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HIGH COURT OF CHHATTISGARH, BILASPUR

MCC No. 591 of 2016

Judgment reserved on 23-08-2016

Judgment delivered on 13-12-2016

1. Smt. Jyoti W/o Shri Narayan Kumar, Aged About 35 Years R/o Poonam Bhojanalaya Lane, Malviya Road, Raipur, Chhattisgarh

---- Petitioner

Versus

1. General Manager, Canara Bank, Staff Selection (Workmen), Circle, Office Mumbai, 112, Sio Garrage Building Sion, Koliwada Road, Sion (E)- 22 (Present Office- Canara Bank, H R M Section, Circle Office, "Guman" Residency Road, Sadar Bazar, Nagpur- 440001

---- Respondent

For Applicant — Shri G. D. Vaswani, Advocate

Shri H. B. Agrawal, Senior Advocate appears as *amicus curiae*

Hon'ble Shri Justice Prashant Kumar Mishra

C A V Order

1. This is an application for restoration of WPS No.1501 of 2015, which was dismissed for want of prosecution for non compliance of the peremptory order passed by this Court on 29.04.2015 directing that if the petitioner fails to pay the process fee, as per rules, the petition shall stand dismissed automatically without reference to the Court.

2. The Registry has recorded office note on 28.07.2015 to the effect that the applicant (for brevity 'the petitioner') having failed to comply the condition imposed in the peremptory order the case is treated as dismissed for non compliance of the Court order dated 29.04.2015.

3. The MCC was filed on 04.08.2016 without any application for condonation of delay, therefore, the matter was posted for orders on default of not filing application for condonation of delay in moving the restoration application.

4. Contesting the objection raised by the Registry of this Court, Shri G.D. Vaswani, learned counsel appearing for the petitioner, would argue that the provisions of the Limitation Act, 1963 (for short 'the Act, 1963') has no application in writ proceedings, therefore, filing an application under Section 5 of the Act, 1963 for condonation of delay is not required and the objection raised by the Registry deserves to be overruled.

5. Shri H.B. Agrawal, learned Senior counsel appearing as *amicus curiae*, would also submit that the Full Bench of the Madhya Pradesh High Court in **Jabalpur Development Authority v. Y. S. Sachan and others**[1] held that the writ petition under Article 226 of the Constitution of India is

1 2004 (2) MPHT 314 (FB)

different from a suit, therefore, the provisions of the Code of Civil Procedure, 1908 (for short 'the CPC') would have no application. He would also submit that the application for restoration of a writ petition, which was dismissed for non compliance of the Court order, shall not be treated as an application under Order IX Rule 2 of the CPC, therefore, the limitation prescribed for moving such an application is not attracted to a writ petition, which was dismissed for want of prosecution or for non compliance of the Court order.

6. Article 226 of the Constitution of India confers power on the High Courts to issue certain directions, orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III of the Constitution of India and for any other purpose. Article 226 nowhere provides for any period of limitation for filing writ petition nor does it provide for the procedure, which shall be followed by the High Court while issuing such writs, orders or directions. Each High Court has framed its own Rules prescribing procedure for filing and disposal of writ petitions. The High Court of Chhattisgarh Rules, 2007 has been framed by the Chhattisgarh High Court in exercise of the powers conferred under Articles 225 and 227 of the Constitution of India and

Section 25 of the Madhya Pradesh Reorganization Act, 2000 (Act No.XXVIII of 2000). The said rules also do not provide for any period of limitation for filing a writ petition or for moving an application for restoration of a writ petition dismissed for want of prosecution or non payment of process fee or for non compliance of any other direction issued by the Court.

7. Order IX Rule 2 of the CPC provides for dismissal of suit where summons has not been served upon the defendant in consequence of failure of the plaintiff to pay the court fees or postal charges for service of notice on the defendant whereas Rule 4 provides that where a suit is dismissed under rule 2 or rule 3, the plaintiff may subject to the law of limitation bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies that there was sufficient cause for such failure as is referred in rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

8. Article 122 of the Act, 1963 prescribes a period of 30 days as period of limitation to move an application to restore 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 and the said limitation of 30 days commence from the date of dismissal of suit.

9. It appears, the Registry has raised objection and pointed out default for the reason that the peremptory order was passed in the writ petition on 29.04.2015, therefore, the petitioner should have moved an application for restoration of writ petition within 30 days from 29.04.2015.

10. The question falling for consideration is –

> Whether a restoration application praying for restoration of a writ petition, which was dismissed for want of prosecution or for non compliance of Court order, being moved after 30 days from the date of dismissal, is required to be supported with an application for condonation of delay or not ?

