

(2011) 07 CAL CK 0030

Calcutta High Court

Case No: Writ Petition No. 1949 of 2000 and GA No. 1506 of 2010

Dr. Saroj Kumar Maity

APPELLANT

Vs

The State of West Bengal and
Others

RESPONDENT

Date of Decision: July 19, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 11

Citation: (2012) 1 CALLT 394 : (2012) 5 CHN 491

Hon'ble Judges: Biswanath Sommadder, J

Bench: Single Bench

Advocate: Ranajit Chatterjee, for the Appellant; L.C. Bihani and Mr. Saikat Banerjee for the State, for the Respondent

Judgement

Biswanath Sommadder, J.

The writ petitioner was appointed as a lecturer in Chemistry in Nabadwip Vidyasagar College on 06th July, 1981, on leave vacancy, and continued till 17th July, 1984. Subsequently, he was appointed as lecturer in Vidyanagar College as a lecturer in Chemistry on 1st August, 1984, on a regular basis in a permanent post, through the College Service Commission. The writ petitioner initially moved this court praying, inter alia, for benefit of his three years service in Nabadwip Vidyasagar College between 06th July, 1981 and 17th July, 1984. By an order dated 6th October, 1993, that writ petition was disposed of with a direction upon the Director of Public Instruction to consider the writ application and after hearing the petitioner pass a reasoned order in the matter within a time frame as stated in that order. Consequently, the Director of Public Instruction passed a reasoned order observing, inter alia, that the previous service of the writ petitioner as a lecturer in Nabadwip Vidyasagar College, Nadia, for the period between 06th July, 1981 and 17th July, 1984, would not be taken into account for the purpose of protection of the petitioner's pay and/or for placing the petitioner in senior grade/selection grade

scale/reader's post and accordingly disposed of the matter. This order of the Director of public Instruction dated 29th December, 1993, was challenged by the writ petitioner in another writ proceeding, being W.P. No. 494 of 1994, which was disposed of by an order dated 05th November, 1997, whereby the order passed by the Director of Public Instruction dated 29th December, 1993, stood quashed.

2. According to the writ petitioner, the order dated 5th November, 1997, passed in W.P. No. 494 of 1994, was accepted by the respondents and no appeal or review was preferred against the said order. In the meanwhile, alleging willful and deliberate violation of the said order dated 05th November, 1997, the petitioner filed a contempt application. During tendency of the contempt application, the Director of Public Instruction, West Bengal, issued a memo dated 30th June, 1998, addressed to the Principal, Vidyasagar College, wherein it was stated that the petitioner's past service as lecturer in Nabadwip Vidyasagar College could be considered for the purpose of pensioners benefits only. Subsequently, by another memo dated 18th November, 1998, the Director of Public Instruction, West Bengal, wrote to the Principal, Vidyanagar College asking him to treat the earlier memo dated 30th June, 1998, as cancelled. On 19th February, 1999, when the contempt petition came up for final hearing, the Court took note of a memo issued by the Director of Public Instruction dated 18th June, 1998, whereby it was intimated that the service period of the writ petitioner, between 06th July, 1981 and 17th July, 1984, was taken note for the purpose of calculating the said period as "qualifying service". The Court also observed that the contention of the writ petitioner for inclusion of the service benefit of "Career Advancement Scheme" need not be gone into, but, if the petitioner was found otherwise eligible, then the department was to take care of it giving benefits to him. It was further observed by the Court that the three years period which was directed to be noted for the purpose of "qualifying service" was to be included in the service book so that the petitioner was to get all service benefits at the time of retirement.

3. The writ petitioner has referred to a memo dated 17th January, 1997, and stated that it could be clear there from that the period of service rendered prior to regular appointment should be counted for the purpose of retirement benefits, provided, there was no break in service for more than three months. It has also been stated by the writ petitioner that though his pay fixation at Vidyanagar College was made taking into account his three years service at Nabadwip Vidyasagar College in terms of the memo dated 18th June, 1998, his pay at Chakdah College (where he is presently working) was not fixed on the basis of last pay drawn by him at Vidyanagar College. According to the writ petitioner, even though such proposal was submitted by Chakdah College way back in the year 2004, no action was taken by the respondent authorities, till as late as 11th April, 2011, when such proposal was rejected by the Director of Public Instruction, West Bengal, citing G.O. dated 26.11.2001, which has been brought on record by means of a supplementary affidavit affirmed by the writ petitioner on 06th June, 2011.

