

Court No. - 2

Case :- SPECIAL APPEAL DEFECTIVE No. - 277 of 2024

Appellant :- State Of U.P. Thru. Prin. Secy. Basic Education Deptt.
U.P. Govt. Lko. And Others

Respondent :- Smt. Shipra Sharma And Another

Counsel for Appellant :- C.S.C.

Counsel for Respondent :- Karuna Kant Gupta,Om Prakash Mani
Tripathi

Hon'ble Rajan Roy,J.

Hon'ble Om Prakash Shukla,J.

1. Heard.

2. The delay in filing the special appeal is condoned for the reasons explained in the affidavit filed in support of condonation of delay which are found to be satisfactory.

3. By means of this special appeal the State has challenged the judgment and order dated 11.10.2022 passed in Writ C No. 5614 of 2019 as also the order dated 19.07.2023 passed on IA No. 5 of 2023 seeking modification and another order dated 16.04.2024 passed on Civil Misc. Review Application Defective No. 9 of 2024.

4. It is not out of place to mention that the original order passed on 11.10.2022 was subject matter of challenge in appeal bearing Special Appeal Defective No. 545 of 2023 which was disposed of on 03.08.2023 in the following terms:

"1. This special appeal arises out of judgment/order dated 11.10.2022 passed by learned Single Judge in Writ -C

No.5614 of 2019.

2. *Learned Standing Counsel representing the appellants, after arguing at some length, prays that he may be permitted to withdraw the instant special appeal with liberty to file a review application before the Writ Court.*

3. *In view of the above, the present special appeal is, accordingly, dismissed as withdrawn at this stage with the liberty as prayed."*

5. As the errors being pointed out as per the decision of the Coordinate Bench were one which could be reviewed, therefore, the appeal was dismissed as withdrawn with liberty to file review application. Such review application was filed along with an application for condonation of delay, however, the said application for condonation of delay has been rejected as the explanation for the delay in filing the review application was not found satisfactory. Consequently, the review has also been rejected. While doing so, the writ Court has observed that the review application was beyond limitation.

6. In this regard, the contention of State-counsel, Mr. Indrajeet Shukla, was that there is a judgment of the Coordinate Bench in ***Mohd. Jahan Begum and Another vs. Board of Revenue and Others; 2016 SCC OnLine All 3678*** wherein the question as to whether the Limitation Act applies to review proceedings arising out of writ proceedings under Article 226 of the Constitution of India or not was considered and it was held that such

Limitation Act does not apply to writ proceedings under Article 226 of the Constitution of India though the concept of delay and laches does apply. It was also held that there is no specific provision for exercise of powers of review by a writ Court and that is a power exercised under the plenary and inherent powers under Article 215 of the Constitution of India of the Constitutional Courts. Consequently, it opined with reference to various precedents that Limitation Act 1963 *stricto sensu* does not apply to the review proceedings arising out of writ proceedings under Article 226 of the Constitution of India, nevertheless, while filing the review application the applicant is required to explain the delay and laches, if any.

7. Be that it may, it has been contended by the counsel for the appellant-State that multiple proceedings have been held only on account of a mistake committed by the State Authorities before the writ Court in the counter affidavit filed by it. He has invited our attention to paragraphs 4, 7 and 9 wherein due to inadvertence it was mentioned that the Expert Committee did not find the objections to answers to questions no. 143 and 96 as tenable, whereas, in fact, it should have been stated that the objection to question no. 143 was not found tenable, but,

so far as the objections by the others (not the writ-petitioner) to question no. 96 is concerned, the same was found tenable, meaning thereby, the original answer no. 4 to the said question was revised on the basis of the said objections which were accepted by the Expert Committee and the same was changed to answer no. 1.

8. The contention is that the writ-petitioner submitted the correct answer originally which was answer no. 4 to question no. 96 and he did not file any objections to the tentative answer key. However, there were others who filed such objections and their objections were considered by the Expert Committee and were sustained and the Expert Committee opined that it is the answer no. 1 which is the correct answer to question no. 96. Now, this placed the writ-petitioner in a situation where his answer became wrong, subsequently. Instead of stating these facts, due to inadvertence certain lines were incorporated in Paragraph 4 and other paragraphs which have been explained in paragraph 36 of the affidavit in support of the interim relief in this appeal.

9. The submission is that it is not a case where a conscious, unambiguous admission was made by the State or there were instructions that this is what should be informed to the Court, but, it was a case where at some

stage an error or mistake occurred which crept into counter affidavit which has been treated as admission by the writ Court and the petition has been allowed. The review has been rejected on the ground of delay.

10. In the context of the review application, learned counsel for the respondent-writ petitioner submitted that as per Rules of the Court, if the discovery of new material is the basis for filing review application, then, an affidavit has to be filed in support thereof which was not done. However, we find that this is not an issue which was considered by the Court while dismissing the review application which has been dismissed only on the ground of delay.

