

IN THE HIGH COURT OF JUDICATURE AT PATNA

The State of Bihar & Ors.

vs.

Smt. Pratima Kumari

Civil Review No. 354 of 2019

(In CWJC No. 21937 of 2014)

12 September 2023

(Hon’ble Mr. Justice Rajeev Ranjan Prasad)

Issue for Consideration

Whether the order dated 06.11.2018 passed in CWJC No. 21937 of 2014 was liable to be reviewed on the ground that relevant facts regarding initiation of departmental proceedings under Rule 43(b) of Bihar Pension Rules, 1950 were not brought before the Writ Court due to absence of counter affidavit.

Headnotes

The learned Writ Court was given to understand that the respondents had not initiated any proceeding under Rule 43(b) whereas the fact was that the respondents had converted the proceeding initiated under the Service Rules into a proceeding under the Pension Rules, thereafter, had proceeded in the said proceeding and imposed punishment upon the petitioner. (Para 16)

Error which has occurred in absence of a clear pleading due to mistake of a lawyer or on account of an oversight on the part of the Court may be a ground for review. (Para 18)

In absence of a counter affidavit of the State, this Court could not be made aware of the correct position with regard to the proceeding under Rule 43(b) of the Pension Rules. (Para 22)

Petition is allowed. (Para 25)

Case Law Cited

Musammat Jamna Kuer v. Lal Bahadur, *AIR (37) 1950 FC 131*; Arun Dev Upadhyay v. Integrated Sales Service Ltd., *2023 SCC Online SC 779*

List of Acts

Code of Civil Procedure, 1908; Bihar Government Servants (Classification, Control and Appeal) Rules, 2005; Bihar Pension Rules, 1950

List of Keywords

Review; Error apparent on the face of record; Rule 43(b) Pension Rules; Departmental proceeding; Post-retiral benefits; Recall of order; Writ jurisdiction; Procedural oversight

Case Arising From

Order dated 06.11.2018 in CWJC No. 21937 of 2014 passed by the Writ Court.

Appearances for Parties

For the Petitioner/s: Mr. Ram Vinay Prasad, Mr. Apurva Kumar, Advocate,
Mr. Abhanjali, AC to GA-12

For the Opposite Party/s: Mr. Shivendra Kishore, Senior Advocate, Mr.
Saroj Kumar, Advocate

Headnotes Prepared by Reporter: Amit Kumar Mallick, Adv.

Judgment/Order of the Hon’ble Patna High Court

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVIEW No.354 of 2019

In
Civil Writ Jurisdiction Case No.21937 of 2014

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1. The State of Bihar through the Principal Secretary, Education Department, Government of Bihar, New Secretariat, Patna.
 2. The Director, (Secondary Education), Govt. of Bihar, Patna.
 3. The Regional Dy. Director of Education, Darbhanga Division, Darbhanga.
 4. The District Education Officer, Samastipur.
 5. The District Programme Officer, (S.E.), Samastipur.

... .. Petitioners

Versus

Smt. Pratima Kumari, Wife of Sri Sudhir Kant Roy, R/o Village/Mohalla
Mabarour, P.S. Rosera Town and District Samastipur.

... .. Opposite Party

Appearance :

For the Petitioner/s	:	Mr. Ram Vinay Prasad, Advocate Mr. Abhanjali, AC to GA- 12 Mr. Apurva Kumar, Advocate
For the Opposite Party/s	:	Mr. Shivendra Kishore, Senior Advocate Mr. Saroj Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL ORDER

7 12-09-2023 This matter has been notified on the mentioning made

by learned Senior Counsel for the opposite party saying that the

case was on the cause list yesterday and it was to be taken up

today but all of a sudden, the matter went outside of the list.

2. On query, it was informed that there was some
technical glitch and for that reason, the matter was not listed.

3. Heard learned counsel for the petitioner and Mr.
Shivendra Kishore, learned Senior Counsel assisted by Mr. Saroj
Kumar, learned counsel for the sole opposite party.

4. This application seeking review of the order dated



06.11.2018 passed by learned Writ Court in CWJC No. 21937 of 2014 has been preferred on behalf of the State of Bihar.

5. Learned counsel for the State submits that CWJC No. 21937 of 2014 was filed by the writ petitioner-opposite party for issuance of a writ in the nature of Certiorari to quash memo no. 1729 dated 16.06.2014 issued under signature of the Director (SE), Bihar, Patna whereby and whereunder a departmental proceeding was initiated against the petitioner under the Bihar Government Servant (Classification, Control and Appeal) Rules, 2005 (hereinafter referred to as the 'Service Rules'). A further prayer was made for a writ in the nature of Mandamus directing the respondents to pay the retiral benefits of the petitioner.

