

(2019) 08 CAL CK 0150

In the Calcutta High Court

Case No : C. Appeal From Order (FMA) No. 1387 Of 2014

?State Of West Bengal & Anr

APPELLANT

Vs

Tapan Kumar Ghosh & Ors

RESPONDENT

Date of Decision : 09-08-2019

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2019) 08 CAL CK 0150

Hon'ble Judges : Dr. Sambuddha Chakrabarti, J;Abhijit Gangopadhyay, J

Bench : Division Bench

Advocate : Tapan Kumar Mukherjee, Somnath Naskar, Gopal Chandra Ghosh, Jayanta Kumar Mitra

Final Decision : Dismissed

Judgement

Abhijit Gangopadhyay, J

This appeal has been filed by the State of West Bengal, Higher Education Department and Director of public instruction Government of West Bengal against the judgment and order dated 11th April, 2012 passed by the Learned Single Judge in a writ application being W.P. No. 16635 (W) of 2010. By the said order dated 11th April, 2012 the Learned Single Judge allowed the writ application and directed the respondent authorities to give four increments in favour of each of the writ petitioners as prayed for and to pay arrears within a period of eight weeks from the date of communication of the order.

The writ application was filed by 31 College Teachers, all of whom are in the rank of Readers of different colleges.

By filing the writ application the petitioners prayed for a mandamus commanding the respondents to grant four advance increments to them with effect from 27th July, 1998 in tune with G.O. No. 118-Edn(CS) dated 4th February, 1999 issued by the Principal Secretary to the Government of West Bengal on the basis of clarificatory G.O.No.1260-Edn(CS)5P/52/98 dated 26.11.2001 relating to

pre-1996 appointees.

The crux of the grievance of the writ petitioners is that the State by implementing G.O. No.118-Edn(CS) dated 4th February, 1999 gave benefit of advance increment to the College Teachers who were recruited as Lecturers on or after 1st January, 1996. The State granted the benefit of advance increment to the College Teachers who had joined the service with Ph.D. and M.Phil. degrees. They were given four increments and those who joined as lecturers without Ph.D. degree after the above date i.e. 1st January, 1996 and obtained the said degree while in service were given two increments. But the petitioners who had joined service as lecturers prior to 1st January, 1996 with Ph.D. degrees were left out of the zone of consideration and no benefit of advance increment was given to them.

The State Government by issuing another Government Order being G.O. No.1206-Edn(CS)/5P-52/98 dated 26th November, 2001 declared that Teachers who acquired Ph.D. degree during service prior to 1st January, 1996 and who were not given the benefit of any advance increment as per the earlier Career Advancement Scheme should be given the benefit of two advance increments with effect from 27th July, 1998.

In the writ application the petitioners describe themselves as teachers of different colleges who joined as Lectures with Ph.D. degrees before 1st January, 1996.

Therefore, the following classes of College teachers were given the benefit of two or four advance increments as per the applicable benefit:

- (i) Those who joined service on or after 1st January, 1996 with Ph.D./M.Phil. degree.
- (ii) Those who joined as lecturers on or after 1st January, 1996 without Ph.D./M.Phil. degree but acquired Ph.D. degree while in service.
- (iii) Those who acquired Ph.D. degree during service prior to 1st January, 1996 and were not given advance increments as per the earlier career advancement scheme.

The petitioners who joined the service with Ph.D. degree prior to 1st January, 1996 were not given the benefit of advance increment.

This was the grievance as was ventilated in the writ application in respect of which the Learned Single Judge of writ Court after final hearing directed the State Government to give four increments in favour of each of the writ petitioners as prayed for.

This order of the writ Court has been challenged by the above mentioned appellants.

The Learned Single Judge held that classification by the respondent is discriminatory and violative of Article 14 of the Constitution. The Learned Single

Judge also held that the action of the respondent is violative of Government policy of attracting and retaining better talent as the concerned Government Order reflects the intention and policy of the Government to attract the talented Teachers having Ph.D. degree and to utilise their service for the benefits of the students who were reading in different Colleges. The Learned Single Judge also held that there was no justifiable reason to give such benefit to some Professors, who joined with Ph.D. degree on or after 1st January, 1996 or to some who improved their qualification after joining on 1st January, 1996 by getting Ph.D. degree and to refuse some who have joined the service with Ph.D. degree prior to 1st January, 1996. Thus considering the facts of the case, considered opinion of the Learned Single Judge was that all of them were of same status or under same class. While expressing such considered opinion the Learned Judge referred to paragraph 15 of the judgment of D.S. Nakara's case reported in (1983) 1 SCC 303 (D.S. Nakara & Ors. -Versus- Union of India) which says that

"Thus the fundamental principle is that Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the objects sought to be achieved by the statute in question."

In the writ application, despite giving opportunity to file affidavit-in-opposition, no affidavit-in-opposition was filed by the State for a long time and on the date of final hearing, prayer for filing affidavit-in-opposition was made which was not allowed by the writ court. It is noted that the writ petition was filed in the year 2010 and the final order was passed on 11th April, 2012. Had the State Government been so serious about the matter, the affidavit-in-opposition would have been filed before the final hearing. Therefore, it was not a case where no opportunity was granted to file affidavit-in-opposition; on the contrary it was a case where despite granting opportunity to file affidavit-in-opposition the respondent i.e. the State authority did not file it.

