

(1965) 03 CAL CK 0003
In the Calcutta High Court
Case No : Civil Rule No. 1381 (W) of 1964

Aswini Kumar Rath and Others

APPELLANT

Vs

P.C. Mukherjee and Others

RESPONDENT

Date of Decision : 29-03-1965

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 309
Government of India Act, 1935 — Section 247

Citation : AIR 1965 Cal 484 : (1965) CriLJ 471 : (1969) 1 LLJ 816

Hon'ble Judges : D. Basu, J

Bench : Single Bench

Advocate : S.S. Roy and Kalipada Chakrabarty, for the Appellant; Bankim Dutta, Addl. Govt. Pleader and Manjusri Dutta, for the Respondent

Judgement

D. Basu, J.—This proceeding in contempt arises out of an alleged breach of the Rule absolute made in C. R. 253(W) of 1962 (hereinafter referred to as "the original case")

2. In that case, the Petitioners came with the complaint that their fundamental rights under Articles 14 and 16 had been violated by certain orders issued by the State. The Petitioners are ordinary Graduates. They were appointed Sub Inspectors of Schools, in the year 1954 or thereabout together with others who are Honours Graduates and Post-Graduates, on the same pay scale of Rs. 100-225, on the basis of an advertisement which laid down the minimum qualification as a Bachelor's degree, with a diploma in teaching—without making any distinction between Graduates inter se. The Petitioners' complaint was that some five years after such appointment, the State made a discrimination by the impugned order of 1959 in Ann. B, by which the pay-scale of the Honours Graduates and Post-Graduates was raised to Rs. 130-350/-, thus making a discrimination against the Petitioners who are ordinary Graduates, without any reasonable basis for classification, the benefit of this higher pay-scale having been retrospectively extended to those Honours Graduates and Post-Graduates

who had been appointed along with the Petitioners in 1954, on the same basis. Subsequently, in pursuance of the recommendations of the Pay Commission the pay-scales of all Sub-Inspectors of Schools were revised by an order of 1962, but the discrimination made against the Petitioners was not removed, for, while the scale of Sub-Inspectors who were ordinary Graduates was raised to Rs. 175-325/-, that of Honours Graduates and Post-Graduates was raised to Rs. 225-475/-. The Petitioners, on the foregoing facts, challenged the validity of the impugned order in Aun.B, as modified by the subsequent order of 1962 as discriminatory, and prayed for a writ of mandamus, so that their pay-scale might be raised to the same level as that of the Graduates of the higher order. The writ of Mandamus prayed for in Para XIV of the Petition was as follows:

"In these circumstances, your petitioners pray your Lordships (a) for a Writ in the nature of Mandamus or any other appropriate writ or writs or order directing the opposite parties to rescind and quash the order of fixing a different and lower scale of pay for the petitioners and all the B.A. or B.Sc. Sub-Inspectors of Schools and directing them to fix the same scale of pay viz. Rs. 130 to Rs. 350/- exclusive of clearness allowance with effect from 1st April 1959 and the revised scale of pay viz. Rs. 225 to Rs. 475/- including clearness allowance with effect from 1st April, 1961."

The Rule nisi was issued on the following terms:

"17-1-62.

Upon reading a petition of Aswini Kumar Rath and others and affidavit of verification thereof dated 17-4-1962 and the exhibits or annexure to the said petition and upon hearing Mr. S. Roy Advocate for the said petitioners.

It is ordered that a Rule do issue calling upon the opposite parties to show cause why a writ in the nature of Mandamus should not be issued directing the opposite parties to rescind the order fixing a different and lower scale of pay for the petitioner and all B.A. B.Sc. Sub-Inspectors of Schools and directing them to fix the same scale of pay as mentioned in the petition."

