

(1977) 10 PAT CK 0001

In the Patna High Court

Case No : Civil Revision No. 225 of 1977

The Bihar State Electricity Board

APPELLANT

Vs

Pawan Kumar Khetan and Others

RESPONDENT

Date of Decision : 12-10-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 4, 115, 151
Limitation Act, 1963 — Section 5

Citation : AIR 1978 Patna 253

Hon'ble Judges : S.K. Choudhuri, J

Bench : Single Bench

Advocate : T.K. Jha and Sachidanand Jha, for the Appellant; Sudhir Chandra Ghose and Sukumar Sinha, for the Respondent

Final Decision : Allowed

Judgement

S.K. Choudhuri, J.—This revision by the plaintiff is directed against the order dated 26-11-1976, passed by the Subordinate Judge, Bhagalpur, dismissing the miscellaneous case No. 13 of 1975, which was filed u/s 151 of the Civil P. C.

2. The petitioner filed a suit in the court of the Subordinate Judge, Bhagalpur, which was numbered as money suit No. 70 of 1972 for realisation of Rs. 33,632.91 p. as the dues for supplying of electric energy for industrial purpose to the mill known as Shri Ambika Mill belonging to the defendant situate at Colgong, police station Colgong, district Bhagalpur. It appears that the aforesaid amount has been claimed after adjusting from the total claim a sum of Rs. 2,400/-which was lying in deposit as security deposit. The suit, after it become ready was fixed for hearing for 16-8-1974. As no step was taken on that date and requisites for issue of notice on defendant No. 2 were not filed as previously ordered in spite of opportunities, the suit was dismissed for default. Accordingly on 25-2-1972(?); a petition under Order IX Rule 4. C. P. C. was filed which was registered as miscellaneous case No. 9 of 1979. On perusal of the said petition it appears that the reason for not filing the said application within time has been stated. It has

also been stated in the said petition that "the reason assigning for restoration is sufficient reason in the eye of law". It appears that as the reason explaining the delay in filing the said application was given in the said petition a separate application u/s 5 of the Limitation Act was not filed. However, the said miscellaneous case was put up on 1-3-1975. By the said order it was pointed out that the miscellaneous case having been filed beyond 30 days and therefore, the petitioner was directed to show cause by 10-3-1975 when the miscellaneous case was ordered to be put up for admission. On 10-3-1975, though hajri was filed nobody appeared when the case was called out and therefore the said miscellaneous case was also dismissed. The order reads thus:

"Applicant files hajri. Cause not shown nor any step taken. Case called out. None responds on behalf of the applicant. The application is rejected as time barred."

Thereafter on 15-3-1975, the petitioner filed an application u/s 151, C. P. C. which was registered as miscellaneous case No. 13 of 1975; that case, it appears from the impugned order, was taken up for hearing ex parte and one witness was examined as A. W. 1. The impugned order does not say that A. W. 1 has been disbelieved or that his evidence was rejected. However, on the ground that as against the previous order dated 10-3-1975 by which the miscellaneous case No. 9 of 1975 was rejected as time barred, the petitioner could have moved the superior court, the court below dismissed the miscellaneous case holding that it was not revisable by that court. Hence the present revision application.

3. Mr. Tarakant Jha, learned counsel appearing in support of this application contended that the court below acted with material irregularity in the exercise of jurisdiction in holding that the miscellaneous case No. 13 of 1975 was not maintainable as the petitioners had the remedy to move higher court. Learned counsel further contended that in spite of the fact that the delay in filing miscellaneous case No. 9 of 1975 was fully explained in the petition itself which was filed under Order IX, Rule 4 C.P.C. the court below was not justified in passing the order dated 1-3-1975 calling upon the petitioner to file show cause by 10-3-1975 explaining the delay beyond 30 days. Learned counsel further contended that when such order was passed calling upon the petitioner to comply with the order passed by that court, which was not passed in presence of the petitioner or its counsel, it was the duty of the court to get the order sheet "seen" by the lawyer concerned. According to the learned counsel the same not having been done the court below was not justified in rejecting miscellaneous case No. 9 of 1975 at the time of admission, on the ground of delay without perusing even the petition which contained all the explanations for the delay and making out sufficient cause for condonation of delay and admission. It was lastly contended by learned counsel that if the suit which was filed with a court-fee of Rs. 2,261.25 p. is not restored the petitioner would suffer an irreparable loss and injury and the interest of justice requires that the suit should be restored.

4. Mr. Sudhir Chandra Ghose, learned counsel, appearing on behalf of the opposite party however contended that on the facts and in the circumstances of

the case the court below was perfectly justified in holding that the second application u/s 151, C.P.C. which gave rise to miscellaneous case No. 13 of 1975 was not maintainable by that court as the previous miscellaneous case, namely, miscellaneous case No. 9 of 1975 was dismissed by order dated 10-3-75, not for default but on merits, According to the learned counsel, therefore, an appeal lay as against the said order and therefore, the Court below was justified in holding that the latter miscellaneous case was not maintainable.

