
(1980) 07 CAL CK 0026
In the Calcutta High Court

Shyamlal Mistri

APPELLANT

Vs

University of Calcutta and Another

RESPONDENT

Date of Decision : 18-07-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 141, 47

Constitution of India, 1950 — Article 226

WEST BENGAL COLLEGE TEACHERS (SECURITY OF SERVICE) ACT, 1975 — Section 3

Citation : 84 CWN 762

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Advocate : Arun Prokash Chatterjee and Sipra Sarkar for University of Calcutta, for the Appellant; B.N. Sen, S.P. Majumder and S.K. Kundu, for the Respondent

Final Decision : Dismissed

Judgement

Sabyasachi Mukharji, J.—This is an application which was filed on 2nd of March, 1979 on behalf of the University of Calcutta and Inspector of Colleges for reviewing or re-considering the order passed by this Court on 31st of January, 1979 and also for restoring the application which resulted in the said order to be heard on its merits. Now, in order to appreciate this application one has to go back to the background, It appears that the said order dated 31st of January, 1979 which is being asked to be re-considered and recalled was passed in an application under Article 226 of the Constitution filed by one Shyamlal Mistri, Principal, Chittaranjan College, against the University of Calcutta, the Inspector of colleges, University of Calcutta and Chittaranjan College through its secretary. The case of the petitioner was that the petitioner was the founder Principal of the said college and the petitioner is an M. A. of the University of Calcutta in Economics. The petitioner also asserted that he had taken post graduate diploma in Education in the year 1957, and in the year 1959 the petitioner had obtained M. Litt. Degree in Education from the Trinity College, Dublin being the 1st class first in position. The petitioner has also motioned certain teaching experience in his original writ petition which is not necessary to be reiterated here. The

petitioner asserted that the said Chittaranjan College was managed by a trust under the registered Deed of trust dated 14th September 1968 and the said college was duly affiliated to the University of Calcutta from the Session 1967-68, B.Com Part 1 Examination in 1969 and B.Com Part II Examination in 1970 and not earlier. The college was at first housed at the said school premises of Chittaranjan high School, Kasba, free of all costs and charges with right to use the school's furniture, equipments etc. The petitioner stated that the normal working hours of the school were from 11.00 A.M. to 4.00 P.M. whereas the normal working hours of the college were from 6.00 P.M. The petitioner asserted that as he was the Headmaster of the school he was appointed as principal designated to work for the college with effect from 1st July 1967. On the 4th of July, 1967 it was resolved by the Chittaranjan College that the petitioner should be appointed subject to the consent of the Chittaranjan School authorities as its Principal (Acting) and he be paid an honorarium of Rs. 251/- per month from the date he joined. Thereafter, according to the petitioner, the matter was reported to the Registrar of the University of Calcutta and the University had by certain letter asked for certain particulars regarding the subject in which the petitioner passed the M. A. Examination and such particulars were duly furnished. It was further stated that by the letter dated 26th of September, 1968 the Registrar of the University of Calcutta had written to the Principal regretting that his appointment could not be approved and requested the College to appoint a properly qualified whole time Principal. The Inspector of Colleges on November 6th, 1968 wrote to the Secretary enclosing a copy of such letter. By the letter there was correspondence between the College and the University and according to the petitioner by a letter dated 27th of July, 1971 the petitioner's appointment as Principal was approved by the University of Calcutta and such approval was acted upon and a resolution was passed on the 28th of March, 1974. The petitioner stated that such resolution was necessary as without such resolution the petitioner would not have been entitled to the scale of pay granted by the University Grants commission which is hereinafter referred to as U. G. C. There was certain increment of the petitioner's salary and according to the petitioner in the said writ petition after more than seven years after getting approval on the 25th of August, 1978 the Inspector of Colleges wrote to the Principal to show cause why the approval should not be withdrawn and the Secretary replied by his letter dated 29th of August, 1978. There were certain other points mentioned in the said petition and the petitioner has narrated how because of the efforts made by the petitioner the college had improved. But by a letter dated 22nd of December, 1978 the Inspector of Colleges has purported to withdraw such approval to the appointment of the petitioner as Principal of the College. It was asserted that such withdrawal was illegal and invalid. The grounds of such as assertion have been mentioned in the original writ petition of the petitioner. The petitioner prayed that the respondents should be asked to withdraw the said letter dated 22nd of December, 1978. By the said letter the Secretary of the Chittaranjan College was informed by the Inspector of Colleges that the approval accorded to the appointment of Shyamlal Mistry was hereby withdrawn and

appointment stood disapproved from the date of appointment of Sri Mistry. He further informed the Secretary of the College to show cause within a fortnight why the governing body of the college should not be superseded in consideration of the stand adopted by the governing body of the college in respect of the appointment of Sri Mistry.

