

25.04.2023
Item no.3
Court No.6.
AB

**R.V.W. 293 of 2019
I A CAN 1 of 2021
In
WPCT 83 of 2017**

**Md. Arif Hossain & Others
Vs
The Union of India & Others**

Mr. Subir Sanyal,
Mr. Sayantan Hazra
....for the Review Applicants.

Mr. Wasim Ahmed,
Sk. Md. Masudfor the State.

Mr. Dayashankar Mishra
.....for the Union of India.

A judgment and order dated November 8, 2019, whereby WPCT 83 of 2017 (Md. Arif Hossain & Others Vs Union of India & Others) was dismissed, is under review in the present application.

The petitioners had approached the Central Administrative Tribunal, Kolkata Bench, claiming to be persons who were engaged by the erstwhile Nawabs and/or their agents for maintaining and/or rendering essential services in respect of a monument in Murshidabad in West Bengal, known as Motijhil Mosque & Cemetery. Being a place of historical importance, the Government of India took a decision to declare the said monument as one of national

importance and entrust the work/responsibility of protection, conservation and preservation of the monument to Archaeological Survey of India (ASI). The petitioners claimed before the Tribunal that they should be absorbed as permanent employees of ASI. They contended that the monument was being managed by ASI and they, being persons employed to render essential service in respect of the monument, are entitled to be regularized in service.

Their representations to the Competent Authority for being absorbed in regular service, having been rejected by the Superintending Archaeologist by an order dated September 4, 2014, the petitioners approached the Central Administrative Tribunal challenging such rejection order.

The Tribunal referred to the final Notification dated June 28, 2011, published in the Gazettee of India by the Department of Culture (Archaeological Survey of India) and noted that as per the said Notification, the Department of Culture or ASI has not taken over the management of the concerned monument. The Department has only taken up the work of conservation, protection and preservation of the monument. Accordingly, the question of regularizing the petitioners did not arise. The operative portion of the Tribunal's order reads as follows:

“7. A bare perusal of the impugned order reveals that the Government of India has taken a policy decision on the basis of the recommendations of the committee only to protect the monument in view of the demand raised by the local people. It has also been clarified that the Department of ASI had no provision/policy to treat the local people as regular employees of the department. The decision was conveyed to the petitioners of the Writ Petition in Writ Petition No.9436(W) of 2007 (copy of the judgment has been annexed by the respondents as Annexure ‘R-5’) when the Hon’ble High Court directed the Government to take a decision to declare the monument as ancient one and take up its protection work. It is also contained in the order of Hon’ble High Court that petitioners of Writ Petition were informed that they had no demand or claim of any employment or absorption of any existing staff in the Government service in case Motijheel Mosque is declared to be a monument of national importance. It was further mentioned in the impugned order that ASI as per notification dated 28.6.2011 has not taken over the management of the Motijheel mosque and cemetery and Department has to take up the work of protection, conservation and preservation of the monument only. Hence, the Archaeological Survey of India is not the management body of the declared monument of national importance. Hence, the claim of absorption, enhancement of salary etc. could only be looked into by the body which manages the mosque and cemetery and not by Archaeological Survey of India or Government of India.

8. We, therefore, find no merit in this case and no interference is warranted in the impugned order.

9. In view of the above, the Original Application is liable to be dismissed and is dismissed accordingly. However, the rights of the petitioners if any exists in accordance with law with regard to their claim to be absorbed from the body which is in management of the ancient monument may be entertained before appropriate forum.”

Being aggrieved by the said order of the Tribunal, the petitioners challenged the same by filing

WPCT 83 of 2017 before this Court. By a judgment and order dated November 8, 2019, a Coordinate Bench dismissed the writ application. The material portion of the said order reads as follows:

“In the absence of the ASI having taken over the management, the petitioners had no legal right to claim regularisation of their services under the ASI. We have not been shown by Mr. Sanyal, learned advocate for the petitioners that such a finding returned by the tribunal is erroneous. ASI has nothing to do with the management of the mosque and having regard to the avowed objects for which it has been brought into existence viz, preservation and conservation of ancient monuments, persons who claim to be part of the management of the mosque cannot and do not have any legally protected right to be regularised in the service of the ASI.

There is no merit in the writ petition and the same stands dismissed. There shall be no order as to costs.”

That is the order under review.

Learned Advocate for the petitioners primarily relied on certain replies to applications made by them under the Right to Information Act. In particular, learned Counsel referred to an application under Section 6 of the RTI Act made to the Central Public Information Officer (CPIO) and the Superintending Archaeologist, ASI, Calcutta Circle, dated November 11, 2019. The query in such application was, in effect, whether or not the Motijhil Jama Masjid (mosque) and Cemetery at Lalbagh, Murshidabad is managed, controlled, funded and supervised by the ASI. If it is not the ASI, then under whose control does the said

monument stand. In its reply dated November 21, 2019, the CPIO stated that “the whole responsibility for conservation/preservation/ maintenance of the said monument is lying with Archaeological Survey of India.”

