
(2013) 03 CAL CK 0012
In the Calcutta High Court
Case No : Writ Petition No. 7571 (W) of 2013

Chittaranjan Kar	Vs	APPELLANT
State of W. Ben.		RESPONDENT

Date of Decision : 26-03-2013

Acts Referred:

Citation : (2013) 3 CHN 629

Hon'ble Judges : Debasish Kar Gupta, J

Bench : Single Bench

Advocate : Ekramul Bari, Syed Mansoor Ali and Tanuja Basak, for the Appellant; Biswajit De, for the State, for the Respondent

Judgement

Debasish Kar Gupta, J.—Affidavit-of-service filed on behalf of the petitioners be kept on the record. It is submitted by the learned Counsel appearing for both the parties that the issue involved in this matter relates to a point of law and can be adjudicated on the basis of materials on record.

2. This writ application is filed by the petitioner assailing an order passed by the respondent No. 3 under his Memo No. 561-L(5) dated September 10, 2009. By virtue of the impugned order the respondent No. 3 "accorded approval of appointment of the petitioner with effect from August 01, 1991 and not from the date of recognition of the concerned Non-Government/Educational Institution by the W. Ben. Board of Secondary Education, i.e. from May 01, 1990.

3. At the very outset a preliminary objection is raised by Mr. Biswajit De, learned junior Government Advocate, High Court, Calcutta. According to Mr. De, The writ application, being W.P. 4073 (W) of 2011 was filed on the self-same cause of action in the year 2011. The above writ application was dismissed for default on April 01, 2011 consequent upon non-appearance of any of the parties at time of hearing. According to Mr. De, there is no provision in the Rules to Applications under Article 226 for dealing with such situation. Rule 53 of the above Rules provides that the procedure provided in the CPC in regard to Suits shall be

followed, as far as it can be made applicable, in all proceedings for issue of a writ. According to Mr. De, Order 9, Rule 4 of the CPC deals with the situation in question. According to the above provision filing of a second suit (in this case application under Article 226 of the Constitution of India) is permissible provided the same is filed within the period of limitation. According to him, this writ application is filed beyond the period of three years, i.e. a reasonable period of time from the date of passing the impugned order.

4. Mr. Ekramul Bari, learned Counsel appearing on behalf of the petitioner submits that in the matter of Hashnak Singh vs. Union of India and Ors., reported in, AIR 1328 SC 1328 it has been decided by the Hon'ble Apex Court that where a petition under Article 226 of the Constitution of India is dismissed in limine without a speaking order, such a dismissal would not constitute a bar of res judicata to a subsequent petition on the same cause of action. Relying upon the decision of Smt. Rinku Mondal (Biswas Smt. Rinku Mondal (Biswas) and Smt. Sarifunnessa Vs. Union of India (UOI) and Others, , it is submitted by Mr. Bari that the above settled principles of law was also followed by a Division Bench of this Court.

5. Having heard the learned Counsel appearing for the parties as also after considering the facts and circumstances of this case I find that admittedly Rules to Application under Article 226 of this High Court is silent in respect of the situation in question. Therefore, the procedure prescribed in the CPC in this regard should be followed to decide the preliminary objection raised by the respondents in this case. For proper adjudication of the above issue the provisions of Order 9, Rules 3 and 4 are quoted below:-

3. Where neither party appears, suit to be dismissed.--Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

4. Plaintiff may bring fresh suit or Court may restore suit to file.--Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject) to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for (such failure as is referred to in rule 2), or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

6. Admittedly, the previous writ application on the self-same cause of action was dismissed in absence of the parties. Therefore it was a matter covered under Order 9 Rule 3 of the Code of Civil Procedure. In view of the provisions of Order 9 Rule 4 of the CPC a second suit (in this case an application under Article 226 of the Constitution of India) is maintainable. But so far as the question of limitation is L; concerned, it is not in dispute that there is no period of limitation for filing an application under Article 226 of the Constitution of India. It is the discretion of the Court to take the decision of allowing the petitioner to proceed I further in

view of the facts and circumstances involved; in the case. Upon prima facie consideration of the facts and circumstances involved in this case I find that the prayer made by the petitioner is to set aside the order impugned on the ground of passing the impugned order ignoring the mandate given in a writ application. Therefore, upon prima facie consideration of the issue involved in this matter I find that the delay in filing this writ application under Article 226 of the Constitution of India does not stand in the way in adjudication of the issue involved in this matter on merit.

7. Before parting with, the relevant portions of the decision of Hashnak Singh (Supra) are quoted below:-

It is therefore, incontrovertible that where a petition under Art. 226 is dismissed in limine without a speaking order such a dismissal would not constitute a bar of res judicata to a subsequent petition on the same cause of action, more so,.....

8. Therefore, on the basis of the discussions and observations made hereinabove the preliminary objection raised by the respondents is rejected.

9. So far as the merits of this case is concerned it is submitted by the petitioner that by a judgment dated September 15, 2008 passed in the matter Chittaranjan Kar vs. State of W. Ben. and Ors. (Re.: W.P. 25432 (W) of 2007) a Single Bench of this Court directed the respondent No. 3 to approve the appointment of the petitioner upon taking note of the date of recognition of the concerned School, i.e., May 01, 1990. According to the petitioner, the impugned order was passed ignoring that mandatory order to approve the appointment of the petitioner with effect from a subsequent date, i.e., from August 01, 1991.

