

Court No. - 13

Case :- CIVIL MISC REVIEW APPLICATION DEFECTIVE No. - 185 of 2021

Applicant :- Satish Narain Trivedi In W.P.No. 5748s/S1999

Opposite Party :- State Of U.P. Thru. Deputy Director Of Education Lko.And Ors.

Counsel for Applicant :- B.R. Singh,Devashish Bhatt,Mukesh Kumar,Pawan Kumar Pandey,Rakshit Raj Singh

Hon'ble Saurabh Lavania,J.

(C.M. Application No. 128070 of 2021: Application for Condonation of Delay)

Heard learned Counsel for the applicant.

Considering the averments made in the affidavit filed in support of application under consideration, the same is allowed.

Accordingly, the delay in filing the present review application is hereby condoned.

(Order on Review Application)

1. Heard.

2. Present review application under Chapter V Rule 12 of the Allahabad High Court Rules, 1952 has been preferred by the petitioner in relation to final judgment and order dated 10.02.2020 passed in Writ Petition No. 5748(S/S) of 1999 (Satish Narain Trivedi Vs. State of U. P. and Others). The relevant portion of the judgment in issue, reads as under:-

" In regard to submissions made by the learned State Counsel that the vacancy was not published in newspaper, which process is mandatory, this Court considered the pleadings and documents on record and it appears therefrom, particularly para 16 of the writ petition, that the vacancy in issue i.e. the vacancy of the post of Peon was notified on the "Notice Board" of the Institution and it was not advertised in two daily newspapers having wide circulation.

In National Fertilizers Ltd. [(2006) 5 SCC 493: 2006 SCC (L&S) 1152] this Court referred to the decision in Union Public Service Commission v. Girish Jayanti Lal Vaghela [(2006) 2 SCC 482: 2006 SCC (L&S) 339] wherein the Court had observed as under: (SCC p. 490, para 12)

"The appointment to any post under the State can only be

made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution."

It is true that, at relevant time, the provisions of Chapter III of the U. P. Intermediate Education Act, 1921, did not provide any procedure for selection on the post of the Peon. In the absence of any prescribed procedure under the rules, it is open to the management to adopt a procedure which conforms the provisions of Articles 14 and 16 of the Constitution of India. The committee of management was free to issue advertisement in the news paper and to call names from the Employment Exchange for making selection.

In the aided Institution, the salary to the teachers and the staff is paid by the State Government. Since the salary is paid by the State Government, for all purposes the employment to the post of clerk is public employment. For a public employment, the minimum requirement which is needed is to advertise the post to enable all the eligible candidates to apply for the post. The committee of management cannot claim to select any person on its own choice without advertising the post in any news paper.

In view of the above, the petitioner's appointment made by the management, without advertisement of the vacancy and without inviting applications from the candidates from open market to participate in the selection process, is void appointment.

It appears from the pleadings on record that the specific stand taken by the State, based on Regulation 101 in the Chapter III of the Act, 1921, that the appointment of the petitioner was not made after seeking prior approval of competent authority i.e. DIOS/opposite party No. 2, is undisputed. The specific plea, based on the Regulation 101, taken in the counter affidavit has not been denied by the petitioner.

The Division Bench of this Court in the case of Jagdish Singh (supra) held that the appointment should be made after taking the approval from the competent authority, as provided under Regulation 101 in the Chapter III of the Act, 1921. At the cost of repetition, the relevant portion of the judgment passed by the Division Bench of this Court in

the case of Jagdish Singh (supra) is quoted below for ready reference:-

"20. Scheme of Regulations 101 to 107 makes it clear that after receiving an intimation of vacancy, the District Inspector of Schools is empowered to send the application of member of deceased employee, who is entitled for compassionate appointment to the institution, who has to issue appointment letter to such candidate. It is, however, implied in the scheme that in the event there is no candidate entitled for compassionate appointment to fill a particular vacancy, the intimation of which has been received by the District Inspector of Schools, the District Inspector of Schools can direct the appointing authority to fill up vacancy by direct recruitment but even in a case the selection is made by direct recruitment by the Principal/committee of management, prior approval is required of the District Inspector of Schools before issuing an appointment letter to the selected candidate. Without prior approval of the Inspector, the Principal or the committee of management cannot issue an appointment letter or permit joining of any candidate. The requirement of prior approval in Regulation 101 is a condition precedent before issuing an appointment letter and is mandatory. The observation of the learned single Judge in the case of Dingur v. District Inspector of Schools, Mirzapur (supra) as quoted above, is also to the effect that approval has to be considered by the District Inspector of Schools after examining the proceeding relating to appointment and after examining as to whether prescribed procedure in a fair manner has been followed or not.

