

(1983) 11 PAT CK 0014
In the Patna High Court
Case No : Civil Revision No. 2151 of 1978

Lakshman Bhagat and Others

APPELLANT

Vs

Brij Nandan Prasad Singh

RESPONDENT

Date of Decision : 01-11-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Limitation Act, 1963 — Article 122, 137, 5
Provincial Insolvency Act, 1920 — Section 25

Citation : AIR 1984 Patna 144 : (1984) PLJR 733

Hon'ble Judges : Ashwini Kumar Sinha, J

Bench : Single Bench

Advocate : Chuni Lal Santosh Kumar Sinha and Krishna Mohan, for the Appellant; Kanhaiya Prasad Singh and N.K. Sharma, for the Respondent

Final Decision : Allowed

Judgement

Ashwini Kumar Sinha, J.—This application is by the original creditor (who is petitioner No. 1) and by the heirs of the other creditor namely Ram Chandra Bhagat. This application is directed against the order dt. the 15th June, 1978. by which the court below held that the two petitions dt. 25-9-1975 and 8-11-1976 were barred by limitation.

2. It is necessary to state here that by order dt. the 31st Jan. 1975, the Insolvency Case No. 4 of 1959 was dismissed for default and the two applications dt. 25-9-1975 and 8-11-1976 were filed for restoring the insolvency case. At this stage it is relevant to state that on 16-9-1976 an application u/s 5 of the Limitation Act was also filed by the petitioners for condoning delay in filing the application dated 25-9-1975 if any.

3. Mr. K. D. Chatterjee, learned counsel appearing for the petitioners, has submitted firstly, that there was no specific article for restoring the Insolvency Case dismissed for default, and it was only the residuary article which is Article 137 of the Limitation Act which, if at all was applicable in the case, and according

to this Article of the Limitation Act an application can be filed within three years from the date when the right to apply accrues and in that view of the matter, two applications were within the time from 31-1-1975 according to Article 137 of the Limitation Act and the court below has wrongly held that the applications, referred to above, were barred by time. Learned counsel appearing for the petitioners has secondly urged that the order dated 31-1-1975 dismissing the Insolvency Case No. 4 of 1959 for default was not only without jurisdiction; but, obviously and apparently a mistake of the court as this date i. e. 31-1-1975 was not a date fixed for taking any steps in the Insolvency Case: but it was a date fixed for disposing of an application filed by one Smt. Pushpa, Bhagat (who is petitioner No. 3) who had filed an application on 14-2-1970 praying for being substituted in place of her grand-mother Surajmani Devi. and hence, point canvassed by the learned counsel for the petitioners is that the party cannot be allowed to suffer for the mistake of the court. Lastly, the learned counsel for the petitioners has submitted that as the Insolvency Case No. 4 of 1959 was already disposed of and adjudicated upon as long back as on 17-5-1963, and the opposite party was already declared insolvent (though ex parte), and the opposite party-debtor's application u/s 151 Civil P. C. for restoration having been already dismissed for default on 4-9-1963 and also receiver having taken charge of the properties of the opposite parties by virtue of the court's order dated 23-6-1964/27-6-1964; the Insolvency Case No. 4 of 1959 was already adjudicated upon, and hence, the court had no jurisdiction to dismiss the same for default on 31-1-1975: and in that view of the matter, the two applications referred to above filed by the petitioners for restoring the insolvency case referred to above, were mere superfluities and the court, on its own, should have ordered that the insolvency case was still continuing.

4. Learned counsel appearing for the opposite party has, on the other hand, contended that the petitioners could prefer an appeal u/s 75 of the Provincial Insolvency Act. 1920, and as the petitioners had not preferred any appeal as against the order dated the 31st Jan. 1975: it was not open to the petitioners to canvass that the order dated the 31st Jan. 1975, was either without jurisdiction or a mistake of the court. Learned counsel appearing for the opposite party has also contended that the finding of the court below to the effect that the applications filed by the petitioners dated 25-9-1975 and 8-11-1976 (for restoring the Insolvency Case No. 4 of 1959) which was dismissed for default on 31-1-1975 was correct in law and needs no interference by this court.

