REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.7648-7649 OF 2009
[Arising out of SLP [C] Nos. 938-939 OF 2009

Ram Kumar Gupta & Ors. ...Appellants

Versus

Har Prasad & Anr.....Respondents

J U D G M E N T

TARUN CHATTERJEE, J.

1. Leave granted.

2. These appeals are filed against the order dated 28th of December, 2007 passed in Writ Petition (Misc.) Single No. 7361 of 2001 and the order dated 3rd of October, 2008 passed in CLMA No. 6551 of 2008 and MCC No. 1153 of 2008 respectively of the High Court of Uttarakhand, whereby the High Court had dismissed the Writ Petition (Misc.)Single No.7361 of 2001 for non prosecution and rejected the application for restoration of the writ petition on condonation of delay in filing the same.

3. The facts of the case are as follows:

The deceased mother of the appellants Smt. Devki Devi was dispossessed from her shop on account of deceptive acts of her Manager, namely, Pooranlal Shah who was engaged by her to run the business of confectionery (Halwai) after the death of her father. The said Manager got an ex parte order for declaring vacancy under Section 16(1) of U.P.Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (Act No.13 of 1972) and thereafter an ex-parte order for allotment of shop in question in his favour. The said order was challenged by the appellants before the High Court of Allahabad and by its judgment and order dated 9th of January, 1980, the matter was remitted back to the First Additional District Judge, Nainital to decide it afresh. After remand, the First Additional District Judge, Nainital by his order dated 5th of March, 1982, again upheld the order of declaring vacancy and allotment in favour of the said Manager. On 25th of May, 1982, the appellants filed a Civil Misc. Writ Petition No. 5997(A)/1982 in the High Court of Allahabad challenging the aforesaid order

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dated 5th of March, 1982 passed by the First Additional District Judge, Nainital. The said writ petition was admitted by the High Court of Allahabad. Subsequently, on the creation of State of Uttarakhand, the said writ petition was transferred to the High Court of Uttarakhand at Nainital and was re-numbered as W.P.(S)No.7361 of 2001. An application for substitution of the deceased Smt. Devika Devi was filed which was allowed by an order dated 17th of December, 2007. The appellants were thus substituted in place of the deceased Smt. Devki Devi in the pending writ petition. By a separate order of the same date, another application filed by the appellants for the substitution of heirs and legal representatives of deceased respondent Pooranlal Shah – Manager was also allowed by the High Court. However, by an order dated 28th of December, 2007, the High Court dismissed the writ petition for non-prosecution. For restoration of the writ petition dismissed for non-prosecution, an application was filed by the appellants through their learned counsel Shri Bindesh Kumar Gupta. Since Sh. Gupta did not appear at the time the said application for restoration was listed for hearing i.e. on 26th of

March, 2008, the said application for restoration was also rejected by a learned Judge of the High Court for non-prosecution. Sometime in the month of September, 2008, a second application for restoration of the writ petition was filed by the appellants saying that since Sh. Gupta was appointed as the Additional Advocate General of the State, he could not appear when the writ petition was taken up for hearing. The High Court by the order dated 3rd of October, 2008 dismissed the second application for restoration on the ground of delay and latches without passing a speaking and reasoned order. Feeling aggrieved by the order of the High Court rejecting the writ application for non-prosecution and subsequent order rejecting the application for restoration, the appellants have filed two Special Leave Petitions, which on grant of leave, were heard in the presence of the learned counsel for the appellants only. At this stage, it may be mentioned that in spite of repeated services on the respondents, no one had chosen to appear before us at the time of hearing of these appeals.

We have heard the learned counsel for the appellants and also examined the materials on record including the two

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orders passed by the High Court, one being rejection of the writ petition for non-prosecution and the other being the order of rejection for restoration of the writ petition. The case that was made out by the appellants for restoration of the writ petition was that the learned counsel for the appellants Sh. Gupta could not appear before the learned Judge of the High Court as at that point of time, he was designated as Additional Advocate General of the State and for that reason, it was not possible for him to appear at the time of hearing of the writ petition as well as for restoration of the writ petition. Keeping this fact in mind and the fact that the appellants could not be represented at the time of hearing of the writ petition, we feel it appropriate to restore the writ petition to its original file in order to give an opportunity to the appellants to contest the same on merits. As noted hereinabove, for restoration of the writ petition dismissed for non-prosecution, an application for restoration was filed by the appellants which was rejected only on the ground of delay and latches. But on a perusal and on proper examination of the record of this case, we find that no delay was caused by the appellants in filing the application for

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restoration of the writ petition. In any view of the matter, the appellants cannot be punished for the lapses even if there was any, as the appellants had engaged a learned counsel to appear and contest the writ petition. That apart, considering the fact that the appellants had been prosecuting the litigation since 1982 diligently and there was no lapse on their part till the writ petition was dismissed for non prosecution and also considering the fact that a lawyer was engaged by them to contest the matter in the High Court who, however, subsequently was designated as an Additional Advocate General of the State and, therefore, could not be present at the time the writ petition was taken up for hearing, we cannot but hold that it would be improper that the appellants should be punished for non appearance of the learned counsel for the appellants at that time as we are of the view that the appellants were suffering injustice merely because their chosen advocate had defaulted. In **Rafiq & Anr. vs. Munshilal & Anr.** [1981 (2) SCC 788], this Court has also drawn the same conclusion while considering the application for restoration of a writ application when the learned counsel for

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the appellant could not be present at the time of hearing of the application.

In view of our discussions made herein above, we are, therefore, of the view that both the orders, namely, the order of rejection of the application for restoration as well as the application for dismissal of the writ application for non prosecution are liable to be set aside. Accordingly, both the orders are set aside and the writ petition is restored to its original file. However, considering the facts and circumstances and length of the matter being kept pending in court, we restore this writ application subject to the condition that the appellants shall deposit and pay a sum of Rs.10,000/- as costs to the respondent within two months from the date of filing of a copy of this order in the High Court.

We make it clear that in the event, the amount of cost, as indicated above, is not deposited within the time specified herein, the appeals shall stand dismissed and the impugned orders shall stand affirmed. In the event, the cost, as indicated, is deposited within the time specified herein above, the High Court is requested to dispose of the writ petition at

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an early date preferably within three months from the date of deposit of the amount by the appellants in the High Court.

The appeals are thus allowed to the extent indicated above. There will be no order as to costs.

.....J.
[Tarun Chatterjee]

New Delhi;
November 18, 2009.

.....J.
[R.M.Lodha]

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