
(2004) 06 CAL CK 0011
In the Calcutta High Court
Case No : Writ Petition No. 3413 (W) of 2004

Karunamoy Ghosh

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 14-06-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21, 226

Citation : (2005) 1 CALLT 447 : (2005) 106 FLR 241

Hon'ble Judges : Pratap Kumar Ray, J

Bench : Single Bench

Advocate : ; Gopal Chandra Ghosh, B.P. Mondal and S. Mondal for the Respondent Nos. 4 and 5 and Santi Das, for the Respondent

Final Decision : Allowed

Judgement

Pratap Kumar Ray, J.—Heard learned advocates appearing for the parties.

In the instant writ application, the petitioner has prayed for release of all retirement benefits on considering the petitioner as an employee who enjoyed the 5th term of extension upon granting appropriate leave for the period of absence for 10 months during the 5th term of extension. The facts leading to the writ application are as follows :

2. The petitioner, admittedly while discharging the function as Headmaster of the school, exercised his option for ROPA 1990 pay scale, that is revised pay scale, but subsequently during the extended period of time to revert to the pre-revised pay scale, the petitioner applied for the same and was allowed to enjoy the pre-revised pay scale with right to serve the school upto the age of 65 years on crossing the age of superannuation, on extension of service year to year basis subject to physical fitness and mental alertness as well as subject to refund of excess amount as already enjoyed while the petitioner was enjoying the revised pay scale prior to his return to the old pay scale. It is an admitted fact that the petitioner's service upto the 3rd term of extension was duly approved by the

District Inspector of Schools concerned. The 3rd term of extension ended on 30.12.95. Time to refund the excess amount as drawn in the revised scale of pay prior to change of option was 28.02.96, which was the last date. Under the circular letter No. 161-SE(R)/IM-6/90 Pt. 2 dated 28.12.95 issued by the Education (School) Department, Government of West Bengal such last date to refund the excess amount was allowed by following the procedure for such refund as it appears in Clause 4 which provides that refund was not unilateral action, but it is a multilateral action in between the teaching and non-teaching staff, the Managing Committee and the District Inspector of Schools concerned. It provides that on the application of the concerned employee the Managing Committee will finalise the amount, and thereafter will forward the papers to the District Inspector of Schools concerned about refund of the excess amount, who in turn will intimate the Managing Committee as well as the employee concerned the actual amount as to be refunded and thereafter the payment to be made. In the instant case, it is true that petitioner's application has been opposed by the State respondents as well as by the school authority taking a plea that due to non-refund of the excess amount as drawn, extension of service for 4th and 5th terms was not approved, but from the affidavits it appears that nowhere the aforesaid respondents have disclosed that the Managing Committee duly intimated the petitioner about the excess amount and forwarded the papers to the District Inspector of Schools concerned for his necessary approval directing the petitioner to refund the excess amount. The District Inspector of Schools also has not disclosed the same in the affidavit. Hence, it appears prima facie from the records that so far as the refund of the excess amount is concerned, the petitioner only cannot be blamed, as the other two authorities, the Managing Committee and the District Inspector of Schools concerned also did not act in terms of the said circular which casts a responsibility to intimate the petitioner. Hence, it appears that non-refund of the excess amount to the tune of Rs. 57,000/- and odd, in the instant case has been caused due to the failure to act as per Circular by all the parties, namely, the petitioner, the State respondents as well as the Managing Committee of the school as they did not follow the procedure properly.

3. The memo dated 28.12.95 is relevant for adjudication of this case, and as such, the same is quoted in extenso:

"The undersigned is directed to refer to Memo No. 59-SE(S) dated 17.4.95 and Memo No. 128-SE(B) dated 18.9.95 and to say that in pursuance of the judgment/order passed by Hon"ble Mr. Justice S.R. Misra in C.O. No. 19564(W) of 1995 on 5.12.95/6.12.95, certain modifications of the above said two Government orders are considered necessary.

2. In the circumstances, the undersigned is directed by the order of the Governor to say that the teaching and non-teaching employees who exercised option to revert to the Pre-1986 scale of pay within the period stipulated in G.O. No. 196-Edn.(B) dated 27.4.92 as subsequently extended by the Calcutta High Court,

that is, on or before 7.8.92 and who are drawing salaries on the basis of Pre-1986 scale of pay, but have not refunded the excess amount drawn by them so far, are hereby given the last chance of refunding the said excess amount by the 28th day of February, 1996. On such refund being made by such teaching and non-teaching employees, the concerned teaching and non-teaching employees will be considered, for extension or allowed to continue on extension, as the case may be, beyond 60 years.

