State Of U.P. Thru Prin.Secy.Home ... vs Shailendra Kumar Maitreya And Another on 4 September, 2018

Bench: Anil Kumar, Rekha Dikshit

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

A.F.R.

RESERVED

Court No. - 7

Case :- SERVICE BENCH No. - 1016 of 2016

Petitioner :- State Of U.P. Thru Prin.Secy.Home (Prisons)Govt.Of Up & Ors.

Respondent :- Shailendra Kumar Maitreya And Another

Counsel for Petitioner :- C.S.C.

Counsel for Respondent :- C.S.C.,R.B.S.Rathore

Hon'ble Anil Kumar,J.

Hon'ble Mrs. Rekha Dikshit,J.

(As per Anil Kumar,J.) Heard Shri Pankaj Patel, learned Addl. Chief Standing Counsel appearing on behalf of the petitioners and Shri R. B. S. Rathore, learned counsel for the respondents.

By means of the present writ petition, the petitioners-State have challenged the impugned order dated 29.03.2012 passed by State Public Services Tribunal (hereinafter referred to as Tribunal), Lucknow in Claim Petition No.1049 of 2011 and order dated 03.12.2014 passed by State Public Services Tribunal, Lucknow in Review Petition No.120/2013.

Facts in brief of the present case are that claimant-respondent no.1 filed a Claim Petition No.1049 of 2011 against the punishment order dated 08.09.2009 passed by Principal Secretary, Home

(Prisons), U. P. Civil Secretariat, Lucknow by which three increments have been withheld with cumulative effect and a censure entry has been awarded to him.

In the claim petition, it has been pleaded by the claimant-respondent no.1 that stoppage of three increments with cumulative effect is a major penalty, whereas, the censure entry is a minor penalty and the impugned punishment order has been passed without application of mind, without giving proper opportunity of hearing and cross-examination of the witness mentioned in the charge-sheet.

In this regard, it has been pleaded by the claimant-respondent no.1 in the claim petition that he has asked for cross-examination of District Magistrate and Superintendent of Police, but no opportunity has been afforded to him. So, the impugned punishment order is in gross involation of the principle of natural justice.

In paragraph no.4.22 of the claim petition, it has been pleaded that punishing authority without application of mind and without considering the reply/representation of the claimant-respondent no.1 has passed impugned order dated 08.09.2009 in a most arbitrary, illegal and discriminatory manner.

Aggrieved by the punishment order dated 08.09.2009, claimant-respondent no.1 preferred representation/review before the Principal Secretary, Hom (Prisons), U. P. Civil Secretariat, Lucknow on 30.11.2009, not decided in spite of the representation/reminder dated 09.06.2011 as well as legal notice dated 14.06.2011. As no heed paid, so he has approached the State Public Services Tribunal, Lucknow for redressal of his grievances challenging the impugned order of punishment.

On behalf of the petitioner no.1-State/respondent no.1 in claim petition, it is specifically stated, in the counter affidavit, that punishment order has been passed against the claimant as per the provisions of Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as Rules, 1999).

In paragraph no.17 of the counter affidavit in reply to paragraph no.4.22 of claim petition, it is stated that representation/review is not under consideration before the punishing authority filed against the punishment order dated 08.09.2009.

In reply to the said paragraph of the counter affidavit, in para 18 of the rejoinder affidavit, it has been pleaded that the contents of para 17 of the written statement are false and incorrect and contents of paras 4.23 to 4.25 of the claim petition are reiterated to be true. It is further submitted that the action of the opposite parties in not deciding the review petition/representation of the claimant-respondent no.1 showed the arbitrariness on the part of the opposite parties.

By order dated 29.03.2012, claim petition has been allowed, set aside the punishment order dated 08.09.2009, further directed that the claimant/respondent no.1 will be eligible for all consequential benefits which were dined to him because of the impugned punishment order dated 08.09.2009.

