

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

REVIEW APPLICATION NO. 93 OF 2021 IN
WRIT PETITION NO. 8439 OF 2018

Shri Jyotiba Phule Seva Trust
& another

Applicants

Versus

Shri Sambhaji Maruti Gutte & others

Respondents

Mr. Kedar Warad, Advocate holding for Mr. P.G. Gunale, Advocate for the applicants.

Mr. A.V Indrale Patil, Advocate for petitioner in Writ Petition.

Mr. V.S. Panpatte, Advocate for respondent No. 3 (Absent).

**CORAM : Mangesh S. Patil &
M.G. Sewlikar, JJ.**

DATE : 7th January, 2022.

PER COURT : (Per M.G. Sewlikar, J.)

1. This review petition is preferred by original respondents No. 4 and 5 to review the order in Writ Petition No. 8439/2018 passed by this Court on 5th April, 2021 to which one of us (M.G. Sewlikar, J.) was a party.

2. Briefly stated, facts leading to this review application are as under :-

Respondent No. 1 was appointed as Peon in applicant No. 2 - school in the year 1992. Respondent No. 4 (original respondent No. 3) granted permanent approval to the appointment of petitioner as Peon. Respondent No. 1 came to be terminated without following the due process of law by applicants No. 1 and 2 with effect from 16th February, 2002 vide order dated 16th July, 2002. Being aggrieved by the order of termination from service dated 16th July, 2002, respondent No. 1 preferred appeal before the Divisional Social Welfare Officer, Aurangabad Division, Aurangabad i.e. respondent No. 3 herein being the appellate authority. Vide order dated 30th November, 2005, termination order of petitioner was set aside with further direction to reinstate respondent No. 1 in service. By the same order, applicant No. 1 was permitted to initiate appropriate proceedings in accordance with law for alleged mis-conduct. Applicants No. 1 and 2 allowed respondent No. 1 to join duties with effect from 13th December, 2005. Immediately on the next day, i.e. on 14th December, 2005, applicant No. 1 placed respondent No. 1 under suspension, pending initiation of Departmental Enquiry. The said order mentions that respondent No. 1 would be entitled to admissible subsistence allowance.

3. According to respondent No. 1, on 2nd January, 2006, applicant No. 1 issued a letter to respondent No. 1 informing him that a Departmental Enquiry was contemplated against him. However, the proposed enquiry never took off and no enquiry was drawn up against respondent No. 1. Respondent No. 1 continued to remain under suspension. However, he was not paid the subsistence allowance.

4. When respondent No. 1 insisted upon applicants No. 4 and 5 for payment of subsistence allowance, it was shown that respondent No. 1 was working in the post of Watchman in applicant No. 2 – school on contract basis and approval to such appointment was obtained from the concerned District Social Welfare Officer. On 17th September, 2007, applicant No. 1 made a representation to respondent No. 4 herein for revocation of the order of suspension. However, no such steps seem to have been taken on the said representation. Therefore, respondent No. 1 filed Writ Petition No. 8439/2018 seeking relief of quashing of suspension order dated 14th December, 2005 and payment of subsistence allowance for the suspension period along with interest.

5. Applicants No. 1 and 2 filed a common affidavit-in-reply. The stand of applicants No. 1 and 2 was that the petition suffers from delay and laches. It is their contention that respondent No. 1 was terminated vide order dated 16th July, 2002 on account of kidnapping of a girl student. One Madhav Tukaram Mundhe came to be appointed on the post of Peon with effect from 17th July, 2002 and since then, said Mundhe is in continuous service. They contended that since there was no vacant post of Peon in applicant No. 2 – school, respondent No. 1 was not allowed to join any permanent post but on paper only it was shown that he was allowed to join. Respondent No. 1 was placed under suspension vide order dated 14th December, 2005. Respondent No. 1 was allowed to join duties by way of sympathy only. Applicants No. 1 and 2 further contended in writ petition that there was an amicable settlement between respondent No. 1 and applicants No. 1 and 2 whereby applicant No. 1 assured respondent No. 1 to appoint respondent no. 1 in Class-IV post. Respondent No. 1 agreed to this proposal. By way of this settlement, respondent No. 1 agreed that he would not claim salary and subsistence allowance in the post of Peon. From January 2006 to May 2013, respondent No. 1 worked in the hostel of applicant No. 2 – school on honorary basis and honorarium for the said period has

been paid to him.

