Sri Srikanta Mukherjee Vs The State of West Bengal and Others

Court: Calcutta High Court

Date of Decision: April 20, 2012

Acts Referred: Civil Procedure Code Amendment Act, 1976 â€" Section 141
Civil Procedure Code, 1908 (CPC) â€" Order 47 Rule 1, Order 47 Rule 5, 114, 4(1)
Constitution of India, 1950 â€" Article 225, 226, 227
Government of India Act, 1915 â€" Section 108
Government of India Act, 1935 â€" Section 223
Management of Recognized Non Government Institutions (Aided and Unaided) Rules, 1969 â€" Rule 28
West Bengal Services (Revision of Pay and Allowances) Rules, 1990 â€" Rule 28

Hon'ble Judges: Tapan Kumar Dutt, J; Soumen Sen, J

Bench: Division Bench

Advocate: T. Chakraborty and Mr. K. Dalal, for the Appellant;Asish Chakraborty, A Biswas For the Respondent No. 3 and Ms. Chama Mukherjee and Md. T.M. Siddique For the State, for the Respondent

Final Decision: Dismissed

Judgement

Soumen Sen, J.
The instant application has been filed for review of the judgment dated 1st August, 2007 passed in A.P.O No.2 of

2007.The order under review was passed in the appeal preferred by the petitioner against the order of dismissal of the writ petition being

W.P.No.1806 of 2006.

2. The petitioner was an assistant teacher of Scottish Church Collegiate School (Secondary School) (hereinafter referred to as the said school) till

he retired from service on 20th November, 2006 on attaining 60 years of age. He joined the said school on 21st February, 1976 and retired on

20th November, 2006.

3. The petitioner challenged the said order of superannuation on 20th November, 2006 on the ground that under the Government Circular dated

22nd March, 2004 he is entitled to continue as such whole time teacher till he attains the age of 65.

4. In order to appreciate the points urged by the petitioner in the review application we may refer to some of the relevant facts which we feel are

necessary for deciding the instant application for review.

5. The petitioner was working as an assistant teacher in the Scottish Church Collegiate School. The said school is receiving Dearness Allowance

(D.A.) from the Government. Under the provisions of the West Bengal Board of Secondary Education Act, 1963 and the Rule 28 of the

Management Rules 1969, a whole time teacher is entitled to claim extension of service beyond 60 years provided he does not take the benefit of

the pay revision.

6. The Government from time to time framed various schemes and revised the pay scales but since the school was only a D.A. getting school, such

benefit of pay revision was not extended to such institution until the matter was settled once and for all by this Hon''ble Court by an order dated 8th

October, 2002 in W.P.No.707 of 2007 in the case of Staff Council Gyan Bharati Bidyapit Vs. State of West Bengal and others.

7. In view of the circular issued by the Government initially on 2nd June, 1969 and the relevant Management Rules more particularly Rule 28, a

teacher of a recognized non-government secondary school is entitled to be considered for the purpose of granting the extension of his service upto

the age of 65 years, i.e. extension of 5 years beyond 60 years.

8. On 31st July, 1981, the State Government has taken a decision and issued a memorandum with regard to revision of pay scales with effect from

1st April, 1981 and issued a memorandum/order paragraph 6 whereof reads as follows:-

6. Those who were in service on 31st March, 1981 will have the option either to retain their existing scale of pay and existing terms and conditions

of service or to come under the revised scales of pay together with the revised terms and conditions of service, as may be determined by the State

Government. The option will have to be exercised within 90 days from the date of issue of this order and they may come under the revised scales

and revised terms and conditions of service with effect from 1st April, 1981 or any subsequent date not later than April, 1992.

The form in which the option will have to be exercised and other terms and conditions governing option will be circulated separately.

The teachers in all Government aided education institutions opting for the revised scales of pay shall retire at 60 years, provided however that who

were above 54 years but below 57 years of age as on April 1, 1981 shall retire on completion of 62 years of age as on March 31, 1989

whichever is earlier, and for such teachers who were above 57 years of age on April 1, 1981 retirement will be on completion of 65 years as on

March 31, 1987 whichever is earlier. The non-teaching employees of all Government aided institutions shall retire at 60 years of age.

9. After the introduction of ROPA Rules 1990 and 1998 the Government issued an order on 29th May, 2002. The said order appears to have

been passed following an order passed by the learned Single Judge of this Hon''ble Court on 8th October, 2002. From the said order it appears

that the Government had taken a decision that authorities of all D.A. getting schools recognized by the West Bengal Board of Secondary

Education in the State which receive D.A. component for the approved teaching and non-teaching staff of their schools from the Government of

West Bengal would have to pay salary in the appropriate scale of pay from their own resources to the approved teaching and non-teaching

employees at the rate prescribed by the State Government for teachers and non-teaching employees of the Government Aided Schools with

immediate effect. This was followed by a Government order dated 22nd March, 2004 which was primarily aimed at giving a right of consideration

to the whole time approved staff of D.A. getting schools to claim an extension of service beyond 60 years if they were in service on or beyond

31st December, 1985. The relevant portions of the said Memorandum dated 22nd March, 2004 are reproduced hereinbelow:-

The undersigned is directed to refer to Memo No.641-SE(P)/5S-577/2001 and dated 29th May, 2002 of this Department whereby it was

decided that the authorities of all D.A. getting schools recognized by the West Bengal Board of Secondary Education in the State which receive

D.A. component for the approved teaching and non-teaching staff of their schools from the Govt. of the West Bengal will have to pay salary in the

appropriate scale of pay from their own resources to the approved teaching and non-teaching employees at the rate prescribed by the State

Government for teachers and non-teaching employees of the Govt. Aided Schools with immediate effect.

There are, however, some employees in those schools, whether ROPA 1998 scale have been introduced in the school or not, who due to their

serving beyond 60 years with approval from the concerned District Inspector of Schools are not eligible to draw pay and allowances under the

ROPA Rules, 1990 or the ROPA Rules, 1998. This issue of allowing D.A. to such employees was under consideration of the Government for

sometime past.

The whole time approved staff who were in service on or beyond 31st December, 1985 may continue up to the age of 65.

10. The petitioner during the course of his employment although had opted for a revised scale of pay but it was contented that his statutory right to

be considered for extension beyond 60 years and up to the age of 65 years cannot be taken away.

11. The petitioner made a representation on 15th September, 2006 on the basis of the Government order dated 22nd March, 2004 for

considering his case for extension of his service up to the age of 65 years since in terms of the Government order dated 22nd March, 2004 he was

in service on 31st December, 1985. Since the said application was not disposed of, a writ application was filed praying, inter alia, for a writ in the

nature of mandamus directing the authorities concerned to allow the petitioner to get the extension of service tenure beyond the age of

superannuation.

12. The said writ petition was dismissed at the stage of admission on the ground that the Government Memorandum dated 22nd March, 2004 has

no manner of application to the case of the petitioner since he had already opted for the benefits of the 1981 Scheme and the relevant ROPA

Rules.