21. The observation "of the learned single Judge in Ram Dhani's case (supra) that previous approval under Regulation 101 is required to be taken before issuing advertisement for filling up vacancy does not lay down correct law. We, however, make it clear that although prior approval is required from the District Inspector of Schools after completion of process of selection but there is no prohibition in the Principal/Management to seek permission of the District Inspector of Schools for filling up vacancy by direct recruitment. The permission may or may not be granted by the District Inspector of Schools but even if such permission to start the selection process or to issue advertisement is granted that is not akin to prior approval as contemplated under Regulation 101.

22. In view of the aforesaid, we are of the considered opinion that prior approval contemplated under Regulation 101 is prior approval by the District Inspector of Schools after completion of process of selection and before issuance of appointment letter to the selected candidate."

In view of the above also, the appointment of the petitioner, without prior approval of the DIOS, is void and being so he is not entitled to

any benefit or relief.

With regard to payment of salary and continuation on the post on the strength of the interim order dated 04.11.1999 and the arguments based on the same for seeking the reliefs sought, this Court is of the view that the interim order would not give any benefit or right to the petitioner to get the reliefs sought in the present writ petition.

The aforesaid view of this Court is in view of the observations made by the Constitution Bench of the Apex Court in Umadevi (3) case [(2006) 4 SCC 1: 2006 SCC (L&S) 753], wherein it has been observed as under:-

...43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that

ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

The Constitution Bench has observed that merely because an employee had continued under cover of an order of the court, which the court described as "litigious employment", he would not be entitled to any right to be absorbed or made permanent in the service.

Further, the Apex Court in re: Shesh Mani Shukla vs District Inspector of Schools, Deoria and others reported in (2009) 15 Supreme Court Cases 436 vide para 19 has held as under:-

"It is true that the appellant has worked for a long time. His appointment, however, being in contravention of the statutory provision was illegal, and, thus, void ab initio. If his appointment has not been granted approval by the statutory authority, no exception can be taken only because the appellant had worked for a long time. The same by itself, in our opinion, cannot form the basis for obtaining a writ of or in the nature of mandamus; as it is well known that for the said purpose, the writ petitioner must establish a legal right in himself and a corresponding legal duty in the State. (See Food Corpn. of India vs. Ashis Kumar Ganguly.) Sympathy or sentiments alone, it is well settled, cannot form the basis for issuing a writ or or in the nature of mandamus. (See State of M.P. vs. Sanjay Kumar Pathak.)"

The Apex Court in the case of Raghvendra Rao etc. v. State of Karnataka and others, JT 2009 (20) SC 520 has observed as under:-

"It is now a well-settled principle of law that merely because an employee had continued under cover of an order of Court, he would not be entitled to any right to be absorbed or made permanent in the service....."

For the foregoing reasons, the writ petition lacks merit. Hence dismissed with no order as to costs."

3. The grounds for seeking review of judgment and order dated 10.02.2020 taken in the present application, are extracted here-in-under:-

"A) Because the judgment and order dated 10.2.2020 is erroneous and is liable to be reviewed by this Hon'ble Court.

B) Because as per Regulation 100 of Chapter III of U.P. Intermediate Education Act, the appointing authority for the post of Peon which

belongs to Class IV category on which the review applicant has been appointed, is the Principal i.e. respondent no. 5 and as a matter of fact the review applicant had been duly selected and appointed by the respondent no. 5 on the post in question, as such there is no justification or reason on the part of respondent no. 2 to disapprove the appointment of the review petitioner on the post of peon by means of order dated 7.9.1999, hence the order impugned in the writ petition is arbitrary and violative of Article 14 of the Constitution of India.

C) Because the Regulation 101 to 107 made under Intermediate Education Act has been asserted by means of Notification dated 30.7.1992 after Regulation 100 in Chapter III of U.P. Intermediate Education Act only in order to ensure that if there is any candidate belonging to Dying in Harness category, the appointment of such candidate shall be given prior to appointing any candidate on the post which belongs to Class III or Class IV category in a particular College.

