

IN THE HIGH COURT OF JUDICATURE AT PATNA**Civil Review No.481 of 2016****IN****Civil Writ Jurisdiction Case No. 9402 of 2011**

=====

Sulabh International Social Service Organisation through its Treasurer- Aparesh Roy Sulab New Pataliputra. Colony PS Pataliputra. Colony . Patna Bihar

.... Petitioner

Versus

1. Regional Provident Commissioner, Bihar, R Block Road No. 6, P.S.- Secretariat, Patna-800013
 2. Employees Provident "Fund Organisation through the Central Provident Fund Commissioner, having head office at Bhavishya Nidhi Bhawan, 14 Bhikhaji Cama Place, P.S.- RK Puram, New Delhi -110066. Respondents
- =====

Appearance :

For the Petitioner/s : Mr. Nidhesh Gupta, Sr. Advocate
Mr. Arindam Mukherjee, Ms. Gargi Tuli &
Mr. Anujit Sinha, Advocates

For the Respondent/s : Mr. Prashant Sinha, Advocate
Mr. Ashok Kumar Verma &
Mr. Kumar Ganesh Gunjan, Advocates

=====

CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

C.A.V. JUDGMENT

Date: 17-05-2017

The Civil Review application has been filed under Section 114 read with Order XLVII Rule 1 of the Code of Civil Procedure by which the review petitioner seeks review of the judgment and order, dated 20.05.2016 passed in C.W.J.C. No.9402 of 2011.

2. In order to appreciate the context under which this Civil Review application has been filed, it would be appropriate to recapitulate in brief the developments which have taken place in the past.

3. By show cause notice, dated 14.02.2011, the Regional Provident Fund Commissioner, Patna had raised the issue regarding



applicability of the Employees Provident Fund & Miscellaneous Provisions Act, 1952 (hereinafter for brevity referred to 'the EPF & MP Act') and the proposal to hold an enquiry under Section 7A of the said Act to determine the amount payable by the petitioner and subsequently followed it up by two orders namely, order dated 18.4.2011 and 16.5.2011, directing the petitioner to produce relevant documents. Aggrieved by these, the review petitioner had filed a writ application bearing C.W.J.C. No.9402 of 2011 by which it had sought the following relief(s):

(i) Issuance of a writ, rule, order or direction in the nature of mandamus directing the Respondents not to enforce the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (in short 'the EPF & MP Act') against the petitioner.

(ii) Issuance of a writ, rule, order and direction in the nature of certiorari quashing the show-cause notice, dated 14.2.2011 and the order, dated 18.4.2011 & 16.5.2011. passed by the respondent No.1 under Section 7A of EPF & MP Act proposing to assess the amount payable towards provident fund as well as directing the petitioner to produce the relevant records.

(iii) Pass such further order/orders, as this Hon'ble Court deems fit and proper in the facts and circumstances of the case.

In the said writ application the Regional Provident Fund



Commissioner, Patna was made respondent No.1 and Employees Provident Fund Organization (in short 'CPFC') through the Central Provident Fund Commissioner, New Delhi was made the respondent No.2.

4. In nutshell, the case of the review petitioner in the writ proceeding was that it is a Charitable and Voluntary Social Service Organization and not an 'industry'. The Organization is run by 'volunteers' who offer voluntary service and there does not exist any master and servant relationship between the said volunteers and the petitioner organization. Since existence of master and servant relationship is a *sine qua non* for application of the provisions of 'the EPF & MP Act', therefore, in absence of the same, provisions of the said Act are not attracted qua the petitioner and hence the enquiry initiated under Section 7A of 'the EPF & MP Act' was illegal and fit to be set aside.

5. The case of the respondents in the writ proceeding was that in the year 1989, the EPFO started the process of coverage of the petitioner organization under 'the EPF & MP Act'. A squad of Enforcement Officers visited the establishment and directed to produce the records, but no records were produced. The petitioner instead of producing the records wrote a letter to the Enforcement officer on 12.04.1989 stating therein that the Act was not applicable to



it. Relying upon this very letter and without any inspection of records, the E.O. vide letter, dated 13.04.1989, submitted a faulty report. On 17.4.1989, another E.O. visited the establishment of the petitioner for verification of the records with prior notice to the petitioner. This time again the records were not produced on the plea that the records are with the Chairman and the Vice-Chairman. Thereafter the Assistant Provident Fund Commissioner vide his letter, dated 31.5.1989 directed the petitioner to produce the records on 21.6.1989, in response to which, the petitioner vide its letter, dated 19.6.1989 replied that the Chairman was out of station and requested for fixing another date. Other efforts to solicit records from the petitioner also failed, the APFC vide his letter, dated 8.11.1989 again directed the establishment to produce the records, this time making clear that non-production of the records would be construed as deliberate and willful denial to provide information and the matter could be finalized ex-parte on the basis of the available information. In the meantime, the office of the respondents received a letter, dated 25.10.1989, from the Bhartiya Sulabh Sauchalaya Karamchari Sangh by which list of employees was also provided and request was made for coverage of the petitioner's establishment. As the petitioner did not cooperate, the CPFC constituted a Central Inspection Squad to inspect the records of the petitioner, which too failed in its efforts to persuade the petitioner



