

**A.F.R.**

**Reserved On: 05.11.2020**

**Delivered on: 01.12.2020**

**Court No. - 1**

**Case :- SPECIAL APPEAL No. - 861 of 2019**

**Appellant :- Naunihal Haidar**

**Respondent :- Assistant Settlement Of Consolidation And 2 Others**

**Counsel for Appellant :- Hari Bhawan Pandey**

**Counsel for Respondent :- C.S.C.**

**Hon'ble Ramesh Sinha,J.**

**Hon'ble Samit Gopal,J.**

**(Per Samit Gopal, J. for the Bench)**

1. The present Special Appeal has been filed against the judgment and order dated 15.04.2019 passed in Writ A No. 16860 of 1991 (Naunihal Haider Vs. Assistant Settlement Officer, Consolidation, Badaun and others) whereby a learned Single Judge has rejected an application for recall of order dated 26.10.2017.
2. Heard Sri Hari Shankar Chaurasia, Advocate holding brief of Sri Hari Bhawan Pandey, learned counsel for the petitioner-appellant and Sri A.K. Goel, learned Additional Chief Standing Counsel and have perused the record.
3. The present case has a long and old background. The petitioner-appellant was initially appointed on the post of Lekhpal on temporary basis in the year 1987. His engagement was extended from time to time and ultimately the services of the petitioner-appellant were dispensed with in the year 1991.
4. Aggrieved by the order dated 01.03.1991 by which the services of the petitioner-appellant were dispensed with, he preferred a Writ A No. 16860 of 1991 before this Court with the following prayers:

“It is therefore most respectfully prayed that this Hon’ble Court may be pleased to issue

A. A writ of Certiorari quashing the impugned order dated 1.05.1991 (Annexure 4) passed by opposite party no.1.

B. a writ of Mandamus commanding the opposite parties not to give effect to and not to implement the impugned order and not to interfere in petitioner's functioning as Lekhpal, village Deptori, Tehsil Bisauli, District Budaun.

C. Any other suitable writ, direction or order which this Hon'ble Court may deem fit and proper be issued in favour of the petitioner.

D. Costs of the writ petition be awarded to the petitioner."

5. In the said writ petition an interim order was passed in favour of the petitioner-appellant on 03.06.1991. The services of the petitioner-appellant were regularized on 20.03.1999 with a condition that the same shall be subject to the final order passed in the said writ petition. The said writ petition was dismissed for non prosecution on 14.11.2008. Subsequent to the dismissal of the writ petition, the services of the petitioner were terminated on 15.01.2014. A Civil Misc. Restoration Application No. 652 of 2014 along with the Delay Condonation Application No. 651 of 2014 was filed by the petitioner-appellant for the restoration of the writ petition which was allowed vide order dated 08.12.2016 passed by a learned Single Judge. Even, the delay condonation application was allowed. The writ petition was directed to be restored to its original number and was directed to be listed before the appropriate Court after two weeks.

6. The writ petition then remained pending for quite sometime and then was listed on 26.10.2017 wherein on the statement of learned counsel appearing for the petitioner-appellant that the same has rendered infructuous by efflux of time, and subsequent developments, the same was dismissed accordingly. The order dated 26.10.2017 is quoted herein-below:

"1. Sri R.P.S. Chauhan, learned counsel for petitioner, at the outset stated that by efflux of time and in view of the subsequent events, this matter has rendered infructuous.

2. Dismissed accordingly.

3. Interim order, if any, stands vacated. "

7. In the meantime, since the services of the petitioner-appellant were terminated on 15.01.2014 he preferred another writ petition before this

Court numbered as Writ A No. 8181 of 2018 (Naunihal Haider Vs. State of Uttar Pradesh and 5 others) which was dismissed with an observation by a learned Single Judge that the remedy to the petitioner-appellant lay in moving appropriate application in his earlier petition and to seek appropriate protection therein. The order dated 29.03.2018 is quoted herein below:

“Petitioner was initially appointed on the post of Lekhpal on temporary basis in 1987. Such engagement was extended from time to time, and ultimately the services of petitioner were dispensed with in 1991. Petitioner aggrieved by such order approached this Court by filing Writ Petition No.16860 of 1991, in which an interim order came to be passed in favour of the petitioner on 3rd June, 1991. Petitioner continued to work and his services were also regularized on 20th March, 1999. The regularization order, however, clearly provided that petitioner's regularization would be subjected to the order to be passed in Writ Petition No.16860 of 1991. This petition was dismissed in default on 14.11.2008. Consequently, the services of petitioner were terminated on 15.1.2014. It is this order of 15.1.2014, which is under challenge in the present writ petition.

