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LACHMESHWAR PRASAD SHUKUL v. GIRDHARI LAL CHAUDHURI.

AGARWALA, J.

Baijnath Ram Marwari(1)—a Division Bench held that where the Court is not sitting but the office is open, the time for a deposit of the printing costs of a Privy Council appeal cannot be deemed to expire on the next day when the Court actually sits. The learned Judges refer neither to the decision in *Anand Ram Pramhans* v. *Ramghulam Sahu*(2) nor to section 10 of the General Clauses Act. Their decision is apparently based on a distinction between the Court and the office of the Court, a distinction which I have already indicated above, should, in my view, be held not to exist.

In this view of the matter I would hold that in Appeal no. 14 the deposit was tendered in time and was wrongly refused by the office; and that in Appeal no. 17 the deposit was made in time. In each of these appeals the deposit should be accepted. With regard to Appeal no. 10 I would hold that as no deposit was made within the prescribed period it cannot be accepted as the Court has no power to extend the time beyond the 60 days which have elapsed.

S. A. K.

Order accordingly.

FULL BENCH.

Before Harries, C.J., Fazl Ali and Agarwala, JJ.

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September, 11, 12, 26.

RAMKHELAWAN SINGH

v.

MONILAL SAHU.*

Code of Civil Procedure, 1908 (Act V of 1908), section 151, Order XLI, rule 19, and Order XLVII, rule 1—appeal dismissed for not filing appellant's list in time—application for restoration, whether is to be treated as one for review—Order XLI, rule 19, whether applicable—dismissal under rule

*Civil Review no. 426 of 1938.

(1) (1927) 8 Pat. L. T. 779.

(2) (1922) I. L. R. 2 Pat. 264.

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23, *Chapter IX, Part II, of the Patna High Court Rules—Court, whether has inherent power to set aside order of dismissal—section* 151*—inherent power, when should be exercised.*

An application to set aside an order of dismissal of an appeal for failure to file the appellant's list within the time allowed cannot be treated as an application for review under Order XLVII, rule 1, Code of Civil Procedure, 1908.

Anant Potdar v. *Mangal Potdar*(1), overruled.

Ramhari Sahu v. *Madan Mohan Mitter*(2), *Haridasi Debi* v. *Sajanimohan Batabyal*(3), *Sonubai* v. *Sivajirao Krishnarao*(4) and *Mt. Dhayani* v. *Ishak*(5), followed.

Fatimunnissa v. *Deoki Pershad*(6), not followed.

Chhajju Ram v. *Neki*(7) and *Bisheshwar Pratap Sahi* v. *Parath Nath*(8), referred to.

Likewise Order XLI, rule 19, of the Code does not apply to such a case.

When the High Court has power to dismiss an appeal, under rule 23, Chapter IX, Part II, of the Patna High Court Rules, it has also power to restore the appeal in a proper case although there is no specific provision in the Rules in this behalf.

Section 151 of the Code expressly saves the inherent power of the Court and every Court must be deemed to possess as inherent in its very constitution all such powers as are necessary to do right and undo a wrong in the course of the administration of justice.

Therefore, an application (bearing a court-fee stamp of Rs. 3) to set aside an order dismissing an appeal for not filing the appellant's list within the time allowed may be entertained under section 151 of the Code.

(1) (1925) I. L. R. 4 Pat. 704.
(2) (1895) I. L. R. 23 Cal. 339.
(3) (1932) I. L. R. 59 Cal. 1334.
(4) (1920) I. L. R. 45 Bom. 648.
(5) (1931) A. I. R. (Sind) 153.
(6) (1896) I. L. R. 24 Cal. 350, F. B.
(7) (1922) L. R. 49 Ind. App. 144.
(8) (1934) 15 Pat. L. T. 763, P. C.

Section 151 should, however, be applied with great caution and only when the ends of justice require its application. In order to decide whether the ends of justice require the application of this section to a particular case, the Court has to keep in view not only the interest of the applicant but also that of the other party who may be affected by the order sought to be made under this section.