4. The writ petitioner has also referred to a memo of the State Government dated 21st September, 1988, whereby the benefit of senior scale lecturers and selection grade lecturers on completion of three years service in case of lecturers possessing doctorate degree and thereafter Reader's scale on completion of further period of eight years service was extended to all teachers of non-government colleges. According to the writ petitioner, having completed five years of service as lecturer in the year 1986 (precisely, on 6th July, 1986), taking into account his three years' service in Nabadwip Vidyasagar College and since he holds a doctorate degree, a proposal was submitted by Vidyanagar College, initially by a letter dated 24th May, 1989, and subsequently, by means of a fresh proposal as contained in a letter dated 30th June, 1998, for grant of senior scale to him. The writ petitioner has stated that he has completed a total of thirteen years service as lecturer in the year 1994 and under the said memo dated 21st September, 1988, he became eligible for grant of Reader's scale on 06th July, 1994, but was denied senior lecturer's scale and Reader's scale not only during the tendency of the earlier writ petition, but even after the order of this Court dated 05th November, 1997.

5. The writ petitioner has contended that consequent upon the order of this Court dated 05th November, 1997, it was incumbent upon the respondents to grant benefit of senior scale lecturer's grade on the basis of the proposal submitted by the Vidyanagar College in the year 1989 and the subsequent proposal dated 30th June, 1998. The writ petitioner has also referred to the order dated 10/18 March, 1999, whereby the Director of Public Instruction, West Bengal, declared that the writ petitioner would not get benefit of the Career Advancement Scheme (i.e., senior lecturer's grade and Reader's grade), upon taking into consideration his three years period of service between 06th July, 1981 and 17th July, 1984, because of a break in service between 18th July, 1984 and 31st July, 1984.

6. The writ petitioner has also referred to a memo dated 8th July, 1999, issued by the Director of Public Instruction, West Bengal, fixing the pay of 31 out of 32 teachers of Chakdah College (where he is presently working), in terms of the revised pay scale and has stated that he has been denied of such revision of pay due to the illegal, arbitrary and mala fide action on the part of the respondent authorities.

7. According to the learned advocate for the writ petitioner, the issue as to whether the period of service rendered by the writ petitioner at Nabadwip Vidyasagar College between 06th July, 1981 and 17th July, 1984, was to be counted for pay fixation, computation of pensioner benefits and for getting benefit under the Career Advancement Scheme is no longer *res integra*, in view of the judgment of this Court dated 5th November, 1997, passed in the earlier writ petition, which has not been appealed against by the respondent authorities. According to the learned advocate for the writ petitioner, in the said judgment it has been held, *inter alia*, that the aforesaid period of service was regular even though there was no recommendation of College Service Commission and that the Circular dated 12th November, 1990,

was not attracted while the Circular dated 29th January, 1986, was attracted. In any event, learned advocate submitted that even an erroneous judgment operates as res judicata between the parties. In this regard he has referred to [Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others](#), and [Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another](#),

8. He further submitted that in respect of the service rendered by the writ petitioner between 1981 and 1984, the respondent authorities have not disclosed any contemporaneous circular which would disentitle the writ petitioner from getting any benefit of the Career Advancement Scheme. He submitted that it is settled law that conditions of service cannot be altered or modified to the prejudice of an employee by subsequent administrative instructions. Learned advocate has referred to [Ex-Major N.C. Singhal Vs. Director General Armed Forces Medical Services, New Delhi and Another](#), and [Ex-Capt. K.C. Arora and Another Vs. State of Haryana and Others](#), to substantiate this point.

9. It has been further contended by the learned advocate for the petitioner that the Circular dated 30th June, 1998, purporting to clarify/amend the G.O. dated 12th December, 1990, was clearly misplaced in view of the legal position that a final judgment cannot be set at naught by subsequent legislative enactment - far less any Government order or executive instruction. In this context, he has relied on the case of S.R. Bhagwat & Ors. v. The State of Mysore reported in JT 1995(6) SC 444.

