
(2008) 04 CAL CK 0015

In the Calcutta High Court

Case No : M.A.T. No. 940 of 2007 & MAT No. 940 of 2007

The State of West Bengal and Others

APPELLANT

Vs

Sauvik Ghosh and Others

RESPONDENT

Date of Decision : 08-04-2008

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2008) 04 CAL CK 0015

Hon'ble Judges : Surinder Singh Nijjar, C.J;Indira Banerjee, J

Bench : Division Bench

Advocate : Samiran giri, for the Appellant; Sk. Kamaluddin, for the Respondent

Final Decision : Dismissed

Judgement

Indira Banerjee, J.

The Judgment of the Court was delivered by:

1. This appeal is against a judgment and order dated 5th July, 2005, whereby the learned Single Judge disposed of the writ petition being W.P. No. 10645 (W) of 2005, filed the Respondent No. 1 herein, an Assistant Teacher of Physical Education of an aided non-government school, by directing the concerned District Inspector of Schools to refix the salary of the respondent No. 1, by granting him the higher post graduate scale of pay, from the date on which he had improved his educational qualification by acquiring the Master of Physical Education degree.
2. The respondent No. 1 passed the Bachelor of Physical Education in the first class from the University of Kalyani in 1999. The Respondent No. 1, thereafter, took admission in the two-year post graduate course conducted by the University of Kalyani.
3. In 1999 the Respondent No. 1 appeared for the Regional Level Selection Test conducted by the West Bengal School Service Commission, Eastern Region, for appointment of Assistant Teachers of Physical Education in aided non-

government schools. The Respondent No. 1 duly cleared the Selection Test.

4. By a Memo No. 2810/ABPL/SSC (ER) Burdwan dated 8th March, 2001, the West Bengal Regional School Service Commission, Eastern Region, recommended the Respondent No. 1 for appointment to the post of Assistant Teacher of Physical Education at Shibpur Dino Bundhoo Institution Branch at 30, Bhutnath Haldar Lane, Shibpur, Howrah, an aided, non-government Secondary/Higher Secondary school, which is hereinafter referred to as the school.

5. By a letter of appointment dated 16th March, 2001 the Respondent No. 1 was appointed to the school as an Assistant Teacher of Physical Education. The Respondent No. 1 joined service as Assistant Teacher of the school on 30th March, 2001 and his appointment was duly approved by the District Inspector of Schools (S.E.), Howrah by a Memo No. 105 (7)/SSC dated 14th May, 2001.

6. At the material time, when the Respondent No. 1 was appointed to the school, the Respondent No. 1 had appeared for the Master of Physical Education final examination, but the results had not been published. The salary of the Respondent No. 1 was, therefore, rightly fixed in the scale of Rs. 4,650 to 10,175, being the graduate scale of pay.

7. It appears that the results of the Master of Physical Education Part II Examination, held in 2001, were published on 21st September, 2001. The Respondent No. 1 passed the Master of Physical Education examination in the second class.

8. After clearing the final Master of Physical Education examination, the Respondent No. 1 made a representation to the District Inspector of Schools concerned for refixation of his pay in the higher post graduate scale.

9. Under cover of a Memo No. 432/1/(2)/D dated Howrah the 26th March, 2003, the concerned District Inspector of Schools forwarded the prayer of the Respondent No. 1 for higher post graduate Scale to the Director of School Education (G.A.), West Bengal and sought necessary instructions.

10. In reply, the Director of School Education informed the District Inspector of Schools concerned, that the Respondent No. 1 could not be granted the post graduate scale of pay. Challenging the decision of the Director of School Education, not to grant the post graduate scale of pay to the Respondent No. 1, the Respondent No. 1 filed the writ application, that has given rise to this appeal.

11. By the judgment and order impugned, the learned Single Judge has disposed of the said writ application, directing the authorities concerned to refix the scale of pay of the respondent No. 1 by granting him the higher post graduate scale of pay.