3. There may be a few teaching and non-teaching employees who opted for the Pre-1986 scale of pay on the basis of G.O. No. 196-Edn.(B) dated 27.4.92 on or before 7.3.92, and are drawing salaries on the basis of Pre-1986 scale of pay, but have not returned the excess amount drawn by them in the revised scale of pay, i. e. the scale of pay introduced in G.O. No. -Edn.(B) dated 7.3.90 and have not attained the age of 60 years are hereby allowed to return the excess amount drawn by them prior to August 1992 or even the excess amount drawn on the basis of the said revised scale after August 1992, in both the class of cases, by the 28th day of February, 1996. On such refund of the said excess amounts, their cases for extension of services beyond 60 years of age will be considered by the respective authorities.

4. In regard to such refund, the concerned employee will approach the Managing Committee with the request to disclose the excess amount and the Managing Committee will indicate the amount of refund and forward the same to the District Inspector of Schools and the concerned District Inspector of Schools will finally disclose the amount sought to be refunded within 15 days from the receipt of the application of the concerned employee through the Managing Committee and the employee has to deposit the amount before the 28th day of February, 1996."

4. From the records it appears that before the memo dated 28.12.95 was published the petitioner was already enjoying his extended period of service by completing the 3rd term of extension as ended on 31.12.95. The Managing Committee of the school took a resolution, on being satisfied with physical fitness and mental alertness of the petitioner, allowing the 4th term of extension and the papers were referred to the Office of the District Inspector of Schools concerned and simultaneously the petitioner was allowed to work in the school to discharge his function as Headmaster to complete 4th term of extension. The petitioner completed 4th term of extension on 31.12.96 by performing duties. From the decision of the District Inspector of Schools concerned, which is annexed in the affidavit in opposition filed by the Headmaster of the school, it appears that the petitioner signed the attendance register and performed duties upto 26.2.97 and received salary upto February 1996. It is the case of the petitioner that after 26.2.97, the Managing Committee, by force restrained the petitioner from performing duties and had taken steps to appoint a Teacher- in-Charge and ultimately the petitioner could not discharge his duties. The resistance as made by the Managing Committee was solely based on non-refund of the aforesaid

amount of Rs. 57,000/- and odd, being the excess amount as drawn in the revised scale of pay before the petitioner reverted his position to the old scale. From the records, it further appears that the petitioner moved a writ application before this Court, being C.O. No. 20815(W) of 1995 challenging the Government order directing refund of the excess amount as drawn as per ROPA 1990, but this application was dismissed on 20.09.95 and the petitioner preferred an appeal, being F.M.A.T. No. 3913 of 1995 and the same was dismissed for default on 17.11.97. Hence, it appears that a lis was pending in Calcutta High Court on the issue that excess amount as drawn by the petitioner was not refundable by taking different points, including equal pay for equal work doctrine. Challenging the aforesaid memo dated 28.12.95 as well as the other memorandum directing refund of the excess amount as drawn in the revised scale of pay before reversion to the old scale of pay and praying for identical pay scale of all the teachers irrespective of their tenure of service upto 60 years or 65 years, several writ applications were filed before this Court including writ application, being C.O. No. 4661 (W) of 1995 (Dwijen Roy and Ors. v. Director of School Education and Ors.). By the order dated 16.8.96, N.K. Batabyal, J, passed an interim order restraining the respondents from realizing the excess payment in terms of ROPA 1990. That writ application is still pending before this Court and as yet it has not been adjudicated. In the said writ application many teachers joined along with their association. Hence, it appears that on the issue of refund of excess amount a final decision was not reached when the petitioner was completing 5th term of extension of service. The main issue of this writ application is whether in the event of non-refund of the excess amount a teacher who had already opted for the old scale of pay with a right to continue in the service upto the age of 65 years upon having extension of service on year to year basis, would be denied benefit of such extended service ?