2. Upon these facts as mentioned hereinbefore the petitioner moved this Court and obtained a rule nisi on the 16th of January, 1979. I directed that the orders of superseding the college should not be given effect to but in the meantime the petitioner should not function as Principal. I must also mention that another application was moved in the Original Side of this Court by the Chittaranjan College and others against the University of Calcutta challenging the said letter dated 22nd of December, 1979 and the said application was also moved before me and I issued a rule nisi and granted an ad-in-term order. Both these applications came up ultimately for hearing before me on the 31st of January, 1979 after affidavits had been filed by the parties for the continuance of the interim order. Without considering the right of the University to cancel or recall the approval granted after lapse of such time I was of the opinion that it was not proper for one person to continue both as whole time Principal of a college at the same time a whole time Headmaster of a high School. It was my opinion that an attitude on behalf of the college which permitted continuance of such an attitude which further encouraged the Principal to do so would be a relevant factor in exercising jurisdiction under Article 226 of the Constitution. It was however pointed out on behalf of the college as well as on behalf of the Principal that he was being denied the benefit of U.G.C. grant by the Government the Principal was prepared to relinquish his position as a Headmaster. It was asserted that the University and the Government were wrongfully withholding the grant of such scale of pay to the petitioner even though the petitioner was entitled to the same under the law. Upon this it was felt that the appropriate order would be that the petitioner Shyamlal Mistry would give an undertaking to the court that the moment Government gave sanction to the University Grants Commission scale of pay to the Principal Chittaranjan College the said Principal would relinquish the post of Headmaster of Chittaranjan School. It was thereupon recorded in the order dated 31st of January, 1979 that Shyamlal Mistry gave such an undertaking. It was further recorded that upon such undertaking being given to this Court learned advocate appearing for the University Mr. De stated that the University withdraw the impugned order dated 22nd of December, 1978 written to the Secretary concerning Shyamlal Mistry. In that view the rule was disposed of on those terms and all interim orders and undertaking apart from those recorded in the said order were vacated, and the rule was disposed of on those terms. In view of the said order passed in C. R. No. 469 (W) of 1979 in the appellate side of this court the writ application moved in the original side by the Chittaranjan College being Matter No. 36 of 1979 was also disposed of by me on that date without passing any order.

3. Thereafter certain difficulties arose in implementing the said order it was

asserted. Incidentally it may be mentioned that an appeal was filed from my order and an application was moved before the Division Bench of this court and the application was ultimately dismissed. It was asserted that the application was not pressed because the order passed by me was by consent of the parties. It appears that there was some difficulty in implementing the said order and on 26th of April, 1979 the present application filed on 2nd of March, 1979 came up for consideration by me. Now, when the application in the appeal was moved the order of the Division Bench dated 12th of February, 1979 reads as follows :-

After hearing the learned Advocate for the appearing parties, we are of the view that the Government can give conditional sanction of the University Grants Commission scale of pay to the Principal, Chittaranjan School. In the circumstances, we do not think, we shall be justified in granting an interim order, as prayed for by the petitioner in this application. Moreover, it is doubtful whether an appeal is maintainable against the impugned order which was passed on consent of parties.

The application is accordingly dismissed.

There will be no order as to costs (later) After recess the matter was mentioned by Mr. Arun Prakash Chatterjee, Advocate for the University of Calcutta. It is stated by him that he has already intimated the learned Advocate on the other side that he would mention the matter before us after the recess. Further it is stated by him that he has instructions not to pass the application and press that the application may be dismissed for non- prosecution. We have already dismissed the application and one of the grounds of such dismissal is that the appeal against the impugned order is not maintainable. Mr. Chatterjee also submits that the appeal is not maintainable. In the circumstances, no further order need be made.

