
(1999) 08 CAL CK 0033

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction M.A.T. No. 2615 of 1997

Haradhan Ghosh

APPELLANT

Vs

Naba Kumar Banerjee and Others

RESPONDENT

Date of Decision : 06-08-1999

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21, 226

Citation : (2000) 1 CALLT 481 : (1999) 2 CHN 792

Hon'ble Judges : Samarendra Nath Bhattacharjee, J;Ruma Pal, J

Bench : Division Bench

Advocate : Mr. P.K. Ghosh and Mr. S. Ghosh, for the Appellant; Mr. Amal Kr. Ghosh and Mrs. A Ghosh, Mr. Manik Das and Mr. Sanjay Kumar Sarkar, for the Respondent

Judgement

R. Pal, J.—This appeal has been preferred from an Order dated 8th August 1997 rejecting an application filed by the appellant for review of an order dated 15th June 1995 setting aside the appointment of the appellant as an Assistant Teacher and directing the appointment of the respondent Naba Kumar Banerjee in his place.

2. The appellant had Joined as an organising teacher in the Hurla Junior High School (referred to as the School) on 9th August, 1978. When the appellant Joined the school, the respondent Naba Kumar Banerjee had been serving in the school as an organising teacher for a little over a year having joined the school as an organising teacher on 1st July 1977. The school was granted recognition on 1st January 1986 by the District Inspector of Schools (SE), Hooghly. Both Nabakumar and appellant were found working. The Inspection report contained Nabakumar's name at serial No. 5 and the appellant's name was serial No. 6. As the names of the appellant and Naba Kumar were not forwarded for approval to the D1S for appointment, Naba Kumar filed a writ application 1C.O. No. 121 (W) of 1987] (referred to as the first writ petition) which was disposed of on 9th January 1987 by directing the Director of Secondary Education (DSE) and the

DIS to consider the case of Naba Kumar and till such consideration was made, Naba Kumar's functioning should not be disturbed, in 1989 Nabakumar and the appellant Jointly moved a writ application [C.O. No. 12784 (W) of 1989] [referred to as the second writ petition) praying for approval of their appointment as Assistant Teachers. On 2nd May, 1991 the DSE sanctioned an additional post of Assistant Teacher in the School in the Social Science group. In 1991 the appellant alone moved a writ application [C.O. No. 7649 (W) of 1991] (referred to as the third writ petition) asking for approval of his appointment against the additional post. Nabakumar was not made a party. The third petition was disposed of on 11th June 1991 by directing the DIS to call for the records of the school and if it appeared that the appellant had been discharging duties as a teacher for the last 12 years proper action was to be taken on the basis of Government Circular dated 20.12.1984. The DIS was directed to hear the appellant in the presence of the School authorities and a reasoned order was directed to be passed within three months. As Naba Kumar was not made a party to the third writ petition he was not heard. On 11th November, 1991 the DSE allowed the DIS to accord approval to the appellant against the additional post after the DIS verified the original documents in support of the appellant's qualifications and date of birth.

3. On 27th November 1991 Naba Kumar moved a writ application [C.O. No. 13821 (W) of 1981] (referred to as the fourth writ petition). The appellant was made the respondent No. 7 in the fourth writ petition. An order was made on 27th November 1991 restraining the authorities from approving the appointment of the appellant for a period of six weeks. On an application filed by the appellant for vacating the Interim order, an order was passed on 7th January 1992 modifying the interim order to the extent that the decision of the concerned authority to accord approval to the appointment of the appellant would abide by the result of the writ application. On 3rd March, 1992, the DIS approved the appointment of the appellant provisionally and subject to the decision in the fourth writ petition.

4. On 30th September, 1992 the State Government Issued a notification being Memo No. 895-Edn.(3) regarding approval of appointment of organiser teachers. Clause 2(1) and (iv) of the notification provides for approval of appointments strictly in order of seniority as recorded in the Inspection Report. As Naba Kumar was undisputedly serving in the school before the appellant, Naba Kumar's writ application was ultimately disposed of on 15th June 1995 by directing the DIS to accord approval in favour of Naba Kumar within six weeks from the date of the communication of the order. A detailed judgment was given in support of the outcome by the learned Judge. The decision was taken after taking note of the earlier facts. It was found from the materials on record as well as the report submitted by the DIS pursuant to the directions of court in the fourth writ petition that Naba Kumar had been appointed on 1st July 1977 and the appellant was appointed on 9th August 1978. It was also noted that the report of the DIS clearly said that out of the total number of teachers, appointments were made in

1987 but that "the remaining 4 would be appointed on the basis of seniority". The learned Judge accordingly held that the since Naba Kumar was senior to the appellant, on the basis of the Notification being memo No. 395-Edn.-S issued on 30th September 1992, Naba Kumar's appointment should have been approved. The approval granted by the DIS was accordingly set aside and the DIS was directed to accord approval in favour of the petitioner within a period of six weeks from the date of the communication of the order. The appellant was not present when the matter was finally disposed of.

5. The appellant filed an application for review of the order dated 15th June 1995. The application was rejected on 18th August 1995 after hearing the appellant and other parties. According to the learned Judge the only ground for review was that no notice of hearing had been given to the appellant. It was noted that the allegation was not that the appellant was not served with Naba Kumar's petition. The learned Judge found that the matter had been appearing for several days before the learned Judge and that no duty was cast on the Advocate for the petitioner to inform the Advocate for the appellant that the matter would be heard. It was held that in any event this was not a ground on which review would lie.