to produce the same. The petitioner started sending representations to the various authorities of the EPFO and Ministry of Labour, Government of India. The Head Office of the EPFO also examined the matter and communicated to Secretary, Ministry of Labour vide its letter no. 2488, dated 14.01.2002 that the Act was applicable upon the petitioner. Subsequently, vide letter dated 17.01.2002 the Head Office of the EPFO again communicated to all the Regional Provident Fund Commissioners holding that the Act was applicable on the petitioner. This letter was issued after examining the judgment passed by this Hon'ble Court on 09.02.1990 in C.W.J.C. No. 3408 of 1989 and it was observed that the said judgment was not applicable to the facts of the case.

6. The respondents in the writ proceeding further contended that the writ application was not maintainable because the authority had only issued a notice under Section 7A of 'the EPF & MP Act' and if the petitioner wanted to question the applicability of the Act on it then it could be decided by the authority exercising power under Section 7A itself. The petitioner thus has alternative and efficacious remedy of raising the issue of applicability before the Section 7A Authority which can be decided by the Authority upon production of records by the petitioner and also by conducting a quasi judicial proceeding under 'the EPF & MP Act'. The petitioner, therefore,



should not be allowed to take the shield of Article 226 of the Constitution of India for evading the due course of law.

7. Thus, in brief, the case of the respondents in the writ proceeding was that the applicability of the provisions of 'the EPF & MP Act' is not limited only to an 'industry', rather, it is applicable to other establishments as well, which are not an 'industry', but employing twenty or more persons. It was further submitted that the question, as to whether there exists an employer-employee relationship between the petitioner and the so called volunteers, could only be decided on the basis of evidence and relevant materials, for which purpose Section 7A enquiry had been initiated, and thus the said issue cannot be decided in a writ jurisdiction. It was therefore contended that the writ application filed by the petitioner was misconceived, premature and fit to be dismissed.

8. After fully considering the pleadings and arguments made by both the parties final judgment and order was delivered on 20.05.2016, the operative portion of which is quoted herein below for needful:

“35. In light of the facts and circumstances stated above, I am of the view that interfering in the enquiry initiated by the respondent authorities purportedly exercising power under Section 7A of 'the EPF & MP Act' at this stage would not be proper, particularly in view of the fact that it is a fact finding



enquiry and there is also a remedy of statutory appeal against the final order passed under Section 7A of 'the EPF & MP Act'. The petitioner does not stand prejudiced in any manner by the holding of such an enquiry under Section 7A of 'the EPF & MP Act', as it can assert, plead, prove and demonstrate on the basis of relevant materials and cogent evidences as to how 'the EPF & MP Act' would not apply to it and further as to how 'volunteers' who are working for the petitioner do not qualify as 'employees' within the meaning as defined under Section 2(f) of the said Act. It goes without saying that while conducting the quasi judicial enquiry, the respondent authorities are bound to give full opportunity to the petitioner to establish its case and also to the representative of the Provident Fund Department, and therefore, the authority is expected to pass a final order on all the issues raised before him by giving proper and sound reasoning.

36. *Under the aforesaid circumstances, I dispose of the present writ application with a direction to the respondent authorities to decide the following issues:*

- a) Given the nature of its organization and the work being rendered by the petitioner, whether, as per the requirement of Section 1(3)(b) of 'the EPF & MP Act', there exist a notification issued by the Central Government specifying the applicability of said Act on such kind of establishment? and,*
- b) Whether the volunteers rendering service for the petitioner as claimed by them can be said to be persons employed for wages, qualifying as 'employees' within the meaning as defined under Section 2(f) of 'the EPF & MP Act'? If yes,*



whether the petitioner at any point of time employed twenty or more such employees?