5. In order to appreciate the submissions and the counter submissions advanced by the learned counsel of the respective parties, it is necessary to state a few more facts. I have already mentioned above that by order dated the 23rd June. 1964/27-6-1964 a receiver was appointed and the receiver took charge of the properties of the debtors-opposite party. Thereafter on 6-8-1967, an application was filed by the heirs and legal representatives of Ram Chandra Bhagat (one of the original creditors) stating that the creditor, Ram Chandra Bhagat died on 15-5-1967 leaving them as his heirs and legal representatives and they be

substituted in his place. They were his widow (petitioner No. 2), mother (Surajmani Devi) and daughter Smt. Pushpa Bhagat (petitioner No. 3). I am informed at the bar that the court below had not disposed of this application dated the 6th Aug. 1967, till the date of impugned order. This has not been controverted by the learned counsel appearing for the opposite party. Thereafter on 16-11-1969 the mother (Suraimani) of late Ram Chandra Bhagat (one of the original creditors) also died. Smt. Pushpa Bhagat, daughter of Ram Chandra Bhagat (deceased), had already filed an application on 6-8-1967 for being substituted in place of Ram Chandra Bhagat as one of the heirs, and she did not need filing another application for being substituted; but still on 14-2-1970 she (Smt. Pushpa Bhagat, the daughter of late Ram Chandra Bhagat, one of the original creditors) filed an application on 14-2-1970 for being substituted in place of Surajmani Devi (her grandmother). This application by Smt. Pushpa Bhagat dated 14-2-1970 for being substituted in place of Suraimani Devi (her grandmother) was a misconceived one. The earlier application filed by the heirs and legal representatives of late Ram Chandra Bhagat (one of the original creditors) was already on the record for being disposed of by the court and it was enough for Smt. Pushpa Bhagat to state that Surajmani Devi, her grandmother being dead, she was already on the record and no separate application for regular substitution in place of Surajmani Devi was needed. But nonetheless such an application by Pushpa Devi (daughter of late Ram Chandra Bhagat) was filed on 14-2-1970. This application dated 14-2-1970 filed by aforesaid Pushpa Bhagat was finally fixed for order on 31-1-1975. It was this application by Smt. Pushpa Bhagat dt. 14-2-1970 which was to be disposed of one way or the other by the court on 31-1-1975, and it was not a date for taking any step by the creditors or their heirs in the main Insolvency Case No. 4 of 1959 which was already adjudicated upon as long back as on 17-5-1963 and the receiver had already taken charge of the properties of the debtors-opposite party by virtue of the order dated 23-6-1964. It is really most surprising as to how the court below dismissed the main Insolvency Case No. 4 of 1959 for default on this date i. e. on 31-1-1975 when it was a date only for disposing of the application filed by aforesaid Pushpa Bhagat on 14-2-1970. Thus, though, ill-advisedly and misconceived, an application was filed on 25-9-1975 with a prayer to pass necessary order in connection with the order passed on 31-1-1975; the court, under inherent jurisdiction, u/s 151, Civil P. C. should have rectified its own mistake so as to prevent an abuse of the process of the court and to do justice between the parties: as. on the facts mentioned above and uncontroverted by learned counsel for the opposite party, injustice is done in dismissing the Insolvency Case No. 4 of 1959 for default due to court's own mistake. Though it was duty of the court to rectify its own mistake to prevent abuse of the process of the court and to do justice between the parties, yet it was much more incumbent upon the court when the matter was brought to its notice by an application by the petitioners on 25-9-1975. It is well settled that the court has inherent power to restore a suit dismissed by mistake by the court itself for default of appearance of the plaintiff on the date fixed for disposal of an

interlocutory matter.

The fact that the order of dismissal could be appealed against would not stand in the way if the dismissal was due to the mistake of the court itself. In the instant case as already stated above, the date 31-1-1975 was the date for disposing of the application for substitution filed by Smt. Pushpa Bhagat and the court should have passed an order one way or the other only with regard to this application. It is true that the petitioners, ill-advisedly also filed an application u/s 5 of the Limitation Act on 16-9-1976 and the court on 3-11-1976 asked the petitioners to remove some defects by 8-11-1976 and again on 8-11-1976 the petitioners filed a fresh application praying that the present application dated 8-11-1976 be treated as part and parcel of the original application dated 25-9-1975 and also again prayed for restoring the Insolvency Case No. 4 of 1959 to the original file (which was dismissed for default), These two applications i. e. application dated 25-9-1975 and 8-11-1976 read with the application dated 16-9-1976 (filed u/s 5 of the Limitation Act) have been disposed of by the impugned order dated 15-6-1978.

