

(2018) 09 CAL CK 0052

In the Calcutta High Court

Case No : Tander Of Mand Appeal No.1903 Of 2017 With Can 10513 Of 2017

St. Teresa's Secondary School & Ors.Vs Mrs. Hasi Sen & Ors.

Date of Decision : 20-09-2018

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 29, 30, 226

Citation : (2018) 09 CAL CK 0052

Hon'ble Judges : Dipankar Datta, J;Protik Prakash Banerjee, J

Bench : Division Bench

Advocate : Soumyo Majumder, Sanjay Kumar Baid, Arunima Lala Sengupta, Uday Chandra Jha, Maheswari Sharma, Ms. Tulika Roy, Tapan Mukherjee, Sougata Mitra

Final Decision : Dismissed

Judgement

PROTIK PRAKASH BANERJEE, J:

1. There is one important lesson that those teachers in service of a religious minority educational institution in West Bengal must take away from this

appeal. In a way it is a lesson that society has taught us as a part of the new â?? moralityâ?? of the consumerist society. Never protest against

injustice, for the management will find some way to punish you.

2. On its face, this is a straight forward appeal from a judgment and order dated October 26, 2017 passed in W.P. No.25680 (W) of 2017 [Hasi

Senâ?"vâ?"The State of West Bengal and Others]. By the said order, the writ petition was allowed to a limited extent. This order was passed in three

other cases which were heard analogously. These are W.P. No.25701 (W) of 2017 [Lourdes Mary Williamsâ?"vâ?"The State of West Bengal and

Others], W.P. No.25704 (W) of 2017 [Soumya Gargashâ?"vâ?" The State of West Bengal and Others] and W.P. No.25697 (W) of 2017 [Nalia

Aliâ?"vâ?"The State of West Bengal and Others]. The appellants herein appear

not to have preferred an appeal against the common order passed in these three other writ petitions. Besides, the preamble to the Memorandum of Appeal describes the appeal to be from an order dated September 26, 2017 when on the face of the copy of the order which accompanies the memorandum, it is from an order dated October 26, 2017. The court could have rejected the memorandum as being defective on this ground alone, but for reasons which should be clear from the discussion below, it thought it better to decide the matter on substance rather than on the form, though in law the order had achieved finality as against the appellants in the other writ petitions from which no appeal was carried.

3. The writ petitioner/respondent no. 1 (hereafter the writ petitioner) in this appeal and three other assistant teachers of the same appellant school, were agitating against the management of the appellant because they were not being paid the arrears of the benefits accruing to the assistant teachers under the Revision of Pay and Allowances, Rules, 2009, as implemented by the school as a dearness allowance getting school. The management was giving the current benefits but not the arrears, despite drawing dearness allowance from the State of West Bengal till January 2013, on the specious ground that if they had to pay the arrears from April 1, 2008 to March 31, 2009, over a period of three years in equal yearly installments, then they would have to create tremendous financial strain on the students and their families, who belonged largely to the middle class, by raising the fees. The appellant chose to forego its Dearness Allowance getting status without however, refunding the money it had drawn as dearness allowance from the State of West Bengal. The reasoning seems to be, lack of money was a reason not to obey the law. Be that as it may, because the writ petitioner and the other persons approached this Court without explaining the delay in doing so, though they prevailed before the learned single Judge in W.P.

No.15316 (W) of 2016 [Mrs. Hasi Sen and Others v. State of West Bengal and Others] by an order dated December 7, 2016, this Court was constrained to reverse the judgment by its decision dated September 19, 2018 in FMA 1372 of 2017.

4. However, the agitation I have referred to above led the management to initiate disciplinary proceedings against the writ petitioner/respondent no. 1 and the said other teachers. The learned single Judge has summarized this in the

following words: -

While the petitioners were working in the St. Teresa's Secondary School (hereinafter referred to as the said school) their services were

terminated under Rule 16(b) of the service rules of the said school. Challenging the said orders of termination, the petitioners approached this Court

and those writ petitions were analogously heard and disposed of by a common order dated 9th March, 2015. By the said order the impugned orders of

termination were set aside and leave was granted to the school authorities to initiate disciplinary proceedings against the petitioners and to complete

the same, in accordance with law and as early as possible. Pursuant to the said order disciplinary proceedings were initiated against the petitioners

through issuance of charge sheets dated 17th March, 2015. An enquiry officer was appointed but he did not supply the relevant documents as sought

for by the petitioners. Such action was protested against by the petitioners and subsequent thereto, the enquiry officer resigned and a second enquiry

officer was appointed. Such appointment of the second enquiry officer was again challenged. However, by an order dated 27th November, 2015 the