3. In my judgment, I held that the impugned order violated both Articles 14 and 16 of the Constitution inasmuch as though the ordinary Graduates and the Graduates having Honours or a Master's degree were appointed as a single unit on the announcement that they would get the same scale of pay, the impugned order sought to make a subsequent discrimination by offering higher pay to the Honours Graduates and Post-Graduates without any reasonable basis for such favourable treatment. But the relief granted was not exactly in the same form as the Petitioners prayed for in their Petition. The order sought for was that the Petitioners' pay-scale should be raised to the higher level at which it had been fixed for the Honours Graduates and Post-Graduates. The order issued by me, in substance, was that the discrimination or differential treatment between the two groups of Sub-Inspectors as made by the impugned order must be removed, but no direction was given as to the particular made in which it was to be done. The

Rule was made absolute by the ordering portion of the judgment in the following terms:

""In the result, this application must succeed. The proper order should be an order in the nature of mandamus directing the Opposite Parties not to enforce the impugned order in Ann. B, read with the order of 1962, ;is specified in para. 10 of the Petition in such manner as to subject the Petitioners to a lower scale of pay than other sub-Inspectors of Schools who have been recruited on the basis of the announcement in Ann. A but who happen to be Honours Graduates or M.As. or M.Sc.s. In view of the nature of the litigation, there will be no order as to costs. Rule is made absolute accordingly."

4. The final order which was drawn up on the 7th October, 1964, by the Registrar, under Rule 37 of the Rules framed by this Court, under Article 226 of the Constitution, and which bears the initial of the learned Government Pleader on behalf of the Opposite Parties was in these words

"Upon reading on the part of Aswini Kumar Rath and 44 others their petition, affirmed by an affidavit of Hrishikesh Das Adhikari and upon reading an affidavit of Sudhir Kumar Dhar dated 16-8-62 and Mandira Krishna Maiti dated 12--9-62 being the return made to the Rule nisi issued herein, dated 17-4-62 and upon hearing Mr. S. Roy, Mr. Kalipada Chakravarty and Mr. S.B. Bhuniya appearing on behalf of the petitioners and Mr. Nirmal Ch. Chakrabarty and Mr. N.C. Das Gupta appearing on behalf of the Respondents, it is ordered that the said order nisi is hereby made absolute, and it is further ordered that a writ in the nature of Mandamus is issued upon the respondents commanding them not to enforce the impugned order as referred to in Annexure "B" read with the order of 1962, as specified in para 10 of the petition (copy of which was served upon the respondents) in such manner as to subject the Petitioners to a lower scale of pay than other Sub-Inspectors of schools who have been recruited on the basis of the announcement in annexure "A" but who happen to be honours Graduates or M.As. or M.Sc.s ""

5. Subsequent to the service of the foregoing final order, Respondent No. 3, the State Government, issued the following order on October 29. 1964-

"No. 3376-Edn(D).

Calcutta, the 29th Octr,. 1964. From Shri H.B. Ghosh,

Deputy Secretary to the Government of West Bengal

To

The Director of Public Instruction, West Bengal.

The undersigned is directed by order of the Governor to say that in pursuance of the orders of the High Court in Civil Rule No. 253/W of 1962, the Governor is pleased to direct that the scale of Rs. 130--5--150--10--350/- as introduced by Govt. Order No. 7754-Edn dated the 20th/21st July, 1969 for Sub-Inspector of

Schools possessing an Hons. Degree or a Second Class Master's Degree should be treated as withdrawn. All Sub-Inspectors of Schools shall, until further orders, draw pay in the scale of Rs. 175--7--245--8--325""

Pending fixation of pay of the appropriate stage of the time scale each officer may be allowed provisionally to draw his present pay subject to adjustment in due course."

Sd/ H.B. Ghosh, Deputy Secretary.

6. The instant application for proceeding in contempt against the State Government and its officers, the Secretary in the Education Department and the Director of Public Instruction,--has thereupon been brought by the Petitioners on December 10, 1964. The Petitioners' case is that since the Petitioners' prayer in the original case was that their pay-scale should be raised to Rs. 225/- to Rs. 475/- and the Rule nisi issued according to that prayer was made absolute, there has been a wilful violation of the Rule absolute and the final order served on the Opposite Parties by the order no. 3376 of 29-10-G4, inasmuch as the Petitioners have been denied the pay-scale which was ordered by the Court to be fixed for the Petitioners. It is also urged that though by this order of 29-10-64, the Honours Graduates and Post-Graduates are purported to be brought to the same level as that of the Petitioners, the second part of the order continues the discrimination by allowing them to draw their pay according to the discriminatory higher scale indefinitely.

