

(2001) 02 CAL CK 0039
In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction C.O. No. 14022 (W) of 1995

Samir Kumar Ghosh

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 16-02-2001

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2001) 2 CALLT 188

Hon'ble Judges : Pratap Kumar Ray, J

Bench : Single Bench

Advocate : Mr. Sumit Kumar Panja, Mr. Kipankar Datta and Mr. S. Paul, for the Appellant;

Judgement

P.K. Ray, J.—This writ application is filed praying fixation of the basic pay scale at Rs. 2,600/- Instead of Rs. 2,280/- as was being paid in the year 1994 to the petitioner along with the other prayers as mentioned thereto, in prayers "a" to "f" which are given below :-

(a) issue a writ in the nature of mandamus commanding the respondents authorities and/or each one of them to allow the petitioner to draw the basic salary of Rs. 2600/- on the scale of pay Rs. 1780/- to 3780/- with all admissible service benefits and to determine the condition of service in accordance with law and also to pay the arrear of salaries from 21st April 1987 till the date:

(b) Issue a writ/order/direction in the nature of Mandamus concerned and each one of them to act and proceed strictly in accordance with law;

(c) Issue a writ in the nature of Certiorari commanding the respondent authorities to call for entire records so that conscionable Justice may be administered:

(d) Issue Rule Nisi in terms of prayers (a), (b) and (c) above;

(e) Issue a mandatory order of Injunction directing the respondents and

particularly the respondent No. 2 to allow the petitioner to draw basic pay of Rs. 2600/- in the pay scale of Rs. 1780/- to Rs. 3780/- and also to pay the arrear of salaries from 21st April 1987 till the decision is taken and to fix the service condition of the petitioner:

(f) Such further and other order or orders direction, relief or reliefs or compensation, may be passed and/or given to your Lordships may fit and proper.

2. By the decision dated 17th September, 1982. service of the writ petitioner was approved with effect from 1st April, 1981 in the post of Assistant Teacher of Bhatpara Amar Krishna Pathsala, High School (hereinafter referred to as the concerned school) by the Additional District Inspector of Schools (SE). 24-Parganas. Petitioner was selected in the W.B.C.S. Examination, 1985 and got assignment in the post of W.B.S. I.R.S.--Grade-I. He was directed to undergo In-service training. He Joined on 9.3.1987. subsequently, tendered his resignation with effect from 21st April, 1987 and the same was accepted by the order dated 3rd December, 1990 by the Secretary. Board of Revenue, West Bengal on the basis of the application dated 14th September, 1990. Petitioner was not granted any permission by school authority to Join this post of State Government. On 18th April, 1987 the petitioner submitted an application to the Secretary of the concerned school praying to Join in the previous post with effect from 21st April, 1987. In this letter dated 21st April, 1987 appearing at page 27 of the writ application, the petitioner contended as follows:-

"With deep regret I beg to state that I, an assistant teacher at your school, absented myself from the school on and from 7.3.87. without prior permission of the authorities.

Now that I want to join my previous post on 21.4.87 Please accord me your permission to do so. I am repentant for what I have done and assure you for what I have done and assure you not to do so again in future. I further beg to state that I will agree to accept the scale of pay and service condition as will be determined by the authorities concerned as per G.A. Rules."

3. On the basis of the said letter dated 18th April, 1987. Secretary of the concerned school allowed joining of the petitioner at Initial stage of pay-scale, by the decision dated 18th April, 1987. Petitioner agreed to such as it appears from the endorsement with date 21st April, 1987 in the said letter.

4. In the letter dated 18th April, 1987, the petitioner expressed his repentant on the issue in question as he was absenting himself from the school on and from 9th March, 1987 without taking any permission. In the said letter, the petitioner further contended that petitioner was agreeable to accept any scale of pay and service condition as would be determined by the authorities. Petitioner even agreed to the condition imposed by the Secretary of the Managing Committee allowing his joining in the initial pay scale but subsequently, on 1st July, 1987, petitioner filed an application which is appearing at page 28 of the writ application. In this application petitioner prayed for fixation of his pay scale at

the rate as was being enjoyed by him before joining to the Board of Revenue, Government of West Bengal. The petitioner further submitted the representation in the year 1993 and the same was forwarded to the District Inspector of Schools concerned by the School authority. Such reference of the matter by the concerned school authority was on the basis of the petitioner's representation dated 2nd February, 1993, appearing at page 31 of the writ application. In this letter dated 2nd February, 1993, it is categorically contended by the petitioner that he could not intimate the school authority properly so far as the joining in the new assignment under the State of West Bengal as the petitioner was required to join in the said post immediately. It is further mentioned in the letter that the petitioner's first communication on such new assignment was made on 1st day of July, 1987 i.e. after the petitioner was allowed to Join by the Secretary of the Managing Committee on 21st April, 1987. However, in the writ application, the writ petitioner had annexed a letter allegedly dated 5th March, 1987, appearing at page 25 to contend inter alia that this letter was sent under Registered Post with A. D. to the school authority whereby and whereunder he prayed in details to grant necessary leave for Joining in the new assignment of State of West Bengal in the post in question, being W.B.S. L.R.S. -Grade-I. An endorsement has been made in handwriting over this letter "to this effect that the same was received by Registered Post on 6th March, 1987 by the school authority".