Court directed the authorities to conclude the enquiry within the month of February, 2016. After the enquiry, the show cause notices were issued on

24th February, 2016 proposing penalty of dismissal from service. The said notice was again challenged and the order passed by the Writ Court on 3rd

March, 2016 was appealed against by the school authorities. In terms of the order passed by the Hon'ble Appeal Court on 7th April, 2016 the

proceedings were again commenced from the stage of evidence. The enquiry report was thereafter served upon the petitioners on 28th August, 2017

to which they replied and thereafter the impugned notices dated 26th September, 2017 were issued.

5. From the said facts, which are matters of record, and which neither party could dispute before this Court, it is clear that the appellants, on

successive occasions, had failed to act in accordance with the principles of natural justice. They may have observed it, but only as a spectator and not

as a responsible employer or a disciplinary or inquiring authority.

6. In this situation, the management being the appellants, had issued individual notices to show cause to the writ petitioner and the other assistant

teachers, which were dated September 26, 2017. By these notices, the

appellants had asked the writ petitioner and the other assistant teachers to show cause within a fortnight from the date of receipt thereof as to why a penalty of dismissal from service shall not be imposed on them. It is an admitted position that the said notices were served on the writ petitioner and the other teachers at a time when the long vacations of this Court for the Puja Festival in 2017 had already commenced.

7. One of the recurring refrains of the argument of the writ petitioner "whether before the learned single judge or this Court" has been that the "The authorities have already made up their mind to dismiss the petitioners since they protested against non-payment of their legitimate dues and as such the impugned notices need to be interfered with at this juncture".

8. Initially, before the hearing was completed before the learned single judge, His Lordship had been pleased to note the submissions of the respondents therein (appellants herein) that the notices were merely to show cause and did not suffer from any infirmity nor disclosed any bias but the writ petitioner and the other assistant teachers had moved the respective writ petitions merely on the basis of an apprehension that they might be dismissed immediately after they replied to the said notices, and so the respondents submitted that the said writ petitioner and the other assistant teachers could not seek interference at that stage, particularly where there was an appellate forum.

9. These submissions of the present appellants (respondents before the learned single judge) weighed with the learned single judge until the occurrence of some very important facts after the institution of the writ petition(s). This appears from the following passage in the judgment impugned:

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"Heard the learned advocates for the respective parties and considered the materials on record. The competent authority upon considering the reply to the enquiry report has tentatively proposed to inflict a punishment and through issuance of the same no legally protected right of the petitioners has been infringed. A reasonable reading of the contents of the notice does not reveal that a reply to the same by the petitioners would be nothing but an empty formality and thus interference with the impugned notices at this stage, is uncalled for."

10. However, in the very next paragraph of the judgment impugned, the

following admitted facts were narrated: -

a. However, in the midst of hearing it has been brought to the notice of this Court that after waiting for a period of fourteen days from the date of

receipt of the impugned notices by the respective writ petitioners, namely, Hasi Sen, Lourdes Mary Williams and Soumya Gargash, the disciplinary

authority had passed final orders against them on 18th October, 2017. Let a copy of the same be kept on record. Along with the final orders cheques

towards the arrear subsistence allowance were also forwarded and the same have been encashed. Such fact has not been disputed by Mr. Jha.

b. It has been submitted on behalf of the school authorities that in respect of Naila Ali, as the said period of fourteen days from the date of receipt

of the impugned notice was not over on the date stipulated for the meeting of the Managing Committee of the said school, no final order has yet been

passed against her.

c. On the date the impugned notices were served upon the petitioners the puja vacation of the Hon'ble Court had commenced and the

petitioners filed the writ petitions before the Vacation Bench on 3rd October, 2017. Except the writ petition of Naila Ali, the other writ petitions were

affirmed on 3rd October, 2017 and Naila Ali affirmed the writ petition on 10th October, 2017. Thereafter the matters were mentioned before the

Vacation Bench and the same were listed on 17th October, 2017. However, the matters could not be taken up for hearing. Immediately after

reopening of the Court the matters were mentioned before the regular bench and were listed on 24th October, 2017. Thus, the petitioners had

challenged the impugned notices immediately upon receipt of the same.