Application on behalf of the appellant.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

The case was in the first instance heard by Fazl Ali and Agarwala, JJ. who referred it to a Full Bench by the following judgment:

"This appeal was dismissed as the appellant failed to file his list within the time allowed to him to do so. The application is to set aside the order dismissing the appeal and the question that has arisen is as to the amount of court-fee payable on the application. The Stamp Reporter suggests that the application is in fact one for review of the order dismissing the appeal and that a court-fee of about Rs. 405 is leviable. On behalf of the petitioner, on the other hand, it is contended that this is an application for restoration of the appeal on which Rs. 3 stamp is leviable. In *Anant Potdar* v. *Mangal Potdar*(1) the cases in this Court for and against the view of the Stamp Reporter are enumerated. It will appear that from the institution of the Court up to 1923 applications such as the present were always treated as applications for review. In 1924 a Bench of which Sir Jwala Prasad was a member took another view although Sir Jwala Prasad had been a member of at least one of the Benches which had decided the other way in earlier cases. The earlier cases of this Court applied the Full Bench decision in *Fatimunnissa* v. *Deoki Pershad*(2). In *Haridasi Debi* v. *Sajani Mohan Batabyal*(3) it was pointed out that the decision in *Fatimunnissa* v. *Deoki Pershad*(2) was based on the language of an earlier Code of Civil Procedure and held that the application was not an application in review. The question is continually arising in this Court and it is desirable that the matter should be settled one way or the other.

The question which requires consideration is whether an application to set aside an order dismissing an appeal for non-filing of the appellant's list within the time allowed can be entertained, unless it be treated as an application for review under Order XLVII, rule 1, of the Code of Civil Procedure. We refer the matter to a Full Bench under Chapter V, rule 4, of the Rules of this Court.

(1) (1925) I. L. R. 4 Pat. 704.
(2) (1896) I. L. R. 24 Cal. 350, F. B.
(3) (1932) I. L. R. 59 Cal. 1334.

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On this reference.

Jafar Imam (with him *Mehdi Imam*, *Harinandan Singh* and *A. Badri Nath Sinha*), for the applicant: This is an application under section 151 and Order XLI, rule 19, of the Code of Civil Procedure, bearing a court-fee of three rupees, for restoration of an appeal dismissed for non-filing of the appellant's list in time. The Appeal was valued at Rs. 12,500 on which court-fee stamps of Rs. 810 had been paid.

The question that arises in this case is whether the application should be under Order XLVII, rule 1, of the Code of Civil Procedure and half of the court-fee paid on the appeal should be given as was decided in *Anant Potdar* v. *Mangal Potdar*(1) and in the other unreported cases noticed in that case, as also in *Mowar Ran Bahadur Singh* v. *Kamkhaya Narain Singh*(2) which has followed *Anant Potdar* v. *Mangal Potdar*(1).

Order XLVII, rule 1, does not apply. The words " any other sufficient reason " in the rule mean a reason sufficient on grounds analogous to those specified in rule 1; that is to say, they must be read *ejusdem generis*—*Chhajju Ram* v. *Neki*(3); *Bisheshwar Pratap Sahi* v. *Parath Nath*(4). The case of *Anant Potdar* v. *Mangal Potdar*(1) is based on the Full Bench case of *Fatimunnissa* v. *Deoki Pershad*(5) which has since not been followed in *Nalini Sundari Debya* v. *Narendra Chandra Lahiri*(6) and *Haridasi Debi* v. *Sajanimohan Batabyal*(7). These two later Calcutta cases take the view that because of the pronouncement of their Lordships of the Judicial Committee in *Chhajju Ram* v. *Neki*(3) in 1922, the words " for any other sufficient cause " must be read *ejusdem*

(1) (1925) I. L. R. 4 Pat. 704.
(2) (1937) 19 Pat. L. T. 17.
(3) (1922) L. R. 49 Ind. App. 144.
(4) (1934) 15 Pat. L. T. 763, P. C.
(5) (1896) I. L. R. 24 Cal. 350, F. B.
(6) (1931) 36 Cal. W. N. 246.
(7) (1932) I. L. R. 59 Cal. 1384.

generis and, therefore, *Fatimunnissa* v. *Deoki Pershad*(1) is no longer good law.