5. In the earlier date of hearing, this Court pointed out that this letter dated 5th March, 1987, possibly a letter prepared subsequently as the contention of that letter never was reflected in the communication dated 1st July 1987 as well as the communication dated 2nd February, 1993 being annexure at page 28 and 31 of the writ application. The writ petitioner prayed to file a supplementary affidavit to explain the matter. A supplementary affidavit also has been filed today. In the supplementary affidavit it is contended that the petitioner got the information of the said letter from the headmaster of the school. It is further contended that the headmaster of the school has handed over the original document being the letter dated 5th March, 1987 as was received by the school authority on 6th March, 1987. It is the case of the petitioner that in view of the long silence of the school since 1987 despite several representations as has been made even to the District Inspector of Schools concerned, the petitioner has no other alternative but to come to this Court for fixation of the pay scale as in view of the placement of the writ petitioner in the year 1987, in the Initial stage of the pay scale, petitioner's earlier service practically has been made null and void though the petitioner is an approved staff with effect from 1st April, 1981.

6. None appears for the Respondents to oppose this application and no affidavit-in-opposition has also been filed.

7. On careful scrutiny of all documents and papers as annexed to the Writ application, the following points emerge :-

(a) On 5th March 1987. writ petitioner was present in the school as he was

absenting from his own submission with effect from 9th March, 1987 but very surpluses, a letter was sent allegedly by Registered Post with A. D. to the school authority on that date though there was scope to hand over the said letter by hand service to the Secretary himself or to the headmaster.

(b) That in the letter dated 18th April, 1987 there was no whisper that the petitioner earlier submitted a letter on 5th March, 1987 praying leave to join the service of the State Government but on the contrary petitioner expressed the repentant for such unauthorised absent and agreed to accept any condition as would be imposed upon him including the fixation of the pay scale and such was accepted and agreed upon by the petitioner by his own endorsement on 21st April, 1987.

(c) That though the petitioner had no sanctioned leave with effect from 9th March, 1987 till 21st April 1987 from the school tn question but the petitioner worked in the post of the State Government.

(d) That even on 18th April, 1987 when the petitioner sought to join in the post in question again, petitioner's resignation letter was not accepted by the Secretary, Board of Revenue West Bengal.

(e) From the representation dated 2nd February. 1993, petitioner again expressed his sorry and contended that he could not Intimate the school authority about his joining to the other post in question and thereby prayed to condone such lapse. From the aforesaid communication and documents it is clear that the letter dated 5th March, 1987, is a letter which is nothing but a document manufactured by the petitioner himself. There is no sequence of the contentions of the petitioner expressed in the subsequent letters. Petitioner has come up with an unclean hand before the writ Court though under the rule there is no scope to work in different place at a time viz. In the school and the other service of the State Government but school authority had allowed to join. in my opinion, such was absolutely an illegal action on the part of the school authority but since same is not challenged by any one, accordingly this Court is not taking cognizance on the issue of legality or illegality on such joining in the year 1987 and continuation of the petitioner in the post in question. That is kept open for adjudication if it is challenged later on by any party. At the present moment for consideration of the matter of writ application, this Court is confined only to the prayers as made viz. fixation of the pay scale with continue by of his service from the year 1981. As this Court has already held that petitioner has not come with a clean hand, petitioner is not entitled to get relief as writ Court is a Court of equity. Beside the aforesaid points, there is another factor which is passing through the mind of this Court viz. the delay. The cause of action of this matter arose on 18th April, 1987 and the writ petitioner has come up with the writ application by filing writ application on 19th December, 1994, so there is an inordinate delay and there is no explanation of such inordinate delay. Relying upon the Judgment of the apex Court on this point in the case of Kamini Kumar Das Choudhury Vs. State of West Bengal and Others, . wherein there is a delay

for two years which also was not condoned by the apex Court, relying the decision reported in the case of State of Madhya Pradesh Vs. Bhailal Bhai and Others, , the decision of the case Hari Singh and Others Vs. State of U.P. and Others, , such inordinately delay cannot be condoned or excused by this Court. It is a settled legal position of law that though in strict sense limitation Act is not at all applicable in writ proceeding but it has been settled by several judgments of the apex Court that the writ application to be filed immediately and there may not be any inordinate delay to get any relief.