*While deciding the aforesaid issues, the respondent authorities will give full opportunity of hearing to the petitioner as well as to the Department's Representative. Both parties would be entitled to adduce oral and documentary evidences in support of their respective cases and they would also be entitled to cross-examine each other's witnesses, if they so require. After considering all the materials and evidences which shall come on record during the course of the enquiry, the respondent authorities shall pass appropriate order giving sound reasonings for each of the conclusions reached at [reliance placed on a decision of this court reported in **1997 (1) PLJR 403**]. Only after deciding the aforesaid issues in accordance with law, the respondent authorities would decide upon the further course of action.*

37. *It is considered appropriate to observe that in case the respondent authorities come to the conclusion that the provisions of 'the EPF & MP Act' are applicable on the petitioner, then they shall proceed to assess the dues in accordance with law which would necessarily require them not only to assess the provident fund dues but also to identify the beneficiaries. The onus to identify the beneficiaries would be on the respondent authorities in accordance with the law settled by the Hon'ble Supreme Court years ago, in the case of **Food Corporation of India Vr. Provident Fund Commission and others**, reported in **(1990) 1 SCC 68**, wherein in para 9 it has been held as follows:*



“It will be seen from the above provisions that the Commissioner is authorized to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen”. [Emphasis supplied]

38. The Hon’ble Apex Court has reiterated the said principles in its later judgment rendered in case of 1997(1) PLJR 403 (K.G. Majithia vs. Union); (1998) 6 SCC 436 (Food Corporation of India vs. Union of India & ors.); (2000)9 SCC 540 (Ramala Sahkari Chini Mills Ltd. vs. Employees’ Provident Fund Tribunal & ors).

This Court applying the said principle observed as follows in case Assistant Provident Fund Commissioner, Bhagalpur Vrs. M/s. K.C. Indane, reported in 2012 (1) PLJR 374:-

“As the petitioner had failed to establish that the respondent establishment did have twenty employees on their rolls nor any supportive documents were filed in this regard, hence, the learned Tribunal while examining the respective claims, has allowed the appeal for want of the identification of the twenty employees and for want of authentic documents supporting the claim of the department that the respondent establishment had twenty employees working under them. I find no infirmity in the order passed by the Tribunal. The writ petition is dismissed.” [Emphasis supplied] Again, in the case of Shiva Agro Industries Private Limited Vrs. Employees Provident Fund Organization, reported in 2012



(1) PLJR 491, this court has observed as follows:-

“..... In view of the complete absence of details of the workmen said to be working in the establishment of the petitioner, the order cannot be sustained simply on the basis of the numerical strength shown in the enquiry report.....” [Emphasis supplied] In M/s. Roxy

Cinema Vs. the State of Bihar and another, reported in 2013 (2) PLJR 931, this Court has observed as follows:-

“..... In absence of the identified workmen or employees, who are entitled to such benefit, a liability cannot be saddled upon an establishment in the name of compliance or enforcement of law. No collection can be made by the provident fund authorities for faceless, nameless or non-identifiable workmen on mere head count or herd count. The court is reinforced in this opinion by having a look at the statement of objects and reasons”

[Emphasis supplied]

39. Since the matter has remained pending for long and also the fact that the Hon'ble Apex Court desires expeditious disposal, therefore, the respondent authorities are directed to conclude the enquiry under Section 7A of 'the EPF & MP Act' on priority basis”.

9. Aggrieved by the aforesaid judgment and order dated 20.05.2016 delivered in CWJC No.9402 of 2011, the petitioner filed a Letters Patent Appeal No. 1282 of 2016 on 20.06.2016, which is still pending adjudication. In the said appeal the petitioner has challenged the judgment and order dated 20.05.2016 passed in writ on the



following

GROUND:

- i.* For that, in the judgment impugned, though the yeomen services rendered by the appellant has been appreciated and acknowledged yet the crucial aspect that the amelioration of the scavengers from the scourge of untouchability could not have been achieved without a movement with indefatigable spirit and ingrained ideals and certainly not by the instrumentality of factory, establishment or industry.
- ii.* For that the learned Single Judge though is very correct in holding that the authority in exercise of power u/s 7A of the Act, at the first instance, is supposed to examine whether a notification in exercise of section 1(3)(b) of the Act exist specifying the applicability of the Act on establishment like the appellant but the learned Single Judge completely erred in further directing that the authority would then examine the fact that the volunteers rendering service do qualify as employees.

It is submitted that the directions by the learned Single Judge subsequent to ascertaining about the fact qua the existence of the notification u/s 1(3) (b) of the Act specifying the applicability of the Act on establishment like the appellant, is not tenable nor is in consonance with the scheme, purpose and



objective of the Act much less the scope of examination of the issue adumbrated above.

- iii.* For that the judgment suffers from the error that the scope of the Act in true perspective has not been interpreted.