10. So far as break in service of seventeen days between the writ petitioner leaving Nabadwip Vidyasagar College and joining Vidyanagar College is concerned, learned advocate for the writ petitioner submitted that such break was for no fault on the part of the writ petitioner but due to delay in issuance of the appointment letter by the Governing Body of Vidyanagar College, over which he had no control. In this regard, learned advocate has referred to a similar case where the Court has condoned the break in service of a teacher when such break was for no fault on his part. The said decision was rendered by the Court in the case of Krishan Lal v. The State of Haryana & Ors. reported in 1982(2) SLR 599. He has also referred to an unreported judgment of this Court dated 26th April, 2000, in CO. No. 7094(W) of 1995, which, according to the learned advocate, has been complied with.

11. Learned advocate finally submitted that the writ petition should be allowed in the facts and circumstances of the case along with the interlocutory application, being G.A. No. 1506 of 2010, praying for grant of two increments for the PhD degree obtained by the writ petitioner, with effect from 27th July, 1998, in terms of the G.O. dated 26th November, 2001.

12. On the other hand, learned senior Advocate appearing on behalf of the State respondents, submitted that the writ petitioner was not entitled to get any benefit under the Career Advancement Scheme with effect from 01st August, 1986, by reason of his break in service between 18th July, 1984 and 31st July, 1984 (i.e., for a

period of fourteen days). He further submitted that the writ petitioner's first appointment as a lecturer in Chemistry in Nabadwip Vidyasagar College was a temporary appointment on leave vacancy for a span of three years without any recommendation from the West Bengal College Service Commission. However, the second appointment of the writ petitioner as lecturer in Vidyasagar College was made on the recommendation of the West Bengal College Service Commission. He submitted that the writ petitioner, having been appointed contrary to the mandate contemplated in the West Bengal College Service Commission Act, 1978, his very first appointment as lecturer in Chemistry in Nabadwip Vidyasagar College was without any legal sanctity. As such, the writ petitioner cannot be permitted to assert any judicially enforceable legal right before this Court for redress of his grievances. He further submitted that although the Governing Body of the college had the power and authority to appoint teachers purely on temporary basis pending formation of the College Service Commission, in terms of the West Bengal College Teachers (Security of Service) Act, 1975, the Governing Body had no power or authority to unilaterally extend such service beyond six months. In this regard, he referred to a memo dated 20th June, 1978, issued by the Director of Public Instruction, West Bengal, which, according to him, stipulated in no uncertain terms that terms of such temporary appointment may be extended on six monthly basis up to two years with prior approval of the Government. He further submitted that in the case of the writ petitioner no such prior approval for extension had been obtained from the Government in writing and the service rendered by the writ petitioner never entitled him to any benefit. Even such arrangement of recruiting and/ or continuing with temporary teachers was discontinued with effect from 02nd November, 1979.

13. With regard to the two memos/government Orders dated 29th January, 1986, and 17th January, 1997, which have been relied on by the writ petitioner - he submitted that the same do not come to any aid of the writ petitioner since he is not entitled to get the benefit of his service in Nabadwip Vidyasagar College, as his name was not recommended by the West Bengal College Service Commission for such appointment in terms of the statutory provision. Pay protection was granted to teachers who worked against temporary vacancies having been appointed on the recommendation of the West Bengal College Service Commission and upon subsequent re-allotment of name by the Commission in terms of memo/Government Order dated 29th January, 1986. The writ petitioner, not having fulfilled the criteria and/or conditions laid down by the Government in the aforesaid two memos/government Orders, could not claim any entitlement of the benefits, which he is claiming in the present proceeding. He further submitted that in any event, irrespective of whether the two aforesaid memos/ Government Orders applied or not, there, admittedly, occurred a break of fourteen days between 18th July, 1984 and 31st July, 1984 and there was no statutory provision or any policy whereby the tenure of one month could be extended by another fourteen days for

the purpose of moving from one college to the other. When the Government, by way of an executive order, has specified one month for moving from one college to other, the time frame stated therein cannot be extended by this Court in exercise of its Constitutional writ jurisdiction. In this context, learned senior advocate for the State respondents has referred to the case of [The Martin Burn Ltd. Vs. The Corporation of Calcutta](#), . He finally submitted that in the facts and circumstances of the case, the writ petition ought not to be entertained by this Court and should be dismissed.