Order XLI, rule 19, and section 151 of the Code of Civil Procedure would, therefore, be the proper remedy as was indicated in Civil Review no. 35 of 1923, decided on the 19th April, 1924, by Jwala Prasad and Foster, JJ. and M. J. C. no. 24 of 1923 and Civil Review no. 38 of 1923, decided on the 15th April, 1924, by Jwala Prasad and Adami, JJ. [Reference was made to *Sonubai* v. *Sivajirao*(2), *Ramhari Sahu* v. *Madan Mohan Mitter*(3) and *Musammat Dhyani* v. *Ishak*(4).]

[AGARWALA, J.—Order XLVII, rule 1, is the only remedy. Order XLI, rule 19, applies only under the three circumstances mentioned therein. The exercise of inherent powers under section 151 of the Code cannot be invoked when there is a special provision under Order XLVII, rule 1, of the Code.]

So, if Order XLVII does not apply and if Order XLI, rule 19, is also held to be not applicable and if the inherent powers under section 151 cannot be invoked, then it comes to this that the High Court has power to dismiss an appeal for default but it has no power to restore it.

[Clause 29 of the Letters Patent and section 122, Code of Civil Procedure, referred to.]

[FAZL ALI, J.—When we have power to dismiss an appeal, we must have powers to restore. But Order XLI, rule 19, does not apply.]

D. N. Varma, for the opposite party: Order XLI, rule 19, can never apply, but Order XLVII, rule 1, does apply. *Anant Potdar* v. *Mangal Potdar*(5) is clear on the point. There is no conflicting decision. Section 151 applies to cases which do not come within the provisions of the Code.

(1) (1896) I. L. R. 24 Cal. 350, F. B.
(2) (1920) I. L. R. 45 Bom. 648.
(3) (1895) I. L. R. 23 Cal. 339.
(4) (1931) A. I. R. (Sind) 158.
(5) (1925) I. L. R. 4 Pat. 704.

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[CHIEF JUSTICE—To what sort of cases does section 151 apply?]

Section 151 gives relief only in cases of mistake, fraud, abuse of the process of the Court, etc.

[CHIEF JUSTICE—Dimissal under Order IX, rule 8, has been set aside under section 151.]

This was perhaps on the hypothesis that where there is no remedy the inherent powers of the Court can be invoked.

[FAZL ALI, J.—In *Vilakathala Raman* v. *Vayalil Pachu*(1) a suit dismissed on the ground of fraud was restored under section 151.]

This was so because fraud vitiates every proceeding of the Court. Under section 151 a decree or judgment cannot be set aside.

[Reference was made to *Bhagwan Savalaram Sonar* v. *Dattatraya Jayant Purandhare*(2) and *Atma Ram* v. *Beni Prasad*(3).]

[CHIEF JUSTICE—*Bhagwan's* case(2) was under Order IX, rule 9, therefore, section 151 was not applied. *Atma Ram* v. *Beni Prasad*(3) does not apply.]

Jafar Imam, in reply.

K. D.

Cur. adv. vult.

FAZL ALI, J.—This case has been referred to a Full Bench in the following circumstances.

The petitioner had filed an appeal to this Court against a decree passed by the Subordinate Judge of Arrah and this appeal was numbered as First Appeal no. 3 of 1938. On the 5th May, 1938, the appeal was

(1) (1914) 25 Ind. Cas. 213.
(2) (1926) I. L. R. 50 Bom. 457.
(3) (1934) I. L. R. 56 All. 907.

