
(2007) 02 NCDRC CK 0057

In the National Consumer Disputes Redressal Commission

Board of Secondary Education

APPELLANT

Vs

SASMITA MOHARANA

RESPONDENT

Date of Decision : 05-02-2007

Acts Referred:

Citation : 2007 2 CPJ 154

Hon'ble Judges : S.N.Kapoor , B.K.Taimni J.

Final Decision : Revision Petition and Condonation Application dismissed

Judgement

1. -HEARD the learned Counsel for the appellant on the application for condonation of delay as well as on merits.

2. INSOFAR as the question of condonation of delay is concerned, the main order was passed on 31.1.2003 in CD Case No. 21 of 2000. An application for review was filed knowing fully well that the State Commission had no power to review its own order. It is not a case where the appellant did not file its written version. If no body appeared on behalf of the appellant before the State Commission then it has to blame itself. It may be mentioned that in terms of Sub-section (2)(ii) of Section 13 of the Consumer Protection Act, where the opposite party omits or fails to take any action to represent his case within the time given by the District Forum/State Commission/National Commission, the District Forum/State Commission/National Commission should proceed to settle the consumer dispute on the basis of evidence brought to its notice. It may be further mentioned that Sub-section (3) of Section 13 of the Consumer Protection Act provides that no proceedings complying with the procedure laid down in the Sub-sections (1) and (2) shall be called in question in any Court on the ground that the principles of natural justice have not been complied with. The only ground on which the review of the order was sought was that principles of natural justice have not been complied with. Since the provision of review in regard to National Commission, was inserted only w.e.f. 15th March, 2003 without making any amendment in the procedure applicable to the State Commission in Section 18, it would indicate that the appellant kept review application pending to take chance.

Would it be a ground to ignore the time wasted in moving review application in view of the above provision. The period of limitation would start from the date of main order and not from the date of order dismissing the application for review. We feel that it would not be possible for us to ignore the period. A wrong advice may be a ground for condonation but a wrong advice given by a person who was supposed to pursue such matters regularly before the State Commission, could not be a ground to condone the delay, on this ground. The copy of application for review Misc. Case No. 1783/2003 filed which is placed at pages 20-22 does not disclose the date of filing the application. Even the synopsis does not disclose the date of filing of the miscellaneous application excepting that it was moved in the year 2003. This application was moved despite the Counsel was expected to know. It was dismissed vide speaking order dated 8.2.2006. Annexure A-4 mentioning that the State Commission had no statutory powers to review its own orders. But, despite this fact another application was filed for recalling order dated 3.1.2003 along with application for condonation of delay. It was rightly dismissed. The appellant casually applied copies one after the other at his own leisure, as if there was no urgency.

For the aforesaid reasons we are not satisfied with the grounds of delay mentioned in the application for condonation of delay and it is dismissed accordingly.

3. IN so far as the contention advanced by the learned Counsel for the appellant on merits of the case is concerned, it is mentioned hereinafter. The petitioner is feeling aggrieved by the order passed by the learned State Commission awarding compensation of Rs. 10,000/- to the complainant/respondent for not issuing the correct mark-sheet and the complaint was made to seek relief by approaching High Court and only after the High Court of Orissa issued directions to issue mark sheet was issued after rechecking on 8.11.1999. On rechecking it was found that the complainant-student had actually secured 30 marks instead of 19 marks in English paper as per mark sheet supplied to her. The complainant-student filed a complaint, for she could not get admission in the College for want of marks sheet as the date of admission had already expired by that time, due to negligence on the part of the opposite party. She had lost one academic year and became junior to her classmates.

4. TWO points were urged on merits before us by the learned Counsel for the appellant. Firstly, the Consumer Fora do not have any jurisdiction to entertain the complaint for holding of examination was statutory duty. Secondly, there was no negligence for an account of the fact that a large number of students appeared in the examination, 54 lakh of answer sheets were examined and there was possibility of some human error which could not be treated as negligence or deficiency on the part of the appellant Board. As such, the appellant should not be held to pay any compensation. We would take up the second point first. Hon''ble Supreme Court in the case of The President, Board of Secondary Education, Orissa & Anr. v. D. Suvankar & Anr., IV (2006) CPJ 21 (SC)=VIII

(2006) SLT 433=2006 (12) SCALE 24, in a similar type of matter on verification of answer scripts, it was found that marks awarded in one paper were wrongly shown as 35 though respondent had really secured 65 marks. The plea taken by the Board of Secondary Education that the mistake occurred due to wrong entry made in the computer. Error was rectified and fresh mark sheet was issued. The Hon"ble Supreme Court observed as follows: "6. Award of marks by an Examiner is to be fair, and considering the fact that revaluation is not permissible under the Statute, the Examiner has to be careful, cautious and has a duty to ensure that the answers are properly evaluated. No element of chance or luck should be introduced. An examination is a stepping-stone on career advancement of a student. Absence of a provision for revaluation cannot be a shield for the Examiner to arbitrarily evaluate the answer script. That would be against the very concept for which revaluation is impermissible. xxx xxx xxx