It is submitted that once the authority come to a finding that there exists a notification u/s 1(3)(b) of the Act specifying the applicability of the Act to the establishment like the appellant, the mandate only extends to examining the strength of employees and only on coming to a finding that it employs 20 or more persons, the authorities are competent to apply the provisions of the Act to the organization but the mandate does not extend to examination and scrutiny of the records of the establishment for the purpose of adjudicating upon the existence of employees in the establishment and/or existence of 'employer-employee' relationship.

- iv.* For that the judgment impugned herein suffers from the cardinal error that the learned Single Judge did not set aside the notice, dated 14.02.2011 and the subsequent orders dated 18.04.2011 and 16.05.2011, yet directed the authorities to examine the entire issue on the touchstone of Section 7 (1) (a) of the Act.

It is submitted that the notice, dated 14.02.2011, in no



unmistakable terms, being a demand and thus, quite obviously, the applicability of the Act, precursor to it, was presumed by the authorities not in dispute, therefore, the learned Single Judge ought to have set aside the notice and the orders impugned in the writ petition. The fall out of the order impugned herein, in the wake of what has been stated above, may lead to conflicting decisions.

- v. For that, in the judgment impugned, omission not to say discussion about the proceeding initiated earlier by the authorities and the same having attained finality is writ apparent as is evident from the letter, dated 18.07.2000 by which the decision of the competent authority that the issue regarding applicability of the Act has been, on verification, located to be not applicable to the appellant. It is submitted that the issue regarding applicability once having attained finality and, neither it being the case of the respondent that the said decision has been set aside, the it ought to have been held that the notice impugned in the writ petition was incompetent as the issue regarding applicability of the Act cannot be an exercise perennial in nature.

The appellant craves leave to urge any other grounds, as may deem necessary and fit and proper.



10. It is pertinent to note that the Division Bench of this Court while hearing the LPA No.1282 of 2016, on 29.09.2016 passed the following order, the same is quoted herein below for needful:

“29.09.2016 - Learned Counsel for the appellant seeks sometime to seek review of the order impugned in the present appeal. List on 22.12.2016. However, adjournment of the matter will not be taken as any expression or opinion on the merits of the appeal or review.”

The aforesaid order has been perceived by the review petitioner as having granted liberty to the petitioner to file this Civil Review Application.

11. It is in the aforesaid backdrop that the present Civil Review Application has been filed on 26.10.2016 by the review petitioner under Section 114 read with Order XLVII, Rule 1 of the Code of Civil Procedure raising several issues for recall of the judgment and order dated 20.05.2016 passed in CWJC No.9402 of 2011 on the following specific grounds contained in para 22 of the Civil Review petition:

GROUND:

- (i). For that the impugned order is not in accordance with law.
- (ii). For that the word ‘establishment’ as used in the EPF Act can be found in the respective Shops & Establishments Act in each



individual State.

- iii). For that the provisions of the EPF Act are not applicable on the petitioner organization.
- iv). For that, if, quasi judicial body had made up its mind with respect to the final outcome of the 'Show cause notice' it would be a futile exercise to force an organization or a person to undergo the rigor of such an enquiry proceeding.
- (v). For that irreparable injury would be caused to the petitioner if the order under review is not recalled.

In course of hearing, the review petitioner submits that EP & MP Act would not apply to the petitioner since it has been specifically kept outside the purview of Bihar Shops and Establishments Act. Besides this, not only whether the Sulabh is an industry has been referred to the larger bench of 7 Judges of Hon'ble Supreme Court but the entire issue including establishment is also pending

Along with Civil Review Application the petitioner has also filed an application under Section 5 of the Limitation Act, 1963 for condoning the delay in filing the Review Application contending that the Division Bench while hearing the LPA 1282 of 2016 has allowed the petitioner by order, dated 29.09.2016 to approach this court and seek a review of the order, dated 20.05.2016, consequent upon which the petitioner has filed this Review Application on 26.10.2016 i.e.



within 30 days of the order, dated 29.09.2016.

12. Responding to the Civil Review Petition, a Counter affidavit has been filed by the respondents, wherein while replying to the issues raised in the Civil Review Petition, the respondents have particularly challenged the maintainability of the Civil Review Petition stating that in view of Section 114(a) read with Order XLVII, Rule 1(a) of the Code of Civil Procedure, the Civil Review Petition is not maintainable. It has been stated that in light of the undisputed fact that the Review Petitioner has already challenged the judgment and order dated 20.05.2016 passed in CWJC No.9402 of 2011 by filing an intra court appeal bearing LPA No.1282 of 2016 on 20.06.2016, which is still pending adjudication and since on the date 26.10.2016 when the Civil Review has been filed, the intra court appeal was/is still pending, therefore, the Civil Review application is not maintainable and fit to be rejected. It was contended that no liberty was granted by the Court to file a review.

