellaneous Judicial Case No. 3 of 1970. This miscellaneous judicial case was also dismissed for default on the 28th April, 1971. An application, labelled as one under Section 151, Order IX, Rule 9 and Order XVII Rule 3 of the Code, was filed for the restoration of Miscellaneous Judicial Case No. 3 of 1970. In this application, it was asserted by Bhagwan Singh that he fell ill on the 27th April, 1971, and hence he could not attend court on the 28th April, 1971. He also stated that as he had no son or daughter in his family, whom he could depute to look after the case, soon after his recovery from illness, when he came to court he learnt about the dismissal of the case and filed the application for restoration on the 3rd July, 1971, alleging that he was prevented by sufficient cause from coming to court on the data fixed and sustained great loss as a result of the dismissal of the miscellaneous judicial case. He examined three witnesses, including a doctor, who proved the medical certificate in support of his illness (Ext. 1). The plaintiff petitioner also examined himself and denied the assertions of Bhagwan Singh. By the impugned order, dated the 7th Feb., 1972, the learned subordinate Judge restored Miscellaneous Judicial Case No. 3 of 1970, subject to payment of a cost to the plaintiff-petitioner. The cost was directed to be paid within 15 days of the Order.

**27.** Mr. K. D. Chatterjee, learned counsel appearing on behalf of the petitioner, has submitted that an application dismissed under Order XLI Rule 19 is also appealable under Order XLIII Rule 1 (d), like an application dismissed under Order IX, Rule 9 or Order IX Rule 13 of the Code, and, therefore, could not be restored under the inherent powers of the court. His argument is similar to that advanced by Mr. Shankat Haran Singh and has already been discussed by me while considering the decision of the Supreme Court in the case of Arjun Singh MANU/SC/0013/1963 : AIR 1964 SC 993). Another decision in the case of Radha Nath Pathak v, Bihar State Board of Religious Trusts MANU/BH/0035/1968 : (1968 BLJR 155) : AIR 1968 Pat 110) relied upon by him, in support of his contention that the inherent powers of the court cannot be permitted to be circumvented in face of other provisions of the statute, may be noticed. This decision is clearly distinguishable. Article 122 of the Limitation Act prescribes a period of thirty days of filing an application for restoring a suit, dismissed for whatever reason and the provisions of Section 151 of the Code cannot be exercised to circumvent the specific provisions of the law of limitation. In that case, it was held that no mistake was committed by the court so as to invoke its

inherent power under Section 151 of the Code and the application was filed beyond thirty days not only from the date of the dismissal of the suit, but even from the date of knowledge and the court could not circumvent the law of limitation by resorting to its inherent power. Thus, this decision is hardly of any assistance to the learned counsel.

**28.** There is no difference! between dismissal of an application for default under Order IX Rule 9 or Rule 13, and Order XLI B. 19 of the Code. For the reasons given by me already, for holding that an application can be restored under Order IX Rule 9 or 13 it must be held that the inherent power of the court is available for restoring an application under Order XLI Rule 19. The order impugned in this revision application, therefore, does not call for any interference on this ground. No other ground having been urged for setting aside the order under revision this civil revision application fails and is dismissed.

**29.** In the result, Civil Revision No. 713 of 1970 is allowed and the case is remanded to the court below for disposal in accordance with law. Civil Revision No. 917 of 1970 is also allowed and the order dated the 16th June, 1970, dismissing Miscellaneous Judicial Case No. 4 of 19&9 is set aside and the said case is restored to its file for disposal in accordance with law. Civil Revision No. 396 of 1972 is dismissed. In the circumstances of the case, there will be no order for costs in any of the cases.

**S.P. Singh, J.**

**30.** I agree with the judgment of Hon'ble the Chief Justice but would like to make a few observations of my own. Section 151 of the Civil P. C. (hereinafter referred to as 'the Code') lays down that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of 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. In Doma Choudhary's case (MANU/BH/0030/1959 : AIR 1959 Pat 121) (FB) which has beer held to be bad law on account of certain subsequent decisions of the Supreme Court it was observed-

> "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 express provisions 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."

There is nothing in the observations quoted above which can be said to be in conflict with any of the decisions of the Supreme Court relied in support of the contention that Doma Ghoudhary's case was not correctly decided. As is clear from the language of Section 151 of the Code inherent power can be exercised only when (i) it may be necessary for the ends of justice and (ii) or to prevent the abuse of the process of the Court. Section 151 does not provide for exercise of inherent powers for any third purpose. The decision in Doma Choudhary's case also recognised the inherent power of the Court for the aforesaid two purposes. It went wrong only when it laid down as a general rule that when another remedy by way of appeal was available it would not be for the ends of justice to exercise the inherent powers of the Court. Presence of an

alternative remedy by itself is not enough to debar the court from exercising Inherent powers "for the ends of justice", But it' does not follow either from the language of Section 151 of the Code or from the decisions referred to in the judgment of Hon'ble the Chief Justice that inherent powers can be exercised in all cases where an alternative remedy is available. It was rightly observed in Doma Choudhary's case that as the power is of necessity, very wide, the courts have to bet very cautious and vigilant in exercising it. An application under Section 151 of the Code cannot be dismissed in limine as not maintainable on the ground that an alternative remedy is available, but before allowing such an application the court must be convinced and ordinarily record a finding that it was for the ends of justice or to prevent abuse of the process of the court. In some cases even at the time of issuing notice to the other side if the court finds that the application is frivolous one and there is no possibility of allowing it for the ends of justice or to remedy an abuse of the process of the court, it may dismiss it at that stage and refuse to issue notice to the other side. The fate of such an application will depend on the facts of each case. Apart from the limitations put by the Supreme Court decisions that inherent powers may only be exercised when they are not in conflict with what has been expressly provided for or against the intention of the legislature or where specific provision does not meet the necessity of the case, the two limitations put by Section 151 of the Code itself have always to be kept in mind that inherent power can be exercised only (i) if it is necessary for the ends of justice and (ii) or to prevent abuse of the process of the court.

**S. Sarwar Ali, J.**

I agree with the Hon'ble the Chief Justice.

**L.M. Sharma, J.**

I agree with the Hon'ble the Chief Justice,

**Brishketu Sharan Sinha, J.**

I agree with the Hon'ble the Chief Justice.

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