

(2014) 07 CAL CK 0033

Calcutta High Court

Case No: W.P. No. 17422 (W) of 2013

Sudipta Ray (Dutta)

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision: July 31, 2014

Acts Referred:

- Constitution of India, 1950 - Article 226
- Evidence Act, 1872 - Section 114
- General Clauses Act, 1897 - Section 24, 27

Citation: (2014) 3 CALLT 441 : (2014) 5 CHN 612 : (2014) 3 ESC 1568 : (2015) 3 WBLR 539

Hon'ble Judges: Debasish Kar Gupta, J

Bench: Single Bench

Advocate: Ekramul Bari, Sayed Mansoor Ali and Tanuja Basak, Advocate for the Appellant;
Mintu Kumar Goswami, Zakir Hossain, Partho Sarathi Bose and Satyajit Talukdar,
Advocate for the Respondent

Final Decision: Disposed Off

Judgement

Debasish Kar Gupta, J.

This writ application is filed by the petitioner for a direction upon the respondent authorities to allow her to resume duties in connection with her appointment as an Assistant Teacher of A.K. Mitra Institution for Girls" (formerly Dwarkanath Balika Vidyapith), District Kolkata in her post of approved assistant teacher in Science group (Mathematics) after regularising her leave for the period from May 17, 2011 to May 16, 2013 as extraordinary leave without pay.

2. The facts of the case in a nutshell as under:

The appointment of the petitioner as an assistant teacher of A.K. Mitra Institution for Girls" (formerly Dwarkanath Balika Vidyapith), District Kolkata (hereinafter referred to as the said school) in Science group (Mathematics) with effect from May

- 2, 2006 was approved by the respondent No. 3 under memo No. 1066/M dated September 20, 2007 recording M.Sc. (Mathematics) and B.Ed. as qualification of the petitioner M.Sc. Chemistry, B.Ed. therein.
3. The petitioner submitted an application to the secretary of the respondent No. 4 for issuing a "No objection" certificate in favour of the petitioner to release her from duty of the said school for two years for pursuing postdoctoral fellowship study in Japan from the date which might be fixed by the authority to pursue study in respect of the above fellowship. In response, a "No objection" certificate dated April 1, 2011 was issued by the secretary of the respondent No. 4 to the petitioner on the basis of a resolution which had been adopted in the meeting of the managing committee of the said school on January 22, 2011. By a communication dated April 21, 2011 the petitioner prayed for leave without pay for two years from May 17, 2011 for pursuing her study in respect of postdoctoral fellowship under reference in Japan.
4. On May 16, 2013 the petitioner went to the above school for resuming her duties of assistant teacher of the above school submitting a joining report dated May 16, 2013 (Annexure P-3 at Page 27 of this writ application). The respondent school authority refused to accept the above joining report and the petitioner was not allowed to resume her duty.
5. According to the respondents a fresh resolution was adopted in the meeting of the respondent No. 4 rejecting the prayer of the petitioner for granting leave to pursue the studies in the above Postdoctoral fellowship as also to cancel the communications dated January 20, 2011 and April 1, 2011. According to the respondent No. 4, the above decision of the respondent No. 4 was communicated to the petitioner by a communication dated May 13, 2011. According to the respondent No. 4, the petitioner refused to accept the above communication. The above respondent received a communication dated May 16, 2011 from the petitioner containing information of leaving Kolkata on May 17, 2011.
6. It is submitted by Mr. Ekramul Bari appearing on behalf of the petitioner that on the basis of the resolution adopted in the meeting of the respondent No. 4 on January 22, 2011 and communication dated April 1, 2011, she left Kolkata on May 17, 2011. The allegation of refusal of the communication dated May 13, 2011 of the respondent No. 4 was denied by the petitioner. According to Mr. Bari, the action on the part of the respondent Nos. 4 and 5 in preventing the petitioner from resuming her service within two years of the period of leave could not be sustained in law, in view of the admitted fact that no disciplinary step was taken by the respondent school against the petitioner. According to Mr. Bari, the prayer of the petitioner for granting leave without pay for the period under reference was not considered in accordance with Rule 7 of the Leave Rules for the teacher of high school read with the Memorandum No. S/218 dated April 4, 1990.