13. Both the sides have advanced arguments on the issue of maintainability of present Civil Review Application. Since the issue of maintainability is striking at the very root of the present case, it is of utmost importance and therefore in my view it needs to be answered at the outset before proceeding to the merit of the other issues, if the need survives.



14. The review petitioner has made submissions that the objection raised by the respondents as to the maintainability of the instant application is misconceived. It has been contended by the petitioner that the respondents have conveniently omitted to mention that the appeal preferred by the petitioner herein was not an appeal under the code as specifically stated in the language of Section 114(a). The petitioner further contends that Section 141 of the Code of Civil Procedure specifically excludes proceedings emanating from exercise of the jurisdiction under Article 226 of the Constitution from the purview of the Code of Civil Procedure. The power of the High Courts to recall and/or review and/or modify their orders is well known. Reliance in this regard has been placed on the judgments of the Hon'ble Supreme Court in the cases of *S Nagraj vs. State of Karnataka* reported in **1993 (4) Suppl. SCC 595** and *Shivdev Singh vs. State of Punjab* reported in **AIR 1963 (SC) 36** and *BCCI vs. Netaji Cricket Club and others* reported in **2005 (4) SCC 741**. It has been further contended that the principles and procedures applicable to a suit are not applicable to writ proceedings. Reliance in this regard has been placed on the judgment of *Babubhai Muljibhai Patel vs. State of Punjab* reported in **1996 (2) SCC 205** (relevant portion 211).

15. The respondents have argued that against the very same judgment and order, dated 20.05.2016 passed in CWJC No.9402 of



2011 the petitioner has filed a Letters Patent Appeal on 20.06.2016 bearing LPA No.1282 of 2016 which is still pending adjudication before the Appellate Court and during the pendency of the said appeal the petitioner could not have filed the instant Review Application on 26.10.2016 against the same order which is under challenge in the appeal. Thus, in view of the pendency of appeal at the time of filing of Review Application, the same is not maintainable in terms of Order XLVII Rule 1(a) of the Code of Civil Procedure. Reliance in this regard has been placed on a judgment of three Judges Bench of the Hon'ble Supreme Court in the case of *Kunhayammed and others vs. The State of Kerala and Another* reported in **2000 (6) SCC 359**. The respondents contended that the Hon'ble Supreme Court has discussed Order XLVII Rule 1(a) of the Code of Civil Procedure in para 35 of the judgment and in para 36 the judgment of the Hon'ble Supreme Court in the case of *Thungabhadra Industries Limited vs. The Government of A.P.* has been discussed wherein it has been held as follows:

“This court held that the crucial date for determining whether or not, the terms of Order XLVII Rule 1(a) of the Code of Civil Procedure are satisfied is the date when the application for review is filed. If on that date, no appeal has been filed, it is competent for the court hearing the petition for review to dispose of the



application on merits.....”.

The respondents further contended that in para 44 of the aforesaid judgment in the case of *Kunhayammed and others* (Supra) it has been conclusively held as follows:

“On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court, the jurisdiction of the High Court to entertain a review petition is lost thereafter as provided by sub-Rule (1) of Rule 1 of Order XLVII CPC”.

The respondents further contended that appeal before the Division Bench against the order of the Single Judge is also made under constitutional scheme inasmuch as an order passed under Article 226 of the Constitution by the Single Judge can be set aside, modified or affirmed by the Division Bench. While adjudicating the Letters Patent Appeal, the High Court exercises writ jurisdiction. Reliance in this regard has been placed on the case of *Satsang vs. Union of India & Ors.* reported in **2004 (2) LLJ 741 (PAT)**. This issue, as per the respondents has again been considered by the Hon’ble Supreme Court in the case of *Meghmala and others vs. G Narasimha Reddy and others* reported in **2010(8) SCC 383**, wherein in para 19 the Hon’ble Supreme Court observed as follows:

“In Kabari (P) Ltd. vs. Shivnath Shroff (1996) 1



SCC 690 this court had taken a view that the court cannot entertain an application for review if before making the review application, the superior court had been moved for getting the self same relief, for the reason that for the self same relief two parallel proceedings before the two Forums cannot be taken”.

16. The respondents further contended that in number of other cases, the Hon’ble Supreme Court has held that the exercise of review jurisdiction of the High Court is to be made under the spirit of Order XLVII Rule 1 of the Code of Civil Procedure and Section 114 of the Code of Civil Procedure. Reliance in this regard has been placed on the cases of *Aribam Tuleshwar Sharma vs. Aribam Pishak Sharma and others* reported in **1979 (4) SCC 389**, *Meerabhanja vs. Nirmala Kumari Choudhary* reported in **1995 (1) SCC 170**, *Board of Control for Cricket in India and Another vs. Netaji Cricket Club and others* reported in **2005 (4) SCC 741**, *Haridas vs. Usha Rani Banik and others* reported in **2006 (4) SCC 78**, *Inderchand Jain (dead) through LRS vs. Motilal (dead) through LRS* reported in **2009 (14) SCC 663**.

