

(2022) 11 CAL CK 0032

In the Calcutta High Court

Case No : MAT No. 327, 475 Of 2022, IA No. CAN 1 Of 2022

District Inspector Of Schools (SE) Nadia

APPELLANT

Vs

Buddhiswar Pramanik & Ors.

RESPONDENT

Date of Decision : 10-11-2022

Acts Referred:

Indian Penal Code, 1860 — Section 136, 215, 226
Code Of Civil Procedure, 1908 — Order 41 Rule 1, Order 43 Rule 1
Contempt of Courts Act, 1971 — Section 20

Citation : (2022) 11 CAL CK 0032

Hon'ble Judges : Subrata Talukdar, J; Lapita Banerji, J

Bench : Division Bench

Advocate : Tapan Mukherjee, Rezaul Hossain, Subir Sanyal, Arunava Banerjee, Mamata Dutta, Piush Chaturvedi, Subrata Mukherjee, Supriyo Chattopadhyay, Samaresh Chandra Dhara

Final Decision : Dismissed

Judgement

Lapita Banerji, J

1. This intra court appeal was filed under Clause 15 of the Letters Patent, 1865 challenging an Order dated November 16, 2021, passed by an Hon'ble Single Judge of this Court in CPAN No. 2053 of 2013 arising out of an Order dated December 24, 2010 in WPA No. 25988 of 2010.

2. By the 'Impugned Order' dated November 16, 2021, the Hon'ble Single Judge refused to recall the Order dated December 24, 2010 for the reasons stated therein. The application for recalling being CAN 1 of 2015 was itself filed 5 years after the date of passing of the Order in 2010. The Hon'ble Single Judge disposed of the contempt application being CPAN No. 2053 of 2013 by directing the District Inspector (DI) of Schools (SE), Nadia/appellant to comply with the directions within 4 weeks from the date of the 'Impugned Order'.

3. The issue in the writ petitions was regarding the failure on the part of the DI

to approve of the appointment of the writ petitioners/non-teaching staff, who worked at the school in issue for long despite the Order dated December 24, 2010. Subsequently, the DI in terms of his communication dated January 28, 2018 approved of the petitioners' appointment but even then failed to comply with its own Notification.

4. The present appeal being MAT 475 of 2022 was filed only challenging the Impugned Order dated November 16, 2021 passed in CPAN No. 2053 of 2013 and not against the Order dated December 24, 2010 passed in WPA No. 25988 of 2010.

5. A point of maintainability has been strongly urged by the writ petitioners/respondents as well as the respondent No.8, being the Secretary of the Managing Committee of the school in issue since the parent order dated December 24, 2010 has not been challenged in the appeal. Hence the issue of maintainability is adjudicated as a preliminary issue by this Court.

6. Mr. Tapan Mukherjee, Learned Counsel, appearing for the appellants argued that the Parent Order dated December 24, 2010 relied on the Judgment passed by the Supreme Court (U.P. Electricity Board Vs. Pooran Chandra Pandey & Ors.) reported in (2007) 11 SCC 92 is no longer good law and the same has been reiterated in a 3-Bench Judgment of Supreme Court in Official Liquidator Vs. Dayanand & Ors. reported in (2008) SCC 1 at paragraph 92. Therefore, the failure to challenge the same in the present appeal is of no consequence to the maintainability of the appeal. In Dayanand (Supra) at paragraph 92, it has been unequivocally held that the comments and observations made by the 2-Judge Bench in Pooran Chandra Pandey (Supra) should be read as obiter and the same should neither be treated as binding by the High Courts, Tribunals and other Judicial fora nor they should be relied upon or made the basis for bypassing the principles laid down by the Constitution Bench.

7. Furthermore, the Constitution Bench Judgment of State of Karnataka Vs. Uma Devi (3) reported in 2006 (4) SCC 1 was not considered in Pooran Chandra Pandey (Supra).

8. On merits he also submitted that since the contempt application was filed on November 27, 2013, almost 3 years after passing of the Order dated December 24, 2010, the same was beyond the period of limitation as prescribed under Section 20 of the Contempt of Courts Act and, therefore, should have been dismissed in limine.

9. On the ground of maintainability, he argued that the decision reported in 1996 (1) CHN 411, Robin Paul & Ors. Vs. Kumkum Mittal & Ors. at paragraphs 30 to 37 cannot be relied upon to argue the maintainability of the present appeal. It has been strenuously argued that in the case of Robin Paul (Supra) an appeal was filed under Order 41, Rule 1 of the Code of Civil Procedure in a Civil Suit and was not a Judgment/Order passed under Article 226 of the Constitution of India. The question that fell for consideration in Robin Paul (Supra) was that whether an

Order passed in review under Order 47, Rule 1 of the Code of Civil Procedure was appealable under Order 43, Rule 1 of the CPC. In such a case it was held that the same was not maintainable.