6A. The plea taken in the counter-affidavits is that (a) the order no. 3376 does not violate but gives effect to the judgment and order in the original case and removes the discrimination complained of by the Petitioners, by bringing all Sub Inspectors of Schools to the same level; but that (b) since the adjustment of the Honours Graduates and Post-Graduates in the lower scale specified in order no, 3376 could not be made all at once, the order had to be made provisional, subject to adjustment to be made hereafter.

7. In order to punish a person for contempt of court, it must be established not merely that the order of the Court has been violated but also that such violation has been wilful: vide B.K. Kar Vs. The Chief Justice and His Companion Judges of The High Court of Orissa and Another, ; S.S. Roy Vs. State of Orissa and Others, . Mr. Roy, learned counsel for the Petitioners does not contest this proposition of law but urges that both conditions mentioned have been established in the instant case.

8. I. On the question of violation of the Court's order, Mr. Roy firstly, contends that it is the final order issued by the Court under Rule 37 of the Rules of this Court under Article 226, which is the only material relevant in determining whether the Respondents have committed contempt and that the respondents cannot contend that they have not committed contempt inasmuch as they have complied with the judgment of the Court, the order being at variance with the judgment.

9. It has been argued by Mr. Dutt on behalf of the Respondents that the final order cannot, in any case, be so read as to be at variance with the judgment of the Court and that since the Court did not give any specific direction as to how the discrimination alleged between the two groups of sub-Inspectors was to be removed, there has been no violation of the judgment if the Respondents have removed the discrimination by lowering the Honours Graduates and Post-Graduates to the same level. Mr. Roy relies strongly upon Rule 37 to say that when a Rule is made absolute, a final order is drawn up and that order or writ as so drawn up is then served and that if the terms of that writ are violated, it is not open to the Respondents to fall back upon any contents of the judgment, in the proceeding for contempt. The words "the said order nisi be made absolute, and it is further ordered" in the final order as drawn up in the presence of the learned Government Pleader may well suggest, as contended by Mr. Roy, that the final order was issued in terms of the Rule nisi thereby making absolute the Petitioners' prayer for being raised to the higher level. Strictly speaking, in order to be in conformity with the judgment, instead of the words "and it is further ordered", the words "in the following terms" or words of that nature should have been used, in order to make it clear that the Court was making the Rule absolute only in the modified form as expressed in the concluding portion of the judgment and not exactly as the Petitioners prayed for in their Petition. But then the question arises, whether it is open to the Respondents to contend that the final order or writ issued was not in conformity with the judgment, in the instant proceeding.

10. Mr. Roy argues that just as the executing Court cannot go behind the decree passed in a suit, and the judgment-debtor also cannot refuse to execute the decree on the ground that it is at variance with the judgment, so also a party against whom a writ of mandamus or any other writ under Article 226 of the Constitution is issued cannot contend, in a proceeding for contempt, that he did not obey the writ because it was at variance with the judgment. According to Mr. Roy, in such a case, the respondents should have approached this Court for amendment of the writ so as to bring it in conformity with the judgment. Mr. Roy, however, conceded that the decisions relied upon by him on this point related to civil execution and not to proceedings in contempt for violation of a writ.

11. In my judgment, the analogy of execution proceeding would not extend to a proceeding for contempt. Contempt of court for disobedience of an order of Court, except where it relates solely to a private injury, is an offence of a criminal nature, and a proceeding relating to the breach of a prerogative writ is no exception to this proposition *R. v. Ledgard* (1341) 1 Q.B. 616 (619), because it interferes with the liberty of a person: *R. v. Poplar Borough Council* 1922-1 KB 95 (127) hence the proceeding all through takes the shape of a person charged with an offence of which he has to exculpate himself (1841) 1 Q.B. 616(1bid), and the guilt of the respondent has to be strictly established both substantively and procedurally vide *Oswald on Contempt*, p. 17; *Gordon v. Gordon*. (1946) 1 All E.R. 247 (253) C.A.)

