

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVISION No.100 of 2016

=====

Dinesh Thakur Alias Dineshwar Thakur son of Late Ramautar Thakur, R/O Village-Koari, PS-Sursand, Distt-Sitamarhi, presently residing at Muhalla-Sikandarpur, near Radha Devi School in the town of Muzaffarpur, PS and Distt-Muzaffarpur. Petitioner/s

Versus

1. Amitabh Thakur son of Dinesh Thakur alias Dineshwar Thakur,
2. Smt. Mithilesh Devi wife of Dinesh Thakur Alias Dineshwar Thakur, both R/O Village-Koari, PS-Sursand, Distt-Sitamarhi.
3. Namrata Thakur wife of late Akhileshwar Thakur,
4. Pallavi Kumari, daughter of late Akhileshwar Thakur,
5. Gaurav Kumar son of late Akhileshwar Thakur,
6. Saurav Kumar son of late Akhileshwar Thakur, Respondents No. 3 to 6 are R/O Village-Koari, PS-Sursand, Distt-Sitamarhi, presently residing at Parao Pokhar, Lane No. 2, Muhalla-Aamgola in the town of Muzaffarpur PS Kazi Muhammadpur, Distt- Muzaffarpur. Respondent/s

=====

Appearance :

For the Petitioner/s	:	Mr. Vaidehi Raman Prasad Singh, Adv.
For the Respondent No. 1 & 2:		Mr. Dharmesh Kumar Srivastava, Mr. Ritesh Kumar Narain, Advocates.
For rest Respondents	:	None

=====

CORAM: HONOURABLE MR. JUSTICE JITENDRA KUMAR
ORAL ORDER

17 27-09-2023 Mr. Vaidehi Raman Prasad Singh, Ld. Advocate is present on behalf of the petitioner and Mr. Dharmesh Kumar Srivastava, Ld. Advocate is present on behalf of Respondents No. 1 and 2. No body appears on behalf of other Respondents despite valid service of notice upon them.

Interlocutory Application No. 6097/2016

2. This I.A. has been filed for condonation of delay in filing the present revision petition. In view of the averment made in the Interlocutory Application, the delay is condoned. Accordingly, the I.A. 6097/2016 stands allowed.

Civil Revision No. 100 of 2016

3. The present Civil Revision has been preferred impugning the order dated 07.11.2015 passed by Ld. District



Judge, Sitamarhi in Miscellaneous Case No. 1/2015 (Dinesh Thakur v. Amitabh Thakur & Ors) whereby the Ld. District Judge has dismissed the Misc. Case No.1/2015 filed by the petitioner herein for restoration of Misc. Case No. 15/2011 on the ground that the Misc. Case was not filed within one month from the date of dismissal and, in fact, it was filed after delay of 70 days which is not properly explained by the petitioner.

4. Ld. counsel for the petitioner submits that Ld. court below was erroneously under impression that limitation to file restoration application of previous restoration application being dismissed in default is 30 days as per Article 122 of the schedule to the Limitation Act, 1963 and hence the Ld. court below has committed error of law in holding that Misc. Case No. 1/2015 has been filed beyond the limitation period. In fact, in the given facts and circumstances, it is Article 137 which would be applicable as per which limitation period is three years, because the Misc. Case No. 1/2015 was not filed for restoration of any suit/appeal dismissed for default, but for restoration of Misc. Case filed for restoration of previous restoration application and which was dismissed for default.

5. Per contra, Ld. counsel for the respondents No. 1 and 2 defends the impugned order submitting that there is no



illegality or infirmity in the impugned order.

6. I considered the submissions advanced by both the parties and perused the case record.

7. The impugned order dated 07.11.2015 was passed by Ld. District Judge, Sitamarhi in Misc. Case No. 1/2015 which was filed on 02.01.2015 for restoration of previous restoration application bearing Misc. Case No. 15/2011 which was dismissed for default on 24.11.2014. Misc. Case No. 15/2011 was filed for restoration of Misc. Appeal No. 06/2008 which was dismissed for default. As such, it is found that the Misc. Case No. 1/2015 was filed within 39 days of the dismissal of Misc. Case No. 15/2011. Now, the question is whether this Misc. Case No. 1/2015 was filed within limitation period as prescribed by Limitation Act or not.

