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**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

**BEFORE
HON'BLE SHRI JUSTICE VIVEK AGARWAL**

ON THE 31st OF JANUARY, 2023

REVIEW PETITION No. 77 of 2023

BETWEEN:-

**RAJ KUMAR PATERIYA S/O LATE SHRI FAUJDAR
PATERIYA, AGED ABOUT 62 YEARS, OCCUPATION:
ASSISTANT TEACHER, GOVERNMENT HIGHER
SECONDARY SCHOOL, GAMOURA, R/O ADRASH
NAGAR COLONY NEAR SUN CITY, DISTRICT
CHHATARPUR (MADHYA PRADESH)**

.....PETITIONER

(BY SHRI PRAVEEN KUMAR VERMA - ADVOCATE)

AND

- 1. THE STATE OF MADHYA PRADESH THROUGH
PRINCIPAL SECRETARY SCHOOL EDUCATION
DEPARTMENT VALLABH BHAWAN, BHOPAL
(MADHYA PRADESH)**
- 2. COMMISSIONER PUBLIC INSTRUCTIONS,
DISTRICT BHOPAL (MADHYA PRADESH)**
- 3. DISTRICT EDUCATION OFFICER, DISTRICT
CHHATARPUR (MADHYA PRADESH)**
- 4. BLOCK EDUCATION OFFICER, DISTRICT
CHHATARPUR (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI SOURABH SONI - PANEL LAWYER)

.....
*This petition coming on for admission this day, the court passed the
following:*

ORDER

This review petition is filed under Order XLVII Rule 1 of the Code of Civil Procedure, 1908, seeking review of order dated 17.01.2023 passed in

W.P. No.26250/2022 (*Raj Kumar Pateriya Vs. The State of Madhya Pradesh and others*) on the ground that when case was listed on 17.01.2023 in motion hearing S.No.63 (wrongly mentioned by the petitioner as 'mother hearing No.63') by the time counsel for the petitioner reached the Court, writ petition was dismissed finally without hearing or giving opportunity to the petitioner.

2. Reliance is placed on the judgment of the Supreme Court in **Ajit Kumar Singh and others Vs. Chiranjibi Lal and others, (2002) 3 SCC 609**, wherein in para 8 it is held that in absence of Advocate for the petitioner, appeal can be dismissed for non prosecution. The High Court ought not to have considered the merits of the case to dismiss the second appeal.

3. Placing reliance on this judgment of the Hon'ble Supreme Court in **Ajit Kumar Singh** (supra), it is submitted that this Court committed a mistake in deciding the petition in absence of the learned counsel for the petitioner.

4. Shri Sourabh Soni, learned Panel Lawyer appears for the State but, his appearance is formal.

5. A perusal of the writ petition reveals that petitioner Raj Kumar Pateriya has filed a writ petition claiming relief that writ in the nature of certiorari be issued, quashing the impugned order dated 19.10.2022 (Annexure P-1) and after quashing the same, it may be pleased to issue a writ in the nature of mandamus, directing the respondents to continue the petitioner in service till 31.12.2025 i.e. till the age of 65 years, with all consequential benefits.

6. Petitioner placed reliance on the judgment of the Supreme Court in **Dr. Jacob Thudipara Vs. The State of Madhya Pradesh and others, (2022) 7 SCC 764**, whereby appeal of the appellant was allowed and it is held that appellant therein, is entitled to the benefit of enhanced age of superannuation i.e. 65 years. He shall be entitled to all the consequential and monetary benefits

including arrears of salaries, etc. has if he would have been continued in service up to the age of 65 years.

7. Placing reliance on this judgment of Supreme Court in **Dr. Jacob Thudipara** (supra) dated April 21, 2022, prayer is made that the petitioner be also allowed to continue in service up to the age of 65 years.

8. This Court noted a fact that petitioner's counsel had not appeared on 17.01.2023 and this Court decided the writ with the help of the learned Panel Lawyer appearing for the State.