6. The appellant preferred an appeal against the orders dated 15th June 1995 and 18th August 1995. The Appellate Court dismissed the appeal in so far as it pertained to the order dated 15th June 1995 on the ground that the appeal was barred by limitation and the delay had not been sufficiently explained. However, as far as the order dated 18th August 1995 was concerned, the Appellate Court allowed the appeal by directing the learned single Judge to hear out the application on merits in the presence of the parties.

7. The review application was again taken up for hearing. The matter was duly heard. On 16th February 1996 the application for review was rejected for a second time. The learned Judge noted that the order dated 18th August, 1995 had been passed after hearing the parties at length including the appellant it was said that the first application for review had been heard on merits and was thereafter rejected. In the circumstances the learned Judge was of the view that there was no scope for further re-hearing of the review application and the order dated 18th August 1995 remained in operation. Naba Kumar then filed an application against the DIS for his failure to act in terms of the order dated 15.6.95. On 22nd March, 1996 the contempt application was disposed of by directing the DIS to comply with the order dated 15.6.95. The DSE by memo dated 29.3.96 allowed Naba Kumar's appointment to be approved.

8. In the meantime the appellant preferred an appeal not only from the order dated 16th February, 1996 but also from the order disposing of the contempt application. Both appeals were disposed of by a common judgment on 17.6.96. The Division Bench was of the view that the learned single Judge should have re-heard the application for review afresh. The order of the learned Judge rejecting the review for the second time was set aside and remanded back for being

heard. On 8th August 1987 the learned Judge rejected the review application for the third time giving detailed reasons. The order records that the matter was reheard on several dates. The learned Judge was of the view that no ground had been made out by the appellant which justified review of the order dated 15th June 1995. The point urged before the court that the order dated 15th June 1995 had been passed in the absence of the Advocate for the appellant was rejected on the ground that the matter had been appearing in the list for several days and that was in any event not a ground on which a review could be allowed.

9. The present appeal has been preferred by the appellant against the order dated 8th August 1997. Initially an order of status quo was passed. Subsequently at the Instance of Naba Kumar the interim order was modified to the extent that if the order of the DSE allowing approval of Naba Kumar's appointment had been given effect to, it would abide by the result of the appeal. On 12.2.98 approval was communicated to the School and on 14.2.98, the School Issued a letter to Naba Kumar appointing him as Assistant Teacher with effect from 1st March, 1996 Nabakumar joined and was paid his salary.

10. The appellant filed an application for modification of the orders passed by the Appellate Court. According to the appellant the appointment of Naba Kumar was in violation of the Interim orders passed by the Appellate Court. He filed an application for contempt against the school authorities claiming that he was not being allowed to discharge his duties since 21.2.98. An order was passed on 2.4.98 directing the school to allow the appellant to rejoin service and to pay his salary as well as Rs. 3,000/- towards arrears. The order for payment was without prejudice to the rights and contentions of the parties in the contempt application. Naba Kumar had no notice of this proceeding, but his salary was stopped. On 9.9.98 an order was passed directing payment of 2 months salary to Naba Kumar on an ad-hoc basis and without creating any equity. The application for contempt as well as the application for modification filed by the appellant were disposed of on 27.11.98 holding that no contempt had been committed. Naba Kumar has, however, not been receiving any salary at all because the appellant has been paid. The State respondent said that they could not make payment to two persons in respect of the same post. To end this tussle finally the court decided on 14.7.99 to hear out the appeal itself on the basis of the papers filed.

11. According to the appellant, the additional post which had been created was of Assistant Teacher, Social Science. It is submitted that the order dated 15th June, 1995 erroneously directed the appointment of Naba Kumar who was a Teacher of Pure Arts to the post. The second submission is that Naba Kumar after his Initial appointment had left the school from April, 1979 to December, 1979 and as such had forfeited his right to seniority.

12. Unfortunately, no such grounds have been taken in the Memorandum of Appeal. Besides the only question before this court is whether the learned Judge erred in refusing to recall his order dated 15th June 1995 on the basis of an application for review. We are of the view that he did not. As told in Aribam

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"It is true as observed by this court in Shivdeo Singh v. State of Punjab (AIR 1963 SC 1909) there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary Jurisdiction to prevent miscarriage of Justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and Important matter or evidence which after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found. It may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merit. That would be the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an Appeal Court to correct all manner of errors committed by the sub-ordinate court"

13. The Issues sought to be raised by the appellant could have been raised by way of an appeal from the order dated 15.6.95. The appeal preferred by the appellant from the order dated 15.6.95 having been dismissed, the issues could not be re-opened in an application for review. The learned Judge's reason for refusing to allow the review application are correct and we see no reason to Interfere with the same.

14. Even otherwise, the records produced by the State show that Naba Kumar had graduated with a combination of Bengali, English, Political Science and English. It is not the case of the School or the State respondents that Naba Kumar was not qualified to be appointed to the disputed post. On the other hand the DIS had submitted a report that Naba Kumar was senior to the appellant. The appeal is accordingly dismissed. The order dated 8th August, 1997 is upheld. The respondent authorities will take all steps to grant Naba Kumar the benefits he would be entitled to by virtue of his appointment forthwith and in any event not later than 6 weeks from the date of this order.

Stay prayed for is refused. Let xerox plain copies of this judgment duly counter signed by the A.R.(C) be made available to the learned Advocates for parties, on their usual undertakings.

15. Appeal dismissed