

Present: **Shri Dulal Chandra Kar**
District Judge, Nadia

Title Appeal No.26 of 2019

Order No.24
13.08.2021

Appellant and respondent nos. 1 to 4 file haziras through respective Learned Lawyers.

Application filed by the appellant on 08.04.2021 supported with affidavit praying for restoration of appeal dismissed by order no.16 dated 01.04.2021 is fixed for orders today.

Perused the application and the written objections and written arguments filed on 11.08.2021 by the respondents nos. 1 to 4 against the application.

This is an application filed by the appellant supported with affidavit praying for restoration of appeal setting aside order no. 16 dated 01.04.2021 dismissing the appeal.

In her application the appellant states that she came to know on 07.04.2021 that her appeal was dismissed on 01.04.2021; that her lawyer inspected the record and came to know of orders passed from 18.11.2020 to 01.04.2021; that she had no wilful laches or control in the matter.

Learned Lawyer for the appellant submitted that the interlocutory application being I.A. no.01/2019 under Order 39, Rules 1 and 2 C.P.C. filed by appellant on 11.03.2019 was fixed for hearing on 20.04.2021, and in the meantime, the respondents nos.1 to 4 served two application on Ld. Lawyer for the appellant on 12.01.2021; that on 13.01.2021 the respondent nos.1 to 4 got the record put up without notice to the appellant and filed those two applications:

1. under section 151 CPC with affidavit praying for dismissal of the appeal on grounds stated therein; and,
2. under Order 6, Rule 17 CPC praying for amendment of written statement against the application for injunction,

both of which were moved on 13.01.2021 without notice to the appellant through his Ld. Lawyer, and the applications were fixed for hearing on 03.03.2021, but the said respondents did not communicate the date of hearing of their applications to the appellant through his Ld. Lawyer, and so, no steps were taken by the appellant on 03.03.2021 on which date, order directing him to show cause which could not be complied with on 01.4.2021 and the order dismissing the appeal was passed on a date not fixed for hearing of the appeal, and in any case the appellant was not communicated with the date of hearing of the applications filed by the respondents nos.1 to 4 by getting the record of appeal put up.

In their written objections and written arguments the respondents nos.1 to 4 state that there was no gross irregularities or mistake on the part of the Court in passing the order dated 01.04.2021 and when there is specific provision in Code of Civil Procedure for setting aside order of dismissal under section 151 of C.P. Code which does not apply; that appellant was aware of the date of hearing of applications filed by the appellant.

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Ld. Lawyer for the respondents nos. 1 to 4 submitted that order dated 13.01.2021 was made in the presence of Ld. Lawyer for the appellant. Ld. Lawyer for the appellant vehemently denied and disputed this submission.

The record does not show that the order dated 13.01.2021 was made in the presence of the Ld Lawyer for the appellant. It is an admitted position that contesting respondents nos. 1 to 4 did not by letter inform the date of hearing of their applications to the appellant.

Order sheet shows that Learned Lawyer for the appellant was not present on 13.01.2021 and he submitted that hearing date of the applications filed by the respondents nos. 1 to 4 was also not communicated to him and non-appearance of the appellant on the subsequent dates including on the date of dismissal of the appeal was not deliberate and wilful.

Appellant relies on:

1. **Ramappa Prappa Khot and others v. Gorwva, AIR 1968 Mysore 270**, wherein it was held that the power created by s.151 is an independent power, uncontrolled by any other provision of the Code; that the power could be exercised even if there is another specific provision in the Code authorising an order such as the one which is sought under section 151.
2. **Manohar Lal Chopra v Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527**, it was held that section 151 itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice.

Respondent nos.1 to 4 rely on decisions:

1. **Lachman Singh v. Smt. Hasi Rani Singh and others, AIR 1979 Cal 196**, where it was held that for failure to comply with the court's orders the Court can dismiss the suit. The plaintiff in that case failed to deposit Commissioner's fees in spite of several opportunities given.
2. **Adhiri Ranjan Dutta v. Sachindra Mohan Das Gupta, AIR 1962 Tripura 20**, where it held that in a case which clearly comes under Order 41, Rule 19, Sec 151 C.P.C. should never be used by a Court as it will mean that the Court would be extending the provisions of section 5 of the Limitation Act to an application to which it cannot be applied.
3. **Mangala Bhivaji Lad v. Dhondiba Rambau Aher, AIR 2010 Bombay 122**, where it was held that inherent powers under s. 151 are to be exercised by Court only in absence of statutory provisions and not to circumvent a statutory provision.
4. **M/s Ram Chand and sons Sugar Mills Pvt Ltd v. Kanhayall Bhargava and others, AIR 1966 SC 1899**, where it is held that inherent power of a Court is in addition to and complementary to the powers expressly conferred under the Civil Procedure Code; that inherent

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power will not be exercised if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code.

