
(2008) 07 CAL CK 0024
In the Calcutta High Court
Case No : Writ Petition No. 15072 (W) of 2007

Satanu Tirki

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 23-07-2008

Acts Referred:

West Bengal Schools (Control of Expenditure) Act, 2005 — Section 14, 16, 20, 5(1), 5(2)

Citation : (2008) 4 CHN 224

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Debabrata Roy, for the Appellant; Tapabrata Chakraborty, for the Respondent

Judgement

Sanjib Banerjee, J.—The question which arises in this writ petition is as to whether the Government notifications conferring benefits on teachers acquiring additional qualifications in the subject relevant for the purpose of their instruction, continue to be operative notwithstanding the School Service Commission having been put into place and the West Bengal Schools (Control of Expenditure) Act, 2005 having come into effect.

2. The writ petitioner joined as an assistant teacher in the Social Science group at the Khoksa Binapani Taposili High School on September 8, 1997. The petitioner's appointment was approved by the District Inspector of Schools (Secondary Education), North Dinajpur, in December, 1997. The petitioner's appointment was approved by the District Inspector of Schools (Secondary Education), North Dinajpur, in December, 1997. The petitioner says that he taught history at the school and he decided to obtain a master's degree in the subject in addition to the bachelors degree that he already possessed. The petitioner obtained requisite permission to take his master's course examinations. The petitioner relies on a belated writing of October 28, 2005 issued by the secretary of the West Bengal Board of Education sanctioning study

leave on full pay to the petitioner for the period August 28, 2004 to September 28, 2004 for the petitioner to take the master's examinations.

3. On June 6, 2005 the managing committee of the school resolved to recommend the petitioner for higher scale of pay following the petitioner obtaining the higher qualification. It is not clear as to when the school forwarded the papers relating to the petitioner to the District Inspector of Schools but it is obvious that by June, 2005 the petitioner had obtained the master's degree. This undisputed fact is of some significance. The petitioner relies on his letter of June 20, 2006 issued to the said District Inspector requiring an early consideration of his case.

4. The petitioner's appointment predates the promulgation of the West Bengal School Service Commission Act, 1997. The terms of service that the petitioner cites as being applicable to him include several notifications and memoranda issued by the government. According to the petitioner, upon his case being recommended by the managing committee of the school to the said District Inspector of Schools, he is entitled, as of right, to obtain the higher scale of pay for having embellished his educational qualifications and it is such grievance which is at the heart of the present proceedings.

5. The petitioner relies on a memorandum bearing number 796-Edn(S) dated November 22, 1993 to canvass the right. The third of the four Clauses in such memorandum provides as follows:

3. It is now clarified that all such teachers of Secondary Schools and Junior High Schools including Madrasahs of various types with higher qualification of post-graduate degree or the equivalent in relevant subjects will get higher scales of pay in relaxation of the above noted staff pattern.

6. The petitioner says that the staff pattern at the school permits the petitioner to assert such right as there are two posts in the Social Science group in the school and the staff pattern permits one post to be occupied by a teacher having a post-graduate degree. He says that since the other teacher in the Social Science group in the school does not possess a post-graduate degree, the petitioner with his subsequent qualification is eminently suited to don the mantle of the post-graduate post in the relevant group. The petitioner relies on the New Revised Scale of Pay of Teachers and non-teaching Staff, Revision of Pay and Allowance Rules, 1998 (ROPA 1998) and cites Clause 12(3) thereof to further his cause:

12. Career Advancement Scheme and related issues.-

(1)....

(2)....

(3) All teachers, including physical education teachers and librarians of secondary schools who have improved/will improve their qualifications who were appointed

with higher qualification in the subjects or group relevant to their teaching/ appointment shall get higher scale of pay appropriate to their qualifications, with effect from the 1st January, 1996 or the date of improving qualifications whichever is later.

(4)....

(5)....

7. It is the petitioner's contention that since his appointment was prior to the School Service Commission being put in place and the said memorandum of 1993 and the conditions recognised by ROPA 1998 should govern his service, the subsequent enactment of either the West Bengal School Service Commission Act or the West Bengal Schools (Control of Expenditure) Act would be irrelevant in the context of his entitlement to higher scale of pay following his obtaining the master's degree.