13. The learned Single Judge was of the view that Government Memorandum dated 22nd March, 2004 also does not change the situation so far

as the petitioner is concerned. According to the learned Single Judge the said Memorandum was issued for a particular purpose to give particular

benefit to the class of employees mentioned therein.

14. Being aggrieved by the said decision an appeal was preferred by the petitioner, inter alia, on the ground that the said order was passed on a

total misconception of fact that the writ petitioner had opted for the benefits under the 1981 Scheme but the fact remains that the

petitioner/appellant had never opted for the benefits under the 1981 Scheme and furthermore, the writ petitioner/appellant being an assistant

teacher in a D.A. getting school, could not have opted for the benefits under 1981 Scheme inasmuch as the teaching staff of the D.A. getting

school does not come under the purview of the Death-cum-Retirement Benefit Scheme, 1981 or ROPA Rules, 1990. Some of the grounds on

which the said appeal was preferred are set out hereinbelow:-

I. For that the impugned order had been passed on the rudiments of a mis-conception that the writ petitioner had opted for the benefits under the

1981 Scheme but the actual fact is that the writ petitioner/appellant had never opted for the benefits under the 1981 Scheme and furthermore, the

writ petitioner/appellant being an assistant teacher in a D.A. getting school, is not even entitled to opt for the benefits under 1981 Scheme inasmuch

as the teaching staff of the D.A. getting school does not come under the purview of the Death-cum-Retirement Benefit Scheme, 1981.

II. For that the learned Judge ought to have appreciated that Dearness Allowance (hereinafter referred to as D.A.) is not a Government Aid and

the grant of D.A. to a school does not tantamount to conferment of a status of an aided institution and as such the provisions applicable to an aided

institution do not ipso-facto apply to D.A. getting schools.

III. For that the learned Judge ought to have appreciated that the teaching staff of aided institution enjoy absolutely the benefits of the Revision of

Pay and Allowances Rules (hereinafter referred to as the said ROPA Rules) and they retire upon attaining the age of 60 years and they avail the

benefits of the Death-cum-Retirement Benefits Scheme, 1981 whereas the teaching staff of D.A. getting schools are excluded from availing the

benefits under the 1981 Scheme and as such they have been conferred a right to be considered for extension of service beyond the age of 60

years subject to the preconditions of physical fitness and mental alertness.

V. For that the learned Judge erred in law in delivering the judgment without even considering the contents of the memorandum dated 22nd

March, 2004 which clearly specifies that ""the whole time approved staffs of D.A. getting schools who were in service on or before 31st

December, 1985 may continue upto the age of 65 years"" and in the instant case the appellant being a teaching staff of D.A. getting school and

having entered into service before 31st December, 1985 is entitled to extension of service beyond 60 years.

VI. For that the learned Judge ought to have appreciated that an employee of a D.A. getting school does not come within the definition of the

employee"" as prescribed under the ROPA Rules and by subsequent Government Circulars the basic pay of an employee of a D.A. getting school

had been directed to be fixed at the rate prescribed under the ROPA Rules and upon such fixation the salary would be payable by the school from

their own resources and the D.A. component would be paid by the Government and such fixation of basic pay in terms of the ROPA Rules do not

debar employees of D.A. getting school from seeking extension of service beyond 60 years.

VIII. For that the memorandum dated 22nd March, 2004 is squarely applicable in respect of the appellant and on the rudiments of the same the

appellant is entitled to extension of service beyond 60 years of age.

15. During the pendency of the appeal, the petitioner filed a supplementary affidavit bringing on record the minutes of the meeting of the Governing

Body of Diocesan Schools held on 12th July, 2006 and a Circular issued by the School Education Department, Government of West Bengal on

29th May, 2002. In support of the said Circular following averments have been made:-

5. That thereafter in the month of July, 2007, the appellant from a reliable source obtained a copy of minutes of the meeting of the Governing Body

of Diocesan Schools (Diocesan Board of Education), Diocese of Calcutta, Church of North Indian held on 12th July, 2006.

6. That a perusal of the said minutes in Annexure ""X"" would reveal that in the said meeting an appeal from Mrs. Sucheta Roy, the Headmistress of

Christ Church Girls'' High School, Dum Dum, dated 12th July, 2006 to the Rt. Revd. P.S.P. Raju, Bishop of Calcutta and Chairman, Governing

Body seeking extension of her service, as she was to retire on 31st January, 2007, was placed and that Mrs. Roy in her appeal, referred to the

Memo. No.98-SE(B)/1M-36/2003 dated 22.03.2004 issued by the Government of West Bengal, School Education Department wherein option

had been given that the whole time approved staff of D.A. getting schools recognized by the West Bengal Board of Secondary Education who

were in service on or before 31st December, 1985 may continue upto the age of 65 years.

11.That in this context it further needs to be mentioned that Mrs. Sucheta Roy in respect of whom the Governing Body had granted extension of

service enjoyed the same and identical scale of pay as enjoyed by the appellant herein prior to retirement and towards conferment of such scale of

pay the Christ Church Girls'' High School also obtained an identical document as obtained from the appellant herein.

12. That Mrs. Sucheta Roy''s date of retirement was 31st January, 2007 and she retired enjoying the revised scale of pay as fixed by the school

authorities in consonance with the Revision of Pay and Allowances Rules and the appellant herein is absolutely similarly situated with the said

incumbent inasmuch as he attained the age of superannuation on 30th November, 2006 and he retired availing the same scale of pay as availed by

Mrs. Sucheta Roy.

15. That the appellant being an employee of a D.A. getting school does not come within the purview of the Revision of Pay and Allowances Rules

but the benefits of revision at par with the employees of Aided schools are granted to the employees of D.A. getting schools on the rudiments of

independent Government orders and in this context reference is drawn to the Memo. Dated 29th May, 2002.

16. Before the Division Bench the School Authorities filed an affidavit in which they have disclosed a document which is an undertaking signed by

the petitioner on 19th May, 1990 in the form of option in which the petitioner had agreed to avail the benefit of revised scale of pay. The petitioner

made a categorical statement that he would not apply for extension of service on attaining the age of superannuation prescribed in Paragraph 17 of

the Government Order No.33-Edn.

(B) dated 7th March, 1990. The relevant portion of the said undertaking is reproduced hereinbelow:-

ANNEXURE - VIII B

(To be used by those governed by the first proviso to para 5(2) of the Order)

I Srikanta Mukherji have read carefully the contents of G.O. No. 33-Edn (B), Dt. 7.3.90 and I agree to abide by the terms and conditions

stipulated therein and I will not apply for extension of my service on attaining the age of superannuation prescribed in para 17 of the Order.

i) I_____ hereby elect for the revised scale of Rs._____ of my substantive/officiating/temporary post with effect from

1st January, 1986.

ii) I Srikanta Mukherji hereby elect to continue in the existing scale of pay of Rs.615/- of my substantive/officiating/temporary post mentioned

below till 1.4.1986 and to come under the revised scale of pay Rs.1770/- with effect from 1.4.1986.