8. After perusal of the Schedule to the Limitation Act, it is found that there is no prescription of any limitation period for such application which has been filed for restoration of previous application filed for restoration of suit dismissed for default. Article 122 of the Schedule to the Limitation Act prescribes limitation of 30 days for filing application for restoring a suit or appeal or application for review or revision, dismissed 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.

9. As such, Article 122 does not apply to restoration application filed for restoration of previous restoration application. In such situation, residuary Article 137 of the Schedule to the Limitation Act comes into play under which limitation of three years has been provided for any other application for which no period of limitation is provided elsewhere in the Schedule.

10. The aforesaid view is fortified by ***Manoj Kumar Vyas & Ors. v. State of Bihar & Ors*** as reported in (2016) 4 PLJR 25 wherein ***Hon'ble Patna High Court*** in similar situation has held that from bare perusal of the provision as contained in Article 122 of the Limitation Act, it is evident that the said provision is not attracted in a case where the petition under Section 151 of the CPC has been filed for restoration of a restoration application. ***The Hon'ble Court*** has relied upon ***Siban Mahto v. Ramdhani Sing*** as reported in ***AIR 1972 Pat 217*** wherein under similar circumstances, it has been held that application filed under Section 151 CPC for restoration of restoration application is not covered by Article 122 but it is covered by residuary Article 137 for which the period of three



years is provided. In *Siban Mahto case (supra)*, *Hon'ble Patna High Court* has relied upon the case of *Dwarka Prasad v. Union of India* as reported in *1954 BLJR 236*.

11. *Hon'ble Delhi High Court* in *J.L. Barua v. Sanjay Das Gupta* as reported in *(2004) 110 DLT 629*, in *Smt. Kailash Devi v. Smt. Priti Mandal @ Priti Aggarwal* as reported in *DRJ 1987(12) 222* and in *Kailash Devi v. Priti Mandal*, as reported in *1988 (1) HLR 84* has also held similar view.

12. *Hon'ble Allahabad High Court* in *C.P. Properties Ltd., Kanpur v. Matadin Bhagwan Dass & Ors* as reported in *1992 SCC OnLine All 787* has also held similar view holding that Article 122 of the Limitation Act relates to restoration of a suit or appeal or application for review of revision, dismissed for default for want of prosecution. Consequently, by no stretch of interpretation the said article in its present form can be held to apply to an application of the present nature, where restoration is sought, not of the suit, but of an application under Order 9. There being no other provision in the Limitation Act, the residuary Article 137 will be applicable and the limitation would be three years from the date when the right to apply accrues.



13. Hon'ble Orissa High Court in ***Smt. Bimala Devi & Ors v. Patitapaban Dev & Ors*** as reported in ***AIR 1973 Ori 169 (FB)*** has held that law is well settled that a residuary Article of the Limitation Act is applicable if any specific Article is not applicable to the facts and circumstances of a case. Article 137 is the residuary Article. It will have no application if Article 122 in terms would be applicable to the facts of this case.

14. ***Hon'ble Calcutta High Court*** in ***Mst. Nurnahar Bewa & Anr. v. Rabindra Nath Dev & Ors.*** as reported in ***AIR 1988 Cal 358*** has also expressed the same view holding that the Statute of limitation is a disabling act and action for claiming rights flowing from various laws is barred with lapse of time as indicated in the Limitation Act. Limitation for an action in law, therefore, has to be found within the four corners of the statute. In the aforesaid circumstances, although the period of limitation for making an application for restoration of a suit dismissed for default under Order 9 of the Code is thirty days from the date of the order of dismissal, the application for restoration of miscellaneous case arising out of such application under Order 9, when such Misc. Case is dismissed for default, is not governed by the provisions of Art. 122 of the Limitation Act in view of the fact that expressly in terms of the said Art. 122, the



miscellaneous case arising out of an application under Order 9 is not attracted and the period of limitation in such case should be governed by Art. 137

15. Hence, the impugned order is not sustainable in the eye of law as the court below has committed error of law while passing the impugned order. Hence, the impugned order dated 07.11.2015 passed by Ld. District Judge, Sitamarhi in Miscellaneous Case No. 1/2015 (Dinesh Thakur v. Amitabh Thakur & Ors) is set aside and the matter is remitted to the learned court below to dispose of the aforesaid Misc. Case No. 01/2015 on merit within a month.

16. Both the parties are directed to be present in the court below on 16th of October, 2023 at 10:30 AM.

17. Accordingly, this revision petition stands allowed.

(Jitendra Kumar, J)

perwez

U			
---	--	--	--

AFR

