

(2019) 07 MP CK 0126
In the Madhya Pradesh High Court
Case No : Writ Appeal No. 43 Of 2019

Ashok Lalwani

APPELLANT

Vs

State Bank Of India

RESPONDENT

Date of Decision : 23-07-2019

Acts Referred:

Madhya Pradesh Uchch Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 —
Section 2, 2(1)
Code Of Civil Procedure, 1908 — Section 115
Code Of Civil Procedure (Amendment) Act, 1999 — Section 46
Constitution Of India, 1950 — Article 226, 227

Citation : (2019) 07 MP CK 0126

Hon'ble Judges : R.S. Jha, J;Vijay Kumar Shukla, J

Bench : Division Bench

Advocate : Sanjay Agrawal

Final Decision : Dismissed

Judgement

1. The present intra-court appeal is filed under Section 2(1) of the Madhya Pradesh Uchch Nyayalaya (Khand Nyaypeeth ko Appeal) Adhiniyam 2005 [hereinafter referred to as the Adhiniyam 2005'] challenging the order dated 6-12-2018 passed by the learned Single Judge in Review Petition No.1596/2018, whereby he has allowed an application preferred by the respondent-Bank for condonation of delay and also recorded the undertaking given on behalf of the present appellant to the effect that the amount so deposited by the respondent-Bank before the executing Court under the head of decretal amount, shall not be disbursed till the next date of hearing.

2. The learned counsel for the respondent has raised a preliminary objection regarding maintainability of the present appeal on the ground that the writ appeal is not maintainable as the review petition has been filed against the order dated 9-8-2018 passed by the Single Bench in M.P. No.1873/2017. In the said petition a challenge was made to the order dated 15-5-2017 passed by the first Appellate Court thereby dismissing the application preferred by the petitioner for

vacating an ex parte order. The said petition filed under Article 227 of the Constitution of India by the present appellant was allowed and the impugned order dated 15-5-2017 was set aside and as a consequence whereof, the application filed by the present appellant for vacating of the interim order was allowed. The appellant was also permitted to withdraw the amount deposited by the respondent-Bank subject to furnishing surety prior to withdrawal of the amount.

3. Thus, apparently the present review petition has arisen out of an order passed in writ jurisdiction under Article 227 of the Constitution of India, wherein a challenge was made to the order passed by the first appellate Court in the appeal. The learned counsel for the respondent assiduously urged that by the impugned order the learned Single Bench has allowed the application for condonation of delay considering the grounds mentioned therein. The undertaking given by the learned counsel on behalf of the present appellant, was recorded by the Court and the same has been continued as per the statement made in that behalf. It is further submitted that the review petition is still pending adjudication before the learned Single Bench.

4. The appellant strenuously urged that the order impugned whereby the learned Single Judge has allowed the application for condonation of delay in review petition shall be deemed to be an order passed under Article 226 of the Constitution of India. He submitted that since there is no specific provision in filing a review petition against an order passed in the writ petition, therefore, the said order shall be treated to be an order passed in the writ jurisdiction under Article 226 of the Constitution of India. To bolster his submission he has placed reliance on the judgment passed by the Apex Court in *Shivdeo Singh and others vs. State of Punjab and others*, AIR 1963 SC 1909. In the case of *Shivdeo Singh (supra)*, the said case, the Apex Court has allowed a writ petition for cancellation of an order of allotment passed in favour of a person, who was not a party to the writ proceedings. Subsequently, he filed a petition under Article 226 of the Constitution of India for impleading him as a party in the writ petition and for re-hearing the whole matter. The High Court allowed the writ petition and held that the second writ petition filed by the said person was maintainable and the High Court had not acted without jurisdiction in reviewing its previous order at the instance of the said person who was not a party to the previous writ proceedings. Further, 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. In view of the aforesaid exposition of facts and law, the principle laid down in the said case would not render any assistance to the case of the present appellant.

5. Regard being had to the arguments advanced on behalf of the parties, we do not find any merit in the present appeal. It is not in dispute that the appellant had filed a writ petition under Article 227 of the Constitution of India challenging

the order dated 15-5-2017 passed by the first appellate Court dismissing his application for vacating an ex parte order, which was allowed. Against the said order the respondent-Bank has preferred a review petition forming the subject-matter of R.P. No.1596/2018 along with an application for condonation of delay, which has been allowed by the order impugned in the present appeal.