17. The respondents, therefore, argued that on the basis of the aforesaid judgments, it can be concluded that power of review by the High Court is to be exercised under the parameters of Order XLVII Rule 1 of the Code of Civil Procedure and the first precondition of maintainability of a review under Order XLVII Rule 1 is that it can be



filed against an order from which an appeal is allowed but from which no appeal has been preferred. Reiterated again that since the instant Review Application has been filed on 26.10.2016 after the petitioner had already filed the appeal on 20.06.2016 which is still pending adjudication, therefore, the Civil Review Application is not maintainable.

18. The counter argument advanced by the Review petitioner that the objection raised by the respondents is misconceived and misplaced for the reason that Section 114 (a) read with Order XLVII, Rule 1(a) of the Code of Civil Procedure does not apply to the review proceedings arising out of judgment passed by the High Court in writ jurisdiction particularly in view of the language of Section 141 of the Code of Civil Procedure, appears to be very strange because the instant review petition itself has been filed under Order XLVII, Rule 1 of the Code of Civil Procedure. This argument is therefore not available to the Review petitioner. If Order XLVII, Rule 1 of the Code of Civil Procedure is applied strictly to the present review petition then the same would manifestly not be maintainable on account of the restriction placed by Clause (a) of Sub-Rule (1) of Rule 1 of Order XLVII which reads as under:

*“1. Application for review of judgment. - (1) Any person considering himself aggrieved,—
(a) by a decree or order from which an appeal is*



allowed, but from which no appeal has been preferred,

(b) xxx

(C) xxx,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2).xxx”

19. Admittedly, in the present case prior to filing the review petition on 26.10.2016, the review petitioner has already filed Letters Patent Appeal on 20.06.2016 which is still pending and therefore in view of the aforesaid limitation prescribed by Order XLVII Rule 1 (1) (a) the instant review petition is not maintainable and fit to be rejected on this count alone. However, since both the parties have advanced elaborate arguments on the issue of maintainability, therefore, instead of rejecting the review petition on the aforesaid count, I propose to decide the objection threadbare.

20. In view of the amendment in Section 141 of the Code of Civil Procedure by which ‘*Explanation*’ was inserted with effect from 01.02.1977, there appears to be substance in the argument of the



petitioner that Order XLVII, Rule 1 of the Code of Civil Procedure would not strictly apply to writ proceedings. Reliance in this regard has been placed on the case of *Puran Singh vs. State of Punjab* reported in **1996 (2) SCC 205** wherein in para 5, 6 and 7 the following has been observed:

"5. The question with which we are concerned is as to whether the aforesaid provisions made under Order 22 of the code are applicable to proceedings under Articles 226 and 227 of the constitution. Prior to the introduction of an explanation by Civil Procedure code (Amendment) Act 1976, Section 141 of the Code was as follows:

"141. Miscellaneous proceedings - The procedure provided in this 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."

The explanation which was added by the aforesaid Amending Act said:

"Explanation - In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution."

There was controversy between different courts as to whether the different provisions of the Code shall be applicable even to writ proceedings under Articles 226 and 227 of the Constitution. Some High Courts held that writ proceedings before the High Court shall be deemed



to be proceedings "in any court of civil jurisdiction" within the meaning of Section 141 of the Code. (Ibrahimbhai Karimbhai v. State of Gujarat; Asstt. Distt. Panchayat Officer v. Jai Narain Pradhan; Krishanlal Sadhu v. State of W.B.; Sona Ram Ranga Ram v. Central Government; Annam Adinarayana v. State of A.P.). However, in another set of cases, it was held that writ proceeding being a proceeding of a special nature and not one being in a court of civil jurisdiction Section 141 of the Code was not applicable. (Bhagwan Singh v. Addl. Director of Consolidation; Chandmal Naurat Mal v. State of Rajasthan; Khurjawala Buckles Mfg.Co. v. CST; Ramchand Nihalchand Advani v. Anandlal Bapalal Kothari; Bharat Board Mills Ltd. v. R.P.F. Commr)”.

