

(2015) 11 PAT CK 0083

In the Patna High Court

Case No : Civil Review No. 20 of 2013 in LPA 1361 of 2001

State of Bihar

APPELLANT

Vs

Rina Roy

RESPONDENT

Date of Decision : 24-11-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule (1), Section 114

Citation : (2016) 2 BBCJ 141

Hon'ble Judges : Iqbal Ahmed Ansari, ACJ. and Mr. Chakradhari Sharan Singh, J.

Bench : Division Bench

Advocate : Mr. Sunil Kumar Mandal, SC-24 with Mr. Bipin Kumar, AC to SC-24, for the Petitioners; Mr. Ansul, Advocate, for the Respondents

Final Decision : Allowed

Judgement

Mr. Chakradhari Sharan Singh, J.—The State of Bihar has preferred the present petition for reviewing the order, dated 16.10.2012, passed by a Division Bench of this Court in LPA No. 1361 of 2001 (The State of Bihar and Others v. Smt. Rina Roy and Others).

2. By the order, under review, the Letters Patent Appeal, preferred by the State of Bihar against an order, dated 04.09.2001, passed in CWJC No. 1690 of 2001, came to be dismissed in the light of dismissal of the Special Leave Petition (Civil) No(s). 6369-6376 of 2005 by the Supreme Court, which were preferred by the State of Bihar against the judgment and order, dated 16.12.2004, passed by this Court in LPA Nos. 439, 445, 446, 447, 1347, 1360 and 1435 of 2001.

3. From the grounds taken in the petition seeking review and the submissions made on behalf of the State of Bihar, it appears that the crucial point, which has been taken, in order to seek review of the said order of this Court, dated 16.10.2012, is that while dismissing the Letters Patent Appeals, preferred by the State of Bihar against the order, dated 04.09.2001, passed in CWJC No. 1690 of 2001, this Court referred to, and relied upon, earlier Division Bench decisions of

this Court in L.P.A. Nos. 439, 445, 446, 447, 1347, 1354, 1360 and 1435, all of 2001 (State of Bihar and Others v. Chairman, Vidyalaya Sewa Board and Others), where against the Special Leave Petitions (Civil) No(s). 6369-6376 of 2005, preferred by the State of Bihar, came to be finally dismissed by order, dated 28.08.2012. The Division Bench passed the order, under review, on the premise that cases of the private respondents herein were covered by the said decisions of the Division Bench in Chairman, Vidyalaya Sewa Board (supra), which is factually incorrect. It is the definite and explicit case of the State of Bihar, in the present review petition, that LPA No. 439 of 2001 and other analogous appeals, including Chairman, Vidyalaya Sewa Board (supra) related to appointment on the post of teachers in two subjects, namely, the subjects of "Mathematics" and "Biology" on the basis of panel prepared by the Vidyalaya Sewa Board (hereinafter referred as the "Board"), which panel did exist as on the date of the decision of this Court in LPA No. 439 of 2001 and other analogous appeals, whereas the appeal, out of which the present review petition arises, pertains to a panel prepared by the Board for the subject "Home Science", and that panel was cancelled on 17.05.2001, prior to the decision of this Court by learned single Judge vide order, dated 04.09.2001, passed in CWJC No. 1690 of 2001.

4. As the review petition is barred by limitation, I.A. No. 3364 of 2014 has been filed seeking condonation of delay of one month and 20 days in filing the present review application.

5. On perusal of the application seeking condonation of delay in preferring the present review application, we are satisfied that the State of Bihar has been able to make out a case that there existed sufficient cause, which prevented them from filing the review petition within the period prescribed, and in the interest of justice, delay needs to be condoned. The delay, in filing present review application, is, therefore, condoned. I. A. No. 3364 of 2014 is hereby allowed.

6. Before we advert to the pleadings and submissions made on behalf of the State of Bihar, seeking review and the submissions made on behalf of the private respondents, certain facts giving rise to the present review application, need to be taken note of. The facts are, in brief, as follows:

(a) Pursuant to Advertisement No. 2 of 1991, dated 01.01.1991, issued by the Board for making appointment to the posts of teachers, in the subject of Home Science, in different Secondary Schools of the State of Bihar, the respondents herein had applied and their names figured in the panel of successful candidates prepared by the Board. With a grievance that despite preparation of panel by the Board, the matter of their appointment was being unreasonably delayed, for some oblique reasons, the selected candidates filed an application before this Court, under Article 226 of the Constitution of India, giving rise to CWJC No. 1690 of 2001. The said writ petition was finally heard, on 16.05.2001, and the order was kept reserved by the learned single Judge.

