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**ALLAHABAD HIGH COURT (LUCKNOW BENCH)**

DIVISION BENCH

NIKHIL KUMAR SINGH — Appellant

Vs.

STATE OF U.P. AND OTHERS — Respondent

( Before : D.Y. Chandrachud, C.J. and Narayan Shukla, J. )

Special Appeal (D) No. 267 of 2015

Decided on : 14-07-2015

- Constitution of India, 1950 - Article 226

**A. Civil Procedure — Dismissal for non-appearance — Restoration/Recall of Order — When a case is dismissed due to the absence of the petitioner and their counsel, and the court makes perfunctory observations on the merits without detailed discussion, such a dismissal is essentially for default of appearance — An application for restoration or recall of such an order is maintainable, even if the order superficially refers to merits. (Pars 3)**

**B. Judicial Discretion — Exercise of — Technical vs. Substantive Justice — Courts should avoid adopting a technical approach when deciding applications for restoration or recall, especially when it would lead to a miscarriage of justice — If a party has been diligently pursuing their case, and absence of counsel is an inadvertent error, restoration should generally be granted to allow for a decision on merits. (Pars 3, 4)**

**C. Writ Petition — Restoration — Grounds for — A writ petition dismissed for default of appearance, even with cursory remarks on merits, should be restored if the petitioner has demonstrated consistent diligence in pursuing the matter up to that point; an inadvertent absence of counsel should not prevent**

## **the litigant from pursuing their remedy. (Pars 4, 5)**

### **Counsel for Appearing Parties**

*B.R. Singh, for the Appellant; R.P. Singh, S.P. Singh and Z. Jilani, for the Respondent*

Final Result : Allowed

### **JUDGMENT**

Dr. D.Y. Chandrachud, C.J. and Narayan Shukla, J.—The appellant filed a writ petition<sup>1</sup> under Article 226 of the Constitution on 16 June, 2008 seeking to challenge the selection process and the appointments made on the post of Training Assistant (Farm Manager) by the second respondent. The record before the Court indicates that the writ petition, which was filed in 2008, was heard from time to time and interim directions were issued by the learned Single Judge on 1 May, 2013, 20 August, 2013, 22 October, 2013 and 25 October, 2013. When the petition came up for hearing before the learned Single Judge on 14 August, 2014, the following order was passed:

- "1. Called in revised. None appeared to press this writ petition on behalf of the petitioner.
2. It appears that either the cause of action no more survives or the petitioner has lost interest in this matter or it has otherwise become infructuous and, probably for this reason, none is interested to have decided this matter on merits and that is why, Counsel for petitioner is absent.
3. However, I myself have gone through the pleadings, grounds as also reliefs sought and find that petitioner is not able to make out a case so as to justify interference of this Court by granting reliefs, as prayed for.
4. In view of the above, the writ petition is dismissed.
5. Interim order, if any, stands vacated.
6. Sri Zafaryab Jilani, Advocate, is present for respondents."

The appellant filed an application for restoration/recall, (CM. Application No. 82393 of 2014). The application has been rejected on 13 May, 2015 by an order of the learned Single Judge which reads as follows:

"This is an application seeking restoration of the case and setting aside the order dated 14.8.2014.

Though, the order dated 14.8.2014 records that none had appeared on the said date to press this petition, however, the order also records some findings on the merit.

Accordingly, this application for restoration or recall of the order is not maintainable which

is hereby rejected.

In the circumstances of the case, the petitioner will be at liberty to take appropriate course by way of filing a review petition, if he so desires."

The learned Single Judge has rejected the application for restoration/recall on 13 May, 2015 on the ground that though on 14 August, 2014, none had appeared to press the writ petition, the order recorded some findings on merits. Hence, the application for restoration or recall was held not to be maintainable.

2. Reading the order of the learned Single Judge dated 14 August, 2014, it is evident that the appellant and his Advocate were both absent when the petition was called out for hearing. In fact, in paragraph 2 of the order, the learned Single Judge recorded that it appeared that either the cause of action had no longer survived or the appellant had lost interest in the matter or it had otherwise become infructuous and, probably for that reason, the appellant was not interested in having the matter decided on merits. Having observed this, the learned Single Judge proceeded to record that having gone through the pleadings, grounds and reliefs, the appellant was not able to make out a case justifying interference by the Court.

3. We find merit in the submission of the learned Counsel for the appellant that once the learned Single Judge had held that the petition was liable to be dismissed in the absence of the appellant and his Advocate, there was no occasion for the learned Single Judge to make any observation on merits of the case. The observations in paragraph 3 of the order dated 14 August, 2014 cannot even be construed, reasonably speaking, to be observations on merits. Beyond stating that having gone through the pleadings, grounds and reliefs, no case was made out for interference by the Court, there is no discussion on the merits of the case nor is there any discussion on facts or the legal submissions which were on the record. In this view of the matter, we are of the view that the learned Single Judge has taken a rather technical view of the matter by declining to entertain the application for restoration or recall on the ground that it was not maintainable. Properly construed, the order dated 14 August, 2014 is an order of dismissal in the absence of the Counsel for the appellant and hence the application for restoration/recall was maintainable.

The only surviving issue is as to whether a case for restoration or recall was made out.

4. From the record, it is evident that the appellant was diligently pursuing the matter and, as a matter of fact, the petition was heard on 1 May, 2013, 20 August 2013, 22 October, 2013 and 25 October, 2013 when the learned Single Judge had issued certain directions. Hence, there is nothing on the record to indicate that the appellant was guilty of inaction or negligence in pursuing the matter. The inadvertent error on the part of the learned Counsel for the appellant in not noticing the listing of the case or in remaining absent, cannot and should not result in a miscarriage of justice by precluding the appellant from pursuing his remedy in the writ petition. Whether any case has been made on the merits of the case is a

separate issue on which we make no observation since that will have to be decided by the learned Single Judge after restoration.

5. For these reasons, we allow the special appeal and set aside the impugned order of the learned Single Judge dated 13 May, 2015 In consequence, we allow the application for restoration/recall. Consequently the order of the teamed Single Judge dated 14 August, 2014 shall stand recalled. The writ petition i.e. Service Single No. 3282 of 2008 shall stand restored to the file of the learned Single Judge for deciding the petition on merits. Since the petition has been pending since 2008, we request the learned Single Judge to take up the petition for hearing expeditiously.

The special appeal is accordingly disposed of. There shall no order as costs.

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<sup>1</sup>Service Single No. 3282 of 2008.