

(1991) 07 CAL CK 0050
In the Calcutta High Court
Case No : F.M.A.T. No. 2000 of 1989

State of West Bengal

APPELLANT

Vs

Sreedam Sarkar and Others

RESPONDENT

Date of Decision : 12-07-1991

Acts Referred:

West Bengal Universities (Control of Expenditure) Act, 1976 — Section 3

Citation : 96 CWN 237

Hon'ble Judges : Ajoy Nath Ray, J;A.M. Bhattacharjee, J

Bench : Division Bench

Advocate : Somnath Chatterjee, Samaresh Banerjee and Chameli Majumdar, for the Appellant;Arun Prokash Chatterjee, Dilip Kumar Saha, K.S. Roy, Aloke Chakraborty and Fazlul Haque, for the Respondent

Judgement

Ajoy Nath Ray, J.—The point in this appeal is the determination of the service status and the service conditions, if any, of the fortytwo (42) writ petitioners under the University of Kalyani, which is the second respondent in the writ. From the judgment and order of the learned judge in the court below passed on 19th May, 1989 this appeal has been preferred by the State of West Bengal, who was the first respondent in the writ. The State did not appear in the court below or file an affidavit-in-opposition. However, before us, the state has made submissions, supporting the case of Kalyani University and has also relied upon, with our leave, annexure (A) to its stay application in the appeal court.

2. The case of the writ petitioners is that they are hostel workers in the University hostels performing various jobs (like those of a Cook or a Mali) and that they have been working for nearly twenty (20) years new. They say that by a letter/order issued on 2/4th March, 1982, the Registrar of the University, by order of the Vice-Chancellor, fixed certain terms and conditions of their already long continuing employment. The document starts at page 25 of the paper book; some relevants terms and conditions therefrom are as follows: -

UNIVERSITY OF KALYANI

Dr. N.K. Pandey Registrar

Kalyani. Nadia. West Bengal

ORDER

The following employees attached to different hostels/halls of the Kalyani University, irrespective of their designations shown against their names, are placed on the scale of Rs. 220-5-260-6-308-7-364-8-388 with effect from April 1, 1981 on the terms and conditions as laid down hereunder:

.....

TERMS AND CONDITIONS

a. They shall be regarded as employees of the "Visiting Committee for Hostels" or a central committee for hostels to be constituted later on, if it deems to be necessary.

... ..

c. Their service may be terminated by three months" notice from either side, provided that the competent authority may terminate their service without notice or on short term notice by payment of the pay and allowances for a period by which the period of notice (if any) fails short of three months.

... ..

e. They shall not be entitled to any "Interim Relief or existing pay/wage separately from respective hostels.

.....

j. They shall be liable to accept transfer to any other hostels of the University.

k. They shall not accept any other employment, with or without remuneration, except with prior permission of the competent authority.

l. They shall be entitled to the benefit of Contributory Provident Fund as per rules admissible to the University employees, provided that the wasting benefit of Welfare Fund will cease forthwith.

.....

By order of the Vice-Chancellor ... Registrar

No. R/HE-Estbtt./SP-534(68)

Dated. March 2, 1982

.....

3. On this basis the writ petitioners have been working and getting paid. There is no substantial dispute that for the payments of these workers the University

funds were drawn upon. There is no allegation of any unfaithful or inefficient work on the part of any of the writ petitioners.

4. On the basis of this the writ petitioners have prayed for various reliefs including absorption as employees of the Kalyani University.

5. Mr. Malay Kumar Basu appearing on behalf of the writ petitioners agreed that in case they are declared as University employees, it would be sufficient, if a further direction followed to this effect that in so far as their scale of pay and other details of service conditions are concerned, the University will determine the same, in the manner that the University might think fit, in accordance with their prevailing rules and practice. The point about the payment of the interim relief of fifty rupees per month, of which details are given later, is outside the scope of this general prayer, which, according to Mr. Basu would satisfy the other requirements of the writ petitioners.

6. In support of his case Mr. Basu relied upon the authorities reported in *The Saraspur Mills Co. Ltd. Vs. Ramanlal Chimanlal and Others*, *Silver Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishments and Another*, and *P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others*, .

7. Mr. Samaresh Banerjee appearing for the State has raised two principal points. The first is that the letter employment of March, 1982 is not a letter of appointment under the University itself. The elaboration of this argument is noted along with the contentions forwarded on behalf of the university itself.

8. Mr. Banerjee also relied upon, from the point of view of the State itself, the provisions the West Bengal Universities (Control of Expenditure) Act, 1976 (W.B. Act 17 of 1976). The relevant provisions of the Act are as following : -

No post to be

created or appointment

made without State

Government's

approval.

