

(2014) 01 GAU CK 0040
In the Gauhati High Court

Case No : Review. Petition 155 and 156 of 2013 in W.Ps. (C) 3838/10 and 520/11

Sri Ghana Pegu

APPELLANT

Vs

Sri Binod Kumar Agarwala and Others
 Sri Aswini Kr.
Baishya Joint Registrar of Co-operative Societies Vs The State
of Assam and Others

RESPONDENT

Date of Decision : 23-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, Order 48 Rule 1 11

Citation : (2015) 2 GLD 16 : (2014) 4 GLT 233

Hon'ble Judges : N. Chaudhury, J

Bench : Single Bench

Advocate : P.N. Goswami, Mr. N.J. Khataniar, Mr. I. Kalita, Mr. D. Das, Mr. B. Talukdar and Mr. M.K. Borah, for the Appellant; U.K. Nair, K. Nayak, Ms. R. Saloi, P. Pathak, Ms. Changkakati, S. Ojah, Ms. P. Barman, Ms. S.T. Bokth, A. Narzery, Dr. B. Ahmed, SC, Co-Op. and learned Counsel, for the Respondent

Final Decision : Allowed

Judgement

N. Chaudhury, J.—Judgment and order dated 24.09.2013 passed by this Court in WP(C) 3838/2010 has been brought under challenge by two review petitions, namely, Review Petition No. 155/2013 and Review Petition No. 156/2013. The Review Petition No. 155/2013 has been filed by one Ghana Pegu, who was the respondent No. 6 in the main writ petition and the review Petition No. 156/2013 has been filed by one Aswini Kumar Baishya, who was the respondent No. 6 in the main writ petition. I have heard Mr. D. Das, learned senior counsel assisted by Mr. M.K. Bora, learned counsel for review petitioner in Review Petition No. 156/2013. Mr. S.S. Dey, learned counsel has appeared on behalf of the review petitioner in Review Petition No. 155/2013. Both these review petitions have been contested by the writ petitioner. I have heard Mr. U.K. Nair on behalf of the writ petitioners. In these writ petitions I have also heard Dr. B. Ahmed, learned Standing Counsel of the Co-operation Department.

2. Mr. D. Das, learned senior counsel arguing on behalf of Aswini Kumar Baishya would argue that the review petition is liable to be allowed on the ground that while passing the order in the main writ petition, promotion order of Aswini Kumar Baishya passed on 07.11.2007 was set aside on 24.09.2013 after expiry of about 6 years relying on judgment of this Court in the case of Khanindra Nath Choudhury Vs. State of Assam and Others, Mr. Das submits that even if the law laid down in the aforesaid case is followed even then setting aside of promotion after such inordinate delay is not permissible and even in case of Khanindra Nath Choudhury (supra), the promotion granted to Private Respondent was not set aside even after holding that Private Respondent was erroneously promoted in view of the fact that there cannot be reservation in a cadre consisting of 4 posts.

3. In support of his contention the learned Senior Counsel has placed reliance in the case of P.S. Sadasivaswamy Vs. State of Tamil Nadu, Drawing my attention to paragraph 2 of the case of P.S. Sadashiva Swami (supra) learned Senior Counsel maintains that challenge of a promotion order cannot be made after inordinate delay. The relevant part of the said paragraph is quoted below:

A person aggrieved by an order of promoting a junior over his head should approach the Court atleast within 6 months or at the most a year of such promotion.

It is the case of Mr. Das that promotion of respondent No. 5 was ordered on 07.11.2007 but the same was challenged in the year 2010 in WP(C) No. 3838 and as such it is much beyond the aforesaid period as referred to in the case of P.S. Sadashiva Swami. Had this point been taken into consideration, the promotion of respondent No. 5 would not have been set aside by this Court, the learned senior counsel argues. According to the learned senior counsel, non-consideration of this aspect of the matter alone is sufficient to warrant review of the order of this Court.