10. He relied on the full Bench Judgment of this Hon'ble Court (Ratanlal Nahata & Ors. Vs. Nandita Bose & Ors.) reported in AIR 1999 Cal 29 at paragraphs 58, 74, 75, 76, 77, 78, 84(1) and (2), 90, 91, 93, 151(1) for the proposition that the provisions of Order 47, Rule 1, CPC was not applicable to writ proceedings. Therefore, in the present Letters Patent appeal even if the Parent Order was not challenged, there was no legal impediment to only challenge the Impugned Order dated November 16, 2021.

11. The Judgments of Ratanlal Nahata (Supra) and of Shirdhi Singh Vs. State of Punjab reported in AIR 1963 SC 1039 were relied on for the proposition that the High Court had inherent jurisdiction to review or recall its own Order under Article 226 of the Constitution of India for preventing injustice. Therefore, an appeal was maintainable under Clause 15 of the Letters Patent from the Order dismissing the of Recalling/Review application. The same view was reiterated in M.M. Thomas Vs. State of Kerala And Anr reported in (2000) 1 SCC 666. It was argued that the High Court as a court of record as envisaged under Article 215 of the Constitution of India has inherent powers to correct its own records. It is the duty of the High Court to keep all its records correctly and in accordance with law. Hence, if any error is apparent on the face of the records, the High Court not only has the power but also a duty to correct it being a court of plenary jurisdiction.

12. Mr. Mukherjee, distinguished the case of T.K. David vs. K.S. Cooperative Bank Limited & Ors reported in (2020) 9 SCC 92 on the ground that the original Order was challenged before the Supreme Court and the Special Leave Petition was rejected. After that, a review from the S.L.P. was filed which was refused to be entertained under Article 136 of the Constitution of India. The said case was not an appeal under Clause 15 of the Letters Patent and, therefore, not applicable to the instant appeal. It was submitted that Article 136 of the Constitution of India and Clause 15 of the Letters Patent are different provisions. Letters Patent is the procedural law, whereas, Article 136 was a special power given to the Supreme Court of India and not applicable to High Courts. Therefore, T.K. David (Supra) has no applicability to the instant appeal.

13. A distinction to the present case has been sought to be drawn with the ratio of the judgment of T.K. David (supra). It was submitted that the said judgment was not applicable to the present case where an appeal from an order dismissing a review was sought to be challenged by way of an SLP under Article 136 was held to be not maintainable. No distinction was drawn between inherent powers of the High Court to review the proceedings under order 47 of the Code of Civil Procedure applicable in case of civil suits.

14. Furthermore, it is submitted that there was no period of limitation for filing a

review application relying on *Lieutenant Government vs. Kulsum Bibi* reported in 2000 (ILR) 28. He also relied on the Judgment of the Division Bench of this Hon'ble Court in *Md. Ainul Haque & Ors. Vs. State of West Bengal & Ors.* passed in CRC 13 of 2015 in CPAN 1351 of 2012 in FMA 262 of 2005 for the proposition that the Court cannot insist on compliance of a thing this is not permissible in law. Therefore, the Hon'ble Single Judge by the Impugned Order dated November 16, 2021 ought not to have insisted on compliance of the Order dated December 24, 2010 as the law was well settled on that score.

15. Mr. Chaturbedi, Learned Counsel appearing on behalf of the respondent no. 8 submitted that the appeal is not maintainable because it is not a Judgment as envisaged under Clause 15 of Letters Patent. He relies on the decision in *Robin Paul (Supra)* for the proposition that there can be no appeal from an order declining to review or recall an order. He rebutted the appellant's argument on the ground that there is no merger in the case where an application for review or recalling has been rejected by the Hon'ble Court. By the said rejection, the Parent Order is permitted to continue to hold the field on the issues that have been adjudicated by the Parent Order. The order impugned has not decided anything further. By the Impugned Order dated November 16, 2021, the recalling application was simply dismissed and time was extended for compliance of the Judgment passed on December 24, 2010. No appeal has been preferred against the Parent Order.

16. Mr. Chaturbedi, placed reliance on *DSR Steel (Private) Limited Vs. State of Rajasthan and Ors* (2012) 6 SCC 782, for the proposition that where an application for review was dismissed affirming the decree or order, there was no question of any merger and anyone aggrieved by decree or order of the tribunal or court 'shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition'.