Thereafter, State filed a Review Petition No.120 of 2013 before the Tribunal, dismissed by order dated 03.12.2014.

Shri Pankaj Patel, learned Additional Chief Standing Counsel while challenging the impugned order also argued that the impugned punishment order has been passed on 08.09.2009 and claim petition was filed in the month of June, 2011, so the same is barred by statutory period of limitation as provided under Section 5 (1) (b) of the U.P. Public Services (Tribunal) Act, 1976 (hereinafter referred to as Act, 1976) because in the counter affidavit, a plea has been taken that claim petition has been filed by the claimant/respondent no.1 at a belated stage.

Shri Pankaj Patel, learned Addl. Chief Standing Counsel further submits that the punishment has been awarded to the claimant/respondent no.1 as per the provisions of Rules, 1999 and there is no provision for representation/review against the same in the Rules, 1999. So in view of the said facts on the alleged plea which is taken up that in spite of the representation/reminder dated 09.06.2011 as well as legal notice dated 14.06.2011, so claimant-respondent no.1 filed a claim petition before the Tribunal is contrary to law as there is no provisions to file representation/review against the punishment order and before the Tribunal, it is specifically stated on behalf of the State that no representation/review filed/pending before the competent authority against the punishment order dated 08.09.2009.

However, without taking into consideration the said facts, claim petition has been allowed, which is otherwise liable to be dismissed, is barred by the statutory period of limitation. So, the impugned orders dated 29.03.2012 and 03.12.2014 respectively passed by the Tribunal are liable to be set aside.

Shri R. B. S. Rathore, learned counsel for the respondents, in rebuttal, submits that the plea of limitation as argued by learned counsel for the petitioners while assailing the impugned judgment has not been taken before this Court in the present case by way of pleadings. So, the said plea cannot be taken at the time of argument that claim petition filed by the claimant/respondent no.1 is barred by statutory period of limitation as provided under the Act, 1976.

In support of his argument, he has placed reliance on the following Judgments :-

> "(i) ChitturiSubbanna vs. KudapaSubbanna & Others, reported in AIR 1965 1325
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> (ii) Foreshore Co-operative Housing Society Limited vs. Praveen D. Desai thru. Lrs. and others, reported in AIR 2015 SC 2006
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> (iii) Phool Patti and another vs. Ram Singh thru Lrs. and another, reported in 2015 (3) SCC 164
>
> (iv) Radhey Shyam vs. U. P. State Public Services Tribunal in W. P. No.934 (SB) of 2011

(v) State of U. P. thru Secy. Dept. of Small Scale Industries vs. ShyamBahadur Singh and another in W.P. No.635 (SB) of 2014."

Hon'ble the Apex Court in the case of ChitturiSubbanna (Supra) has held as under :-

"In Ittyavira Mathai v. Varkey, AIR 1964 SC 907, this Court did not allow the question of limitation to be raised in this Court as it was considered to be not a pure question of law but a mixed question of law and fact. This Court said :

"Moreover, the Appellants could well have raised the question of limitation in the High Court in support of the decree which had been passed in their favour by the trial Court. Had they done so, the High Court would have looked into the records before it for satisfying itself whether the suit was within time or not. The point now raised before us is not one purely of law but a mixed question of fact and law. No specific ground has even been taken in the petition made by the appellant before the High Court for grant of a certificate on the ground that the suit was barred by time. In the circumstances, we decline leave to the appellant to raise the point of limitation before us."

Hon'ble the Apex Court in the case of Foreshore Co-operative Housing Society Limited (Supra) has held as under :-

"Para 48. In the case of ITW Signode India Ltd. v. CCE (2004) 3 SCC 48, a similar question came before a three Judges Bench of this Court under the Central Excise Act, 1944, when this Court opined as under:

69. The question of limitation involves a question of jurisdiction. The finding of fact on the question of jurisdiction would be a jurisdictional fact. Such a jurisdictional question is to be determined having regard to both fact and law involved therein. The Tribunal, in our opinion, committed a manifest error in not determining the said question, particularly, when in the absence of any finding of fact that such short-levy of excise duty related to any positive act on the part of the Appellant by way of fraud, collusion, wilful misstatement or suppression of facts, the extended period of limitation could not have been invoked and in that view of the matter no show-cause notice in terms of Rule 10 could have been issued.

