IN THE HIGH COURT OF MADHYA PRADESH, JABALPUR

BEFORE
SHRI JUSTICE SUJOY PAUL

ON THE 24th JUNE, 2022

MCC NO. 1331/2022

BETWEEN :-

COMMISSIONER,
MUNICIPAL CORPORATION,
JABALPUR,(M.P.)

…….**APPLICANT**

(BY SHRI R.N. SINGH, SENIOR COUNSEL WITH SHRI SAURABH MAKHIJA AND SHRI VIJENDRA SINGH CHOUDHARY, ADVS.

AND

1. KEDARNATH SINGH MANDELE, S/O SHRI HARISHANKAR, AGED ABOUT 45 YEARS, R/O LIG 766, DHANWANTRI NAGAR COLONY, JABALPUR, (M.P.)

2. STATE OF MADHYA PRADESH, THROUGH PRINCIPAL SECRETARY, DEPARTMENT OF URBAN ADMINISTRATION & DEVELOPMENT, MANTRALAYA, VALLABH BHAWAN, BHOPAL, (M.P.).

…..**.RESPONDENTS**

(BY SHRI K.C. GHILDIYAL, SENIOR COUNSEL WITH SHRI R.K. PANDEY FOR THE PRIVATE RESPONDENT)

This MCC coming on for admission this day, ***Shri Justice Sujoy Paul,*** *passed the following :*

O R D E R (Oral)

1. This is an application seeking clarification of the order dated 24.6.2016 passed by this court in W.P. No.321 of 2015.

2. Shri R.N. Singh, learned Senior Counsel for the applicant-Municipal Corporation, Jabalpur submits that the applicant is seeking clarification of said order only to a limited extent. The respondent no. 1 was directed to be regularized on the post of Junior Engineer. This could not be pointed out/noticed that the respondent no. 1 does not have minimum essential qualification to become a Junior Engineer. To this extent, the order passed in W.P. No. 321 of 2015 deserves to be modified.

3. It is noteworthy that learned Senior Counsel for the Corporation apprised this court that Writ Appeal No. 453/2016 and other connected matters filed by the Corporation were dismissed by a common reasoned order by the Division Bench on 9.8.2016. Aggrieved, the Corporation filed a SLP which was dismissed in *liminie* on 13.8.2019. The contention of learned counsel for the applicant is that in view of judgment of Supreme Court in **(2000) 6 SCC 359 (Konhayammed Vs. State of**

Kerala), since SLP was dismissed on the first hearing and was not converted into an appeal, the doctrine of merger order of this court cannot be presumed. Thus, the necessary clarification in the aforesaid order may be ordered.

4. Countering the aforesaid argument, Shri K.C. Ghildiyal, learned Senior Counsel for the private respondent submits that the order of this court in W.P. No. 321 of 2015 was unsuccessfully challenged by the present applicant before the writ appellate court and in view of detailed order of Division Bench, order of this court stood merged in the order of Division Bench. Thus, no clarification/review is permissible. Apart from that, there is considerable delay in seeking clarification. For this reason also, application may be dismissed.

5. No other point is pressed by learned counsel for the parties. I have heard the learned counsel for the parties at length and perused the record.

6. Although application is artistically worded as an 'application seeking clarification', for all practically purposes, in my view, the applicant is seeking review of order dated 24.6.2016 passed in W.P. No. 321 of 2015. Had it been captioned "review petition", at the threshold it would have been clear that the petitioner is required to satisfy the principles flowing from Order 47 Rule 1 of CPC. This court while exercising the review jurisdiction is obliged to examine the petition on the

touchstone of the broad principles flowing from Order 47 Rule 1 of CPC. The Apex Court in **(2006) 8 SCC 686 (Union of India and others Vs. B. Valluvan and others)** poignantly held that -

> **"16.** The Division Bench of the High Court committed a serious error in entering into the merit of the matter while exercising its review jurisdiction. The Court's jurisdiction to review its own judgment, as is well known, is limited. The High Court, indisputably, has a power of review, but it must be exercised within the framework of Section 114 read with Order 47 of the Code of Civil Procedure. The High Court did not arrive at a finding that there existed an error on the face of the record. In fact, the High Court, despite noticing the argument advanced on behalf of the Union of India that the 1st respondent had no legal right to be appointed, proceeded to opine that the panel prepared for filling up of future vacancies should be given effect to. The review of the High Court was not only contrary to the circular letter issued by the Union of India, but also contrary to the general principles of law."