Contention is that after the petitioner came to know of dismissal of the writ petition in default, he moved an application for restoration, which was allowed on 8th December, 2016. The writ petition, thereafter, was dismissed on 26.10.2017, upon the statement of the counsel for the petitioner that by efflux of time the writ petition has been rendered infructuous. The order dated 26.10.2017 passed in Writ Petition No.16860 of 1991 reads as under:-

"1. Sri R.P.S. Chauhan, learned counsel for petitioner, at the outset stated that by efflux of time and in view of the subsequent events, this matter has rendered infructuous.

2. Dismissed accordingly.

3. Interim order, if any, stands vacated."

Petitioner thereafter has made certain representations for his reinstatement in service, and as no orders have been passed, he has approached this Court. Learned counsel for the petitioner submits that once petitioner's services have been regularized and he was about to retire, the respondents would not be justified in terminating his services, in the manner stated. It is also stated that petitioner is entitled to retiral benefits, and in respect of such grievance a fresh cause has arisen.

Petition is opposed by the learned Standing Counsel.

Admittedly petitioner was engaged on temporary basis and his services were terminated in 1991. Petitioner's continuation thereafter was under an interim order. The order of regularization passed in favour of the petitioner also made it clear that the same shall be subject to the final

outcome of the writ petition. Admittedly petition of 1991 was initially dismissed in default, and thereafter has been dismissed on 26.10.2017. Once that be so, the petitioner can have no grievance against the order of the respondents, inasmuch as his continuance was under the interim order, and there was no independent right created in favour of the petitioner to continue. The order of regularization is also specific in that regard. The writ petition apparently was dismissed on the statement of the counsel that petition had been rendered infructuous due to efflux of time and on account of subsequent events. No direction, therefore, can be issued to the respondents to reinstate the petitioner in service. Remedy of the petitioner lay in moving appropriate application in his earlier petition and to seek appropriate protection therein.

Subject to the observations made above, this writ petition is dismissed ”

8. Consequent to the dismissal of the writ petition on 29.03.2018, the petitioner-appellant filed recall/restoration application which was numbered as Civil Misc. Recall/Restoration Application No. 5 of 2018 along with a Civil Misc. Delay condonation Application No. 4 of 2018. The prayer in the said recall/restoration application is quoted herein-below:

“It is therefore most respectfully prayed that this Hon’ble Court may be pleased to recall the order dated 26.10.2017 passed by this Hon’ble Court in the instant writ petition and to restore the same to its original number after hearing the case on merit so justice be done to the applicant.”

9. The said recall/restoration application has been decided by the learned Single Judge vide order dated 15.04.2019 which is impugned herein by which the said application has been rejected.

10. The learned Single Judge has in the impugned judgment and order in para 3 stated that the petitioner-appellant has filed a recall/restoration application and has stated as follows:

“3. The reason given for filing of this recall/restoration application is that subsequently, petitioner filed another Writ Petition No. 8181 of 2018 which was dismissed on 29.03.2018.”

11. Subsequently, in paragraph 5 of the impugned judgment and order, the learned Single Judge has stated that the review application has been filed by another counsel. Para 5 of the same is quoted herein-below:

“5. In the present writ petition, Review Application has been filed by another counsel without giving any cogent reason as to why review petitioner was not filed by same counsel.”

12. The learned Single Judge then takes up two issues in the impugned judgment and order, the first being that the review petition ought to have been filed by the same counsel and not by a new counsel and the second aspect of the matter that the grounds taken in the review petition amounts to almost rehearing of the matter and states that some of the arguments advanced are such as were not raised earlier. Paragraphs 6 and 7 of the impugned judgment and order referring to the first objection and the second aspect of the matter are quoted herein-below:

“6. First objection before review-applicants is that review petition ought to have been filed by same counsel and not by a new counsel. In T.N. Electricity Board Vs. N. Raju Reddiar AIR 1997 SC 1005, Apex Court has deprecated the practice of arguing matter by one counsel and review by another counsel and has observed that review application ought to have been filed by same counsel who has argued matter.

7. Now the second aspect is that the grounds taken in review petition amounts to almost rehearing of matter and some of arguments advanced are such as were not raised earlier. A review petition cannot be made as an opportunity to re-argue the matter.”