11. The issue concerning applicability of the provisions of the CPC in the writ proceedings is no longer *res integra* in view clear pronouncement made by the Supreme Court in **Puran Singh and Others v State of Punjab and Others**[2] wherein the Supreme Court was dealing with an issue as to whether the provisions contained under Order 22 of the CPC are applicable to proceedings under Article 226 & 227 of the Constitution of India. Noticing divergences of views amongst

2 (1996) 2 SCC 205 = AIR 1996 SC 1092

different High Courts and having dealt the matter quite vividly the Supreme Court held thus in paras 5, 9 & 10 :

> 5.....When the High Court exercises extraordinary jurisdiction under Article 226 of the constitution, it aims at securing a very speedy and efficacious remedy to a person, whose legal or constitutional right has been infringed. If all the elaborate and technical rules laid down in the Code are to be applied to writ proceedings the very object and purpose is likely to be defeated. According to us, in view of the conflicting opinions expressed by the different courts, the Parliament by the aforesaid amending Act introduced the explanation saying that in Section 141 of the Code the expression "proceedings" does not include "any proceedings under Articles 226 of the Constitution" and statutorily recognised the views expressed by some of the courts that writ proceedings under Article 226 of the Constitution shall not be deemed to be proceedings within the meaning of Section 141 of the Code. After the introduction of the explanation to Section 141 of the Code, it can be said that when Section 141 provides that the procedure prescribed in the Code in regard to suits shall be followed, as far as it can be made applicable "in all proceedings in any court of civil jurisdiction" it shall not include a proceeding under Article 226 of the constitution. In this background, according to us, it cannot be held that the provisions contained in Order 22 of the Code

are applicable per se to writ proceedings. If even before the introduction of the explanation to Section 141, this Court in the case of Babubhai v. Nandlal AIR 1974 SC 2105 (supra) had said that the words "as far as it can be made applicable occurring in Section 141 of the Code made it clear that in applying the various provisions of the Code to the proceedings other than those of a suit, the court has to take into consideration the nature of those proceedings and the reliefs sought for" after introduction of the explanation the writ proceedings have to be excluded from the expression "proceedings" occurring in Section 141 of the Code. If because of the explanation, proceeding under Article 226 of the Constitution has been excluded, there is no question of making applicable the procedure of Code 'as far as it can be made applicable' to such proceeding. The procedures prescribed in respect of suit in the Code if are made applicable to the writ proceedings then in many cases it may frustrate the exercise of extraordinary powers by the High Court under Articles 226 and 227 of the Constitution.

9. We have not been able to appreciate the anxiety on the part of the different courts in judgments referred to above to apply the provisions of the Code to Writ Proceedings on the basis of Section 141 of the Code. When the constitution has vested extraordinary power in the

High Court under Articles 226 and 227 to issue any order, writ or direction and the power of superintendence over all courts and tribunals throughout the territories in relation to which such High Court is exercising jurisdiction, the procedure for exercising such power and jurisdiction have to be traced and found in Articles 226 and 227 itself. No useful purpose will be served by limiting the power of the High Court by procedural provisions prescribed in the Code. Of course, on many questions, the provisions and procedures prescribed under the Code can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. It need not be impressed that different provisions and procedures under the Code are based on well recognised principles for exercise of discretionary power, and they are reasonable and rational. But at the same time, it cannot be disputed that many procedures prescribed in the said Code are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person who pursues such remedies. The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious.

As such even if it is held that Order 22 of the Code is not applicable to writ proceedings or writ

appeals, it does not mean that the petitioner or the appellant in such writ petition or writ appeal can ignore the death of the respondent if the right to pursue remedy even after death of the respondent survives. After the death of the respondent it is incumbent on the part of the petitioner or the appellant to substitute the heirs of such respondent within a reasonable time. For purpose of holding as to what shall be a reasonable time, the High Court may take note of the period prescribed under Article 120 of the Limitation Act for substituting the heirs of the deceased defendant or the respondent. However, there is no question of automatic abatement of the writ proceedings. Even if an application is filed beyond 90 days of the death of such respondent, the Court can take into consideration the facts and circumstances of a particular case for purpose of condoning the delay in filing the application for substitution of the legal representative. This power has to be exercised on well known and settled principles in respect of exercise of discretionary power by the High Court. If the High Court is satisfied that delay, if any, in substituting the heirs of the deceased respondent was not intentional, and sufficient cause has been shown for not taking the steps earlier, the High Court can substitute the legal representative and proceed with the hearing of the writ petition or the writ appeal, as the case may be. At the same time the High Court has to be conscious that after lapse of time a valuable right accrues to the legal