(b) From the records of CWJC No. 1690 of 2001, it appears that on 11.05.2001,

the respondents of the said writ application were directed to produce relevant records of the case, whereby and where under a decision was taken to review the earlier decision, for appointment to the posts of teachers in the subject of Home Science.

(c) It further appears that a counter affidavit was filed on behalf of the Director, Secondary Education, Bihar, pointing out certain serious irregularities, in initiation of the process of selection of well as preparation of panel by the Board for appointment as teacher in the subject of Home Science. A statement to the following effect was made in paragraph 14 of the counter affidavit so-filed in CWJC No. 1690 of 2001:-

"14. That on considering the aforesaid facts and circumstances and the report of the enquiry Committee, the matter was finally placed before the Government and the Government, after due consideration, passed the following orders:-

I. That panel submitted by the Vidyalaya Sewa Board, shall be cancelled;

II. That it has been ordered that irregularities committed by Vidyalaya Seva Board shall be enquired into by the Vigilance Department.

III. The administrative department should initiate immediate steps for filling up the backlog vacancies in accordance with the rules of reservation and other Government instructions."

(d) It is not in dispute that the Director, Secondary Education, Government of Bihar, through letter No. 1821, dated 17.05.2001, decided to cancel the panel so-prepared by the Board for appointment of teachers in the subject of Home Science. The said letter has been brought on record by way of Annexure 2 to the present review application.

(e) A learned single Judge of this Court, order, dated 04.09.2001, allowed the writ petition with a direction to consider the cases of respondents herein for their appointment to the posts of teachers in the subject of Home Science, in different Secondary Schools of the State of Bihar, for which they had been selected. Learned single Judge, while allowing the writ application, made following observations:-

"It is settled that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, it would not be correct to say that successful candidates acquire a indefeasible right to be appointed which cannot be legitimately denied. Ordinarily, the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection, they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons and if the vacancies or any of them are filled up, the State is bound to respect comparative merit of the candidates, as reflected in the

recruitment test and no discrimination can be permitted. In this connection, reference may be made to the decision of the Constitutional Bench of the Apex Court in the case of *Shankarsan Dash v. Union of India* : AIR 1991 Supreme Court 1612.

In the case at hand it appears that the decision of the State not to fill up the vacancies does not appear to be bona fide nor appropriate reasons have been shown for the same and, therefore, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test and thus, the State cannot be allowed to discriminate in the matter. The posts which were advertised were to be filled up by direct recruits and the plea of the State now that some of the posts will be filled up by the existing posts of primary teachers and Clerks of the nationalized secondary schools is wholly untenable. The stand of the State has to be tested on the touchstone of reasonableness. Since the posts were advertised to be filled up by direct recruits, no exceptional circumstance existed nor there any emergent situation for the State to deviate from the principle of limiting the number of appointments so advertised. The action of the State Authority, in this view of the matter, must be held to be arbitrary, unreasonable and discriminatory."

(f) The State of Bihar, aggrieved by the said decision of the learned single Judge, preferred appeal under Clause 10 of the Letters Patent of the High Court, giving rise to LPA No. 1631 of 2001, taking a plea, inter alia, of irregularities committed in the process of selection for preparation of panel by the Board and also contending that empanelment of a person did not confer any indefeasible right on him for appointment. In the said appeal, a plea was taken that there was reasonable ground, exceptional circumstance and compelling situation, which necessitated cancellation of the merit list (i.e., panel) by the Board prepared for appointment to the post of teachers in the subject of Home Science.

(g) There was another batch of writ applications filed in this Court with respect to preparation of panel of teachers for appointment in the subjects of Mathematics and Biology. Those writ applications, being CWJC Nos. 2994, 7732, 8026, 9259, all of 2000 (Biology) and CWJC Nos. 12625/2000, 3920/2001, 752/2001 and 373/2001 (Mathematics) were allowed by this Court by orders, dated 15.02.2001 and 19.09.2001. The State of Bihar had preferred appeal under Clause 10 of the Letters Patent of the High Court, being LPA Nos. 439, 445, 447, 446, 1347, 1345, 1360 and 1436, all of 2001, which were dismissed by the Division Bench of this Court by an order, dated 16.12.2004. The State Government preferred Special Leave Petition before the Supreme Court, giving rise to SLP (Civil) No. 6369-6376 of 2005, SLP (Civil) Nos. 2322 of 2005, 17485 of 2003 and SLP (Civil) No. 19245 of 2003. The Supreme Court dismissed the S.L.Ps in following terms by common order, dated 28.08.2012:-

"SLP(C) Nos. 6369-6376/2005

We have heard the learned counsel for the parties at length and also perused the

records.

