

(2006) 07 CAL CK 0052
In the Calcutta High Court

Case No : Civil Appellate Jurisdiction F.M.A. No. 1689 of 2003

Sri Kali Kinkar Chatterjee

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 26-07-2006

Acts Referred:

Citation : (2007) 1 CALLT 384

Hon'ble Judges : Vikash Sridhar Sirpurkar, C.J.; Nadira Patherya, J

Bench : Division Bench

Advocate : Dilip Chatterjee and Manojit Pal, for the Appellant; S.P. Ghosh, for the Respondent

Final Decision : Allowed

Judgement

V.S. Sirpurkar, C.J.—The appeal is filed against the dismissal order passed by a learned single Judge of this Court dismissing the writ petition filed by the original writ Petitioner, one Kali Kinkar Chatterjee. In that writ petition the writ Petitioner had sought to quash the order dated 25th April, 2000 whereby the O.S.D. and Ex-officio Deputy Secretary had directed that there would be no pay protection to the Petitioner, who had come from the non-Government unaided school to the Government aided school, since there was no provision for such pay protection.

2. A brief history would be necessary to understand the controversy. The Petitioner Kali Kinkar Chatterjee joined a school called "Bagha jatin School" which was a recognized and Government aided institution, as a teacher on 19th August, 1966. He continued in that school for twenty-three years when he applied for the post of Headmaster which had fallen vacant in a school called "A.K Ghosh Memorial School" which was a recognized but unaided school. This was a permissible exercise and accordingly the Petitioner left the aided school and joined the unaided school as a headmaster. While fixing his salary, the unaided school fixed his salary at the minimum pay of Rs. 940, this was also in keeping with the rules. At the time when he joined the A.K. Ghosh memorial School, his initial salary was Rs. 820/- as he had reached almost the height of his scale of

pay-due to his long years of service of twenty-three years. However, when he was selected as a headmaster his initial pay was to be treated as Rs. 940/-. He continued to be in A.K. Ghosh Memorial School as a headmaster and this was with the full approval of the authorities. The department then obviously knew the fixation of pay of the Petitioner at the minimum of Rs. 940. However, in the year 1996 the post of Headmaster of Bagha Jatin High School fell vacant. He accordingly applied for that post and was selected also. He was duly given his salary which he was getting as a Headmaster of A.K. Ghosh Memorial School and ultimately he retired from that school on 31st October, 2001. There has been a revision of pay scales of the Assistant Teachers and the Headmaster. The relevant revised scale was with effect from 1st January, 1996. At the time when his salary was fixed in A.K. Ghosh Memorial School he was given the pay scale of Rs. 2200-80-3000-100-4000 with higher initial start at Rs. 940/-. At that time his unrevised scale was Rs. 550-25-625-30-745-35-780-40-1220-50-1470. However, in this scale he was drawing at the basic pay of Rs. 820 because of his twenty-three years of service. In his case this scale abandoned and he was provided with revised scale which we have given earlier. At the time when he left A.K. Ghosh Memorial School, his monthly basic pay was Rs. 3200/- as per the revised pay scales. The Petitioner on 14th August, 1996 sent a letter to the school after he took the post of a Headmaster of Bagha Jatin High School for the approval and also requested for the fixation of the Petitioner's pay. However, that pay was not fixed by the authorities. The school authorities of Jadavpur Bagha Jatin High School sent a further letter dated 4th February, 1997 again requesting the fifth Respondent for fixation of the Petitioner's pay, but that was also of no avail. Ultimately the Jadavpur Bagha Jatin High School sent a third letter dated 7th August, 1998 but no reply was given to that letter also. It was in April, 1999 the District Inspector of Schools, Secondary Education, the fifth Respondent vide Memo dated 12th April, 1999 forwarded a copy of the service book of the Petitioner to the Director of School Education, the fourth Respondent for fixation of pay. This matter was referred to the Secretary, Department of School Education, Government of West Bengal for necessary action for fixing the Petitioner's pay and ultimately the Officer on special duty and Ex-officio Deputy Secretary under instruction from the concerned Ministry issued a Memo No. E(S)/5P-25/2000 dated 25th April, 2000 intimated that since there was no provision for pay protection, the proposal for fixation of salary after the pay protection was being rejected. The Petitioner came to this Court and challenged the said action on the part of the Government on various grounds.

