

(2012) 03 CAL CK 0004**Calcutta High Court****Case No:** Writ Petition 5941 (W) of 2006

Samir Kumar Ghosh

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision: March 28, 2012**Citation:** (2012) 3 CHN 398**Hon'ble Judges:** Biswanath Somadder, J**Bench:** Single Bench**Advocate:** Subhendu Kumar Mukherjee and Ms. Namita Basu, for the Appellant; Rudra Jyoti Bhattacharjee, Ms. Debjani Ghosal, For the Respondent No. 2 and Mr. S.K. Halder, For the State, for the Respondent**Judgement**

Biswanath Somadder, J.

This writ petition has been taken out by a dismissed employee of Bansberia Mills Mutual Benefit Co-operative Relief Society Limited essentially for the purpose of securing his provident fund and other statutory dues. This matter earlier went up before the Hon'ble Court of Appeal and an order was passed on 19th February, 2007, which reads as follows:

Learned Counsel for the respondents submits that his clients do not want to oppose the application for condonation of delay. Hence, the application is allowed and delay in filing the appeal is condoned. Let the appeal now be registered.

By consent of the parties, both the application for stay and the appeal, treating the same as on day's list, are disposed of dispensing with all the formalities to be observed for hearing of the appeal itself.

The impugned order was passed admittedly in absence of the appellant. It is contended that no service was effected upon the appellant, as such, it could not appear before the learned trial Judge. From the judgment and order we find that affidavit of service was filed. The learned trial Judge of course has not recorded whether service was satisfactory or not.

However, both the parties suggested and consented that we should not enter into this controversy for disposal of the appeal. The question is as to whether the writ petitioner/respondent is entitled to get terminal benefit on the alleged charge of defalcation of fund or not. This point could not be agitated before the learned trial Judge as the appellant could not appear.

We, therefore, by consent of the parties set aside the impugned order dated 23rd August, 2006 and send back the writ petition for hearing afresh. Therefore, the appellant shall file affidavit in opposition within three weeks from date. Reply thereto shall be filed within two weeks thereafter and the matter is to be heard by the learned trial Judge, if possible, within six weeks. We, therefore, request the Hon'ble trial Judge to give a priority hearing of this matter because it is a case involving a retired employee. The direction given above for filing affidavits is firm and mandatory. No further extension shall be granted either by the Appeal Court or by the learned trial Judge. The matter will be heard out in absence of the affidavit or affidavits of defaulting party or parties.

We think that some safeguard measure has to be taken as it is said by Mr. Bhattacharyya appearing for the appellants that an aggregate sum of Rs. 33,000/- (Thirty three thousand) would have been payable on account of provident fund and gratuity, but for the charge of defalcation the said sum is withheld. Therefore, the aforesaid sum shall be deposited with the Advocate-on-record of Mr. Bhattacharyya, who shall invest the same in a short term fixed deposit account in any nationalised bank, the branch of which situates in and around this Court. A Xerox copy of such fixed deposit shall be supplied to the learned Advocate for the respondent/writ petitioner. The deposit so to be made, if required, shall be renewed from time to time and the same will be kept subject to further order which might be passed by the learned trial Judge.

Admittedly, no copy of the writ petition has been served upon the appellant. Therefore, the aforesaid direction for filing affidavit in opposition will be effective from the date of receipt of copy of the writ petition.

It would appear from the observations made by the Hon'ble Court of Appeal in the order reproduced hereinabove that the question as to whether the writ petitioner was entitled to get any terminal benefit in view of the alleged charge of defalcation of funds was left open to be decided by the first Court.

2. At the time hearing of the matter, the learned advocate representing the respondent No. 2 being the Board of Directors of Bansberia Mills Mutual Benefit Co-operative Relief Society Ltd., submits that the writ petitioner is not entitled to any terminal benefit and no amount is due and payable to the writ petitioner on account of provident fund and gratuity.
3. The learned advocate appearing on behalf of the writ petitioner, however, draws this Court's attention to the application for stay filed by the respondent No. 2 before

the Hon"ble Court of Appeal wherefrom it would appear that as per Audit Report pertaining to 1987-88, a sum of Rs. 15,754/= was due and payable to the writ petitioner on account of his provident fund dues and a further sum of Rs. 17,377/- was due and payable towards gratuity.

4. Although a charge of defalcation against the writ petitioner ultimately resulted in his termination of service, this Court is not required to go into that aspect of the matter in the facts of the instant case. The only issue that comes up for consideration now is whether the respondent No. 2 is entitled to adjust the total amount due and payable to the writ petitioner on account of his provident fund and gratuity dues from the amount alleged to be defalcated by the writ petitioner. The answer is obviously no, since the total amount due and payable to the writ petitioner, on account of his statutory dues, cannot be adjusted by the respondent No. 2 from any other sum of money which may be owed by him to the Co-operative Society.

5. In such circumstances, this writ petition is disposed of with a direction upon the respondent No. 2 to release the entire statutory dues of the writ petitioner as observed hereinbefore, including the sum of Rs. 33,000/-, which was deposited with the learned Advocate-on-Record of the respondent No. 2 in terms of the Hon"ble Appeal Court's order dated 19th February, 2007, as expeditiously as possible, preferably within a period of six weeks, but not later than eight weeks from the date of communication of a photostat certified copy of this order.

6. The disposal of the instant writ petition shall, however, not preclude the respondent No. 2 to take such steps, as available in law, in order to realise the amount alleged to have been defalcated by the writ petitioner. Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties.