

**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

BEFORE

HON'BLE SHRI JUSTICE SATYENDRA KUMAR SINGH

ON THE 24th OF JANUARY, 2023

MISCELLANEOUS PETITION NO.3518 OF 2019

BETWEEN:-

**SHYAM SINGH TOMAR, S/O LATE SHRI
SWAROOP SINGH TOMAR, AGED ABOUT 62
YEARS, OCCUPATION – PRIVATE SERVICE, R/O
RADHA KRISHNA LODGE, M.G. ROAD, TEHSIL
MARWAHI, BILASPUR (CHHATTISGARH).**

.....PETITIONER

(BY SHRI D.K. AGRAWAL – ADVOCATE)

AND

**STATE BANK OF INDIA, THROUGH : BRANCH
MANAGER, COMMERCIAL BRANCH, CITY
CENTRE, GWALIOR (MADHYA PRADESH).**

.....RESPONDENT

(BY SHRI RAJU SHARMA - ADVOCATE)

*This petition coming on for admission this day, the Court passed
the following:*

ORDER

This petition under Article 227 of the Constitution of India has been preferred against the order dated 4/4/2019, passed by the Court of 3rd Additional District Judge, Gwalior in MJC No.46-A/2015, whereby the application filed by the respondent/State Bank of India under

Section 151 of Civil Procedure Code (for brevity “CPC”) was allowed and his application filed under Order IX Rule 13 of CPC bearing MJC No.26-A/2014 was restored.

2. Brief facts giving rise to this petition are that the petitioner/plaintiff has filed a civil suit bearing No.16-A/2007 before the Court of 14th Additional District Judge, Gwalior, wherein the respondent/State Bank of India was one of the party as defendant no.5. The aforesaid civil suit was transferred to the Court of 3rd Additional District Judge, Gwalior and registered as Civil Suit No.56-A/2009. During the trial of above civil suit, at the stage of defence evidence, respondent did not produce his witness for cross-examination and remained absent, therefore, *ex parte* judgment dated 15/9/2010 was passed against him. The respondent filed First Appeal before this Court as well as an application under Order IX Rule 13 of CPC before the Court of 3rd Additional District Judge, Gwalior for setting aside the alleged *ex parte* judgment and decree passed against him. His application filed under Order IX Rule 13 of CPC was registered as MJC bearing No.26-A/2014, which was dismissed on 29/7/2015 for want of prosecution as well as for non-compliance of the orders of the learned Trial Court. The respondent/State Bank of India filed an application under Section 151 of CPC bearing MJC No.46-A/2015 for setting aside the aforesaid order dated 29/7/2015 and restoration of MJC No.26-A/2014. By the impugned order, learned Trial Court allowed respondent's application and restored the application filed under Order IX Rule 13 of CPC bearing MJC No.26-A/2014, which is pending before the Court of 3rd Additional District Judge, Gwalior.

3. Learned counsel for the petitioner submits that in view of the

specific provisions of appeal available under Order XLIII Rule 1 (c) of CPC, the order of dismissal of the application filed under Order IX Rule 13 of CPC cannot be assailed under Section 151 of CPC before the same Court, as held by Hon'ble the Full Bench of this Court in the case of **Nathu Prasad Vs. Singhai Kapurchand, 1976 AIR (MP) 136**, hence, the application filed by the respondent under Section 151 of CPC was not maintainable. Learned Trial Court has committed error of jurisdiction in entertaining and allowing the respondent's application filed under Section 151 of CPC. He has also relied upon the judgment passed by Hon'ble the Apex Court in the case of **Neerja Realtors Private Limited Vs. Janglu (Dead) Through Legal Representative, (2018) 2 SCC 649**. He further submits that the application filed by the respondent under Section 151 of CPC was without sign and seal of the authorised person of the respondent/State Bank of India. The counsel for the respondent himself filed the said application without any authority. Learned Trial Court illegally held that the Vakalatnama filed in MJC No.26-A/2014 will be treated as a valid Vakalatnama in the aforesaid case bearing MJC No.46-A/2015. Thus, the impugned order dated 4/4/2019 is liable to be set aside, hence, be set aside.

4. Learned counsel for the respondent/State Bank of India by referring to the same judgment passed by the Full Bench of this Court in the case of **Nathu Prasad (supra)** submits that an application assailing the order of dismissal of the application filed under Order IX Rule 13 of CPC, cannot be said to be an application for restoration suit, therefore, the same is not appealable under Order XLIII Rule 1 (c) of CPC, and hence, respondent's application filed under Section 151 of CPC for setting aside the order dated 29/7/2015 was very well maintainable.

Learned Trial Court has not committed any error in allowing his aforesaid application. The petition is devoid of merits and may be rejected.

