(1967) 04 BOM CK 0008

Bombay High Court

Case No: O.C.J. Miscellaneous Petition No. 1 of 1966 and Special Civil Suit No. 4 of 1960

Laxmi Investment Co. Pvt. Ltd., Akola		APPELLANT
	Vs	
Tarachand Harbildas		RESPONDENT

Date of Decision: April 20, 1967

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 141, 151
- Companies Act, 1956 - Section 161, 446(3)

Citation: (1967) MhLj 970

Hon'ble Judges: S.P. Kotval, C.J; R.M. Kantawala, J

Bench: Division Bench

Advocate: K.C. Cooper, instructed by Kanga and Co, for the Appellant; S.J. Deshpande, for opponents Nos. 2 and 4, for the Respondent

Judgement

Kotval, C.J.
This petition has been referred to a Division Bench for decision by Mr. Justice Tulzapurkar because the learned Judge entertained some doubt whether he has the power to grant the application made before him. It virtually raises the following question:

Where an application to restore a suit to file under Order IX rule 9 is itself dismissed for default, whether a further application to restore the application under Order IX rule 9 to the file will at all lie?

The learned Judge felt that in view of the decision of this Court in D. B. Manke v. B. Walwekar A I R 1923 Bom. 386 such an application might not lie, but there are conflicting authorities on the question.

2. The circumstances under which Miscellaneous Petition No. 1 of 1966 came to be filed are as follows: The applicant is the liquidator of a company known as the Laxmi

Investment Co. Private Ltd. of Akola. He was appointed the liquidator of the company after an order of winding up was passed on February 12, 1962. This company had entered into an agreement with one Tarachand and others to purchase the immovable property from the said Tarachand and others for a sum of Rs. 60,000 on January 23, 1957. The agreement was subsequently modified in December 1957 whereby the company agreed to pay Rs. 25,000 more to the vendors. The vendors did not fulfil their agreement and the company filed a suit (C. S. No. 4 of 1960) for specific performance and damages on the footing of the agreement. The suit was filed on June 26, 1960 and was fixed before the Civil Judge, Senior Division, Khamgaon on February 22, 1961. On that date the advocate for the plaintiff reported no instructions and withdrew from the suit in consequence of which the Civil Judge dismissed the suit for default. On March 22, 1961, the company made an Application No. 28 of 1961 for restoration of the suit to the file under Order IX, rule 9 of the Code of Civil Procedure. Before that application could be heard, the company was ordered to be wound up and the liquidator was put in charge of the affairs of the company. According to the liquidator, however, he knew nothing of the pendency of the suit or of the application for restoration filed on March 22, 1961. That application (Application No. 28 of 1961) for restoration of the suit came up for hearing before the Civil Judge on April 19, 1962, and no one being present on behalf of the company the application was dismissed. The Court did not know that a liquidator had been appointed and the liquidator did not know that the suit had been filed and dismissed or that the application for its restoration was pending.

3. The present application which under certain circumstances, has come to be renumbered as Application No. 1 of 1961, was filed by the liquidator on behalf of the company on June 19, 1962, praying that the order of dismissal of the application to set aside the ex parte decree dated April 19, 1962, should be set aside and the Miscellaneous Application No. 28 of 1961 should be restored to the file. The liquidator has alleged that he had no knowledge whatever of the pendency of the suit or of its dismissal for default nor of the fact that an application to restore the suit to the file had been made and was pending on the file of the Civil Judge. He alleged that he came to know of the pendency of the suit and the application only on June 18, 1962, from one of the former directors of the company one Amratlal Vyas and thereupon he acted very promptly. He alleges that he sent a telegram to the Clerk of the Court of the Civil Judge, Senior Division, Khamgaon, informing him that he had learnt about the dismissal of the application for restoration and that he had instructed the company''s advocate, Mr. Bhate of Khamgaon to make an application for restoration of the said Application No. 28 of 1961. This application was filed on behalf of the liquidator by the said advocate on June 19, 1962 and was followed up three days later by an application for condonation of one day''s delay in filing the said application for restoration on June 22, 1962.

4. These were the proceedings taken before the Civil Judge, Senior Division, Khamgaon, but in view of the liquidator having been appointed in the meanwhile on

March 20, 1963, the Civil Judge acting under the provisions of section 446 (3) of the Companies Act, 1956, transferred the proceedings to the High Court. At that stage the application presented on June 19, 1962, came to be renumbered in this Court as Application No. 1 of 1966. It is that application which came before the learned single Judge and since the decision in D.B. Manke Vs. B. Walwekar, Secretary, Sew Sports Club, was relied on behalf of Tarachand and others and since that is a decision of a Division Bench, the learned Judge felt that he should refer the question to a Division Bench for considering the effect of the decision in D.B. Manke Vs. B. Walwekar, Secretary, Sew Sports Club, .