6. It is submitted that the said writ application was taken up for the first time on 06.12.2017 when no one appeared on behalf of the petitioner. A simple order of adjournment was passed fixing 24.01.2018 as the next date of listing. Thereafter, the matter was listed on 06.11.2018. On the said date, the learned Writ Court took note of the fact that in this case no counter affidavit had been filed even after four years. The learned Writ Court proceeded to decide the writ application by holding that once the petitioner had retired from service, the



relationship of master and servant ceased to exist, therefore, any exercise of jurisdiction under the Service Rules after the retirement would be totally beyond jurisdiction. In fact, the learned Writ Court expressed its views that after retirement, the impugned action would have been permissible under Rule 43(b) of the Bihar Pension Rules, 1950 (hereinafter referred to as the 'Pension Rules') with certain riders.

7. Learned counsel submits that the learned Writ Court disposed of CWJC No. 21937 of 2014 vide order dated 06.11.2018. The operative part of the order interalia states that since the respondents have not initiated proceeding under Rule 43(b), they are precluded from taking any action for forfeiting pension and post-retiral benefit as petitioner superannuated on 31.05.2014.

8. It is submitted that in absence of a counter affidavit, the learned Writ Court could not be informed that the proceeding which was initiated under the Service Rules had been converted into a proceeding under Rule 43(b) of the Pension Rules and an order imposing punishment had already been passed. It is submitted that in the operative part of the order, the learned Writ Court has clearly proceeded to pass the order on a premise that the respondents have not initiated



proceeding under Rule 43(b) and this has happened only because the correct facts were not available before the learned Writ Court. It is submitted that in such circumstances, it would be just and proper to recall the order dated 06.11.2018 and hear the writ application afresh on its own merit.

9. Reliance has been placed on the judgment of the Hon'ble Federal Court in the case of **Musammat Jamna Kuer Vs. Lal Bahadur and Ors.** reported in **AIR (37) 1950 FC 131.**

10. Mr. Shivendra Kishore, learned Senior Counsel assisted by Mr. Saroj Kumar, learned Advocate has opposed the review application. It is submitted that the writ application remained pending for about four years before it was finally disposed of. During the period of four years, the State did not file any counter affidavit.

11. Learned Senior Counsel submits that so far as Memo No. 1863 dated 17.06.2015 issued by the Director (Secondary Education), Bihar, by which the proceeding under the Service Rules was converted into a proceeding under Rule 43(b) of the Pension Rules is concerned, even though a copy of the same has been marked to the petitioner but the petitioner had not received the same as a result whereof the petitioner had not taken any step towards challenging the said memo no. 1863



dated 17.06.2015.

12. Learned Senior Counsel for the opposite party further submits that the petitioner had not even received the order of punishment as contained in Memo No. 2679 dated 11.09.2015 by which a decision was taken by the competent authority under Rule 43(b) of the Pension Rules that there will be a reduction in pension of the petitioner by 5%. Even this order was not within the knowledge of the petitioner.

13. Having said so, learned Senior Counsel still argues that there is no error apparent on the face of the record of the order of which review has been sought.

14. Learned Senior Counsel has relied upon a judgment of the Hon'ble Supreme Court in the case of **Arun Dev Upadhyay Vs. Integrated Sales Service Limited and Another** reported in **2023 SCC Online SC 779**. It is submitted that the Hon'ble Supreme Court has in this case indicated the three conditions under which this Court may exercise its power to review.

Consideration

15. Having heard learned counsel for the petitioner and learned Senior Counsel for the opposite party as also on perusal of the records, this Court finds that, for the first time, the



writ application was listed on 06.12.2017. On that date, none appeared for the petitioner, therefore, the case was adjourned. No prima-facie view was indicated on the said date and there was no direction of this Court to the State to file counter affidavit. This, however, does not mean that the State should not have filed counter affidavit on its own but in practice it happens that on the first date of hearing of the matter this Court indicates its prima-facie view and calls upon the State to file a counter affidavit. In this case, because learned counsel for the petitioner was not present, the matter was simply adjourned. Thereafter, it was taken up only on 06.11.2018 when the order of which review has been sought has been passed.

16. A bare reading of the order dated 06.11.2018 would show that the learned Writ Court having gone through the materials available on the record took a view that the entire exercise of initiating proceeding and forfeiture of post-retiral benefits of the petitioner is totally without jurisdiction. The learned Writ Court was given to understand that the respondents had not initiated any proceeding under Rule 43(b) whereas the fact was that the respondents had converted the proceeding initiated under the Service Rules into a proceeding under the Pension Rules, thereafter, had proceeded in the said proceeding



and imposed punishment upon the petitioner by which her pension was reduced to the extent of 5%.

17. Learned Senior Counsel for the opposite party has, in fact, himself stated at the Bar that the petitioner was not aware of the office order by which the proceeding was converted into a proceeding under Rule 43(b) of the Pension Rules and then the subsequent orders, therefore, this could not be brought to the notice of the learned Writ Court.