12. The main ground urged in this appeal is that, in passing the impugned judgment and order, the learned Single Judge ignored a Government Order No. 155-SE(B) dated 13th July, 1999. It is contended that the direction to grant the

higher post graduate scale to the petitioner is contrary to the said Government Order dated 13th July, 1999, in terms whereof, the post graduate scale of pay can only be granted to teachers appointed to posts for which the requisite qualification is a post graduate degree. It is further contended that a teacher appointed through the School Service Commission could, in terms of the said Government Order, be given the scale of pay pertaining to the qualification as recorded by the School Service Commission in its recommendation.

13. The judgment and order under appeal, has also been attacked as contrary to the West Bengal Schools (Control of Expenditure) Act, 2005 and in particular Section 14(2) thereof, which provides that every teacher of a school, who is appointed in a post of the graduate teacher category, shall be entitled to draw the scale of pay of a graduate teacher and shall not be entitled to claim any additional increment or higher scale of pay for acquiring any qualification, other than the qualification specified for the post.

14. West Bengal Schools (Control of Expenditure) Act, 2005, which is prospective in its operation, and admittedly came into force on 27th December, 2005, can have no manner of application to the case of the Respondent No. 1, who acquired the post graduate degree in a relevant teaching subject in 2001.

15. The salary and allowances of Assistant Teachers of aided non government schools, have at all material times been governed by Rules for Revision of Pay and Allowances, commonly referred to as the ROPA rules, framed pursuant to the recommendations of Pay Commissions constituted from time to time.

16. As per the ROPA rules framed from time to time, including ROPA 1990 and ROPA 1998 relevant for the purpose of this appeal, the scales of pay of Assistant Teachers teaching of aided non-government schools is to be fixed on the basis of their educational qualifications.

17. By a Government Order being Memo No. 33-Edn., dated 7th March, 1990, the Government implemented the recommendations of the Third Pay Commission and introduced ROPA 1990.

18. The said memorandum inter alia, provided as follows:-

16(3) All teachers and librarians of Secondary Schools who have improved or will improve their qualification or who were appointed with higher qualification in the subject or group relevant to their teaching/appointment shall get higher scale of pay appropriate to their qualifications with effect from the 1st January, 1986 or the date of improving qualification whichever is later.

This principle shall apply mutatis mutandis to the teachers/librarians of other institutions/organizations as mentioned in Annexure-I.

19. Even after implementation of the recommendations of the Third Pay Commission and introduction of ROPA 1990, some teachers were denied higher scale pertaining to their qualifications, on the ground of the higher qualification

not being necessary for the teaching posts held by them, as per the approved staff pattern of the concerned schools.

20. The Education Directorate of the Government of West Bengal issued two Government Orders, the first being G.O. No. 795-Edn.(S) dated Calcutta the 22nd November, 1993 and the second being G.O. No. 796-Edn.(S)/5P- 78/93 also dated Calcutta the 22nd November, 1993.

21. The Government Order No. 795-Edn. (S) dated 22nd November, 1993 is extracted herein below:-

The undersigned is directed to say that it has come to the notice of this Department that higher scale of pay is not being granted to Physical Education teachers having higher qualification of Master Degree in Physical Education. This is presumably due to non-existence of any provision for post-Graduate teacher in Physical Education in terms of the staff pattern laid down in G.O. No. 772-Edn. (S) dated the 8th July, 1974. In this Department Memo No. 372-Edn.(B) dated the 31st July, 1981 read with Memo No. 33-Edn.(B) dated the 7th March, 1990 the higher scale of pay to the teachers of Secondary Schools having higher qualification has already been granted.

It is now clarified that all such Physical Education teachers including those of Madrasahs of various types having Master Degree in Physical Education from recognized Universities will be entitled to get higher scale of pay in relaxation of the above noted staff pattern.

This order will take effect from the date of issue of this clarification.

All concerned have been informed.

