

(1968) 1 ILR (Cal) 122**Calcutta High Court****Case No:** Civil Rule No. 893 (F) of 1966 and F.A. 687 of 1962

Jaibharat Trading Co.

APPELLANT

Vs

Sri Sri Gopalji Thakurji

RESPONDENT

Date of Decision: July 4, 1966**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 19, 151
- Limitation Act, 1908 - Article 168, 181
- Limitation Act, 1963 - Article 122, 137

Citation: (1968) 1 ILR (Cal) 122**Hon'ble Judges:** P.N. Mookerjee, J; Chatterjee, J**Bench:** Division Bench**Advocate:** Chandidas Roy Chowdhury and Mohanlal De, for the Appellant; Amarendra Nath Gupta, for Opposite Party No. 1, for the Respondent

Judgement

P.N. Mookerjee and Chatterjee, JJ.

This Rule was issued for restoration of an appeal dismissed for default in the matter of filing paper-books. The appeal was dismissed for default under the order of this Court, dated December 13, 1963. This dismissal took place under the following circumstances:

2. When on May 8, 1963, the connected Civil Rule No. 3342F of 1962 was made absolute, restraining the opposite party from executing the ejectment decree under appeal on certain terms, there was an order for expeditious hearing of the appeal and filing of paper-books. In terms of that order the paper-books were due to be filed on September 4, 1963. There having been default in this respect the matter was placed before the Bench on September 11, 1963, for orders when time was given to the Appellant to file the paper-books within two weeks after the Puja vacation. In default, the matter was directed to be put up for final orders. In pursuance of this direction, the case appeared on the list for final orders on December 13, 1963, and, on that day, the following order was recorded by the Court:

Nobody for Appellant appeared when this matter was called on for orders. If the paper-books be not filed on the date the Court re-opens after the Christmas holidays, this appeal will stand dismissed with costs hearing fee being assessed at two gold mohurs.

3. As a result of this order, the appeal stood dismissed as the paper-books were not filed within the time, finally granted for the purpose as aforesaid. On January 7, 1964, an office note appears in the order book that, as the paper-books had not been filed, the appeal stood dismissed. The matter stood in that position until June 22, 1965, when Civil Rule No. 2121F of 1965 was issued on the application of the Appellant for restoration of the appeal. That Rule eventually came up for hearing on February 23, 1966, when it was discharged because of insufficient materials, but liberty was given to the Appellant to file a fresh petition with better particulars. Under this leave the present Rule was obtained on March 22, 1966.

4. The Appellant's case is that, although the appeal was dismissed in January, 1964, under the order of the Court, dated December 13, 1963, for non-compliance with the direction for filing of paper-books, the Appellant had no knowledge of the same until May 16, 1965, and within a short time thereafter it filed the application for restoration on which the earlier Civil Rule No. 2121F of 1965 was issued. It is the Appellant's case that it had no knowledge of the above dismissal order as, in response to a letter of the learned Advocate, it had sent the paper-book costs to him through Badriprosad Dwivedi who was its employee at the time and it was reported by the said Badriprosad to the Appellant that the said money had been duly made over to the learned Advocate. Under these circumstances, it was under the impression and had an assurance in its mind that its appeal was pending. As, however, the Appellant received no information about the appeal for a long time, Bajranglal Agarwalla, one of the partners of the Appellant firm went to the learned Advocate on May 16, 1965, and then he came to know for the first time that the appeal had been dismissed and, thereafter, the Appellant acted with the due diligence in making its earlier application for restoration and also in making the present application after ascertaining the whereabouts of Badriprosad and getting his affidavit as to the events which had happened so far as he was concerned. It is to be noticed in the above connection that, although the appeal was dismissed sometime in January, 1964, and the Respondents opposite parties had full knowledge about such dismissal, which had the effect of vacating automatically the injunction order, which has been obtained by the Appellant against the said opposite parties during the pendency of the said appeal, the Respondents opposite parties did not take any steps whatsoever for executing the decree in question as to indicate that the Appellant's appeal had been dismissed, but, on the other hand, they appear to have gone on accepting monies or monthly payments from the Appellant apparently as rent, as stated by the Appellant, though about the character of these monies, namely, whether they were accepted as rent or otherwise the materials before us do not afford sufficient indication. In the context of the above conduct of the Respondents opposite parties, it is highly probable that the Appellant had no knowledge about the dismissal of its appeal prior to May 16, 1965, as stated by it. In that context the

affidavit of Badriprosad, explaining the circumstances under which the Appellant's appeal was dismissed without any knowledge on its part about such event, may well be accepted. Upon that view this Rule ought to succeed on the merits.