4. Thereupon, the application as I mentioned before came up before me. The present application for modification was filed on the 2nd of March, 1979 and the same came up before me on the 26th of April, 1979. It was represented that the petitioner Shyamlal Mistri had not given all the particulars though he denied not having given such particulars. Therefore, by order dated 26th of April, 1979 I directed that Shyamlal Mistri would give all the particulars in a form of a letter of his educational qualification and his teaching experience to the University of Calcutta with a copy to the learned advocate on record for the University of Calcutta within ten days from the date. I also directed the University of Calcutta to serve a copy of the application to the Director of Public Instruction and I gave direction for filing affidavit in respect of the application for variation filed on 12th of March, 1979. Ultimately the matter again came up for hearing before me on 31st of March, 1979. In that application, on 31st of May, 1979, I directed that in view of the fact that the question whether the petitioner was entitled to the U.G.C. scale of pay or not was pending, the Government should make a decision on that point having regard to the facts and circumstances of the case under which the petitioner had been functioning as the Principal and the approval of the

grant of the University to his appointment. I further directed that the Government should make its decision and give reason for so doing and if the Government was of the opinion that the petitioner was not entitled to the U.G.C. scale the Government should say so clearly and give reasons. It was, further, directed by me that if the Government wanted any further information or particulars to arrive at the decision the University and the petitioner should furnish those particulars and in considering those particulars if the Government wanted further elucidation the Government might give the petitioner an opportunity of being heard and I adjourned the matter for three months. During the hearing it was represented orally by learned advocate for the petitioner Shyamlal Mistri that both the Government and the University were being instigated by a dismissed teacher of the college and he was instrumental in initiating the move for disapproval of Sri Mistri after lapse of such a long time and it was submitted that it would be very difficult in the present situation for the petitioner to obtain the grant of the U.G.C. scale. At that time Mr. Sen appearing for the petitioner Shyamlal Mistri submitted before me that learned standing counsel appeal on behalf of the University was being instructed by the said dismissed employee; I found that the person who was pointed out to me by Mr. Sen was present in court was in fact actually instructing learned standing counsel who was appearing for the University. It is recorded in the minutes of the order dated 31st of May, 1979 that one Mr. Saroj Banerjee who was present in Court and the learned standing counsel took instructions from him on some points. I enquired of Sri Chatterjee whether the University had authorized this gentleman to instruct him or not, Mr. Chatterjee stated that there was no such authority in favour of the gentleman. I further recorded that it appeared from the appearance of this gentleman on the different dates that this gentleman Sri Saroj Banerjee was taking a great deal of interest in this litigation. I was of the opinion that it was not proper for counsel or lawyer appearing for statutory authority to take instructions from such persons. The views that I expressed and the submission that were made on that occasion were recorded in the minutes of the order dated 31st of May, 1979. Thereupon, it appears from the order dated 29th of August, 1979 was also of the 18th of December, 1979 that time was obtained for the Government to make the report as directed by the first order. Thereupon, as there was change in the determination of the Benches taking up different matters this application came up for hearing before Mr. Justice Deb as well as Mr. Justice B. C. Roy respectively and their Lordships having declined to take this matter if was heard by me.

5. A letter was produced before me dated 14th of November, 1979 enclosing the report made by Dr. N. R. Kar, Director of Public Instruction, Government of West Bengal, a copy of the said letter had been sent to Sri Arun Prokash Chatterjee as he had written to the said Director for expediting the matter. In his report the Director had stated his reasons which it is not necessary for me to set out in detail- It concludes "in view of the position stated in the forgoing paragraph the undersigned is directed by the order of the Governor to say that the Governor is