These special leave petitions are directed against the final common judgment dated 16.12.2004 passed by the High Court of Judicature at Patna in LPA Nos. 439, 445, 446, 447, 1347, 1354, 1360 and 1435 of 2001 whereby the High Court dismissed the aforesaid LPAs:-

On 9.3.1988, the Director, Secondary Education, Government of Bihar sent a requisition to the Vidyalaya Sewa Board for sending panels of teachers in Biology, Mathematics and other subjects. An advertisement being 1/88 was published on 30.7.1988 for appointment of Assistant Teachers in the Nationalized Secondary Schools as well as in the Project Schools. The Vidyalaya Sewa Board prepared a panel in 1990 for appointment in Biology subject. On 20.2.1991, the State Government did not approve the panel and cancelled it and demanded a fresh panel. In the meantime, the new reservation policy of the State Government came into force. The Board in continuation of the earlier advertisement No. 1/88 issued a fresh advertisement on 29.4.1995. The respondents who were duly selected pursuant to the said advertisement issued in 1995, have still not been appointed. In the meantime, the entire process of selection for appointment of teachers in the State of Bihar has undergone a change. Be that as it may, in the peculiar facts and circumstances of these cases, we are not inclined to interfere with the impugned judgment passed by the High Court. The special leave petitions are accordingly, dismissed."

(Emphasis is added)

(h) When the Letters Patent Appeal No. 1361 of 2001 was taken up by this Court on 16.7.2008, on a plea taken on behalf of the State of Bihar that certain similar matters were pending adjudication in SLP (Civil) Nos. 6369-6376 of 2005, before the Apex Court, in which interim order of stay was also granted, the matter was adjourned for three months. The appeal was, by an order, dated 20.10.2008 admitted for hearing with a direction to list the same after disposal of SLP (Civil) Nos. 6369-6376 of 2005.

(i) The said Special Leave Petition before the Supreme Court having been dismissed by order, dated 28.08.2012, L.P.A. No. 1361 of 2001 came to be taken up by a Division Bench of this Court. In view of the order passed by the Supreme Court in Special Leave Petition (Civil) Nos. 6369- 6376 of 2015, the Division Bench dismissed the appeal preferred by the State of Bihar,.

(j) For the benefit of quick reference, relevant part of the order passed by the Division Bench in LPA No. 1351 of 2001, which is under review, in the present proceeding, is being extracted herein below:-

"It has been contended by the learned counsel appearing on behalf of respondents that the respondents have already been made parties in the present appeal, and therefore, in view of the orders passed by this Court on 20.10.2008 the present appeal is listed after disposal of Special Leave Petition (Civil) No.

6369-6376 of 2005 therefore, the respondents could not have any anxiety for issuance of appointment letters according to the undertaking given by the then Director, Secondary Education before this Court.

It is made clear that in view of the order passed by the Apex Court in Special Leave Petition (Civil) No. 6369-6376 of 2005 filed by the State in similar matter, this Letters Patent Appeal filed by the State in this Court has to be dismissed.

Accordingly, it is dismissed.

In view of the order dated 28.08.2012 passed by the Apex Court in (sic) LPA No. 439 of 2001 and other analogous cases dismissing the said SLP filed by the State of Bihar, the present appeal has been listed before this Court for disposal. Accordingly, the matter has been taken up for hearing at the instance of both the counsel."

(Emphasis is supplied)

7. The above are the foundational facts leading to institution of the present review petition.

8. As has been pointed out, at the very beginning, the main ground of the State of Bihar for seeking review is that by the order under review, this Court decided the matter based upon another Division Bench decision, but and the fact that the Supreme Court had not interfered with the Division Bench decision in the case of Chairman, Vidyalaya Sewa Board (supra), was not noticed and in ignorance of this fact and also the fact that the decision of the Division Bench was not applicable to the facts and circumstances of LPA No. 1361 of 2001. Whereas the case of Chairman, Vidyalaya Sewa Board (supra) related to appointment to the post of teachers in the subjects of Mathematics and Biology, LPA No. 1361 of 2001 arising out of CWJC No. 1690 of 2001 relates to appointment to the post of teachers in the subject of Home Science. It is the specific case of the State of Bihar that though panel was prepared by the Board for appointment to the post of teachers in Home Science, the said panel was, admittedly, cancelled by the Board and the facts, as regards the irregularities in process of selection, were there on record before the writ Court.