D) Because in the present case there is no candidate belonging to dying in harness category available in the College and prior to selection/appointment of the review applicant the Principal of the College had asked the respondent no. 2 to send suitable candidate to be given appointment on the post which had been fallen vacant due to retirement of one Sri Ram Suchit, but the District Inspector of Schools did not send any candidate inspite of reminders, then the respondent no. 5, who is the appointing authority had selected the review applicant to be appointed on the post in question and thereafter sent necessary documents for financial approval and when the DIOS did not give any reply in that regard then the review applicant was appointed by the respondent no. 5 by means of order dated 10.8.1997.

E) Because prior to issuing the appointment order the respondent no. 5 after selecting the review applicant had sent the relevant documents to the respondent no. 2 for according financial approval as per requirement of Regulation 101 of Chapter III of U.P. Intermediate Education Act by means of letter dated 27.6.1997 and inspite of the said letter was received by the DIOS, the DIOS up till 9.8.1997 had not given any reply in that regard and as per the Regulation 107 Chapter III, if DIOS fails to give any reply within one month then the Principal concerned is authorized under law as per Regulation 107 to issue appointment order and the said procedure is followed in the present case.

F) Because the reasoning given by the respondent no. 2 in the order impugned in writ petition that prior to appointing the review applicant the provisions as provided under Regulation 101 Chapter III has not been followed is totally illegal, arbitrary in the eyes of law as prior to appointing the review applicant on the post of Peon the respondent no. 5 had followed the prescribed procedure as provided under Regulation 101.

G) Because the Hon'ble Supreme Court of India in the case of Rajesh Kumar Mishra and other Vs. State of U.P. and others Vs. State of U.P. and others reported in (2020) 1 UPLBEC, 9 has held that continuance of service for long period is creating right for the ad hoc employees who were not appointed as per procedure and as such the case of the

review applicant is covered by the said judgment.

H) Because the Hon'ble Supreme Court of India has also taken view in the aforesaid latest judgment that long officiation of service though on ad hoc basis can be counted for regularization purpose and termination of service after long period of time is harsh.

I) Because in case of review applicant it may be looked into that all the procedures of selection were followed and the District Inspector of Schools did not pay heed towards the same.

J) Because the review applicant was appointed on the vacant post after following due procedure as there was exigency of service."

4. After discussing a series of decisions on review jurisdiction in **Kamlesh Verma v. Mayawati reported in (2013) 8 SCC 320**, the Hon'ble Supreme Court has observed that review proceedings have to be strictly confined to the scope and ambit of Order XLVII Rule 1, CPC. As long as the point sought to be raised in the review application has already been dealt with and answered, parties are not entitled to challenge the impugned judgment only because an alternative view is possible. The principles for exercising review jurisdiction were succinctly summarized in the captioned case as below:

"20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in Chajju Ram v. Neki¹⁷, and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poullose Athanasius¹⁸ to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd.²⁵,.

20.2. When the review will not be maintainable:—

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on

the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.”

5. In **Ram Sahu (Dead) Through LRs v. Vinod Kumar Rawat** reported in **2020 SCC OnLine SC 896**, the Hon'ble Supreme Court citing previous decisions and expounding on the scope and ambit of Section 114 read with Order XLVII Rule 1, has observed that Section 114 CPC does not lay any conditions precedent for exercising the power of review; and nor does the Section prohibit the Court from exercising its power to review a decision. However, an order can be reviewed by the Court only on the grounds prescribed in Order XLVII Rule 1 CPC. The said power cannot be exercised as an inherent power and nor can appellate power be exercised in the guise of exercising the power of review.

6. Recently the Hon'ble Apex Court in the case of **Sanjay Kumar Agarwal vs. State Tax Officer (1) and Another** **2023 SCC OnLine SC 1406**, observed as under:-

"9. In the words of Krishna Iyer J., (as His Lordship then was) "a plea of review, unless the first judicial view is manifestly distorted, is like asking for the Moon. A forensic defeat cannot be avenged by an invitation to have a second look, hopeful of discovery of flaws and reversal of result..... A review in the Counsel's mentation cannot repair the verdict once given. So, the law laid down must rest in peace."