17. He also relies on *Municipal Corporation of Delhi vs. Yashwant Singh Negi* reported in (2020) 9 SCC 815, for the same proposition following *DSR Steel (Supra)*.

18. Furthermore, he argued that the Parent Order instead of being challenged was complied with by granting approval to the appointment of the writ petitioner on November 8, 2021 much before the filing of the instant appeal in or around April, 2022. The appellants should not be allowed to approbate and reprobate at the same time.

19. On facts he submitted that the recalling application was filed by one Mitali Dutta, who was the D.I of Schools on August 26, 2015. The approval of the writ petitioner's appointment was granted by the same person on January 21, 2018 after necessary compliances regarding ascertainment of vacancy status from the schools. The present appellant/D.I is now seeking to disregard the appointment given by the previous D.I on inconsistent grounds. On one hand, it has been alleged that the approval for appointment was not a genuine document and on

the other hand it has been alleged that it has been issued on personal interest. Such inconsistent stand taken by the appellant is not tenable in law.

20. Mr. Sanyal learned Counsel, appearing on behalf of the private respondents/ writ petitioners submitted that the impugned order dated November 16, 2021 was simpliciter an order of dismissal of the recalling application. No substantial rights of the parties have been decided by the said order. Therefore, the same is not a judgment within the meaning of Clause 15 of Letters Patent.

21. He also relied on the Judgment of Robin Paul (Supra), for the contention that an appeal is not maintainable from an order refusing to review or recall the Parent Order.

22. Having considered the rival submissions of the parties and the materials placed on record, this court is of the view that without challenging the Parent Order dated December 24, 2010, the appellant could not have only challenged the impugned order dated November 16, 2021, as by the impugned order the Hon'ble Single Judge refused to recall and or modify the order dated December 24, 2010. This court cannot agree with the submission of Mr. Mukherjee, in relation to Robin Paul (Supra). Even if the Code of Civil Procedure is not applicable to the writ proceedings but the rules of procedure are applicable mutatis mutandis to the writ proceedings. Hence, even in writ proceedings the Parent Order cannot be held to merge with the order dismissing the review/recalling application. Therefore, without challenging the Parent Order the present appeal is not maintainable.

23. This court agrees with the view taken in Kulsum Bibi (Supra) for the proposition that there is no period of limitation applicable for the purpose of filing a review petition. Furthermore, the decision of a Co-ordinate Bench of this Hon'ble High Court in Md. Ainul Haque (Supra) that the court cannot insist on compliance of a thing that is not permissible in law is also not in dispute. A proper application within the legal parameters has to be made for the court to correct the legal records.

24. This court relies on the Judgment of the Apex Court in Yashwant Singh Negi (Supra) which has relied on the judgment of DSR Steel (Supra).

25. Paragraph 25.3 of DSR Steel (Supra) is set out herein after:

"25.3. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently

pursuing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.” The proposition of law is settled by judgments of the Apex Court.

26. This court agrees with the proposition of law as stated in N.M Thomas (Supra) and in T.K. David (Supra). On the issue that an order passed by writ court can be reviewed and/ or recalled by the High Court since it was the duty of the High Court to correct any error that is apparent on the face of the record being a court of plenary jurisdiction. In T.K. David (supra), the Special Leave Petition was preferred from an original Order passed in a writ petition and was rejected on August 21, 2015. An application for review was filed on February 6, 2020 and was rejected. An SLP was filed under Article 136 and the same was found to be not maintainable. The distinction sought to be drawn between an appeal under Clause 15 Letters Patent and an application under Article 136 of the constitution is extremely strenuous and cannot be accepted.

27. The parent order may or may not have become infructuous due to the subsequent developments in law but it has to be challenged on merit for setting aside and/or variation of the same.

28. The appellant without preferring an appeal from the order dated December 24, 2010 cannot in the present appeal being MAT No. 475 of 2022 pray for setting aside of the order dated December 24, 2010.

29. Without going into the merits of the appeal and the legality of the Parent Order passed on December 24, 2010, this court is of the view that the instant appeal being MAT No. 475 of 2022 is not maintainable.

30. MAT 475 of 2022 along with the application for stay being CAN 1 of 2022 are accordingly dismissed.

31. Issues raised in MAT 327 of 2022 are identical.

32. Accordingly, MAT 327 of 2022 along with I.A CAN No. 1 of 2022 are dismissed.

33. All parties to act on server copy of this Order as downloaded from the official website of this Hon’ble Court.

34. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.