

Item No.4
10.01.2025
Court. No. 36
GB

CAN 1 of 2024
In
C.O. 70 of 2024

Atibir Industries Co. Ltd. & Ors.
VS
Shree Ganesh Roadlines
Represented by Vivek Chaudhury

Mr. Krishnendu Goopta,
Mr. Kanakendu Chatterjee

...for the Petitioners.

Mr. Kanai Lal Samanta

...for the Opposite Party.

1. CAN 1 of 2024 is an application for recalling and/or modification of the judgment dated April 12, 2024, passed by this Court in C.O. No.70 of 2024. The said revisional application was dismissed and the order passed by the learned Civil Judge (Senior Division), Haldia dated December 8, 2023 in Money Suit No.06 of 2022 was upheld.
2. By the order impugned in the civil revisional application, the learned trial court, upon exercising power under Section 151 of the Code of Civil Procedure, had recalled the order dated March 29, 2023. By the order dated March 29, 2023, the money suit was dismissed for non-prosecution at the instance of the plaintiff/opposite party. The order was recalled and the suit was restored. The learned court held that the money suit had been filed for a claim and on the assurance of the defendants in the suit that, they would repay all the dues, the plaintiff had withdrawn the suit. On April 19, 2023, an application

was filed under Section 151 of the Code of Civil Procedure by the plaintiff, praying for recalling of the order dated March 29, 2023. The plaintiff prayed for restoration of the suit. The ground for recalling was that a meeting was held between the parties on April 4, 2023, but the defendants denied to pay off the dues of the plaintiff. The plaintiff's case was that, acting in good faith and to resolve the dispute, the plaintiff was persuaded to withdraw the suit. That, the subsequent mala fide action of the defendants compelled the plaintiff to file an application under Section 151 of the Code of Civil Procedure, praying for recalling of the order of the dismissal of the suit for non-prosecution. The trial court was of the view that in such backdrop of the case, justice would be sub served if the application was allowed. The order of dismissal of the suit on the ground of non-prosecution, was recalled. The trial court also observed that the plaintiff would not deliberately withdraw his suit, unless there was some talk of compromise or assurance of payment by the defendants.

3. Accordingly, the civil revision was filed and Mr. Goopla, learned advocate appeared for the defendants in the said suit and submitted that the question of restoring the suit would not arise as the same was dismissed without any liberty to file afresh on the self-same cause of action. The inherent power of the Court could not be exercised to negate the applicability of Order 23 Rule 1 sub-Rule 4 of the Code of Civil Procedure. The learned court was

denuded of all powers to invoke the inherent jurisdiction and to restore the suit, once the suit was dismissed for non-prosecution.

4. This Court recorded the factual backdrop and came to a finding that the bona fide of the plaintiff was available from his conduct. Within 20 days from the order of dismissal, the plaintiff again approached the court and prayed for recalling of the order. This Court recorded the averments that, the suit was withdrawn on the oral assurance of settlement. This Court noticed that the suit had not progressed to such a stage where rights had been created in favour of the defendants. No pleading to such extent was available from the revisional application.
5. Thus, this Court was of the view that in the event the suit was not restored to its original file and number, grave injustice would be caused to the plaintiff. Accordingly, this Court held that the learned trial judge had rightly exercised inherent power under Section 151 of the Code of Civil Procedure. Reference was made by this Court to the decision of the Hon'ble Apex Court in the matter of ***Jet Ply Wood Pvt. Ltd. And Another versus Madhukar Nowlakha and Others*** reported in ***AIR 2006 SC 1260***. The Hon'ble Apex Court held that inherent power to recall an order was vested in a court, under Section 151 of the Code of Civil Procedure. By invoking such power, a court could restore the suit. The relevant portions of the said judgment were quoted in