“6. Even before the introduction of the explanation to Section 141 of the Code, this Court had occasion to examine the scope of the said Section in the case of Babubhai Muljibhai Patel v. Nandlal Khodidas Barot. It was said: (SCC p. 715, Para 10)

"It is not necessary for this case to express an opinion on the point as to whether the various provisions of the Code of Civil Procedure apply to petitions under Article 226 of the Constitution. Section 141 of the Code, to which reference has been made, makes it clear that the provisions of the Code in regard to suits shall be followed in all proceedings in any court of civil jurisdiction as far as it can be made applicable. The words "as far as it can be made applicable" make it clear that, in applying the various provisions of the Code to



proceedings other than those of a suit, the court must take into account the nature of those proceedings and the relief sought. The object of Article 226 is to provide a quick and inexpensive remedy to aggrieved parties. Power has consequently been vested in the High Court to issue to any person or authority, including in appropriate cases any government, within the jurisdiction of the High Court, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari. It is plain that if the procedure of a suit had also to be adhered to in the case of writ petition, the entire purpose of having a quick and inexpensive remedy would be defeated. A writ petition under Article 226, it needs to be emphasized, is essentially different from a suit and it would be incorrect to assimilate and incorporate the procedure of a suit into the proceedings of a petition under Article 226."

It can be said that in the judgment aforesaid, this Court expressed the view that merely on basis of Section 141 of the code it was not necessary to adhere to the procedure of a quit in writ petitions, because in many cases the sole object of writ jurisdiction to provide quick and inexpensive remedy to the person who invokes which jurisdiction is likely to be defeated. A Constitution Bench of this Court in the case of State of U.P. vs. Dr. Vijay Anand Maharaj said as follows:-

"It is, therefore, clear from the nature of the power conferred under Art.226 of the Constitution and the decisions on the subject that the High Court in exercise



of its power under Art.226 of the Constitution exercises original jurisdiction, though the said jurisdiction shall not be confused with the ordinary civil jurisdiction of the High Court. This jurisdiction, though original in character as contrasted with its appellate and revisional jurisdictions, is exercisable throughout the territories in relation to which it exercises jurisdiction and may, for convenience, be described as extraordinary original jurisdiction."

"7. 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 Article 226 of the Constitution" and statutorily recognized 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 had said that (SCC Headnote p. 707) 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".

21. But then ***can it be said that even if the provisions of Order XLVII Rule 1 of the Code of Civil Procedure may not be applicable***



stricto sensu to writ proceedings, the underlying principles governing the application of Order XLVII, Rule 1 pertaining to maintainability of Review application and the scope of exercise of power would have to be completely ignored by the High Court while exercising power of review under its plenary jurisdiction?

22. The question whether an order passed under Article 226 of the Constitution could be reviewed came to be considered in the case of *Shivdev Singh vs. State of Punjab* reported in **AIR 1963 (SC) 1909**, which was decided on 8th February, 1961. The Supreme Court held, while rejecting the submission that the High Court has not such power to review its judgment passed under Article 226 of the Constitution, by observing “there is nothing in under Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it.” Shivdev Singh’s case (supra) was noticed in the case of *Aribam Tuleshwar Sharma vs. Aribam Pishak Sharma* reported in **AIR 1979 (SC) 1047**. In that case the High Court reviewed an order under Article 226 of the Constitution of India in exercise of power conferred under Order XLVII Rule 1 and Section 151 of the Code of Civil Procedure. Although, the order of review was passed prior to incorporation of Section 141 in the Code of Civil Procedure, the



Supreme Court held that the grounds, on the basis of which the review was sought, are not permissible, since plenary jurisdiction relates to preventing miscarriage of justice and to correct grave and palpable errors committed by the court. Thus, holding that even the High Court while exercising the power under its plenary jurisdiction has its own limits.

23. Subsequently, in the case of *Kunhayammed and others* (supra) the Supreme Court in para 36 and 44 held as follows:

“36. For our purpose it is clause (a) sub-rule (1) which is relevant. It contemplates a situation where an appeal is allowed but no appeal has been preferred. The Rule came up for consideration of this Court in Thungabhadra Industries Ltd. Vs. The Govt. of A.P. (AIR 1964 SC 1372) in the context of Article 136 of the Constitution of India. The applicant had filed an application for review of the order of the High Court refusing to grant a certificate under Article 133 of the Constitution. The applicant also filed an application for special leave to appeal in respect of the same matter under Article 136 along with an application for condonation of delay. The Supreme Court refused to condone the delay and rejected the application under Article 136. When the application for review came up for consideration before the High Court, it was dismissed on the ground that the special leave petition had been dismissed by the Supreme Court. This Court held that the crucial date for determining whether or not the terms of Order 47 Rule 1(1) CPC are satisfied is the



date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the Court hearing the review petition would come to an end. On the date when the application for review was filed the applicant had not filed an appeal to this Court and therefore there was no bar to the petition for review being entertained”.