9. In the impugned order, it is categorically noted that petitioner is an employee of School Education Department for whom age of superannuation is not enhanced by making any amendment in the relevant rules, namely, Fundamental Rules-56, whereas reference made by the petitioner to the judgment of the Supreme Court deals with cases of Professors / Teachers appointed in the Higher Education Department i.e. the College Education for whom the age of superannuation was enhanced from 62 to 65 years and, therefore, finding that there is no merit in the petition as Assistant Teacher in a School Education Department is not covered under the amendment carried in FR-56, dismissed the petition.

10. The question which is raised by the learned counsel for the petitioner / review petitioner is that without hearing him, matter could not have been decided on merits.

11. The case in hand which is cited by the learned counsel for the petitioner i.e. **Ajit Kumar Singh** (supra) is in regard to the decision in a civil matter in second appeal. Supreme Court's judgment is in relation to Rule 11(1) of Order XLI of the Code of Civil Procedure, 1908.

12. Section 141, CPC deals with miscellaneous proceedings. It reads as under:-

"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.

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

13. Order XLI Rule 11, CPC, reads as under:-

"11. Power to dismiss appeal without sending notice to Lower Court. - (1) The Appellate Court after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

(4) Where an Appellate Court, not being the High Court, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment.

11A. Time within which hearing under rule 11 should be concluded- Every appeal shall be heard under rule 11 as expeditiously as possible and endeavour shall be made to conclude such hearing within sixty days from the date on which the memorandum of appeal is filed."

14. Order XLI Rule 17, CPC reads as under:-

"17. Dismissal of appeal for appellants default. - (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called

on for hearing, the Court may make an order that the appeal be dismissed.

[Explanation.-Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.]

(2) **Hearing appeal *ex parte*** - Where the appellant appears and the respondent does not appear the appeal shall be heard *ex parte*."

15. Thus, it is evident that for second appeal, procedure as prescribed under Order XLI Rule 11 and Order XLI Rule 17 will be applicable and in that context, Hon'ble Supreme Court in case of **Ajit Kumar Singh** (supra) has held in para 8 of the judgment that second appeal could not have been dismissed on merits. But, in view of the explanation carved out in Section 141, CPC, since procedure provided in the CPC does not include any proceedings under Article 226 of the Constitution and admittedly, writ petition was filed under Article 226 of the Constitution, analogy of order XLI Rule 11 or Order XLI Rule 17 will not be applicable. This fact is considered by the Bombay High Court in **Gerald Joseph Saldanha and Others Vs. State Of Maharashtra And Others, 1986 (1) BOM CR 491**, decided on 09.10.1985, where it is held that when Section 141 of the Code of Civil Procedure specifically lays down that proceedings under Article 226 of the Constitution are not covered by it, the explanation added to Rule 17(1) of Order XLI, CPC will not apply to the proceedings under Article 226 of the Constitution or appeal arising therefrom.

16. Hon'ble Supreme Court in **Puran Singh and others Vs. State of Punjab and others, (1996) 2 SCC 205**, in para 9, 10 and 11 has held as under:-

"9. In the case of *Ram Kala v. Asstt. Director, Consolidation of Holdings* [AIR 1977 P&H 87 : 79 Punj LR 100] , a Full Bench of

three Judges held that Article 137 of the Schedule to the Limitation Act does not apply to an application for adding or substituting a party to a petition under Article 226 of the Constitution. It was also held that Section 141 of the Code cannot be pressed into service for applying the provisions including Order 22 of the Code in a petition under Article 226 of the Constitution. Later a Full Bench of five Judges of the same Court in the case of Teja Singh v. Union Territory of Chandigarh [AIR 1982 P&H 169; (1981) 1 SLR 274 : 84 Punj LR 160] held that in view of Rule 32 of the Writ Rules framed by the High Court under Article 225 of the Constitution which provided that in all matters in which no provision had been made by those Rules, the provisions of Civil Procedure Code shall apply *mutatis mutandis* insofar as they were not inconsistent with those Rules the explanation which had been added to Section 141 of the Code by the aforesaid Amending Act, did not in any way nullify the effect of Rule 32 of the Writ Rules. Rule 32 of the Writ Rules is as follows:

"32. In all matters for which no provision is made in these rules, the provisions of the Code of Civil Procedure, 1908, shall apply *mutatis mutandis* insofar as they are not inconsistent with these rules."