A further RTI application dated July 6, 2020, was made which was to the same effect as the first application. In its reply, the CPIO stated that “as Motijhil Jama Masjid, District Murshidabad is a centrally protected monument, preservation/ conservation/maintenance of the said monument is the prime concern of the Archaeological Survey of India from its central protection. In this regard, all the issues related to the development of the monument are under the control of the said organization. Besides this, ASI regulates all archaeological activities in the country as per the provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958.”

Similar reply was given on August 6, 2020, to yet another application dated July 16, 2020 made by the petitioners under the RTI Act.

The 4th RTI application dated November 17, 2020 made by the petitioners enquiring whether or not the activities of the ASI in relation to the said monument includes the issue of management of the monument, yielded a similar reply.

The next RTI application was made by the petitioners on April 9, 2021. In its reply dated April 19, 2021, the Superintending Archaeologist (I/C), Raiganj Circle, answered the questions “Has Raiganj circle of ASI (erstwhile Kolkata Circle) taken over the management/administrative control of the said monument” and “does the onus of management of the said protected monument fall on the Raiganj Circle of ASI,” in the affirmative. The petitioners strongly rely on this document.

Finally, yet another RTI application was made by the petitioners on April 22, 2021. By its reply dated April 30, 2021, the Superintending Archaeologist confirmed that management and administrative control of Motijhil Jama Masjid and Cemetery is with ASI.

Learned Advocate referred to other documents at paged 59, 62, 63, 92, 93 and 105 of the petition filed in connection with the Memorandum of Appeal. It is not necessary to refer to all such documents. We will refer to a few of them hereinafter.

Learned Advocate for Union of India submitted that management of the monument never was nor now is with ASI. ASI is only concerned with the protection, conservation and preservation of the monument, which has been declared to be a monument of national

importance. The management always was and is with the Motijhil Jama Masjid Unnayan Committee.

We had called for a report from the Director General of ASI as regards the role of ASI in connection with the said monument. Such report was filed before us as an Annexure to an affidavit affirmed on January 30, 2023, by the Superintending Archaeologist, ASI, Raiganj Circle, Hazarduari Palace, Murshidabad. After discussing the various provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958, the Director General has stated in the report as follows:

“Since the Motijhil Mosque has been declared as of National importance provision of the Ancient Monument and Archaeological Sites and Remains Act, 1958 and Rules, 1959 made thereunder are applicable on this monument. Further, ASI is responsible to undertake conservation, preservation and maintenance of the said centrally protected monument through Raiganj Circle.

It is to mention here that prior to declaring protected in the year 2011 and even at present, the affairs of worship and necessary actions for smooth functioning of the worship, the Motijhil Jama Masjid Unnayan Committee is functioning at this monument. ASI has neither interfered in functioning of the said committee, nor prevented religious prayers at this monument. As such, both the entities, ASI and the Committee are functioning side by side at that monument.

Besides this, save and except management and administrative control of the said Mosque, ASI regulates all the Archaeological activities at the Monuments as per provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 and main concern of ASI here is only conservation, preservation and maintenance of such monument of national importance.

It is also necessary in this connection to refer the definition of “maintain” as provided under Section 2(f) of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (Amendment and Validation Act, 2010) which is reproduced as under :-

*“**maintain**, - with its grammatical variations and cognate expressions, includes the fencing, covering in, repairing, restoring and cleansing of a protected monument, and the doing of any act which may be necessary for the purpose of preserving a protected monument or of securing convenient access thereto;”*

As stated in the above paras, the activities performed by ASI and Committee are separate in nature, and nowhere authority of the Committee has been challenged by ASI. Thus, ASI has not taken complete management of the Mosque. This issue has already been settled by the Hon’ble court in its order dated 08.11.2019 passed in W.P.C.T. 83 of 2017.

The following report is submitted on the requisitioned points in the said order dated December 6, 2022 that “the ASI or the ASI, Raiganj Circle concerned has not taken over the Management and Administrative Control of the Motijhil Mosque since its declaration as monument of National Importance till date”.

In the light of above detailed statements and the relevant provisions of the said Act of 1958, it is submitted to state clearly that the ASI has no role in the Management and Administrative Control of the said Motijhil Jama Masjid (Mosque) of Murshidabad and this is being looked after by the Committee. ASI maintains the monument as per AMASR Act, 1958 and accordingly, this report is submitted before Your Lordships for kind consideration.”

The petitioners have filed an exception to the said report, which we have duly considered.

We have given our anxious consideration to the rival contentions of the parties.