8. The petitioner relies on a Division Bench judgment of this Court reported at 2008(1) CLJ 810 (State of West Bengal and Ors. v. Sauvik Ghosh and Ors.) in support of his entitlement and another Division Bench judgment reported at State of West Bengal and Others Vs. Md. Sohidullah and Others, insofar as the judgment relates to the case of Shyam Sundar Mohanto. A third judgment, reported at 2008(2) WBLR 720 (Baishali Banerjee v. State of West Bengal and Ors.), is also placed.

9. In the Sauvik Ghosh case the writ petitioner had been appointed as an assistant teacher of physical education and offered the graduate scale of pay. At the time when the petitioner in that case was appointed he had taken his final master's examination but the results had not been published. The Division Bench noticed the memorandum of November 22, 1993, ROPA 1998, a subsequent memorandum of July 13, 1999 which the State said had undone the effect of the 1993 memorandum, and another memorandum of March 8, 2000. The State had also cited the West Bengal Schools (Control of Expenditure) Act, 2005 in urging before the Appellate Court that the petitioner in that case was not entitled to the higher scale of pay. The Division Bench was of the view that the Act of 2005 which came into force on December 27, 2005 could have no manner of application as the teacher had acquired the post-graduate degree in 2001.

10. The opinion expressed by the Division Bench was that the Act of 2005 was prospective in its operation and that notwithstanding the West Bengal School Service Commission Act, the clarification relating to physical education teachers contained in the memorandum of March 8, 2000 and the reference therein to the memorandum of November 22, 1993 would show that even in the year 2000 (which was well after the West Bengal School Service Commission Act came into effect in 1997), the memorandum of November 22, 1993 continued to retain its force.

11. In the Md. Sohidullah case, one of the matters that fell for consideration was

that of a teacher by the name of Shyam Sundar Mohanto who was appointed in the pass graduate category. He had taken the first part of his masters examination at the time that he was appointed and completed the master's course successfully subsequent to his appointment. The only date that appears from the report is June 13, 2003 when the District Inspector of Schools sought a clarification from the Director of School Education after receiving the school's recommendation of Mohanto's claim for higher scale of pay. It is, thus, apparent from such date that Mohanto had successfully completed his master's course examination prior to June 13, 2003.

12. In the Baishali Banerjee matter, the same Division Bench of this Court took a similar view as it had taken in the Mohanto case and at paragraph 10 of the report the following view" was expressed:

10. Let us now examine the said Act of 2005 to find out whether there is any hindrance in the way of extending higher pay scale to the appellant. Appellant was appointed in 2001. She acquired post graduate qualification in 2001. Hence she was to be considered contemporarily. Her case was unnecessarily kept pending. Her prayer could not be considered to her disadvantage under the provisions of the said Act of 2005 in this regard. Learned Counsel appearing for the appellant has successfully drawn our attention to Section 16 wherein it is provided that notwithstanding anything contained in the said Act, the terms and conditions of service of a teacher shall not be varied to his or her disadvantage in the view of the commencement of the said Act.

13. The State contends that after the coming into effect of the Act of 2005, there is no room for allowing the benefit of higher scale of pay to teachers who possess or acquire a higher qualification than was necessary for the purpose of appointment to the post. The State says that, to start with, the fundamental premise that has to be considered is the staff pattern in a school. And, according to the State, even if the staff pattern permits the appointment of a teacher in the relevant subject with a higher qualification, upon the 2005 Act coming into effect, any benefit conferred by any Government memorandum earlier would stand nullified.

14. In this context, Sections 14, 16 and 20 of the said Act of 2005 are placed to urge that there is, no further scope for any teacher claiming any benefit under the November 22, 1993 notification. The cited Sections may first be noticed:

14. (1) Every teacher of a school shall, if appointed in the post of Undergraduate teacher category, be entitled to draw pay in the scale of pay in which he is appointed and shall not be entitled to claim any additional increment or higher scale of pay for acquiring any qualification other than the qualifications specified for such post.

(2) Every teacher of a school shall, if appointed in the post of Graduate teacher category, be entitled to draw pay in the scale of pay in which he is appointed and shall not be entitled to claim any additional increment or higher scale of pay for

acquiring any qualification other than the qualifications specified for such post.