5. Heard learned counsel for both the parties and perused the record.

6. Admittedly, respondent's application filed u/S 151 of CPC bearing MJC No.46-A/2015 was filed for restoration of his application filed under Order IX Rule 13 of CPC bearing MJC No.26-A/2014 and not for restoration of his civil suit. And, as per the amended provisions of section 141 of CPC, whereby vide Amendment Act 104 of 1976 an explanation was added to the aforesaid Section, it is very much clear that against an order of dismissal of an application filed under Order 9 Rule 9 or Rule 13 of CPC, an application lies under Order 9 Rule 9, r/w section 141 of CPC. Amended section 141 of C.P.C. is as follows:-

“141. Miscellaneous proceedings. - The procedure provided in this Code in regard to suit shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

[Explanation.- In this section, the expression “proceedings” includes proceedings under Order IX, but does not include any proceeding under article 226 of the Constitution.]

7. The aforesaid fact also finds support from the judgement passed (*Although passed before coming into effect the Amendment Act 104 of 1976*) by Hon'ble the Full Bench of this Court in the case of **Nathu Prasad (supra)**, cited by learned counsel for both the parties, as well as in the judgment passed by Hon'ble the Apex Court in the case of **Neerja Realtors Private Limited Vs. Janglu (Dead) Through Legal Representative, (2018) 2 SCC 649**, cited by learned counsel for the petitioner, wherein although it is held that the order of dismissal of suit,

either on merits or in default, is an appealable order under Order XLIII Rule 1 of CPC, but when an application under Order IX Rule 9 of CPC is itself dismissed for default, an application lies under Order IX Rule 9 read with Section 141 of CPC for restoration of the application filed under Order IX Rule 9 of CPC. It has specifically been mentioned that no appeal lies from an order rejecting an application for restoration of application filed under Order IX Rule 9 of CPC. Relevant paras of the judgement passed by Hon'ble the Full Bench of this Court in the case of **Nathu Prasad (supra)** are as follows:-

We may now sum up the conclusions we have reached on the above discussion:—

- (i) When application ('A') under Order 9, Rule 9, C.P.C. is itself dismissed for default of the plaintiff/petiitioner's appearance, an application ('B') lies under Order 9, Rule 9, read with section 141 of the same Code, for restoration of the application ('A'). In order to succeed in this proceeding ('B'), the petitioner has to satisfy the Court that he was prevented by sufficient cause from appearing on the date when the application ('A') was called on for hearing.
- (ii) The order of dismissal for default of the application ('A') is appealable under clause (c) of Rule I, Order 43, C.P.C.
- (iii) Both the above remedies, i.e., application under Order 9, Rule 9, and appeal under Order 43 Rule 1(c) are concurrent. They can be resorted to simultaneously. Neither excludes the other. The scope of each of the above proceedings is, however different.
- (iv) When an appeal (second remedy) is decided one way or the other, the order of dismissal for default appealed from gets merged in the order of the appellate Court, so that thereafter the application ('B') under Order 9, Rule 9, becomes infructuous. When it comes to the

notice of the appellate Court that an application has also been made under Order 9, Rule 9, for restoration, the appellate Court may do well to postpone the hearing of the appeal until the decision of the application under Order 9, Rule 9, C.P.C.

(v) No appeal lies from an order rejecting an application ('B') for restoration of application ('A') which latter application was for restoration of the suit.

(vi) As observed by their Lordships' of the Supreme Court in *Mahadeolal Kanodia v. The Administrator General of West Bengal* [AIR 1960 SC 936] and *Jaisri v. Rajdewan* [AIR 1962 SC 83.] , if a Division Bench does not agree with another Division Bench in a decision rendered earlier, the Second Division Bench must either follow the earlier decision or place the matter before the Chief Justice for being referred to a larger Bench. But the second Division Bench cannot take upon itself the task of holding that the decision of the first Division Bench was wrong. We answer this reference accordingly. The matter shall now be placed before the single Bench.

8. In the instant case, respondent filed an application under Section 151 of CPC for restoration of his application filed under Order IX Rule 13 of CPC, instead of filing an application under Order IX Rule 9 read with Section 141 of C.P.C. It is a well settled principle of law that mentioning of a wrong provision or non-mentioning of a provision does not invalidate an order if the court and/or statutory authority had the requisite jurisdiction therefor. Hence, learned Trial Court has not committed any jurisdictional error in entertaining respondent's aforesaid application.

9. Admittedly, respondent's application filed under Order IX Rule 13

of CPC was filed by Lokendra Sharma (PW-1), the then Branch Manager and he in his statement, so recorded, specifically deposed that Shri Ashok Khedkar, Advocate was appointed by the respondent/State Bank of India, therefore, considering the affidavit filed by Shri Ashok Khedkar, Advocate and reasoning mentioned therein learned Trial Court has not committed any illegality or irregularity in allowing respondent's application for restoration filed under Section 151 of CPC. Hence, the petition appears to be devoid of merits.

10. Accordingly, the petition is **dismissed**.

(SATYENDRA KUMAR SINGH)
JUDGE

Arun*