4. Arguing the revision petition No. 155 of 2013 on behalf of Sri Ghana Pegu, Mr. S.S. Dey, learned counsel submits that there are atleast two errors apparent on the face of records in the order under review and they are as follows:--

(i) Case of respondent No. 6 has not been considered while giving the opinion in paragraph 4 of the judgment but his entitlement for reservation has also been set at naught while considering the case of respondent No. 5 alone. Mr. Dey submits that this Court committed error apparent on the face of record in not noting that Schedule Tribe (Plains) candidates are entitled to 10% of the total vacancies under the roster in force. The cadre of Joint Registrar of Co-operative Societies consists of 7 posts and as such 10% of the posts come to 0.7% which if rounded off the mischief of Khanendra Nath Choudhury (supra) could have been avoided.

(ii) The second point argued by Mr. S.S. Dey is that Khanendra Nath Choudhury does not apply to the case at hand inasmuch as the cadre strength in the said case was only 4 and as such entitlement of Schedule Castes as well as Schedule

Tribes (Plains) to the extent of 7% and 10% respectively were below 0.5 and as such consideration of rounding off did not arise in that case but in the case in hand the cadre being composed of 7 posts, the question of rounding off is very much there.

Relying on the case of Manoj Kr. Roy Vs. State of Assam and Others, and State of Uttar Pradesh and Another v. Paban Kumar Tiwari reported in (2005) 2 SCC 10, learned counsel submits that Hon'ble Apex Court as well as this Court took recourse to rounding off while considering entitlement of the reserved categories. This being the position there was no ground for not applying the same procedure in the present case. Had the principle of rounding off been applied to the case in hand, the candidates of Scheduled Tribes (Plains) who are entitled to 10% of the total vacancy would have been held to be entitled to reservation in a cadre of 7 posts. According to the learned counsel non-consideration of this aspect has not only vitiated the judgment under consideration but such non-consideration itself is an error apparent on the face of record.

5. Per contra, Mr. U.K. Nair submits that the objection raised by the learned counsel in regard to non-consideration of his candidature and/or non-applicability of the case of Khanindra Nath Choudhury (supra) and/or propriety of setting aside a promotion order passed 7 years ago may be a question in an appeal arising out of the order under question but definitely not in review application. According to the learned counsel no case of error apparent has been made out warranting exercise of power of review in this court and accordingly the review petition is liable to be rejected. According to the learned counsel, the argument put forward by learned senior counsel in Review Petition No. 156/2013 and by the learned counsel in Review Petition No. 155 of 2013 were never before made before this Court when the main report was taken-up for hearing and the judgment was passed. I have heard also Dr. B. Ahmed.

6. There is no dispute at the bar that spirit of the provision of Order XLVII CPC applies in a review petition arising out of a judgment in writ petition as well. Order XLVII Rule 1 of the CPC lays down the guidelines for exercising power of review. Clause 1 Order XLVII Rule 1 is quoted below:

1. Application for review of judgment.-(1) Any person considering himself aggrieved -

(a) by a decree or order from which an appeal is allowed, but no appeal is preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on reference from a Court of small causes,

and who, from the discovery of a new or important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any

other sufficient reason, desires to obtain the review of the decree passed or order made against him, may apply for review of judgment to the court which passed the decree or made the order.

On perusal of the aforesaid provision it appears that the possible grounds for maintaining a review petition are as follows:--

(a) that a new matter or evidence has been discovered which was not in the knowledge of the petitioner in spite of due diligence; or

(b) that although such matter or evidence was in knowledge but the same could not be produced before the court when the judgment under review was passed or ordered; or

(c) that there is some mistake or error apparent on the face of record; or that any other sufficient reason exists.

