

21.06.2024
Court No.13
Item No.1
AP

**WPCRC 46 of 2024
In
WPA 7922 of 2023
With
CAN 1 of 2024**

**Uday Mukherjee and Ors.
Vs.
Dr. Jayram Hembram,
The Chief Medical Officer of Health & Secretary
DH & FWS, Purba Bardhaman**

Mr. Haradhan Mondal
.... For the Petitioners.

Mr. Tapan Kumar Mukherjee
Mr. Suman Sengupta
Ms. Amrita Panja Moulick
.... For the State.

In Re.: CAN 1 of 2024

1. CAN 1 of 2024 is an application seeking recall of this Court's order dated 18th December, 2023 has been filed on the basis of leave granted by a Division Bench of this Court on 15th May, 2024 in MAT 659 of 2024 (The State of West Bengal and Ors. Vs. Uday Mukherjee & Ors.)

2. The Division Bench expressed displeasure at the State for not bringing the documents placed before this Court. Upon payment of costs, the State was granted liberty to apply before this Court to reconsider the matter in the light of new material.

3. The State in its infinite wisdom has chosen to file the instant application for recall of the order dated 18th December, 2023. The application cannot

be maintainable under Order 9 of the Code of Civil Procedure as the State was represented and despite repeated request did not file any report. The State could have filed an application for review of the order dated 18th December, 2023. The circumstances where an application for recall can be filed, has been discussed at Para 6 of the decision of the Supreme Court in the case of ***Budhia Swain & Ors. Vs. Gopinath Deb*** reported in **(1999) 4 SCC 396**.

“6. What is a power to recall? Inherent power to recall its own order vesting in tribunals or courts was noticed in *Indian Bank v. Satyam Fibres (India) (P) Ltd.* [(1996) 5 SCC 550] Vide para 23, this Court has held that the courts have inherent power to recall and set aside an order

(i) obtained by fraud practised upon the court,

(ii) when the court is misled by a party, or

(iii) when the court itself commits a mistake which prejudices a party.

In *A.R. Antulay v. R.S. Nayak* [(1988) 2 SCC 602 : 1988 SCC (Cri) 372 : AIR 1988 SC 1531, para 130] (vide para 130), this Court has noticed motions to set aside judgments being permitted where

(i) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all and was shown as served or in ignorance of the fact that a necessary party had died and the estate was not represented,

(ii) a judgment was obtained by fraud,

(iii) a party has had no notice and a decree was made against him and such party approaches the court for setting aside the decision *ex debito justitiae* on proof of the fact that there was no service.”

4. In ***Vishnu Agarwal v. State of U.P.*** reported in **(2011) 14 SCC 813** at Para 7 the distinction between review and recall has been emphasized.

“7. Apart from the above, we are of the opinion that the application filed by the respondent was an application for recall of the order dated 2-9-2003 and not for review. In *Asit Kumar Kar v. State of W.B.* [(2009) 2 SCC 703 : (2009) 1 SCC (L&S) 541 : (2009) 1 SCC (Cri) 851 : (2009) 1 SCR 469] this Court made a distinction between recall and review which is as under: (SCC p. 705, paras 6-7)

“6. There is a distinction between ... a review petition and a recall petition. While in a review petition the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party.

7. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in *All Bengal Excise Licensees' Assn. v. Raghabendra Singh* [(2007) 11 SCC 374] cancelling certain licences was passed without giving an opportunity of hearing to the persons who had been granted licences.”

5. Equally curious of the fact that the earlier order dated 17th April, 2023 passed in the same matter has not been questioned either before this Court or any other. The application of the State ought to be dismissed on this ground alone.

6. However, in the interest of justice this Court takes the application for recall as one for review.

7. Coming to the facts of the case, it appears that the subject matter of the writ petition is a post of

Kala-azar Technical Supervisor (hereinafter referred to as 'the KTS'). The said post was created under a World Bank's sponsored project called National Vector Borne Disease Control Programme (hereinafter referred to as 'the NVBDCP'). The said project is funded by the World Bank via the Central Government and implemented through the State Government.

8. The programme was started by the Ministry of Health and Family Welfare called National Vector Borne Disease Control Programme by a notification dated 28th July, 2008. The post of KTS was created and 66 posts have been identified for the State of West Bengal to be distributed in various districts.

9. Sometime in September 2020, the State has proposed a modification and/or reorientation to the post of KTS under the NVBDCP. It was found that out of 66 sanction KTS posts, 47 were lying vacant. As to whether the 66 post of KTS were ever filled up fully and when vacancies arose and why they are not filled up remains unexplained.