6. According to applicants No. 1 and 2, vide order dated 11th June, 2013, respondent No. 1 came to be appointed to the post of Watchman with effect from 18th June, 2013 and approval to such appointment was granted by respondent No. 3. According to applicants No. 1 and 2, from 18th June, 2013, respondent No. 1 is in service of applicant No. 2 school in the post of Watchman and receiving regular salary.

7. Respondent No. 1 filed rejoinder and denied that he was posted as Watchman and that there was such amicable settlement.

8. This Court, after hearing arguments of learned counsel for both the sides, dismissed the writ petition holding that respondent No. 1 was appointed on a permanent vacant post of Peon. His services were terminated. Said order of termination was challenged before respondent No. 4 herein and termination order was set aside. This Court held that respondent No. 4 herein gave liberty to applicants No. 1 and 2 to initiate Departmental Enquiry against respondent No. 1 herein. This Court, further held that this order of

respondent No. 4 was not challenged before the appropriate forum. Therefore, it attained finality. This Court further held that respondent No. 1 was allowed to join the duties and was placed under suspension from the next day and the suspension has not been revoked. This Court further held that the legal consequence of an employee being placed under suspension is that he continued to retain lien over the said post. The vacancy caused in the post due to suspension of the incumbent is temporary during the period of suspension. This Court further held that when a post falls vacant due to suspension of an incumbent, such vacancy is purely temporary and cannot be filled in as a permanent post. Any appointment made to such a vacancy would be subject to the outcome of suspension. This Court held that if suspension is revoked, the subsequent appointee will have to move out. Accordingly, this Court allowed the writ petition and set aside and quashed suspension order of respondent No. 1 and further directed respondent No. 1 to be reinstated in applicant No. 2- school forthwith and applicants No. 1 and 2 were also directed to pay subsistence allowance to respondent No. 1 for the period he remained under suspension within a period of three months from the date of receipt of copy of the order. It was further directed that applicants No. 1 and

2 shall take decision as to regularisation of the services of respondent No. 1 during the period of suspension which would be without prejudice to any decision that respondents No. 4 and 5 may take regarding holding of departmental proceedings against respondent No. 1 in accordance with law.

9. Heard Shri Warad, learned counsel holding for Shri Gunale, learned counsel for the applicants and Shri Indrale Patil, learned counsel for respondent No. 1. Shri Panpatte, learned counsel for respondent No. 3 was absent.

10. Learned counsel Shri Warad submitted that respondent No. 1 was placed under suspension on 14th December, 2005. Respondent No. 1 challenged this order of suspension in the year 2008. He submitted that there was huge delay of 13 years in challenging the order of suspension. He submitted that this Court, while deciding Writ Petition No. 8439/2018, did not consider the aspect of delay and laches though the same had been pleaded and argued. He further submitted that there was amicable settlement between respondent No. 1 and applicants No. 1 and 2 and, by way of amicable settlement, respondent No. 1 was appointed as Watchman

and he continued to work as Watchman till filing of the writ petition. According to learned counsel Shri Warad, respondent No. 1 has been paid salary as a Watchman. Therefore, the question of payment of subsistence allowance to respondent No. 1 never arose. He further submitted that respondent No. 1 had filed Writ Petition No. 7832/2019 for quashing of cancellation of approval to the post of Watchman. It was the stand of respondent No. 1 that he never signed the said petition and did not get himself deleted. He submitted that this clearly shows that respondent No. 1 was appointed as a Watchman. But this Court did not appreciate this fact in proper perspective. Learned counsel Shri Warad placed reliance on the case of State of Jammu and Kashmir vs. R.K. Zalpuri and others reported in (2015)15 Supreme Court Cases 602.

11. Review is permissible when there is an error apparent on the face of the record. Error apparent on the face of record means an error which strikes one on mere looking at record and would not require any long drawn process of reasoning. For finding out whether there was any error apparent on the face of record, it is impermissible to look into the documents. Mere wrong appreciation of evidence cannot be a ground for review. In the matter of Parsion

Devi v. Sumitri Devi, (1997)8 SCC 715, the Honourable Apex Court held as under :-

“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 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.’”

