

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Appeal No.69 of 2017

Order reserved on: 8-3-2017

Order delivered on: 18-4-2017

Brijesh Chandrapal Singh, S/o Shri Sheo Kabilas Singh, aged about 53 years, Deputy Collector, Surguja, R/o Surguja, Tahsil and District Surguja (C.G.) at present R/o Village and Post Pasan, Tahsil Pondi-Uproda, District Korba (C.G.)

(Applicant)
---- Appellant

Versus

1. State of Madhya Pradesh, Through Principal Secretary, General Administrative Department, Government of Madhya Pradesh, Mantralaya, Bhopal (M.P.) (now Chhattisgarh), Mahanadi Bhawan, Mantralaya, Naya Raipur (C.G.)
2. Shri N.R. Tonder, Deputy Collector, Jabalpur (M.P.) (Now retired)
---- Respondents

For Appellant: Mr. Anukul Biswas, Advocate.

For State/Respondent No.1: -

Mr. Y.S. Thakur, Additional Advocate General.

Hon'ble Shri Justice Pritinker Diwaker and
Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

Sanjay K. Agrawal, J

1. The appellant's substantive Writ Petition (original application) No.3316/2005 was dismissed for want of prosecution on 24-9-2009 and his application for restoration was dismissed by the impugned order holding the application to be barred by limitation. Feeling unhappy and disagreed with the order impugned, the appellant herein has filed this writ appeal.

2. Mr. Anukul Biswas, learned counsel appearing for the appellant, would submit that the learned Single Judge committed an illegality in rejecting the application for restoration holding the same to be barred by limitation. He would further submit that the name of the appellant's counsel was not correctly shown in the cause list, therefore, the appellant could not notice the listing of case, and as such, the writ petition came to be dismissed and the learned Single Judge committed an illegality in rejecting the application for condonation of delay and further rejecting the application for restoration of writ petition.
3. On being asked whether the writ appeal is maintainable, learned counsel for the appellant would submit that the writ appeal is maintainable under Section 2(1) of the Chhattisgarh High Court (Appeal to Division Bench) Act, 2006, as order rejecting restoration application is an order within the meaning of Section 2 (1) of the Act of 2006.
4. We have heard learned counsel for the parties and considered their rival submissions made herein-above and also gone through the record with utmost circumspection.
5. The appellant's substantive writ petition was dismissed by the writ court on 24-9-2009 for want of prosecution and that order has not been challenged further and as such, it has become final. Thereafter, the petitioner filed application for restoration (registered as Miscellaneous Civil Case) which has been dismissed by the learned Single Judge by the impugned order finding no sufficient

cause for restoring the writ petition dismissed for want of prosecution.

6. At this stage, it would be appropriate to notice and consider the inherent power of this Court to review its order under Article 226 of the Constitution of India. The Constitution Bench judgment of the Supreme Court in the matter of **Shivdeo Singh and others v. State of Punjab and others**¹ has clearly held that there is nothing in 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. Paragraph 8 of the report states as under:-

“8. ... Learned counsel contends that Art. 226 of the Constitution does not confer any power on the High Court to review its own order and, therefore, the second order of *Khosla, J.*, was without jurisdiction. It is sufficient to say that there is nothing in Art. 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. Here the previous order of *Khosla, J.*, affected the interests of persons who were not made parties to the proceeding before him. It was at their instance and for giving them a hearing that *Khosla, J.* entertained the second petition. In doing so, he merely did what the principles of natural justice required him to do. It is said that the respondents before us had no right to apply for review because they were not parties to the previous proceedings. As we have already pointed out, it is precisely because they were not made parties to the previous proceedings, though their interests were sought to be affected by the decision of the High Court, that the second application was entertained by *Khosla, J.*”

7. In the matter of **Najmuddin and other v. Union of India and**

1 AIR 1963 SC 1909

others² Their Lordships of the Supreme Court have clearly held that when a writ petition dismissed for default, indisputably, the High Court may restore the same in exercise of jurisdiction under Article 226 of the Constitution of India itself and/or in exercise of inherent power.

8. Thus, from the aforesaid judgments of the Supreme Court it is quite *vivid* that writ petition dismissed for default, writ court can in exercise of jurisdiction under Article 226 of the Constitution of India and / or in exercise of inherent power can restore it and has also power of review to correct grave and palpable errors to prevent miscarriage of justice.

9. The question for consideration would be whether, the order rejecting restoration would be appealable under Section 2(1) of the Act of 2006 without challenging the order dismissing the writ petition for non-prosecution.

10. The Supreme Court in the matter of **State of Assam v. Ripa Sarma**³ has held that order rejecting review petition cannot be challenged in special leave petition without challenging main judgment. Paragraph 6 of the report states as under:

“6. In view of the above, the law seems to be well settled that in the absence of a challenge to the main judgment, the special leave petition filed challenging only the subsequent order rejecting the review petition, would not be maintainable.”

11. In the matter of **Bussa Overseas and Properties Private Limited**

2 (2009) 2 SCC 720

3 AIR 2013 SC 3588

and another v. Union of India and other⁴, the Supreme Court has held that when the prayer for review is dismissed, there is no merger. If the order passed in review recalls the main order and a different order is passed, there is no need to challenge the main order and observed in paragraph 29 as under:-

“29. Needless to state that when the prayer for review is dismissed, there can be no merger. If the order passed in review recalls the main order and a different order is passed, definitely the main order does not exist. In that event, there is no need to challenge the main order, for it is the order in review that affects the aggrieved party.”

12. Following the decision of the Supreme Court in **Sheodev Singh** (supra) and **Najmuddin** (supra), it is held that writ court has power and jurisdiction to restore the writ petition in exercise of its jurisdiction under Article 226 of the Constitution of India and/or in exercise of inherent power and when the application for restoration is dismissed there can be no merger of order rejecting restoration petition with the original order with that of the order passed by the writ court and therefore, the writ petitioner whose application for restoration has been dismissed, is required to challenge the order dismissing the writ petition for default as well as the order rejecting application for restoring the writ petition to maintain the writ appeal. Following the principle of law laid down and drawing an analogy from the decision of the Supreme Court from **Ripa Sarma** (supra) and **Bussa Overseas** (supra), since, the order rejecting restoration of the writ petition has not merged into the order dismissing the writ petition for default, therefore, unless the order dismissing the writ

4 (2016) 4 SCC 696

petition for default is challenged, the writ appeal only challenging the order rejecting restoration of writ petition would not be maintainable as the writ jurisdiction has been exercised by the writ court under Article 226 of the Constitution of India while dismissing the writ petition and writ appeal under Section 2(1) of the Chhattisgarh High Court (Appeal to Division Bench) Act, 2006 lies only from judgment or order passed by the writ court in exercise of original jurisdiction under Article 226 of the Constitution of India, and no writ appeal lies against the order passed in restoration petition as the writ petitioner who seeks restoration of writ petition only invokes the review / inherent jurisdiction of the writ court to recall its order showing sufficient cause for restoration of writ petition and against that order, no writ appeal lies under Section 2 (1) of the Act of 2006.

13. As a fallout and consequence of the aforesaid discussion, we accordingly hold that writ appeal as framed and filed only challenging the order rejecting the application for restoration is not maintainable. It is accordingly dismissed as not maintainable.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Sanjay K. Agrawal)
Judge