pleased to decide that the case for grant of U.G.C. scale of pay to Sri Shyamlal Mistri as Principal of Chittaranjan College could not be entertained. "On behalf of the applicants the University of Calcutta and the Inspector of Colleges it was urged that under the rules of the University a person could not hold two permanent posts at the same time. It was submitted that it appears from Sec. 3 of West Bengal College Teachers (Security of Service) Act of 1975 that appointment to the post of a teacher should be made by the governing body on the recommendation of the University and College Service commission to be constituted by the State Government or a Selection Committee provided that no recommendation of the University and College Services Commission or of the Selection Committee would be necessary with respect to filling up of any permanent or temporary vacancy in the post of a teacher for a period not exceeding six months. It was further submitted that u/s 3(i) of the West Bengal Universities (Control of Expenditure) Act, 1976 no college affiliated to a University in West Bengal excepting those specified therein should create any teaching post involving any financial liability without the prior sanction of the State Government. It was further provided that under Sub-section (2) of section 3 that no such college should after the commencement of the said Act appoint any person to any post without the prior sanction of the State Government. In the present application it was asserted that the undertaking of Sri Sen on behalf of the petitioner as recorded in the order dated 31st of January, 1979 was of no significance because such undertaking was dependent upon the action of the State Government and it was not bound either to sanction a teaching post involving the financial liability or to sanction the appointment of any person to any post teaching or non-teaching in the college and it was urged that the order of this Court on the basis of the said undertaking the University had practically withdrawn the impugned order without any consideration and the rule was made absolute without going into the merits of the case and without hearing the University and the Inspector of Colleges. It was asserted that there was valid reason for issuing the impugned letter dated 22nd of December, 1978 and there was no justification for those respondents to withdraw that impugned letter without a corresponding substantial submission of the petition to the rules or the disciplines of the University. It was asserted that counsel for the University gave consent to the form of the order as passed by me without scrutinizing the possible effect of the said order and it was not immediately realised that the result of the said order would in effect be that the petitioner would continue to hold the post for indefinite period and in the result it was prayed that the order should be modified. In the affidavit-in-opposition filed to that application for variation it was further stated that certain clarification of the order was sought for from me but I had refused such clarification. The order of Mr. Justice M. M. Dutt and Mr. Justice R. K. Sharma of the Division Bench dated 12th of February, was set out and it was stated that the said appeal as still pending. The petitioner has also stated the efforts that he made for grant of the U.G.C. Scale and the petitioner had asserted that the present petitioner for variation or review of the order is not maintainable and no in from. It did not disclose discovery of any new

or important matter of evidence which after the exercise of due diligence was not with in the knowledge of the respondents or could not be produced at the time of the original hearing. The petitioner had asserted that the said Act to which reference had been made did not apply to the petitioner as his approval had been granted tot his acting as principal prior to the Act coming into operation. The other allegations were also denied and it was stated that there was no violation of the principle or rule of the University in the petitioner not relinquishing the two posts in the facts and circumstances that have arisen. It was also pointed out that it was significant that the learned advocate or counsel who had appeared before me on 31st January, 1979 had not made any averment or any statement that he was in any way misled. In those circumstances, it was submitted that this application made for variation of the order was not maintainable.

6. Arguments were advanced before me as to why the petitioner could not continue in two posts. Now, there are certain factors which have to be borne in mind. In view of the order that I had passed in this Matter No. 36 of 1979 in the writ application filed on behalf of the college challenging the letter dated 22nd of December, 1978. If the order passed by me in the present writ application is allowed to be reopened then the Chittaranjan College would be seriously prejudiced because there is no application to recall that order or modify that order. The said order has already been drawn and completed and filed. I have no jurisdiction suo moto to recall that order.

7. In this case the appeal that has been preferred from my order dated 31st of January, 1979 is still pending. The question is, whether the trial court is competent to modify an order in respect of which an become infructuous because it was by consent and on that ground after the preference of the appeal and during the pendency of that appeal whether the trial court was competent to modify or alter the original order which is the subject matter of appeal" Are there any relevant factors under which under any provision of law the Court is competent to recall an order passed by consent of the parties, unless such consent was induced by fraud and undue influence or any other such factor and are there relevant evidence or averments of these factors in this case" Learned Standing Counsel drew my attention to the West Bengal College Teachers (Security of Service) Act, 1975 as well as the West Bengal Universities (Control of Expenditure) Act, 1976 and contended that the petitioner Sri Shyamal Mistri was not entitled in view of the facts and circumstances and of his educational qualification, to get U.G.C. grant. He referred me of the report of Director of Public Instruction dated 14th of September, 1979 dealing with the question of the eligibility of Shyamal Mistri to obtain the U.G.C. grant. It was, however, contended on behalf of Shyamal Mistri that these provisions would not be applicable to the petitioner because the approval of the University to the appointment of the petitioner as the principle of Chittranjan college had been accorded long prior to the coming into operation of these Acts. It was secondly contended that this particular feature of the aspect of the matter had not been

taken into consideration by the Director of Public Instruction in his report. It was, further urged that in view of the attitude of the State Government and the University the report of the Director of Public Instruction passed was otherwise illegal and invalid. In any event it was submitted that it was only on the basis of the petitioner getting the full U.G.C. scale of pay as a professor that the petitioner had given an undertaking to give up his appointment as the Headmaster of the school and it was only on the giving up the said under taking that the impugned order was passed by the consent. There was no fraud or collusion in the matter obtaining consent as such.