7. Mr. Bari relied upon the decision of [Mahadeb Khan and Another Vs. The State of West Bengal and Others](#), in support of his submission.

8. On the other hand a preliminary objection is raised by Mr. Partho Sarathi Bose, learned Counsel appearing on behalf of the respondent Nos. 4 and 5 with regard to maintainability of this writ application in view of the availability of a statutory Appellate Forum under the appeal regulation of the West Bengal Board of Secondary Education.

9. Reliance is placed on the decisions of S.C. Dewan Vs. Aswini Datta Vidyapith reported in 1975 CWN 21 and [Ajit Kumar Mahanti Vs. Managing Committee of Jhilimili High School and Another](#)

10. With regard to the merits of the case, it is submitted by Mr. Bose that the resolution adopted in the meeting of the respondent No. 4 on May 11, 2011, was communicated to the petitioner under a communication dated May 13, 2011. According to Mr. Bose, the refusal on the part of the petitioner to accept the above communication was an admitted fact in view of the endorsement of the postal authority on the sealed envelop containing the above communication. According to him, the fact that the petitioner had left Kolkata on May 17, 2011 was also not disputed. Therefore, no relief could be claimed by the petitioner on the basis of the "No objection certificate" dated April 1, 2011.

11. It is further submitted by Mr. Bose, that the provisions of leave Rules of the West Bengal Board of Secondary Education did not permit the respondent Nos. 4 and 5 to extend the benefit of lien in favour of the petitioner for pursuing postdoctoral fellowship in a foreign country. It is also submitted by him that in accordance with the provisions of sub-Rule (3) of Rule 13 of the above Leave Rules, the service of the petitioner in the above school stood terminated automatically.

12. According to Mr. Bose, no equitable relief can be granted to the petitioner in the facts and circumstances of this case.

13. Mr. Bose relied upon the decisions of [Delhi Cloth and General Mills Ltd. Vs. Union of India \(UOI\)](#), Suresh T. Kilachand Vs. Sampat Shripat Lambate reported in AIR 1994 SCC 583, [Aligarh Muslim University and Others Vs. Mansoor Ali Khan, Chief Engineer \(Construction\) Vs. Keshava Rao \(D\) by LRs., , Regional Manager, Bank of Baroda Vs. Anita Nandrajog](#), and [Vijay S. Sathaye Vs. Indian Airlines Ltd. and Others](#), in support of his above submissions.

14. I have heard the learned Counsel appearing for the respective parties at length and I have considered the facts and circumstances of this case as discussed hereinabove. The point of maintainability of this writ application is taken up for consideration at the very outset.

15. The said school catered to the needs of the educational opportunities. A teacher duly appointed to a post in the said school was entitled to seek enforcement of the

orders issued by the Government availing of the remedy provided under Article 226 of the Constitution of India. Reference may be made to the decision of [K. Krishnamacharyulu and Others Vs. Sri Venkateswara Hindu College of Engineering and Another](#), and the relevant portions of the above decision are quoted as follows:

"..... We are of the view that the State has obligation to provide facilities and opportunities to the people to avail of the right to education. The private institutions cater to the needs of the educational opportunities. The teacher duly appointed to a post in the private institution also is entitled to seek enforcement of the orders issued by the Government. The question is as to which forum one should approach. The High Court has held that the remedy is available under the Industrial Disputes Act. When an element of public interest is created and the institution is catering to that element, the teacher, the arm of the institution is also entitled to avail of the remedy provided under Article 226; the jurisdiction part is very wide. It would be different position, if the remedy is a private law remedy. So, they cannot be denied the same benefit which is available to others. Accordingly, we hold that the writ petition is maintainable."

16. In the instant case, the action on the part of the respondent school has to be examined in the light of the relevant Rules from under the provisions of the West Bengal Board of Secondary Education Act, 1963.