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laid by the Registrar before a Bench of this Court for final order with a note pointing out that the petitioner had failed to comply with several orders calling upon him to supply the appellant's list. On that date no one appeared for the petitioner and the appeal was dismissed. On the 11th June, 1938, the petitioner made an application for the restoration of the appeal. This application bore a stamp of Rs. 3 and purported to have been made under Order XLI, rules 17 and 19, and section 151 of the Code of Civil Procedure. The Stamp Reporter noted on the application that the court-fee was insufficient, his view being that such an application could have been made only under Order XLVII, rule 1, of the Code. The matter was then placed before my brother Agarwala and myself and we decided to refer it to a Full Bench. The reasons which led us to make the reference as well as the point of law which we decided to refer are set out in the following extract from our order:

"The Stamp Reporter suggests that the application is in fact one for a review of the order dismissing the appeal and that a court-fee of about Rs. 405 is leviable. On behalf of the petitioner, on the other hand, it is contended that this is an application for restoration of the appeal on which Rs. 3 stamp is leviable. In *Anant Potdar* v. *Mangal Potdar*(1) the cases in this Court for and against the view of the Stamp Reporter are enumerated. It will appear that from the institution of the Court up to 1923 applications such as the present were always treated as applications for review. In 1924 a Bench of which Sir Jwala Prasad was a member took another view although Sir Jwala Prasad had been a member of at least one of the Benches which had decided the other way in earlier cases. The earlier cases of this Court applied the Full Bench decision in *Fatimunnissa* v. *Deoki Pershad*(2). In *Haridasi Debi* v. *Sajanimohan Batabyal*(3) it was pointed out that the decision in *Fatimunnissa's* case(2) was based on the language of an earlier Code of Civil Procedure and held that the application was not an application in review. The question is continually arising in this Court and it is desirable that the matter should be settled one way or the other.

The question which requires consideration is whether an application to set aside an order dismissing an appeal for non-filing of the appellant's list within the time allowed can be entertained, unless it be treated as an application for review under Order XLVII, rule 1,

(1) (1925) I. L. R. 4 Pat. 704.
(2) (1896) I. L. R. 24 Cal. 350, F. B.
(3) (1932) I. L. R. 59 Cal. 1334.

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of the Code of Civil Procedure. We refer the matter to a Full Bench under Chapter V, rule 4, of the Rules of this Court."

In *Ramhari Sahu* v. *Madan Mohan Mitter*(1) a Bench of the Calcutta High Court had held that an application for re-admission of an appeal dismissed for the appellant's failure to deposit the cost for the preparation of the paper-book was not an application for review, but an application under the rules of the High Court. This decision was overruled in *Fatimunnissa* v. *Deoki Pershad*(2) by a Full Bench of five Judges who held that the remedy of the appellant in such a case was to apply for a review and the reasons they gave in support of this view were as follows:—

"Under the Code there are only two ways known to the law by which a judgment and decree of a Divisional Bench of this Court can be set aside in India. These two methods are described in sections 558 and 623 of the Code. The present case is clearly not one in which default was made in appearing at the hearing of the case, for the record shows that the pleaders on both sides were in attendance and heard. It seems to us, therefore, that the view expressed in the reference is correct, and that the case of *Ramhari Sahu* v. *Madan Mohan Mitter*(1) so far as it decides the contrary is wrongly decided."

In this Court before 1924 there was on the whole a tendency to follow the practice which had prevailed in the Calcutta High Court since the decision of the Full Bench; but in some cases it was observed that the dismissal of an appeal for failure to file the appellant's list or deposit the printing cost within the time allowed by the Court could be set aside under Order XLI, rule 19, read with section 151 of the Code of Civil Procedure. In 1924 the question as to what was the proper procedure for setting aside such a dismissal was directly raised before a Division Bench of this Court in *Anant Potdar* v. *Mangal Potdar*(3) and the learned Judges who sat on the Bench held, following the decision in *Fatimunnissa's* case(2), that an application to set aside the dismissal

(1) (1895) I. L. R. 23 Cal. 339.
(2) (1896) I. L. R. 24 Cal. 350, F. B.
(3) (1925) I. L. R. 4 Pat. 704.

must be regarded as one for review under Order XLVII, rule 1. The learned Judges recognised that the order dismissing the appeal was no longer a decree under the amended Code, but they pointed out that it was still a judgment. The correctness of this decision has been recently doubted in *Haridasi Debi* v. *Sajani Mohan Batabyal*(1) in which it has been held that an application for restoring an appeal dismissed for default in the payment of initial deposit is not an application for review but an application under Order XLI, rule 19, read with section 151 of the Code. The same view seems to have been taken by the Bombay High Court in *Sonubai* v. *Sivajirao Krishnarao*(2) and by the Judicial Commissioners of Sind in *Mt. Dhayani v. Ishak*(3). The question which has now to be decided by this Bench is which of the two conflicting views is correct.