11. Let me pause here for a moment. What do these facts show? The teachers of an educational institution administered by a religious minority,

sought what the law gave them as a right and when the school was drawing a benefit from the Government under the said law and was not passing

the benefit on to the teachers. The law gave them this right because the school was drawing dearness allowance from the Government but had not

discharged its duty to pay the arrears it was supposed to do. The management took advantage of a mandate by the authorities of the State of West

Bengal which was drafted in a slipshod manner, and gave up its dearness allowance prospectively, without refunding what it had got on that count.

When the writ petitioners, being less than properly advised, approached this Court without explaining the delay beyond the ordinarily reasonable period of limitation, ultimately this Court dismissed the writ petition in appeal.

12. It shows a management of a school, not being satisfied with withholding the benefits, then taking advantage of the Code of Regulations for Anglo-

Indian & Other Schools, 1993 (hereinafter the "AIS Code") and taking punitive action against its teachers who had dared to protest. A

management of a school, which is admittedly incensed enough against its assistant teachers for having wanted "more" like Oliver, thereafter,

chose to serve a notice to show cause why the teachers concerned should not be dismissed, yet again (because they had passed an order of dismissal

which was set aside by this Court, passed a further show cause notice to the same effect as before for the same allegations which was also set aside)

but served it on the writ petitioners within the period when this Court was closed and then, though the writ petitioners had affirmed and served copies

of their respective writ petitions on the appellants, and which were listed on October 17, 2018 before the Vacation Bench when it could not be taken

up, nonetheless chose to dismiss three of the four writ petitioners in the four writ petitions on October 18, 2018 because they had not replied to the

show cause notices, knowing they could not do so without making their writ petitions infructuous. They were listed before the regular bench

immediately on reopening of the court.

13. Looked at from this angle, it is possible to understand why some of the lower-tier Anglo Indian and Listed schools are considered, rightly by the

State of West Bengal, as money-making industries rather than educational institutions, where the students are exploited by being made to pay more

fees and the teachers who actually teach them are exploited by being paid less than that to which they are entitled. The AIS Code, while part of the

regulatory frame-work to ensure that the rights guaranteed under Articles 29 and 30 of the Constitution of India are not used as a loophole to mal-

administer, is a toothless tiger when the procedure prescribed is followed in letter but not in spirit.

14. Perhaps this is what prevailed upon the learned single Judge when His Lordship was pleased to record a

"From the records it is explicit that there had been a series of litigations

amongst the parties on and from the year 2013. The writ petitions preferred in the year 2013 were ultimately disposed of by an order dated 9th March, 2015. In the said order the Court had specifically observed that the petitioners shall be treated to be in service only for the limited purpose of completing the disciplinary proceedings against them, in accordance with law. From the orders passed in the subsequent writ petitions it appear that it had been the intent of the Court to ensure that the said disciplinary proceedings are disposed of as expeditiously as possible in consonance with the principles of natural justice.â??

15. Be it mentioned, that the learned single Judge was not holding by the impugned order that the writ petitioners shall be treated to be in service only for the limited purpose of completing the disciplinary proceeding. His Lordship was recording a specific observation of the writ court in the order dated March 9, 2015 in an earlier round of writ petition, that this was so. Therefore, if vincula juris between the parties was made to exist by an earlier order setting aside the earlier order of termination of service without disciplinary proceedings, which achieved finality, it could not be taken as a ground before this Court by the appellants against the present order impugned before this Court which the appellants have done. They are estopped by records, by their conduct and by the judgment aforesaid, which achieved finality.

16. In the above factual conspectus, as expressly recorded in the order impugned, His Lordship was pleased to direct as follows: -

a. â??In the said conspectus of facts, I am of the opinion that justice would be subserved in the event an opportunity is granted to the petitioners to reply to the notices proposing punishment upon extension of the time specified in the impugned notices. For such reason and on the said limited ground the orders dated 18th October, 2017 passed in respect of the petitioners, namely, Hasi Sen, Lourdes Mary Williams and Soumya Gargash are set aside. It needs to be noted that no final order has yet been passed by the school authorities against Naila Ali.â??

b. â??Accordingly, this Court directs all the petitioners to reply to the notices dated 26th September, 2017 positively by 17th November, 2017. Upon considering the said replies, the disciplinary authority shall pass the final order in respect of the petitioners, in accordance with law and as expeditiously as possible preferably by 15th December, 2017.â??

