

PATNA HIGH COURT

Kapura Kuer

Vs

Narain Singh

(Sinha, J.)

14.01.1948

JUDGMENT

Sinha, J.

1. This application in revision is directed against the orders, dated 15th January 1947, passed by the learned Subordinate Judge of Gaya setting aside an order dismissing the respondent's application for restoration for re-hearing of a suit which had been decreed ex parte.

2. It appears that the suit in which the order impugned was passed had been instituted on 8th January 1946. The petitioner in this Court was originally defendant 9, but was transposed to the category of plaintiff subsequently. On 7th June 1946, in the absence of the defendants, the suit was taken up ex parte, and decreed in the defendants absence. On 28th June 1946, an application under Order 9, Rule 13, Civil Procedure Code, was filed on behalf of some of the defendants. After certain adjournments, the case was ultimately fixed for disposal on 23rd November 1946. On that date, neither party took any steps, and the case was dismissed for default. On 25th November 1946, an application under Section 151, Civil Procedure Code, was made on behalf of some of the defendants. It was stated in that application that, due to the notorious communal disturbances, the applicant's witnesses had not turned up, and that he was coming to Court with his lawyer, and reached the Court at 11-40 A.M. when he was told that his application had been dismissed for default about ten minutes earlier. The learned Subordinate Judge, taking into consideration the exceptional state of affairs at that time, ordered that the petitioner's application under Order 9, Rule 13 be restored on payment of ten rupees as costs to the opposite party by 20th January 1947. At a very late stage of the arguments, our attention was drawn by learned Counsel for the opposite party that, as a matter of fact, on 20th January 1947, the sum of ten rupees was paid to the opposite party, as ordered by the learned Subordinate Judge. On that payment being made, the learned Subordinate Judge passed the order that the application under Order 9, Rule 13 of the Code be restored. It is against the order restoring the application under Order 9, Rule 13 of the Code that this Court has been moved in its revisional jurisdiction.

3. This case was first placed before a single Judge of this Court before whom it was argued that the learned Subordinate Judge had no jurisdiction to entertain the application under Section 151 of the Code after dismissal for default of the application under Order 9, Rule 13 of the Code. That argument has been repeated before us also, and a number of decisions have been brought to

our notice on behalf of the petitioner. None of those rulings is exactly in point. If the fact which has been now brought to our notice, namely, that the opposite party had accepted the ten rupees by way of costs awarded to her by the order restoring the application under Order 9, Rule 13 had been brought to the notice of the learned Judge before whom this case was originally placed for hearing, I have no doubt that he would not have thought of placing this case for hearing by a Division Bench. The petitioner in this Court, who was the opposite party in the Court below, having accepted the amount of costs awarded to her as a condition precedent to the restoration of that application, the opposite party in the Court below, the petitioner in this Court, is now estopped from challenging the legality or the propriety of the order made by the Court below. Mr. Ganesh Sharma, appearing for the petitioner suggested that this matter should have been brought to his notice earlier so that he may have been in a position to apprise the Court as to the exact state of affairs. But that is a matter which appears on the order-sheet itself, and we must presume that the statement in the order-sheet that the opposite party, in the Court below had accepted the ten rupees awarded to her by way of costs as a condition precedent to the restoration of the case is correct. We must, therefore, proceed on the basis that the opposite party, having accepted that sum, is estopped from challenging the other portion of the same order restoring the application under Order 9, Rule 13.

4. As the matter has been argued at some length before us, we must express our opinion, though it may be mere obiter dicta, as to the maintainability of the application under Section 151, Civil Procedure Code in the circumstances of the case. It was argued by Mr. Ganesh Sharma on behalf of the petitioner, relying upon the cases of *Ramghulam Singh v. Sheodeonarain Singh*¹ *Mt. Bodhia v. Ram Chandra Marwari Mufti Raazaddin v. Maheshanand*², *Kishun Prasad v. Hardwar Singh*³, *Maharaja Bahadur Sir Kesho Prasad Singh v. Mahendra Prasad*⁴ and *D.B. Manke v. B. Walwekar*⁵ as also *Joshi Shib Prakash v. Jhinguria*⁶ that where an application under Order 9, Rule 9 or Rule 13 of the Code has been dismissed for default, another application for restoration of the case is not maintainable. Those are cases in which the exact question in controversy before us had not been canvassed or determined. In none of these cases has it been laid down that an application under the inherent powers of the Court to restore a case, which had been dismissed for default, is not maintainable. In most of those cases it has only been laid down that the provisions of Order 9 of the Code are not applicable to the dismissal for default of an application under Order 9, Rule 9 or Rule 13 of the Code. Those cases do not go further than that. On the other hand, our attention has been called to the decision of the Calcutta High Court in *Sarat Chandra Bose v. Bisweswar Mitra*⁷, and of the Allahabad High Court in *Ganesh Prasad v. Bhagelu Ram*⁸ In both those cases it has been ruled that in appropriate cases it is open to the Court to invoke its inherent jurisdiction to do that justice between the parties for which alone it exists, if a proper case is made out for the Court to exercise those special powers. But those decisions do not run counter to the decisions relied on on behalf of the petitioner. In my opinion, in the very special circumstances of this case, the learned Subordinate Judge was perfectly justified in resorting to his inherent powers to restore the application under Order 9, Rule 13, which had been, dismissed for default, and, on the findings of the learned Subordinate Judge, for that dismissal the applicant in the Court below was not responsible.

5. For these reasons, I would discharge this rule with costs; hearing fee two gold mohurs.

Mahabir Prasad J.

6. I agree.

Cases Referred.

1A.I.R.1922 Pat. 121

2AIR 1929 Pat 529

3AIR 1946 Pat 184

4A.I.R. 1933 Pat. 682

5A.I.R. 1923 Bom. 386

6A.I.R. 1924 All. 446

7AIR 1927 Cal 534 : (1927) ILR 54 Cal 405 : 103 Ind. Cas. 69

8A.I.R. 1926 All. 773