17. In view of such disclosure the petitioner in Paragraph 16 of the supplementary affidavit made the following averments:-

16. That all the employees of the appellant''s school had been made to sign the proforma as provided for under the Revision of Pay and

Allowances Rules 1990 and the preparation and execution of such a document is nothing but an internal arrangement adopted by the school and

the same does not have the effect of usurping the right towards extension of service and such contention stands fortified by the memo. dated 22nd

March, 2004 which in fact is addressed to and is applicable in respect of employees of D.A. getting schools.

18. The Division Bench had made reference to the Scheme of 1981, the Management Rules 1969 and more particularly Rule 28, ROPA Rule

1990, Annexure-I Circular dated 7th March, 1990, the minutes of the meeting regarding Mrs. Sucheta Roy and have held that the petitioner having

agreed to abide by the terms and conditions stipulated in the Government Order dated 7th March, 1990 had willfully and voluntarily waived to get

his service beyond 60 years and such waiver cannot be construed to be against the public policy. The Division Bench had also rejected the

contention of the appellant/petitioner that following issuance of memorandum dated 22nd March, 2004 he acquired a right to get extension of

service after 65 years of age.

19. The petitioner instead of challenging the said order of the Hon''ble Division Bench filed an application for review in September, 2007, inter alia,

on the following grounds:-

I.For that the impugned judgment had been delivered on the rudiments of an erroneous comprehension that the applicant having availed revision of

pay through exercising of an alleged option had waived his right to avail extension of service beyond 60 years of age and that the applicant cannot

claim double benefits of revision of pay under the ROPA Rules as well as extension of service.

II.For that the Hon''ble Court ought to have appreciated that if the applicant is an optee under the ROPA Rules then in terms of paragraph 17(2)

of the same, the applicant would also be entitled to enjoy pensionary benefits but the applicant, being an employee of a D.A. getting school is not

entitled to get pensionary benefits being covered by Contributory Provident Fund Rules under Employees Provident Fund and Miscellaneous

Provisions Act, 1952 and as such the acceptance of revised scale does not act as an embargo towards availing extension of service.

III.For that the impugned judgment had been delivered without taking into consideration the contents of the Government Order dated 29th May,

2002 which clearly stipulates that the authorities of all D.A. getting schools recognized by the West Bengal Board of Secondary Education in the

State which receive D.A. component for the approved teaching and non-teaching staff of their schools from the Government of West Bengal will

have to pay salary in the appropriate scale of pay from their own resources to the approved teaching and non-teaching employees at the rate

prescribed by the State Government for teachers and non-teaching employees of the Government aided schools and as such the grant of revised

scale of pay excluding D.A. component, is payable by the school authorities from their own fund and not by the Government and accordingly such

revisions does not act as a deterrent towards extension of service to employees of D.A. getting schools.

IV. For that the impugned judgment is based upon surmises and conjectures.

VII. For that the Hon''ble Court had merely quoted the observation of the learned Single Judge to the effect that memo. dated 22nd March, 2004

was issued to give particular benefit to the class of employees mentioned therein, without adjudicating the specific issue as agitated by the applicant

to the effect that the applicant comes within the said ""class of employees"" and the said expression had remained undefined and unexplained.

IX.For that the impugned finding that the applicant by availing revision of scale of pay had waived his right to avail extension of service, is an

instance of total misconception of law and fact constituting ""sufficient reason"" for intervention through review.

X. For that the impugned judgment is an instance of mistakes galore inasmuch as the Hon''ble Court being oblivious of the averments made in the

supplementary affidavit observed that ""the Headmistress of a minority institution was not granted extension of service"".

XI. For that the Hon''ble Court neither did consider the averments made in the supplementary affidavit nor did consider the documents annexed

thereto though genuineness of authenticity of averments did not stand disputed and/or controverted by the respondents and such non consideration

of official evidence constitutes an error apparent on the face of the record requiring no convoluted argument for detection of such errors.

20. Mr. Tapabrata Chakraborty appearing on behalf of the petitioner submitted that there is an error apparent on the face of record resulting in

serious miscarriage of justice. It was submitted that the said order was passed on a total misconception of fact and the learned Counsel had drawn

our attention to four documents which are as follows:-

I. Pension Scheme for teachers and non-teaching staff issued under the Government Order 15th May, 1985.

II. Finance Department Circular dated 7th March, 1990.

III. Government Order dated 29th May, 2002.

IV. The Government Memorandum dated 22nd March,2004.

21. Mr. Chakraborty submitted that it would be apparent from the Scheme of 1981 that such Scheme does not extend to a D.A. getting school.

He has drawn our attention to Paragraph 2 of the said Scheme along with Statement-I as mentioned therein. The said Paragraph 2 of the 1981

Scheme is reproduced hereinbelow:-

2. After careful consideration of the recommendations, the Governor is pleased to direct that retirement benefits at the rates described in the West

Bengal Recognized Non-Government Educational Institutions Employees (Death-cum-Retirement Benefit) Scheme, 1981 enclosed as Annexure-I

will be admissible to all whole time approved teaching and non-teaching employees of the non-Government/Sponsored/Aided Institutions as shown

in Statement-I, who were in active service on or after 1st April, 1981 subject to the following conditions. Person who retired from service prior to

1st April, 1981 will not get these benefits.

22. Mr. Tapabrata Chakraborty by referring to Statement-I as indicated in the Scheme 1981 submitted that it would be evident from Paragraph 3

and Paragraph 4 that such benefits would not extend to Dearness Allowance getting schools. Since the respondent institution is a D.A. getting

school, the said scheme of 1981 cannot and does not have any manner of application to the teaching and non-teaching employees of the said

institution. Similarly, the Circular of 7th March, 1990 also does not apply to such D.A. getting school. In making reference to Paragraph 17 it was

submitted that the entire rule including Paragraph 17 is applicable to the teaching and non-teaching staff of the non-Government/Sponsored/Aided

Educational Institutions and other Organization as mentioned in Annexure-I. The said Annexure-I of the said rule does not cover D.A. getting

School. In this regard he has relied upon Rule 2(e) of the said Rule which defines employee as follows:-

2(e). ""Employee"" means a member of the teaching and non-teaching staff of the non-Government/Sponsored/Aided educational institutions and

other organizations as mentioned in Annexure I.

23. Annexure-I to the said Rule is also reproduced hereinbelow:-

ANNEXURE-I

1. Teachers and non-teaching staff of -

(i) State Government sponsored or aided Primary School/Jr. Basic Schools (including Pre-Basic Schools);

(ii) State Government Sponsored or Aided Jr. High/High Schools/Higher Secondary Schools up to Class XII standard (including Jr. High/High and

Sr. Madrasah);

(iii) State Government Sponsored or Aided Schools for Handicapped;

(iv) State Government Sponsored/Aided Training Institutes for Primary teachers;

(v) State Government Sponsored/Aided Polytechnics;

(vi) State Government Sponsored/Aided Junior Technical Schools;

(vii) Sponsored Day Students'' Homes;

(viii) Recognized

Non-Government Sponsored/Aided voluntary organizations under the administrative control of Education Department.