12. Mr. Roy is, no doubt, right in his contention that nobody can be permitted to take upon himself whether or not to obey a writ, according to his own view of it. But, so stated, the proposition does not exhaust the whole law relating to contempt for an alleged breach of a writ. The propositions which emerge from the relevant decisions may be stated as follows:

(a) In the proceeding for contempt, the respondent may impeach not only the form of the writ but also the grounds upon which the writ had been issued: *R. v. Marshland Smeeth and Fen District Commrs.*, (1920) 1 K.B. 155 (164). In other words, the validity of the writ itself may be challenged in the contempt proceeding (1841) 1 Q.B. 616 (622) .

(b) But once the writ is found to be valid, no cause for non compliance will be heard ((1841) Q.B. 616 (ibid) including even beneficent or conscientious motives (1922) 1 KB 95 (104)). It is then that the principle relied upon by Mr. Roy will come into operation, namely, that a litigant should not be permitted to say that he feels strongly that the order is a wrong order and, therefore he will not obey it, and, in that event, no device to evade the order will be tolerated, vide *Avery v. Andrews*. (1882) 51 LJ Ch 414.

13. The observations in the first proposition in the case of the *Marshland Commrs.* (1920) 1 K.B. 155(164) which do not appear to have been departed from so far, are instructive:

"It was submitted by the defendants that they are entitled to argue that the writ of mandamus should not have been issued by the Divisional Court. Upon the whole I think that this submission is sound in law.. .. But it seems reasonably clear from *Clarke v. Leicestershire and Northampton shire Canal Co.* (1845) 6 Q.B. 898 (903) that the defendants in such proceedings as the present may impeach not merely the form of the writ of mandamus but also the grounds upon which it was issued It is worthy of note that the Court will apparently allow the validity of even a peremptory writ to be challenged upon an application to attach If then the defendants are entitled to inquire into the validity of the grant of the writ of mandamus by the Divisional Court,I am called upon to consider the point raised by Mr. Rawlinson namely, that upon a proper construction of the Acts of 1796, 1849, and 1863, no writ of mandamus could be properly granted."

14. It is to be noted that in the above case, the Court actually went into the merits as to whether the Rules should have been made absolute and the writ issued, that is, into the question whether the relevant statutes for the breach of which mandamus had been prayed for were mandatory or merely directory. It was, of course, an action for false return to the writ but *McCarthy J.*, (quoting *Shoritt on Information*, p. 423) observed that the same principle will apply even "upon an application to attach"" for breach of a peremptory writ of mandamus (p. 164, *ibid*).

15. Directly relating to a proceeding for attachment for breach of a peremptory

writ of mandamus was the earlier case of *R. v. Ledgard* otherwise cited as *R. v. Poole*, (1841) 1 QB 616, referred to at pp. 423-4 of *Shorlt on Information*. In this case, the defendant Corporation was directed by the writ not only to make payment of a particular sum as compensation for dismissal of the Petitioner, an employee, but further directed that that payment must be made out of the existing borough rate fund or a new rate must be levied for the purpose. In the proceeding for attachment for failure to make the payment it was contended that the Court, in issuing mandamus, could not specify "the means by which payment is to be obtained, leaving no option of resorting to any other." This contention was upheld and the Rule discharged. Holding that any objection as to the validity of the writ itself could be raised even at this stage, Lord Denman C. J. observed-

"No other question can now be raised, than whether the mandamus itself is good in law. The disobedience is fully proved and not denied. But any objection to its validity may still be taken. If they had been pointed out before and held fatal, we should have been bound to abstain from enforcing it, and cannot now issue an attachment if the writ itself be vicious."