Para 56. Mr. Nariman, learned senior Counsel appearing for the Appellant put heavy reliance on the decision in the case of Ramesh B. Desai v. Bipin Vadilal Mehta (2006) 5 SCC 638, for the proposition that a plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. In our considered opinion, in the aforesaid decision this Court was considering the provision of Order XIV Rule 2, Code of Civil Procedure. While interpreting the provision of Order XIV Rule 2, this Court was of the view that the issue on limitation, being a mixed question of law and fact is to be decided along with other issues as

contemplated Under Order XIV, Rule 2, Code of Civil Procedure. As discussed above, Section 9A of Maharashtra Amendment Act makes a complete departure from the procedure provided Under Order 14, Rule 2, Code of Civil Procedure. Section 9A mandates the Court to decide the jurisdiction of the Court before proceeding with the suit and granting interim relief by way of injunction."

Hon'ble the Apex Court in the case of Phool Patti and another (Supra) has held as under :-

> " It was contended that Phool Patti and Phool Devi, the daughters of Bhagwana had the necessary locus standi to challenge the gift made by Bhagwana to Ram Singh. While this may or may not be so (we are not commenting on the issue) the question of a challenge to the gift of 20 kanals of land does not arise on the facts of this case. There was no pleading to this effect, no issue was framed in this regard in the suit filed by Phool Patti and Phool Devi, nor was any evidence led to challenge the validity of the gift. It is too late in the day for them to question the validity of the gift in favour of Ram Singh for the first time in this Court without any foundation, factual or otherwise, having been laid for a decision on this issue."

And in the case of Radhey Shyam (Supra), this Court has held as under :-

> "Since the petitioner has preferred a claim petition within one year after service of notice and no decision was taken within one month, he was entitled to prefer claim petition on or before 05.08.2010. In the present case, the claim petition was filed by the petitioner on 29.12.2009, that was well within statutory period provided by Section 4 read with section 5 of the Act. The tribunal has been failed to exercise power vested in it. Since, the claim petition was filed within time, the tribunal should have decided the controversy on merit in stead of dismissing it as time barred.
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> In view of above, writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 30.08.2010 as well as order dated 22.12.2009 with all consequential benefits. A writ in the nature of mandamus is issued directing the U. P. Public Services Tribunal to restore the claim petition to its original number and decide the same on merit, expeditiously, say within a period of one year."

In the case of Shyam Bahadur Singh and another (Supra), this Court has held as under :-

> "In order to appreciate the time barred claim as argued by the counsel for the petitioners, we have to advert to the provisions of the Tribunal Act. Provisions of the Tribunal Act provide the limitation in respect of certain situations. Section 5 (1) (b) of the Tribunal Act provides that the provisions of the Limitation Act shall apply mutatis mutandis to reference under Section 4 of the Tribunal Act.
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> Contention of the counsel for the petitioners that the principles laid down in Section 3 of the Limitation Act will strictly apply and the limitation as provided for a suit will apply in respect of the claim under the Tribunal Act."

We have heard learned counsel for the parties and gone through the records.