22. The Government Order No. 796-Edn. (S)/5P-78/93 dated 22nd November, 1993 is extracted herein below:-

The undersigned is directed to say that it has come to the notice of this Department that higher scale of pay is not being granted to some teachers of secondary schools despite their having higher qualifications of post-graduate degree or equivalent in the relevant subjects. This is, presumably, due to lack of suitable provisions for teachers with higher qualifications in Social Science Group and for adequate number of teachers with higher qualifications in Language Group and Science Group in terms of the staff pattern laid down in G.O. No. 772-Edn.(S) dated 8th July, 1974 and G.O. No. 60-Edn. (S) dated 15th January, 1972 for High Schools and Junior High Schools respectively.

In this Department Memo No. 372-Edn.(S) dated the 31st July, 1981 read with Memo No. 33-Edn.(S) dated the 7th March, 1990 the higher scale of pay to the teachers of Secondary Schools having higher qualification has already been granted.

It is now clarified that all such teachers of Secondary Schools and Junior High Schools including Madrasahs of various types with higher qualification of post-

graduate degree or the equivalent in relevant subjects will get higher scales of pay in relaxation of the above noted staff pattern.

This order will take effect from the date of issue of this clarification.

All concerned have been informed." relaxation of the above noted staff pattern.

This order will take effect from the date of issue of this clarification.

All concerned have been informed.

23. The Government Order No. 795-Edn. (S) dated 22nd November, 1993 clarified that all Physical Education teachers, having Master's degree in Physical Education from recognized Universities, would be entitled to the higher post graduate scale of pay, even though an Assistant Teacher of Physical Education was not required to have a post graduate degree in Physical Education, in terms of the staff pattern laid down in G.O. No. 772- Edn.(S) dated 8th July, 1974.

24. By a Government Order No. 25-SE(B)/1M-102/98 dated Calcutta, the 12th February, 1999 the Government of West Bengal accepted the recommendation of the Fourth Pay Commission. The said Government Order inter alia provided as follows:-

12(3) All teachers including physical education teachers and librarians of secondary schools who have improved/will improve their qualifications who were appointed with higher qualification in the subjects or groups relevant to their teaching/appointment shall get higher scale of pay appropriate to their qualifications, with effect from the 1st January, 1996 or the date of improving qualifications, whichever is later.

25. From the Government Orders/Circulars referred to above it is amply clear that a teacher of Physical Education appointed with post graduate degree, would be entitled to the higher post graduate scale of pay, irrespective of the classes taught and irrespective of the minimum educational qualifications pertaining to the post as per the staff pattern of the school.

26. Similarly, a teacher of Physical Education who did not have a post graduate degree at the time of his/her appointment, but acquired the degree later, would also become entitled to the higher scale of pay on and from 1st January, 1996 or from the date of improving the qualifications, whichever was later.

27. A Government Order No. 155-SE(B)/10M-102/98 Pt. I dated Calcutta, the 13th July, 1999, Government of West Bengal was issued amending Paragraph 12(3) of Government Order No. 25/SE(B)/IM-102/98 dated 12th February, 1999. Paragraph 12(3) as amended stands as follows:-

All teachers, including Physical Education teachers and Librarians of Secondary Schools who have improved/will improve their qualification or who are appointed with higher qualification in the subjects or group relevant to their teaching/appointment shall get higher scale of pay appropriate to their qualifications, with

effect from the 1st January, 1996 or the date of improving qualification, whichever is later, provided that such higher qualified teachers in the relevant subjects or group is justified as per approved staff pattern of that school, if such teacher is appointed through West Bengal School Service Commission, his/her pay will be fixed in the scale of pay as per his/her qualification mentioned by the West Bengal School Service Commission.

28. The question is, whether teachers appointed after 13th July, 1999 and/or teachers who improved their qualifications after 13th July, 1999 can be denied the scale of pay pertaining to their higher qualification, either on the ground, that the School Service Commission, concerned did not mention the higher qualification in its recommendation or on the ground that the higher qualification was not necessary for the teaching post held by the concerned teacher, having regard to the approved staff pattern of that school.

29. There can be no doubt as argued on behalf of the State, that the Government has power to issue orders and orders lawfully issued by the Government would have the force of law. However, a Government Order which contravenes a fundamental right, guaranteed under the Constitution, is null and void and no order in the eye of law.