3(1) Notwithstanding anything contained in any law for the time being in force or in any contract, custom or usage to the contrary, no University or no college affiliated to such University, excepting a college which is, -

(a) established, maintained or administered

by the State Government, or
(b) established by a religious or linguistic minority, or
(c) not in receipt of any financial assistance from the State Government,
shall, after the commencement of this Act, -
(i) create any teaching or non-teaching post involving any financial liability.
(ii) increase the pay or allowances attached to any post or sanction any new allowance :
(iii) grant any special pay or allowance or other remuneration under any description whatsoever including ex-gratia payment or any other benefits having financial implication to any person holding a teaching or non-teaching post, or
(iv) incur, except as provided in the rules prescribed for the purpose, any expenditure on any development scheme.
without the prior sanction of the State Government.

(2) Notwithstanding anything contained in any law for the time being in force or in any contract, custom or usage to the contrary no college other than any of the colleges referred to in clauses (a),(b) or (c) of sub-section (1) shall, after the commencement of this Act, appoint any person to any post without the prior sanction of the State Government. :

Provided that no sanction of the State Government shall be necessary for filling up any sanctioned post of a teacher for a period not exceeding six months by a candidate who possesses the prescribed qualifications.

Submission

of Budget,

6(1) Notwithstanding anything contained in any Act, or in any Statute, Ordinance or Regulation made thereunder., every University shall submit a budget showing its estimated receipts and disbursements for the following year, to the State Government immediately after the same is finalised by the University at a meeting specially convened for the purpose.

9. Relying upon this Mr. Banerjee has said that since it is the State which ultimately finances the university, a prior sanction of the State Government is a must in accordance with section 3 quoted above. With his usual fairness Mr. Banerjee in this connection relied upon the aforesaid Annexure (A), which is a notification of the education department dated 9th October, 1981 and some clauses of this are set out below : -

Government of West Bengal

Education Department

University Education Branch

No. 1583 (100)-Edn (U) Dated Cal., the Oct. 19, 1981.

From : S. Ghosh,

Dy. Secretary to the Govt. of West Bengal

To: The._____

Sub : Introduction of uniform service conditions for the Workers/employees of Hostels/Messes attached to Universities and Colleges -

10. The question of introduction of uniform service conditions for the workers/

employees of the hostels/messes attached to universities and colleges was engaging the attention of the State Government for some time past.

11. The undersigned is now directed by order of the Governor to say that after careful consideration of the matter the Governor has been pleased to decide that the following guidelines shall be followed by the authorities of the universities and colleges in regard to the employment of the above categories of employees :

1) at every mess/hostel attached to universities and colleges there should be a hostel committee or central students' welfare committee which should be constituted in the manner prescribed by the respective university in this behalf. The hostel/mess employees shall be considered as employees of the respective hostel committee/central students' welfare committee who shall have to maintain service records of the employees concerned according to the manner prescribed.

2) the staff pattern of such hostels/messes shall be as follows :

(a) (b)

Cook

One

Assistant Cook

One

(c)

Kitchen Attendant/Helper

One

(d)

Helper/Assistant

Two

3) The requirement of additional staff in excess of the core staff should be determined according to the staff pattern enunciated above and the staff may be appointed by the respective committees on approval of the Director of Public Instruction, West Bengal in case of colleges; or the State Govt. in case of universities

7) The additional burden of expenditure on account of these measures shall be borne by the State Government subject to the conditions that the amount of emoluments that are being paid by the respective institutions to these staff prior to the sanction of ad-hoc subvention from 1.9.79 shall continue.

9) This order shall take effect from 1st April, 1981.

10) This order issues with the concurrence of the Finance Department vide their U.O. No. Group-B/2292 dated 16.10.81.

11) The Accountant General, West Bengal is being informed.

Deputy Secretary

Mr. Basu relied upon this notification as the necessary sanction, if any needed, from the State.

12. Mr. Banerje also correctly submitted that this was not a case of equal work, equal pay at all as thought, (with respect), by the learned judge in the court below. The whole basis of employment. itself being under scrutiny, the questions of scale, pay etc., would only arise, if at all, as a second step in the process of reasoning.

13. Mr. K.S. Roy appearing on behalf of the Kalyani University has principally emphasized the fact that the University itself never held itself out to be the employer of the writ petitioners.

14. Mr. Roy stated that it is not in dispute that the visiting committee for hostels was never ultimately constituted. Yet, he said, the March-1982 order talks of this visiting committee as the employer, and thus, the Kalyani University cannot be substituted in its place. Mr. Roy relied upon several decisions, (the references being Surinder Singh and Another Vs. Engineer-in-chief, C.P.W.D. and Others, , 1988 - 3 SCC 91, 1989 - 1 SCC 121, 1989 - 2 SCC 235 and 1989 - 3 SCC 191), for the proposition that when the courts consider the case of equal work, equal pay, the position of the worker must be considered also from the standpoints of responsibility entrusted and of educational qualifications, and not merely from the standpoint of the physical quantity of work; the nature and culture of employment are also important.