(3) Every teacher of a school shall, if appointed in the Honours Graduate or Post-graduate teacher category, be entitled to draw pay of Post graduate teacher category, upon acquiring Post-graduate degree, in the manner as may be specified by order.

16. Notwithstanding anything contained elsewhere in this Act, the terms and conditions of service of a teacher or a non-teaching staff in the employment of a school, immediately before the commencement of this Act, shall not be varied to his disadvantage in so far as such terms and conditions relate to the appointment of such teachers and non-teaching staff to the posts held by them immediately before the commencement of this Act.

20. The provisions of this Act or any rules or orders made thereunder shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force or in any contract, custom or usages to the contrary.

15. The State contends that the Division Bench judgment in the Mohanto case and the subsequent judgment of the same Bench in the Baishali Banerjee case failed to take into account the exact import of the said Act of 2005 and particularly of Section 16 thereof. It is submitted that the last sentence at paragraph 10 of the report in the Baishali Banerjee case merely echoed a submission made on behalf of the writ petitioner without noticing the entirety of Section 16. The contention on behalf of the State is that though the opening words of Section 16 refer to the terms and conditions of service of a teacher, what is saved by that Section are only the terms and conditions relating to the appointment of such teachers. The State argues that only the appointment was saved as u/s 5(3) of the said Act any appointment made by a school in contravention of Section 5(1) or 5(2) of the Act would be void. The State contends that Section 16 protects the appointments made prior to the Act of 2005 coming into effect as appointments made in contravention of the procedure recognised in Sub-sections (1) or (2) of Section 5 could otherwise be contended to be void.

16. The State submits that the judgments rendered in the Md. Sohidullah case insofar as it related to Mohanto and in the Baishali Banerjee case are contrary to the statute and in conflict with another Division Bench judgment rendered in the Tarak Chandra Roy case. The State says that the judgment in the Sauvik Ghosh case is also in conflict with the Tarak Chandra Roy judgment.

17. In the unreported judgment of a Division Bench of January 17, 2008 in WP No. 14319 (W) of 2003 with CR 11204 (W) of 2001 with MAT 568 of 2007 (Tarak Chandra Roy v. State of West Bengal and Ors.), the following question referred by a Single Judge was taken up for consideration:

After the School Service Commission Act, 1997 came into force would the appointees get the benefit of the higher scale of pay despite being interviewed

and selected in pass category. (Page 2)

18. In that case the petitioner was appointed on March 23, 1999 as an assistant teacher in physical education and applied on September 27, 2001 for grant of the post-graduate scale of pay on the basis of his enhanced qualification in the relevant subject. Such representation was not decided which led to a writ petition being instituted which was disposed of by directing the managing committee of the school to pass a reasoned order after hearing. The school recommended the claim of the teacher to the District Inspector, but the claim appeared not to have been accepted though there was no specific rejection thereof. In such context, the Division Bench opined as follows:

We have considered the submission made by the learned Counsel. In our opinion, the petitioner being an appointee subsequent to the promulgation of the West Bengal School Service Commission Act, 1997 cannot be given the benefit of Circular dated 22nd November, 1993 and 8th March, 2000. Petitioner having been appointed as Assistant Teacher pass category can only get the pay scale specified by the commission for that post. Even otherwise the benefit of Circular dated 22nd November, 1993 and 8th March, 2000 would not confer any vested right upon the Assistant Teachers. No such right has been protected under the West Bengal Schools (Control of Expenditure) Act, 2005. In view of Section 14 of the 2005 Act no graduate category teacher is entitled to claim any additional increment for acquiring any qualification than the qualifications specified for such post. The provision in Section 16 would not be applicable to aid the claim of the petitioner as by virtue of Section 20 of the 2005 Act the Circulars and orders existing previously stand abrogated. That being the position of law, the petitioner would not be entitled to claim higher scale of pay. We, therefore, dismiss the writ petition. (Pages 5-6)

19. The State submits, on the authority of a Supreme Court judgment reported at 2008 2 SC 201, that when conflicting judgments appear to have been made by Benches of coordinate strength, the issue in conflict should be referred to a larger Bench.