30. The School Service Commission, being a statutory authority constituted under the West Bengal School Service Commission Act, 1997, is bound to act fairly, reasonably and in accordance with law. The School Service Commission is obliged to record correctly the educational qualifications of the candidates, as disclosed, subject however, to verification. When candidates with higher qualifications apply for teaching posts, for which the minimum requisite qualification is lower, the School Service Commission concerned might, in its discretion, choose not to give any credit for educational qualifications other than the requisite educational qualification for the teaching post, for the purpose of selection.

31. The School Service Commission cannot, however, omit to record educational qualifications as disclosed by a candidate. When the School Service Commission makes a recommendation the educational qualification of an Honours graduate can in no circumstances be shown as pass graduate. Nor can a post graduate be described as a graduate in any communication. If the educational qualifications are mentioned in the recommendation, the full educational qualifications as disclosed, would have to be mentioned, irrespective of the requirements of the teaching post.

32. Therefore, when the School Service Commission, after perusing and verifying mark sheets and certificates, selects and recommends candidates, there is a prima facie presumption that the educational qualifications have correctly been recorded. Accordingly, the salary and allowances might be fixed as per the qualifications recorded by the School Service Commission in its recommendation.

33. The presumption that the educational qualifications recorded by the School

Service Commission is correct, is, however, rebuttable. If a teacher can satisfy the concerned authorities, that his/her actual educational qualifications in the relevant teaching subject were higher than those recorded by the School Service Commission in its recommendation, the teacher would have to be granted the scale of pay pertaining to the higher qualification.

34. Some times higher educational qualifications are omitted to be mentioned in the recommendation of the School Service Commission not deliberately, but because the higher educational qualification might have been obtained after submission of the application. In such cases, the School Service Commission would be bound to record the higher qualification in its records, if such a request is made by the candidate.

35. From the language and tenor of the Government Order dated 13th July, 1999, it is apparent that the recommendation of the School Service Commission applies to initial fixation of pay and not to re-fixation upon enhancement of educational qualifications or otherwise. If there is any discrepancy between the actual educational qualification and the educational qualification mentioned in the recommendation of the School Service Commission, the actual qualification would have to be taken into account. From the language and tenor of the same Government Order there does not appear to be any bar to grant of higher scale of pay to a teacher recommended through the School Service Commission, who has later enhanced his/her qualifications.

36. If, as argued on behalf of the State, the Government Order dated 13th July, 1999 were to mean, initial fixation would be on the basis of the educational qualifications mentioned in the recommendation of the School Service Commission, irrespective of whether the qualifications had correctly been recorded or not, and a teacher appointed on the recommendation of the School Service Commission would be bound by the qualification as mentioned in the recommendation for all time to come, and even on enhancement of qualification, the teacher would not be entitled to the higher scale of pay pertaining to qualification, only because the School Service Commission had mentioned a different qualification in its initial recommendation, the Government Order would have to be struck down as totally arbitrary, discriminatory and violative of Article 14 inter alia for the reasons elaborated hereinafter.

37. The staff pattern of a school including a Madrasah is fixed in accordance with Government Circulars and/or Orders in this regard issued from time to time. Some of the relevant Government Orders regarding the staff pattern of schools are G.O. Nos.772-Edn.(S) dated Calcutta the 8th July, 1974; 403-SE (S) dated Calcutta the 3rd February, 1992 and 670-SE(S) dated Calcutta the 4th September, 1998.

38. The relevant portion of the Government Order dated 4th September, 1998 is extracted herein below for convenience:-

In continuation of this memo No. 772-Edn.(S) dt. 8.7.74 and 730-Edn.(S)

dt.20.7.90 and 670-Edn.(S) dt.4.9.90, the undersigned is directed to say that in non-government Jr. High, Jr. High Madrasah, High School and High Madrasah/ Higher Secondary (Normal Section) the distribution of staff in different groups shall be followed henceforth in the following manner:-

1. For Jr. High School/r. High Madrasah.

- (a) Language Group - Two posts (one pass degree and one Hons/Master degree)
- (b) Science & Mathematics - Two posts (one pass degree & one Hons/Master degree)
- (c) Social Science Group - Two posts (one pass degree & one Hons/Master degree)
- (d) Headmaster/Headmistress will be in any of the groups. He/She must be having qualifications mentioned in the procedure 14 SE(s) dt.8.1.98.

