

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CIVIL MISCELLANEOUS JURISDICTION No.406 of 2021**

M/s B. Prasad and Co. through its Partner, Krishna Murari Kumar, Son of Bisheshwar Prasad, Resident of Anishabad, Harnichak, Private P and T Colony, Patna.

... .. Petitioner/s

Versus

The Executive Engineer (Civil) Prasara Bharti Broadcasting Corporation of India, Civil Construction Wing, All India Radio, Patna.

... .. Respondent/s

**Appearance :**

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| For the Petitioner/s | : | Mr. J.S. Arora, Sr. Advocate<br>Mr. Manoj Kumar, Advocate<br>Mr. Kushagra Kush, Advocate |
| For the Respondent/s | : | Mr. Tuhin Shankar, Advocate<br>Mr. Sanjeev Kumar, Advocate                               |

**CORAM: HONOURABLE MR. JUSTICE JITENDRA KUMAR**  
**ORAL ORDER**

8      22-09-2023                      The case has been taken up on mentioning by Ld. counsel for the parties.

2. It is brought to the notice of this Court that Civil Miscellaneous Jurisdiction No. 813 of 2018 and Civil Miscellaneous Jurisdiction No. 406 of 2021 were heard together and separate orders were passed in both the cases. However, inadvertently, the order passed in Civil Miscellaneous Jurisdiction No. 813 of 2018 has been typed in Civil Miscellaneous Jurisdiction No. 406 of 2021. Similarly, the order passed in Civil Miscellaneous Jurisdiction No. 406 of 2021 has been typed in Civil Miscellaneous Jurisdiction No. 813 of 2018. Hence, the order dated 08.09.2023 is corrected accordingly. The



corrected order passed on 08.09.2023 is as follows:-

“The present Civil Miscellaneous No. 406 of 2021 has been filed by the petitioner, under Article 227 of the Constitution of India, for setting aside the order dated 17.08.2021, passed by Ld. District Judge, Patna in Miscellaneous Case No. 36 of 2021, whereby Ld. District Judge, Patna had transferred the Miscellaneous Case No. 36 of 2021 to the court of Ld. ADJ-X, Patna for hearing and disposal, ignoring the submission of Ld. counsel for the petitioner that the said miscellaneous case before the Ld. District Judge is not maintainable. As such, by not dismissing the miscellaneous case, Ld. District Judge impliedly upheld the admission of the case before himself and transferred it to the Court of Ld. ADJ-X, Patna for further proceeding.

2. The relevant factual matrix of the case is that Miscellaneous Case No. 18 of 2014 was filed by the Respondent under Section 34 of the Arbitration and Conciliation Act, 1996 against the arbitral award dated 10.05.2014, in the Court of Ld. Sub-Judge-1, Patna. However, later on, the same was transferred to the Court of Ld. District Judge, Patna, where it was numbered as Miscellaneous Case No. 78 of 2017 on 05.06.2017 and thereafter the same was transferred to the Court of Ld. ADJ-X,



Patna for hearing and disposal. However, the said Miscellaneous Case No. 78 of 2017 was dismissed for non-appearance of the petitioner, who is Respondent herein, on 12.12.2019.

3. For restoration of Miscellaneous Case No. 78 of 2017, Miscellaneous Case No. 36 of 2021 was filed under Order IX Rule 4 of the Civil Procedure Code before Ld. District Judge, Patna, which was admitted on 05.03.2021 after condonation of the delay in filing the petition. An application was filed by the Respondent who is Petitioner herein, before Ld. District Judge questioning the maintainability of the Misc. Petition before Ld. District Judge. However, Ld. District Judge, Patna did not dismiss the Misc. Case and transferred the said miscellaneous case to the Court of Ld. ADJ-X for hearing and disposal.

4. Ld. counsel for the petitioner herein submits that restoration application under Order IX Rule 4 of the Civil Procedure Code, should have been filed before the same court of Ld. ADJ-X, Patna which has dismissed the Miscellaneous Case No. 78 of 2017 for default, because it is settled principle of law that the same court, which has dismissed the petition, can have the jurisdiction to entertain the restoration application. He relies upon the case of **Sumesh Vs. Jijimol S.** as reported in



**(2019) 4 KerLJ 972**, wherein Hon'ble Kerala High Court has observed that it is needless to say that the proper remedy to challenge an order dismissing the suit for default is an application under Order 9 Rule 9 of the CPC, to set aside the dismissal for default, before the court, which dismissed the suit for default itself. He further relies upon the judgment of **Luchhtnan Dass Vs. Devi Dial** as reported in **AIR 1920 Lahore 418** wherein the Hon'ble High Court was pleased to observe as follows:-