2. Employees of District School Boards.

3. Non-teaching Staff of Non-Government Colleges.

4. Library Staff of Sponsored/Aided-

(i) Educational Institution;

(ii) District Library;

(iii) Sub-Divisional/Town Library;

(iv) Rural/Area/Primary Unit Library.

24. It was submitted that option given in Paragraph 17 is in relation to the employees covered under the definition of Rule 2(e) of the said Rules

and does not extend to the petitioner. It was submitted that since a disparity was existing between the scale of pay of Government and non-

Government schools, the matter was ultimately resolved by this Hon''ble Court in the case of Staff Council Gyan Bharati Vidyapith & Anr. Vs.

State of West Bengal & Ors. on October 8, 2002 in W.P. No.707 of 2002 which had resulted in a circular being issued by the Government on

29th May, 2002 by reason whereof a D.A. getting school is now required to pay salary in the appropriate scale of pay from their own resources to

the approved teaching and non-teaching employees at the rate prescribed by the State Government for teachers and non-teaching employees of

the Government Aided School with immediate effect. The relevant portion of the said Circular No. 641-SE(LAW)/5S-577/2001 dated 29th May,

2002 is reproduced below:-

After due consideration of the matter, it is decided that the authorities of all D.A. getting schools recognized by the West Bengal Board of

Secondary Education in the State which receive D.A. component for the approved teaching and non-teaching staff of their schools from the Govt.

of West Bengal will have to pay salary in the appropriate scale of pay from their own resources to the approved teaching and non-teaching

employees at the rate prescribed by the State Govt. for teachers and non-teaching employees of the Govt. Aided Schools with immediate effect.

It is also decided that the approved teaching and non-teaching employees of those D.A. getting schools will get D.A. from the Govt.(on percentage

basis) at the rate as is admissible to other employees of State Govt. aided Educational Institutions as is announced from time to time by the State,

in supersession of all the previous orders issued from the Govt. to this effect.

25. The respondent educational institution as a D.A. getting school is required to follow the said Government Order dated 29th May, 2002. Since

it is a D.A. getting school and the pensionary benefits are not extended to such teaching and non-teaching staff, under Memorandum dated 22nd

March, 2004 a special right for consideration has been given to the whole time staff if they were in service on or beyond 31st December, 1985 to

claim an extension upto the age of 65.

26. It was submitted that these circulars have not been considered in their proper perspective and both the learned Single Judge as well Division

Bench had proceeded on the basis as if the benefit of the 1981 Scheme has been availed by the petitioner and accordingly he cannot claim

extension in terms of the Government Order dated 22nd March, 2004 beyond the age of superannuation, that is, 60 years.

27. Per Contra, Mr. Asish Chakraborty, learned Counsel appearing on behalf of the Respondent No.4, 5 and 6 submitted that the review

application is required to be dismissed in limine. The learned Counsel submitted that the writ petition should have been dismissed on the ground of

suppression of material facts. It was submitted that the writ petitioner has suppressed the undertaking dated 19th May, 1990 whereby he has

exercised his option for a revised pay scale and has given a clear undertaking that he would not apply for extension of service on attaining the age

of superannuation prescribed in Paragraph 17 of G.O.No.33-Edn(B) dated 7th March, 1990.

28. He further submitted that the Paragraph 10 of the writ petition, the petitioner based his cause of action on the purported ground that

notwithstanding the Government Order dated 31st July, 1981 his statutory right to be considered for extension upto the age of 65 years. The

petitioner had conveniently suppressed that the undertaking obtained was not in relation to the Government Order dated 31st July, 1981 but with

regard to Government Order dated 7th March, 1990, the implication whereof has been duly considered by a Division Bench of this Court in a

judgment reported in 1991(2) CLJ 188 (West Bengal Headmasters'' Association & Ors. Vs. State of West Bengal & Ors.).

29. In referring to the said judgment it was argued that the petitioner tried to make out his case on the basis of the ratio laid down in the said

judgment in which the Hon''ble Division Bench was considering the implication of Rule 28 of the Management of Recognized Non-Government

Institutions (Aided and Unaided) Rules, 1969, vis-Ã¯Â¿Â½-vis the Government Order dated 31st July, 1981. It was argued that the Division Bench has

also taken a note of the subsequent Government Order dated 7th March, 1990 on the basis of which the present undertaking was obtained on

19th May, 1990. It appears from the said decision that the Hon''ble Division Bench considered the said Management Rule 28, Government Order

31st July, 1981 and to the subsequent Government Order dated 7th March, 1990.

30. It was held in the said decision that the teachers of Government Aided Higher Secondary Schools who opted for the revised scales of pay in

terms of offer given to them by the State Government by Order dated 31st July, 1981 have neither forfeited nor waived their right in the facts and

circumstances of that case for being considered for extension of their services after superannuation in terms of a statutory Rule 28.

31. It was further noticed that unlike the Government Order dated 7th March, 1990, the optees were required under the Government Order dated

31st July, 1981 to exercise their option in writing, saying that having opted for the revised scales of pay they shall not apply for extension of service

on attaining the age of 60 years.

32. The first proviso to Paragraph 5(2) of the Government Order dated 7th march, 1990, makes it clear that the teachers who had not attained the

age of superannuation as prescribed in Paragraph 17 of the aforesaid Government Order on the date of issuance of the said order, for getting the

revised scales of pay would be required to exercise their option in form prescribed in Annexure VIII-B.

33. The said form Annexure VIII-B clearly mentions that those governed by the first proviso to Paragraph 5(2) of the Order would be required to

exercise their option in that particular form and Paragraph 1 of the said form requires each teacher to exercise his option by clearly indicating that

having opted for the revised scales of pay, he would not apply for extension of his service on attaining the age of superannuation, that is, 60 years.

34. On the basis of the aforesaid it was submitted that the statements made in Paragraph 10 are misleading if not suppression of material facts. It

was argued that the writ petition and the appeal ought to have been dismissed on the ground that the writ petitioner made a false statement and/or

concealed material facts and/or made a misleading statement with a view to get an order and in such a case such petition should have been

dismissed in limine without considering the merits of the claim.

35. It was further submitted that the case made out in the original writ petition as also before the Appellate Court are entirely different from what is

now sought to be argued in this review petition and this review petition is required to be dismissed as an abuse of process of Court. In this regard,

reliance has been placed on the following judgments:-

i) K.D. Sharma Vs. Steel Authority of India Ltd. and Others,

ii) Dalip Singh Vs. State of U.P. and Others,

iii) M.C.D. Vs. State of Delhi and Another,

36. The respondent schools in referring to the two new documents disclosed in the supplementary affidavit affirmed on July, 2007 and filed before

the Appellate Court submitted such a new plea should not be allowed to be raised without amending the pleading.