17. In view of the above settled principles of law the decisions of S.C. Dewan (supra) and Ajit Kumar Mahanti (supra) do not hold the respondent Nos. 4 and 5 with regard to maintainability of the writ application. Needless to point out that the decisions of a Division Bench or Single Bench of a High Court cannot prevail over the decisions of the Hon"ble Supreme Court on the selfsame point of law. So, the objection of the respondent No. 5 with regard to the maintainability of this writ application is rejected.

18. With regard to the effect of refusal to accept a communication containing the resolution adopted in the meeting of the respondent No. 4 on May 4, 2011, it is the settled principle of law that unless a different intention appears, the service shall be deemed to be effected by proper addressing, prepaying and posting it by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post in the light of "Meaning of service by post" as provided u/s 27 of the General Clauses Act, 1897. Similar presumption is raised under illustration (f) to Section 114 of the Indian Evidence Act, whereunder it is stated that the court may presume that the common course of business has been followed in a particular case. Though the presumptions both u/s 27 of the General Clauses Act, 1897 as also u/s 114 of the Evidence Act, are rebuttable but in absence of proof to the contrary the presumption of proper service on the addressee would arise. Reference may be made to the decision of [Harcharan Singh Vs. Smt. Shivrani and Others](#), and the relevant portions of the above decision are quoted bellow:-

"Section 27 of the General Clauses Act, 1897 deals with the topic - "Meaning of service by post" and says that where any Central Act or Regulation authorises or requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting it by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. The section thus raises a presumption of due service or proper service if the document sought to be served is sent by properly addressing, prepaying and posting by registered post to the addressee and such presumption is raised irrespective of whether any acknowledgment due is received from the addressee or not. It is obvious that when the section raised the presumption that the service shall be deemed to have been effected it means the addressee to whom the communication is sent must be taken to have known the contents of the document sought to be served upon him without anything more. Similar presumption is raised under illustration (f) to Section 114 of the Indian Evidence Act whereunder it is stated that the court may presume that the common course of business has been followed in a particular case, that is to say, when a letter is sent by post by prepaying and properly addressing it the same has been received by the addressee. Undoubtedly, the presumptions both u/s 27 of the General Clauses Act as well as u/s 114 of the Evidence Act are rebuttable but in the absence of proof to the contrary the presumption of proper service or effective service on the addressee would arise..... "

19. In this case, relevant materials are available on record in support of refusal to accept the communication dated May 13, 2011 of the Secretary of respondent No. 4 which contained the informations relating to the resolution dated May 11, 2011 adopted in the meeting of the respondent No. 4. Admittedly, the petitioner left Kolkata subsequently on May 17, 2011. No proof to the contrary is available on record leads to a presumption of proper service of the resolution dated May 11, 2011 of the respondent No. 4 upon the petitioner. Therefore, the issues involved in this writ application have to be adjudicated on the basis of the presumption of service of the resolution dated May 11, 2011 upon the petitioner on the basis of the settled proposition of law as discussed hereinabove.

20. For the purpose of adjudication of the dispute regarding automatic termination of the service of the petitioner, the provisions of Rules 11 and 13 of the Leave Rules for teachers of high schools are quoted bellow:-

"11. (i) No permanent teaching or non-teaching employee shall be granted leave of any kind for a continuous period exceeding 5 years. Where such an employee does not resume his or her duty after remaining on leave for a continuous period of 5 years or where such an employee after the expiry of his or her leave remains absent from duty, otherwise on ground of suspension for any period, which together with the period granted to him or her exceeds 5 years, he or she shall, unless the Board

on reference from the school authorities and in view of exceptional circumstances of the case otherwise determines, be deemed to have resigned and shall accordingly cease to be in the employment of the school.

(ii) When an employee who is not in permanent employ fails to resume his or her duties on the expiry of maximum period of extraordinary leave granted to him or her under rule 7 or where such an employee who is granted a shorter period of extraordinary leave than the maximum period admissible, remains absent from duty for any period which together with extraordinary leave granted exceeds the limit up to which he or she would have been granted such leave under rule 7, he or she shall, unless the Board on reference from the school authorities and in view of the exceptional circumstances of the case otherwise determines, be deemed to have resigned and shall accordingly cease to be in the employment of the school.