17. Against this, the grounds taken by the appellants may be summarized as follows: -

a. The order of termination dated October 18, 2017 is an appealable order, and hence the writ court ought not to have interfered with it because a statutory remedy exists.

b. The order of termination dated October 18, 2017 was not the subject matter of the challenge before the writ court.

c. The writ petitioner was retiring on October 31, 2017. The appellants gave the writ petitioner fourteen days to reply from receipt of the notice dated

September 26, 2017 to show cause against the proposed penalty of dismissal. The appellants waited until October 18, 2018 (when too this Court was

in recess due to the Puja Vacation) after it could not be taken up despite listing before the Vacation Bench on October 17, 2018, and thus dismissed

the writ petitioner since she had not replied to the notice to show cause. If the order impugned in the appeal remains, it will create an impossible

situation, for, the writ petitioner would retire "as she has" and by an order of the Court she will be deemed to be continuing in service, though no

disciplinary proceeding can be carried on against her because the employer-employee relationship ceased to exist after expiry of October, 2017.

d. Fair procedure was adopted by the appellants and therefore even on merits there was no call to set aside the order of termination.

18. So far as the grounds contained in paragraphs 17a and 17d are concerned, as I read it, the history of the litigations between the parties leads one to

an irresistible conclusion. This conclusion is that this Court has held time and again in matters between the parties, that the writ petitioner in the instant

case and the other assistant teachers in the other connected writ petitions from whose final orders no appeal has been carried, could not have been

dismissed without disciplinary proceedings, and that the disciplinary proceedings must be concluded expeditiously, but it has also held that the

appellants have not complied with the basic principles of natural justice, leading to successive attempts of the appellants to dismiss the writ petitioners

being set aside only on such grounds. The intention of the Court, in lis inter partes, which has been flouted time and again, was and is clearly that the

disposal of the disciplinary proceedings be done as expeditiously as possible in consonance with the principles of natural justice. This is exactly what

the learned single judge has been pleased to hold while setting aside the order of dismissal dated October 18, 2017 and issuing the directions impugned,

so that the writ petitioner and the other writ petitioners who did not get a chance to be heard in respect of something as serious as the deprivation of

their livelihood, got an effective and adequate opportunity of being heard.

Since this is a gross violation not merely of the basic principles of natural justice which amounts to a violation of Article 14 of the Constitution of India,

but also the right to livelihood, guaranteed under Article 21 of the Constitution of India, both rights under Part III of the Constitution of India, no

amount of encashment of terminal benefits would amount to waiver of these rights. The procedure by which the appellants chose to dismiss the writ

petitioner without considering that she could not reply to the notice to show cause without making her pending writ petition infructuous, and while

knowing it to be pending, could not be and was not fair. In that view of the matter, the ground I have summarized in paragraph 17d fails and must be

held against the appellants. Since I have already held that the above conduct of the parties shows gross violations of both the basic principles of

natural justice and the fundamental rights guaranteed to the writ petitioner under Articles 14 and 21 of the Constitution of India, mere availability of a

statutory remedy as taken in the ground I have summarized in paragraph 17a, cannot be an absolute bar to the writ court entertaining an application

under Article 226 of the Constitution of India. There are too many precedents on this point, once I have found so in the facts of the case, for me to

reiterate them. I would content myself with only one of them, being Whirlpool Corporation v Registrar of Trademarks reported in [1998] 8

SCC 1. So, this too is held against the appellants.

19. The effect of the aforesaid is necessarily to hold that the acts of the appellants are consequences of gross violation of the basic principles of

natural justice and also the fundamental rights of the writ petitioner. Their decision was based on a process which violated the basic principles of

natural justice. This was brought before the Court at the time of hearing and the conduct was admitted by the appellants, though they had their own

explanation of the matter. Both the parties had ample notice of this point, and argued on it - the appellants herein were not taken by surprise. They

had issued the termination orders, after all, and this was argued in their

presence when they did not appear to have objected to the said termination order of October 18, 2017 being made part of the attack, but had in fact argued that by encashment of the terminal benefits, the writ petitioner had accepted the order " which because of what I have held in paragraph 18 above being a gross violation of fundamental rights, cannot be sustained, since there can be no waiver nor estoppel against fundamental rights.