At page 37 of the petition is a letter dated March 2, 2005, written by the Superintending Archeologist, ASI, addressed to the Secretary of the Motijhil Jama Masjid Unnayan Committee. The said letter reads as follows:

“As you are aware that the Archaeological Survey of India is going to protect Motijhil Mosque you are hereby requested to submit an undertaking that the Motijhil Jama Masjid Unnayan Committee will not put the claim for absorption of any existing staff in government service in case it is declared as a monument of national importance.

This must be treated as most urgent as without such declaration the protection will not be considered. An undertaking in this respect may be obtained in proper form and submitted to this office.”

Page 63 of the petition is the reply of the Secretary of the Unnayan Committee to the aforesaid letter. The reply reads as follows:

“I am extremely delighted that A.S.I. is going to take over Motijhil Mosque. This will save the historically famous Heritage Building which is in a highly dilapidated condition. For this we are extremely thankful to you.

Now I like to inform you that we have no demand or claim of any employment or absorption of any existing staff in government service in case the Motijhil Mosque is declared to be a monument of National importance”.

We have also seen the final Notification declaring the Jama Masjid as a monument of national importance. The declaration comes with the clear rider that no claim for employment or permanent absorption will be entertained by ASI from any local people.

We have recorded the arguments of the parties in detail since learned Counsel have taken pains to make detailed submissions. However, review cannot be equated with appeal. A Court exercising power of review under Order 47 Rule 1 of the Code of Civil Procedure cannot act as a Court of Appeal in disguise. An order may be reviewed if there is error apparent on the face of the order or if fresh material is discovered by the review petitioner, which he could not have discovered even by acting diligently or for other sufficient cause.

In the present case, there is no error apparent on the face of the order under review. If a lengthy chain of reasoning and argument is necessary to establish error apparent on the face of the order under review, that itself would show that the review application is meritless.

An order may be erroneous. However, such error may not be apparent on the face of the order. In such case the remedy of the aggrieved party is to approach the higher forum by way of appeal or revision or the like. An erroneous order may be corrected by the appellate forum. A Court in exercise of review jurisdiction cannot correct any and every error in an order.

In this connection, learned Advocate for the Union of India relied on a Division Bench decision of

this Court rendered in RVW 294 of 2015. In the said decision, the Division Bench discussed various judgments of the Hon'ble Supreme Court. Some of the observations that have been made by the Hon'ble Supreme Court in various cases may be culled out as follows:

- (I) An error which has to be established by a long drawn process of reasoning cannot be said to be a mistake apparent on the face of the record ;
- (II) 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 of CPC ;
- (III) There is clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected only by the higher forum, the latter may be corrected by exercise of review jurisdiction. A review petition has a limited purpose and cannot be allowed to be an appeal in disguise.

The aforesaid observations can be found in the decisions of the Hon'ble Supreme Court in **AIR 1995 SC455 (Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhury); (1997)8 SCC715 (Parsion Devi & Ors. Vs Sumitri Devi & Ors.); 2014(5) SCC 75**

(Dr. Subramanian Swamy Vs State of Tamilnadu & Ors.) and AIR 1964 SC 1372 (Thungabhadra Industries Ltd. Vs The Govt. of AP).

In the case reported at ***(2015) 2 SCC 390***, the Hon'ble Supreme Court observed that an application for review on the ground of discovery of new material should be considered with great caution and should not be granted very lightly.

The petitioners rely on cryptic answers to their queries raised in several RTI applications to try and demonstrate that ASI is in management of the concerned monument and, therefore, the petitioners are entitled to be absorbed as regular employees of ASI. Apart from the fact that such replies to RTI applications are in direct conflict with the report in the form of affidavit submitted by the Director General of ASI, such documents were not before the Coordinate Bench, which dismissed the writ petition challenging the order of the Tribunal. The petitioners did not make any effort to obtain clarification from ASI regarding the actual status of ASI in relation to the monument in question. It cannot be said that the petitioners acted with diligence and in spite of so acting, it was not possible for them to ascertain the stand of the ASI. Nothing stood in the way of the petitioners to make

RTI applications prior to disposal of the writ petition by the Coordinate Bench. We are of the view that none of the grounds of review enumerated in Order 47 Rule 1 of the CPC exists in the facts and circumstances of the case.

Further, an application for review based on material discovered subsequent to the passing of the order under review should be considered with great caution as has been observed by the Hon'ble Supreme Court thereby meaning that normally such review application should not be allowed.

We do not find any extra ordinary circumstance in this case, which would persuade us to modify or reverse the order under review by exercising our power under Order 47 Rule 1 of CPC.

The review application being RVW 293 of 2019 is dismissed along with IA CAN 1 of 2021.

Urgent photostat certified copy of this order, if applied for, be supplied expeditiously after compliance with all the necessary formalities.

(Apurba Sinha Ray, J.)

(Arijit Banerjee, J.)