
(1948) 05 PAT CK 0004
In the Patna High Court

Mrs. Minnie Lal

APPELLANT

Vs

Mahadeo Lall Marwari and Others

RESPONDENT

Date of Decision : 06-05-1948

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 19, 151
Limitation Act, 1908 — Article 168 Schedule 1

Citation : AIR 1949 Patna 112

Hon'ble Judges : Shearer, J;Reuben, J

Bench : Full Bench

Judgement

Reuben, J.—Petitioner was the appellant in First Appeal No. 280 of 1946. This appeal was dismissed on 26th November 1947, as the result of her failure to comply with a peremptory order to file the printing cost. Hence, this petition for vacating the order of dismissal and for restoring the appeal to the file, on the ground that the petitioner was prevented by illness from complying with the order of the Court. An application of this sort does not come within the provisions of Order 41, Rule 19, Civil P.C., and there was at one time considerable doubt as to the proper provision of law under which such an application can be entertained. In *Ramhari Sahu v, Madanmohan* 28 Cal. 339, it was treated as an application under the rules of the High Court. This was overruled by a Full Bench of the same Court in *Fatimumssa v. Deo Prasad* 350 .C.W.N. 21 which took the view that the application is entertainable by way of a review of, a judgment--a view adopted by a Division Bench of this Court in *Anant Potdar Vs. Mangal Potdar*, . So far as this Court is concerned, the question is now set at rest by the decision of the Full Bench in *Ramkhelawan Singh Vs. Monilal Sahu and Others*, . which held that such an application lies u/s 151, Civil P.C. which preserves the inherent powers of the Court to act as *ex delicto justitiae*.

2. Mr. U.N. Sinha, on behalf of the opposite party, has urged that the petition is barred by limitation, having been filed beyond the period prescribed in Article 168 in Schedule 1, Limitation Act, 1908. He points out that this article refers in general terms to an application "for the readmission of an appeal dismissed for

want of prosecution," and relies for his contention on a decision of a Full Bench of the Rangoon High Court re-reported in *S.A. Ganny v. I.M. Russell* A.I.R.1930 Rang. 228 . That decision is distinguishable on the facts because, as was pointed out by Carr J. at pp. 892 and 393 of the report, the application for re-admission in that case was filed under Order 52, Civil P.C., as then in force in Burma. Far from supporting Mr. U. N. Sinha, that case supports the view that Article 168 has no application to the case before us I refer to the passage in the judgment of Page C.J. at P. 387, where he cites *Srimati Lakhimoni Dassi v. Dwijendra Nath* A.I.R.1919 Cal. 345, *Wadia Gandhi & Co. v. Purshottum* 32 Bom. 1 and *Narhndrala Lal Khan Vs. Tarubala Dasi*, as authorities for the proposition that "Article 168 would apply only to applications to readmit appeals dismissed for want of prosecution as provided or contemplated by the Code of Civil Procedure." The same view was expressed by Carr J. at p. 391:

I think that it must be held, on authority, that the articles in the Third Division of Schedule 1 to the Limitation Act apply only to applications under the Code of Civil Procedure, and applications ejusdem generis.