6. As I have already stated above the moment the application was filed on 25-9-1975 by the petitioners praying for passing necessary orders in relation to the order dated 31-1-1975, it was the duty of the court itself to rectify its own mistake in order to prevent the abuse of the process of the court and to do justice between the parties. I have already mentioned above that 31-1-1975 was the date fixed only for passing appropriate order on the application of Smt. Pushpa Bhagat filed on 14-2-1970 and for no other purpose. The two applications dated 25-9-1975 and 8-11-1976 though as already stated above, were ill-advised and misconceived should have been taken by the court as mere superfluities, the court should have realised its own mistake in dismissing the insolvency case for default on 31-1-1975 and the court was fully within its jurisdiction to rectify its own mistake under its inherent power u/s 151 of the Code. Thus, in my opinion, on the facts of the instant case, this order dated 31-1-1975 dismissing the Insolvency Case No. 4 of 1959 for default was purely a mistake of the court and the party cannot be allowed to suffer due to the mistake of the court. This order dated 31-1-1975, on the facts of the instant case, in my opinion, was wholly without jurisdiction and due to the mistake of the court itself and the party cannot be allowed to suffer due to the mistake of the court. This: order dated 31-1-1975 being without jurisdiction and due to the mistake of the court is thus set aside. If this order fails, as I have already held above, due to the mistake of the court: in my opinion, the subsequent orders including the impugned order dated 15-6-1978 must be treated as non est. The application thus succeeds on this point alone but still as the learned counsel for the petitioners has contended that it was the residuary Article 137 of the Limitation Act. 1963, which applied on the facts of this case and as the period allowed for filing the application was three years when the right to apply accrued the aforesaid two applications were not time barred must be dealt with. Learned counsel appearing for the opposite party contended that it was Article 122 of the

Limitation Act which really applied to the aforesaid two concerned applications and as the period of limitation was only 30 days from the date of dismissal and as admittedly the petitions were filed beyond that period, the court below had very rightly held that the applications were barred by time. This submission of the learned counsel for the opposite party has no force and is rejected.

7. Article 122 of the Limitation Act reads as follows:

"To restore a suit or appeal or application from review or revision dismissed for default for appearance or for want of prosecution or for failure to pay costs of service of process or to furnish security for costs.

Thirty days The date of dismissal."

The applications mentioned above were neither to restore a suit nor to restore an appeal nor were applications for restoration of any review application nor were applications for restoration of any revision application dismissed for default of appearance or for want of prosecution or for failure to pay costs of service of process or to furnish security for costs. The nature of the application does not fall within the ambit of Article 122 of the Limitation Act as quoted above. Thus, there is no substance in the contention of the opposite party that the applications filed by the petitioners were barred by time and the court below has very rightly upheld that they were barred by limitation. There is still another aspect of the matter which needs to be considered. Should the court below have exercised its discretion u/s 25 of the Provincial Insolvency Act (Act V of 1920) to dismiss the main Insolvency Case No. 4 of 1959? Section 25 of the provincial Insolvency Act is in wide terms but it is impossible to give effect to those wide terms so as to confer a jurisdiction to ignore an act of insolvency at least in cases where the debtor continues to be heavily indebted and there is no proof that he is able to pay his debts. Section 25 of the Provincial Insolvency Act reads as follows :

"In the case of a petition presented by a creditor, where the court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the court shall dismiss the petition." The section expressly mentions three circumstances in which the petition made by a creditor must be dismissed namely. (i) the absence of right of the creditor to make the application: (ii) failure to serve the debtor with the notice of the admission of the petition, and (iii) the ability of the debtor to pay his debts. In addition, the court has been given a discretion to dismiss the petition if it is satisfied that there is other sufficient cause for not making the order against the debtor. The last clause of the section need not necessarily be read ejusdem generis with, the previous ones, but even so there can be no sufficient cause if after an act of insolvency is established, the debtor is unable to pay his debts. The discretion to dismiss the petition can only be exercised under very different circumstances. What those cases would be it is neither easy nor necessary to

specify but examples of sufficient cause are to be found when the petition is malicious and has been made for some collateral or inequitable purpose such as putting pressure upon the debtor or for extorting money from him or where the petitioning creditor having refused tender of money fraudulently and maliciously files the application. These examples merely illustrate the grounds on which orders are generally made in the exercise of the discretion conferred by the last clause of Section 25.

