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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.03.2020

CORAM :

THE HON'BLE MR.A.P.SAHI, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.A.No.3908 of 2019

Aided Primary School,
rep. by its Secretary,
Thazhambadi, Puduchathiram Union,
Namakkal District.

.. Appellant

vs.

1.The Director of Elementary Education,
College Road, Chennai-6.

2.The District Elementary Education Officer,
Namakkal.

3.The Assistant Elementary Education Officer,
Puduchathiram Union,
Namakkal District.

.. Respondents

Appeal filed under Clause 15 of the Letters Patent against the order dated 03.04.2019 passed by the learned Single Judge in Review Application No.35 of 2018 in W.P.No.259 of 2018.

Review Appl:Application filed under Order 47 rule 1 read with Section 114 of Civil Procedure Code, to review the order dated 09/01/2018 made in WP.No.259 of 2018.

Prayer in WP.No.259 of 2018:Petition under Article 226 of the Constitution of India, praying for the issue of a Writ of Mandamus, directing the respondents to grant permission to fill up the vacant Secondary Grade Teacher post arose due to retirement of Tmt.Lakshmi on 31.05.2017, with TET qualified



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teacher on the basis of the proposal submitted by the school on 05.07.2017 and 30.11.2017.

For Appellant : Mr.R.D.Ashok Kumar
for M/s.S.N.Ravichandran

For Respondents : Mr.C.Munusamy
Spl. G.P. (Edn.)

JUDGMENT

(Delivered by The Hon'ble Chief Justice)

Heard learned counsel for the parties.

2. We had passed the following order on 20.01.2020, calling upon learned counsel for the State, to answer the same:

"This writ appeal has been filed assailing the order passed in Review Application No.35 of 2018 filed by the State. The writ petition had been allowed by the learned Single Judge and a contempt application has been filed. From a copy of the cause list that has been placed before us, we find that the contempt application and the review application were listed on the same day before the learned Single Judge. The learned counsel contends that he did appear, but in order to press the contempt application, whereas the review application was heard and allowed without serving a copy of the same on the appellant's counsel.

2. We find from the order that the learned counsel had been heard, but in the wake of the issues raised, we are entertaining this writ appeal.

3. Sri.C. Munsamy, learned Special Government Pleader for the State having accepted the same, we call upon him to answer this writ appeal on the question as to why should the appellant Institution be compelled to have a teacher who does not possess TET qualification in the vacancy which arose in January 2017.

4. Learned Special Government Pleader for the State shall provide details of such teachers whom they intend to deploy with such qualification.



List the matter on 26.02.2020."

3. The facts of this case lie in a very short compass. A vacancy arose in an Aided Elementary Primary School, which has only one Headmaster and at the time when the vacancy arose on 31.05.2017, there were only two teachers. The Institution runs Classes I to V. The Institution being poorly staffed, sought for a permission to make an appointment on the post of a teacher.

4. The said request for proceeding to make an appointment was not granted and was kept pending, and ultimately, on 18.08.2017, an offer was made by the District Elementary Educational Officer, Namakkal, informing the appellant Institution that it may proceed to fill up the post by appointing one of the surplus teachers out of 81, who were available and the choice was left to the appellant to do so. The appellant declined to accept the same on the ground that the list did not contain any such teacher, who may be qualified and eligible possessing a Teacher Eligibility Test certificate and, therefore, the Institution may be permitted to make its own appointment afresh. This communication was again responded to by the District Elementary Educational Officer by reiterating the earlier stand vide letter dated 03.11.2017.

5. It is at this stage that the appellant again made a request for making a fresh appointment and in the event the appellant does not get a suitable reply, the appellant made it known to the respondents that the Institution will be compelled to approach the Court.

6. Accordingly, the appellant filed W.P.No.259 of 2018 that was allowed on 09.01.2018 issuing the following directions:

"5. A perusal of the same shows that the petitioner School, having only one Headmaster, is entitled to have one more teacher on account of the retirement of the previous Secondary Grade Teacher Tmt.Lakshmi, who attained the age of superannuation on 31.5.2017. In view of the settled legal position as mentioned above, the writ petition is allowed and the respondents are directed to grant permission to the petitioner School to fill up the vacant Secondary Grade Teacher post with a qualified Secondary Grade Teacher with TET, on the basis of the proposal dated 5.7.2017 and 30.11.2017, within a period of four weeks from the



date of receipt of a copy of this order. Needless to mention that the teacher so appointed will be also entitled to receive the salary from the respondents from the date of appointment. No costs."