37. At the appellate stage the writ petitioner disclosed two documents which were as follows:-

(I) Minutes of the meeting of the Governing Body o Diocesan Schools(Diocesan Board of Education), Diocese of Calcutta, held on 12th July,

2007.

(II) The Government Order No.641-Se(LAW)/ 5S-577/2001.

38. The basis of such objection was that since the Courts ordinarily should insist on the parties to confine their argument to the specific pleadings

made out in their petition and such party should not be permitted to deviate from the same by way of modification or supplementation except by

adopting the well-known process of formally applying for amendment.

39. It was submitted that the said two documents the petitioner tried to make out entirely a new case and such new plea could not be allowed

without amending the original pleading inasmuch as the writ petitioner did not make the said Governing Body or Mrs. Sucheta Roy a party to the

said writ petition and not even in appeal. The said Governing Body was not a party in the writ petition or in the Court of appeal.

40. The learned Counsel relying on the decision of the Hon''ble Supreme Court reported in S.S. Sharma and Others Vs. Union of India (UOI) and

Others, submitted that such new plea should not be allowed without formally applying for amendment and relying on such Governing Body

resolution without impleading the Governing Body or Mrs. Sucheta Roy would cause grave injury by depriving them the opportunity to controvert

the allegations made in the said supplementary affidavit.

41. During the pendency of the review petition it appears that the school filed an affidavit affirmed on 6th July, 2011 in which the said school relied

upon minutes of the meeting of the Managing Committee held on 12th May, 1990. The said document was brought on record in support of the

contention of the school that a teacher who had already opted for revised scales of pay would not get the benefit for extension of service beyond

60 years. It appears that in the said meeting, the Managing Committee, inter alia, considered the implication of introduction of revised scales of pay

in the secondary section of the school as per Government notification No.33-

Edn(B) dated 7th March, 1990 and passed the following resolution:-

It was resolved that only the employees who would opt for the revised scales of pay would enjoy the benefit of the same and the age of

superannuation of all categories of teaching and non-teaching employees who would elect to come over to the revised scales of pay be fixed at 60

years.

42. Although an objection was raised with regard to the filing of such supplementary affidavit but the earlier Division Bench hearing the matter

permitted such affidavit to be filed and the issue with regard to the admissibility of such affidavit was kept open. Now, at the stage of final hearing

of the matter we feel that for doing substantive justice the said resolution of the Managing Committee should be allowed to be taken on record

since it is an important piece of evidence. In order to satisfy our conscience, we directed the school by an Order dated 17th November, 2011 to

produce the original minute book containing such resolution. We have gone through the minute book and the resolution dated 7th March 1990.

43. We have no doubt about the genuineness of the said resolution. The said resolution in effect supports the contention of the school that the writ

petitioner is an optee and had exercised his option for a revised scales of pay and, accordingly, have executed an undertaking on 19th May, 1990.

It is not in dispute that the respondent No.4 is only a D.A. getting school and does not come under the purview of the Government Circular of

1981 of the ROPA Rule, 1990.

44. The learned Counsel appearing on behalf of the District Inspector of Schools made her submission and prayed for leave to file an affidavit to

clarify the stand of the said respondent in relation to the applicability of the relevant circulars to the writ petitioner and also to apprise the Court

about the decision taken in respect of Smt. Sucheta Roy.

45. The Division Bench of our High Court in the case of Ballygunge Siksha Samity & Ors. v. Ms. Susmita Basu & Ors. reported in 2000 (I) CHN

635 considered the 1969 Management Rules and the notification No. 33-Edn(B) dated 7th march, 1990 and held in the absence of any nexus

between the 1969 Management Rules and the notification dated 7th March, 1990, the recommendations of the Third Pay Commission contained

in the said notification cannot be extended to recognized non-Government unaided institutions by virtue of the deeming provision in the note

appended to Sub-Rule (9) of Rule 28 of the 1969 Rules.

46. It was further held that having regard to the definition ""sponsored institution"" in Rule 2(g) of the 1969 Rules, a ""D.A. Getting"" school would not

come within the purview of the said notification. The respondent No.4 like Ballygunge Siksha Samity is only a D.A. getting school and not an aided

school. The said Division Bench considered the definition ""employee"" in the said notification and held as follows:-

If it was the intention of the State Government that even recognized non-Government unaided institutions were to be included in the reference, such

intention would have manifested itself in the preamble of the notification itself without one having to garner such intention from the definition of an

expression made therein. Furthermore, Annexure-I to the notification, referred to in the definition of employee, also refers, inter alia, to State

Government sponsored or aided Junior High/High Schools/Higher Secondary Schools upto Class XII standard and also to recognized non-

Government sponsored/aided voluntary organizations under the administrative control of the Education Department. The institutions mentioned in

Annexure-I do not include recognized non-Government institutions which are neither sponsored nor aided by the Government.

47. Mr. Tapabrata Chakraborty taking a queue from the said observation of the Hon''ble Division Bench argued that since the notification dated

7th March, 1990 cannot apply to the respondent No.4, the question of the writ petitioner exercising any option in terms of Government Order

dated 7th march, 1990 could not and does not arise.

48. The learned Counsel admitting the execution of the said undertaking submits that such undertaking was purely an internal arrangement between

the school and the writ petitioner and by such undertaking the statutory right to apply under the Government Order dated 22nd March, 2004

cannot be taken away. But the said document has to be construed having regard to the earlier Government Order dated 29th May, 2002 by which

the Government had restored parity in the pay scale as also D.A. and the writ petitioner, in fact, was exercising such right.

49. Mr. Asish Chakraborty also never disputed the fact that the school is a D.A. getting school and such the notification dated 7th March, 1990

does not apply. The school, however, in its affidavit in opposition to the stay petition in dealing with the said undertaking in Paragraph 3(c) made

the following averment:-

3(c). The appellant has suppressed that he had also exercised option for revision of pay scale in terms of the Memorandum bearing No.33-Edn.

(B) dated March 7, 1990 issued by the Government of West Bengal being the revised scale of pay of Teaching and Non-Teaching Staff with

effect from 1986. While exercising for the revision of pay scale in terms of the said Government order dated March 7, 1990, the appellant had

expressly given an undertaking the he shall not apply for extension of his service after attaining the age of superannuation prescribed in para-17 of

the said order dated March 7, 1990. In this connection, a copy of the Form of Option in Annexure VIII-A dated March 7, 1990 submitted by the

appellant/writ petitioner is hereto annexed and marked ""R-1"". The answering respondents also craves leave to refer to a copy of the said

Memorandum dated March 7, 1990 at the time of hearing of this application, if necessary.