10. Suffice to say that even after proposed reorganization the State continued to feel the need for 66 posts of KTS personnel. There were lesser personnel required in some districts and more in others. It could, therefore, be presumed that Kala-

azar as a disease has not been completely eliminated in the State as on 10th September, 2020.

11. It is sought to be explained in the proposal of the State to the Central Government that the 66 posts of KTS could not be filled up due to non-availability of candidates fulfilling the current Terms of Reference (TOR).

12. In a meeting of the State Task Force on Kala-azar held on 13th November, 2019 under the Chairmanship of the Secretary, Department of Health and Family Welfare, Government of West Bengal several proposals for change of qualifications and age of the KTS personnel were mooted.

13. The principal change was that the minimum age was sought to be reduced from 50 to 21 and the maximum age was sought to be reduced from 60 to 40. Educational qualifications and requirements were also proposed to be changed. The proposal was stated to have been sent to the Central Government, Ministry of Health and Family Welfare.

14. The matter was lying with the State until February 2023 in the bureaucratic hierarchy.

15. Pending consideration of the proposal, a recruitment process of KTS personnel was conducted under notice dated 22nd July, 2022. Interview letters were issued to the eligible candidates. It is recorded

in the order dated 17th April, 2023 of a Coordinate Bench that a panel has been prepared. Counsel for the State across the bar today submits that no such panel has ever prepared. No records are produced in that regard.

16. On 27th March, 2023 the Mission Director, NHM, West Bengal State Health and Family Welfare Samiti issued fresh guidelines for recruitment to the post of KTS now re-designated as Vector Borne Disease Technical Supervisor (hereinafter referred to 'the VBDTS') under the new National Vector Borne Disease Control Programme (NVBDCP). The State vide notification dated 16th March, 2023 cancelled the earlier recruitment process whereof interview was held on 3rd February, 2023. Fresh advertisement for the post of VBDTS was proposed.

17. This Court in the application of the State has not found any directive from the Central Government for such change of rules for recruitment of the re-designated KTS personnel into VBDTS. The same appears to have been done by the State itself.

18. In the brochure published by the National Health Mission under the Ministry of Family Welfare, Government of India in April 2023 it is found by the Central Government that Kala-azar continues an endemic in 54 districts in the country of which 11 districts are in West Bengal.

19. The arguments advanced on behalf of the State that Kala-azar has been eliminated in the State, therefore, falls flat and is without any truth or merit whatsoever.

20. This Court is of the view that a deliberate attempt has been made to mislead this Court.

21. Be that as it may, this Court is of the view that the State is entitled to re-designate the posts and create fresh terms and conditions for such newly re-designated posts. The reasons for change of terms and conditions albite sketchy are available in the documents annexed to the application.

22. Since the two Benches of this Court has been continuously misled by the State and the correct facts have not been brought on record except only to some extent in the instant application, maintainability whereof is quite suspect, this Court directs the three writ petitioners to be allowed to function temporarily as KTS personnel in the district concerned. The said three writ petitioners shall be absorbed as the special case without precedent in any future recruitment process to the post of VBDTS notwithstanding their age.

23. The writ petitioners undertake before this Court to perform all duties that would be performed by a VBDTS.

24. Except in respect of three writ petitioners, the State is permitted to cancel all earlier recruitment processes to the post of KTS personnel. It is expected that the balance 63 posts are advertised for the recruitment of VBDTS in future and shall follow the new terms and conditions of recruitment.

25. Until recruitment is formally made, the writ petitioners shall discharge all functions as may be entrusted to them by the CMOH, Purba Bardhaman.

26. Accordingly, CAN 1 of 2024 shall stand disposed of.

In Re.: WPCRC 46 of 2024

27. In view of the modification of the order dated 18th December, 2023, WPCRC 46 of 2024 shall also stand disposed of.

28. Rule, if any, shall stand discharged.

29. Interim orders, if any, shall stand vacated.

30. On the question of costs, this Court notice that the CMOH, Purba Bardhaman has already paid costs to the writ petitioners as directed by the Division Bench. The CMOH, Purba Bardhaman is warned and is directed to place full and correct facts before a Court in respect of any proceedings that may be defended by him for the State.

31. All parties are to act on a server copy of this order duly downloaded from the official website of this court.

(Rajasekhar Mantha, J.)