*“The first contention is correct, for reading together Rr. 3 and 4 O. 9 Civil P.C., it is clear that the Court which can under R. 4 set aside an order dismissing a suit for default is the Court which passed the order of dismissal.”*

5. However, per contra, Ld. counsel for the Respondent submits that under the Commercial Courts Act, 2015 the Principal Judge is a District Judge and as such, he can entertain such application of restoration. He further submits that Miscellaneous case was filed during Corona period and at that time, the Court of Ld. ADJ-X was also vacant. He has also relied upon the case of **The Commissioner, Mysore Urban Development Authority Vs. S.S. Sarvesh, (Civil Appeal No. 1463 of 2019)**, decided on 05.02.2019.



6. Perused the case records and considered the submissions advanced by Ld. counsel for the parties. On reading Rule 4, Order IX of the Civil Procedure Code, it clearly transpires that the court, which has dismissed the suit or any petition for default of the plaintiff/petitioner, has jurisdiction to entertain any restoration application and get satisfied whether there was any reasonable cause of the petitioner not to attend the matter on the date of dismissal and set aside the dismissal order. Such view is fortified by the authorities - **Sumesh case (Supra)**, and **Luchhtnan Dass case (Supra)** as referred to above and relied upon by the petitioner herein.

7. It is not the case of the Respondent that when the Court of Ld. A.D.J.-X was vacant, Ld. District Judge was in-charge of that Court. As far as the case of the **Commissioner, Mysore Urban Development Authority (supra)** is concerned, the subject matter of this case is different from that of the present case. In **Commissioner, Mysore Urban Development Authority case (supra)**, the Hon'ble Supreme Court was dealing with restoration of an appeal which was dismissed for default and Hon'ble Supreme Court was of the view that while dealing with restoration of the appeal, the appeal should have been restored subject to compensation to the other party. This



Court is in complete agreement with such view of Hon'ble Supreme Court. However, in the present case, the question is which Court has jurisdiction to entertain the restoration application.

8. However, this Court is unable to agree with the submission of Ld. counsel for the Respondent that Ld. District Judge has authority to entertain application for restoration of Miscellaneous Case No. 78 of 2017, which was earlier transferred by Ld. District Judge to the Court of Ld. A.D.J.-X for hearing and disposal and the same was dismissed for default by the Court of Ld. A.D.J.-X. This Court is of considered opinion that once Miscellaneous Case No. 78 of 2017 was transferred to the Co-ordinate Court of Ld. A.D.J.-X, the Court of Ld. District Judge became *functus officio* and any application for restoration of Miscellaneous Case No. 78 of 2017, which was dismissed for default by the Court of Ld. A.D.J.-X, would lie only before the Court of Ld. A.D.J.-X. Hence, Miscellaneous Case No. 36 of 2021, which was filed by the Respondent herein before the Ld. District Judge for restoring Miscellaneous Case No. 78 of 2017, was not maintainable and hence admission of Miscellaneous Case No. 36 of 2021 condoning the delay in filing the application was without jurisdiction and hence any



order passed by Ld. District Judge in Miscellaneous Case No. 36 of 2021 is nullity because the same has been passed without jurisdiction. Reliance is place on the following authorities:

**(I) Chiranjilal Shrilal Goenka Vs. Jasjit Singh**  
as reported in **(1993) 2 SCC 507.**

**(II) Harshad Chiman Lal Modi Vs. DLF Universal Ltd.** as reported in **(2005) 7 SCC 791.**

**(III) Hasham Abbas Sayyad Vs. Usman Abbas Sayyad & Ors.,** as reported in **(2007) 2 SCC 355**

**(IV) I.C.I.C.I. Vs. Sharad Khanna** as reported in **1993 Mh.LJ. 448.**

9. Accordingly, the present Civil Miscellaneous Jurisdiction No. 813 of 2018 is allowed setting aside all the orders passed by Ld. District Judge, Patna in Miscellaneous Case No. 36 of 2021.

10. However, the Respondent is at liberty to file fresh application under order IX Rule 9 of the Civil Procedure Code before the court of Ld. A.D.J.-X, Patna for restoration of Miscellaneous Case No. 78 of 2017. The Court below is required to consider Section 14 of the Limitation Act, 1963 for condonation of delay which has been caused on account of prosecuting the matter before the wrong forum. The Court



below may also consider the case of **Commissioner, Mysore Urban Development Authority (supra)** which has been relied upon by the Respondent herein, while considering the restoration application if filed by the Respondent herein.”

**(Jitendra Kumar, J)**

Amrendra/-

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