5. Now we may say at once that in our opinion the decision in D.B. Manke Vs. B. Walwekar, Secretary, Sew Sports Club, cannot apply to the facts of the present case, nor is it an authority for what it is supposed to be. In that case the plaintiff had filed a suit in the Court of Small Causes at Bombay to recover wages from the defendant. The suit was decreed ex parte because the defendant''s pleader did not attend to contest the suit at the hearing. The defendant then filed an application for setting aside the ex parte decree and the application was fixed for hearing on April 10, 1922. The notice issued was under Order IX, rule 9 of the Code of Civil Procedure. The notice was, however, struck off for want of prosecution and the defendant presented a further application for setting aside the ex parte decree which was clearly barred. The Small Causes Court treated it as an application to restore the application previously made under Order IX, rule 9. The Court restored it and passed an order against the plaintiff for a fresh trial of the suit. The plaintiff had come up to the High Court in revision against that order.

6. Now what the Division Bench held in D.B. Manke Vs. B. Walwekar, Secretary, Sew Sports Club, was that (p. 386):

... It cannot be said that there is any rule in the CPC that enables the Court to restore an application made under Order IX, Rule 9 which has been dismissed for want of prosecution. It is urged upon us that the Court has inherent powers to make orders within the provisions of section 161 and that this was an order made accordingly. There is no reference made in the decision of the Court that the order was made u/s 151. It is quite clear that if that section had been considered, the order under revision could not possibly have been made under it. That section gives the Court power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The plaintiff has got a decree and the defendant had every opportunity of appearing in Court at the time of hearing and also when notices were issued by him against the plaintiff for a new trial. It cannot be said therefore that in any circumstance it is necessary for the ends of justice that he should have yet another opportunity of harassing the successful party.

The latter portion of the order which we have deliberately quoted in extensor commencing from the reference to section 151, nowhere says that section 151 cannot apply in such a case. On the contrary, what the Division Bench in effect said

was that if that section were to be considered, upon the facts and circumstances before it the order under revision could not possibly have been made. They proceeded to demonstrate why and they pointed out that section 151 only justified the making of an order for the ends of justice or to prevent abuse of the process of the Court and in the circumstances of that case, justice was met by not giving the defendant another opportunity of harassing the successful party. That, therefore, was a decision upon the facts and circumstances of that case. What the Division Bench clearly said in that case was that assuming that section 151 applied, sufficient cause had not been shown for the restoration of the second application. At no stage did the Division Bench say that section 151 would not or did not apply. On the contrary, they assumed that it would apply but showed that upon the facts and circumstances of that case even if it applied sufficient cause had not been made out. We cannot, therefore, regard that case as authority for the proposition that u/s 151 the second application would not lie to restore to file the application under Order IX, rule 9 dismissed for default. It is the head-note of the case which gives a completely wrong impression.

7. Mr. Cooper has also pointed out one other circumstance in connection with that case namely that in point of fact section 151 did not apply to Small Causes Court at that time and the powers u/s 151 could not have been exercised by the Court of Small Causes in that case at all. This circumstance was not taken into account.

8. Upon the authorities a power to restore such an application to the file can be spelt out under two heads. There are a number of authorities supporting either one or the other view. The two alternative views are; (a) to support such an application under Order IX, rule 9, read with section 141 of the CPC which says that the procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction; (b) that in such a case section 151 of the CPC could well be applied because there is no other remedy open.

9. The difference of opinion between the several High Courts stems from the remarks of the Privy Council in the leading case of Thakur Prasad v. Fakirullah I L R (1894) All. 106 (P C). It is now settled law that section 151 of the CPC does not confer any power upon any Court but is merely declaratory of a power which inherently exists in every Court and all that it says is that:

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

The section assumes that the power is inherent in a Court and is merely declaratory of it. Secondly, it is also settled law that section 151 of the Code cannot be invoked where there is a specific provision in the Code giving a remedy to a party. In such a case the party would be limited to that remedy and the inherent power u/s 151

would not be available to such a party.

10. It is basing themselves upon the last mentioned principle that the Courts have differed on the nature of the remedy available to a party in a case like the one before us. The question they raise is whether in a case like the present section 141 of the CPC read along with Order IX, rule 9 would apply or not. If it applies, obviously upon the principle stated above, section 151 of the CPC would not be attracted, but if section 141 read with Order IX, rule 9 would not apply, then there would appear to be no other remedy provided in the Code and the inherent power u/s 151 would come into play.