Period of limitation for filing the claim petition is provided under Section 5 (1) (b) of the U. P. Public Services (Tribunal) Act, 1976, which reads as under :-

> "(1) (b). The provisions of the Limitation Act, 1963 (Act 36 of 1963) shall mutatis mutandis apply to reference under Section 4 as if a reference were a suit filed in civil court so, however, that--
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> (i) notwithstanding the period of limitation prescribed in the Schedule to the said. Act, the period of limitation for such reference shall be one year;
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> (ii) in computing the period of limitation, the period beginning with the date on which the public servant makes a representation or prefers an appeal, revision or any other petition (not being a memorial to the Governor) in accordance with the rules or orders regulating his conditions of service, and ending with the date on which such public servant has knowledge of the final order passed on such representation, appeal, revision or petition, as the case may be, shall be excluded."

A Division Bench of this Court in the case of Karan Kumar Yadav vs. U. P. State Public Services Tribunal and Ors., 2008 2 AWC 1987 All while interpreting the Section 5 (1) (b) of U. P. Public Services (Tribunal) Act, 1976 held as under :-

> "Para 12. Section 5(1)(b) aforesaid lays down the applicability of Limitation Act and confines it to the reference under Section 4 of the Act, 1976 as if a reference was a suit filed in the civil court. This leaves no doubt that a claim petition is just like a suit filed in the civil court and in the suit the period of limitation cannot be extended by applying the provisions of Section 5 of the Limitation Act. Sub-clause (i) of Section 5 of the Tribunal's Act, specifically provide limitation for filing the claim petition, i.e., one year and in Sub-clause (ii) the manner in which the period of limitation is to be computed has also been provided.
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> Para 13. Section 5 of the Limitation Act, reads as under:
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> Extension of prescribed period in certain case.--Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient case for not preferring the appeal or making the application within such period.
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> Explanation.--The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this Section.

> Para 14. Its applicability is limited only to application/appeals and revision. It hardly requires any argument that Section 5 does not apply to original suit, consequently it would not apply in the claim petition. Had the Legislature intended to provide any extended period of limitation in filing the claim petition, it would not have described the claim petition as a suit, filed in the civil court in Section 5(1)(b) and/or it would have made a provision in the Act giving power to the Tribunal, to condone delay, with respect to the claim petition also.
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> Para 15. In view of the aforesaid provision of the Act and the legal provision in respect to the applicability of Section 5 of the Act, it can safely be held that the application for condonation of delay in filing a claim petition would not be maintainable nor entertainable. The Tribunal will cease to have any jurisdiction to entertain any claim petition which is barred by limitation which limitation is to be computed in accordance with the provisions of the Tribunal's Act itself and the rules framed thereunder."

In the case of State of U. P. and others vs. Dr. Neeraj Kumari Mishra Deo and another, 2011 (29) LCD 668, a Division Bench of this Court has held as under :-

> "Our attention has been drawn to a judgment of this Court in the case of Karan Kumar Yadav vs. U. P. State Public Services Tribunal and others, reported in 2008 (2) AWC 1987 (LB). By that judgment the learned Bench of this Court has taken a view that the provisions of Section 5 of Limitation Act are not applicable to claim petition and consequently, there is no question of condoning the delay."

Thus, as per Act, 1976, the period of limitation for filing the claim petition before the Tribunal is of one year from the date of cause of action and after expiry of the said period, it has got no jurisdiction to entertain the claim petition.

In the instant matter, by order dated 08.09.2009, punishment has been awarded to the claimant-respondent no.1, thereafter, he made a representation/review before the Principal Secretary, Home (Prisons), U.P. Civil Secretariat, Lucknow on 30.11.2009, which has not been decided in spite of the representation/reminder dated 09.06.2011 and legal notice dated 14.06.2011.

From the material on record, the position which emerges out is that no proof was given by the claimant-respondent no.1 in this regard by way of any evidence before the Tribunal, only a bald statement has been made in the claim petition in spite of the averments made by the State/petitioner in the paragraph no.17 of the counter affidavit.

And in reply to the same, only it is stated by the petitioner in the rejoinder affidavit that the statement as made in the said paragraph are false and the claimant-respondent no.1has not given any proof in regard to filing of the review/representation.

