
(2013) 07 CAL CK 0099
In the Calcutta High Court
Case No : Writ Petition No. 20101 (W) of 2013

Barun Kumar Sasmal	Vs	APPELLANT
The State of West Bengal and Others		RESPONDENT

Date of Decision : 30-07-2013

Acts Referred:

Citation : (2013) 4 CALLT 187 : (2014) 1 CHN 712

Hon'ble Judges : Debasish Kar Gupta, J

Bench : Single Bench

Advocate : Ekramul Bari and Mrs. Tanuja Basak, for the Appellant; Chanchal Kumar Mitra for the State, for the Respondent

Final Decision : Allowed

Judgement

Debasish Kar Gupta, J.—Let affidavit of service filed by the petitioner be kept on record. This writ application is filed by the petitioner assailing an order passed by the respondent No. 3 under his Memo No. 275/4(5)/LS dated July 21, 2006.

2. This matter has a chequered history. The appointment of the petitioner in the post of Assistant Teacher of Hemnagar Hem Chandra Smriti Vidyamandir (High School), District Howrah, was approved by the respondent No. 3 with effect from October 3, 1997 recording his academic qualification as B.Sc. (Hons. in Zoology), B.Ed. Though at that point of time the petitioner was in possession of M.Sc. Degree in Zoology but the same was not taken into consideration by the authority because the concerned employment exchange forwarded the name of the petitioner with academic qualification of B.Sc. (Hons. in Zoology), B.Ed. After introduction of Revision of Pay and Allowances, 1998 the petitioner prayed for extending the benefit of postgraduate scale of pay in his favour in terms of the provision of sub-paragraph (3) of Paragraph 12 of Revision of Pay and Allowances.

3. Due to the inaction on the part of the respondent No. 3 the petitioner filed an application under Article 226 of the Constitution of India in the matter of Barun Kumar Sasmal v. The State of West Bengal & Ors. (In Re. W.P. No. 4504 (W) of

2006) and the above writ application was disposed of on April 28, 2006 with a direction upon the respondent No. 3 to take a decision in the above matter. In compliance of the above order, the respondent No. 3 rejected the claim of the petitioner by passing the impugned order on the ground that the above benefit was not payable to the petitioner in terms of WB/CPS/K 89 (Part I) 2005 and CO. No. 1959-SE(S) dated December 26, 2005.

4. Thereafter, the petitioner filed another writ application under Article 226 of the Constitution of India bearing W.P. No. 2382 (W) of 2013. But subsequently, it was dismissed for non prosecution. According to the petitioner, the above writ application was withdrawn on the basis of an assurance given by the respondent authority to extend the above benefit in favour of the petitioner.

5. Thereafter, the authority of the school forwarded the claim of the petitioner to the respondent No. 3 for consideration afresh. Instead of considering afresh, the respondent No. 3 issued a notice to the Headmaster of the school in question asking him to show cause to submit the claim of the petitioner even after rejection of that claim on a previous occasion.

6. At the very outset, a preliminary objection is raised on behalf of the State respondents that an application under Article 226 of the Constitution of India filed by the petitioner on the selfsame cause of action was dismissed as withdrawn. Therefore, this writ application is not maintainable. According to the petitioner, the above writ application was not disposed of on its merit and the instant writ application is maintainable.

7. Reliance is placed on the decision of State of U.P. and Another Vs. Jagdish Saran Agrawal and Others,

8. Having heard the learned Counsel appearing for the respective parties as also after considering the above preliminary objection, I find that the above issue has already been settled in the decision of Jagdish Sharan Agarwal (supra) and the relevant portions of the above decision are set out below:

14. In the present case, the suit filed by Nagar Palika was dismissed on technical ground and in any case that State was not a party. So far the suit where the State was a party and amendments were made, the same was dismissed for non prosecution. But the same was not dismissed under Order 9 Rule 8. Order 9 Rule 8 and Order 9 Rule 9 CPC read with as follows:

8. Procedure where defendant only appears. - Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

9. Decree against plaintiff by default bars fresh suit. - (1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a

fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thins fit, and shall appoint a day for proceeding with suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

There, Order 9 Rule 9 cannot be said to be applicable. The dismissal of the suit for non prosecution was not a decision on merit. Consequently, the said order cannot operate as res judicata.

15. Above being the position the High Court's order is clearly unsustainable and is set aside. The matter is remitted to the District Judge, Lalitpur to decide the proceeding on merit. Appeals are allowed but without any order as to costs.

9. In view of the above settled proposition of law, the preliminary objection raised on behalf of the State respondents is rejected.

10. It is necessary to point out here that it is not a case of dismiss for default but a case of dismiss for non prosecution. Therefore Order IX Rules 8 and 9 have no manner of application in this case.

11. So far as the impugned order is concerned, I find that after considering the claim of the petitioner in terms of WB/CPS/K 89 (Part I) 2005 and G.O. No. 1959 SE(S) dated December 26, 2005, the same was rejected on the ground that there was no provision in the above Circular/Government Order to extend the benefit of postgraduate scale of pay in favour of an Assistant Teacher of a Recognised Non Government Aided Educational Institution. I find that the claim of the petitioner was based on the provisions of paragraph 12(3) of the Revision of Pay and Allowances, 1998 and the above provision is quoted below:

12. Career Advancement Scheme and related issues

(1)

(2)

(3) Ali teachers including Physical Education Teachers and Librarians of Secondary Schools who have improved/will improve their qualifications who were appointed with higher qualification in the subjects or groups relevant to their teaching/appointment shall get higher scale of pay appropriate to their qualifications, with effect from the 1st January, 1996 or the date of improving qualification, whichever is latter.

12. In view of the above provision, though the petitioner was entitled to get the above benefit, his claim had not been considered by the respondent No. 3. Therefore, the decision making process of the respondent No. 3 suffered from procedural impropriety in taking into consideration the irrelevant factors and non

consideration of the claim taking into consideration the relevant factors. Reference may be made to the decision of State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others, and the relevant portions of the above decision are set out below:

28. When the issue raised in judicial review is whether a decision is vitiated by taking into account irrelevant, or neglecting to take into account of relevant, factors or is so manifestly unreasonable that no reasonable authority, entrusted with the power in question could reasonably have made such a decision, the judicial review of the decision making process includes examination, as a matter of law, of the relevance of the factors. In the present case, it is, however, not necessary to go into the merits and relevance of the grounds having regard to the view, we propose to take on the point of natural justice.

13. The other ground for rejecting the claim of the petitioner so far as the application of the provisions of the West Bengal Schools (Control of Expenditure) Act, 2005 is concerned, the same had no manner of application at that point of time because the petitioner was acquired the qualification prior to promulgation of the above Act. Therefore, the impugned order is quashed and set aside.

14. I direct the respondent No. 3 to extend the above benefit of postgraduate scale of pay in his favour in connection with his service within a period of two months from the date of communication of this order.

15. This writ application is, thus, disposed of. There will be, however, no order as to costs.

Urgent photostat certified copy of this order be supplied to the parties, if applied for subject to compliance with all necessary formalities.