11. The principal question, therefore, is whether section 141 would apply in a case like the one we have before us and it is here that the remarks of the Privy Council in Thakur Prasad v. Fakirullah I L R (1894) All 106 (P C)., come into play. In that case the Privy Council were concerned with an application for execution and the question was whether section 647 of the then CPC which corresponds to section 141 of the present Code applied. The Privy Council held that section 647 does not apply to applications for execution. They took the view that it only applied to original matters in the nature of suits. Their Lordships said (p. 111):

...Their Lordships think that the proceedings spoken of in section 647 include original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and do not include executions." The divergence of opinion amongst Courts in India has arisen from the different interpretations put upon this view of the Privy Council, especially as to what their Lordships implied by the words "such as proceedings in probates, guardianships, and so forth". The Courts which have taken the view that section 141 read with Order IX, rule 9 would apply to an application to restore an application under Order IX, rule 9 which has been dismissed for default, have interpreted the remark of the Privy Council to include all applications within section 141. Since section 141 would apply to other applications according to this view, there is no question of turning to section 151. The other view has limited the remarks of the Privy Council to applications which are ejusdem generis with proceedings in probates, guardianships and so forth, that is to say not interlocutory applications which arise out of other proceedings such as suits but which in themselves initiate a lis. In our opinion, the latter view is to be preferred.

12. We cannot put the matter better than it has been put by Mr. Justice Mukerji in Sarat Krishna Bose Vs. Bisweswar Mitra and Others, . After quoting the said passage from the judgment of the Privy Council in Thakur Prasad v. Fakirullah I L R (1894) All. 106 (P C), the learned Judge remarked:

...The expression ''so forth'' must, in my opinion, be read as meaning proceedings ejusdem generis with the instances that precede it, and include such proceedings as in divorce, in insolvency, for succession certificate and the like and the expression

''original matters'' in my opinion confirms that view as meaning matters which originate in themselves and not those which spring up from a suit or from some other proceedings or arise in connection therewith.

The Calcutta High Court itself had taken a contrary view in Bipin Behari Shaha v. Abdul Barik I L R (1916) Gal. 950 and the Division Bench in Sarat Krishna Bose Vs. Bisweswar Mitra and Others, , dissented from it as follows (p. 411):

...The criterion of originality as indicated in Bipin Behari Shaha v. Abdul Barik I L R (1916) Gal. 950 in the passage quoted above is not what is meant. This passage has been construed by the learned Judges of the Allahabad High Court as meaning that the second application might be treated as an original application for restoration of the suit itself Pandit Pitambar Lal Vs. Dodee Singh, but with all respect I am unable to agree that that is what the passage means. I think the true meaning of the passage is that, in the opinion of the learned Judges, a proceeding which originates in a new application which has to be numbered as a separate miscellaneous case and decided upon evidence satisfies the requirements laid down in the decision of the Judicial Committee. In this view I am unable to concur.

Several other Courts have followed this view. See Nathuni Singh and Others Vs. Naipal Singh and Another, , Kunj Behari v. Chanchala Das A I R 1966 Ori 24. and Pooranchand Mulchand Jain Vs. Komalchand Beniprasad Jain, . We are unable to accept the view of the Patna High Court in Doma Choudhary v. Ram Naresh Lal A I R 1969 Pat. 121 (F B) and of the Andhra Pradesh High Court in Raj Appa Row v. Veera Raghava A I R 1966 A P 263.

13. We may make it clear at this stage that we are strictly confining ourselves to a case where an application to restore a suit to file is dismissed for default and not a case where an ex parte order is passed, for as pointed out in Ramkarandas Radhavallabh Vs. Bhagwandas Dwarkadas, ., different considerations would prevail in such a case. In such a case it may be urged that a remedy under Order IX, rule 13 exists and therefore the inherent power u/s 151 could not be invoked. In the Supreme Court case to which we have just referred the Supreme Court was concerned with an ex parte decree passed in a summary suit under Order XXX VII of the CPC and the question was whether such a decree could be set aside under the inherent power u/s 151. The Supreme Court pointed out that rule 4 of Order XXXVII expressly gives power to the Court to set aside the decree passed under the provisions of that Order and therefore there was no scope for resort to section 151 for setting aside the decree. Similarly, in another case referred in the arguments before us, namely Arjun Singh Vs. Mohindra Kumar and Others, ., the Supreme Court was considering a case where an ex parte decree had been passed and the Supreme Court held that the inherent power of the Court could not override the express provisions of the law.

...If there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code.

For this reason we would make it clear here that we confine ourselves to the facts and circumstances of the present case where the suit was dismissed for default, an application to set aside that dismissal for default was made and it was also dismissed for default. We are also not concerned with a case where an ex parte decree happens to be passed and proceedings are taken to set it aside.

14. In our opinion, therefore, the application filed by the Liquidator on June 19, 1962, and supported by an affidavit of June 22, 1962, can be considered under the inherent powers of the Court u/s 151 of the Code of Civil Procedure. Since this was the question upon which the learned single Judge entertained doubt, and in view of what we have said in this judgment the case must now go back to the learned single Judge for disposal according to law. Costs shall be costs in the application.