13. Lien:

(1) A teacher or non-teaching employee of an institution on confirmation in a permanent post shall acquire a lien on the post.

(2) Such teacher or non-teaching seeking permission to serve in a higher post in another institution or college within West Bengal or to accept other service within West Bengal where teaching experience is essential, may be granted extraordinary leave, referred to in rule 12, without pay for a period, not exceeding two years, with permission to retain lien.

(3) The lien shall automatically terminate if such teacher or non-teaching employee (a) is permanently absorbed in his/her post in other institution,

(b) leaves the post for which the lien was granted, or (c) does not return to the filling up of such deputation vacancies shall apply if consequential vacancies are filled up and the teacher or the non-teaching employee, appointed to the post so vacated temporarily shall forthwith have to quit in the event of the holder of line reverts."

21. Considering the facts and circumstances of this case, I am of the opinion that the petitioner was not entitled to enjoy the benefit of lien under the provisions of Rule 13 of the Leave Rules for teachers of high school. Nor any extraordinary leave was granted in favour of the petitioner with permission to retain lien. Therefore, the claim of automatic termination of lien invoking the provisions of Clauses (b) of sub-Rule (3) of Rule 13 of the Leave Rules for the teachers of high school in this case was misconceived.

22. Considering the period of absence of the petitioner from her service as an assistant teacher under the respondent No. 4, I am of the opinion that the petitioner could not be deemed to have resigned or ceased to be in the employment under the above respondent.

23. Upon further consideration of the provisions of sub-Rule (i) of Rule 11 of Leave Rules for teachers of high school, I am of the opinion that the above provision was applicable in this case.

24. After considering the provisions of sub-Rule (8) of Rule 28 of the Management of Recognised Non-Government Institutions (Aided and unaided) Rules, 1969, I find substance in the submissions made on behalf of the petitioner that the petitioner could not be removed or dismissed from her service of an approved permanent teacher under the respondent No. 4 without adhering to the above provisions in the facts and circumstances of this case. The above provisions are quoted bellow:-

"28. (8.) Both in aided and un-aided Institutions the Committee shall have the power, subject to the prior approval of the Board, to remove or dismiss permanent or temporary teachers and other employees. For this purpose the Committee shall first draw up formal proceedings and issue charge-sheet to the teacher or the employee concerned, and offer him reasonable facilities for defending himself. The teacher or the employee proposed to be proceeded against shall submit his explanation, ordinarily, within a fortnight of the receipt of the charge-sheet, the committee shall send to the Board all relevant papers including the charge-sheet, explanations submitted by the teacher or the employee concerned and that reasons for which the Committee decides in favour of taking disciplinary action. If the Board considers that there are sufficient grounds for taking disciplinary action the Committee shall issue formal notice calling upon the teacher or the employee concerned to show-cause, ordinarily within a fortnight, why he should not be dismissed or removed from service. The Committee shall, then, send again to the Board all relevant papers including the explanation submitted by the teacher or the employee concerned and the recommendations of the Committee for the action proposed to be taken. So far as the Committee is concerned, the decision of the Board shall be final:

Provided that the Board may delegate to any Committee constituted u/s 24 of the Act the powers and functions conferred on the Board by this sub-rule."

25. There was no dispute with regard to the fact that the above procedure had not been followed to take a decision in the matter of absence of the petitioner from the service under the respondent No. 4.

26. For consideration of the submissions made on behalf of the petitioner that the prayer of the petitioner made under communication dated April 21, 2011 for granting leave without pay was not taken up under the provisions of Rule 7 of the Leave Rules for the teachers of high school read with the Memorandum No. S/218 dated April 4, 1990 issued by the West Bengal Board of Secondary Education, the above provisions are quoted bellow:-

"7. Extraordinary Leave

If for any unforeseen reason a teacher or a non-teaching employee or a school fails to attend his or her duties and if there is no other leave due at his or her credit he or she may be granted leave without pay at the discretion of Managing Committee for a period not exceeding two years.