6. The present intra-court appeal is preferred under Section 2(1) of the Adhiniyam 2005 and the provision engrafted under Section 2 of the Adhiniyam, being relevant for the present purpose, is extracted hereunder:

"2. Appeal to the Division Bench of the High Court from a Judgement or order of one Judge of the High Court made in exercise of original jurisdiction. - (1) An appeal shall lie from a Judgement or order passed by one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India, to a Division Bench comprising of two judges of the same High Court;

Provided that no such appeal shall lie against an interlocutory order or against an order passed in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

(2) An appeal under sub-section (1) shall be filed within 45 days from the date of order passed by a single Judge:

Provided that any appeal may be admitted after the prescribed period of 45 days, if the petitioner satisfies the Division Bench that he had sufficient cause for not preferring the appeal within such period."

7. In the case of Surya Dev Rai Vs. Ram Chander Rai and others reported as (2003) 6 SCC 675, the Supreme Court delineated the difference of jurisdiction under Article 226 and 227 of the Constitution of India. The scope of writ of certiorari was summarized as under:-

"10. Article 226 of the Constitution of India preserves to the High Court the power to issue writ of certiorari amongst others. The principles on which the writ of certiorari is issued are well- settled. It would suffice for our purpose to quote from the 7- Judge Bench decision of this Court in Hari Vishnu Kamath Vs. Ahmad Ishaque and Ors. - (1955) 1 SCR 1104. The four propositions laid down therein were summarized by the Constitution Bench in Custodian of Evacuee Property Bangalore Vs. Khan Saheb Abdul Shukoor etc. - (1961) 3 SCR 855 as under :-

".....the High Court was not justified in looking into the order of December 2, 1952, as an appellate court, though it would be justified in scrutinizing that order as if it was brought before it under Article 226 of the Constitution for issue of a writ of certiorari. The limit of the jurisdiction of the High Court in issuing writs of certiorari was considered by this Court in Hari Vishnu Kamath Vs. Ahmad Ishaque 1955-I S 1104 : (s) AIR 1955 SC 233) and the following four propositions were laid down :-

"(1) Certiorari will be issued for correcting errors of jurisdiction;

(2) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice;

(3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous.

(4) An error in the decision or determination itself may also be amenable to a writ of certiorari if it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision."

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12. In the exercise of certiorari jurisdiction the High Court proceeds on an assumption that a Court which has jurisdiction over a subject-matter has the jurisdiction to decide wrongly as well as rightly. The High Court would not, therefore, for the purpose of certiorari assign to itself the role of an appellate court and step into re-appreciating or evaluating the evidence and substitute its own findings in place of those arrived at by the inferior court.

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20. Authority in abundance is available for the proposition that an error apparent on face of record can be corrected by certiorari. The broad working rule for determining what is a patent error or an error apparent on the face of the record was well set out in *Satyanarayan Laxminarayan Hegde and Ors. Vs. Mallikarjun Bhavanappa Tirumale*, (1960) 1 SCR 890. It was held that the alleged error should be self-evident. An error which needs to be established by lengthy and complicated arguments or an error in a long-drawn process of reasoning on points where there may conceivably be two opinions cannot be called a patent error. In a writ of certiorari the High Court may quash the proceedings of the tribunal, authority or court but may not substitute its own findings or directions in lieu of one given in the proceedings forming the subject-matter of certiorari.

21. Certiorari jurisdiction though available is not to be exercised as a matter of course. The High Court would be justified in refusing the writ of certiorari if no failure of justice has been occasioned. In exercising the certiorari jurisdiction the procedure ordinarily followed by the High Court is to command the inferior court or tribunal to certify its record or proceedings to the High Court for its inspection so as to enable the High Court to determine whether on the face of the record the inferior court has committed any of the preceding errors occasioning failure of justice."

8. The Bench in *Surya Dev Rai* (supra) also observed in para 25 of its judgment that distinction between Articles 226 and 227 stood almost obliterated. In para

24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of Article 226 and 227 was obliterated was not correct as rightly observed by the referring Bench in Para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction under Section 115 CPC by Act 46 of 1999, jurisdiction of the High Court under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions including Waryam Singh and another vs. Amarnath and another - AIR 1954 SC 215, Ouseph Mathai vs. M. Abdul Khadir - (2002) 1 SCC 319, Shalini Shyam Shetty vs. Rajendra Shankar Patil - (2010) 8 SCC 329 and Sameer Suresh Gupta vs. Rahul Kumar Agarwal - (2013) 9 SCC 374.