8. It has to be ensured that the Examiners who make the valuation on answer papers are really equipped for the job. The paramount consideration in such cases is the ability of the Examiner. The Board has bounden duty to select such persons as Examiners who have the capacity, capability to make valuation and they should really be equipped for the job. Otherwise the very purpose of evaluation of answer papers would be frustrated. Nothing should be left to show even an apprehension about lack of fair assessment. It is true that valuation of two persons cannot be equal on golden scales but wide variation would affect credibility of the system of valuation. If for the same answer one candidate gets higher marks than another that would be arbitrary. As indicated above, the scope for interference in matters of valuation of answer papers is very limited. For compelling reasons and apparent infirmity in valuation, the Court steps in. Care should be taken to see that the Examiners who have been appointed for a particular subject, belong to the same faculty. It would be a mockery of the system of valuation of a teacher belonging to Arts stream is asked to evaluate answer papers of Science stream. It may be that a teacher had Physics, Chemistry or Biology at the intermediate level, but at Graduation stage he had special paper in Zoology. To ask such a teacher to evaluate Botany paper would not be proper. Similarly in the case of teacher having Mathematics in Intermediate level while he took his high studies in Physics or Chemistry, or Botany at the Graduation Level evaluation of answer paper in Mathematics by him would not be proper. May be that he has working knowledge in the subject. But the valuation should be done by an Examiner who is well equipped in the subject. That would rule out the chance of variation improper valuation. Board authorities should ensure the anomalous situations as pointed out above do not occur. Additional steps should be taken for assessing the capacity of a teacher before he is appointed as an Examiner. For this purpose the Board may constitute a Body of Experts to interview the persons who intend to be appointed as Examiners. This process is certainly time-consuming but it would further the ends for which the examinations are held. The Chief Examiner is supposed to act as safety valve in the matter of proper assessment.

15. The appellant-Board is certainly not blemish less. Undisputedly, lesser marks were shown in the marks sheet supplied to the respondent No. 1. In the first marks sheet the total marks indicated were 654. Finally, marks sheet was issued showing the aggregate marks to be 690. Except putting the blame on the Computer Firm, Assistant Examiner and the Scrutiniser. nothing further has been offered by the appellant-Board as explanation. True it is, that the first mistake was of the computer firm but the second correction is clearly on the basis of the prayer for re-addition of marks. It was found that the marks actually secured were 71 while on the cover page of the answer sheet the marks noted as 65. For this the blame has to be fixed on the Assistant Examiner and the Scrutinizer. But that does not provide an escape route to the Board.

16. Ultimately, it is the Board which has to ensure that the correct marks sheet is issued to the candidates since candidates who appear at the High School Certificate are of tender age. If by mistake the Board indicates to the candidate's incorrect marks, it is bound to have adverse effect on the mind of the candidates of tender age. Therefore, it is imperative on the part of the Board to ensure that errorless marks sheet is issued to each candidate. The plea of the computer firm that considering the large number of candidates the mistake is not serious has no substance. The computer entries are made to ensure accuracy and to do away with defects, which arise from manually recording of marks, and to ensure accuracy. The Assistant Examiner and the Scrutiniser appear to have taken their jobs casually unmindful of the consequences, which result from their negligence acts. Therefore, the sum of Rs. 20,000 has to be paid to the respondent No. 1 by the Board out of which it shall recover Rs. 15,000 from computer firm. It appears that the Board has taken action against the Assistant Examiner and Scrutiniser for their negligence. While affirming action taken against them, we express our displeasure for their careless and negligent acts which have led to unnecessary litigation."

(Emphasis supplied) In the aforesaid case Hon"ble Supreme Court awarded compensation of Rs 20,000/- to D. Suvankar, the student complainant.

5. IN view of the above and the fact that there would be Examiner and Chief Examiner at least and that they were supposed to ensure that no such mistake is left, the Board must not indicate to the candidate the incorrect marks. This point has seriously adverse effect on the minds of the candidates of tender age. It leads to depression and in extreme cases it leads to suicide. Therefore, it was imperative on the part of the Board to ensure that errorless marks sheet is issued to a candidate. IN this light, it could not be said that there was no deficiency on the part of the Board.