18. In the judgment of the Hon'ble Supreme Court in the case of **Musammat Jamna Kuar (supra)**, it has been categorically held that an error which has occurred in absence of a clear pleading due to mistake of a lawyer or on account of an oversight on the part of the Court may be a ground for review. Paragraphs '6', '7' and '8' of the judgment in the case of **Musammat Jamna Kuar (supra)** are quoted hereunder for a ready reference:-

“[6] The appellant made an attempt to have this error in the High Court's judgment corrected by means of a review petition but in this she was unsuccessful. In the judgment given in the review petition the learned Judges of the High Court made the following observations:

"Now that we have been taken through the printed record including page 11 we have reason to believe in view of para. 7, at page 11 of the printed record, that the result of the appeal should have been a decision



that all the property entered in the written statement of 20th August 1936, belonged to Mt. Jamna Kuar as she was the heiress of Kunj Behari Lal and the applicants under S. 4 were not. Unfortunately on the date we decided the appeal Mr. P. M. Verma himself did not understand the case of his client in full and no representative of his client enlightened him. Consequently he was not able to show us that all the properties in the written statement of 20th August, 1936 had been admitted by the applicants in the Encumbered Estates Act proceeding to have belonged to Kunj Behari Lal and that by the amendment of the claim of Mt. Jamna Kuer (i.e., the addition of para. 15), Mst. Jamna Kuer had intended to claim all the properties entered in the written statement of 20th August 1936. If our decision did not give to Mst. Jamna Kuer, all that she was entitled to, it was not because we made any mistake which was apparent on the face of the record, but because from the time of the amendment of the claim of Mst. Jamna Kuer, that is to say, from 16th October 1930, there had been no clear pleadings or arguments."

Thus the review petition was dismissed in spite of the finding that the appellant was entitled to a declaration as regards all the properties mentioned in the written statement of 20th August 1936, on the technical ground that no error on the face of the record was held to be established."

"[7] An application made by Mst. Jamna Kuer for leave to appeal to their Lordships of the Privy Council from the decree of the High Court was granted. In view of the enlarged jurisdiction of this Court, the appeal has come before us."

"[8] There can be no doubt that this appeal must be allowed. The mistake as to the items of property regarding which Mt. Jamna Kuer had laid claim is apparent on the face of the record.



The trial Judge had clearly stated in his judgment that Jamna Kuer's claim related to properties 3 to 37 of the gazette notification. In para. 15 of her amended objection petition, she had laid claims to all the properties left by Kunj Behari. On 29th April 1942, it was admitted by the pleader of the applicants that all these properties related to the estate of Kunj Behari and that so far as the debtors were concerned, they were owners of only two properties mentioned in the gazette notification. In this situation it would have been appropriate if the High Court had corrected this error on the review petition and saved the appellant the trouble and expense of an appeal to the Privy Council or to this Court. Whether the error occurred by reason of the counsel's mistake or it crept in by reason an oversight on the part of the Court was not a circumstance which could affect the exercise of jurisdiction of the Court to review its decision. We have no doubt that the error was apparent on the face of the record and in our opinion the question as to how the error occurred is not relevant to this enquiry. A mere look at the trial Court's decision indicates the error apart from anything else."

19. So far as the judgment placed by learned Senior Counsel for the opposite party is concerned, once again the Hon'ble Supreme Court has taken a view that the power to review can be exercised upon existence of any of the three conditions which are expressed under Order 47 Rule 1 CPC.

20. The provision under Order XLVII Rule 1 of the



Code of Civil Procedure is being reproduced hereunder for a ready reference:-

“1. Application for review of judgment- Any person considering himself aggrieved,-

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

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

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and 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 a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applied for the review.

[Explanation.- The fact that the decision



on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.]”

21. The paragraphs ‘9’ to ‘14’ from the judgment of the Hon’ble Supreme Court in the case of **Arun Dev Upadhyay** (Supra) are being reproduced hereunder for a ready reference:-

“**9.** A plain reading of the above provisions in uncertain terms states that the power to review can be exercised only upon existence of any of the three conditions expressed therein. ‘A mistake or an error apparent on the face of the record’ is one of the conditions. It is only on this ground that review has been preferred. The above phrase has been consistently interpreted by authoritative pronouncement of this Court for decades. A three Judge Bench of this Court comprising of Hon’ble Sri S.R. Das, C.J., M. Hidayatullah and Sri K.C. Das Gupta, J.J. in the case of Satyanarayan Laxminarayan Hegde v. Millikarjun Bhavanappa Tirumale⁴, discussed the scope of the phrase ‘error apparent on the face of record’. The challenge before this Court in the said case was the judgment of the High Court on the ground whether it suffers from an error apparent on the face of the record. The High Court had issued a writ of certiorari and had quashed order of the Tribunal and

4. AIR 1960 SC 137



restored that of the Mamlatdar. In paragraph 8 of the report, the issue which was to be considered is reflected. The same is reproduced hereunder:

“8. The main question that arises for our consideration in this appeal by special leave granted by this Court is whether there is any error apparent on the face of the record so as to enable the superior court to call for the records and quash the order by a writ of certiorari or whether the error, if any, was “a mere error not so apparent on the face of the record”, which can only be corrected by an appeal if an appeal lies at all.”