So, the Tribunal should have considered the fact that no proof has been given by the claimant-respondent no.1 in regard to pendency of representation/reminder against the punishment order dated 08.09.2009. When the said facts have been denied by the petitioner/State and dealt the said issue on merit that whether it has got jurisdiction to entertain the claim petition which is barred by the period of limitation as the impugned order of punishment has been passed on 08.09.2009 thereafter as per the case of the claimant-respondent no.1, he had made representation/review/legal notice which are not maintainable as per the provisions of Rule, 1999 because under the said rule, there is no provision of review/representation against the punishment order and only remedy is available to the delinquent employee against the punishment order to file an appeal. But entertain the claim petition with the following findings :-

> "Petitioner has mentioned that opp. Party no.1 without application of mind and without considering the reply/representation of the petitioner and without providing the proper opportunity of cross-examination has passed impugned order dated 08.09.2009 in a most arbitrary, illegal and discriminatory manner. Being aggrieved with the punishment order dated 08.09.2009 petitioner preferred representation/review before the opp. Party no.1 on 30.11.2009, which is still pending."

Thus, the core question which is to be considered that the point of jurisdiction can be taken at any stage because it is a pure question of law. As the Word ''Jurisdiction' has been defined by Hon'ble the Apex Court in the case of Foreshore Co-operative Housing Society Limited (Supra) which is as under :-

> "Para 41. The term 'jurisdiction' is a term of art; it is an expression used in a variety of senses and draws colour from its context. Therefore, to confine the term 'jurisdiction' to its conventional and narrow meaning would be contrary to the well settled interpretation of the term. The expression 'jurisdiction', as stated in Halsbury's Laws of England, Volume 10, paragraph 314, is as follows:
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> 314. Meaning of 'jurisdiction': By 'jurisdiction' is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by similar means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the claims and matters of which the particular court has cognisance, or as to the area over which the jurisdiction extends, or it may partake of both these characteristics.

Para 42. In American Jurisprudence, Volume 32A, paragraph 581, it is said that Jurisdiction is the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any case; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.

Further, in paragraph 588, it is said that lack of jurisdiction cannot be waived, consented to, or overcome by agreement of the parties.

Para 43. It is well settled that essentially the jurisdiction is an authority to decide a given case one way or the other. Further, even though no party has raised objection with regard to jurisdiction of the court, the court has power to determine its own jurisdiction. In other words, in a case where the Court has no jurisdiction; it cannot confer upon it by consent or waiver of the parties."

In the present case, as per the provisions of Act, 1976, legislature has provided under Section 5 (1) (b) of the Act that the period of limitation is of one year and there is no power for condoning the delay in filing the claim petition beyond the period of one year from the date of cause of action that is to say it has got no jurisdiction to entertain the claim petition. So, the said plea can be taken/argued by the petitioner in the present writ petition under Article 226 of the Constitution of India.

Further, in the case of Phool Patti and another (Supra), no pleading has been made, no issue has been raised and no evidence has been led in a suit out of which an appeal has been filed and the question of limitation is mixed question of law and fact, so the Hon'ble Apex Court held that the same cannot be taken at an appellate stage, however, in the instant case, the period of limitation to entertain the claim petition as provided under Section 5 (1) (b) of the Act, 1976 is pure question of law and if not pleaded in the writ petition, the same can be agitated before this Court. So, the claimant-respondent no.1 cannot derive any benefit from the said judgment which is not applicable to the facts of the present case.

So far as the case of Radhey Shyam (Supra) is concerned, the same has been decided by a Division Bench of this Court without taking into consideration the law laid down on the point in issue by two previous Benches of this Court in the case of Dr. Neeraj Kumari Mishra Deo and another (Supra) and Karan Kumar Yadav (Supra), as such, the judgment passed by this Court of Radhey Shyam (Supra) is not binding in the present case as per legal maxim "Per incuriam" which has been interpreted by Hon'ble the Apex Court in the case of K. S. Panduranga vs. State of Karnataka, reported in 2013(1)A C R994 as under :-

> "Para : 30. Presently, we shall proceed to deal with the concept of per incuriam. In A.R. Antulay v. R.S. Nayak (1988) 2 SCC 602, Sabyasachi Mukharji, J. (as His Lordship then was), while dealing with the said concept, had observed thus:
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> 42. ... 'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong.