50. While dealing with Paragraph 10, the schools specifically denied that the employee of D.A. getting school does not come within the purview of

employee"" as prescribed under the ROPA Rules or that fixation of basic pay in terms of ROPA Rules do not bar an employee of D.A. getting

school from seeking extension of service beyond 60 years of age as alleged. The school admits that an employee of a D.A. getting school comes

within the purview of ""employee"" as prescribed under the ROPA Rules which, however, is contrary to the law laid down by the Division Bench in

the case of Ballygunge Siksha Samity & Ors. v. Ms. Susmita Basu & Ors. (supra).

51. Be that as it may the 1969 Management Rule, the Government Order dated 7th March, 1990 and the undertaking along with the 2004

notification did come up for consideration before the Division Bench and the said Bench did not accept the contention of the writ petitioner and

had arrived at a specific finding that the writ petitioner has waived his right by virtue of the undertaking singed on 19th May, 1990.

52. In deciding the present review application, we are reminding ourselves of the fact that when the earlier Division Bench was available, the said

application was not heard. Moreover, as it appears from record, one of the Judges of the Division Bench was available for quite some time and

although it appears that the review application was affirmed sometimes in September, 2007 but the said matter remained pending.

53. When the points of the like nature are raised before us, namely, that a Division Bench did not take into consideration the Government Circular

of 2002 and suggesting that other contentions although raised were not noticed and/or overruled, the Bench taking the review, as it happens in our

case, does not have the benefit of having originally heard the matter and, accordingly, in such cases a more onerous duty is required to be

discharged as has been rightly pointed out in the case of Abdul Salam Vs. Union of India (UOI) and Others,

54. Justice Sanjib Banerjee speaking for the Bench in Paragraph 30 in appreciating the disadvantageous position to which a Review Bench is put

to by reason of the matter being heard by an entirely new Bench have correctly and rightly observed as follows:-

Since in such cases, the Bench taking up the review does not have the benefit of having originally heard the matter, a more onerous duty is required

to be discharged. It is possible that the same set of facts and contentions that had been negated whether directly or by necessary implication, may

find favour with the Bench taking up the review. It is not in our understanding for the Bench taking up the review to supplement its reason or

judgment for the one that has been passed even if the Bench hearing the review feels that a different order could have been passed unless the

preconditions for review are strictly met and the grounds urged call for review. What appears to an error judgment cannot be corrected as if in

appeal, by a Bench of co-ordinate jurisdiction.

55. This takes us to the more fundamental issue as to the jurisdiction of review of an order passed by a Writ Court in exercise of its power under

Article 226 of the Constitution of India. A large number of decisions have been cited by both the parties in respect of the power of Court to review

its own order passed under Article 226 of the Constitution of India.

56. In deciding the said issue another issue obviously comes up for consideration is whether the power of review u/s 114 read with Order 47 of

the CPC would be applicable in writ proceedings and even if such principles might not apply strictly, if the requirements for review as mentioned in

the CPC would be a guiding factor in reviewing an order passed under Article 226 of the Constitution of India. In short, the scope and ambit of a

Court in reviewing an order passed under writ jurisdiction is the matter for consideration.

57. The CPC contemplates appeal, review and revision of an order and/or judgment by a Civil Court on grounds stated there. While exercising a

power under Article 226 of the Constitution of India, the High Court is exercising high prerogative writ powers to pass such orders and directions

which may be necessary in the interest of justice. The CPC also consciously excludes the application of the power exercised under Article 226 of

the Constitution in Section 141 of the said Code.

58. The Writ Rules framed by our High Court refers to application of some of the provisions of the CPC and more particularly Rule 53 of the Writ

Rules. The implication of introduction of such rules in the Writ Rules, vis-Ã¯Â¿Â½-vis, the Constitutional power exercised by the High Court under

Article 226 of the Constitution of India had come up for consideration in Ratanlal Nahata Vs. Nandita Bose, which was subsequently followed in

Maruti Real Estate Vs. Life Insurance Corporation of India (2008(1) CHN 442).

59. In Maruti Real Estate case (supra), the Division Bench was considering an application filed by the LIC which was not described as an

application for review, but in effect, it seeks review of an order. While considering the said matter, the Hon''ble Division Bench in Paragraph 22

refers to the Full Bench decision of the High Court in Ratanlal Nahata Vs. Nandita Bose, in which the Full Bench in Paragraphs 74 to 78 held as

follows:-

Coming now to the applicability of Code of Civil Procedure, in a proceeding under Article 226 of the Constitution of India we may at the very

threshold take note of the fact that Section 141 of the CPC as amended in 1976 excludes the applicability of said provision in a proceeding under

Article 226 of the Constitution of India. It may be true that by reason of Rule 53 of the Writ Rules framed by this Court, the procedures provided

in the CPC in regard to suits as far as it can be made practicable may be followed in all proceeding for issue of a writ. The said rule, however, is

subject to the rules framed by this Court, viz., Original Side Rules and Appellate Side Rules as would appear from Rule 48 itself. The Appellate

Side Rules and the Original Side Rules make provision as regard procedure to be followed in review petition.

The CPC per force, therefore, is not applicable in a proceeding under Article 226 of the Constitution of India but only the procedural aspects

thereof mutatis mutandis apply. Furthermore Rules 48 and 53 of the writ rules must be read in the light of Section 4(1) of the CPC which protects

powers under Letters Patent, Section 108 of Government of India Act, 1915, Section 223 of Government of India Act, 1935 and Article 225 of

the Constitution of India, thus read, we have no doubt in our mind that Order 47 Rule 5 ipso factor cannot be made applicable by telescoping the

same in the writ proceedings through Rule 53 of the writ rules. The extensive power of the Chief Justice to allocate business of the Court as

noticed hereinbefore by no means can be curtailed or whittled down in terms of Order 47 Rule 5 so far as the proceedings before High Court is

concerned. We intend to make it clear that Order 47 Rule 5 will have application in cases where CPC alone applies i.e. before the Subordinate

Courts and other Tribunals.

Apart from the reasons noticed hereinbefore, we reiterate that Order 47 Rule 5 having been framed in terms of Section 114 of the CPC which

provision itself being not applicable in relation to a writ proceeding, the procedures laid down in terms whereof would not ipso facto apply

inasmuch whereas a Civil Court trying a suit (not the High Court trying in exercise of its original jurisdiction) is bound by the provision of Order 47

Rule 5 of the Code of Civil Procedure, the High Court while exercising its writ jurisdiction is not, as the power of review is taken recourse to by

the High Court in exercise of its inherent jurisdiction.

Power under Article 226 of Constitution of India is exercised by the High Court in its equity jurisdiction and thus, as its has to do equity to the

parties and to do complete justice to them, its power of review is not and cannot be limited only in terms of Section 114 or Order 47 Rule 1 of the

Code of Civil Procedure. By parity of the reasoning Order 47 Rule 5 ipso facto would not be attracted in a writ proceeding.