3. The learned Judge has, however, rejected the writ petition solely on the ground that there was no provision for pay protection and that the Petitioner could not insist on the pay protection. Thus in the result the Petitioner's basic pay was not fixed treating it to be Rs. 3200/- in the scale of pay of Rs. 2200-80-3000-100-4000 and it is directed to be fixed at the minimum of the Headmaster's pay scale, which is mu"" lower than the Petitioner's pay which he earned while he was a headmaster at A.K. Ghosh Memorial School. We are told

that ultimately the scale of the Headmaster is now revised with effect from 1st January, 1996 at Rs. 8000-275-13500.

4. The learned Counsel appearing on behalf of the writ Petitioner of Appellant pleaded that the action of the State Government in not protecting the pay was wholly incorrect, arbitrary and while doing so, some relevant Government orders have been totally ignored. The learned Counsel argued in short that if it was in the knowledge of the State that the Petitioner's pay scale in A.K. Ghosh Memorial School was fixed at the minimum basic pay of Rs. 940/- and if that action was approved by the State while granting approval to the appointment of the Petitioner as an Headmaster in A.K. Ghosh Memorial School, there was absolutely no reason why the Petitioner should be deprived of his pay and should be fixed lower than that pay when he was selected and came back to Jadavpur Bagha Jatin School as an headmaster. It is pointed out by the learned Counsel that the shift from an aided school to the non-aided school or from non-aided school to the aided school was perfectly permissible under the rules and the department took no exception to the Petitioners being appointed as a headmaster of an unaided school though he was teaching at the aided school. Further the department has taken no exception again for the Petitioner being selected for the post of headmaster of the aided school. Under such circumstances, the department could not then deprive the Petitioner of his rightful salary or rightful pay protection on the spacious ground that there was no rule for the same.

5. The learned Counsel argues that it is an accepted principle in the service law that the salary of a person cannot be reduced to his disadvantage without there being any reason, such as disciplinary action against such person. The counsel argues that there was no such disciplinary action, on the other hand, the Petitioner was selected and the authorities concerned were well aware of the fact that the Petitioner was working as a Headmaster in a recognized school, though unaided school for it good long period of six years. If this was so, the Petitioner was entitled to the protection of his pay.

6. Another document relied upon by the Petitioner is a Government order dated 20th May, 1988 issued by the Secretary under the Orders of the Hon'ble Governor of West Bengal. According to which the service rendered by a teaching or non-teaching employee in unaided institution is directed to be counted towards the pensionable service provided such an employee retires or dies or is superannuated from the aided recognized institution. Heavily relying on this, the learned Counsel says that thus even the service rendered by the Petitioner for about six years in A.K. Ghosh Memorial School was liable to be counted for the purpose of pension and if that service was to be counted naturally the salary carried in that would also have to be counted and if this principle is applied it was in the fitness of the things that the Petitioner would be entitled for pay protection.

7. As against this the learned Counsel for the State suggests that the pay protection could be granted only if there is a rule to that effect and there was no

such rule available that the salary of the persons who come from the unaided school to the aided school can be protected. Unfortunately the learned Counsel for the State has not put before us the rules regarding the pay protection at all. As regards the Government Order dated 20th May, 1988, the learned Counsel says that there is a further explanation of that Government Order by another communication dated 19th April, 2006 offered by the Joint Secretary, Kolkata on 19th April, 2006 according to which, the service rendered by the Petitioner in the unaided school could not be taken into consideration as that school was only a D.A, getting school. The learned Counsel further says that unless the State Government is armed with a rule, there would be no question of giving the pay protection to the Petitioner.