8. Reliance in this connection was placed on the decision of the Supreme Court in the case of Mohd. Yasin Vs. University of Kashmir, Srinagar and Others, where it was held that the review petition before the Supreme Court was not maintainable as there was no apparent error or mistake on the face of the earlier judgment. No new plea was also raised which could not have been raised with due diligence at the earlier proceeding. In those circumstances the Supreme Court dismissed the review petition. It was urged that the facts of the instant case are similar. No new facts have come into light which could no have been discovered with due diligence at the time of the order of 31st of January, 1979 was passed.

9. In the case of Shivdeo Singh and Others Vs. State of Punjab and Others, the Supreme Court set aside an order in favour of "B" at the instance of "A" which was passed in the absence of "B" originally. It was held that the powers of review which inheres in every Court of Plenary jurisdiction is also there in a Court exercising jurisdiction under Article 226 of the Constitution. For doing justice between the parties this can be done. While on the ratio of the principle of this decision one has to bear in mind the principle enunciated by the Supreme Court in the case of Babboo alias Kalyandas and Others Vs. State of Madhya Pradesh, . In that case it was emphasized that even though the Court exercising jurisdiction under Article 226 of the Constitution has power to rectify an error, but it must be on the grounds strictly provided in the CPC namely, an apparent mistake or a mistake or a view of fact which was not known or could not have been, with the due diligence, known at the time of passing of the original order. The limitations applicable to all courts exercising power u/s 47 of the CPC are equally applicable in respect of matters under Article 226 of the Constitution. In the instant case before me one has to bear in mind that the Government which is purported to have taken the view that so called U.G.C. scale of pay cannot be granted to the petitioner Shyamal Mistri on certain grounds has not applied for recalling the order. Indeed the Government cannot apply because the Government is not in any way affected by the original order.

10. In any case of J.C. Calstaun v. Pramathanath Roy 33 C.W.N. 883 the Division Bench of this Court reiterated that consent order could not be reviewed except on ground of fraud and that by way of a suit. In the case of Ponnammal v. R. Srinivasarangan AIR 1956 S.C. 162 at page 165 the Supreme Court in paragraph 9 of the Judgment reiterates that rights of the parties or the validity of the

compromise or any consent order must be determined by the state of affairs at the time when the original order which is sought to be reviewed was passed. In the case of *L. Kashi Nath v. Collector of Central Exercise* AIR 1979 All 129 the Division Bench of the Allahabad High Court observed that though Section 141 of the CPC made a provision of the CPC made a provision of the CPC non-applicable to applications under Article 226 of the Constitution but the fundamental principles behind the provisions would still be attracted in applications under Article 226 of the Constitution.

11. The position in law as I see it, is, that the Court has power in appropriate cases to do justice between the parties to recall an order provided it was found and that the original order was passed on certain mistake or on certain basis which was not there. In the instant case the undertaking of the petitioner was on the basis that the petitioner would be getting full pay as a professor and naturally should not therefore continue as a Headmaster of the school but if for any reason the petitioner is not entitled to or is not given that full scale of pay in accordance with the U.G.C. scale then it would be unfair to compel the petitioner to give up the position and in a case where the approval to the appointment of the petitioner had been given long prior to the coming into operation of certain provisions of the Act to which my attention was drawn, in such a case those provisions could not be attracted in the case of the petitioner. If that is the position, then, in view of the pendency of the appeal and in view of the fact that I cannot recall the order passed on the original side in Matter No. 36 of 1979, in the facts and circumstances of the case I see no ground for recalling the order passed by me. I say nothing about the legality, validity or otherwise of the purported order of the Government regarding the non-eligibility of the petitioner to get U.G.C. scale of pay.

In the premises, this application fails and is accordingly dismissed. There will, however be no order as to costs.