

## Smt. Madhuri Prasad and Another Vs Nakul Lal

**Court:** Jharkhand High Court

**Date of Decision:** May 8, 2012

**Acts Referred:** Civil Procedure Code, 1908 (CPC) â€” Order 9 Rule 5, 115(1), 151

**Citation:** (2012) 3 JCR 17

**Hon'ble Judges:** P.P. Bhatt, J

**Bench:** Single Bench

**Advocate:** Jai Prakash and Yogesh Modi, for the Appellant; B. Kishore Prasad and B. Vibha, for the Respondent

**Final Decision:** Allowed

### Judgement

@JUDGMENTTAG-ORDER

P.P. Bhatt, J.

Heard the learned counsel for the parties. The present revision application is filed u/s 115(1) of the CPC against the order

dated 22.12.2009 passed by learned Munsif, Hazaribagh in Misc. Case No. 09/2005, whereby, the learned Munsif has set aside the dismissal

order of the suit dated 8.9.2005 and restored Title Suit No. 39/ 2004.

2. Learned counsel for the petitioners submitted that title suit No. 39/2004 filed by the plaintiff was order to be dismissed under Rule 5 of Order

(IX), CPC and therefore the only option which was available with the Court below was to ask the plaintiff to file a fresh suit under sub-section 2 of

Order IX, Rule 5 of the CPC. But instead of passing such order, the Court below while passing the order dated 22.12.2009 failed to appreciate

this legal provision contained in sub-rule (2) of Rule 5 of Order (IX) and passed an order for restoration of the suit, which is not legally permissible.

It Is further submitted that the restoration application along with limitation petition was preferred by the Opp. Party and the learned Court below

has also passed the order with regard to condonation of delay without hearing the present petitioner. It is also submitted that the present petitioners

filed their appearance on 15.12.2006 and thereafter they filed rejoinder dated 20.2.2006. It is submitted that the Court below has failed to

appreciate the provision of law as contained in sub-rule (2) of Rule 5 of Order (IX) and only on this ground, the present revision application may

be allowed and thereby impugned order dated 22.12.2009 may be set aside. In support of his contention, learned counsel for the petitioners has

refereed to and relied upon the judgment reported in Vishwanath Satwaji Gaikwad Vs. Laxman Abaji Kawale and Others, and by referring para

12 of the judgment, he submitted that the said judgment is applicable to the facts and circumstances of the present revision application.

3. As against this, learned counsel for (sic) Opp. party submitted that it is not open for the petitioner to raise this plea before this Court as they

have already participated in the restoration proceeding and they also adduced their evidence before the learned Court below. It is also submitted

that after pronouncement of the said order by the Court, the plaintiff has acted upon it and the defendants have also appeared and participated in

the suit proceedings. Therefore, now it is not permissible for the petitioners to raise such plea and challenge the order impugned dated 22.12.2009

by way of filing this revision application at this belated stage.

4. Considering the aforesaid rival submissions advanced by the learned counsel for the parties and from perusal of order dated 22.12.2009 passed

by the learned Court below, it appears that the said order was passed in restoration application preferred by the opp. party under Rule 5 of Order

(IX) read with Section 151 of the CPC and the Court below also passed an order of setting aside the order dated 8.9.05 and thereby, passed an

order of restoration of the original suit i.e. title suit No. 39/04. It appears that immediately thereafter, present revision application has been filed on

10.2.2010. Therefore, it can not be said that the revision application is filed at belated stage. Now this order is required to be analyzed in view of

provision as contained in Rule 5 of Order (IX) of the Code of Civil Procedure, which is reproduced as under:

5. Dismissal of suit where plaintiff, after summons returned unserved," fails for three months to apply for fresh summons.--(Subs, by Act 24 of

1920, Section 2, for the original sub-rule (1).)[(1) Where, after a summon has been issued to the defendant or to one of several defendants, and

returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to

the Court returns made by the serving officers, to apply for the issue of a fresh summon the Court shall make an order that the suit be dismissed as

against such defendant, unless the plaintiff has within the said period satisfied the Court that-

(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served; or

(b) such defendant is avoiding service of process; or

(c) there is any other sufficient cause for extending the time.

in which case the Court may extend the time for making such application for such period as it thinks fit.]

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

In view of provision under sub-section (2) of Rule 5 as contained in Rule 5 of Order (IX), it appears that the only option which was available

before the Court below to pass an order for permitting the plaintiff to file a fresh suit, if permissible under law. But instead of adopting the said

recourse, the Court below passed an order of restoration of the suit, which is not legally permissible under Rule 5 of Order (IX), CPC and,

therefore, the argument advanced by the learned counsel for the Opponent cannot be accepted because there is no such law which prohibits or

debars the petitioners from raising such plea at this juncture, which is totally based on provision of law. Merely participation in the proceeding, the

petitioners cannot be debarred and prohibited from raising such plea at this juncture. Learned counsel for the petitioners has referred to and relied

upon the judgment reported in Vishwanath Satwaji Gaikwad Vs. Laxman Abaji Kawale and Others, which is applicable in the facts and

circumstances of the present case and paragraph 12 of the said judgment reads as under :

12. It has also to be noted that sub-rule (2) of Rule 5 of Order (IX) of the Code makes a clear provision that the plaintiff can file a fresh suit

subject to the law of limitation. That means, the plaintiff was not without any remedy. He could have filed fresh suit against defendant No. 2

provided the same was within the period of limitation, and in such circumstances, there was no need for the Court to exercise inherent jurisdiction

u/s 151 of the Code to set aside the order of dismissal of the suit as against defendant No. 2. If the suit claim of the plaintiff had been within the

period of limitation on the said date, then he could very well have proceeded against defendant No. 2 by filing fresh suit and if the suit claim of the

plaintiff had gone out of the period of limitation on the said date, then the Court cannot bring such claim within the period of limitation by exercising

inherent jurisdiction u/s 151 of the Code.

In view of the aforesaid facts and circumstances of the present case and in light of the judgment referred above, this Court is of the view that the

learned Court below has not properly appreciated and considered the provision as contained in sub-rule (2) of Rule 5 of Order (IX), C.P.C. and

therefore, the order impugned dated 22.12.2009 requires to be set aside. Accordingly this revision application is allowed and order dated

22.12.2009 is hereby set aside.