

(2017) 03 GAU CK 0014
In the Gauhati High Court
Case No : Case No. Review. Pet. 76 of 2015

Dildar Hussain (MD)

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 06-03-2017

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 114

Citation : (2017) 2 GauLT 206

Hon'ble Judges : Mr. Suman Shyam, J.

Bench : Single Bench

Advocate : Mr. M.K. Choudhury, Mr. M.H. Ahmed and Mr. M.R. Choudhury, Advocates, for the Petitioner; SC Secondary Education, Mr. K.K. Mahanta, Mr. K. Singh, for Caveator, Mr. K.P. Sarma, Mr. H. Das and Mr. A.F.N.U. Mollan, Advocates, for the Respondents

Final Decision : Disposed Off

Judgement

Mr. Suman Shyam, J.— Heard Mr. M.K. Choudhury, learned Sr. counsel appearing for the review petitioner. Also heard Mr. A. Deka, learned standing counsel, Secondary Education appearing on behalf of the respondent Nos. 1 to 4, Mr. H. Das, learned counsel appearing for the respondent No. 5 as well as Mr. K.K. Mahanta, learned Sr. counsel assisted by Mr. K. Sinha, learned counsel appearing on behalf of respondent No. 9.

2. By filing the instant review petition, a prayer has been made for reviewing/recalling the judgment and order dated 23-04-2015 passed by the learned Single Judge in W.P.(C) No. 7496/2013 and the connected writ petitions. The present review petitioner was the writ petitioner in W.P.(C) No. 2084/2014 which was analogously heard and disposed of by the common judgment and order dated 23-04-2015 along with W.P.(C) No. 5757/2012 and W.P.(C) No. 7496/2013 preferred by the respondent No. 9.

3. The dispute involved in the aforementioned writ petitions were pertaining to the competing claims made by the review petitioner and the respondent No. 9 for

provincialisation of their services on the basis of seniority. It appears from the record that the respondent No. 2 had earlier published a list of teaching and non-teaching staff of the concerned school on the basis of which an order dated 18-09-2013 was issued provincialising the services of the said staff including the review petitioner herein as a 3rd Assistant Teacher of the school. The order dated 18-09-2013 was put to challenge by the respondent No. 9 by filing W.P.(C) No. 7469/2013 wherein an interim order dated 20-12-2013 was passed directing the respondents to maintain status quo in the matter. In compliance of the order of this Court, the respondent No. 2 had passed an office order dated 12-03-2014 suspending the operation of the order of provincialisation dated 18-09-2013 which order was again put to challenge by the review petitioner in W.P.(C) No. 2084/2014.

4. By referring to paragraph 7 of the judgment and order dated 23-04-2015, Mr. Choudhury, learned Sr. counsel appearing on behalf of the review petitioner submits that certain allegation had been made by the Head Mistress of the School to the effect that the Inspector of Schools had prevailed upon her to manipulate the record pertaining to seniority of the 3rd Assistant Teacher and the review petitioner has been shown to have been the beneficiary of such manipulation. The learned Sr. counsel submits that although the Inspector of Schools was made a party as respondent No. 5 yet no notice of the proceeding was ever served upon him giving him an opportunity to rebut the said allegation brought against him by the Head Mistress of the School. Notwithstanding the same, the learned Single Judge had proceeded on the basis that the allegations have not been denied by the Inspector of Schools and placing substantial reliance on the uncorroborated statement of the Head Mistress of the School, had gone on to set aside the recommendation made by the respondent No. 2 in favour of the review petitioner.

5. By referring to the order dated 04-03-2009 (Annexure-7), Mr. Choudhury, further submits that there were sufficient materials available on record to show that Md. Amdadur Rahman was working as Assistant Teacher (Science) in the School. However, by ignoring such materials the learned Single Judge has recorded a finding that there is no teacher by the name of Md. Amdadur Rahman ever working in the School and on the basis of such finding an order has been passed in favour of the respondent No. 9 for considering this case for provincialisation. Mr. Choudhury submits that the aforesaid finding having been recorded on an erroneous assumption that there is no teacher in the School by the name of Md. Amdadur Rahman an error apparent on the face of the record has crept into the judgment of the learned Single Judge warranting review/recall of the same.

6. Opposing the submission made on behalf of the review petitioner, Mr. K.K. Mahanta, learned Sr. counsel appearing on behalf of the respondent No. 9 submits that the judgment of the learned Single Judge is based on sum total of materials placed on record and therefore the contention of the review petitioner

that the decision has been motivated by non-service of notice upon the respondent No. 5 or that the decision has been substantially influenced by the unrebutted stand of the Head Mistress levelling allegation against the Inspector of Schools is not correct. The learned Sr. counsel, however, fairly submits that the respondent No. 5 being the Inspector of Schools though impleaded in his private capacity, no notice was served upon the said respondent in the writ proceeding.

7. From a perusal of the materials available on record, I find that the respondent No. 5 has filed an affidavit taking a categorical stand that he had never issued instruction to the Head Mistress of the School for manipulating records as claimed by her. It is not in dispute that no notice of the writ petition was served upon respondent No. 5. From a perusal of the impugned judgment and order, I find that the decision of the learned Single Judge is substantially based on an assumption that allegation made by the Head Mistress against the Inspector of Schools, which post was held by respondent No. 5, has remained unrebutted. From a reading of the affidavit filed by the respondent No. 5, it cannot be said that the allegations has been accepted by him.

8. If a notice was served upon the respondent No. 5 and had he appeared and filed this affidavit, what would have been the view taken by the learned Single Judge cannot be speculated at this stage. However, it is true that the petitioner could not appeared and file his affidavit due to non-service of notice which in turn has influenced the outcome of the writ proceeding.

9. By referring to a decision of the Supreme Court in the case of Kamlesh Verma v. Mayawati & Ors. reported in (2013) 8 SCC 320, Mr. K.K. Mahanta, learned Sr. counsel submits that the condition under which the power of review can be exercised has been summarized by the Hon'ble Supreme Court and the principles laid down therein would not permit this Court to allow the review petition. Referring to the affidavit of the respondent No. 5, Mr. Mahanta has also urged that the appearance of respondent No. 5 and his affidavit filed in the review petition clearly demonstrate a nexus between the review petitioner and respondent No. 5.

10. The issue before this Court is not as to whether the writ petitioner has a good case on merit or not but whether the grounds urged in the review petition justifies recall of the order.

11. In the decision rendered by the Supreme Court in the case of Kamlesh Verma (Supra) it has been mentioned that a review will be maintainable on:

"(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 and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulse Athanasius 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."

12. In the present case, I find that the learned Single Judge did not have the benefit of the affidavit from the respondent No. 5 which would have had a material bearing in the outcome of the writ petitions in the peculiar facts and circumstances of the case. Once the respondent No. 5 had denied the allegations by filing an affidavit, the allegation made against him by the Head Mistress stood negated on the face of the record and therefore, a proper finding of fact on the correct state of affairs was necessary in the matter which had evidently not been done. As such, the absence of the affidavit from the respondent No. 5, in the context of the conclusion and findings recorded by the learned Single Judge, in my opinion raises a serious question pertaining to the soundness of the judgment and the same in the opinion of this Court would constitute sufficient reason for review/recalling the impugned judgment and order dated 23-04-2015. That apart, a perusal of the document (Annexure-7) also goes to show that the impugned judgment and order suffers from error apparent on the face of the record.

13. For the forgoing reasons, the review petition succeeds. The judgment and order dated 23-04-2015 is hereby recalled.

14. The writ petitions would now be listed for final hearing.