5. To answer that issue different factors are to be considered. Before introduction of the revised pay scale by ROPA 1990 all the teachers were getting their respective salaries and all allowances in terms of ROPA 1986 as well as ROPA 1981. All the teachers of secondary and higher secondary institutions working in different schools which is controlled and managed by the Rules of Management of Recognised Non-Government Institutions (Aided and Unaided) 1969 {hereinafter for brevity referred to as the said Rules of 1969} got a statutory right. Under the said Rules of 1969 to serve the institutions upto the age of 65 years after reaching the age of superannuation 60 years subject to the condition that the Managing Committee would be entitled to decide the physical fitness and mental alertness of the teacher concerned, to allow such extended period of service. All the teachers accordingly were getting their salaries, allowances and service benefits irrespective of their retirement from service either reaching the age of superannuation or by serving upto 65 years on the extended term of service. But for the first time by the circular letter under ROPA, 1990, a change was made whereby and whereunder revised pay scale of 1990 was allowed to be availed by those teachers who would opt to be superannuated at the age of 60

years and who would forego their right to pray for extension of service, on year to year basis upto the age of 65 years in terms of Rule 28 of the said Rules of 1969. By this process, two pay scales were introduced, - one for the teachers who would be agreeable to retire at the age of 60 years waiving the right to pray for extension, which is termed as revised pay scale of 1990 and the other teachers who retained their right to have the extension of service upto 65 years opting the old pay scale, that is, pre-revised pay scale of 1990. By this process, a difference in pay scales was introduced by categorising two types of teachers. Different Court cases were moved by the teachers' association, including West Bengal Headmasters' Association challenging the legality and validity of the Government circular letter and the memorandum aforesaid under ROPA, 1990 and when such matter was pending before this Court, by the interim order dated 18th July, 1990, a Division Bench of this Court presided over by the Hon'ble Chief Justice sitting with Hon'ble Justice S.K. Sen (as His Lordship then was) in F.M.A.T. No. 1425 of 1990 along with C.O. 6605(W) 1990 allowed the teachers concerned to file option by putting their objection, if any. Interim order reads thus :

"(i) The option in terms of the impugned memorandum dated March 7, 1990 shall be exercised subject to the order which may be passed on the prayer for interim relief and/or the writ petition, as the case may be, and without prejudice to the rights and contentions of the parties and persons when they claim to represent such option will be exercised on or before August 1, 1990.

(ii) The exercise of such option shall not, however, prevent the consideration of the cases for extension of service of those who attain the age of 60 years during the pendency of the consideration of the prayer for interim relief and/or the decision of the writ petition, as the case may be.

(iii) In case of persons who fall within the purview of paragraph (ii) above the case for extension shall be decided as if the option to retire at the age of 60 years had not been exercised the term of extension of service, if any, granted shall, however, be co-terminus with the date of the order which may be passed on the prayer for interim relief and/or the direction in that regard given in such order and/or the decision of the writ petition, as the case may be, and it shall for all purposes be subject to the directions which the Court might issue in the final judgment rendered in the writ petition."

6. By this process, at that time many teachers opted for the revised pay scale with objection. The appeal and the writ applications aforesaid were finally disposed of by the judgment dated 6th August, 1991 along with F.M.A.T. 1426 of 1990 by holding that teachers who opted for revised pay scale shall be deemed to have waived their statutory right under Rule 28 of the Management Rules, 1969, so far as their right for consideration of extension of the service upto the age of 65 years on year to year basis subject to physical fitness and mental alertness. The State Government was directed to give fresh opportunity to the teachers to exercise their option in terms of the aforesaid Government order on

7th March, 1990 for opting revised scale of pay. Subsequently, State Government invited a fresh options and simultaneously amended the Management Rule, 1969 by notification No. 1151-Edn.(S) dated 20th August, 1991 restricting provision of extension of service only to those teachers who had not opted revised pay scale as introduced with effect from 1st April, 1986 by notification of 1990 as aforesaid. The relevant provision of the said amendment reads thus:

"(iii) to extend, if it thinks fit, the service of any teacher of other employee, who was in service on the 31st March, 1981, but did not opt for the revised scales of pay introduced with effect from the 1st April, 1981; on a year to year basis beyond the age of 60 years being the age of superannuation, but not beyond the age of 65 years."