20. What is now to be seen is whether there is any conflicting view apparent from the four Division Bench judgments. In the Sauvik Ghosh case and the Md. Sohidullah relating to Mohanto, the teachers had obtained their additional qualification prior to the Act of 2005 coming into effect. In the Baishali Banerjee case, it does not appear from the report as to when the teacher in that case obtained her master's degree. In the Tarak Chandra Roy case the teacher was appointed under the procedure laid down by the School Service Commission and though the question framed by the Single Judge and referred to the Division Bench was wide in the manner in which it was worded, the Division Bench chose not to give any specific answer to the question. The answer to the issue, in so far as it is relevant for the present context, is, however, apparent from the reasoning. The ratio in the Tarak Chandra Roy case is that an appointee subsequent to the promulgation of the West Bengal School Service Commission

Act could not get the benefit of any previous circular after the Act of 2005 came into effect. It was found that by virtue of Section 20 of the Act of 2005 the circulars and orders existing previously stood abrogated.

21. The judgment in the Md. Sohidullah relating to Mohanto does not indicate the date of Mohanto's appointment. In the absence of the relevant dates, which are crucial in a matter of such nature, appearing in the Md. Sohidullah case relating to Mohanto and Baishali Banerjee case, it cannot be said with certainty as to whether such judgments are in conflict with the ratio in the Tarak Chandra Roy case. What can be said with certainty, however, is that there is no conflict, apparent or otherwise, between the judgments rendered in the Sauvik Ghosh case and the Tarak Chandra Roy case. Sauvik Ghosh had been appointed prior to the West Bengal School Service Commission Act being implemented and obtained his master's degree prior to the Act of 2005. Tarak Chandra Roy was appointed under the School Service Commission and it was thereafter irrelevant as to whether he obtained the master's degree prior to the Act of 2005. The Sauvik Ghosh judgment and the Tarak Chandra Roy decision can coexist without any conflict since in the one case the appointment was prior to the School Service Commission being put in place and in the other it was an appointment made by the School Service Commission.

22. On a reading of the Sauvik Ghosh and the Tarak Chandra Roy cases in the light of Sections 16 and 20 of the Act of 2005, it is possible to contend that if a teacher has been appointed by the School Service Commission or if a teacher has obtained higher qualification subsequent to the Act of 2005 coming into effect, such teacher, in either case, may not be entitled to claim any benefit under the November 22, 1993 memorandum or under ROPA 1998. The Sauvik Ghosh judgment recognises that the Government has power to issue orders and lawful orders would have the force of law (paragraph 28) and it also finds that the Act of 2005 would not have retrospective operation.

23. In the Tarak Chandra Roy case the Division Bench found that all previous Government orders on the matter lost all force by virtue of Section 20 of the Act of 2005. The logical corollary following the ratio of the two judgments would be that a teacher appointed by the School Service Commission would not be entitled to the benefits conferred by orders standing prior to the Act of 2005 coming into effect; and, if a teacher obtained a higher qualification after the Act of 2005 came into effect such teacher would not be entitled to claim a higher scale of pay. But such questions do not arise in the present case and the present matter does not require either a more detailed probe or a definitive answer in respect of such issues.

24. The petitioner here was not appointed by the School Service Commission for him to be now found ineligible to obtain higher benefit under the memorandum of November 22, 1993 or ROPA, 1998 in line with the ratio in the Tarak Chandra Roy case.

25. The case at hand appears to be covered by the Sauvik Ghosh dictum that if a teacher appointed prior to the School Service Commission being put in place obtains a higher qualification prior to the Act of 2005 coming into effect, the benefit conferred by the memorandum of November 22, 1993 and ROPA, 1998 has to be conferred on such teacher.

26. It is on such facts that the petitioner here succeeds. The District Inspector of Schools will immediately process the recommendation made by the school in June, 2005 and accord the higher scale of pay to the petitioner with effect from such date as the petitioner is entitled to in terms of the memorandum of November 22, 1993 and ROPA, 1998.

27. A writ of mandamus do issue accordingly. WP No. 15072 (W) of 2007 is allowed but without any order as to costs.

28. Urgent certified photostat copies of this judgment, if applied for, be issued to the parties upon compliance with all requisite formalities.