14. Having regard to the facts and circumstances of the instant case, it is clear that although the writ petitioner's initial appointment as lecturer in Chemistry of Nabadwip Vidyasagar College was not made on a recommendation of the West Bengal College Service Commission, in view of the judgment and order dated 05th November, 1997, passed in the earlier writ petition, the period of service between 06th July, 1981 and 17th July, 1984, shall be deemed to be held as regular service rendered by the writ petitioner. The said judgment and order dated 5th November, 1997, has not been appealed against by the State respondents and has, therefore, reached its finality. Hence, it would operate as res judicata between the parties. In this regard, one may notice the observations made by the Supreme Court in paragraph 7 of Satyadhyay Ghosal's case (supra), which has been relied on by the learned advocate for the petitioner:

(7) The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in section 11 of the Code of Civil Procedure; but even where section 11 does not apply, the principle of res judicata has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the original Court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct.

15. In Mohanlal Goenka's case (supra), which has also been relied on by the learned advocate for the petitioner, the Supreme Court in no uncertain terms and quite categorically observed to the effect that there is ample authority for the proposition that even an erroneous decision on a question of law operates as res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata.

16. Thus, relying on the observations made by the Supreme Court, it can be held that not only the earlier decision of this Court rendered on 05th November, 1997 in

W.P. No. 494 of 1994, binds the parties in the instant proceeding, the State respondents cannot render it nugatory by not giving any effect to it, even if the said decision was erroneous. Consequentially, the break in service, between 18th July, 1984 and 31st July, 1984, i.e., for a period of fourteen days, caused by the writ petitioner's cessation of service in Nabadwip Vidyasagar College and assumption of duty in Vidyanagar College, cannot be attributed to any fault or laches on his part. It is the admitted position that there was delay on the part of the college authorities of Vidyanagar College in issuing appointment letter in favour of the writ petitioner and as such the delay on the part of the writ petitioner joining service as lecturer in Vidyanagar College which resulted in his break in service was totally beyond his control. He had no role to play in the matter as the break in service was caused solely due to administrative laches on the part of the concerned college authorities and the writ petitioner cannot be penalised for it. The judgment of the Supreme Court in the case of Martin Burn Ltd. (supra), has no manner of application at all in the facts of the instant case, in view of what has been discussed hereinbefore. This Court, therefore, holds that the writ petitioner's seniority for the purpose of fixation of pay shall be computed on and from the date of initially joining service on 06 July, 1981, as lecturer in Chemistry at Nabadwip Vidyasagar College. However, in view of the submission made by the learned advocate for the petitioner which has been recorded in the judgment and order dated 05th November, 1997, the writ petitioner shall not be entitled to claim any extra pecuniary or monetary benefits for the services rendered by him from 06.07.1981 till 17.07.1984, save and except the other service benefits which he is likely to get for the service rendered by him during those three years. Consequentially, the period between 18th July, 1984 and 31st July, 1984, shall be considered as a continuous period of service rendered by the writ petitioner and shall not be construed as a break in service. The impugned memos dated 18th November, 1998, and 10th/18th March, 1999, issued by the Director of Public Instruction, West Bengal, are, thus, liable to be set aside and quashed and are accordingly set aside and quashed. The memo dated 11th April, 2011, issued by the Director of Public Instruction, West Bengal, during the tendency of the instant writ petition, whereby the proposed fixation of pay of the writ petitioner as a Reader in Chemistry of Chakdah College on his obtaining Ph.D. degree was not approved - which has been brought on record by the writ petitioner by a supplementary affidavit - is liable to be set aside and is accordingly set aside in view of the observations made hereinabove. The writ petitioner shall be entitled to all consequential benefits including benefits accrued in his favor on account of obtaining his PhD degree and the respondent authorities are directed to give the writ petitioner the benefits of the Career Advancement Scheme with effect from 27th July, 1996, and reflex his pay accordingly. The writ petition stands disposed of accordingly.

Biswanath Sommadder, J.