13. The learned Single Judge has proceeded to give the reasoning why the review application is not maintainable. Certain case laws have been quoted which refer to the issue of review. In para 13, the learned Single Judge has stated that review is not an appeal in disguise. He proceeds to rely upon another judgment of the Apex Court as to when can power of review be exercised. Para 13 of the impugned judgment and order is quoted herein-below;

“13. Thus, Review is not an appeal in disguise. Rehearing of the matter is impermissible in the garb of review. It is an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. In Lily Thomas Vs. Union of India AIR 2000 SC 1650, the Court said that power of review can be exercised for correction of a mistake and not to substitute a new. Such powers can be exercised within limits of the statute dealing with the exercise of power. The aforesaid view is reiterated in Inderchand Jain Vs. Motilal (2009) 4 SCC 665.”

14. Then, lastly the said impugned judgment and order concludes in para 15 which is quoted herein-below:

“15. In view thereof, review application is rejected.”

15. Learned counsel for the petitioner-appellant argued that the applicant for recall/restoration was filed giving adequate reasons which was treated as an application for review and the learned Single Judge rejected it. It is further argued that the learned Single Judge misread an application for recall/restoration and proceeded to decide it as review application. It is argued that the judgment and order is totally based on non-existent fact and deserves to be set aside.

16. Sri A.K. Goel, learned Additional Chief Standing Counsel though opposed the present special appeal but could not dispute the fact that the application as filed was an application for recall of the order dated 26.10.2017 and not a review application.

17. There is a marked difference between “recall” and “review.” As is apparent from the application titled as Civil Misc. recall/restoration application the same had been filed with a prayer to recall the order dated 26.10.2017 and to restore the writ petition to its original number. There is no prayer in the said application to review the order passed in the writ petition. Even the writ petition was dismissed on the ground that it has become infructuous by efflux of time and subsequent events but not on merits.

18. The Apex Court in the case of **Asit Kumar Kar Vs. State of West Bengal and others : (2009) 2 SCC 703** has held that there is a difference between recall and review and has held as under:

“6. There is a distinction between a petition under Article 32, 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.”

19. The said judgment of Asit Kumar Kar (**supra**) has been followed in the judgment of **Vishnu Agarwal Vs. State of Uttar Pradesh and another : (2011) 14 SCC 813**.

20. The learned Single Judge completely fell in error while deciding the application for recall/restoration application by treating it as an application for review. Prayer made in the said recall/restoration application is as has been quoted above just plain and simple for recalling of the order by which the petition was dismissed as infructuous and further the prayer that the writ petition be restored to its original number. There is no prayer whatsoever in the said application that the order be reviewed. Even further, the order sought to be recalled is not a judgment as the merits of the matter have not been touched at all. The petition was dismissed without going into the merits of the matter and without deciding the issues as raised therein. The application for recall and restoration is of an order which did not decide any issue raised between the parties in the writ petition.

21. If a party whose counsel under some misconception made a prayer for dismissing the writ petition as infructuous by efflux of time and by some subsequent events does not mean that the petition has been decided on merits. As a matter of fact, a rectification of the said order was prayed by means of the application for recall/restoration. Rectification of an order stems from the fundamental principle that justice is above all. The writ petition of the petitioner continued to be pending before this Court from the year 1991 to 26.10.2017 for a good period of 26 years with an order in favour of the petitioner on the strength of which he continued to remain in service till 15.01.2014 on which date his services were terminated as the said writ petition was dismissed for non prosecution on 14.11.2008. Even thereafter, the recall application filed by the petitioner-appellant along with the delay condonation application were allowed vide order dated 08.12.2016 and the writ petition was directed to be restored to its original number.

22. Thus, looking to the facts and circumstances of the matter, the learned Single Judge totally fell in error in treating the application for

recall/restoration as an application for review and thereby dismissing the same as such.

23. The present special appeal is thus **allowed**.

24. The impugned judgment and order dated 15.04.2019 is set aside. The review/recall Application No. 5 of 2018 dated 14.07.2018 along with the Delay Condonation Application No. 4 of 2018 are allowed. The writ petition is restored to its original number.

25. The office shall forthwith list the **Writ A No. 16860 of 1991 (Naunihal Hairder Vs. Assistant Settlement Officer, Consolidation, Budaun and others)** before the appropriate Bench for its hearing and disposal which is expected to be done as expeditiously as possible.

26. No order as to cost.

**Order Date :- 01.12.2020**

M. ARIF

(Samit Gopal, J.)

(Ramesh Sinha, J)