

**(1989) 03 CAL CK 0008**

**Calcutta High Court**

**Case No:** C. R. No. 82 of 1980

The Ganganagar Sugar Mills Ltd.

APPELLANT

Vs

Upper Ganges Sugar Mills Ltd.  
and Another

RESPONDENT

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**Date of Decision:** March 30, 1989

**Acts Referred:**

- Limitation Act, 1963 - Section 5

**Citation:** 94 CWN 61

**Hon'ble Judges:** Prabir Kumar Majumdar, J

**Bench:** Single Bench

**Advocate:** S.K. Gupta and Arabinda Sen, for the Appellant; L.P. Murrarka and L.K. Poddar, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Prabir Kumar Majumdar, J.

This application is for recalling the order dated 15th June, 1987 passed by me dismissing the suit for non-prosecution. On or about 1st February, 1980 the plaintiff instituted this suit against the defendants, inter alia, for leave under Clause 12 of the Letters Patent; Decree against the defendants or such of them as may be held liable to the plaintiff for the sum of Rs. 14,37,400.23p. Declaration that the sum of Rs. 9,33,377.16 is payable by the defendant or either of them to the plaintiff and decree directing the defendants to pay the sum of Rs. 9,33,377,16p. along with interest thereon from 31st January, 1977 at the rate of 18% per annum until payment; Interim and further interest; Costs and other relief"s.

2. On or about 10th April, 1980 the plaintiff made an application for summary judgment and there was also an application by defendant no. 1 for revocation of leave under Clause 12 of the Letters Patent. Both the said applications were disposed of by giving direction for expeditious hearing of the suit.

3. The written statements have been filed as also the affidavit of documents and the inspection was completed. The suit was ready for hearing.
4. On or about May, 1988 this suit was mentioned on behalf of the plaintiff upon notice to the defendant for fixing an early date of hearing when it was pointed out by the defendant's counsel that the suit had already been dismissed by the order dated 15th June, 1987 for non-prosecution. The plaintiff upon search had come to know that the suit appeared in the peremptory list in my Court on 12th June, 1987 and on 15th June, 1987, the said suit was dismissed for non-prosecution as plaintiff did not appear to prosecute the suit.
5. Now this notice of motion dated 13th June, 1988 has been taken out for recalling of the order 15th June, 1987 as aforesaid.
6. The explanation sought to be given by the plaintiff/petitioner is that upon hearing from the Advocate on Record of the defendant that the said suit had been dismissed for non-prosecution as aforesaid, the petitioner's advocate on record made certain searches. Upon searches being made the plaintiff had come to learn that the suit appeared in the daily list in my Court on Friday the 12th June, 1987 and again on Monday the 15th June, 1987. It is alleged by the petitioner that the suit as also the cause title and the name of the petitioner's advocate on record was not printed properly and clearly in the cause list dated 12th June 1987 as also 15th June, 1987.
7. It is also alleged that the name of the plaintiff is "Ganga Nagar Sugar Mills Ltd." and this was not correctly printed in the said cause list. It was printed as "Ganga Nagar Mills Ltd." and the name of the defendant no. 1 "Uppe Gange Sugar Mills Ltd." It is further alleged by the petitioner that no one on behalf of the petitioner could appear before me at the time when the above suit was called on for hearing on 12th June, 1987 and 15th June, 1987. The petitioner, therefore, prays that the said order be recalled as the petitioner was prevented by sufficient cause from appearing at the hearing of the above suit on 12th June, 1987 and 15th June, 1987 although the petitioner had been diligent in taking steps in the above suit.
8. This application is being opposed by the defendant. Besides other points the defendant has also taken a point that the said order dated 16th June, 1987 was duly drawn up, completed and filed on 24th June, 1987 and the same was conclusive and final. It is submitted by the defendant that the said order dated 15th June, 1987 having been already drawn up, completed and filed this court has no jurisdiction to entertain, try and determine this petition for recalling or setting aside of the said order dated 15th June, 1987.
9. At the time of hearing of this application, this point as to maintainability of the petition as also jurisdiction of this court has been taken by the defendant no. 1. There is also another point taken by the defendant that this application for recalling of the order as also restoration of the suit has also been barred by law of limitation.

10. Let me now deal with the aforesaid contentions. It is not in dispute that the said order dated 15th June, 1987 dismissing the plaintiff's Suit has been drawn up, completed and filed. How the question is whether in view of such drawing up and completion of the said order, this court has any jurisdiction to entertain this application for restoration of the suit. The learned Counsel for the plaintiff has referred to a recent bench decision [S.C. Sons \(P\) Ltd. Vs. Sm. Brahma Devi Sharma and Others,](#) .

11. In this case before the Division bench, the application for restoration was made within the period of limitation prescribed for an application for restoration of the suit, namely, Article 122 of the Limitation Act, 1963. Article 122 of the Limitation Act prescribes the period of 30 days from the date of dismissal. The Division Bench held that if such application for restoration was made within the time prescribed by the Limitation Act but during that period if the order dismissing the suit was drawn up completed and filed, then that would not take away the right of the litigant to make an application for restoration of the suit.