The reason as to why the provisions of CPC are not applicable in a writ proceeding has been explained by the Apex Court in Puran Singh and

others Vs. State of Punjab and others, N.P.Singh, J., speaking for the Division Bench held that the provisions of CPC were not applicable even

before coming into force of 1976 Amendment Act in view of the decision of the Apex Court in Babubhai vs. Nandlal reported in AIR 1974 SC

2105 and held (para 5 of AIR):

If because of the explanation, proceeding under Article 226 of the Constitution has been excluded, there is no question of making applicable the

procedure of Code as far as it can be made applicable to such proceeding. The procedures prescribed in respect of suit in the Code if are made

applicable to the writ proceedings then in many cases it may frustrate the exercise of extra ordinary powers by the High Court under Articles 226

and 227 of the Constitution.

60. The Division Bench held that if the order under review results in serious miscarriage of justice, the Court would not be shy to review its own

Order. The reason appears to be that the Court in exercising high prerogative writ jurisdiction, the paramount consideration would be to ensure

that no injustice is caused to a party if it appears that the order is passed in ignorance of material on record or law since in such case if the order is

allowed to continue it would cause serious miscarriage of justice. The propriety of such order even under review has to be tested on the touchstone

of substantive justice and the Court would always remind itself that technicalities should not stand in the way of reviewing its own order. If it

appears to the Court that the Court had committed some mistake or error apparent on the face of record it would unhesitatingly review such order.

The paramount consideration as it appears to us from the analysis of the judgments is ""miscarriage of justice"". The error apparent on the face of the

record or a mistake or for sufficient reason as one would find in Order 47 of the CPC are the additional considerations which read with

miscarriage of justice give an ample power to the Constitutional Courts to exercise its inherent power to review.

61. The said Division Bench had also relied upon an observation of the Apex Court in the case of Shivdeo Singh and Others Vs. State of Punjab

and Others, in which the Hon''ble Supreme Court approved the inherent power of review of the High Court of its order passed under Article 226

of the Constitution of India in the following manner:-

It is sufficient to say that 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.

62. The fountainhead or source of all power is the Constitution. The power exercisable under Article 226 of the Constitution is one of such powers

derived from the Constitution. All statutes are subservient to such constitutional powers and while the statute may come and go but the Constitution

is perennial. The CPC in Section 141 clearly excludes the application of code in writ proceedings.

63. Mr. Tapabrata Chakraborty has relied upon the judgment reported in 2009(2) CHN 860 (Satyanarayan Pandey v. State of West Bengal &

Ors.) for the proposition that the object of the review petitioner is to prevent the miscarriage of justice and if it is found that the earlier judgment

was delivered without considering settled legal principle, it would be an error apparent on the face of the record and the Court would not hesitate

to review such decision. It would appear from the said decision that in reviewing its order, the said Division Bench in Paragraph 24 considered the

circumstances under which a review would lie which is reproduced hereinbelow:-

24. If an established legal proposition or principle of law is not applied in a particular case, then the judgment delivered without considering such

legal principle would suffer from error apparent on the face of records. The scope of scrutiny by the reviewing Court in such cases of course would

not be as wide as that of an Appellate Court. In such circumstances, the first task of the Court exercising the review jurisdiction would be to

ascertain as to whether the principle or proposition of law which is alleged to have not been considered would have applied in the facts of the

particular case. If the finding is positive on this count, then the next task of the reviewing Court would be to apply that proposition of law in the

facts of that case, and then ascertain if the judgment already rendered would have been varied if such a proposition of law was applied to that

case. If answer to this question is also affirmative, then the judgment would have to be reviewed at the instance of the aggrieved party.

64. The Division Bench in the said case exercised its jurisdiction on the ground that the subsequent acquittal of the petitioner from the criminal case

had a direct bearing on the second and the fourth charge so far as the departmental proceeding is concerned and the alleged offence of extortion

cannot be said to have been committed against the person or property of employer or a coÃ¯Â¿Â½employee. In the said decision it was noticed that

the order imposing punishment was not in conformity with ratio of the decision of the Hon''ble Supreme Court in the case of G.M. Tank and it was

further noticed that in the said case the acquittal in the criminal proceeding had a bearing on the departmental proceedings which had been

completely overlooked in not allowing the said appeal.

65. In the case of Rajender Singh Vs. Lt. Governor, Andaman and Nicobar Islands and Others, it was held that if an order is passed without

deciding many important issues and by ignoring material on record it would be a clear case of an error apparent on the face of record and same

would be the case if such order is passed without considering the relevant documents. In that case, one of the arguments made on behalf of the

petitioner was that whether the qualification laid down under Paras 13 and 14 of UGC Career Advancement Scheme is mandatory or not for the

purpose of placing the appellant in senior scale and selection grade was not at all considered and dealt with.

66. The Hon''ble Supreme Court upon careful examination of the impugned judgment came to a definite conclusion that the judgement and order

was passed without deciding many important issues and ignoring material on record. The Hon''ble Supreme Court found that the High Court

overlooked many documents relied on by the appellant and on such facts it was held that review jurisdiction would be available. It was observed

that the power of judicial review of its own order by the High Court inheres in every Court of plenary jurisdiction in order to prevent miscarriage of

justice. The Hon''ble Supreme Court further held that such power extends to correct all errors to prevent miscarriage of justice and the Court

should not hesitate to review its own earlier order when there exists an error on the face of the record and in the interest of justice so demand in

appropriate cases.

67. The petitioner laid much emphasis on the judgement reported in Green View Tea and Industries Vs. Collector, Golaghat, Assam and Another,

n the ground that the Hon''ble Division Bench in considering the Government Order dated 7th March, 1990 has completely overlooked and/or

ignored the fact that ROPA Rule 1990 is not applicable to the respondent school and, accordingly, the observation of the Hon''ble Division Bench

that the petitioner had willfully and voluntarily waived his right to get extension of service beyond 60 years in view of benefits being conferred upon

the ROPA Scheme is patently erroneous.

68. The learned Counsel further submitted that the Hon''ble Division Bench had completely overlooked that if the petitioner had taken advantage of

the option clause of ROPA Rule 1990 then he would be entitled to get pension in terms of second clause of Paragraph 17 and he cannot lose on

both the grounds. It was further submitted that the Division Bench could not have held that the petitioner having enjoyed the benefit of revised

scales of pay under the ROPA Scheme for years, the petitioner is not entitled to exercise of service as provided in Rule 28 and the Management

Rules, 1969. This finding is an error apparent on the face of record as it completely fails to take into consideration that such rule is not applicable

to a D.A. getting school and the undertaking is purely an internal arrangement between the school and the writ petitioner.

69. We are, however, unable to persuade ourselves to accept such contention of the writ petitioner in this review jurisdiction. The power to review

of an Order passed under Article 226 of the Constitution is not curtailed and/or limited by any provision of the CPC or other statute but, at the

same time, we have to remind ourselves that under the garb of review we should not permit rehearing of the entire appeal. The review proceedings

are not meant for rehearing of appeal. The scope and ambit of Order 47 Rule 1, vis-Ã¯Â¿Â½-vis, the jurisdiction available to High Court, while seeking

to review the orders under Article 226 of the Constitution of India, came up for consideration in the case of Aribam Tuleshwar Sharma Vs.