6. IN so far as the other point is concerned, no doubt earlier the view was that the educational institutions were not rendering services and they were performing their statutory duty while holding examinations. However, the judgment in the case of Lucknow Development Authority v. M.K. Gupta, III (1993) CPJ 7 (SC)=(1994) 1 SCC 243, has changed the course to a great extent

so far statutory authorities are concerned. In this regard para 8 of the judgment (pp.258-60) is note worthy: "Having examined the wide reach of the Act and jurisdiction of the Commission to entertain a complaint not only against business or trading activity but even against service rendered by statutory and public authorities the stage is now set for determining if the Commission in exercise of its jurisdiction under the Act could award compensation and if such compensation could be for harassment and agony to a consumer. Both these aspects specially the latter are of vital significance in the present-day context. Still more important issue is the liability of payment. That is, should the society or the tax payer be burdened for oppressive and capricious act of the public officers or it be paid by those responsible for it. The administrative law of accountability of public authorities for their arbitrary and even ultra vires actions has taken many strides. It is now accepted both by this Court and English Courts that the State is liable to compensate for loss or injury suffered by a citizen due to arbitrary actions of its employees. In *State of Gujarat v. Memon Mahomed Haji Hasam*, the order of the High Court directing payment of compensation for disposal of seized vehicles without waiting for the outcome of decision in appeal was upheld both on principle of bailee's legal obligation to preserve the property intact and also the obligation to take reasonable care of it...to return it in the same condition in which it was seized and also because the Government was, "bound to return the said property by reason of its statutory obligation or to pay its value if it had disabled itself from returning it either by its own act or by act of its agents and servants". It was extended further even to bona fide action of the authorities if it was contrary to law in *Lala Bishamabar Nath v. Agra Nagar Mahapalika, Agra*. It was held that where the authorities could not have taken any action against the dealer and their order was invalid, "it is immaterial that the respondents had acted bona fide and in the interest of preservation of public health. Their motive may be good but their orders are illegal". They would accordingly be liable for any loss caused to the appellants by their action". The theoretical concept that King can do no wrong has been abandoned in England itself and the State is now held responsible for tortious act of its servants. The First Law Commission constituted after coming into force of the Constitution on liability of the State in tort, observed that the old distinction between sovereign and non-sovereign functions should no longer be invoked to determine liability of the State. Friedmann observed:

"It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where the State, either directly or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and non-governmental function, but the nature and form of the activity in question".

In the case of *GDA v. Balbir Singh, II (2004) CPJ 12 (SC)=III (2004) SLT 161=(2004) 5 SCC 65* in para 11 it is stated that: "11. Today the issue thus is

not only of award of compensation but who should bear the brunt. The concept of authority and power exercised by public functionaries has many dimensions. It has undergone tremendous change with passage of time and change in socio-economic outlook. The authority empowered to function under a statute while exercising power discharges public duty. It has to act to sub serve general welfare and common good. In discharging this duty honestly and bona fide, loss may accrue to any person. And he may claim compensation which may in circumstances be payable. But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility to pay the loss determined should be whose? In a modern society no authority can arrogate to itself the power to act in a manner, which is arbitrary. It is unfortunate that matters, which require immediate attention, linger on and the man in the street is made to run from one end to other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrate and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative discretion, which shields the action of administrative authority. But where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same. It was never more necessary than today, when even social obligations are regulated by grant of statutory powers. The test of permissive form of grant is over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. When the Court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax-payers' money, which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries." (Emphasis supplied)

In view of the above discussion, giving the wrong marks sheet would certainly cause not only simple mental agony but it causes adverse impact on the minds of the students of tender ages causing depression and sometimes leading to suicide, thus amounting to extreme mental agony. We cannot, therefore, take a lenient view for negligence on the part of the Asstt. Examiner, Chief Examiner or

the Examination Department of any Board in this regard. In the light of the decisions in *LDA v. M.K. Gupta* (supra), and *GDA v. Balbir Singh* (supra), negligence being writ large, the Consumer Fora would have jurisdiction in such like matters. Further, for holding examination, examination fee is charged. Holding examination may be statutory duty; but administrative failure in issuing correct mark sheet and certificate in time is part of service and to this extent under the garb of non-sovereign statutory duty, the Board can neither take shelter nor avoid liability for negligence of Examiner, and Chief Examiner for failure to issue correct mark sheet in time. In view of the aforesaid reasons, Consumer Fora have jurisdiction to entertain complaint in this regard.

7. AS regards compensation awarded as a matter of fact, loss of one year is not just the loss of one year. In case we calculate the loss @ minimum wages, it would be about Rs. 3,600/- per year and this will have a cascading and cumulative effect on whole life of the student. She will be treated as junior to her classmates. Her classmates may get a better job, may get experience of one year more. In case we compare throughout life her classmates might get promotion sometimes 5-6 years earlier. Seeing in this light, merely awarding a sum of Rs. 10,000 is apparently is on a very low side from every point of view. For the aforesaid reasons, we do not see any merit in this case. The application for condonation of delay as well as revision petition both are dismissed accordingly. Revision Petition and Condonation Application dismissed.