7. In the said judgment, the Division Bench directed that the teachers would not suffer due to a situation where the legal questions were not finally resolved as the matter was pending in High Court. In that view, direction was given that the teachers would be entitled to revert back to the old pay scale if they so desire to enjoy their right to discharge duties upto the age of 65 years on extended service by accepting the old pay scale subject to refund of the excess amount as drawn in the revised pay scale during the interregnum period when the matter was pending before this Court. The present case is also of that type. When the petitioner has already crossed 60 years of age and completed the 3rd term of extension, the aforesaid circular letter dated 28.12.95 was published fixing the last date of refund of the excess amount as 28.02.96. The refund of the excess amount is procedural aspect of the matter, but the substantive right is the right of a teacher to enforce the right to pray for extension of service till 65 years in the old pay scale, on fulfillment of condition of health as stipulated, even if for some time they enjoyed revised scale of pay when the matter was pending in the High Court. The substantive right of the teacher to enjoy the extended period of service cannot be curtailed and/ or abridged by the procedural law, namely, refund issue, even if there is any failure by the teacher concerned to refund the excess amount. It is a settled law that substantive right cannot be curtailed and/ or encroached upon by any procedural law. Further, it is a settled law that procedural law cannot subserve the substantive justice. Reliance may be placed in the case of *Raman Kutti v. Avar*, reported in (1994) 2 SCC 692, wherein the Apex Court held in paragraph 8: "Procedure is hand made of justice and unless the procedure touches upon the jurisdictional issue, it would be moulded to subserve substantive justice". In the aforesaid judgment, the Apex Court relied on the earlier judgment passed in the case of *K. Kalpana Saraswathi Vs. P.S.S. Somasundaram Chettiar*, . Furthermore, the Apex Court applied the doctrine of proportionality to conclude the finding that the procedural law cannot subserve the substantive justice in the case of *Kalipada Das alias Mahanto and Others Vs. Bimal Krishna Sen Gupta (Dead) by Lrs.*, . In a recent decision, the Apex Court has re-echoed the principle in the case of *Dhannalal Vs. Kalawatibai and Others*, , wherein the Apex Court held : "Procedural law cannot be allowed to betray substantive law by subordinating it to unnecessary complexity and

technicalities". The Apex Court further held that technicality alone ought not hold the field and justice oriented approach is the call of the day in the case of Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc., . The same principle has been followed in the case of M.S. Grewal and Another Vs. Deep Chand Sood and Others, , wherein in paragraph 28, the Court held : "Law Courts will lost its efficacy if it cannot possibly reopened to the need of the society - technicalities there might be, but the justice oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice".

8. Having regard to the aforesaid judgments, it appears that now it is a settled law that the procedural law cannot subserve the substantive justice and further it is a settled law that technicality alone ought not to hold the field, but justice oriented approach should be made by the Court.

9. In the instant case, it appears that due to the pendency of different litigations and the fate of the teachers to enjoy pay scales either revised or pre-revised, right of the teachers to enjoy extended service upto 65 years, were not finally determined or decided. During that juncture, the petitioner crossed the age of 60 years and on protest applied for reversion from the revised pay scale to the old pay scale to enjoy the benefit of extension of service. The petitioner completed 3rd term of extended service with necessary approval of the District Inspector of Schools and at this juncture the final date was fixed when the Us was finally decided by the aforesaid circular letter to refund the excess amount as drawn by. putting a condition that further extension of service would not be allowed to those teaching staff who are enjoying extended period of service unless such refund is made. The District Inspector of Schools applied the same very methodically in this decision as annexed in the affidavit-in-opposition of the school authority being his decision dated 16.2.98, whereby and whereunder though it was noticed by the District Inspector of Schools that the petitioner worked upto 26.2.97, that is first part of 5th term of extension and the petitioner got salaries upto February, 1996, beginning of the first part of the 4th term of extension, but rejected the prayer to accord approval of extension of service for the 4th and 5th terms solely on the ground that excess amount was not refunded by the petitioner upon making the petitioner's service for the 4th term of extension as already rendered in ashtray. As already held, the substantive right of the petitioner was the right to continue in service subject to physical fitness and mental alertness upto the age of 65 years upon having extension of service on year to year basis and enjoyment of old pay scale. The teachers who were enjoying old scale of pay were getting less pay packet than the teachers who opted the revised pay scale introduced by ROPA 1990. The teachers who opted for old pay scale, accordingly got the right to serve till 65 years, but such right being a substantive right, the only condition precedent of enjoyment of such right was the acceptance of old pay scale. The petitioner admittedly was enjoying old pay scale and such old pay scale was granted till February, 1996. Nobody has said that the petitioner was not mentally and physically alert, but the Managing