Aribam Pishak Sharma and Others, in which the Hon''ble Supreme Court in Paragraph 3 held as follows:-

It is true as observed by this Court in Shivdeo Singh and Others Vs. State of Punjab and Others, there is nothing in Article 226 of the Constitution

to preclude the 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 power 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 any analogous ground. But, it may not 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 power which may enable an appellate Court to correct all manner of errors committed by the subordinate court.

70. The said decision was subsequently considered in Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhury, in which Their Lordships held,

while entertaining a review only on the ground of error apparent on the face of the record, it has to be kept in mind that an error apparent on the

face of record must be such an error which must strike one or mere looking at the record, would not require any long-drawn process of reasoning

on points where there may conceivably be of two opinions. We may usefully refer to the observations of this Court in the case of Satyanarayan

Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, wherein, K.C. Das Gupta, J., speaking for the Court has made the

following observations in connection with an error apparent on the face of the record:-

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. Where an alleged error is far from self-evident and if it can be established, it has to be

established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the

powers of the superior court to issue such a writ.

71. It is also well-settled that mistake or error apparent on the face of the record has to be self-evident and does not require a process of

reasoning and the same is clearly distinct from erroneous decision as has been held in Parsion Devi and Others Vs. Sumitri Devi and Others, . In

the said decision, the Hon''ble Supreme Court was considering the phrase ""mistake or error apparent on the face of record"". It was held, an error

which is not selfÃ¯Â¿Â½evident 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 under Order 47, Rule 1 CPC. In exercise of the jurisdiction under Order 47, Rule 1 CPC it is

not permissible for an erroneous decision to be ""reheard and corrected"". There is a clear distinction between an erroneous decision and an error

apparent on the face of the record. While the first can be corrected by the higher forum, the latter can be corrected by exercise of the review

jurisdiction. A review petition has a limited purpose and cannot be allowed to be ""an appeal in disguise"".

72. Although the said decision was rendered under Order 47 Rule 1 of the Code of Civil Procedure, it is certainly a guiding principle even for

considering an application under Article 226 of the Constitution of India.

73. Since it appears to us that the correctness of the order under review is sought to be assailed on the basis that the appellate court ignored

relevant facts, overlooked materials on record and on an erroneous understanding of relevant rules and circulars it was necessary for us to consider

the said submission in order to ascertain the justification of such plea giving rise to a claim for review. We reiterate the Division Bench while

dismissing the order under review applied its mind to the undertaking as also the ROPA Scheme and had arrived at a definite conclusion that there

has been an act of waiver on the part of the writ petitioner to claim any extension of service beyond 60 years. It could not be said that there has

been any error apparent on the face of the record or that the same was passed ignoring any material on record. In the review jurisdiction we are

not required to reappreciate the evidence already on record and just because on the basis of the same materials this Bench may come to a different

finding that by itself would not be a ground for review.

74. The learned Counsel for the school had relied upon the following three decisions:-

1 Union of India (UOI) and Another Vs. International Trading Co. and Another, 2. State of Orissa and Others Vs. Balaram Sahu and Others, etc.

etc., and

3. Punjab State Electricity Board and Others Vs. Gurmail Singh,

75. The learned Counsel for the school had also relied upon these three decisions for the proposition that the writ petitioner has failed to make out

any case of discrimination and merely because a wrong might have been done in the case of Mrs. Sucheta Roy, the same is not to be repeated.

We are not entering into such issues in this review jurisdiction since the Division Bench, in our mind, had already addressed the issue. We feel at

the appellate stage the appellant lost opportunity to make the said Governing Body a party or Mrs. Sucheta Roy and we feel that the Division

Bench was justified in recording its observation with regard to the case of Mrs. Sucheta Roy.

76. In the affidavit affirmed on 5th December, 2011, the District Inspector of School contended that in the circular of 2004 it was made clear that

the superannuation/retirement benefit in the case of the writ petitioner and persons similarly situated would be calculated as usual in terms of the

recognized Non-Government Secondary Institutions Pension Rules as circular vide GO No.1610-Edn (S) dated 18th July, 1968 read with GO

No.2156-Edn (S) dated 20th September, 1967. It was further contended that Smt. Sucheta was not granted the extension and the same would

appear from the communication dated 2nd November, 2007 which is as follows:-

From : Shri S. Mahapatra,

Joint Secretary to the Govt. of West Bengal.

To : The Director of School Education, W.B., (Grant-in-Aid Section).

Sub :Extension of service of Smt. Sucheta Roy, Headmistress of

Christ Church Girls" High School, North 24-Parganas.

The undersigned is directed to refer to his memo no.2255-GA/4G-295/81, dated 10th September, 2007 and to say that the teachers of D.A.

Getting schools enjoying pay scale of ROPA"90 or ROPA"98 are due to retire at the age of 60 years. So the above mentioned teacher is not

allowed extension of service beyond 60 years.

77. In any event, it cannot be said on the basis of the materials on record that the petitioner has been able to make out any case for reviewing the

order dated 1st August, 2007.

78. It was on the basis of the circular dated 18th July, 1968 read with circular dated 20th September, 1967, it was submitted on behalf of the

Director of School Education as also the school that the writ petitioner is entitled to retirement benefits under the aforesaid Government Orders.

The learned Counsel on behalf of the School has fairly submitted that although the stand was not taken earlier by the School in view of lack of

challenge to pension, the school could not make any submission in respect thereof, although the fact remains that the pension cannot be denied to

the writ petitioner since he is otherwise eligible to pension.

79. It was submitted that the school would take all steps to forward the necessary papers concerning pension of the writ petitioner after the writ

petitioner duly made an application in the prescribed form.

80. It is not in dispute that when the writ petitioner made the application for extension of service, the School authorities did not respond to such

letter. The school also did not say that at the relevant point of time the writ petitioner was not entitled to pension. Although we are mindful of fact

that the issue of pension is not an issue in the writ petition but having regard to the subsequent facts and in view of the submission made on behalf

of the District Inspector of School as also the school authorities it cannot be disputed that the petitioner is entitled to pension. In fact, he was

getting the dearness allowance in terms of the earlier government orders as referred to above.

81. However, having regard to the unblemished service record of the petitioner who had served the institution as a teacher for all these years till he

retired, we expect that the pensionary benefits and other retiral benefits as admissible under the Government orders and circulars should be

released to the petitioner within a period of three months from date. The School Authorities are directed to take up the matter immediately with the

Director of School Education, West Bengal for release of pension and other retiral benefits and such pension and other benefits should be released

within the said period of three months as indicated hereinabove. Accordingly, the review application fails. There shall be, however, no order as to

costs.

82. Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.

83. The signed copy of the operative portion of this judgment be made available to the parties.

Tapan Kumar Dutt, J.

I agree