“44. To sum up, our conclusions are:-

- (i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.
- (ii) ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into



an appeal.

- (iii) *Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.*
- (iv) *An order refusing special leave to appeal may be a non- speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.*
- (v) *If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly,*



the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) *Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.*

(vii) *On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C.”*

[emphasis supplied]

24. The important aspect that emerges from the aforesaid



decision of the Supreme Court is that the Supreme Court has resorted to and applied the principle emanating from Sub-Rule (1) of Rule 1 of Order XLVII of the Code of Civil Procedure for explaining the jurisdiction of the High Court to entertain a review petition by holding that on an appeal having been preferred the jurisdiction of High Court to entertain a review petition is lost. This judgment therefore answers the question that although Order XLVII Rule 1 may not be applying *stricto sensu* to writ proceedings but the important underlying principles governing the application of Order XLVII Rule 1 with regard to maintainability and scope of power to be exercised must be followed and read into the power of the High Court while dealing with review petitions under its plenary jurisdiction. In other words, it cannot be argued that since Order XLVII Rule 1 of the Code of Civil Procedure does not apply to writ proceedings *stricto sensu* therefore the High Court while exercising the power of review under its plenary jurisdiction can exercise unbridled power without any limitation and de hors the underlying principles governing the application of Order XLVII Rule 1 particularly in matters relating to maintainability of review petition and scope of power to be exercised.

25. Article 137 of the Constitution of India which empowers the Hon'ble Supreme Court to review any judgment pronounced or order made by it although does not prescribe any limitation on the power of



review by the Supreme Court but even the Supreme Court does not exercise limitless and unbridled power while dealing with the review petitions and recognizes the limits to exercise of such power which flows from the principles governing the application of Order XLVII Rule 1 of the Code of Civil Procedure.

26. The decisions relied upon by the respondents although may be arising out of suit or proceeding under the Code but the principles laid down by those judgments are all emanating from Order XLVII Rule 1 and as such those principles cannot be ignored by the High Court while exercising its plenary jurisdiction in dealing with review petitions. The underlying principles in those judgments cannot be brushed aside by simply contending that they are not in the context of High Court's power of review in writ jurisdiction.

27. I am therefore of the considered view that although Order XLVII Rule 1 may not be strictly applicable to review proceedings arising out of exercise of power under Article 226 but the underlying principles of Order XLVII Rule 1 with regard to maintainability and the scope of power have to be adhered to and read into the plenary jurisdiction of the High Court while entertaining and deciding Review petitions. It, therefore, follows that since before the date of filing the present Review application, the review petitioner has already filed an intra court appeal bearing LPA No.1282 of 2016, therefore, the



present Review petition is not maintainable.

28. The respondents have also contended that in the present Review petition the issues raised and the grounds for challenge by the review petitioner postulates a rehearing of the case which is not permissible in a review proceeding. It is relevant to take note of the fact that the very first ground taken by the review petitioner is that the impugned judgment is not in accordance with law and the review petitioner in para 8 of its petition has stated that the impugned order came to be passed in a situation wherein the petitioner had not placed all the necessary legal and factual details before this Court and that the said omission was an act of oversight, neither intentional nor deliberate on part of the petitioner. I am afraid on such grounds and reasons the review petition cannot be entertained and the relief being sought cannot be granted in review jurisdiction as the same will amount to rehearing the entire case and deciding the legality of the judgement and order dated 20.05.2016 passed in CWJC No.9402 of 2011. The review petitioner has also failed to give any cogent reason as to why it could not raise the issues at the time of hearing of the writ petition which it is seeking to agitate in the review proceeding although they were available to it at that point of time.

29. It is also relevant to point out that in the order dated 29.09.2016 passed in LPA No.1282 of 2016 the Division bench has



not granted any liberty to the Review petitioner to file the present Review petition during the pendency of the appeal. Such a perception on part of the Review petitioner is wholly misconceived. Having given this as the main reason for condonation of delay, the petition seeking condonation may not stand on a sound, nonetheless in ends of justice the delay in filing the review is condoned for addressing the issue raised in this review petition.

30. Having held that the present Review petition is not maintainable, no need survives to answer the issues on merit raised by the Review petitioner.

31. In view of the aforesaid facts and circumstances I am not inclined to entertain the present review petition as the same is not maintainable. The Review petition is accordingly dismissed.

(Samarendra Pratap Singh, J.)

Md.Jamaluddin Khan

AFR/NAFR	AFR
CAV DATE	17.03.2017
Uploading Date	18.05.2017
Transmission Date	18.05.2017

