

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MCC No. 102 of 2016**

1. Mohd. Shahid S/o Sagir Ahmad, Aged About 32 Years R/o West Chirmiri, Police Station Podi, Tahsil Baikunthpur, District Koriya (Chhattisgarh)
2. Vakeel Ahmad, S/o Sagir Ahmad, Aged About 29 Years R/o West Chirmiri, Police Station Podi, Tahsil Baikunthpur, District Koriya (Chhattisgarh)
3. Shabir Ali S/o Jahir Hussain, Aged About 32 Years R/o West Chirmiri, Police Station Podi, Tahsil Baikunthpur, District Koriya (Chhattisgarh).....(Non Applicants No. 1 To 3)

---- Applicants**Versus**

1. Dev Sharan S/o Late Raghunath Singh, Aged About 32 Years R/o Near Prem Nagar, Chittajhor, Podi, (West Chirmiri) P. S. Podi Tahsil Baikunthpur, District Korea (Chhattisgarh)
2. Sukdev Singh S/o Late Raghunath Singh, Aged About 27 Years R/o Near Prem Nagar, Chittajhor, Podi, (West Chirmiri) P. S. Podi Tahsil Baikunthpur, District Korea (Chhattisgarh)
3. Bhagwan Singh S/o Late Raghunath Singh, Aged About 22 Years R/o Near Prem Nagar, Chittajhor, Podi, (West Chirmiri) P. S. Podi Tahsil Baikunthpur, District Korea (Chhattisgarh).....(Claimants)
4. The Oriental Insurance Company Limited Branch Sadar Road Ambikapur, District Surguja (Chhattisgarh).....(Non Applicant No. 04)

---- Respondents

For Applicants	:	Shri Shakti Raj Sinha, Advocate
For Respondent Nos. 1 to 3	:	Shri R.N. Pusty, Advocate
For Respondent No.4	:	None

**Hon'ble Shri Justice Prashant Kumar Mishra &
Hon'ble Shri Justice Chandra Bhushan Bajpai**

ORDER**Per Prashant Kumar Mishra, J****21/07/2016**

1. This application for restoration of MAC No. 403/2006 is barred by 1489 days of its limitation. It is argued that the appellants' Counsel Shri Shakti Raj

Sinha had filed his Vakalatnama, but his name did not appear in the cause-list. In the alternative, it was submitted that when the matter was earlier dismissed for want of prosecution, Shri Sinha had filed his Vakalatnama along with restoration application bearing MCC No. 89/2011 and was under impression that the said Vakalatnama would hold good for prosecuting the main appeal. It is also submitted that in connected MAC No. 1233/2009 preferred by the claimants, the Vakalatnama was submitted on 10.1.2011. Therefore also, the Counsel was under strong belief that since both the cases will be listed together, he will be able to protect the interest of the appellant/owner of the vehicle. It is, thus, argued that delay in filing the application is bonafide and it deserves to be condoned and the MCC deserves to be allowed.

2. Shri R.N. Pusty, learned counsel for respondent Nos. 1 to 3 would submit that the Counsel had never filed his Vakalatnama in the subject MAC, therefore, there is no question of his name being published in the cause-list. He would submit that the owner was negligent in prosecuting the appeal, therefore, the application for condonation of delay and the restoration application have no substance and it deserves to be dismissed.

3. It appears that MAC No. 403/2006 was earlier dismissed for want of prosecution on 22.6.2009 and 1.4.2010, however, on both the occasions the restoration application was allowed. It was dismissed for want of prosecution for the third time on 1.12.2011.

4. Learned counsel for the applicants appears to have filed his Vakalatnama in MCC No.89/2011, which was allowed on 25.2.2011 and the Vakalatnama remained tagged with the file of MCC.

5. Ordinarily, if the original Counsel has filed the MCC, his Vakalatnama in the earlier proceeding gets revived automatically and his name is published in the cause-list. However, the present is a case where the Counsel had not filed

his Vakalatnama prior to 1.4.2010 when the MAC was dismissed for want of prosecution for the second time. Therefore, Shri R.N. Pusty is right in submitting that there being no Vakalatnama of the Counsel, there was no question of his name being published in the cause-list.

6. At the same time, it is required to be seen that ordinarily when a new Counsel is engaged to file the MCC, he is required to file a fresh Vakalatnama which gets exhausted with the disposal of MCC requiring him to file fresh Vakalatnama in the original proceeding.

7. In the case in hand, there appears to be bonafide assumption on the part of the Counsel that the Vakalatnama filed with the MCC would hold good for the main appeal, therefore, he was waiting for listing of the case along with his name in the cause-list. It is for this bonafide assumption or belief that the appellants' counsel had filed an application for urgent hearing of the main appeal on 14.7.2011 along with affidavit of the appellants. The said application is on record.

8. Merely because the appeal was dismissed for want of prosecution twice, the present application need not be dismissed for earlier defaults in view of the settled legal position that the prayer for restoration or for setting aside the order is to be examined on the basis of the reasons assigned for non-appearance on the date when the case was dismissed for want of prosecution. In this regard, it would be profitable to refer to the judgment rendered by Karnataka High Court in the matter of **N.P. Siddaiah Vs. M/s. K. Gopal & Sons, AIR 1985, Karnataka 175**, wherein the following has been held in paragraphs 9 & 10.

“9. xxx xxx xxx
 ” ” ”

Therefore, what the revision-petitioner-defendant should show is that he had got sufficient cause to remain absent on the date when the matter was set down for ex parte

hearing. Therefore, it is not necessary for him to show cause as to why he had remained absent on the dates like 15-11-1977 and 15-12-1977. In short, the revision petitioner-defendant has to satisfy the Court that he had sufficient cause for his non-appearance on the date when the suit was actually called for hearing and when the evidence of the plaintiff was recorded. He need not show sufficient cause for his remaining absent on the date when he was actually marked ex parte by the Court which was seized of the matter.

10. It is not necessary for the revision petitioner to show that he was diligent all throughout and that his conduct was not blameworthy. Similar is the view taken by Mannan Subba Rao v. K. Poliah Naidu (1975) 2 Andh WR 471. Therefore, both the Courts below unnecessarily went at a tangent while dismissing the petition on the ground that the revision petitioner-defendant had failed to show sufficient cause for his non-appearance even on 15-11-1977 and 15-12-1977, when he was set ex parte”.

9. There is one more reason why we are compelled to accept the above plea of bonafides and the intention to prosecute the case on merits because the other connected appeal arising out of the same award preferred by the claimants for enhancement of the award amount bearing MAC No. 1233/2009 is still pending before this Court. We are of the considered opinion that present is a case where the delay in filing the MCC deserves to be condoned on payment of cost and MAC No.403/2006 deserves to be restored.

10. Accordingly, it is directed that on appellants' paying cost of Rs.2,000/- to respondents/claimants Nos. 1 to 3 through their counsel Shri R.N. Pusty within a period of 15 days from today, MAC No. 403/2006 dismissed for want of prosecution on 1.12.2011 shall be restored to its original number.

11. The MCC stands allowed in the above stated terms.

Sd/-
(Prashant Kumar Mishra)
Judge

Sd/-
(Chandra Bhushan Bajpai)
Judge