8. On this rival contention, the question before us is as to whether the concerned authorities were right in denying the pay protection to the original writ Petitioner/Appellant herein.

9. The learned Trial Court has taken a view in keeping with the view expressed before him by the Government that since there was no rule for pay protection available, the pay protection could not be given and the Petitioner would have to continue on the reduced pay on his selection as a Headmaster of a recognized aided school.

10. Before we proceed to decide the matter on merits few principles would have to be borne in mind. The first such principle is the principle of equal work equal pay. There can be and is no dispute that as a Headmaster of a recognized unaided school, the Petitioner would be doing the same duties and was actually doing the same duties which a Headmaster of a recognized but aided school would be doing. It is not as if the headmaster of an aided school has more onerous duties or his duties carry more responsibilities than the headmaster in the recognized unaided school. They both do the same duties. If this principle is to be made applicable then a totally irrelevant circumstance like shift of the Petitioner from the unaided school to the aided school could not entail his loss by way of fixation in the lowest scale carried by the Headmaster of the aided school. If his duties did not change and if he did not suffer any punishment due to the departmental enquiry or otherwise, there will be really no justification denying the pay scale which would be ordinarily earned by a headmaster working in the aided school. The question is only limited to the shifting of a person from unaided school to the aided school. That circumstance, in our opinion, cannot deprive the concerned person of his rightful salary. It is true that the Petitioner/Appellant was shifted from unaided school to the aided school and it is also true that because of his selection as a headmaster in unaided school he became entitled to a better salary in a scale applicable to the headmaster.

11. It is nobody's case that when the Appellant shifted from Bagha Jatin School to A.K. Ghosh Memorial School, he was given an added advantage as an headmaster. He was in fact fixed at the lowest ladder of the scale applicable to the headmaster and was paid the same salary as per the scale applicable to the

headmaster then. There can be no dispute that the scale applicable to the headmasters was in respect of the aided schools, but the fact remains that the Petitioner was not given any added advantage and he was rightly fixed as if he had gone to an aided school from the unaided school. Now if this is so, there would be no point in reducing his salary merely because he has been selected in his own school from where he went to A.K. Ghosh Memorial School. That would be, in our opinion, not a correct exercise. We say this particularly because during the argument the learned Counsel for the Appellant put before us a memorandum No. 269-SE (Pry) dated 16th April, 1996. For the sake of clarity we would choose to reproduce the said memorandum.

Memo No. 269-SE(Pry) Dated: Calcutta, 16th April, 1996

To: The Director of School Education.

Sub: Protection and fixation of pay of Teacher of an approved Non-Govt. aided/ Govt.

Ref: Deputy Director of School Education (Basic)"s notes dated 29.11.94.

The undersigned is directed to say that the question of protection and fixation of pay of an approved teacher of a recognized Non-Govt. aided/Govt. sponsored educational institution who later joins another recognized Non-Govt. aided/Govt. sponsored educational institution in an approved post through proper channel has been under consideration of the Govt, for sometime past.

2. After careful consideration, the Governor is now pleased to allow protection and fixation of pay of a teacher of an approved Non Govt. aided/Govt. sponsored educational institution viz. Primary/ Junior High/Secondary/Higher Secondary school/Madrasah/ Primary Teachers" Training Institute, who is appointed as a Teacher/Head Teacher/Headmaster/Asstt. Headmaster/Lecturer/ Principal, as the case may be, in the same or higher scale of pay, against an approved post in another approved non-Govt. aided/Govt. sponsored educational institution in the following manner.

(a) When the new post does not carry duties and responsibilities of greater importance, the pay shall be fixed at the stage of the time scale which is equal to his/her in the old post, or if there is no such stage, at the stage next below the existing pay in the former post plus personal pay, equal to the difference between the old pay and the pay now allowed, to be absorbed in subsequent increases in pay in the new post.

