
(1965) 04 OHC CK 0030
In the Orissa High Court
Case No : Civil Revision No. 211 of 1964

Dinabandhu Patnaik and Another

APPELLANT

Vs

Ananta Charan Sahu and Another

RESPONDENT

Date of Decision : 08-04-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 2, Order 9 Rule 4, 151
Constitution of India, 1950 — Article 163
Limitation Act, 1963 — Section 5

Citation : (1966) 32 CLT 501

Hon'ble Judges : Misra, J

Bench : Single Bench

Advocate : M.M. Sahu, for the Appellant; S.C. Ghose, for the Respondent

Final Decision : Allowed

Judgement

Misra, J.—Defendants 1 and appeared in the suit on 10-5.1963. Process fees were not filed for service of summonses on Defendants 3 and 4. So their names were struck off on 6-7-1963. This order in substance amounts to the suit being dismissed against Defendants 3 and 4. On 1-12-1963 Plaintiffs tiled an application to recall the order dated 6-7-1963 alleging that by mistake process fees were not filed to take summonses on Defendants 3 and 4. Copy of this application was not served on Defendants 1 and 2. On 18-4-1964 the Court recalled the order dated 6-7-1963. On 29-4-1964 Defendants 1 and 2 filed an application for recalling the order dated 18-4-1964. On 16-7-1964 this application was dismissed. Against this order the Civil) Revision has been filed by Defendants 1 and 2.

2. Under Order 9, Rule 2 of the Code of Civil Procedure, where on the day so fixed it is found that the summons has not been served upon the Defendant in consequence of the failure of the Plaintiff to pay the court-fee, postal or other charges or if any chargeable for such service, the Court may make an order that the suit be dismissed. The order dated 6-7-1963 is an order in terms of Order 9,

Rule 2 though the Court did not clearly say that the suit was dismissed against Defendants 3 and 4. Order 9, Rule 4 prescribes that where a suit is dismissed under Rule 2, the Plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit. The application dated 19-12-1963 is governed by the old Limitation Act. Under Article 163, the period of limitation was 30 days for an application by a Plaintiff for an order to set aside dismissal or default of appearance or for failure to pay costs of service of process from the date of the dismissal. As the dismissal was on 6-7-1963 and the application for restoration was filed on 19-12-1963, the application was clearly barred by limitation. Section 5 of the Limitation Act had no application to Order 9, Rule 4 of the Code. The Court had therefore no power to extend the time even if sufficient cause was found in favour of the Plaintiffs. The learned trial Court exercised its jurisdiction with material irregularity in setting aside the order of dismissal against Defendants 3 and 4 without applying its mind to the question of limitation. Order dated 18-4-1964 is liable to be quashed.

3. Mr. Ghose, however, relied upon a decision of this Court in *Bahadur Pradhani Vs. Gopal Patel*, , in support of the contention that the restoration is permissible u/s 151, CPC Code. The contention is misconceived. As laid down in *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, , Section 151 of the Code cannot be invoked in cases where it would conflict with any specified provisions of the Code or is contrary to the intention of the Legislature. Interference in this case u/s 151 of the Code would clearly conflict with the specific provisions of the Code in Order 9, Rule 4. In the facts and circumstances of this case, a clear relief was available to the Plaintiffs under Order 9, Rule 4 and Section 151 cannot be invoked in such a case. The aforesaid decision has no application to the facts of this case.

4. In Civil Revision No. 27 of 1964, I have already held that the observations of this Court in para 11 of ILR 1964 Cutt 18, have no application to a case of this nature where the application itself was barred by limitation. Reasons have been fully set out in that decision and need not be repeated in this case.

5. In the result, the order dated 18-4-1964, passed by the trial Court is quashed. Plaintiffs' suit against Defendants 3 and 4 stands dismissed as per order dated 6-7-1963. The Civil Revision is allowed, but in the circumstances there will be no order as to costs.

Revision petition allowed.