Order XLVII, rule 1, provides that a party aggrieved by a decree or an order specified in clauses (*a*), (*b*) and (*c*) of rule 1 may apply for review on any of the following grounds:—

(*1*) On the ground of the discovery of new or important matter or evidence which after the exercise of due diligence was not within the knowledge of the party or could not be produced by him at the time when the decree was passed or order made;

(*2*) on account of mistake or error apparent on the face of the record; and

(*3*) for any other sufficient reason.

It seems to me that grounds nos. 1 and 2 would not be ordinarily applicable to cases where an appeal is dismissed for the appellant's failure to file the list or to deposit the printing cost. In such cases the appellant usually applies for the restoration of the appeal on the ground that there was sufficient cause for his not depositing the printing cost or filing the list, as the case may be, within the time prescribed

(1) (1932) I. L. R. 59 Cal. 1354.
(2) (1920) I. L. R. 45 Bom. 648.
(3) (1931) A. I. R. (Sind) 158.

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by the Court; and, therefore, if the application can be treated as an application for review it can be treated as such only on ground no. 3. It has, however, been clearly pointed out by the Judicial Committee in *Chhajju Ram* v. *Neki*(1) and *Bisheshwar Pratap Sahi* v. *Parath Nath*(2) that rule 1 of Order XLVII must be read as in itself definitive of the limits within which review of decree or order is now permitted and the words "any other sufficient reason" mean a reason sufficient on grounds analogous to those specified in rule 1. In view of these decisions it is no longer possible to hold that an application like the present can be treated as an application for review. As was remarked by the learned Judges of the Calcutta High Court in *Haridasi Debi's* case(3) "it would require no ordinary flight of imagination to treat a failure to deposit initial cost as being an omission of the same kind or description as an omission to produce a matter or evidence subsequently discovered or a mistake or error apparent on the face of the record." The points which we must bear in mind are, first, that under Order XLVII, rule 1, the new matter or evidence should have been discovered by the party applying for review and not by the Court whose order is to be reviewed; and, secondly, that the error referred to in this provision should be one apparent on the face of the record and not one caused by the Court not being apprised at the time of the dismissal of the appeal of the circumstances which prevented the appellant from taking the necessary steps. That being so, in my judgment the decisions in *Fatimunnissa* v. *Deoki Pershad*(4) and *Anant Potdar* v. *Mangal Potdar*(5) can no longer be relied on as good authorities on the subject.

The next question to be considered is whether in a case like the present the applicant has any remedy

(1) (1922) L. R. 49 I. A. 144.
(2) (1934) 15 Pat. L. T. 763.
(3) (1932) I. L. R. 59 Cal. 1334.
(4) (1896) I. L. R. 24 Cal. 350, F. B.
(5) (1925) I. L. R. 4 Pat. 704.

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at all. It is plain that Order XLI, rule 19, which is the only provision in the Code of Civil Procedure for the restoration of the appeal does not apply to such a case. Rule 19 enables the Court of appeal to re-admit an appeal which is dismissed under rule 11, sub-rule (2), or rule 17 or rule 18. Rule 11 and rule 17 provide for cases where on the date fixed, or another date to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing. Rule 18 provides for cases where it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit within the period fixed the sum required to defray the cost of serving the notice. In the present case the appeal was dismissed not under any specific provision of the Code but under one of the rules framed by the High Court (Part II, Chapter IX, rule 23). Are we then to hold that the petitioner is without any remedy, even if he is able to convince the Court that he was prevented by sufficient cause from filing the appellant's list or depositing printing cost within the time fixed by the Court? Unfortunately in our rules there is no rule corresponding to Order XLI, rule 19, but I am unable to hold that merely because there is no rule on the subject, this Court is powerless to grant any relief in such cases. In my opinion, the failure to file a list or deposit the printing costs stands on no worse footing than the default referred to in rules 11, 17 and 18 of Order XLI and I find it difficult to hold that if there had been any rule in the Code corresponding to rule 23 (Chapter IX) of this Court, there would not have been any corresponding provision for restoring the appeal for sufficient cause. In my view if we have power to dismiss an appeal for the appellant's failure to file the appellant's list or deposit the printing cost, we have also power to restore the appeal in a proper case. Section 151 expressly saves the inherent power of the court and every court must be deemed to possess as inherent in