5. Therefore, the moot question for determination is as to whether the application filed u/s 151, C. P. C. which gave rise to miscellaneous case No. 13 of 1975 was maintainable. I have already pointed out above that the previous miscellaneous case was dismissed by order D/- 10-3-75 and for convenience I have already quoted the said order verbatim. The said order clearly shows that the previous miscellaneous case was rejected at the time of admission as nobody responded when the case was called out. The order further says that the court was of the opinion that as no cause was shown the application was time barred. It may be noted that it is a case which was dismissed at the time of admission and therefore, no evidence could be adduced by the petitioner in support of the allegation of sufficient cause made out in the application. The question, therefore, is as to whether the petitioner could successfully challenge this order before the higher court either by filing an appeal or by revision. I may point out here that no appeal lay as against the order of dismissal of miscellaneous case No. 9 of 1975; however, the petitioner could have come up to this court in revision but still the question is as to whether the said remedy could be considered to be an appropriate remedy available to the petitioner. Before the revisional court the petitioner could not have satisfied that it had made out sufficient cause for non-compliance of the order dated 16-8-1974 by which the suit itself was dismissed. The said order could be recalled by the court below only on sufficient cause being shown under Order IX Rule 4 and it is only in those circumstances that the court after recording a finding could (sic) miscellaneous case No. 9 of 1975. Therefore, no useful purpose would have been served by coming to this Court in revision against the order of dismissal of the said miscellaneous case as there was no evidence nor any proof in the records of the case to hold that the petitioner has proved the allegation regarding sufficient cause for condonation of delay in filing miscellaneous case No. 9 of 1975. I have already pointed out that no appeal lay against the order dated 10-3-1975 and the scope of revision under! Section 115, C.P.C. was also very limited and no useful purpose therefore would have been served by approaching this Court in its re-visional jurisdiction. In my opinion, there-fore, on the facts and in the circumstances of the case the only appropriate remedy available to the petitioner was to the an application u/s 151 C.P.C. for setting aside the order of dismissal dated 10-3-1975 and restoring miscellaneous case No. 9 of 1975. The aforesaid view which I have taken is fully supported by the Full Bench decision in Civil Revn. No. 917 of 1970 disposed of on 12-5-1977 (Pat).

6. By the Full Bench decision (of five Judges) three revision applications have

been disposed of. It held that that Full Bench of three Judges in *Doma Choudhary and Others Vs. Ram Naresh Lal and Others*, was not correctly decided. It has been pointed out that even if an order of dismissal for default is appealable the party concerned "without leading further evidence will not be able to satisfy the court that the order of dismissal for default of an application filed under Order IX, Rule 9 or Rule 13 should be set aside and the application restored. The provision of appeal in such cases will be illusory". It has also been pointed out that mere provision for appeal in such cases "will not at all be efficacious but will be an empty formality in cases where the appellate court does not allow any additional evidence to be given". Regarding *Doma Choudhary's* case (supra) while finally expressing the view it has been stated by the Full Bench as follows:

"..... Therefore, I have no doubt in my mind that the decision in *Doma Choudhary's* case (supra) that, where an appeal is provided even when the remedy is not efficacious, it will bar the exercise of inherent powers, except in cases where there is abuse of process of the court, is no longer good law in view of the decisions of the Supreme Court discussed above".

After considering the various cases of the Supreme Court the Full Bench (five Judges) laid down the following propositions:

"(1) The inherent powers of the court are very wide and are not in any way controlled by the provisions of the case.

(2) They are addition to the powers specially conferred on the Code and the Courts are free to exercise them.

(3) The only limitation put on the exercise of the inherent powers is that when exercised, they are not in conflict with what has been expressly provided for, or those exhaustively covering a particular topic or against the intention of the legislature. These limitations are not due to the fact that the inherent power is controlled by the Code, but because it should be presumed that the procedure specifically provided for orders in certain circumstance is dictated by the interests of justice.

(4) Inherent powers are to be exercised where specific provision does not meet the necessities of the case."

7. Thus I am of the view that the court below acted with material irregularity in the exercise of its jurisdiction in holding that the application u/s 151 C.P.C. which gave rise to miscellaneous case no. 13 of 1975, was not maintainable. The application is accordingly allowed. The impugned order is set aside and the case is sent back to the court below for disposing of the miscellaneous case No. 13 of 1975 in accordance with law and in the light of the observations made above. It is not necessary for me to consider the other arguments which were put forward before this Court. It is for the court below to consider the relevant arguments and materials on the record as also the hardship, if any, which would be caused,

at the time of hearing of the miscellaneous case. In the circumstances of the case I would make no order as to costs.