

(1986) 02 CAL CK 0038
In the Calcutta High Court
Case No : F.M.A.T. No. 1655 of 1983

Dwijendra Lal Sarkar and Others

APPELLANT

Vs

Pritimoy Hore and Others

RESPONDENT

Date of Decision : 06-02-1986

Acts Referred:

Calcutta University Act, 1979 — Section 4(6)(b)
Constitution of India, 1950 — Article 226

Citation : 90 CWN 885

Hon'ble Judges : Susanta Chatterji, J; Mookerjee, J

Bench : Division Bench

Advocate : Saktinath Mukherjee, Samaresh Banerjee and Bhaskar Ghosh, for the Appellant; K.K. Maitra, B.J. Chatterjee and Alik Kumar Ghosh, Sudhendu Mukherjee and Tapan Kumar Mukherjee for University and Pradipta Roy for Respondent Nos. 5 to 15 in F.M.A.T. No. 1635 of 1983, for the Respondent

Final Decision : Allowed

Judgement

Mookerjee, J.—On 10th May, 1981 the Governing Body of Bhairab Gaguly College, Belgachia which was a Government Sponsored Institution, had purported to accept the report of an Enquiry Committee and had resolved to dismiss the respondent no. 1, Pritimoy Hore, who was a Clerk-cum-Typist of the said College. Against the said dismissal, Pritimoy Hore had purported to file an appeal to the Director of Public Instruction, Government of West Bengal, Writers Buildings. Thereafter, he had moved in this Court an application under Article 226 of the Constitution of India, inter-alia, with the prayer that the Director of Public Instruction Government of West Bengal be directed to dispose of his said appeal as well as the application for stay made in the said appeal. Notices of the said application, being Civil Order No. 11713 (W) of 1981, having been served upon the respondents, the Principal of the said College and the University had appeared in the said Civil Order. On 1st December, 1981, B. C. Roy, J. disposed of the said writ/petition of Pritimoy Hore. The learned Judge recorded in his order that according to Statute 13(b) of the Statutes framed under the Calcutta

University Act, 1961 appeal against the order of dismissal passed against the writ petitioner, would have to be preferred before the Vice Chancellor, Calcutta University within 30 days from the receipt of the order imposing penalty or penalties. Mr. J. K. Banerjee, learned advocate appearing on behalf of the petitioner, had submitted that his client would prefer/appeal before the appropriate authority. The learned judge declined to make any observation as to whether in computing limitation, the Appellate Authority ought to exclude the time during which the writ application was prosecuted by the writ petitioner. The learned judge in his order dated 1st December, 1981 held that the appeal before the Director of Public Instruction, Government of West Bengal had been preferred in a wrong forum and the prayer for issue of a writ of Mandamus directing the respondents to expedite the hearing and disposal of the said appeal had become infructuous. The learned trial Judge further observed that it was not necessary for him to say that the Appellate Authority before whom the appeal would be now filed, would consider the question of limitation in accordance with law.

2. We understand that Pritimoy Hore, against his dismissal from service, with effect from 2 1st May, 1981, had filed an appeal before the Vice Chancellor, Calcutta University. On 31st March, 1981, R. N. Pyne, J. passed an order in Civil Order No. 11713 (W) of 1981 that the pending appeal filed by the petitioner to the Vice Chancellor, Calcutta University be disposed of at an early date preferably within four weeks in accordance with the Calcutta University First Statute, 1979. Being aggrieved, by the said order of R. N. Pyne, J. dated 3rd March, 1982, the Principal and some of the Members of the Governing Body of the said College have preferred F.M.A No. 2277 of 1983. On 30th May, 1983, Civil Order No. 11713 (W) of 1981 had been placed as "To Be Mentioned" before B. C. Roy, J. The learned advocate for the writ petitioner and for the University of Calcutta had appeared. B. C. Roy, J. recorded that Statute 13 (b) of the Statutes of the Calcutta University Act, 1966, was not applicable to Government Sponsored Colleges, including Bhairab Ganguly College till the coming into force of the Calcutta University Act, 1979. The learned judge purported to order "However, in consideration of the facts and circumstances of the case and also of the submission made by the learned advocates for both parties and also in consideration of the serious inconvenience that will result with the petitioner, I direct the Appellate Authority under Statute 13(b) of the Calcutta University Statute, 1966 or the Delegated Authority to dispose of the appeal preferred by the petitioner as a special case as early as possible preferably within a period of one month from the date of this order. This order is made as special case and it should not be taken in any circumstances as a precedent". Being aggrieved, by the said order dated 30th May, 1983 D. L. Sarkar, the Principal of the said College preferred F.M.A.T. No. 1655 of 1983. On or about 10th June, 1983 the pro vice Chancellor, Calcutta University to whom the appeal of Pritimoy Hore, was delegated had allowed the said appeal, set aside the order of dismissal dated 20th March, 1981 and directed the Governing Body of the said College to pay Pritimoy Hore 50% of his back salaries.