Para : 31. Again, in the said decision, at a later stage, the Court observed:

> 47.... It is a settled rule that if a decision has been given per incuriam the court can ignore it.

Para : 32. In Punjab Land Development and Reclamation Corporation Ltd. v. Labour Court (1990) 3 SCC 682, another Constitution Bench, while dealing with the issue of per incuriam, opined as under:

> 40. The Latin expression 'per incuriam' means through inadvertence. A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of this Court.

Para : 33. In State of U.P. v. Synthetics and Chemicals Ltd. (1991) 4 SCC 139, a two-Judge Bench adverted in detail to the aspect of per incuriam and proceeded to highlight as follows:

> 40. 'Incuriam' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young v. Bristol Aeroplane Co. Ltd. (1944) 2 All ER 293 (CA)) Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law.

Para : 34. In Siddharam Satlingappa Mhetre v. State of Maharashtra (2011) 1 SCC 694, while addressing the issue of per incuriam, a two-Judge Bench, after referring to the dictum in Bristol Aeroplane Company Ltd. (supra) and certain passages from Halsbury's Laws of England and Raghubir Singh (supra), has stated thus:

> 138. The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a coequal strength is also binding on a Bench of Judges of co-equal strength. In the instant case, judgments mentioned in paras 124 and 125 are by two or three Judges of this Court. These judgments have clearly ignored the Constitution Bench judgment of this Court in Sibbia case (1980) 2 SCC 565 which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 of the Code of Criminal Procedure. Consequently, the judgments mentioned in paras 124 and 125 of this judgment are per incuriam.

Para : 35. In Government of A.P. and Anr. v. B. Satyanarayana Rao (dead) by L.Rs. and Ors. (2000) 4 SCC 262 this Court has observed that the rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

So far as the judgment passed by a Division Bench of this Court in the case of Shyam Bahadur Singh and another (Supra) is concerned, the point of limitation has not been dealt on the reference of

Karan Kumar Yadav (Supra) but it has not been dealt that under what circumstances, it disagree with the judgment given by another Division Bench. Once in the case of Karan Kumar Yadav (Supra), it has been held that the point of limitation for filing the claim petition as per provisions of 5 (1) (b) of Act, 1976 is of one year from the date of cause of action, so as per the position of law, the judgment in which a particular point is considered and discussed is binding on a subsequent Co-ordinate Bench. As such, the claimant-respondent no.1 cannot derive any benefit in his favour from the said judgment.

In the present case, the cause of action occurred to the claimant-respondent no.1 is on 08.09.2009 by which punishment order has been passed against him and as per his own version, he has filed review/representation against the punishment order and thereafter filed representation/reminder as well as legal notice, which are not maintainable under the Rules, 1999 as stated herein above.

Once the Tribunal has got no jurisdiction to entertain the claim petition filed against the punishment order dated 08.09.2009 at a belated stage in the month of June, 2011, so the finding given by the Tribunal in order to entertain the claim petition after expiry of the period of limitation are contrary to law in view of the observations made herein above, hence, the orders passed by the Tribunal are liable to be set aside.

In the result, writ petition is allowed and the impugned orders dated 29.03.2012 as well as 03.12.2014 passed by the State Public Services Tribunal are set aside, the punishment order dated 08.09.2009 passed by Principal Secretary, Home (Prisons), U. P. Civil Secretariat, Lucknow is restored.

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(Rekha Dikshit,J.) (Anil Kumar,J.) Order Date :- 04.09.2018 Mahesh