16. However strange it may seem that in the contempt proceeding it is open to the alleged contemner to question the judgment itself, there is consensus of opinion at least on the minor point that it is competent for the person, against whom a writ has been issued to raise the objection, at any point of time, that the writ is not in conformity with the judgment or is in excess thereof. *R. v. Poole Corporation* (1898) 10 L.J.Q.B. 198; *R. v. Mayor of Eaton*, 2 Sm. Rep. 54. To the same effect is the observation in *Tapping on Mandamus* (1848), at p. 423,

"Any substantial objection to the validity of the writ may be taken, on showing cause against the rule for an attachment; for such an objection, if it had been previously brought to the knowledge of the Court, must have prevailed, so, the Court is bound to abstain from enforcing performance of such a writ; therefore, an attachment cannot issue if the writ be vicious, as for instance if it be misconceived in its most important clause, the mandatory part."

17. Mr. Roy, however, contends that, in the instant case, in particular, the Respondents cannot be allowed to take the plea that the Writ was at variance with the judgment inasmuch as the learned Government Pleader subscribed to the Writ as drawn up in the office and that, at least, such plea cannot be taken as a bona fide one, inasmuch as the learned Government Pleader must have communicated to the Respondents that they were to obey the Writ in the terms it was drawn up. But, whatever might be the effects of the notice of a party's lawyer in civil proceedings, the contention of Mr. Roy cannot prevail in view of the propositions already arrived at, namely, that-

(a) The instant proceeding is of the nature of a criminal proceeding;

(b) The Petitioners in this proceeding are entitled to show that the Writ is at variance with the judgment and cannot be punished for contempt if they have complied with the judgment.

In such a case, nothing of the nature of estoppel can be availed of in order to punish the Respondents.

18. Mr. Roy next urged that no Court can either make a new case for a party or base its decision on grounds outside the pleadings *Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar*, . He could not, however, question the power of the Court, in a writ proceeding, to make the Rule absolute in a modified form. As stated by Tapping --*Mandamus*, p. 305,

"The Court, on making the rule absolute will, for the purposes of justice, mould the rule nisi according to the exigencies of each particular case, and to that end frame the rule absolute accordingly."

19. I shall now explain why in making the Rule absolute, I could not make a direct command upon the respondents to raise the pay scale of the petitioners to the higher level and had issued a mere direction that the discrimination complained of should be removed.

20. Though a Government servant is entitled to recover arrears of salary for a period of service already rendered at his usual rate of pay which existed during that period, he has no legal right to have his pay fixed at a particular rate, either by way of raising the scale of pay already sanctioned for him or by way of preventing a reduction, unless he has a statutory right to the same,--as was guaranteed to members of the Indian Civil Service by the Proviso to Section 247(1) of the Government of India Act, 1935 (vide *The Accountant General, Bihar and Another Vs. N. Bakshi*, or in respect of some offices by provisions of our Constitution, such as Articles 59(3)-(4);125(1). In the instant case, the impugned order of 1959 which fixed the pay of the sub-Inspectors of Schools of the two groups differently was an administrative order, and the petitioners could not legally claim that their pay should be fixed at the higher rate that had been sanctioned for the other group of sub-Inspectors. They could successfully approach the Court in the matter of the pay-scale only because constitutional provisions had been violated by the respondents in fixing a higher scale for the sub-Inspectors of the oilier group in the circumstances of the case and the only relief that the Court could give them in a proceeding for mandamus was that the impugned orders should not be so applied as to infringe the fundamental rights of the petitioners under Articles 14 and 16(1). The Court was concerned with the removal of the discrimination and, whether the respondents removed it by raising the Petitioners or by lowering [he sub-Inspectors of the other group who had been elevated by the impugned administrative order issued by the respondents was, accordingly, left to the respondents.