11. Ordinarily if the delay is condoned we do not interfere in exercise of such discretion, but, where the delay is not condoned; rather, explanation is rejected and consequently the review application also gets rejected that too in the circumstances noticed hereinabove when the Division Bench vide its order dated 03.08.2023 granted liberty to the State to file such review application and the consequence of rejection of such explanation and the review application would be that an apparently incorrect answer to question no. 96 would have to be treated as correct thereby giving undue benefit to a

candidate and this may prejudice other candidates who had appeared in the selection, then, this Court will not be found wanting in interfering in such matters.

12. We have also gone through the explanation given by the State before the writ Court which was hearing the writ petition and we find that in the facts and circumstances of the case, this was a case where the explanation should have been accepted. We accordingly set aside the order passed on 16.04.2024 in Civil Misc. Review Application Defective No. 9 of 2024 on the delay condonation application and the review application.

13. Ordinarily we would have revived the review application, but, the error is so apparent that no purpose would be served by relegating the State to pursue the review application. The State has placed before the Court the original document containing the opinion of the Expert; there is no white fluid used on the said document. On being confronted, the counsel for the respondent-writ petitioner and the State counsel submitted that though there is no fluid on this document which contains the Expert opinion based on it the document which was prepared subsequently for the candidates in that document there was white fluid used. We find that any fluid used on subsequent document is meaningless and

erroneous. So far as the original document is concerned, we find that there is no such fluid. We have perused page 18 of the Expert's opinion which refers to question no. 96 and it clearly says that instead of the original answer 4 after disposal of the objections, the correct answer is answer no. 1.

14. Now, at this stage the counsel for the respondent-writ petitioner submitted that, in fact, the question itself has been changed. We find that this is not the ground on which the writ has been allowed. The ground on which the writ has been allowed is the alleged admission on the State which in fact was on error/mistake, as is evident from the original documents produced in Court, as already discussed.

15. In the circumstances already noticed hereinabove, we find merit in the contention of State counsel that this was not a case where there was any admission, but, a case where there was an error and mistake. Of course, such errors as noticed above should not have been made. The Chief Standing Counsel, Mr. Shailendra Kumar Singh is present in Court and we direct him to conduct an inquiry in the matter as to circumstances in which such a counter affidavit got filed. Whether this error was there in the narrative given to the Standing Counsel who prepared it,

or it was committed at the level of Standing Counsel and appropriate action shall be taken so that such errors are not repeated, as, only account of this error the writ Court was persuaded to treat the averments made therein as an admission and allow the writ petition. He shall also inform the Principal Secretary (Law)/Legal Remembrancer, Government of U.P., Lucknow about this order.

16. As regards the contention of the respondent counsel that appeal itself is not maintainable because of the earlier Special Appeal Defective No. 545 of 2023 challenging the original order dated 11.10.2022 passed by the writ Court having been dismissed, we are of the opinion that this contention has been raised only to be rejected. We have already quoted the order dated 03.08.2023. The said special appeal was dismissed as withdrawn with liberty to file a review application. Once the review application has been decided, it is always open for the litigant to challenge not only the order passed in the review application, but, the original order also passed by the writ Court as there was no decision in the earlier appeal on merits and there is no such law which prohibits the litigant from doing so

17. For the reasons aforesaid, we also set aside the order dated 11.10.2022 passed in Writ C No. 5614 of 2019.

18. We do not wish to enter into any other issues on merits of the matter as now the writ Court will consider the same afresh. .

19. As regards the order passed on the modification application, in view of the original orders having been quashed the subsequent order dated 19.07.2023 passed in the same proceedings also does not survive, the same is also quashed.

20. The writ proceedings bearing Writ C No. 5614 of 2019 shall stand restored to its original number and shall be listed before the writ Court in the 2nd week of July, 2024 when the matter shall be considered afresh.

21. The State shall file a supplementary counter affidavit explaining the averments made in the earlier counter affidavit and bringing on record the true copy of Expert's opinion with regard to question no. 96. It shall be open for the respondent to file a supplementary rejoinder affidavit in response and thereafter the writ Court shall consider and decide the same afresh.

22. We may also mention that as per the State counsel there is no dispute as regards question no. 143, however, the respondent's counsel disputes this fact. We leave this issue to be considered by the writ court.

23. All pleas other than the one which has been considered and decided herein are open for consideration by the writ Court.

24. We request the writ Court for an early decision in the matter considering the nature of dispute.

25. The special appeal is ***allowed***.

[Om Prakash Shukla, J.] [Rajan Roy, J.]

Order Date :- 27.5.2024
Santosh/-