2. For High School/High Madrasah/Higher Secondary (Normal Section):-

- (a) Language group - Four posts (Two pass degree & two Hons/Master Degree)
- (b) Science & Mathematics - Three posts (one pass degree & two Hons/Master degree)
- (c) Social Science - Two posts (one pass degree & one Hons/Master degree)
- (d) Work Education, Physical and Social Service - Two posts - They must be having qualifications as mentioned in the Procedure 14-SE(S) dt. 8.1.98.
- (e) Headmaster/Headmistress: One. He/She must be having qualifications mentioned in the procedure 14 SE(s) dt.8.1.98

3. For School having additional teaching posts in any group, distribution of teaching posts for Hons./Master degree holders shall be limited to 50% of that group.

In case of odd number of posts in any group the number of posts arrived may be rounded up to next figure for Hons/Master degree holders & and the shortfall for Pass degree holder in that group is to be adjusted subsequently.

4. This cancels this Deptt.'s G.O. No. 642-SE(S) File No. IS-14/98 dt. Calcutta 20th Aug. 1998. All concerned must be informed accordingly. N.B. Classes for V to X in H.S. Schools are in normal.

39. For Junior High Schools/Madrasahs as well as High Schools/Madrasahs there are teaching posts for which the minimum qualification is pass graduate and there are teaching posts for which the minimum requisite qualification is Honours graduate/Post graduate. The fixation of higher educational qualifications for some posts and lower educational qualifications for others has no nexus with the teaching duties pertaining to the posts.

40. In terms of the Government Order referred to above, a certain percentage of teaching posts are set apart for Pass Graduates and a certain percentage for Honours Graduates and/or Post Graduates. When additional teaching posts are sanctioned, irrespective of the subject or the class for which the post is sanctioned, the same percentage ratio is required to be maintained.

41. For reasons best known to the Government, the requisite qualifications for teaching posts are fixed on the basis of percentage calculated with reference to the total number of posts in a group. For example, of two teaching posts in the Language group in a Junior High School the requisite qualification for one post is Pass Graduate and the requisite qualification for the other post is Honours Graduate and/or Post graduate. Similarly out of 4 sanctioned posts in the Language group in a High School, the requisite qualification for two posts is Pass Graduate and for the other two Honours Graduate and/or Post graduate.

42. There are posts in Junior High Schools and Madrasahs for which the requisite educational qualification, as per the Government Order, is Honours Graduate and/or Post graduate and posts in High Schools/Madrasahs for which the requisite qualification is Pass Course Graduate. As observed above, the fixing of higher qualifications for some posts and lower qualifications for others has nothing to do with the teaching duties pertaining to the teaching post.

43. Therefore, out of 2 teaching posts in English in a High School, the minimum requisite qualification for one teaching post would be B.A. (Pass) and for the other an Honours or Masters" degree. If additional posts are sanctioned, posts for Honours/Masters" degree holders would be limited to 50%. In terms of the standard staff pattern, the minimum requisite qualification for one teacher teaching History in the lower classes could be Honours Graduate or Post graduate but the requisite qualification for another teacher also teaching History in the same school but in higher classes could be Pass Graduate.

44. No reason are forthcoming as to why different qualifications have been fixed for the same teaching posts, involving the same teaching duties. The Government Orders pertaining to staff pattern have nothing to do with salary and allowances. Salary and allowances are fixed on the basis of separate Rules for Revision of Pay and Allowances framed from time to time.

45. There can be no doubt that the question of equality arises amongst equals. The State is certainly competent to classify teachers on the basis of qualifications, responsibilities, duties, length of service and the like for the purpose of fixation of the their pay and allowances. The classification must, however, meet the test of reasonable nexus with the object sought to be achieved by the classification.

