

**(1974) 06 GAU CK 0010**  
**In the Gauhati High Court**  
**Case No : Civil Revision No. 107 of 1971**

|                               |    |            |
|-------------------------------|----|------------|
| Shyam Sundar Agarwal and Co.  | Vs | APPELLANT  |
| The State of Assam and others |    | RESPONDENT |

**Date of Decision :** 19-06-1974

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 105(2), 115, 151

**Citation :** AIR 1974 Guw 54

**Hon'ble Judges :** M.C. Pathak, C.J.; D.M. Sen, J.; D. Pathak, J

**Bench :** Full Bench

**Advocate :** B.M. Goswami and J.K. Barua, for the Appellant; K. Sarma, for the Respondent

**Final Decision :** Dismissed

## Judgement

M.C. Pathak, C.J.—By this application u/s 115 and/or Sec. 151 of the CPC the petitioner-firm has challenged the order dated 31-7-1971 passed by the learned Assistant District Judge, Lakhimpur District, Dibrugarh in Miscellaneous Case No. 103 of 1969. The facts leading to this Revision petition are as follows:

2. The petitioner Shyam Sundar Agarwal and Co. filed a Money Suit being M. S. No. 37 of 1968, against the opposite parties for recovery of Rs. 56012.05 p due on contract work done by the petitioner. The suit was decreed ex parte on 24-8-1968. On behalf of the State of Assam the Government Pleader filed a petition under Order 9, Rule 13, CPC for setting aside the ex parte decree and for restoring the original suit to file. That petition was registered as Miscellaneous Case No. 118/68, which was however dismissed for default on 6-11-68. On behalf of the State of Assam the Government Pleader filed a petition u/s 151, CPC for restoration of Miscellaneous Case No. 118/68 to file and that petition was numbered as Miscellaneous Case No. 103/69. By order dated 31-7-1971 the learned Assistant District Judge allowed the Miscellaneous Case No. 103 of 1969 on condition of rectifying the defects in accordance with law and by the same order Misc. Case No. 118/68 was directed to be restored to file on removing the

defects pointed out. Hence this revision petition.

3. The learned Counsel for the petitioner submits that an appeal under O. 43, Rule 1(d), Civil Procedure Code, lies from an order under Rule 13 of Order 9, rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte. When Miscellaneous Case No. 118/68 was dismissed for default on 6-11-1968, an appeal lay from that order of rejection of the application for setting aside the ex parte decree under Order 43, Rule 1 (d) and therefore no petition under Sec. 151, CPC lay against the order dated 6-11-68 and as such the impugned order, it is submitted by the learned Counsel, is without jurisdiction and bad in law.

4. In this connection the learned Counsel for the petitioner has relied on the decision of this Court in Madanlal v. Tripura Modern Bank Ltd., AIR 1954 Ass 1 (FB) wherein the majority of the learned Judges held that no matter whether an application under Order 9, Rule 13 was dismissed for default or on the merits, an appeal would be competent under Order 43, Rule 1(d), Civil Procedure Code.

5. The learned Counsel for the petitioner then referred to the decision of the Supreme Court in Nain Singh Vs. Koonwarjee and Others, wherein the Supreme Court has observed as follows:--

The High Court, in our opinion, erred in holding that the correctness of the remand order was open to review by it. The order in question was made under Rule 23, O. 41, Civil Procedure Code. That order was appealable under Order 43 of that Code. As the same was not appealed against, its correctness was no more open to examination in view of Section 105 (2) of the Code which lays down that where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom he shall thereafter be precluded from disputing its correctness. The High Court has misconceived the scope of its inherent powers. Under the inherent power of Court recognised by Section 151, Civil Procedure Code, 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. Further the power u/s 151 of the Code cannot be exercised as an appellate power.

