

**Bhola Mahto Vs. Nirpath Mahto and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/517315](http://sooperkanoon.com/517315)

**Court :** Jharkhand

**Decided On :** Apr-28-2005

**Reported in :** [2005(3)JCR340(Jhr)]

**Judge :** N.N. Tiwari, J.

**Appeal No. :** C.M.P. No. 387 of 2004

**Appellant :** Bhola Mahto

**Respondent :** Nirpath Mahto and ors.

**Advocate for Def. :** S.K. Murti, Adv.

**Advocate for Pet/Ap. :** Lalit Kumar Lal, Adv.

**Disposition :** Petition allowed

**Judgement :**

ORDER

**N.N. Tiwari, J.**

1. In this application the petitioner has prayed for condonation of delay in filing the C.M.P. No. 387 of 2004. It has been stated that the Advocate's Clerk Incharge had undergone a surgical operation in the medical clinic of Dr. Mukti Saran and after discharge from the clinic he was advised complete bed rest and that he could not

come to the Court from 5.8.2004 to 28.8.2004 and in the said circumstances he could not comply with the peremptory order dated 5.8.2004 by which the petitioner was directed to take steps for notice to respondent Nos. 5 and 6. It has been stated that subsequently by information issued by the office of the Court the appellant came to know that the appeal was dismissed for non-compliance of the order and, thereafter, without any delay filed the said C.M.P. paying for restoration of the appeal.

2. Mr. S.K. Murti, learned counsel appearing on behalf of the opposite party contesting the said petition stated inter alia that the appellant was negligent in complying with the order of this Court and the illness of the Advocate's Clerk Incharge is a mere pretence for not complying with the order and not taking proper steps as directed by this Court. Learned counsel further submitted that the defendant opposite party has been put to unnecessary loss and harassment in defending the C.M.P./ as well as the instant Interlocutory Application.

3. After hearing the parties and considering the facts and circumstances I find that the petitioner has shown sufficient ground for not complying with the peremptory order dated 5.8.2004. It has clearly been stated that the Advocate's Clerk Incharge of the case had undergone a surgical operation in the medical clinic but the said statement has not been controverted by filing any counter affidavit by the opposite party.

4. In view of the above I find that the petitioner has made out sufficient ground for condonation of delay. However, the delay in filing the C.M.P. has caused inconvenience and harassment to the opposite party. In that view the delay is condoned subject to payment of Rs. 1,000/- (Rupees one thousand) to the opposite party or his counsel. The cost must be paid within three weeks.

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5. In this petition the petitioner has prayed for restoration and readmission of Second Appeal No. 199 of 2003 which was dismissed for non-compliance of the peremptory order dated 5.8.2004. It has been stated in the petition that the appeal was admitted for final hearing by order dated 5.8.2004. The appellants were

directed to file requisites for purpose of service of notice on respondent Nos. 5 and 6 by peremptory order dated 5.8.2004. It has been stated that the Advocate's Clerk Incharge of the case had undergone a surgical operation and could not come to the Court from 5.8.2004 to 14.8.2004 and as such the steps for notice on respondent Nos. 5 and 6 could not be taken within the time framed fixed by this Court and consequently the appeal was dismissed for non-compliance for the said peremptory order.

6. Mr. Murti, learned counsel appearing on behalf of the petitioner has opposed the petition on the ground that the appellant has willfully neglected to comply with the order and in spite of the operation of the Advocate's Clerk Incharge there was no impediment in taking steps for service of notice on respondent Nos. 5 and 6 within the peremptory time by this Court.

7. After hearing the parties and considering the facts and circumstances of the case it appears that the appellant had to take steps for issuance of notice on respondent Nos. 5 and 6 whereas other respondents had appeared. The statement has been made on affidavit that the Advocate's Clerk Incharge Shri Suresh Chandra Verma had undergone a surgical operation and could not attend the Court from 5.8.2004 to 14.8.2004 and even after discharge from the hospital he was advised complete bed rest till 28.8.2004. The said statement has not been controverted by filing any counter affidavit by the opposite party and as such the same is accepted.

8. In my opinion the petitioner has made out a case for restoration of the C.M.P. as he has been able to show that the appeal was dismissed under the circumstances beyond the control of the petitioner. This C.M.P. is thus allowed Second Appeal No. 199 of 2003 is restored to its original file/stage. The appellant is allowed further one week's time to take steps for service of notice and comply the order dated 5.8.2004 failing which S.A. No. 199 of 2003 shall stand dismissed without further reference to a Bench.