5. Mr. Gupta, however, raises two other questions in this connection. In the first place, he argues that this application is not maintainable in law and, in any event, it would be barred by limitation.

6. On the first question it is clear that the present case of the default, with which we are concerned, would not come within Order XLI, Rule 19 of the Code of Civil Procedure. The matter of restoration then would not be covered by any provision of the Code or any express provision of law. It would be a matter under the inherent jurisdiction of the Court u/s 151 of the Code of Civil Procedure, and the present case has to be treated or dealt with on that footing. In that view of the matter the present application would be maintainable as one seeking to invoke the inherent powers of the Court in favour of the Appellant. Strictly speaking, such an application is not covered by any express provision of law, but it is an application only for drawing the attention of the Court to certain facts for exercise of its inherent powers. In the matters of exercise of such inherent powers there is obviously no period of limitation and, accordingly no bar of limitation can arise in the instant case. In any view of the matter, even if a period of limitation be held to apply to the above application for invoking the exercise of the inherent powers of the Court, it can only come under the old Article 181 (new Article 137) of the Indian Limitation Act, which prescribes a period of three years from the accrual of the rights to apply. The present application for restoration of the appeal was admittedly made within this period and, accordingly, it will not be time-barred. Further, already stated, we are satisfied on the merits that the Appellant has a case for restoration of the appeal and that will justify the exercise of the inherent powers of this Court for the purpose in its favour.

7. In holding as above we have considered the matter from all possible points of view in the light of the decisions, bearing upon the same. That the matter is not covered by Order XLI, Rule 19 of the Code or any specific provision of the Code is clear on the authorities vide [Mrs. Minnie Lal Vs. Mahadeo Lal Marwari and Others](#), and the unreported decision of this Court in Gotilal Barman v. Abhoypada Hazra Unreported decision of A.C. Sen and T.P. Mukherji, JJ. in F.A. 169 of 1957 dated 20.11.64. See also Hari Dassi Debi v. Sajani Mohan Batabyal (1932) 36 C.W.N. 564 and [Ramkhelawan Singh Vs. Monilal Sahu and Others](#), . That again, in such circumstances, it fails to be dealt with u/s 151 of the Code is also clear on the said authorities. That, in such a situation, Article 168 of the old Limitation Act, 1908, would have no application follows sufficiently from the discussion, appearing in the aforesaid decisions and with that discussion we are in substantial agreement on the point. The instant case is one of dismissal for non-compliance with the Court's order in the matter of filing of paper-books. Such a case, in our opinion, would not fall within the said Article on reasons similar or substantially similar to those given in the above decisions. The two decisions reported in S.A. Ganny v. I.M. Russell (1930) ILR 8 Rang. 380 (F.B.) and [G. Sirur Vs. R. Mythili Ammal and Others](#), , cited by the opposite party as

authorities to the contrary are distinguishable on reasons indicated by us above and sufficiently discussed in the [Mrs. Minnie Lal Vs. Mahadeo Lal Marwari and Others](#), and the unreported decision of this Court Unreported decision of A.C. Sen and T.P. Mukherji, JJ. in F.A. 169 of 1957 dated 20.11.64 referred to hereinbefore. The instant case is not one of dismissal for "want of prosecution" as contemplated in Article 168 of the Indian Limitation Act, 1908, nor is it a case of dismissal "for default of appearance or for want of prosecution or for failure to pay costs of service of process or to furnish security for costs", as contemplated in the corresponding Article 122 of the new Limitation Act. The restoration here, as we have held above, would be u/s 151 of the Code of Civil Procedure, for which there is no period of limitation vide Ananda Prosad Mitra v. Sushil Kumar Mandal, Receiver (1941) 46 C.W.N. 325 (332). In any event, it will be covered by no other Article of the Limitation Act except the old Article 181 or the corresponding new Article 137, which will keep it well within their prescribed periods of limitation.

8. In the above view of the matter, we make this Rule absolute, set aside the order of dismissal of the appeal and direct that the appeal be restored to file. It will, thereafter, proceed according to law.

9. The Appellant, however, must file the paper-books within two months from this date. In default, this Rule will stand discharged.

10. The Respondents will also be entitled to the costs of this hearing, hearing fee being assessed at ten gold mohurs.

11. The appeal will be placed for hearing on the daily list, a month after the filing of the paper-books.