(b) When the latter post carries duties and responsibilities of greater importance than those attached to the former post hold by the increment, the pay shall be fixed in the time-scale of the new post in the manner as laid down in para 7 of G.O. No. 492(6)-Edn.(B) dated 26.10.81 issued by this Department.

(c) The date of increment in the former case shall remain unaltered and in the latter case it shall be on completion of one full incremental period.

3. Fixation of pay as indicated in the proceeding para shall be made provided that there is no break-in-service between leaving the former post and joining the better post, reasonable journey-time being not treated as break-in-service.

4. The Dist. Inspector of Schools shall be required to move the Director of School Education for pay-fixation in the above manner.

5. This order issues with the concurrence of Finance Department Group T" (Pay) vide U.O. No. 2068 of Group P (pay) dated 4.12.95.

6. The Principal Accountant General, West Bengal and Finance Department of this Government are being informed.

7. All concerned may also be informed accordingly.

8. This order issues in cancellation of the earlier order in memo No. 1203-SE (Pry) dated 13.12.95.

12. One glance at this memorandum would suggest that if an approved teacher of a recognized non government, aided government sponsored educational institute shifts to another recognized non-government, aided government sponsored educational institution in an approved post through proper channel, then the pay of such incumbent in the earlier school is protected. Clause 2(a) would be the applicable clause in the present case. Since the Petitioner/Appellant has shifted from the non-aided school to the aided school in the same capacity as a headmaster after the shift, he did not have to carry the duties and responsibilities of greater importance which would have happened had he shifted back to Bagha Jatin School from the post of a teacher and not from Headmaster. The clause is very clear that the pay of such person shall be fixed at the stage of the time scale which is equal to his or her in the old post or if there is no such stage at the stage next below the existing pay in the former post plus personal pay equal to the difference between old pay and the pay allowed after the shift which is to be absorbed in subsequent increase in the pay in the new post. Undoubtedly this is applicable in cases of a shift from one aided school to another aided school but we do not see any reason as to why the same should not be applicable in case of the teachers or the headmasters shifting from non-aided school to the aided school. There shall be, however, only one circumstance in such cases to be ascertained and that is whether in the aided school the pay of such person was properly fixed or not. If the pay in the unaided school was properly fixed and he was drawing the same pay as his counterparts in the aided school, then there would be no reason why because of the shift from the non-aided school to the aided school the concerned person should suffer and should be placed at the lowest step of the pay scale applicable to such teachers. After all such persons would be doing the same duty, that he was doing. We have already reiterated that, the duties do not change merely because the school is unaided school. The teacher as well as the Headmaster has to perform identical duties as that of the aided school. At least it has not been shown or urged before us that there is any difference in the duties. Therefore, there will be no justification

whatsoever that the teachers shifting from one aided school to another aided school should enjoy the benefit of pay protection, but the teachers shifting from unaided school to aided school should be denied the benefit of pay protection even if their pay is properly fixed in the unaided school. In our opinion, the stand taken by the Government is completely unreasonable for this reason alone.

13. This is apart from the fact that by the Memorandum dated 20th May, 1988, the Governor has also acknowledged the services of a teacher in the unaided institution for the purposes of pension. If the service in the unaided school is to be recognized for the purposes of pension it cannot be so recognized unless it is linked with the pay which such incumbent has earned while in that service. In that way for the purposes of fixation of pension the pay of the concerned person would also be taken into consideration if his service in the unaided school is to be considered. There is thus a link between the two factors, one of them being the acknowledgement of the services in the non-aided school by taking it into consideration for the purpose of fixation of pension, and, two, the salary earned by such person in that unaided school. We have not been shown any pension rules to suggest that it is only the length of service which is to be considered de hors the pay earned by such person in the post in unaided school. Hence, we are of the clear opinion that the memorandum dated 20th May, 1988 would help the Petitioner even if it does not clinch the issue. In our opinion, that memorandum read with the memorandum dated 16th April, 1996 would certainly clinch the issue. We have shown that no discrimination can be made against a teacher merely because he had been serving in an unaided school, though a recognized school. The fact that the Government had recognized that school would speak volumes in terms of the duties of the person serving in such school by recognizing the Government to recognize the standard of that school. The fact that the school gives the standard education, that the school has proper infrastructure and that the school is not an unauthorized school, therefore, in our opinion, there should not be any discrimination between those who are serving in the recognized unaided school and those who are serving in the recognized aided school.