In that view of the matter, the order dated October 18, 2017 being a consequence of a nullity and itself a nullity, was very much on the table where the challenge was made and was in fact argued upon; in such view of the matter, the defect if at all, was of the learned advocate who did not choose to

use a supplementary affidavit or amend the writ petition to bring it on record. I would hold that this is one of those extraordinary cases where the rule

that ordinarily a party may not be allowed to deviate from his pleadings except by way of the well-known means of supplementation being amendment

of pleadings, may be departed from. For sustenance I rely upon S.S. Sharma and Others "Union of India and Others reported in AIR 1981 SC

588 equivalent to (1981) SCC 397 [paragraph 6] since justice cannot be available in a straight-jacket formula. Therefore, the ground I have

summarized in paragraph 17b above cannot be sustained. It may not have been formally pleaded in the writ petition, and it could not have been, since it

was passed long after the writ petition was affirmed and listed with notice to the appellants, but it and its effect were very much the subject matter of

the challenge as clearly seen from what the learned single Judge has recorded in the impugned order.

20. The only ground which may have survived was the efficacy of the directions passed by the learned single Judge about completion of the

disciplinary process beyond October 31, 2017, in view of the writ petitioner retiring on that date. Yet even that ground, which I have summarized in

paragraph 17c of this judgment, does not survive. This is because of what I have held in paragraph 15 of this judgment. The appellants did not

challenge the finding or the direction in the order dated March 9, 2015 in the earlier writ petition referred to by the learned single Judge in the order

impugned. The effect of not challenging that order was that the writ petitioner was, is and would continue in service for the limited purpose of

continuance of the disciplinary proceedings. Both parties accepted this. Now the

appellants cannot suddenly turn around and say that they passed the termination order without giving further time to the writ petitioner to reply to the notice to show cause dated September 26, 2017 since the writ petitioner would be retiring and the employer-employee relationship would cease to exist, and with the snapping of the vincula juris, the disciplinary proceedings could not be continued. Therefore, this ground also fails.

21. As a consequence of the aforesaid analysis, the appeal and the connected application for stay which was directed to be heard alongwith the appeal, must be and are dismissed. Since the time periods fixed in the order impugned have already passed, I extend the time to the writ petitioner to submit her reply to the notice dated September 26, 2017 within 21 days from the date she communicates this order to the appellants. It is expected that after duly and fairly considering the reply aforesaid, the disciplinary authority shall pass the final order in respect of the writ petitioner in accordance with law, and after scrupulously complying with the principles of natural justice in letter and in spirit, as expeditiously as possible, but preferably within November 14, 2018. The appellants have not preferred any appeal from the final order passed in the other three writ petitions referred to in paragraph

2. The order dated October 26, 2017 has achieved finality so far these other writ petitions are concerned.

22. Yet, before parting with this case one is reminded of a few lines of Bob Dylan from what became an anthem "Blowin' In the Wind".

"Yes, 'n' how many years can a mountain exist Before it's washed to the sea?

Yes, 'n' how many years can some people exist Before they're allowed to be free?

Yes, 'n' how many times can a man turn his head And pretend that he just doesn't see?"

23. What does one do when one sees "though not with judicial eyes" oppression and bias in practice, which law does not permit one to say it is?

One demurely restricts oneself to the cold letters of the law. One pretends to ignore the fact that taking advantage of the façade of a religious

minority institution, an autocratic management of a school perpetually disobeys those laws of the land it is bound to obey and victimizes those who

raise their voices in protest. These managements habitually violate even the provisions of Part III of the Constitution of India, which no person

discharging public and/or statutory functions can be allowed to violate, and

which in themselves give such managements the guarantees to establish and administer such institutes. The judiciary has, of late, been forced to ignore egregious violations of the very rubric of this nation " since the actions and those who are to bring them to court have been "untimely ripped from the bosom of life. I have done justice according to my lights, but perhaps not wholly. Because I cannot compensate the writ petitioner / respondent for the continuous trampling of her fundamental rights by merely dismissing the appeal and passing the directions as in paragraph 21 above, I can only direct the appellants shall bear the costs of the appeal. That, and shed my fierce tears, hoping that justice does not go gently into that good night.