6. The learned Counsel's submission in substance is that the order dated 6-11-1968 dismissing the Miscellaneous Case No. 118/68, whether it was dismissed for default or on merits, was appealable under Order 41, Rule 1 (d) of the Civil Procedure Code; and the provisions of Section 151, CPC cannot be made use of where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same.

7. In the instant case, it is submitted, the defendant could have preferred an

appeal from the order dated 6-11-68 but they failed to do so. On the other hand, they filed an application u/s 151, CPC and therefore no remedy could be given to the defendant under that provision and the power u/s 151 could not be exercised as an appellate power.

8. In *Jami Ram Medhi v. Ramjan Ali*, Civil Revn. No. 44 of 1971 decided on 7-2-1974 (Gauhati), it was held by a Single Bench of this Court as follows:--

It is the settled law that if there is a specific provision for appeal against an order under the Civil Procedure Code, Section 151 of the Code is not attracted.

9. In the instant case Miscellaneous Case No. 118/68 was dismissed for default on 6-11-68 and the result was that the application under Order 9, Rule 13, CPC stood dismissed and ordinarily an appeal from such an order would lie under Order 43, Rule 1(d), CPC and if no such appeal has been filed the remedy u/s 151, CPC cannot be availed of.

10. In the instant case, however, the application under Order 9, Rule 13, CPC (Misc. Case No. 118/68) was filed on 18-9-68. By the order dated 18-9-68 the Court directed the applicant to take steps within three days. The case was put up on 1-11-68 and the order passed on the same date shows that notices could not be issued for want of requisites and that the petitioner only filed a Hazara. On that date the Presiding Officer was on leave and the order has been signed by the Sheristudar himself. The order, has not been signed by any Judicial Officer. The record was next put up on 6-11-68 and the Court ordered, that on that date also the applicant was absent and no steps were taken, that is, requisites were not filed and as such the case was dismissed for default. These aspects of the case were considered by the learned Assistant District Judge in the impugned order and he found as follows:--

The G. P. was absent on 6-11-68. He has given an explanation that he was away in the NEFA area with some Govt. case. His presence on 6-11-68 was not legally necessary had the process with process fee been there on the record. The case on that ground could not have been dismissed. It was due to default in taking steps that the Misc. Case No. 118/68 was dismissed. But as I hold that the processes and process fee were filed in time, the said dismissal must be treated as an abuse of the powers of the Court.

11. The learned Assistant District Judge has thus found that the processes and process fee in Misc. Case No. 118/68 were filed by the Government Pleader in due time and therefore the application could not have been dismissed for not taking steps on 6-11-68. That being the position, the order of dismissal for default passed on 6-11-68 was passed on account of mistake of the Court. The order of dismissal for default is the result of a mistake of the Court as found by the learned Assistant District Judge, and the mistake could occur due to the laches on the part of the office of the Assistant District Judge. No party should suffer for the laches of the office of the Court in this way. That being the position the order of dismissal for default of Misc. Case No. 118/68, which arose out of a

mistake or error apparent on the face of the record, may be rectified by the Court itself under either Section 151 or under Order 47, Rule 1, Civil Procedure Code. The impugned order of the learned Assistant District Judge is therefore sustainable in law and there is no ground for interference with the impugned order in this Revision Petition.

12. The learned Counsel for the petitioner has submitted that even assuming that an application u/s 151 lies, the impugned order of the learned Assistant District Judge was bad because of all the defendants did not file the application for setting aside the ex parte decree and that the application filed on behalf of the State of Assam was not verified by the proper person. The learned Assistant District Judge has elaborately dealt with these points and his findings on these points cannot be said to be in any way bad in law or without jurisdiction. Hence we do not find any substance in the submission of the learned Counsel in this regard also.

13. In the result we find that this petition has no merits and is accordingly rejected. The Rule is discharged. The stay order stands vacated. In the facts and circumstances of the case, we make no order as to costs.

D. Father, J.

14. I agree.

D.M. Sen, J.

15. I agree.