9. Pursuant to the notice issued to the private respondents, they have entered appearance in the review petition through their learned counsel. However, there is no counter affidavit filed on their behalf.

10. What emerges from the facts noted above, which is not in dispute that the respondents herein, who had preferred CWJC No. 1690 of 2001, had, pursuant to an advertisement issued by the Board, applied for their appointment as teachers in Secondary Schools in the subject of Home Science.

11. It has, however, remained uncontroverted that before passing of the order, dated 04.09.2001, in CWJC No. 1690 of 2001, the panel prepared by the Board for appointment in the said subject had been cancelled by an order, dated

17.05.2001. Admittedly, the order, passed by this Court in the case of Chairman, Vidyalaya Sewa Board (supra), related to subjects of Mathematics and Biology. In our view, this aspect escaped the attention of the Division Bench of this Court, while passing the order under review, dated 16.10.2012.

12. Mr. Sunil Kumar Mandal, learned Standing Counsel-24, appearing on behalf of the Petitioners State of Bihar, has argued that in view of uncontroverted facts, there is an error apparent on the face of record in the order under review, and has submitted that the mistake or the omission being grave, this Court may review/recall the order under review in order to prevent miscarriage of justice and adjudicated the Letters Patent Appeal, i.e., LPA No. 1361 of 2001 afresh and on its merits.

13. Mr. Mandal has submitted that there is clear distinction on facts, in the matter relating to preparation of panel by the Board for appointment to the post of Teachers in the subjects of Mathematics and Biology, on one hand, and the subject of Home Science, on the other.

14. Mr. Ansul, learned counsel, appearing on behalf of the respondents, on the other hand, has opposed the relief sought for by the State of Bihar, seeking review of the order passed by the Division Bench of this Court, dated 16.10.2012. He has submitted that the State of Bihar has miserably failed to make out a case that despite due diligence exercised by them, they could not bring to the notice of this Court, in course of the proceedings of LPA No. 1361 of 2001, the facts, which are being raised, now, in the present review application. He has contended that the Division Bench of this Court has rightly, relying on its earlier decision in the case of Chairman, Vidyalaya Sewa Board (supra), which had not been interfered with by the Supreme Court, dismissed the Letters Patent Appeal preferred by the State of Bihar. Mr. Ansul has also submitted that the State of Bihar has failed to distinguish the cases of the present respondents, whose names figured in the panel prepared by the Board for appointment of Teachers in Home Science from the cases of persons, whose names figured in the panel prepared by the Board for the subjects of Mathematics and Biology.

15. From the order under review and the materials on record of the proceedings of LPA No. 1361 of 2001, we find substance in the submission made on behalf of the State of Bihar that while passing the order under review, dated 16.10.2012, the fact that the panel, which was subject matter of said LPA No. 1361 of 2001 arising out of CWJC No. 1690 of 2001 related to appointment of teachers in the subject of Home Science, whereas, the earlier decision of this Court in the case of Chairman, Vidyalaya Sewa Board (supra) related to appointment of teachers in the subjects of Mathematics and Biology, but these material glaring differences between the two cases could not be brought to the notice of the Court or escaped the attention of this Court.

16. The error, in our opinion, is palpable and does not require any long drawn reasoning. It was a material fact, essential for deciding the dispute in LPA No.

1361 of 2001, when the Court was considering the panel prepared for appointment of teachers in the subject of Home Science, whereas the case of Chairman, Vidyalaya Sewa Board (supra), earlier decided by a Division Bench of this Court and subsequently, not interfered with by the Supreme Court, related to the panels for appointment of teachers in the subjects of Mathematics and Biology. In the absence of any denial of the fact, as averred in the civil review application, that the panel, prepared by the Board for appointment of teachers in the subject of Home Science was cancelled by the Board before the writ application, filed by the respondents came to be allowed by the learned single Judge, a case for review is, indeed, made out.

17. In our view, the State of Bihar has been able to make out a case, in the facts and circumstances as noted above, for review of the order, dated 16.10.2012, as we are satisfied that an error, apparent on record, has crept in while making the order under review.

18. There are three well recognised grounds for review of an order, as enumerated under Order 47, Rule 1 of the Code of Civil Procedure, namely, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the decree or order was passed, (ii) mistake or error apparent on the face of the record and (iii) for "any other sufficient reason".

