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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 16.05.2017**

% **LPA 343/2017**

B MANGLA Appellant

Through: Mr. Khalid Arshad, Advocate.

versus

THE DIRECTOR OF EDUCATION & ORS Respondents

Through: Mr. K.K. Sharma, Senior Advocate
along with Mr. Rajiv Bakshi,
Advocate for respondents No.3 & 4.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE DEEPA SHARMA

VIPIN SANGHI, J. (ORAL)

1. We have heard learned counsel and proceed to dispose of the present appeal.
2. The appellant preferred W.P. (C) No. 7249/2002 to seek successive promotions to the posts of PGT, Vice-Principal and Principal in the respondent no.3 school. She also sought quashing of promotions granted to respondents No.4 & 5 who were also serving in the respondent no.3 school. She also prayed for compensation from the respondents in her writ petition.
3. The writ petition was preferred, as noted above, in the year 2002. It

appears that the said writ petition came up before the learned Single Judge for hearing on 23.01.2017. On the said date, the learned Single Judge after hearing submissions of learned counsel, apparently, was of the view that the pleadings of the appellant/ petitioner were lacking and there were no averments found in her writ petition to show that she satisfied the eligibility criteria for promotion to the higher posts. It was also not disclosed as to what were the norms for promotion, i.e. whether promotions were automatic. Accordingly, the learned Judge put it to the learned counsel for the appellant/ petitioner that it would be advisable not to press the petition. Apparently, it was suggested that the appellant may seek liberty to file a detailed petition, disclosing the Recruitment Rules and how the appellant/ petitioner satisfied the eligibility criteria for promotion from TGT to PGT, PGT to Vice-Principal and then from Vice-Principal to Principal's posts. However, it appears that the learned counsel for the appellant/ petitioner insisted on arguing the matter and, consequently, the learned Single Judge observed that it was not possible to decide the writ petition in view of grossly defective state of pleadings. The writ petition was, accordingly, dismissed. The relevant extract from the order passed by the learned Single Judge on 23.01.2017 reads as follows:

“6. During the course of hearing, I have put it to counsel for the petitioner that in such cases where pleadings are hopelessly lacking, and there are no averments found of satisfying of eligibility criteria by the petitioner for promotions to the higher posts, as also how the promotion posts are automatic promotion posts, it would be advisable for the petitioner not to press this petition with liberty to file a detailed petition which will state the recruitment rules, how the petitioner satisfies the eligibility criteria in the recruitment rules for promotions from

TGT to PGT, then PGT to Vice Principal and then from Vice Principal to Principal, however, counsel for the petitioner kept on insisting for decision in this very writ petition, but which is not possible in view of the grossly defective state of the pleadings.

7. I may also note that as compared to the defective pleadings of the petitioner, on the other hand there are sufficient pleadings of the contesting respondents, including the respondent no.3/school, in the counter affidavits, with respect to how the petitioner was not fit for appointment to the higher posts, and for which she was duly considered. Since however there is the position of complete lack of pleadings and documents of the petitioner for this Court to grant reliefs to the petitioner, I am for the present not looking at the defences, inasmuch as, such defences need only be looked into if only first the petitioner has made necessary pleadings and satisfied this Court about existence of causes of actions in favour of the petitioner for automatic promotions from the post of TGT to PGT, PGT to a Vice Principal and thereafter from a Vice Principal to a Principal, and which as already stated above do not exist.

8. The writ petition is accordingly dismissed.”

4. The appellant then moved an application being C.M. No.14188/2017 under Section 151 CPC “*for modification/ recall and/ or clarification of judgment dated 23.01.2017*” in the aforesaid writ petition. In the application, the appellant disclosed that she is a widow and a senior citizen and she resides with her daughter in the United State of America. She was not in India when the matter was listed on 23.01.2017, since she was in USA and she was not aware of, and was not informed about what transpired on the date of hearing. She further stated that normally, upon such a poser being put by the Court to a counsel - as was put to the counsel for the appellant/ petitioner by the learned Single Judge during the hearing on 23.01.2017, the

counsel of reasonable acumen and prudence would avail of the liberty granted by the Court. However, the petitioner's counsel, instead of taking time to seek instructions from her on the said aspect, and instead of applying reasonable prudence to readily avail of such a favourable liberty, even without informing the petitioner of the said circumstances/ situation having arisen during the course of hearing before the Court, and without taking instructions from her, spurned the offer made by the Court and insisted on a decision in the writ petition - leading to its dismissal. Consequently, the appellant sought the following substantial relief in the application:

“a. Modify, recall and or clarify the judgment dt. 23.01.2017 by granting liberty to the Petitioner to file a detailed fresh writ petition seeking the reliefs as sought for in WP(C) 7249/2002; and/or ”

5. The said application being C.M. No.14188/2017 came up before the learned Single Judge on 21.04.2017, which has been dismissed by him by observing that no grounds are made out for review of the judgment dated 23.01.2017 and for grant of liberty to file fresh proceedings. The learned Judge has observed that judgment dated 23.01.2017 is quite clear and in the interest of justice, does not call for review of the said judgment dated 23.01.2017. In this background the present appeal has been preferred by the appellant.