Committee took a decision allowing such extension of service. The only fault of the petitioner to suffer the rigour of non-approval of extended service for the 4th and 5th terms is non-refund of excess amount of Rs. 57,000/- and odd. I have already discussed this point and I have held that refund of excess amount is a procedural issue under the procedural law and any lapse of such procedural law cannot deprive the petitioner's substantive right to continue in service till the age of 65 years when admittedly the petitioner accepted the old pay scale, and admittedly the petitioner was physically and mentally alert and admittedly worked upto 1st part of 5th term. In that view of the matter, the decision of the District Inspector of Schools dated 16.2.98 though has been placed in the opposition of the school authority, but since the said decision is fouling the legal principle and encroaching upon the right of the petitioner, the same is not justified and accordingly is set aside and quashed though it has not been directly assailed in the writ application. Furthermore, this Court already held that such procedural law of refund of the excess amount was required to be followed by multilateral process and not by unilateral way as if the petitioner had the right suo motu to deposit the amount in the treasury. As already discussed, under the procedural law as framed, first the Managing Committee is required to calculate the amount and to refer the matter to the District Inspector of Schools for his necessary approval. After a nod in the positive way by the District Inspector of Schools, the same is to be informed to the petitioner as well as to the Managing Committee of the school by the concerned District Inspector of Schools by directing the teacher concerned to deposit the excess amount as fixed by the District Inspector of Schools in prescribed format. Such treasury challan is also to be signed and approved by the District Inspector of Schools. It appears from records that neither the Managing Committee of the School nor the District Inspector of Schools intimated the petitioner the actual amount that he was required to be refunded in terms of the procedure as already referred to and quoted, being Clause 4 of the aforesaid circular letter dated 28.12.95. Having regard to such position, it cannot be said that the petitioner is responsible for such non-refund. Had it been a unilateral action on the part of the petitioner to deposit the amount, surely law would have resisted the petitioner to some extent to enjoy his right, but in the instant case as the procedural law provides a multilateral action in between the employee, the Managing Committee and the District Inspector of Schools so far as refund of the excess amount, this Court is of the view that unless and until other parties confirm the amount, the employee concerned would not suffer if there is any lapse to refund the excess amount. In the instant case, for non-refund the petitioner has suffered. His retirement benefits have not been released and approval of 4th and 5th term of extensions have not been accorded.

10. Having regard to the aforesaid findings and observation this Court holds that the petitioner was legally entitled to have the extension of service upto the 5th term. The petitioner, since already worked in the school upto 28.2.97, being the 2 months period of 5th term extension and thereafter he was restrained to serve,

the petitioner is legally entitled to be declared in service till the age of 65 years by completing his 5th term of extension of service. In that view, the respondents are directed to accord approval of the 4th and 5th term of extension of service of the petitioner within one month from the date of communication of the order. Simultaneously the respondents are directed to release all retirement benefits and arrears salaries of the petitioner for the extended period of service along with interest on the arrear salaries at the rate of 18% per annum from the date when the same was payable. Such payment be made within 3 months from the date of communication of the order. All the respondents are directed to prepare the pension papers of the petitioner by completing the service book showing the petitioner as Headmaster who completed service upto the 5th term of extension of service. However, the period for which the petitioner could not function, namely from 1.3.1997 to 31.12.1997, the petitioner would not be entitled to enjoy salary as the petitioner did not come before this Court agitating his grievance at that material time challenging the action of the Managing Committee by which he was restrained to perform duties. Such period be considered as on leave without any pay and/or such period be adjusted with leave available to the petitioner in accordance with the leave rules. The Managing Committee and the District Inspector of Schools are directed accordingly to decide the issue and thereby to grant leave for the said period by adjusting available leave. In the event such leave is adjusted, the petitioner is entitled to get the salary for the said period within 2 months with interest as directed. However, excess amount as drawn by the petitioner would be adjusted against arrear salaries as available to the petitioner. The respondents are accordingly, directed to release all retirement benefits within the said period of three months considering the petitioner as in service upto 65 years of age and by fixing the petitioner's pay scale as was available due to such extended period of service, in December, 1997.

11. The writ application is accordingly allowed.

12. Since all the respondents are present, the petitioner need not to communicate this order to the State and the Managing Committee. Those respondents will act in terms of the advice of their learned advocates.

Urgent xerox certified copy of the order, if applied for, be supplied expeditiously.