10. It is submitted by Mr. De, that the respondent No. 3 passed the impugned order relying a Memo issued by the Director of School Education, W. Ben.

11. I have heard the learned Counsel appearing for the respective parties and I have considered the facts and circumstances of this case.

12. For proper adjudication of the allegation of the petitioner, the operative part of the judgment dated September 15, 2008 passed in W.P. 25432 (W) of 2007 are quoted below:-

The service of the petitioner, therefore, could not be approved by the District Inspector of Schools concerned with effect from 1st August, 1991 when the school was approved by the W. Ben. Board of Secondary Education with effect from 1st May, 1990 in terms of the aforesaid Government Order dated 20th December, 1984.

In the aforesaid circumstances, the aforesaid decision of the District Inspector of Schools (SE) Purba Medinipore with regard to the date of approval of the petitioner as mentioned in the Memo No. 3788-S dated 19th September, 1991 cannot be sustained and the same is, therefore, quashed.

The concerned District Inspector of Schools (SE) is directed to issue appropriate

order rectifying the date of approval of the appointment of the petitioner upon taking note of the date of recognition of the concerned school i.e. 1st May, 1990.

The aforesaid rectification should be made by the concerned District Inspector of Schools without any further delay but positively within a period of four weeks from the date of communication of this order.

The learned Advocate of the petitioner is directed to communicate the gist of the order together with the copy of the aforesaid Government Order dated 20th December, 1984 to the District Inspector of Schools (SE) Purba Medinipore immediately.

Needless to mention here that the said District Inspector of Schools (SE) concerned will also release the financial benefits to the petitioner after the rectification of the date of approval of the appointment of the petitioner at an early date but positively within a period of six weeks from the date of rectification of the said date of approval in terms of this order.

With the aforesaid directions, this writ petition stands disposed of.

There will be, however, no order as to costs. Urgent xerox plain copy of this order countersigned by the Assistant Registrar (Court) be given to the petitioner, on usual undertaking.

(Pranab Kumar Chattopadhyay, J).

13. After perusing the above order I find, that it was a mandatory order and by virtue of the above final order the respondent No. 3 was directed to approve the appointment of the petitioner from the date of recognition of the School concerned, i.e. from May 01, 1990. It is not in dispute that the respondent No. 3 approved the appointment of the petitioner from a subsequent date, i.e. from August 01, 1991 relying upon a Memo of the Director of School Education, Government of W. Ben. The operative part of the impugned order is quoted below:-

OFFICE MEMORANDUM

In the above G.O. No. 2605(16)SC/s dt. 20.12.1984 it is mentioned that the approval of appointment of organizer teachers and non-teaching staff of the newly recognised Jr. High/X-class High Schools should be approved as such with effect from the date of recognition/upgradation.

In the above G.O. there is mention that the decision of the Director of School Education, W. Ben. is final if the matter is referred to him.

In this particular case, the approval of appointment had been accorded w.e.f. 01.08.91 in terms of the Memo. No. 2085-SC/S dt. 10.9.91 of the Director of School Education, W. Ben.

Now, in the circumstances, considering all the facts and circumstances, I am of the opinion no relief can be given to the petitioner in terms of the enclosed

guideline of the Director of School, Education, W. Ben. bearing Memo. No. 675-LS dt. 21.7.09. All concerned may be informed accordingly.

Sd/T.N. Roy District Inspector of Schools (Secondary Education) Purba Medinipur.

14. After considering the above judgment I find that the impugned order was passed by the respondent No. 3 in a manner which an appellate authority can deal with a judgment delivered in an application under Article 226 of the Constitution of India. It is the settled principles of law when there is a judicial pronouncement, which is mandatory in nature, an executive authority should act in compliance of the above order until and unless the same is set aside or stayed by the Appellate Authority. In this case admittedly no material is made available on record to show that the judgment delivered in the writ application was set aside or stayed by the Appellate Authority.

15. Therefore, consequence is this, the concerned Officer acted not in accordance with the rule of law but in accordance with the rule of man. The above practice is a case of fraud on power and that practice should be stopped in limine.

16. The above order is quashed and set aside with a direction upon the respondent No. 3 to pass an order strictly in compliance of the order judgment dated September 15, 2008 passed in the W.P. 25432 (W) of 2007 within a period six weeks from the date of communication of this order.

17. In the event the petitioner has already retired from the service then benefits shall be paid within the period mentioned hereinabove taking into consideration this judgment together with interest at the rate of 9% per annum.

18. This writ application is, thus, disposed of.

19. Let there be a cost of Rs. 5,000/- to be paid from the Government Fund the fees for the learned Advocate for the petitioner at the first instance within the period stipulated hereinabove.

20. The Secretary to the Government of West, Education Department is directed to realise the aforesaid cost from the concerned District Inspector of Schools (SE) within a period of three months from the date of communication of this order from the salary of the concerned District Inspector of Schools (SE) or by way of raising public demand in case of his retirement.

21. The Competent Authority is directed to attach this judgment to the service book of the concerned District Inspector of Schools (SE). Urgent photostat certified copy of this order, if applied for, be given to the parties, on priority basis.