10. On a plain reading, Section 141 of the Code provides that the procedure provided in the said Code in regard to suits shall be followed "as far as it can be made applicable, in all proceedings". In other words, it is open to make the procedure provided in the said Code in regard to suits applicable to any other proceeding in any court of civil jurisdiction. The explanation which was added is more or less in the nature of proviso, saying that the expression 'proceedings' shall not include any proceeding under Article 226 of the Constitution. The necessary corollary thereof shall be that it shall be open to make applicable the procedure provided in the Code to any proceeding in any court of civil jurisdiction except to proceedings under Article 226 of the Constitution. Once the proceeding under Article 226 of the Constitution has been excluded from the expression 'proceedings' occurring in Section 141 of the Code by the explanation, how on basis of Section 141 of the Code any procedure provided in the Code can be made applicable to a proceeding under Article 226 of the Constitution? In this background, how merely on basis of Writ Rule 32 the provisions of the Code shall be applicable to writ proceedings? Apart from that, Section 141 of the Code even in

respect of other proceedings contemplates that the procedure provided in the Code in regard to suits shall be followed "as far as it can be made applicable". Rule 32 of Writ Rules does not specifically make provisions of Code applicable to petitions under Articles 226 and 227 of the Constitution. It simply says that in matters for which no provision has been made by those rules, the provisions of the Code shall apply *mutatis mutandis* insofar as they are not inconsistent with those rules. In the case of *Rokyayabi v. Ismail Khan* [AIR 1984 Kant 234 : (1984) 2 Kant LC 114] in view of Rule 39 of the writ proceedings rules as framed by the Karnataka High Court making the provisions of Code of Civil Procedure applicable to writ proceedings and writ appeals, it was held that the provisions of the Code were applicable to writ proceedings and writ appeals.

11. We have not been able to appreciate the anxiety on the part of the different courts in judgments referred to above to apply the provisions of the Code to writ proceedings on the basis of Section 141 of the Code. When the Constitution has vested extraordinary power in the High Court under Articles 226 and 227 to issue any order, writ or direction and the power of superintendence over all courts and tribunals throughout the territories in relation to which such High Court is exercising jurisdiction, the procedure for exercising such power and jurisdiction have to be traced and found in Articles 226 and 227 itself. No useful purpose will be served by limiting the power of the High Court by procedural provisions prescribed in the Code. Of course, on many questions, the provisions and procedures prescribed under the Code can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. It need not be impressed that different provisions and procedures under the Code are based on well-recognised principles for exercise of discretionary power, and they are reasonable and rational. But at the same time, it cannot be disputed that many procedures prescribed in the said Code are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person who pursues such remedies. The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious."

17. Thus, it is evident that when the intention of the legislature is not to require the Court to necessarily follow the provisions of Code of Civil Procedure while deciding a writ under Article 226 of the Constitution and they have excluded the writs under Article 226 of the Constitution, to be treated as proceedings under the Code of Civil Procedure, then, it is evident that matter was left to the discretion of the Court to either dismiss a writ petition for default or dispose it of on merits.

18. Since there is nothing in the Code of Civil Procedure that enjoins the Court to necessarily dismiss them for default on failure of the party and counsel in appearing in the Court, the contention of the petitioner's counsel that writ petition should have been dismissed for default and could not have been disposed of on merits, is not tenable as is not made out in the light of judgments of the Hon'ble Supreme Court and the Bombay High Court.

19. In view of above, the review petition fails and is dismissed.

The seal of the High Court of Madhya Pradesh is a circular emblem with a serrated border. In the center, there is a depiction of the Ashoka Lion Capital, a symbol of the Indian state. Below the lion capital, the motto 'सत्यमेव जयते' (Satyameva Jayate) is inscribed in Devanagari script. The words 'THE HIGH COURT OF MADHYA PRADESH' are written around the perimeter of the seal.

सत्यमेव जयते

VIVEK AGARWAL)
JUDGE