8. On the facts of the instant case it is abundantly clear that the case did not fall under the last clause of Section 25 and could not be treated as falling under that clause. The debtor-opposite party was already adjudicated insolvent in the main insolvency case (Insolvency Case No. 4 of 1959) as long back as on 17-5-1963. Though this order was ex parte order, the debtor's application u/s 151 for restoration (Miscellaneous Case No. 151 of 1963) was dismissed for default as long back as on 4-9-1963-There is no proof of malicious or inequitable dealing on the part of the creditors (petitioners). They proved the necessary facts and established the act of insolvency and the inability of the opposite party to pay his debts as well. The debtor (opposite party) has not been able to prove that he was able to pay. It is therefore, quite clear that, in view of the well established legal principles, as just mentioned above, the Insolvency Case No. 4 of 1959 could not be dismissed by the court below on 31-1-1975. There is yet another aspect of the matter. In the impugned order there is no whisper as to under which article of the Limitation Act the applications were barred. Though the court below states "This Miscellaneous Case is, therefore, hopelessly barred by limitation": yet one is left to imagine as to under which article of the Limitation Act the court below held, it to be, barred by limitation. Learned counsel for the opposite party has taken it to be one under Article 122 of the Limitation Act but as I have already held above, Article 122 of the Limitation Act was not applicable in the instant case.

9. Article 137 of the Limitation Ad is residuary Article and it reads as follows .-

"Any other application for which no period of limitation is provided elsewhere in this Division."

Three years when the right to apply accrues.

Learned counsel for the opposite party has not drawn my attention to any of the Article which deals with the application for restoring the insolvency case, dismissed for default, and it is due to that that the learned counsel for the opposite party placed reliance upon Article 122 of the Limitation Act which, as already stated above, was not applicable in the instant case. As no period of limitation is provided for restoring the insolvency case dismissed for default: in my opinion, it is the residuary article i. e. Article 137 of the Limitation Act which applied in the instant case and the two applications mentioned above, having been filed well within the prescribed period, were not barred by limitation and the court below has acted illegally in the exercise of its jurisdiction in holding

that the applications were barred by limitation. This residuary Article 137 of the Limitation Act would be applicable in such appropriate cases which are dismissed for default for the laches of the parties but not due to the mistake of the court. In the instant case. I have already held above that the order dismissing the insolvency case for default on 31-1-1975 was pure and simple due to the mistake of the court. The question of limitation did not arise in this case at all. The court should have realised and appreciated its own mistake and should have held that the applications filed by the petitioners were misconceived and ill-advised, as the mistake was committed by the court itself and should have rectified its own mistake and should have prevented the abuse of the process of the court, in order to do justice between the parties.

10. Thus all the three contentions raised by the learned counsel for the petitioners succeed and the application is allowed. The order dated 31-1-1975, having been held to be wholly without jurisdiction and also due to a clear mistake on the part of the court itself, the impugned order dated 15-6-1978 must be treated to be non est and the Insolvency Case No. 4 of 1959 is restored to its original file.

11. Having held as above, the court is now directed to dispose of the application dated 6-8-1967 filed on behalf of the heirs and legal representatives of late Ram Chandra Bhagat (one of the original creditors) which, as already stated above. I am informed at the bar has not yet been disposed of. The court below is also directed to dispose of the other application dated 14-2-1970 filed by Smt. Pushpa Bhagat. The court will dispose of these applications after hearing the parties, in accordance with law.

12. On the facts of the instant case as mentioned above. I am satisfied that if the order dated 31-1-1975 is allowed to stand it will occasion a failure of justice.

13. In the result, the application is allowed but in the circumstances of the case there will be no order as to cost