3. We propose to set aside both the order dated 31st March, 1983 of R. N. Pyne, J. and the order dated 30th May, 1983 B. C. Roy J. There was nothing to show that notices were served upon the Principal and the Members of the Governing Body of the said College concerned before the learned Judges had made their orders in Civil Order No. 117 13 (W) of 1981 which had been already finally disposed of on 1st December, 1981. We have already set out the substance of the said order dated 11th August, 1981 disposing of the said Civil Order No. 117 13 (W) of 1981. The said order did not give liberty to the parties to again mention the matter for further order and/or directions. In fact, B. C. Roy, J. in his order dated 11th August, 1981 had recorded that the writ application had become infructuous and had observed that it was not necessary for him to say that the Appellate Authority before whom the appeal would be filed would consider the question of limitation in accordance with law. Therefore, there was no scope for passing any further order in the said disposed of Civil Order No. 11713 (W) of 1981 regarding the appeal under Statute 13(b) of the Calcutta University Statute filed by Pritimoy Hore. R. N. Pyne, J. did not dispose of the said Civil Order. Therefore, we fail to see how the same was *ex parte* mentioned before him and directions were obtained for disposal of the said appeal by the Vice Chancellor, Calcutta University.

4. The foresaid *ex parte* orders respectively dated 31st March, 1983 and 30th May, 1983 passed by the two learned Single Judges are bound to be set aside not only on the ground that they were passed *ex parte* behind the back of the present appellant but also on the ground that it was not open to the learned Judges to give any direction upon the vice-chancellor of the Calcutta University regarding maintainability or merits of the appeal preferred by Pritimoy Hore. While finally disposing of the writ application of Pritimoy Hore on 1st December, 1981, B. C. Roy, J. himself had declined to make any observation about the proposed appeal of Pritimoy Hore under Statute 13(b) of the Calcutta University statutes. But by his subsequent order dated 30th May, 1983 the learned Judge exceeded his jurisdiction by directing that the Appellate Authority under Statute 13 (b) would dispose of the said appeal as Special Case. In case the appeal was not maintainable in law, the learned trial judge could not have vested the Appellate Authority with jurisdiction to entertain the appeal. Therefore, the said directions upon the Appellate Authority to dispose of the appeal in question ought to be set aside. We record that while hearing an interlocutory matter another Division Bench of this court has already observed the said order of B. C. Roy, J. for making a special case was not justified.

5. Mr. saktinath Mukherjee, learned advocate on behalf of the appellants, has submitted that the provisions of the Calcutta University Statute 1979 were in the nature of subordinate or delegated legislation. Section 4(6) (b) of the Calcutta University Act, 1979 has not vested the University to prescribe with retrospective effect the terms, conditions of service etc, for posts of Principal, teachers and other employees. Long after the dismissal order of the said employee of the College had taken effect, on 10th February, 1983 the Calcutta

University Statutes, 1979 had come into force in respect of Government Sponsored Colleges. Neither at the date of the dismissal of Pritimoy Hore the writ petitioner nor at the date of presentation of his appeal to the Vice Chancellor, Calcutta University, Statute 13(b) of the said Statute was applicable to the employees of Government Sponsored Colleges. Mr. Mukherjee submitted that the right of appeal being a creature of statute, such right cannot be claimed in respect of a decision in a suit or proceeding which had been instituted when no right of appeal was provided by law. Person aggrieved in such a case cannot take advantage of a provision conferring right of appeal while his cause was already pending. The legislature has expressly or by necessary implication had not given retrospective effect to such provision for appeal. Mr. Mukherjee has also submitted that when a suit or proceeding has been already disposed of, a person aggrieved by the said order of disposal, cannot claim right of appeal merely because after passing of the said final decision the provision for appeal is enacted with prospective effect. Doctrine of finality would apply to such an order disposing of the suit or the proceeding.

6. It is not necessary for us to deal at length with these well-settled propositions of law. In the first place, more pertinent question in this appeal is whether in a writ proceeding already disposed of, the trial court could have directed the Vice Chancellor, Calcutta University to treat an appeal under Statute 13(b) of the Calcutta University Statute as a special case in disregard of the legal provisions relating to maintainability of such appeals. Plainly, the court could not have lawfully made such an order.

7. The appellants have not, however, filed any writ proceeding challenging the order of the Pro Vice Chancellor of the Calcutta University dated 6/9th June, 1983 allowing an appeal of Pritimoy Hore and setting aside the order of his dismissal dated 20th March, 1981. Therefore, it is not within the scope of these two appeals to make any order quashing the said appellate decision dated 6/9th June, 1983. It is however open to the appellants to institute in accordance with law appropriate separate proceeding impugning the appellate decision. At the same time, as already indicated, the directions of R. N. Pyne, J. dated 31st March, 1983 and the directions of B. C. Roy, J. dated 31st May, 1983 ought to be set aside.

8. We understand that on 29th September, 1983, Pritimoy Hore has preferred a fresh appeal against the said order of his dismissal dated 20th May, 1981 before the Vice Chancellor, Calcutta University. The said appeal is pending. The said pending appeal also is not the subject matter of the two appeals before us. We propose to express no opinion either about the maintainability or about the merits of the said appeal either in any separate writ application or in the said appeal itself. For the foregoing reasons, we allow these appeals, set aside the orders dated 31st March, 1983 and 30th May, 1983 passed by the learned trial judges.

There will be no order as to costs.

Susanta Chatterji, J.

I agree.