19. Though it is difficult to hold in favour of the State of Bihar that even after exercise of due diligence, they could not bring to the notice of this Court at the time of passing of the order under review, dated 16.10.2012, that the panel, in question, was cancelled and that earlier Division Bench decision did not cover the cases of the persons placed in the panel for appointment of teachers in the subject of Home Science, we have no doubt, in our mind, that it was a vital and very important aspect for decision of LPA No. 1361 of 2001, which could not be brought to the notice of the Court.

20. It would be apposite to taken note of certain judicial pronouncements on scope of review of an order. The Supreme Court, in case of Aribam Tuleswar Sharma v. Aribam Pishak Sharma, reported in (1979)4 SCC 389, considering the scope of review held as follows:-

"There is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may

also be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers, which may enable an appellate court to correct all manner of errors committed by the subordinate court."

(Emphasis added)

21. In case of Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi (AIR 1980 SC 674), the Supreme Court held that a Court cannot review its order except where a glaring omission or patent mistake or like grave error has crept in, earlier by judicial fallibility.

22. In case of O.N. Mohindroo v. The District Judge, Delhi and Another (AIR 1971 SC 107), the Supreme Court held that the Court may reopen its judgment if a manifest wrong has occurred and it is essential to pass an order to do full and effective justice.

23. In a recent decision of this Court, in case of The High Court of Judicature at Patna through the Registrar General v. K.K. Chaubey and other analogous cases, a Full Bench of this Court, after analysing earlier decisions of Supreme Court, has laid down the law on the subject of review, which has its genesis of legal maxim "actus curiae neminem gravabit", paragraph 32 of which is being extracted herein below:-

"32. The law, on the subject of review, may, in the light of the discussion held, as a whole, be summarized thus:-

(i) Ordinarily, a court or a tribunal cannot review its order or decision if the statute does not confer on the court or the tribunal, as the case may, the power to review its own order. This apart, whatever limitations are imposed by a statute, while conferring the power of review on a court or a tribunal, the court or the tribunal as the case may be, must adhere to the limitations, which the relevant statute may impose on the exercise of such power. Section 114 CPC, which embodies the substantive power of review of a civil court, does not impose any limitations on the court's power to review its order or decision; yet the power of review even by a civil court cannot be unguided and uncanalised, for, Order 47, Rule 1 circumscribes the court's power of review.

(ii) Though, at one point of time, it was considered to be a rule of universal application that review by a court of its order is not possible except on three prescribed grounds, namely (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the decree or order was passed and (ii) mistake or error apparent on the face of the record or (iii) any such sufficient ground, which is analogous to the two grounds aforementioned, the subsequent development of law, on the subject of review, has shown that the grounds referred to, namely, that any sufficient ground must be analogous to the two sufficient grounds aforementioned is no longer a rule of

universal application.

(iii) One of the cases, which has helped in the expansion of the court's power to review its order is the case of Lily Thomas (*supra*) inasmuch as Lily Thomas (*supra*) ruled that ordinarily, the power of review, being a creature of statute, cannot be exercised as an inherent power, yet such technicalities of law may have to be bent, in an appropriate cases, for the purpose of correcting an order committed by the Court if such an error arises out of a presumption of fact, which was nonexistent, and when the court finds that its refusal to review its own error would cause, or has caused, grave miscarriage of justice.

(iv) It is essentially the principle behind the doctrine of "actus curiae neminem gravabit", which has made the court hold, in Municipal Board, Pratabgarh (*supra*), that when a court corrects and rectifies an error, it restores the rule of law and not defeat it. Even Rajesh D. Darbar v. Narasingrao Krishnaji Kulkarni, reported in (2003) 7 SCC 219, recognises that in an exceptional case, a court may have to review its order by invoking the doctrine of "actus curiae neminem gravabit".

24. Discussed thus, we are of the considered view that there is a palpable error apparent on record in the order under review, dated 16.10.2012 passed in LPA No. 1361 of 2001, which has occurred because vital fact, that the subject matter of consideration before the Court was appointment to the post of teachers in the subject of Home Science and not appointment in the subjects of Mathematics and Biology for which even the advertisements were different, could not pressed nor brought to the notice of the Court.

25. We, accordingly, consider it to be a fit case, where the LPA No. 1361 of 2001 requires reconsideration. The order, under review, dated 16.10.2012, is hereby recalled.

26. This application is allowed.

27. Let LPA No. 1361 of 2001 be placed before appropriate Bench for hearing and disposal in accordance with law.