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7. On the strength of the said judgment, the appellant approached all the educational authorities with due intimation about the said directions and also asked for formal permission which was not extended by the respondents who kept quiet in the matter. The appellant Institution then proceeded with an advertisement and has appointed a teacher, who fulfills the Teacher Eligibility Test qualification.

8. The respondent department filed a Review Application before the learned Single Judge contending that the writ petition had been allowed without noticing the fact of the offer made by the department of deploying a teacher who was surplus in another Institution and no permission having been granted to the appellant to appoint a new teacher. The learned Single Judge, after having noticed the same, allowed the Review Application on 03.04.2019 and reviewed his judgment and dismissed the writ petition.

9. The learned Single Judge held that in the case at hand even at the initial stage, prior to the judgment dated 09.01.2018, the writ petitioner had been informed of filling of the post by a surplus teacher which was declined by the appellant and which fact impelled the Court to review the judgment.

10. The present appeal arises out of the review judgment dated 3.4.2019 contending that the learned Single Judge could not have re-heard the matter and taken a different stand altogether, as this course was not permissible keeping in view the principles of Order 47, Rule 1 of the Code of Civil Procedure, 1908. Reliance has been placed on the judgment of the Apex Court in the case of Kamlesh Verma v. Mayawati and others, reported in (2013) 8 SCC 320.

11. The Apex Court in the said judgment held that 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. The learned counsel, therefore, contends that keeping in view the principles laid down in the said judgment, the Review Application was neither maintainable nor could it be allowed. Paragraphs 20 to 20.2 of the said judgment are extracted herein under:



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"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" have been interpreted in *Chhajju Ram v. Neki* [(1921-22) 49 IA 144 : (1922) 16 LW 37 : AIR 1922 PC 112] and approved by this Court in *Moran Mar Basselios Catholicos v. Most Rev. Mar Poullose Athanasius* [AIR 1954 SC 526 : (1955) 1 SCR 520] 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.* [(2013) 8 SCC 337 : JT (2013) 8 SC 275]

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 reheard 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.

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

12. Apart from this, the challenge raised on merits is that the vacancy in the present case arose on 31.05.2017 long after the Right of Children to Free and Compulsory Education Act, 2009 came into force and the qualifications required for a teacher to be appointed is now governed by the NCTE Regulation, which compulsorily requires possession of a Teacher Eligibility Test certificate for a candidate to be appointed in an Elementary School. It is, therefore, submitted that on the date when the vacancy arose, the eligibility as insisted upon by the appellant was necessary or else the appointment would be invalidated. It is for this reason that the appellant had refused to accept a surplus teacher who did not possess the Teacher Eligibility Test qualification.

13. Replying to the said contentions raised, Shri C.Munusamy, learned Government counsel contends that the error in the judgment dated 9.1.2018 was apparent, inasmuch as the facts had already been pleaded and recorded, but they had not been noticed by the learned Single Judge and consequently, the mistake of the Court should cause harm to no one and therefore, relying on that principle, the learned Single Judge appropriately entertained the Review Application and allowed the same.

14. On merits, Shri C.Munusamy contends that there was no challenge raised to the intimation given by the District Elementary Educational Officer offering the names of 81 teachers for appointment. In the absence of any such challenge raised in the writ petition, which was only for a mandamus seeking permission, the learned Single Judge had erroneously allowed the writ petition and therefore, the Review Application was rightly entertained and the earlier judgment was set aside.

15. He further contends that in the absence of any prior permission from the competent authority as required under Rule 15(4) Tamil Nadu Recognized Private Schools (Regulation) Rules, 1974, the Management could not have proceeded or insisted upon making an appointment. In the instant case, there was no



permission and the appointment has been made after the judgment of the learned Single Judge dated 09.01.2018 that has already been reviewed. In the given circumstances, therefore, the appointment is otherwise not valid on account of want of prior permission.