> representative of the deceased respondent and he should not be compelled to contest a claim which due to the inaction of the petitioner or the appellant has become final.
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> (Emphasis supplied)

12. The question as to whether provisions of the Act, 1963 would apply in proceedings under Article 226 of the Constitution of India is also no longer *res integra* in view of the law laid down by the Supreme Court in **Smt. Sudama Devi v Commissioner and others**[3], wherein the Supreme Court held thus :

> We are of the view that so far as Writ Petition under Article 226 of the Constitution is concerned, there can be no hard and fast rule of 90 days by way of period of limitation but the general rule of laches alone can be applied and this must necessarily depend on the facts and circumstances of each case. The High Court has said in its order that "the writ petition was beyond time by 136 days. Neither the explanation of 136 days nor the explanation for filling it today, was given." This view does not appear to be correct because the High Court has proceeded on the assumption that there is a period of limitation of 90 days and unless sufficient cause is shown as contemplated under Section 5 of the Limitation Act a writ petition filed after the expiration of 90 days is

3 (1983) 2 SCC 1

> liable to be rejected. This assumption is wholly unjustified. There is no period of limitation prescribed by any law for filing a writ petition under Article 226 of the Constitution. It is in fact doubtful whether any such period of limitation can be prescribed by law. In any event one thing is clear and beyond doubt that no such period of limitation can be laid down either under rules made by the High Court or by practice. In every case it would have to be decided on the facts and circumstances whether the petitioner is guilty of laches and that would have to be done without taking into account any specific period as a period of limitation. There may be cases where even short delay may be fatal while there may be cases where even a long delay may not be evidence of laches on the part of the petitioner. We would, therefore, set aside the order of the High Court and remand the Writ Petition to the High Court so that the High Court may dispose it of on merits in accordance with law. We accordingly allow the appeal, set aside the judgment and order of the High Court and direct that the writ petition may be disposed of by the High Court on merits in accordance with law. There will be no order as to costs.

13. In view of the settled legal position as enunciated by the Supreme Court in **Puran Singh** (supra) and **Smt. Sudama Devi** (supra), it is not permissible to argue to the contrary that provisions of the CPC or the Act, 1963 would apply in

proceedings under Article 226 of the Constitution of India. By the same analogy, if these two enactments do not apply in the parent proceedings under Article 226, any application in the nature of restoration or review or modification of any order passed in exercise of power under Article 226 & 227 of the Constitution of India would not be treated to be barred by limitation merely because it is moved beyond the period of 30 days from the date of the order.

14. In a case where the MCC is filed for restoration of writ petition, which was dismissed for want of prosecution or for non compliance of Court order, the provisions contained under Order IX Rule 2 or Rule 4 of the CPC read with Article 122 of the Act, 1963 would not apply, therefore, such MCC is not to be treated as barred by limitation even if it is filed after 30 days from the date of order, however, in view of the observations made by the Supreme Court in para 10 of the judgment rendered in **Puran Singh** (supra), the High Court may take note of the period prescribed under Article 122 of the Act, 1963 for considering as to what shall be reasonable time for moving such restoration application or review petition or application for modification/clarification.

15. When such application is filed after long lapse of time, which, *prima facie,* appears to be unreasonable, it would be the

duty of the applicant to explain the delay in filing the restoration application or review petition or application for modification/clarification itself, however, no separate application may be necessary unless the Court desires such application to be filed.

16. This order shall also not be taken to lay down the principle that Court can never dismiss such application on the ground of delay and laches because if the principles of delay and laches shall apply to the parent proceedings under Article 226 & 227 of the Constitution of India it would also apply to the incidental proceedings like restoration application, review petition or the application for modification/clarification and the writ Court can always invoke its inherent powers to dismiss such applications being suffered from delay and laches in the given set of facts and circumstances of the case.

17. In view of the above, the objection pointed out by the Registry is overruled.

18. The explanation offered by the learned counsel for the petitioner at the time of hearing on the question of delay in moving the restoration application is considered to be reasonable and sufficient to entertain the restoration

application on merits. Accordingly, learned counsel for the petitioner is also heard on the merits of MCC.

19. On due consideration and on being satisfied with the grounds urged and the reasons assigned by the petitioner for his failure to comply with the peremptory order, the MCC is allowed and the writ petition bearing WPS No.1501 of 2015 is restored to its original number.

20. A copy of this order be placed on the record of WPS No.1501 of 2015.

21. Ex-*consequenti*, the MCC is allowed. Sd/-

Judge
Prashant Kumar Mishra

Gowri