In the present case, I do not think it necessary to examine the cases cited above and the other reported cases, going back to *Baimanekbai v. Manehji Kavasji* 7 Bom. 218, supporting the view that division 3 of schedule 1, Limitation Act, 1908, in which division Article 168 occurs, refers to applications under or contemplated by the Civil Procedure Code. The answer to Mr. U.N. Sinha's contention is, in my opinion, that the Court is here called on to exercise its inherent power, and that power is not affected by the law of limitation. This is the view expressed by Shah J. in a case which is exactly in point *Sonubai Baburao Gaikawad Vs. Shivajirao Krishnarao Gaikawad*, . As put by Mahmud J. "the law of limitation relates to the action of parties, but not to the action of the Court," and "the mere fact that one of the parties had made an application asking the Court to exercise that power will not...reader the action of the Court subject to the rule of limitation." *Ragkunath Das v. Raj Kumar* 7 ALL. 276 1885 and *Dhaii Singh v. Basant Singh* 8 ALL. 519. In *Jagdish Naraiti. Singh v. F.H. Holloway* A.I.R.19 Pat. 52 Chapman J. took the view that Article 168 applies to an application u/s 151, Civil P.C. This was merely by way of an obiter dictum, for the case before the Bench was disposed of, Roe J. concurring, on the ground that the Court below acted rightly in disallowing an application made after the period of limitation which would apply to suits or applications asking for a similar remedy. Their Lordships, therefore, merely laid down a principle according to which, the inherent power should be exercised. A similar view as to this principle was expressed by Shah J. at p. 653 in *Sonubai Baburao Gaikawad Vs. Shivajirao Krishnarao Gaikawad*, and by Chaudhuri J. at p. 253 in *Lakkvmont Dassi v. Dwijendra Nath* A.I.R 1919 Cal. 345 . Mr. U.N. Sinha has also cited *Ajodhya Mahton and Another Vs. Musammatt Phul Kuer*, . That decision is merely as authority that, where a definite period of limitation is provided by law within which action must be taken a Court is not entitled to extend such period by purporting to act u/s 151, Civil P.C. This follows from the fact that provision

made in the law for a particular relief necessarily excludes any inherent power in the Court to grant that relief. Therefore, if the party has put it out of its power to claim that relief by allowing the period limited for the application to elapse, it is not open to the Court to grant that remedy in exercise of inherent power. Here, however, the relief sought is not covered by any provision of law and the inherent power of the Court to grant the remedy is preserved.

3. Let us now consider the petition on the merits. The first appeal was tiled by the petitioner on 22nd July 1946, and she paid a court-fee of Rs. 1683-4-0. There is nothing calling for remark in the progress of the case till the peremptory order was passed on 11th October 1947, directing the filing of Rs. 288-12-0 as printing cost within six weeks, in default of compliance with which order the appeal stood dismissed on the date fixed. From the unchallenged affidavit of Baij Nath Mistri, supported by the certificates of two Calcutta Doctors, we learn that the petitioner fell seriously ill in May 1947, was removed to the Presidency General Hospital at Calcutta where she was an in patient from 12th May 1947, to 14th July 1947, and was under treatment of the aforesaid two doctors from 20th August 1947, to the end of December 1948(?), during which time Bhe was not allowed to communicate with outsiders and could not transact any business. It was only on 28th December, that, happening to meet her lawyer at Calcutta, she came to know that her appeal had been dismissed for default. Her application for the restoration of the appeal was filed on 20th January. On the other side the only suggestion to the contrary is that the petitioner has a manager, one Sukhram Babu, and that there is also a grown-up daughter living with her. The affidavit to this effect is sworn by a person who admittedly has no personal knowledge, and we see no reason to disbelieve the affidavit of Baij Nath Mistri to the effect that, during this time, the petitioner had no one to look after her affairs. The petitioner had spent a considerable sum of money in instituting and taking preliminary steps in the appeal. There is no suggestion that she was in any financial difficulty and it is not likely that she would knowingly allow her appeal to be dismissed for her failure to deposit the small sum asked for as printing costs. I would, therefore, accept her story that she did not know of the Court's order in time to comply with it and was unaware of the dismissal of her appeal till towards the end of December. In the circumstances found by me, the delay in the filing of this petition becomes excusable.

4. On the above grounds, I would allow this petition and direct that the First Appeal No. 280 of 1946 be restored to the file and the printing cost be deposited within one month from today. This order will be conditional on the petitioner paying three gold mohurs as compensation to the other side. This sum, or the receipt of the Advocate of the opposite party acknowledging receipt of this amount should be deposited in Court within one month from to day. Failing this deposit, the petition will stand dismissed; hearing fee, three gold mohurs.

Shearer J.

I agree.