6. Learned counsel for the appellant submits that since the appellant was not even in India when the writ petition was heard by the learned Single Judge on 23.01.2017, she could not give instructions to her counsel that he should avail of the liberty granted by the learned Single Judge during the course of hearing, to file a better petition with complete details and

particulars. However, her learned counsel did not seek accommodation from the learned Judge to take instructions from the appellant and, instead, recklessly pursued the matter and eventually invited dismissal of the writ petition. Only when the appellant learnt of the said development, she moved the application, i.e. C.M. No.14188/2017, which has been dismissed by the learned Single Judge. Learned counsel submits that in the interest of justice, the said application should have been generally allowed by the learned Single Judge, since the appellant should not have been made to suffer for the reckless and immature conduct of her counsel.

7. There is no representation today on behalf of respondents No.1 & 2. The appeal has been opposed on behalf of respondents No.3 & 4.

8. Mr. Sharma submits that the prayer made in the application, i.e. C.M. No.14188/2017 to seek, inter alia, recall of the judgment dated 23.01.2017 tantamounted to seeking review of the said order, and even though provisions of Section 114 and Order XLVII CPC have specifically not been invoked, and merely Section 151 CPC had been invoked, the same would not make a difference. Mr. Sharma submits that the present Letters Patent Appeal (LPA) is not maintainable in view of the fact that the appellant had sought review of the order dated 23.01.2017 vide C.M. No.14188/2017, and the appellant has not assailed the said order dated 23.01.2017. Without assailing the original order, the present LPA is not maintainable only to assail the order dismissing the review application. In support of his submission, he has placed reliance on the decision of the Supreme Court in *Municipal Corporation of Delhi Vs. Yashwant Singh Negi*, 2013 (2) SCR 550, and *DSR Steel (Private) Limited. Vs. State of Rajasthan and Others*,

(2012) 6 SCC 782.

9. Mr. Sharma submits that the writ petition itself was highly belated, and a similar writ petition preferred by one Indal Singh against the respondent school seeking similar relief was dismissed on the grounds of delay and laches by the learned Single Judge, and the said dismissal was upheld by the Division Bench in LPA No.588/2002 vide order dated 09.08.2002.

10. In rejoinder, learned counsel for the appellant submits that the application moved by the appellant was not to seek review of the order dated 23.01.2017, but only to seek recall/ modification of the said order. He submits that the appellant did not move the application to point out any patent error in the order passed by the learned Judge on 23.01.2017. The application is not premised on any of the well-recognised and accepted grounds on which a review would be maintainable under Order XLVII Rule 1 CPC. In fact, it was merely to undo the damage done to the appellant on account of inappropriate handling of the case by her then counsel, that the application to seek recall of the order dated 23.01.2017 had been moved. The appellant had not assailed the judgment dated 23.01.2017, since the appellant was not aggrieved thereby, and wished to avail of and comply with the liberty that the learned Single Judge had granted to the appellant during the course of hearing of the writ petition.

11. Having heard learned counsels, we are inclined to allow the

present appeal and set aside the impugned order dated 23.01.2017.

12. The objection raised by Mr. Sharma to the maintainability of the present LPA may be first dealt with. The submission of Mr. Sharma is that the appellant vide C.M. No.14188/2017 had, inter alia, sought recall of the judgment dated 23.01.2017, which tantamounted to seeking review of the said order. We cannot agree with this submission. Merely because the prayer made in the said application was, inter alia, to seek the recall of the order dated 23.01.2017, it does not follow that the appellant was seeking review of the said order. The provisions of the Civil Procedure Code do not strictly apply to writ proceedings. However, the principles would be attracted. The grounds on which review of a judgment may be sought are set out in Rule 1 of Order 47 CPC, which are:

- i) That new and important matter or evidence is discovered which, after the exercise of due diligence, was not within the knowledge of the review petitioner, or could not be produced by the review petitioner at the time when the decree was passed;
- ii) that there is some mistake or error apparent in the face of record;
- iii) that there are other sufficient reasons calling for review of the judgment.

13. Pertinently, the appellant did not claim that the order dated 23.01.2017 was erroneous for any reason whatsoever. The recall of the said order was not sought on the ground that there was any error in the said order. The recall was sought so as to avail of the opportunity offered to

counsel for the appellant/ petitioner – of filing a fresh writ petition with better particulars, which had not been accepted by the counsel for the appellant/ petitioner on his own, and without taking instructions from the appellant/ petitioner.