Power of review can also be exercised by the Court in the event of discovery of a new matter or evidence, despite exercise of due diligence, was not within the knowledge of the party or could not be produced by the party at the time when the order was made.

12. The position that emerges is that review Court does not sit in appeal over its own order. Rehearing of the matter is impermissible in law. It is impermissible for an erroneous decision to

be reheard and corrected.

13. The submissions which learned counsel for the review applicants has advanced have already been considered by this Court while delivering the judgment under review. This Court observed that respondent No. 1 was placed under suspension on 14th December, 2005. He made representation to respondent No. 4 in the year 2007 for revocation of suspension. This Court also observed that though respondent No. 1 was placed under suspension, disciplinary proceedings were never initiated. This Court has dealt with this aspect of the matter in paragraph No. 35 of the judgment which is quoted hereunder for facility of reference :

“35. In the present case petitioner was placed under suspension on 14-12-2005. More than fifteen years have gone by since then. During this entire period neither has he been paid any subsistence allowance nor any departmental proceeding has been initiated against him. By any standard, fifteen years is a long period in the service life of an employee. Though initial suspension of the petitioner might have been justifiable but such prolonged suspension that too without holding any departmental proceeding and without payment of subsistence allowance has become arbitrary and

oppressive. As rightly pointed out by this Court in the order dated 13-06-2019, such a situation cannot be allowed to continue. “

14. Respondent No. 1 was placed under suspension for a period of fifteen years and no Departmental Enquiry was initiated for this period. Respondent No. 1 was not guilty of delay and laches. Rather applicants No. 1 and 2 are guilty of delay and laches as they placed respondent No. 1 under suspension for fifteen years and did not initiate any Departmental Enquiry against him and did not pay subsistence allowance either.

15. So far as amicable settlement is concerned, respondent No. 1 has specifically denied in rejoinder filed by him that there was such amicable settlement and that he was appointed on the post of Watchman. This being a disputed fact, cannot be gone into while deciding the review petition.

16. We have carefully gone through the decision of Honourable Apex Court in the case of State of Jammu and Kashmir vs. R.K. Zalpuri (supra), the facts were completely different. In that case, the High Court had not gone into the question of delay and

laches at all. This is not the position in the case at hand. As indicated earlier, this Court has elaborately dealt with the aspect of delay and laches.

17. Learned counsel Shri Indrale Patil brought to our notice the event post decision of this Court in Writ Petition No. 8439/2018. He placed on record communication dated 11th September, 2021. From this communication it appears that in accordance with directions of this Court, applicant No. 1 initiated enquiry against respondent No. 1, thereafter applicant No. 1 terminated the services of respondent No. 1 since he did not give his reply within seven days. This communication shows that Enquiry Committee was established in accordance with the directions of this Court in Writ Petition No. 8439/2018. This demonstrates that applicant No. 1 initiated Departmental Enquiry against respondent No. 1 in accordance with the directions given by this Court. This shows that applicant No. 1 accepted the part of the order and seeking the remaining part of the order to be reviewed. This is impermissible in the facts and circumstances of the present case. Directions of this Court were that applicants No. 1 and 2 shall pay subsistence allowance and to initiate Departmental Enquiry if applicants No. 1 and 2 deemed it fit. When

applicant No. 1 initiated Departmental Enquiry against respondent No. 1, it clearly goes to show that applicants No. 1 and 2 admit that suspension of respondent No. 1 was not revoked. Therefore, when the direction of this Court regarding initiation of Departmental Enquiry is implemented, it goes to show that applicant No. 1 also admits that respondent No. 1 was placed under suspension and it is still not revoked. For this reason also, review is not maintainable.

18. The application does not fall within the parameters of review as observed by the Honourable Apex Court in the matter of Parsion Devi v. Sumitri Devi (supra). What the applicants wanted is rehearing of the matter which is impermissible.

19. For the forgoing reasons, review in the facts and circumstances of this case, is not maintainable. Review application is devoid of any substance hence it is dismissed.

(M. G. SEWLIKAR)
Judge

(MANGESH S. PATIL)
Judge