16. His third contention is that when a surplus teacher is offered by the department, then what has to be seen is as to whether he was a validly appointed teacher or not. In the instant case, the Teacher Eligibility Test became compulsory after the Government Order was issued on 15.11.2011, but any appointment made prior to that without a Teacher Eligibility Test certificate was valid. Thus, the list of teachers which has been provided to the appellant Institution contains the names of such teachers, who had been appointed prior to 15.11.2011 and therefore, they were fully eligible and were continuing as teachers, hence, the insistence of the appellant to have a Teacher Eligibility Test certificate could not have been a ground for making a request for fresh appointment.

17. Thus, on the above stated grounds, the learned Government counsel contends that the Review Application has been rightly allowed and the appellant Institution is not entitled for any relief.

18. Having heard learned counsel for the parties, what is more impelling is the status of the appointee who was born in between the legal battle between the appellant Institution and the respondent department. His appointment is clearly an outcome of the judgment of this Court dated 09.01.2018, which came to be reviewed after more than a year, but the fact remains that he is a qualified teacher possessing a Teacher Eligibility Test certificate.

19. Before proceeding to consider as to the nature of the relief as prayed for, we may clarify that the grounds for review of any judgment, particularly in the exercise of jurisdiction under Article 226 of the Constitution of India, are founded on the basic principle that no one should suffer on the mistake of the Court.

20. However, the locus classicus on review is the celebrated decision of the Federal Court reported in AIR (37) 1950 Federal Court 131 (Smt. Jamna Kuer vs. Lal Bahadur & Others).

21. Apart from this, in the instant case, to arrive at



another conclusion, the learned Single Judge does not appear to have given a different reason other than what is accepted for entertaining a Review Application viz., facts that have been omitted that can be considered a ground of review. The error in the present case is therefore apparent, and falls within the basic principle of error apparent on the face of the record. The learned Single Judge while delivering the original judgment on 9.1.2018 had completely omitted the facts as pleaded by the State that were relevant for deciding the controversy.

22. Learned counsel for the appellant is correct in his submission on the strength of the Apex Court judgment cited by him that review is not a re-hearing nor an opportunity to deal with the matter once again, inasmuch as once a decision arrived at had attained finality, then the Court becomes functus officio unless there are impelling circumstances to review the judgment which includes fraud, misrepresentation or even mistake. There is no such ingredient which could curtail the entertaining of the Review Application by the learned Single Judge on the facts of the present case. Consequently, no error, much less a legal error, was committed by the learned Single Judge in proceeding to entertain the Review Application.

23. However, we are skeptical about the nature of the relief that ought to have been moulded on the facts of the present case when the appellant continues to insist that a teacher not qualified as on the date of occurrence of the vacancy, i.e., 31.5.2017, could not be sent to the Institution. This issue has not been dealt with either by the District Elementary Educational Officer or even by the learned Single Judge. We, therefore, on the facts of the present case are of the opinion that the District Elementary Educational Officer has to consider the aforesaid objections raised, to which no reply was given except for insisting in employing a surplus teacher. The communication sent by the District Elementary Educational Officer does not contain any such reasons, even though a counter-affidavit filed by the department did say so.

24. We, therefore, partly allow this appeal while upholding the exercise of review undertaken by the learned Single Judge, but we modify the impugned judgment to the effect that the District Elementary Educational Officer shall obtain a specific instruction from the Director of School Education as to whether the qualifications which are required to be seen for appointment as on the date of occurrence of vacancy, which in the present case is 31.05.2017, and whether a surplus teacher by way of transfer from another school could be appointed as against the



claim of the appellant of appointing a teacher possessing Teacher Eligibility Test certificate.

25. In the result, the appeal is partly allowed in the aforesaid terms. The District Elementary Educational Officer, Namakkal, shall pass an appropriate order within a period of six weeks from today. No costs. Consequently, C.M.P.No.24660 of 2019 is closed.

Sd/-
Assistant Registrar

//True Copy//
Sub Assistant Registrar

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To

- 1.The Director of Elementary Education,
College Road, Chennai-6.
 - 2.The District Elementary Education Officer,
Namakkal.
 - 3.The Assistant Elementary Education Officer,
Puduchathiram Union,
Namakkal District.
- +1 cc to M/s.S.N.Ravichandran Advocate sr20560
+1 cc to Government Pleader sr21135

W.A.No.3908 of 2019

aa01/07/2020