5. **Vareed Jacob v Sosamma Geevarghese and others, AIR 2004 SC 3992**, where it was held that that when circumstances do not fall under any of the rules prescribed that the court can invoke its inherent power under section 151 CPC.
6. **Ramkarandas Radhavallabh v. Bhagwandas Dwarkadas, AIR 1965 SC**, where it was held that inherent powers are to be exercised by the Court in very exceptional circumstances.

The appeal was not fixed for hearing on 01.04.2021. On that date the appellant was directed to show cause as to why the appeal should to be dismissed for non prosecution. Appellant did not take any steps on 01.04.2021 to show cause and the Court dismissed the appeal for non-prosecution.

In **Lachman Singh v. Smt. Hasi Rani Singh and others, AIR 1979 Cal 196**, referred to above, it was held that for failure to comply with the Court's orders, the Court can dismiss the suit. Orders dismissing appeal on a date not fixed for hearing of the appeal, but on the failure of the appellant in taking steps in spite of show cause order could be made under section 151 of the Civil Procedure Code in exercise of inherent powers and the powers under the said section can be invoked to set aside such dismissal. The dismissal was not under Order 41, Rule 17 of the C.P. Code.

Order 41, Rule 17 (1) of C.P. Code provides for dismissal of the appeal on the day the appeal is fixed for hearing or on any other day to which hearing may be adjourned. The said Rule do not permit dismissal of appeal on date which was not the date fixed for hearing of the appeal. The date on which appeal was dismissed for non-prosecution on 01.04.2021 was actually fixed for hearing of two petitions filed by the respondent nos.1 to 4 on 13.01.2021. None of the two petitions were taken up for hearing on that date, and the case was dismissed for non-prosecution as appellant failed to appear and show cause why the appeal should not be dismissed for not taking steps.

On facts Order 41, Rule 17 CPC does in fact not apply and so Order 41, Rule 19 C.P. Code also does not apply. The appellant in such a case need not file application for restoration of appeal under Order 41, Rule 19 of C.P. Code. Circumstances do not fall under any of the rules prescribed and the inherent power of the Court could be invoked under section 151 CPC and the appeal restored, on good grounds being shown, to file for hearing of the two petitions filed with the respondent nos.1 to 4, other petitions, if any is pending, and the appeal.

The application was made on 08.04.2021 to set aside order dated 01.04.2021 by which the appeal was dismissed. There has been no delay. No appellant or suitor gains anything by not taking steps and the respondents do not

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lose anything if the appeal or case is restored for hearing. The respondents would only have to defend the appeal which otherwise also they would have had to had the appeal not been dismissed. No party can have any grievance if case is decided on merits after full hearing. An opportunity should be granted to the appellant to prosecute the appeal by contesting the applications filed by the respondents nos.1 to 4 one of which filed on 13.01.2021 is for dismissal of appeal on suppression of facts of previous suit between the parties of their predecessors on the same cause of action.

Having regard to the facts and circumstances, this is fit case to restore the appeal under inherent powers.

Hence, **Ordered:** The application is allowed on contest against the respondents nos.1 to 4 without costs.

Order no. 16 dated 01.04.2021 dismissing the appeal for non-prosecution is set aside in exercise of inherent powers of the Court under section 151 of the Code of Civil Procedure and the appeal is restored to file for hearing.

Note in register.

Application under section 151 C.P. Code filed on 13.01.2021 by the respondents nos.1 to 4 for dismissal of the appeal on the ground that appellant herein was defendant no.1 in a previous suit being Title Suit no.129 of 1998 and the predecessor of the respondent nos. 1 to 4 was arrayed as defendant no.6 is an important application and on priority should be heard first. The fate of appeal and other pending applications would depend on the fate of this application for dismissal of appeal.

To **20.09.2021** for hearing application under section 151 C.P.C. filed by the respondents nos. 1 to 4 on 13.01.2021, and written objections by appellant in the meantime.

Dictated & Corrected by me

Sd/-

(Dulal Chandra Kar)
District Judge, Nadia

Sd/-

(Dulal Chandra Kar)
District Judge, Nadia