10. After discussing the relevant material on record, the conclusion is stated in paragraph 17 of the report. The view was that where an error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. The view that long-drawn process of arguments to canvass a point attacking the order in a review jurisdiction, cannot be said to be an error apparent on the face of record. Relevant extract from paragraph 17 of the report is reproduced hereunder:

“17.....Is the conclusion wrong and if so, is such error apparent on the face of the record? If it is clear that the error if any is not apparent on the face of the record, it is not necessary for us to decide whether the conclusion of the Bombay High Court on the question of notice is correct or not. An error which has to be established by a long drawn



process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. As the above discussion of the rival contentions show the alleged error in the present case is far from self evident and if it can be established, it has to be established by lengthy and complicated arguments. We do not think such an error can be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ. In our opinion the High Court was wrong in thinking that the alleged error in the judgment of the Bombay Revenue Tribunal, viz., that an order for possession should not be made unless a previous notice had been given was an error apparent on the face of the record so as to be capable of being corrected by a writ of certiorari.”

11. Another case which may be briefly dealt with is the case of *Parison Devi v. Sumitri Devi*⁵, where, this Court ruled that under Order XLVII Rule 1 CPC, a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. It also observed that a review petition cannot be allowed to be treated as an appeal in disguise.

12. A series of decisions may also be referred to wherein, it has been held that

5. (1997) 8 SCC 715



power to review may not be exercised on the ground that decision was erroneous on merits as the same would be the domain of the Court of appeal. Power of review should not be confused with appellate powers as the appellate power can correct all manners of errors committed by the subordinate courts. The following judgments may be referred:

(1) Shivdeo Singh v. State of Punjab, AIR 1963 SC 1909

(2) Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389 : AIR 1979 SC 1047

(3) Meera Bhanja (Smt.) v. Nirmala Kumari Choudhary (Smt.), (1995) 1 SCC 170.

(4) Uma Nath Pandey v. State of U.P., (2009) 12 SCC 40

13. Recently, this Court in a judgment dated 24th February, 2023 passed in **Civil Appeal No. 1167-1170 of 2023** between *S. Murali Sundaram v. Jothibai Kannan and Others*, observed that even though a judgment sought to be reviewed is erroneous, the same cannot be a ground to review in exercise of powers under Order XLVII Rule 1 CPC. Further, in the case of *Perry Kansagra v. Smriti Madan Kansagra*⁶, this Court observed that while exercising the review jurisdiction in an application under Order XLVII Rule 1 read with Section 114 CPC, the Review Court does not sit in appeal over its own order.

14. In another case between *Shanti Conductors (P) Ltd. v. Assam SEB*⁷, this

6. (2019) 20 SCC 753

7. (2020) 2 SCC 677



Court observed that scope of review under Order XLVII Rule 1 read with Section 114 CPC is limited and under the guise of review, the petitioner cannot be permitted to reagitate and reargue questions which have already been addressed and decided. It was further observed that an error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of record.”

22. In the given facts of the present case, when this Court applies the judicial pronouncements on the subject as referred hereinabove, one thing is clear that in this case the review-petitioner/applicant is not reagitating or rearguing the questions which have already been answered and decided. It is a case in which in absence of a counter affidavit of the State, this Court could not be made aware of the correct position with regard to the proceeding under Rule 43(b) of the Pension Rules. In the opinion of this Court, the error in the order of which review has been sought has occurred in the operative part of the order where learned Writ Court has recorded as under:-

“Since the respondents have not initiated proceeding under Rule 43 (b), they are precluded from taking any action for forfeiting pension and post-retiral benefits as petitioner superannuated on 31.5.2014.”



23. This Court finds that in the writ application there were statements that the respondents have not sanctioned pension, gratuity and leave encashment but there was no statement in the writ application that any action towards forfeiture of the pension and post-retiral benefits of the petitioner has been initiated. In fact, the Court was not made aware that Rule 43(b) of the Pension Rules had already been invoked long back vide Memo No. 1863 dated 17.06.2014.

24. In the opinion of this Court, the order dated 06.11.2018 is required to be recalled. Accordingly, the order under review is hereby recalled.

25. This civil review application is allowed.

26. Let the writ application being CWJC No. 21937 of 2014 be listed under appropriate heading.

(Rajeev Ranjan Prasad, J)

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