9. Later another Bench of the Supreme Court in the judgment reported as (2015) 9 SCC 1 - Jogendrasinhji Vijay Singhji Vs. State of Gujarat and others held as under :-

"18. The aforesaid authoritative pronouncement makes it clear as day that an order passed by a civil court can only be assailed under Article 227 of the Constitution of India and the parameters of challenge have been clearly laid down by this Court in series of decisions which have been referred to by a three-Judge Bench in Radhey Shyam (supra), which is a binding precedent. Needless to emphasize that once it is exclusively assailable under Article 227 of the Constitution of India, no intra-court appeal is maintainable.

19. The next aspect that has to be adverted to is under what situation a letters patent appeal is maintainable before a Division Bench. We repeat at the cost of repetition that we have referred to series of judgments of this Court which have drawn the distinction between Articles 226 and 227 of the Constitution of India and the three-Judges Bench in Radhe Shyam (supra) has clearly stated that jurisdiction under Article 227 is distinct from jurisdiction under Article 226 of the Constitution and, therefore, a letters patent appeal or an intra-court appeal in respect of an order passed by the learned Single Judge dealing with an order arising out of a proceeding from a civil court would not lie before the Division Bench. Thus, the question next arises under what circumstances a letters patent appeal or an intra-court appeal would be maintainable before the Division Bench.

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30. From the aforesaid pronouncements, it is graphically clear that maintainability of a letters patent appeal would depend upon the pleadings in the writ petition, the nature and character of the order passed by the learned Single Judge, the type of directions issued regard being had to the jurisdictional perspectives in the constitutional context. Barring the civil court, from which order as held by the three-Judge Bench in Radhey Shyam (supra) that a writ petition can lie only under Article 227 of the Constitution, orders from tribunals cannot always be regarded for all purposes to be under Article 227 of the Constitution. Whether the learned Single Judge has exercised the jurisdiction

under Article 226 or under Article 227 or both, needless to emphasise, would depend upon various aspects that have been emphasized in the aforesaid authorities of this Court. There can be orders passed by the learned Single Judge which can be construed as an order under both the articles in a composite manner, for they can co-exist, coincide and imbricate. We reiterate it would depend upon the nature, contour and character of the order and it will be the obligation of the Division Bench hearing the letters patent appeal to discern and decide whether the order has been passed by the learned Single Judge in exercise of jurisdiction under Article 226 or 227 of the Constitution or both.

The Division Bench would also be required to scrutinize whether the facts of the case justify the assertions made in the petition to invoke the jurisdiction under both the articles and the relief prayed on that foundation. Be it stated, one of the conclusions recorded by the High Court in the impugned judgment pertains to demand and payment of court fees. We do not intend to comment on the same as that would depend upon the rules framed by the High Court."

10. In view of the aforesaid enunciation of law it is luminescent that in para 30 of the judgment rendered in the case of Jogendrasinhji Vijay Singhji (supra) the apex Court has held that maintainability of Letters Patent Appeal would depend upon pleadings in writ petition, nature and character of the order passed by the learned Single Judge, type of directions issued regard being had to the jurisdictional perspectives in the constitutional context. The only exclusive bar was in respect of an order passed by the Judicial Court which could be challenged only under Article 227 of the Constitution of India. The same view has been taken by the Full Bench of this Court in the case of Shailendra Kumar vs. Divisional Forest Officer and another, (2017) 4 MPLJ 109.

11. The present writ appeal arises out of an order passed in the jurisdiction under Article 227 of the Constitution of India by a Judicial Court, is not maintainable.

12. Even on merits, by the impugned order the learned Single Judge has allowed the application for condonation of delay filed in the review petition. The learned Single Judge has considered the application for condonation of delay on merit after hearing both the parties. We do not perceive any illegality in the impugned order passed by the learned Single Judge warranting any interference in the present intra-court appeal.

13. Accordingly, the writ appeal being sans merit is dismissed. There shall be no order as to costs.