detail and paragraph 25 and 26 are once again quoted below for convenience:-

“25. The aforesaid position was reiterated by the learned Single Judge of the High Court in his order dated 4-2-2005 though the language used by him is not entirely convincing. However, the position was clarified by the learned Judge in his subsequent order dated 14-3-2005 in which reference has been made to a Division Bench decision of the Calcutta High Court in Rameswar Sarkar [AIR 1986 Cal 19 : (1985) 2 CHN 482] which, in our view, correctly explains the law with regard to the inherent powers of the Court to do justice between the parties. There is no doubt in our minds that in the absence of a specific provision in the Code of Civil Procedure providing for the filing of an application for recalling of an order permitting withdrawal of a suit, the provisions of Section 151 of the Civil Procedure Code can be restored to in the interest of justice. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act ex debito justitiae for doing real and substantial justice between the parties. This Court had occasion to observe in Manohar Lal Chopra v. Rai Bhadur Rao Raja Seth, AIR 1962 SC 527 as follows:

‘It is well settled that the provisions of the Code are not exhaustive for the simple reason that the legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them.’

26. Based on the aforesaid principle, the Division Bench of the Calcutta High Court, in almost identical circumstances in Rameswar Sarkar case [AIR 1986 Cal 19 : (1985) 2 CHN 482], allowed the application for withdrawal of the suit in exercise of inherent powers under Section 151 of the Code of Civil Procedure, upon holding that when through mistake the plaintiff had withdrawn the suit, the court would not be powerless to set aside the order permitting withdrawal of the suit.”

6. Reference was further made to the decision of ***Rameswar Sarkar versus State of West Bengal and Others*** reported in **1985 SCC Online Cal 139**.

Paragraph 16 of the said decision is quoted below:-

16. In the instant case, according to the plaintiff he could not realize the seriousness of the prejudice that would be suffered by him if the suit was withdrawn without liberty to file a fresh suit. It has been already noticed that the plaintiff has paid the maximum court-fee of Rs.10,000/-. It is true that the Court has passed an order dismissing the suit for non-prosecution on the application of the plaintiff but in our opinion, that would be no ground to refuse to do justice. If through mistake the plaintiff has withdrawn the suit, the Court, in our view, will not be powerless to set aside the order of dismissal of the suit and allow the withdrawal of the application for withdrawal of the suit in exercise of its inherent power. Most respectfully we beg to differ from the view that the Court has no jurisdiction to allow withdrawal of an application for withdrawal of a suit in exercise of its inherent power as recognized under S.151 of the Code of Civil Procedure. It is, however, made clear that there must be some justifiable reasons for allowing withdrawal of the application for withdrawal of suit.”

7. In paragraph 14, this Court arrived at a conclusion that the suit was admittedly withdrawn when talks of settlement was going on. The plaintiff had a bona fide intention to settle the dispute. Withdrawal of the suit could have been a bona fide mistake or on wrong advice or on the honest intention of the plaintiff to settle the dispute.
8. This application for recalling has been filed for modification of the order by deleting the observations made hereinabove, on the ground that those were factually incorrect. The observations made hereinabove

are not recording of facts. From the averments in the application filed before the learned court and the averments in the application for recalling filed under Section 151 of the Code of Civil Procedure, this Court arrived at a conclusion that the withdrawal of the suit may have been on a bona fide mistake or on wrong advice or on the honest intention of the plaintiff to settle the dispute. This is the opinion of the Court with regard to the circumstances which had led the plaintiff to first withdraw the suit and then pray for recalling of the order of withdrawal, when the defendants refused to settle as soon as the suit was dismissed.

9. The decision cited by Mr. Goopta, in the matter of ***Sushila Kumari versus Colonel Satish Chander*** reported in **(2017) 3 Supreme Court Cases 257**, will not be applicable in this case. In the case referred to by Mr. Gooptu, the High Court had recorded that both the parties had undertaken to withdraw the pending cases. That was a case of mistake in recording a submission made by a party. The Court which made the incorrect recording is competent to recall the same and the party who alleges such wrong recording has to approach the Court which had recorded such submission.
10. In the instant case, no such factual recording has been made. The opinion or finding of the Court with regard to the conduct of the plaintiff, is a part of the Court's decision. This observation of the Court does not amount to recording any admission on the part of the defendants.

11. Under such circumstances, the application being CAN 1 of 2024 is dismissed.
12. Parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)