12. It has been observed by the Division Bench of this Court to this effect :

The inherent right of the Court to recall an order before it is completed and filed is "well settled and that power still exists. Ordinarily no court can modify or re-call any final order after the said order is drawn up, completed and filed. But it is not an absolute proposition of law. The said proposition is only a general rule and having some exceptions. The mere fact that before the expiry of the period provided in Article 122, the order dismissing the suit for non-prosecution was drawn up, completed and filed, does not make any difference if the application is made within the time provided by Article 122. The exercise of inherent jurisdiction of the High Court to recall any order before it is drawn up, completed and, filed does not and cannot take away the jurisdiction of the Court to entertain such an application if it is made within the time provided by Article 122 of the Limitation Act. To recall an order before it is completed and filed is, by its nature itself, an exercise of jurisdiction by the Court as a part of its inherent power but that cannot nullify the specific and express provision of the Limitation Act including Article 122 thereof. An application which is otherwise not barred by limitation cannot be so barred merely because the order in respect of which the application has been made has been drawn up and completed before the expiry of such time. If it is held otherwise, that would completely nullify the provisions of the Limitation Act. The inherent power of the High Court cannot take away the right of a litigant to make an application within the time stipulated in the Limitation Act. Accordingly, the application made before the trial Court for setting aside the dismissal for non-prosecution not being barred by limitation cannot be barred merely because it was made after the order was drawn up and completed. On the other hand if such an application is otherwise barred by the Laws of limitation, it is not open to the Court to allow such application in the exercise of its inherent right merely because the order has not yet been drawn up,

completed and filed.

13. It appears that the Division Bench of this Court in the case referred to above observed in paragraph 71 of the report that the application made before the Trial Court for setting aside the dismissal for non-prosecution not being barred by limitation could not be barred merely because it was made after the order was drawn up and completed. On the other hand if such an application was otherwise barred by laws of limitation, it was not open to the Court to allow such an application in exercise of its inherent right merely because the order had not yet been drawn up, completed and filed.

14. In the present case the order dismissing the suit was made on 15th June, 1987 and the notice of motion for recalling the said order and restoration of the suit was taken out on 13th June, 1988 almost about a year after the dismissal of the suit. It also appears that the application being the grounds of the notice of motion was affirmed on 6th June, 1988. There is also a prayer in the said notice of motion that delay, any, in making the instant application be condoned. It also appears that the said order passed by me on 15th June, 1987 dismissing the suit was drawn up, completed and filed on 24th June, 1987. It is true that the said order was drawn up, completed and filed within the period of limitation for making an application for restoration of the suit, but admittedly the application for restoration had not been made within the said period of limitation i.e., 30 days from the date of dismissal of the suit, in other words, by 15th July, 1987. According to the said bench decision [S.C. Sons \(P\) Ltd. Vs. Sm. Brahma Devi Sharma and Others](#), if the application for restoration of the suit was made within the period of limitation prescribed under Article 122 of the Limitation Act 1963 then the mere fact that before the expiry of the period provided under Article 122, the order dismissing the suit for non-prosecution was drawn up, completed and filed, does not make any difference if the application is made within the time provided by Article 122.

15. It, therefore, appears according to the said bench decision that the court cannot exercise jurisdiction, in a matter like this, if the order sought to be recalled has been drawn up, completed and filed and no application for restoration has been made within the period prescribed by laws of limitation.

16. Admittedly, in the present case the application for restoration has been taken out long after the dismissal of the suit. Such an application may, however, be entertained condoning the delay u/s 5 of the Limitation Act if there are sufficient reasons for condoning the delay. But it appears to me that such power of condoning the delay u/s 5 of the Limitation Act can only be exercised if the Court has jurisdiction to entertain the application for restoration. This part of the law has not yet been disturbed uphill now that if the order sought to be recalled has been drawn up, completed and filed the court loses jurisdiction to entertain any application relating to such matter after drawing up, completion and filing of the said order. The Bench decision referred to above also held the same view. The learned Judge

speaking for the bench in the case referred to above has observed "Accordingly in our opinion, the application made before the trial Court for setting aside the dismissal for non-prosecution not being barred by limitation cannot be barred in rely it was made after the order was drawn up and completed. On the other hand, if such an application is otherwise barred by the laws of limitation, it is not open to the court to allow such application in the exercise of its inherent right merely because the order has not been drawn up. completed and filed."

17. It may be noted that there the Division Bench found that the application for restoration was made within time prescribed by Limitation Act but during such time the order dismissing the suit had already been drawn up, completed and filed. Respectfully agreeing with the views expressed by the Division Bench of this Court in AIR 1985 Cal 437, I feel that the order sought to be recalled has been drawn up, completed and filed and no application for recalling the said order for restoration of the suit has been made within the period prescribed by the laws of limitation, this court cannot entertain this application for recalling of the order dated 15th June, 1987 and for restoration of the suit.

For the reasons aforesaid, this application fails and is dismissed. There will be no order as to costs.