46. As per the Rules for Revision of Pay and Allowances framed from time to time, the salary and allowances of teachers of schools are to be fixed on the basis of their qualifications in the relevant teaching subjects and not the requisite educational qualifications for the posts they hold.

47. Had there been any rational criteria for fixation of different qualifications for different teaching posts which had nexus with the duties and responsibilities pertaining to the teaching post, it may have been permissible to fix the salary and allowances on the basis of the minimum qualification for the post, as per the staff pattern. A meaningless classification, for undisclosed reasons, is no ground for discrimination in payment of salary and allowances.

48. Where all Assistant Teachers constitute a single class, and as per the Government Orders pertaining to salary and allowances of their scales are to be fixed on the basis of qualifications in the relevant teaching subject, payment of different scales to two teachers with the same qualifications, teaching the same subjects in the same classes, in the same or in different aided non-government schools or Madrasahs and thus equally circumstanced, on the basis of a sham classification based on the requisite qualification for the teaching post, as per the approved staff pattern, which is in no way related to the duties and responsibilities pertaining to the teaching posts, amounts to denial of equal pay for equal work and offends Article 14 of the Constitution of India. It is immaterial that separate selection tests are conducted by the School Service Commission for posts earmarked for Pass Graduates and posts earmarked for Honours Graduates/ Post Graduates.

49. The Government Order dated 13th July, 1999 in so far as the same provides that teachers who improve their qualifications or are appointed with higher qualifications in subjects relevant to their teaching, would get higher scale of pay provided the higher qualification was a requisite qualification for the post as per approved staff pattern of the school is patently, discriminatory and violative of Article 14 of the Constitution of India for reasons stated hereinabove.

50. As observed above, the order dated 13th July, 1999 is prospective. The said order discriminates between teachers who improved their qualifications and/or were appointed with higher qualifications before 13th July, 1999 and those who improved their qualifications and/or were appointed with higher qualifications after 13th July, 1999 without rational justification.

51. Teachers who were appointed with higher qualifications or improved their qualifications before 13th July, 1999 continue to get the higher scale of pay irrespective of the qualification for the post. Therefore, even in case of teachers, with higher qualifications, holding posts for which the higher qualification is not necessary, one set of teachers would get the higher scale of pay pertaining to actual educational qualification and the other set would get the scale pertaining to the qualification fixed for the post, though both sets are of equal status and required to discharge the same duties and responsibilities.

52. The appellant State did not intend to restrict higher scale of pay only to holders of posts for which the higher qualification was essential. Even though the prescribed qualification for all posts of Assistant Teachers of Physical Education, has, at all material times, been Pass graduate, the Government Order dated

22nd November, 1993, referred to above, clarified that Physical Education Teachers with Masters degree in Physical Education from a recognised University would be entitled to the higher post graduate scale of pay.

53. Even after the Government Order of 13th July, 1999 referred to above an order No. 417-SE(S)/5 P-33/98 dated 8th March 2000 has been issued which inter alia clarifies the order dated 22nd November, 1993. The relevant part of the said order is extracted herein below for convenience:-

Now in clarification of para-3 of Government Order No. 759-Edn.(S) dt.22.11.93 the undersigned is directed to say that the benefit of higher scale of pay is admissible to those Physical Education teachers only who have obtained such degree on completion of two years regular course from a recognised University. This order will take effect from the date of issue of this clarification.

54. The contention of the appellant State, that the learned Single Judge did not consider the order dated 13th July, 1999 is not correct. The learned Judge has duly referred to and discussed the order dated 13th July, 1999 in the judgment and order under appeal. The learned Judge correctly observed that the subsequent order dated 8th March, 2000, relating to the benefit of higher post graduate scale to teachers of Physical Education, who had obtained the degree on completion of the two-year regular course from a recognised University, made it clear that qualification pay could not be linked with the staff pattern.

55. The judgment and order impugned does not call for interference in appeal. The appeal is, therefore, dismissed.

Surinder Singh Nijjar, CJ.

54. I agree.