14. It is not that whenever a party seeks recall of a judgment or order, it tantamounts to seeking review thereof. Review of a judgment postulates the reconsideration of the judgment on its merits, i.e. the reconsideration of the reasons and the findings found in the judgment upon satisfaction of one or more of the ground for review taken note of herein above. An order or judgment may be recalled/ set aside even under Rule 13 of Order 9 where an ex-parte decree is passed against the defendant. Merely because the defendant may seek the setting aside of the ex-parte decree, it cannot be said that by doing so, he seeks review of the ex-parte judgment and decree. Pertinently, in the order dated 23.01.2017, there was no determination of the claims raised by the appellant/ petitioner on merits and, thus, there was no occasion for the appellant to seek review of the said order. Moreover, the appellant was not aggrieved by the reasoning given by the learned Single Judge for dismissing the writ petition, which was that the petition lacked the material particulars essential to adjudicate her claim in the petition. In fact, the appellant also realised that the writ petition – as filed, was deficient of particulars and so desired to withdraw the same with liberty to file a better petition.

15. Reliance placed on *Yashwant Singh Negi* (supra) and *DSR Steel Pvt. Ltd.* (supra) is misplaced. In both these decisions, the Supreme Court was dealing with situations where review applications had been preferred –

which is not the case in hand.

16. A perusal of the order dated 23.01.2017 – relevant portion whereof has been extracted herein above, shows that the learned Single Judge was himself inclined to grant opportunity to the appellant/ petitioner to not press her petition and, instead prefer a detailed petition with liberty from the Court, after making full and complete disclosure of the relevant facts and the law. It is also evident that the said suggestion made by the Court was not acted upon by the appellant's counsel, who did not disclose the fact that she was not even in India when her writ petition was heard by the learned Single Judge on 23.01.2017. Thus, it is evident that it was not a case of the appellant having taken a conscious decision to press her writ petition (despite the observation/ offer made by the Court), subsequently sought to make amends by seeking to avail of the liberty that the Court was initially inclined to grant.

17. The facts and circumstances which emerge on a reading of the order dated 23.01.2017, and on a reading of the application moved by the appellant i.e. C.M. No.14188/2017 show that the appellant was done-in by her counsel, who did not seek instructions from the appellant on the suggestion made by the learned Single Judge on 23.01.2017, and proceeded to press with his arguments in the writ petition. A litigant should not be made to suffer on account of the conduct and negligence of his counsel, since the appellant was not even in India at the relevant time when the writ petition was heard and disposed of on 23.01.2017. Obviously, she would not have been aware of the proceedings as they were undertaken before the Court. Thus, it could not be said that the appellant contributed in any

manner to invite the order dated 23.01.2017. In our view, she could not be blamed for the manner in which her counsel proceeded to deal with a case on 23.01.2017.

18. Since the claims made by the appellant in her writ petition had not been adjudicated on merits, in the aforesaid circumstances, in our view, the learned Single Judge should have allowed the application moved by the appellant i.e. C.M. No.14188/2017 and recalled the order dated 23.01.2017 and also permitted the appellant to withdraw her writ petition with liberty to file a better petition with full particulars. Adoption of such a course of conduct would have been in the interest of justice. May be, on account of the fact that the respondents had contested the said writ petition for 15 long years, the appellant could have been subjected to some costs. The dismissal of the appellants application i.e. C.M. No.14188/2017 has left the appellant without a sense of closure. Her claims have not been adjudicated on merits.

19. The submission of Mr. Sharma that the writ petition was belated or that a similar petition of one Indal Singh had been dismissed on the grounds of delay and laches, and the said dismissal had been upheld in LPA No.588/2002 vide order dated 09.08.2002 are aspects which apparently were not raised by the respondents before the learned Single Judge when the writ petition was dismissed on 23.01.2017. The alleged delay and laches on the part of the appellant was neither the reason for dismissal of the writ petition on 23.01.2017, nor the reason for dismissal of the application i.e. C.M. No.14188/2017 by the impugned order. We, therefore, do not consider it necessary to delve into the said aspect.

20. For the reasons aforesaid, we set aside the impugned order dated 21.04.2017 passed by the learned Single Judge and revive the writ petition i.e. W.P.(C.) No.7249/2002. We find merit in the said application, i.e. C.M. No.14188/2017 and, consequently, allow the same subject to costs in favour of the respondents quantified at Rs.10,000/- to be shared equally between respondent nos.3, 4 and 5. The appellant shall pay the costs within eight weeks. The writ petition of the appellant, therefore, stands dismissed as withdrawn, with liberty to file a fresh writ petition after disclosure of all the relevant facts, circumstances, rules and regulations. We make it clear that it shall be open to the respondents to raise all their defences, including the defence that the earlier writ petition i.e. W.P.(C.) No.7249/2002 was barred by delay and laches. We, however, clarify that the period consumed between the time when W.P.(C.) No. 7249/2002 was preferred, till date shall not be counted towards delay and laches in case the appellant were to file a fresh writ petition within the next eight weeks.

21. The appeal stands disposed of in the aforesaid terms.

VIPIN SANGHI, J

DEEPA SHARMA, J

MAY 16, 2017

B.S. Rohella/SR