7. The first ground referred to above is in regard to discovery of a new matter or evidence which was not in the knowledge of the applicant in spite of due diligence. The second ground is in regard to non-production of such new matter or evidence to Court when the judgment under review was passed. While discovery of a new matter or evidence by the applicant is qualified by the clause "which after exercise of due diligence was not within his knowledge", there is no such requirement in the second ground in regard to non-production of such new matter/evidence. The second ground is connected to the first ground by a disjunctive "or". There is no mention of the clause "which after exercise of due diligence was not within his knowledge" in the second ground. The principle of literary interpretation requires that when language of a statute is plain without any ambiguity, the court is to accept the statute as it is, and not to go for any interpretation to find a different meaning than what is expressed in the language of the statute. Keeping in mind this settled rule of interpretation of statute, if we read the provision of order XLVII Rule 1, it appears that it is sufficient if the petitioner draws attention of the court to such material/evidence which was either not in knowledge of the petitioner in spite of due diligence or it could not be produced before the court even if it was known. Now, question may arise as to why such a lenient provision has been made for giving scope of getting a judgment or order reviewed. Answer to this question may lie in explanation IV u/s 11 of the C.P.C. where it is provided that res judicata shall apply even to a point which might and ought to have been made ground of defence or attack in a former suit but was not so taken. Perhaps, to provide a remedy to an innocent victim of such exigency, the legislature in its wisdom has coined the first and second grounds of review referred to above. Be that as it may the basic thrust under these two grounds of review is that some matter or evidence was in existence at the relevant time and for some or other reasons the same escaped the notice of the Court either because the same was not in the knowledge of the parties to the suit in spite of due diligence or even if the same was in knowledge, was not produced before the Court at the relevant time.

8. Now the words "matter" or "evidence" arising in a case cannot be limited to a matter of fact only but would be applicable to question of law as well. The sum total of consideration of all these grounds would lead us to the inference that if it is brought to the satisfaction of the Court that some relevant aspect of the matter was in existence at the time of judgment is delivered but either was not brought to the knowledge of the Court for some or other reason but it is necessary for proper adjudication of the matter in dispute in that event such "matter" or "evidence" can be brought before the Court for the purpose of invoking review jurisdiction of this Court. Once a petitioner successfully brings to the knowledge of the court as to such new matter/evidence and the Court is satisfied that the matter/evidence produced in the review petition is relevant and indispensable for proper adjudication of the lis the first two grounds of review prescribed under the Rule 1 of the order XLVIII is fulfilled. This is because, the ultimate anxiety of the Court is to find out the truth so that justice is done. No doubt the spirit of the provisions of Order XLVII Rule 1 has been followed in review petition arising out of writ petition and as such the aforesaid exigencies or guidelines mentioned in Clause 1 Order XLVII Rule 1 has to be taken into consideration while deciding the present case.

9. The learned counsel for both the review petitions have established that the question as to whether rounding off is applicable in case of deciding the quantum of reservation in all cadres is a relevant aspect of the matter and neither the said fact nor holding the said claim came up for consideration before this court when the judgment of the review was passed. Apart from that except mentioning the name of respondent No. 6 the consideration of the case of the respondent No. 6 did not figure in the judgment under review. The question as to whether the promotion of respondent No. 5 should have been set aside for the purpose of making way of the writ petitioners also did not find place in the earlier judgment. All these aspects can definitely come within the meaning of "matter" under Clause 1 of Order XLVII Rule 1 of the Code of Civil Procedure. Consequently, it is to be held that there are grounds for review of the judgment.

10. Accordingly, both the review petitions are allowed.

11. Judgment passed by this Court on 24.09.2013 is hereby recalled.

12. At this stage, Mr. U.K. Nair, learned counsel for the writ petitioners submits that the writ petitions needs to be heard immediately on a fixed date to which neither Mr. Das nor Mr. S.S. Dey has any objection.

13. With the consent of both the sides it is stated that the writ petitions shall be heard afresh on merit on 30.01.2014.

14. At this stage Mr. S.S. Dey, learned counsel for the respondent No. 6 in the main writ petition submits that inadvertently no affidavit-in-opposition was filed by his client and he be permitted to place his case in the form of affidavit. Mr. U.K. Nair does not have any objection to it. It is provided that respondent No. 6 shall be at liberty to file any affidavit, if any, on or before 27.01.2014.