From a reading of the Memorandum of Appeal assailing the judgement and order of the Learned Single Judge it is found that the grounds of appeal are very ordinary and have no substance and not at all impressive. There is virtually no ground of appeal having merit of law and of fact. Some of the grounds are that, the judgement was bad in the facts and circumstances of the case ; facts of the case was not appreciated by the Judge ; respondents were not allowed to make appropriate submissions ; the principle of reasonable classification and intelligible differentia were applied wrongly ; observation of the writ Court that the classification emanating from the Government Order No. 118-Edn(CS) dated 04.02.1999 has no nexus with the objective sought to be achieved by the respondent authorities was erroneous ; observation of the writ Court that the Government Order in question was a class legislation was erroneous, etc.

One of the grounds (ground No. X) taken in Memorandum of Appeal is that, it is

prerogative of the employer to fix cut off dates which in this case is 1st January, 1996. Another ground (ground No. XIX) is that the choice of a date as basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. The submissions made in those ground require discussion.

Ground No. X speaks of employer's prerogative. This is wholly illegal. In the facts and circumstances of this case where question is of equal treatment of similarly placed persons so far as their advance increment is concerned there cannot be any question of 'prerogative of employer' as there can be no question of arbitrariness or irrationality in the decision of the concerned authority and therefore, 'employer's prerogative' can neither be used as a sword to counter the claim of the aggrieved College Teachers nor can be used as a shield to defend their onslaught who has alleged unequal treatment which is opposed to the concept of equality as enshrined in our constitution.

While discussing the concept of 'prerogative' in the case of Centre for public interest litigation -versus- Union of India reported in (2012) 3 SCC 117, after taking note of prerogative of the Government in appointing lawyers as observed in the case of Rajiv Ranjan Singh 'Lalan' (VIII) and another -versus- Union of India and others reported in (2006) 6 SCC 613 the Supreme Court has observed that under our constitutional and statutory frame work there is nothing known as prerogative and the Supreme Court quoted with approval a passage from a book written by N.A. Palkhivala namely "Our constitution : Defaced and Defiled (Macmillan: December 1974) which is as follows:

"Our Constitution recognises no prerogative whatsoever; it recognises merely rights, duties and discretions. The difference between 'prerogative' and 'discretion' is clear. A person who has a prerogative can act arbitrarily or irrationally and yet his decision must be treated as legal and valid. On the other hand, if a person has the discretion, and not the prerogative, to make a decision, the discretion can only be exercised fairly and reasonably; otherwise his act is void on the ground that there was no valid exercise of discretion in the eye of the law".

Ground No. XIX has also no merit in the facts and circumstances of the case. When Teachers joining the Colleges before 1st January, 1996 without Ph.D. degree acquired the same while in service were given the benefit of advance increments and when the Teachers joining College with Ph.D. degree after 1st January, 1996 were also given the advance increments when they acquired the degree while in service then the fixing of cut off date becomes ineffective and loses significance, if there was any. The cut of date in such facts and circumstances does not bear any meaning. Thus, in this case choice of date i.e. 'cut off' date becomes inconsequential.

As almost all kind of College Teachers, whether they joined before 1st January, 1996 or after 1st January, 1996 were allowed to get the benefit of advance

increment on obtaining their Ph.D. degree while on service, no reason is found as to why the petitioners who joined service before 1st January, 1996 with Ph.D. degree will not be granted the benefit of advance increment.

Are the respondents who joined the Colleges with the Ph.D. degree are sinners who could not be given the benefit of advance increments with the similarly situated College Teachers i.e. College Teachers who have acquired Ph.D. degree while in service? Are the Ph.D. degrees of the College Teachers who obtained the same while in service are more valuable than Ph.D. degree of the College Teachers like the petitioners who obtained the said degree before joining the College? Reply to both of the above questions is 'No' unless arbitrariness sneaks up in the matter.

Such classification as has been made in this case is wholly unreasonable and there is no intelligible differentia which distinguishes the petitioners from the advance-increment-getting College teachers and the differentia has no nexus to the objective sought to be achieved i.e. attracting and retaining more talented person as College teachers.

The Learned Single Judge has followed a decision of a Division Bench of the Court passed on 29th June, 2007 in FMA 252 of 2007, FMA 1782 of 2006 wherein also the similar issue like the present one was discussed.

The appellants have not cited any case law in support of the appeal. The respondents/writ petitioners have cited two judgments (apart from the above Division Bench judgment dated 29th June, 2007) reported in AIR (2000) Supreme Court Cases 451 (Ajoy Jadav -versus- Government of Goa and Others) and D.S. Nakara and other -versus- Union of India reported in (1983) 1 SCC 305. These two judgements were also placed before the writ Court by the writ petitioners the respondents herein and the writ Court accepted the ratio laid down in those two judgements. No different opinion is expressed by me in this regard.

In the facts and circumstances no merit is found in this appeal and the impugned judgment and order of the Learned Single Judge dated 11th April, 2012 passed in W.P. No. 16635 (W) of 2010 is not interfered with.

The appeal is dismissed, however without any costs.

I agree.