West Bengal Board of Secondary Education

Director of Secondary Education

No. S/218

Dated: 26.4.90

To: The Heads of all recognized Secondary Schools.

Sub: Provision for "Lien" for the teaching and non-teaching staff of Secondary Schools.

Dear Sir/Madam,

I am directed to state that the Board had been moved for sometime past for making a provision of "Lien" for the employees of Secondary Schools.

The matter was placed before the 34th meeting of the Board on 24.1.90 for consideration. After detailed and careful considerations the Board adopted the following resolution:

Under the provision of rule 7 (Extraordinary Leave) the Managing Committee may also allow a teacher or a non-teaching employee of a School to be retained on "Lien" for the reasons of personal ground or serving elsewhere for a period not exceeding two years (at a time not more than one year) without disturbing usual leave standing in the credit of the employee concerned proceeding on "Lien".

Yours faithfully,

Sd/-

Sudin Chattopadhyay,

Secretary."

27. It is not in dispute that the prayer of the petitioner made under communication dated April 21, 2011 (Annexure P-2 at page 23 of this writ application) for granting extraordinary leave was not considered under the aforesaid provisions of Rule 7 of Leave Rules for teachers of high school read with Memorandum No. S/218 dated April 4, 1990 of the West Bengal Board of Secondary Education. Therefore, the action on the part of the respondent Nos. 4 and 5 in restraining the petitioner from resuming her duties within two years from the initial date of absence suffered from procedural impropriety.

28. The decision of Delhi Cloth & General Mills Ltd. (supra) does not help the respondent in view of the distinguishable feature that the doctrine of promissory estoppel has not been taken into consideration in the case in hand. For the same reason of distinguishable facts and circumstances the decisions of Suresh T. Kilachand (supra), Aligarh Muslim University (supra) are not applicable in this case. The case of Keshava Rao (supra) was decided by the Hon"ble Supreme Court in the light of Rule 2505 of Railway Manual taking into consideration the facts and circumstances of this case. Therefore, there is not scope of applying the decision to adjudicate the case in hand. The case of Anita Nandrajog was decided by the Hon"ble Supreme Court considering the "Fifth Bipartite Settlement concerned." Therefore, the above decision does not help the respondents in this case. Similarly, the case of Vijoy S. Sathaye was decided in accordance with the provisions of Regulation 12 (b) of the Service Regulations applicable in that case. So, the above decision has no manner of application in this case.

29. It is settled principle of law that disposal of case by merely placing reliance on a decision of the court without dealing with its applicability to the fact of the case is not proper. Difference in fact situation may alter the conclusion. Reference may be made to the decision of [Punjab National Bank Vs. R.L. Vaid and Others](#), and the relevant portion of the above decision is quoted below:

"5. We find that the High Court has merely referred to the decision in R.K. Jain case without even indicating as to applicability of the said decision and as to how it has any relevance to the facts of the case. It would have been proper for the High Court to indicate the reasons and also to spell out clearly as to the applicability of the decision to the facts of the case. There is always peril in treating the words of a judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a difference between conclusions in two cases. Disposal of cases by merely placing reliance on a decision is not proper. Precedent should be followed only so far as it marks the path of justice, but you must cut out the dead wood and trim off the side branches else you will find yourself lost in thickets and branches, said Lord Denning, while speaking in the matter of applying precedents. The impugned order is certainly vague."

30. In view of the discussions and observations made hereinabove, the action on the part of the respondent Nos. 4 and 5 to restrain the petitioner from resuming her service under the respondent No. 4 cannot be sustained in law. I direct the respondent Nos. 4 and 5 to allow the petitioner to resume her duties under the respondent No. 4. However, I make it clear that this direction will not prevent the above respondents from taking steps in the matter of her absence from duties under the respondent No. 4 in accordance with law as discussed hereinabove.

31. This writ application is, thus, disposed of.

32. There will be no order as to costs.

33. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

Later:

A prayer is made on behalf of the respondent Nos. 4 and 5 for staying the operation of the judgment.

The same is considered and rejected.