8. Considering the matter, there is 7 years delay and such delay is being unexplained delay, no relief can be granted in favour of the petitioner. Very surprisingly, on 1st July 1987, the petitioner prayed for restoration of his earlier basic pay scale and thereafter a long silence he awake from his slumber on 2nd February, 1983 and thereafter came to the writ Court in the year 1994. It is also a settled position of law that mere filing of the representation one after another will not cover the delay as is being caused. Besides the aforesaid aspects of the matter about delay as well as application of equitable principle, another factor is to be looked into viz. the doctrine of waiver estoppel and acquiescence. In this case, the petitioner agreed to accept the initial stage of pay scale not only by filing his representation on 18th April, 1987 but also accepting the decision of the Secretary by his endorsement made on 21st April, 1987 in the said letter appearing at page 27.

9. Hence, so it is clear that the petitioner has taken advantage of his lapse and to save his service, agreed to the proposal to join in the Initial pay scale and accordingly, petitioner is estopped to challenge the same on application of the doctrine of approbate and reprobate as well as the principle of acquiescence and waiver. In the Judgment State Bank of Patiala and others Vs. S.K. Sharma, , the apex Court while considering the application of the doctrine of waiver held that even a mandatory requirement can be waived if such requirement is in the Interest of the person concerned and not for public interest. In the instant case it is clear that petitioner agreed long back in the year 1987 to accept his Initial pay scale to save his service and accordingly, petitioner cannot turn round to challenge the matter after 7 years in the writ proceeding. Reliance is made to case of Graphite India Ltd. and Another Vs. Durgapur Projects Ltd. and Others, , case of Rajendra Singh. reported in 1996 (5) SCC 960.

10. Furthermore, applying the doctrine of acquiescence petitioner since not only has taken advantage to save his service foregoing his legal right, if any available to him qua departmental proceeding due to such unauthorised absence as well as misconduct to accept another job while in the service of the school Authority, but petitioner all through enjoyed such initial pay scale and increments thereof for the last 7 years before coming this writ Court, hence on application of the acquiescence principle petitioner is not entitled to get any relief. Reliance is placed on the Judgment in Rabiram v. B.D.O.. reported in AIR 1968 All 550, wherein a candidate without raising any objection to the election as held, took

part for the second time in the said election of that constituency. On 18th April, 1987 petitioner had full knowledge of his rights and wrong and he has chosen to accept the service of the school by way of his placement in the initial stage of pay scale. It is not the case of the petitioner in the writ application by furnishing sufficient pleadings that petitioner had no knowledge of his rights. On the contrary from the letter dated 18th April, 1987 filed by the petitioner while retaining his service of the State Government, petitioner in unequivocal term agreed to join the school service on condonation of lapses of unauthorised absence. Hence applying the waiver doctrine and on the basis of the principle set out in the judgment reported in *M/S. Motilal Padampat Sugar Mills v. State of U.P.* reported in AIR 1972 SC 621 paragraph 5 and 6, it is a fit case where doctrine of waiver is squarely applicable. Beside such, applying the doctrine of approbate and reprobate which is species of the doctrine of estoppel, the writ petitioner is not entitled to get any relief. Writ petitioner long back in the year 1987 to save his service and to avoid the departmental proceeding by the School Authority for his unauthorised absence and acceptance of service in other place, agreed to join the school service in the said pay scale. Hence now the petitioner cannot be allowed to go back. The principle of such doctrine has been enunciated in details in the *Prashant Ramachandra Deshpande Vs. Maruti Balaram Haibatti*, . which is relied upon in this case also by me. Applying the doctrine of approbate and reprobate and relying this judgment of the apex Court in the case *State Bank of Patiala and others Vs. S.K. Sharma*, corresponding *State Bank of Patiala and others Vs. S.K. Sharma*, , the case *R.N. Gosain Vs. Yashpal Dhir*, corresponding *R.N. Gosain Vs. Yashpal Dhir*, , the case *New India Assurance Co. Ltd. Vs. Smt. Shanti Bai and others*, . It is a fit case to apply this doctrine and petitioner accordingly is not entitled to get any relief.

11. After consideration of the entire matter in question I accordingly dismiss the writ application. Since the writ petitioner has not come before this Court with clean hand and after waiving his right long back in the year 1987 has come to the writ Court with false document to take a chance as if the writ Court is a Court where everything to be dumped for consideration, writ petitioner must pay cost. Accordingly, costs of Rs. 5000/- is imposed upon the petitioner which is to be deposited to the Registry within a month from date.

12. Since none has appeared for respondents, registry is directed to send the copy of the judgment to the respondent Nos. 2, 3, and 5 forthwith for compliance with the judgment.

13. Application dismissed