7. Unless the above necessary ingredients are satisfied to entertain a review petition, this petition cannot be entertained merely because it is called as 'application seeking clarification'. This is trite that a litigant is not entitled to get something indirectly, which he cannot get directly :-

(See (1987) 1 SCC 378, (D.C. Wadhwa Dr. and others Vs. State of Bihar and others), (2018) 9 SCC 100, (Shailesh Manubhai Parmar Vs. Election Commission of India and others).

8. As per language employed in Order 47 Rule 1, it is clear that a review cannot be entertained against which an appeal is pending. Review is not entertainable when during the pendency of or prior to filing of review petition, the appellate court upheld the order and order under review stood merged in the order of appellate court.

9. In this regard, it is profitable to consider the judgment of Supreme Court reported in **AIR 1964 SC 1372 (M/s. Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh,** The relevant portion reads as under :-

> (8……
> … The crucial date for determining whether or not the 'terms of O. XLVII. R.1 (1) are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the court hearing the review petition would come to an end."
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> **(Emphasis Supplied)**

10. The Bombay High Court in **AIR 1971 Bom 45, (Mallikarjun Sadashiv Honrao Vs. Suratram Shivlal and others)** held as under :-

> "In my view, the basis of Order 47, Rule 1 of the CPC requiring that an appeal should not have been filed or that an appeal should not lie seems to be that, once an appeal is filed before the appellate Court and that appeal is dismissed the trial Court's

> decree must necessarily merge in the appellate Court's decree with the result that the trial Court's decree has no independent existence apart from the appellate Court's decree."
>
> **(Emphasis Supplied)**

11. The Delhi High Court in , **ILR (1995) II Delhi 649 (Hari Singh Vs. Smt. S. Seth)** held thus :-

> 6. Under Order 47 Rule 1 (a) CPC, an application for review of a judgment lies by any person aggrieved by a decree or order "from which an appeal is allowed but from which no appeal has been preferred". The propositions have been laid down by the Supreme Court in Thungabhadra Industries case, firstly that it before the making of an application for review, an appeal from the judgment sought to be reviewed has already been filed and is pending, then the Court has no jurisdiction to entertain the review application, secondly, where the application for review is first made and thereafter an appeal is preferred (as done in this case), the review application can be disposed of provided the appellate Court has not disposed of the appeal before the review application is taken up for disposal. The present case falls within the second principle and the learned trial Judge rightly refused to hear the review application.
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> **(Emphasis Supplied)**

12. The matter may be viewed from another angle. If the present applicant had an occasion to apprise the appellate court about the alleged deficiency in educational qualification of private respondent and failed to apprise the appellate court about it, by way of review, the applicant cannot be permitted to raise the said defence for the first time. If this

practice is permitted, there will be no end to a litigation. The parties will continue to re-agitate the issues under the garb of argument that it could not be raised in the earlier round.

13. Assuming that the said ground of lack of educational qualification was raised by the applicant before the writ appellate court and yet writ appellate court did not interfere on it, the said ground shall be deemed to have been rejected and by no stretch of imagination can be permitted to be raised by way of 'an application seeking clarification'.

14. Reference may be made to **(1986) 1 SCC 100**, **(Forward Construction Co. and others Vs. Prabhat Mandal (Regd.) Andheri and others)** wherein it was held as under:-

> **20**. So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to Section 11 CPC provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying

> Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force.
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> **(Emphasis Supplied)**

15. Furthermore, in **AIR 1988 Madras 248**, (**The State of Tamil Nadu, rep. by (the Collector of Madurai Vs. S. Alagirisubramanian Chettiar)** the court opined as under :-

> "In other words, the respondent had omitted to seek the relief of rendition of accounts against the appellant and such omission was not with the leave of court. In view of the omission of the respondent to sue for the relief of rendition of accounts, which was available to him even then, he cannot afterwards sue for the relief so omitted in view of O.2, R.2 (3), C.P.C."
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> **(Emphasis Supplied)**

16. In view of foregoing analysis, in my judgment, examining it from any angle, this application seeking clarification cannot be entertained. Thus, admission is declined. The MCC is dismissed.

(SUJOY PAUL)
JUDGE