14. It was pointed out, though haltingly, that there is another order passed by the Joint Secretary dated 19th April, 2006 explaining or clarifying the Memorandum issued by the Governor dated 20th May, 1988. Reliance is placed on behalf of the Government on the following paragraph of the order dated 19th April, 2006:

It is reiterated again from the end of the Government in the School Education Department clearly that the period of service rendered in D.A. getting schools shall not be counted as pension able service in terms of G.O. No. 136-Edn(B) dated 15-5-85. It may further be clarified that if a teacher serves in one or more aided school first and, thereafter, in a D.A. getting school and at last he retires from an aided school his service in the aided schools prior to that D.A. getting school will not be counted for the pensioner benefits due to the "break-in-

service". He will get the pensioner benefits only for his service in the last school from which he will retire.

15. Relying on this, the learned Government Pleader suggests that since there was a "break-in-service" of the Petitioner when he shifted from Bagha Jatin School to A.K. Ghosh Memorial School, though as a headmaster it amounted to a "break-in-service" and, therefore, the services in A.K. Ghosh Memorial School may not be counted for the purpose of pension.

16. As a sequel to this logic the learned Government Pleader says that, therefore, he would not also be entitled to the pay protection. We do not agree for the simple reason that it is not our task presently to decide as to when his pension should be and how is it to be fixed and whether his services in A.K. Ghosh Memorial School is to be ignored treating the "break-in-service". That will be for the authorities who fixes his pension as to whether they would condone such break-in-service or whether they would hold it not to be a "break-in-service" at all. We are not concerned presently with the present issue. What we are concerned presently is as to whether the pay earned by the Petitioner/Appellant in A.K. Ghosh Memorial School which was a proper pay as per the scales applicable to the headmasters should be protected or the Petitioner should be allowed to be brought to the lowest scale treating as if he is becoming a headmaster for the first time. We have clarified already that such discriminatory treatment cannot be given to the Petitioner. We have also found that such discrimination would be a hostile discrimination particularly if his case is compared to the headmasters of an aided school shifting from one school to another school. This is apart from the fact that we have as a matter of fact found that the Petitioner as a headmaster of an unaided school was doing the same duties. His selection in the unaided recognized school was also approved by the Education Department. There was no irregularity in such selection. There was no difference even in the educational qualifications. They are also identical in cases of aided school as well as unaided school and that is an admitted position. The only difference is that one school is aided by the Government in the sense that the Government pays the salaries, in another the salaries are paid by the private management. But those salaries are also paid as per the scales applicable to the aided school. At least in the present case the Petitioner/Appellant was given the same salary which he would have earned, had he become the headmaster in an aided school instead of unaided school. Under the circumstances, we find no reason why the benefit of pay protection should be denied to the Petitioner/Appellant.

We would, therefore, choose to allow the appeal, set aside the judgment of the learned single Judge and allow the writ petition by holding and declaring that the Petitioner should be held entitled to pay protection. In that his pay which he was drawing in A.K. Ghosh Memorial School would be protected for the fixation of his salary as a Headmaster In Bagha Jatin School particularly in the light of the provisions of G.O. 269-SE(Pry) dated 16th April, 1996. Under the circumstances,

however, the Petitioner would not be entitled to the cost since we are told that he was getting the same pay actually. Needless to mention that that pay will not be held as an excess pay and will not be recovered from the Petitioner.

17. The appeal thus succeeds.

N. Patherya, J.

18. I agree.