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its very constitution all such powers as are necessary to do right and undo a wrong in the course of the administration of justice. Thus in my judgment the answer to the question referred to this Bench is that an application to set aside an order dismissing an appeal for not filing the appellant's list within the time allowed may be entertained under section 151 of the Code and generally speaking such an application cannot be made under Order XLVII, rule 1, of the Code.

I shall now proceed to deal with the facts of the present case in order to decide whether this particular appeal should be restored. It appears that on the 3rd March, 1938, an Advocate, Mr. N. C. Roy, who appeared for the petitioner applied for the inspection of documents and on the 4th March the documents were actually inspected. Notwithstanding this fact the appellant's list was not filed in time and on the 4th April, 1938, the Registrar directed the appellant to file it within 14 days of that date. On the 25th April the list still not being filed the Registrar recorded the following order in the order-sheet :—

"Time has been twice allowed for the purpose of filing the appellant's list. The last order, though peremptory, has not been carried out. Final adjournment for seven days is given for compliance, failing which the appeal will be laid before the Bench with a recommendation for dismissal."

On the 3rd of May the Registrar directed the appeal to be laid before the Bench as the final order for filing the list had been disregarded and the appeal was dismissed by the Bench on the 5th of May. It is stated by the petitioner in his affidavit that his Advocate was fully instructed to file a list and he was in no way responsible for his appeal not being prosecuted properly but this is not borne out by the contents of a letter which was written to him by Mr. Roy on the 8th May, 1938. This letter which has been quoted in the petitioner's affidavit runs as follows :—

"Dear Ramkhelawan Babu,

I wrote to you a few days ago that unless list in your F. A. 8/38 was filed immediately, your appeal would be dismissed on the 5th

May, but when the High Court closed the appeal (F. A. 3/38) came up before the Bench. I was, as you know, unwell and so did not go to Court, but I instructed somebody to apply for time. The Judges, however, have dismissed the appeal as the list has not been filed. An application for restoration should be filed soon. The petition should be drafted and kept ready at once. The High Court is closed and I shall leave Patna within 5 or 6 days. My fees (Rs. 48 as I wrote to you before) together with the fees for preparing the list should be paid now. The list should be kept ready and this may be prepared by us during this vacation. Please therefore come with sufficient money and do not spoil the case. Unless money is paid nothing will be done.

One of your men saw me on 3rd May, but he told me he was going to Muzaffarpur."

This letter shows that the Advocate had given warning to the petitioner in a previous letter and that his fees as well as the fees for preparing the list had not been paid. The petitioner filed a fresh affidavit on the date on which this application was heard to the effect that he had paid a sum of Rs. 36-1-0 to his Advocate, but the Advocate is now dead; and, in view of the fact that the statement in question was not made in the petition itself which was filed during his life-time, I am not prepared to act upon it or hold that the Advocate did not act honestly and that he was negligent in the discharge of his duty towards his client. It is to be borne in mind that section 151 should be applied with great caution and only when the ends of justice require its application. In order to decide whether the ends of justice require the application of this section to a particular case, we have to keep in view not only the interest of the applicant but also that of the other party who may be affected by the order sought to be made under this section. In my opinion upon the materials on the record it is difficult to hold that the petitioner has made out a sufficient cause for restoring the appeal and I would, therefore, dismiss this application with costs.

HARRIES, C.J.—I agree.

AGARWALA, J.—I agree.

S. A. K.

Application dismissed.