10. It is also well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so."

11. In Parsion Devi v. Sumitri Devi, this Court made very pivotal observations:—

"9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise."

12. Again, in *Shanti Conductors Private Limited v. Assam State Electricity Board*, a three Judge Bench of this Court following *Parsion Devi v. Sumitri Devi* (supra) dismissed the review petitions holding that the scope of review is limited and under the guise of review, the petitioner cannot be permitted to reagitate and reargue the questions which have already been addressed and decided.

13. Recently, in *Shri Ram Sahu (Dead) Through Legal Representatives v. Vinod Kumar Rawat*, this Court restated the law with regard to the scope of review under Section 114 read with Order XLVII of CPC.

14. In R.P. (C) Nos. 1273-1274 of 2021 in Civil Appeal Nos. 8345-8346 of 2018 (*Arun Dev Upadhyaya v. Integrated Sales Service Limited*), this Court reiterated the law and held that:—

"15. From the above, it is evident that a power to review cannot be exercised as an appellate power and has to be strictly confined to the scope and ambit of Order XLVII Rule 1 CPC. An error on the face of record must be such an error which, mere looking at the record should strike and it should not require any long-drawn process of reasoning on the points where there may conceivably be two opinions."

15. It is very pertinent to note that recently the Constitution Bench in *Beghar Foundation v. Justice K.S. Puttaswamy (Retired)*, held that even the change in law or subsequent decision/judgment of co-ordinate Bench or larger Bench by itself cannot be regarded as a ground for review.

16. The gist of the aforestated decisions is that:—

(i) A judgment is open to review inter alia if there is a mistake or an error apparent on the face of the record.

(ii) A judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so.

(iii) An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of record justifying the court to exercise its power of review.

(iv) In exercise of the jurisdiction under Order 47 Rule 1 CPC, it is not permissible for an erroneous decision to be "reheard and corrected."

(v) A Review Petition has a limited purpose and cannot be allowed to be "an appeal in disguise."

(vi) Under the guise of review, the petitioner cannot be permitted to reargue and reargue the questions which have already been addressed and decided.

(vii) An error on the face of record must be such an error which, mere looking at the record should strike and it should not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.

(viii) Even the change in law or subsequent decision/judgment of a co-ordinate or larger Bench by itself cannot be regarded as a ground for review.

7. In the case of **S.Madhusudhan Reddy Vs. V.Narayana Reddy and Others; reported in 2022 SCC OnLine SC 1034**, the Hon'ble Apex Court observed as under:-

"As can be seen from the above exposition of law, it has been consistently held by this Court in several judicial pronouncements that the Court's jurisdiction of review, is not the same as that of an appeal. A judgment can be open to review if there is a mistake or an error apparent on the face of the record, but an error that has to be detected by a process of reasoning, cannot be described as an error apparent on the face of the record for the Court to exercise its powers of review under Order XLVII Rule 1 CPC. In the guise of exercising powers of review, the Court can correct a mistake but not substitute the view taken earlier merely because there is a possibility of taking two views in a matter. A judgment may also be open to review when any new or important matter of evidence has emerged after passing of the judgment, subject to the condition that such evidence was not within the knowledge of the party seeking review or could not be produced by it when the order was made despite undertaking an exercise of due diligence. There is a clear distinction between an erroneous decision as against an error apparent on the face of the record. An erroneous decision can be corrected by the Superior Court, however an error apparent on the face of the record can only be corrected by exercising review jurisdiction. Yet another circumstance referred to in Order XLVII Rule 1 for reviewing a judgment has been described as "for any other sufficient reason". The said phrase has been explained to mean "a reason sufficient on grounds, at least analogous to those specified in the rule" (Refer : Chajju Ram v. Neki Ram and Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius)."

8. Upon due consideration of the grounds as also the law related to dealing with review petition, according to which the review is by no means an appeal in disguise and the scope of review is limited as also the judgment dated 10.02.2020, relevant portion of which is quoted above, this Court finds no force in the present review petition for the reasons that while passing the judgment dated 10.02.2020, this Court considered the relevant facts and law on the issue and thereafter

recorded findings on the issue cropped up. Accordingly, the review application is dismissed.

9. No order as to costs.

Order Date :- 23.4.2024
(Manoj K.)