

**(1962) 09 J&K CK 0002**  
**In the Jammu And Kashmir High Court**  
**Case No : Civil Revision No. 95 of 1961**

Kaviraj Mohan Singh and Others

APPELLANT

Vs

Shiv Ji Bhagati and Others

RESPONDENT

**Date of Decision :** 28-09-1962

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 9 Rule 13, Order 9 Rule 4, Order 9 Rule 9, 14

**Citation :** AIR 1963 J&K 12

**Hon'ble Judges :** J.N. Wazir, C.J;S. Murtaza Fazl Ali, J

**Bench :** Division Bench

**Advocate :** J.N. Bhat, for the Appellant; J.N. Bhan, R.N. Kaul, A.N. Raina and K.N. Raina, for the Respondent

## Judgement

S. Murtaza Fazl Ali, J.—This is an application against an order of the Judge Small Cause Court Srinagar dismissing an application of the

Plaintiff for restoring a previous application dismissed for default on the ground that the application was not maintainable. The learned Judge did not

decide the application on its merits but dismissed it in limine, on the ground indicated above. It appears that the learned Judge seems to have been

of the view that as an order rejecting the application for default was appealable under Order 43 Rule 1(c) CPC the Court had no jurisdiction to

restore the application u/s 151 Code of Civil Procedure

2. Mr. Bhat appearing for the Petitioner has submitted that the view taken by the Court below is legally erroneous. He has relied on a number of

authorities in support of the view that an order of the type we have in this case, is not appealable and the Court has inherent power to restore such

an application. Reliance was first of all placed on a full bench decision of the

Assam High Court reported in *Holi Ram Gaonbura v. Rameshwar*

*Das AIR 1954 Gau 1*, where it was held that an order of this type was not appealable and that an application for restoration which was itself

dismissed for default could be restored u/s 151, CPC in this case Chief Justice Sarjoo Prasad, while agreeing with Ram Labhaya J. made the

following observations:

It is difficult to hold that Order 9 read with Section 141 CPC would apply to even such an application for restoration in view of the well known

dictum, of the Privy Council in *Thakur Prasad v. Fakir-ullah ILR All 106 (PC)* . The only provision, therefore, under which the court can act to

give appropriate relief to the party is Section 151 of the Code. This view, as I have said, is also supported by Anr. long line of authoritative

pronouncements, the most prominent of which are the decisions in *Sarat Krishna Bose Vs. Bisweswar Mitra and Others*, and in *Ganesh Prasad*

*Vs. Bhagelu Ram and Others* . The observations of Sulaiman J. as he then was, in the latter case are particularly significant. I, therefore, hold that

an application u/s 151 CPC was competent and on merits I am inclined to the view taken by my brother Ram Labhaya J. that the application

should be allowed.

To the same effect is Anr. Full Bench decision of Madhya Pradesh High Court reported in *Pooranchand Mulchand Jain Vs. Komalchand*

*Beniprasad Jain*, . The Allahabad High Court seems to have taken the same view in a case reported in *Gaja Vs. Mohd. Farukh and Others*, . A

single Judge of this Court also was of the opinion that Section 151 CPC would apply to the case of this type and has so held in *Civil Revn. No.: 56*

of 1961, D/ 1-6-1962 (J. and K.).

3. On the other hand reliance has been placed by the learned Counsel for the opposite party on a Full Bench decision of the Patna High Court

reported in *Doma Choudhary and Others Vs. Ram Naresh Lal and Others*, where their Lordships have observed as follows.

It seems to be manifest on a plain reading of Clauses (c) and (d) that there is no ground for discrimination 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 for 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.

4. We have perused the judgment of the Patna High Court and with great respect to their Lordships, we are unable to agree with the view expressed by them.

5. Order 43 Rule 1(c) of the CPC runs as under:

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.

A careful analysis of this provision clearly indicates that an appeal would lie only against an order under Order 9 Rule 9 CPC rejecting an

application for an order to set aside the dismissal of a suit. Clause (c) therefore, clearly postulates that there must be an order dismissing a suit for

default and an application to set aside that order. In the instant case, the matter does not seem to be covered by Order 43 Rule 1(c) CPC in terms.

Even if the application is restored the suit stands dismissed because then the other application which was dismissed for default has to be considered.

We do not think that the Legislature intended to make an order of the type we have in this case also appealable because this order itself seems to

have been passed u/s 151 CPC. The CPC contains a provision for filing an application to set aside an order dismissing a suit for default. But there

is no provision at all under which an application can be given to restore such an application if it is itself dismissed for default. This can only be done

by the courts under the inherent powers contained in Section 151 CPC. If, therefore, a Court can entertain an application for restoration of an

application dismissed for default under Inherent powers, there is no reason to suppose that it cannot restore that application also if it is dismissed

for default. The power which gives the court a discretion to entertain an

application must necessarily give the residuary powers to pass other orders

ex debito justiae. Thus we are unable to construe an order dismissing an application which has itself been dismissed for default as an order

dismissing the suit itself so as to be appealable under Order 43 Rule 1(c) CPC. Moreover, if an appeal lies against such an order the appeal will be

of an illusory nature because the appellate court could not go into the question as to whether the applicant was prevented by sufficient cause from

attending the court except on affidavits. The order, if appealable, would only indicate that the application has been dismissed without giving the

grounds.

In these circumstances, therefore, the appellate court has again to go into the original question regarding the fact as to whether the applicant

was prevented by sufficient cause from attending the court. Thus the appellate court would really be acting as an original court in deciding this

question. I am fortified in my view by the observations of the Chief Justice Sarjoo Prosad in AIR 1954 Gau 1, which are as follows:

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. There may be nothing on the record on the basis of which the party who has

been prevented from appearing by causes beyond his control, could show to the appellate court that the order of dismissal for default was wrong

or contrary to law. If the appellate court were to decide the matter by affidavits or make an order on enquiry it would mean, in the 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 such cases will be converted to all intents and purposes into a petition for restoration of the application under Order 9

Rule 13 CPC. 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 u/s 151 Code of Civil Procedure

To the same effect are the observations of Uniwalla J. in Anr. Patna case reported

in Chandrika Singh Vs. Parsidh Narayan Singh and Others,

where he observed as follows:

Even if the order dismissing miscellaneous case under Order 9 Rule 9 or under Order 9 Rule 13 is appealable, I am hearing some difficulty to

follow how the appellate court hearing the appeal against the order of dismissal will be able to investigate into the contested facts which may be put

forward on behalf of the parties before it as to whether there was sufficient cause which prevented the applicant from appearing when his

miscellaneous case was called out for hearing. Unless the appellate court takes additional evidence in the case or directs an enquiry by taking

additional evidence by the lower court, the contested facts would not be decided, and in absence of and decision on those contested facts, the

appellate court would find it difficult to set aside the order of dismissal without the aid of the necessary findings on further facts. In the instant case,

the application under Order 9 Rule 4 was dismissed for default and there is no specific provision in the Code which empowers a court to

investigate new facts which are now placed in Anr. application for restoration of the miscellaneous case and they cannot but be investigated under

inherent powers of the court.

For these reasons, therefore, we feel that the view taken be the Assam High Court and the other High Courts to the effect that in such cases, the

Court has power to grant relief to the applicant u/s 151 CPC and that an order dismissing an application of the type we have in this case, for

default is not appealable is correct.

6. The result is that the application is allowed, the order of the Judge Small Cause Court Srinagar dated 22-7-1961 is set aside and he is directed

to dispose of the application of the Petitioners on merits and in accordance with law.

7. There will be no order as to costs.

Wazir, C.J.

8. I agree.