15. In the view I take of the matter the authorities regarding equal work, equal pay are not of much relevance. On 28.11.1990, Hon"ble Mr. Justice A.M. Bhattacharjee and I have delivered a judgment in a matter (FMA 629 of 89), Divisional Railway Manager, Eastern Railway, Asansol and Ors. vs. Satyajit Mazumdar and Ors. wherein we have considered the circumstances under which an employee employed under a public employer, even if working through a contractor, can claim to have become, in law, the direct employee under the concerned public employer. In that case, we have relied upon the decision of the Supreme Court in Hussainbhai, Calicut Vs. The Alath Factory Thezhilali Union, Kozhikode and Others, . We have held that the courts have power in appropriate situation to lift the veil and look at the situation of real employment to decide whether the employee has in law become entitled to be absorbed by the public employer.

16. Indeed it is not possible for a public employer today de facto to employ a person as an employee, and carry on under a subterfuge, that, de jure he is the employee of some other (here non-existent) body. I cannot permit the Kalyani

University to take the stand that though for all practical purposes the writ petitioners work as Mess or Hostel workers of the Kalyani University, yet, they are to be treated as employees of visiting committee, which never got under way. On this ground, and on the basis of the principles set out in Satyajit Mazumdar's case (supra), the writ petitioners have clearly become employees of Kalyani University.

17. An argument of Mr. Roy and Mr. Banerjee that under the Kalyani University Act only the Executive Council could take the writ petitioners in employment, is not acceptable, because the University itself, acting through an official as its de facto representative, also has the power to employ; especially when the posts themselves are new posts, such power is not restricted to the Executive Council alone. Some relevant provisions of the said Act which endorse this view are set out below : -

THE KALYANI UNIVERSITY ACT, 1981

The University.

3(1) The Chancellor and the Vice-Chancellor of the University and the members of the Court and the Executive Council, for the time being, shall constitute a body corporate by the name of the University Kalyani.

Powers of the University.

4. The University shall have the following powers, namely, : -

12. to create posts as and when required, of officers and employees of the University besides those provided for in this Act;

Powers and functions of the Executive Council.

21. Subject to the provisions of this Act, the Executive Council shall exercise the following powers and perform the following functions : -

(iv) to establish, maintain, manage and recognize Halls and Hostels ;

(vii) to create, with the approval of the State Government, posts of officers. Teachers and other employees of the University or to recommend to the Court for creation of posts of officers and Teachers of the University ;

(x) to appoint Teachers, officers and other employees of the University and to fix their emoluments and define their duties and other terms and conditions of service in accordance with the Statutes and the Ordinance and to suspend, discharge or otherwise punish in accordance with the Statutes and the Ordinances such Teachers, officers and other employees ;

(xiii) to determine, with the approval of the State Government, the terms and conditions or service of Librarians and non-teaching staff of all colleges other than Government Colleges ;

18. I have come to the conclusion, that the Kalyani University has taken on all the writ petitioners as its own employees. I think that the State sanction is sufficiently given in the notification of 19th October, 1981 itself. Though the notification again envisages committees of employment, yet, these committees were never formed. Thus, the writ petitioners will continue in their employment, on a regular basis, in like manner as they have worked and drawn upon the funds of the university, and presumably, of the State, on the basis of the said appointment and prior sanction respectively of March, 1982 and October, 1981.

19. I am also of opinion that even if there were no sanction of the State u/s (3) of the 1976 Act, yet, that could not affect the employment of the writ petitioners, but the same would be a matter, perhaps, of allocation of expenses, as between the State and the University. I do not agree that an absence of sanction would affect the jurisdiction of the Kalyani University to employ its own employees. If the university were to become rich suddenly, nothing would stop them from employing additional persons. The said Sections 3 does not provide that in case of its non-compliance, the appointment shall be void, or voidable even, as against the person employed.

20. It has been stated, amongst other places, in paragraph 11 of the writ petition that with effect from October, 1987 all teaching and non-teaching staff of the said University were granted an interim relief of fifty rupees per month. This position is not disputed in the 10th Paragraph of the affidavit-in-opposition of the university. No submissions were made in this regard on behalf of the university. Mr. Banerjee however, said that the interim relief does not apply to officers. The humble Mess workers are far removed from officers, like, say, the Vice-Chancellor. Under these circumstances, since I declare them as University employees, I do not see why they should be deprived of this benefit of fifty rupees per month which practically all others are getting. This is probably the only place where the principle of equal work, equal pay comes into operation.

21. I am afraid that the other directions (than Rs. 50/-) of the learned judge especially with regard to scale of pay and grant of sanction under directions 111 and are unsustainable as being without legal foundation. I would, therefore, substitute the order passed by the learned judge by the following :

I) The writ petitioners are declared as employees of the university of Kalyani.

II) Within three months hereof the University will determine by written order the scale and other conditions applicable to each of the writ petitioners. In this exercise the University will be at liberty to proceed with the case of any other Mess or Hostel worker, similarly, situated as the writ petitioners who are not a party here.

III) The writ petitioners will be entitled to the interim relief of fifty rupees per month with effect from October, 1987.

Since I have upheld in part and set aside in part the directions of the learned

judge, there will be no order as to costs.

A.M. Bhattacharjee, J.

I agree.