21. On the previous date fixed for pronouncement of judgment in the instant proceeding (March 16, 1965), Mr. Roy produced the West Bengal Services (Revision of Pay and Allowances) Rules, 1961 and drew my attention to the fact that these Rules by which the pay-scale of the sub-Inspector of Schools was revised in conformity with the recommendations of the Pay Commission, were

made under Article 309 of the Constitution. From this, Mr. Roy argued that since this revised order of 1962 had a statutory force, once the lower scale fixed for the petitioners was annulled by the Court as discriminatory, there arose in favour of the petitioners a statutory right to have for themselves the only other scale left in the revised order, namely, the scale fixed for the Honours Graduates or post-Graduates, so that the Court had no other alternative than to direct the respondents to fix the higher pay-scale for the petitioners. But, the instant proceeding not being one for review, I am not called upon to say what shape my judgment would have taken if this additional material had been brought to my attention at the hearing of the main case. The sole point for determination now is whether the respondents are guilty of contempt for violating the writ, read with the judgment as it stands.

22. It was next urged by Mr. Roy that since no Court can affect the rights of parties not on the record, it cannot be imagined that this Court, in making the Rule absolute, intended that the pay-scale of the Honours and Post-Graduate sub-Inspectors, who were not before the Court should be reduced. But the question for my determination in the instant proceeding is not whether it would have been a wrong decision if such a direction had been made, but whether it was possible for the respondents to entertain the bona fide belief that, according to the judgment of this Court, it was open to them to remove the discrimination complained of by reducing the absent sub-Inspectors to the level of the petitioners. Whether they would launch themselves into further difficulty, in doing so, is their lookout. What I am concerned in the instant case is whether, in doing so, respondents have violated the command of this Court.

My answer to that question is in the negative.

23. II. As to the wilfulness of the conduct of the respondents, even assuming that there has been a technical breach of the writ of final order as issued by this Court, it cannot be held, in view of the contents of the judgment, that the respondents have flouted the order of the Court deliberately and contumaciously, by reason of their reading the judgment together with the writ. In fact, in some High Courts, it is the judgment which is first served on the party concerned and then the writ (vide *N. Baksi Vs. O.K. Ghosh*, .

24. It was disclosed at the instant hearing that the respondents have preferred an appeal against my judgment in the original case and, from this it was urged by Mr. Roy that this showed that the respondents were bent upon defeating the judgment, in any manner possible. It appears, however, that this appeal has been filed subsequent to the institution of this proceeding in contempt, and no inference of mala fides can be drawn from this ex post facto conduct of the respondents.

25. There is, however, another aspect of this case to which I must refer before I close. The second paragraph of the respondent's order No. 3376 showed that the adjustment of the pay of the sub-Inspectors of the other group had not been

immediately made but was proposed to be made in future, about which no time-limit had been specified in the order itself. So long as such adjustment was not made, the discrimination between the petitioners and the sub-Inspectors of the other group was patently to continue, even though the pay-scale of the other group was reduced. If this position were to continue indefinitely, it could not be held that the respondents intended, bona fide, to remove the discrimination, as ordered by the Court, in the manner proposed by the respondents themselves. My primary anxiety, therefore, in issuing the Rule in the instant proceeding, was to ascertain whether the second paragraph was a bona fide incident of the scheme of reduction which could not be done all at once in view of the number of officers concerned, or a mere cloak to avoid compliance with the command of the Court. I am now satisfied that the respondents have a bona fide intention to implement the order No. 3376 within a reasonable time. Learned Additional Government Pleader has, at this hearing, produced before me, a draft of a Government order, proposed to be issued presently, which contains a direction that those sub-Inspectors who were allowed the higher scale of pay. shall draw their pay according to the reduced pay-scale ordered by memo. No. 3376, with effect from the 1st of June, 1965 and that adjustment of the amounts in excess, if any, drawn by such officers individually will follow.

26. The learned Addl. Government Pleader assured me that this draft order would be issued within two weeks from the pronouncement of the order of the Court in the instant proceeding. There is no reason why I should not act on this undertaking. Any apprehension as to the respondents' bona fide being thus removed, this Rule must be and is accordingly, discharged. Parties must bear their own costs.