

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Present:

The Hon'ble Justice Shampa Sarkar

W.P. No.12218 (W) of 2014

Nityananda Bera

Versus

The State of West Bengal & Ors.

For the petitioner

: Mr. Anami Sikdar,
Mr. Abhijit Boral.

For the respondent No.4

: Mr. Kanai Lal Samanta.

For the State

: Mr. Shamim ul Bari.

Hearing concluded on : 12/01/2020

Judgment on: 09/04/2020

Shampa Sarkar, J. :

The petitioner is aggrieved by a communication dated August 3, 2012 issued by the Commissioner of School Education, West Bengal, by which the District Inspector of Schools (S.E.), Purba Medinipur, had been instructed that the petitioner should not receive any salary between August 1, 2005 to December 14, 2011 as the petitioner had not rendered his duty during the said period, due to the dispute in his date of birth as recorded in his service book with further instruction that the said period should be treated as leave without pay.

2. The facts of the case are that the petitioner a group D staff in

Deriachak Sri Aurobindo Vidyamath (hereinafter referred to as the said school) moved a writ petition before this Hon'ble Court for correction of his date of birth in his service book as also in the records of the said school where he was working. He prayed that the date as per his higher secondary examination certificate and his own school records should be incorporated in his service book. The writ petition was registered as W.P. No.4840 (W) of 2004. The said writ petition was dismissed with cost. Against the order of dismissal dated May 14, 2004 passed in W.P. No.4840 (W) of 2004, an appeal was preferred which was registered as MAT No.2188 of 2004. The said appeal and connected applications being CAN 1575/2005 and CAN 4972/2005 were disposed of on July 11, 2005 with liberty to file a civil suit.

3. The facts pleaded in this writ petition are that the petitioner filed a civil suit being T.S. No.68/2005 before the learned Civil Judge (Junior Division), 1st Court, Tamluk against the respondents Nos.1, 3, 4 and 5 and the Secretary of the School praying for correction of his date of birth and date of joining in the service book and records of the said school. The petitioner joined the said school on April 1, 1977 but in the service approval memo of the petitioner's appointment as a group 'D' employee in the said school the date of joining was wrongly recorded as January 1, 1964. The date of birth of the petitioner was also wrongly recorded in the records of the said school as well as in the service book as August 1, 1945 instead of September 11, 1952. On July 25, 2005 an ad interim order of injunction was passed by the civil court restraining the defendants from giving any effect to the service approval memo dated November 29, 1983

issued by the D.I. of Schools (S.E.), Purba Medinipur, and further restraining the defendants from giving effect to the superannuation notice requiring the petitioner to retire from service with effect from August 1, 2005. On the basis of the ad-interim order, the petitioner claimed to be in service on August 1, 2005, but the petitioner was not permitted to join the school. He was restrained by the then headmaster of the school from signing the attendance register and was threatened with dire consequences. Finding no other alternative, the petitioner lodged Kolaghat P.S. G.D.E. No.33 dated August 1, 2005 and Kolaghat P.S. G.D.E. No.180 dated August 4, 2005. The ad interim order was made absolute by order dated January 20, 2006 and the application for temporary injunction was allowed.

4. That right from August 1, 2005 to October 16, 2006, the petitioner regularly attended the school and tried to convince the school management to obey the order of the competent civil court, but such effort was in vain. The D.I. of Schools (S.E.), Purba Medinipur who was the defendant No.4 in the suit, by his communication dated December 17, 2006 under the caption, “payment of salary of Sri Nityananda Bera, a Group D staff of the school and his joining”, instructed the Secretary/Headmaster of the said school that there was no necessity for the school to take permission from the D.I. of the Schools (S.E.) to prepare the salary bills of the petitioner, and the school authority should inform the office of the D.I. of Schools (S.E.), Purba Medinipur, regarding the date of resumption of duties of the petitioner. The D.I. instructed that if the petitioner was not permitted to resume his duties, the school authority

should explain the the reason for not allowing the petitioner to resume his duties inspite of the order of the civil court. By the said communication, the school authority was further instructed to do the needful so that the said order of the learned Civil Judge (Junior Division), 1st Court, Tamluk could be complied with by the said school and also by the office of the D.I. of Schools (S.E.), Purba Medinipur, by releasing the salary of the petitioner, or else, the school authority would be held responsible for violation of Court's order. The D.I. of Schools (S.E.), Purba Medinipur, again by his communication dated December 18, 2006 reiterated every instruction contained in the communication dated October 17, 2006 and further intimated the school authorities that the order of the Civil Judge (Junior Division), 1st Court, Tamluk ought to be complied with. The said school was further instructed to submit the requisition for payment of salary in favour of the petitioner within 7 days from the date of receipt of the communication, upon allowing the petitioner to resume his duties pursuant to the order passed in T.S. No.68/2005, failing which, appropriate steps would be taken against the school authorities. In spite of receiving the said communication, the school authority sat tight over the matter. The D.I. of Schools (S.E.), Purba Medinipur, a representative of the state respondents and the officer responsible for transmitting the funds towards payment of salary of the petitioner, had thus accepted the continuity of service of the petitioner in the said school as a Group D employee beyond August 1, 2005. As such, there was no further question of denying the salary to the petitioner with effect from August 1, 2005 to December 14, 2011.

5. On January 10, 2009 the Managing committee of the said school adopted a unanimous resolution to the effect that all the issues raised by the petitioner in T.S. No.68/2005 were genuine and correct and the actual date of birth of the petitioner was September 11, 1952 and not August 1, 1945 and the date of joining of the petitioner would also be corrected as the same was wrongly recorded on account of a *bona fide* mistake on the part of the school authorities.

6. It was resolved that the service of the petitioner since August 1, 2005 would be regularized and the letter of approval of appointment would be corrected accordingly and refixation of pay of the petitioner would be processed as if he was in service after August 1, 2005. It was further resolved that for the restoration of goodwill of the school as well as peaceful environment, the pending case should be amicably settled between the petitioner and the said school. The secretary of the school was entrusted to take steps in order to compromise the civil suit. Accordingly, a solenama was filed on August 27, 2009 before the learned Civil Judge (Junior Division), 1st Court, Tamluk and T.S. No.68/2005 was decreed on November 28, 2011 in favour of the petitioner by allowing his prayers for correction of his date of birth in his service book, correction of school records with regard to the date of his joining in the said school and all other consequential service benefits as agreed to be disbursed to the petitioner, was to be given. The Secretary of the said school issued a letter dated December 15, 2011 and requested the petitioner to attend the school. Thereafter the petitioner started signing the official attendance register of the school as a Group D employee and he submitted a written

declaration to that affect. It is on record that against the judgment and decree dated November 28, 2011 passed in T.S. No.68/2005, the State of West Bengal the respondent No.1 herein, preferred an appeal which was registered as T.A. No.01/2012. The said T.A. No.01/2012 was dismissed on contest on April 12, 2012 and the judgment and decree dated November 28, 2011 passed in T.S. No.68/2005 was accordingly confirmed by the learned District Judge, Purba Medinipore.

7. The judgment of the civil court reached its finality and all parties were legally bound to act in terms of the said judgment and decree dated November 28, 2011 passed in T.S. No.68/2005 in its letter and spirit. By memo dated August 3, 2012 the Commissioner of School Education, West Bengal instructed the D.I. of Schools (S.E.), Purba Medinipore to accept the date of birth of the petitioner as determined by the court, but advised that the said teacher (wrongly identified the petitioner as teacher instead of Group D employee), should not receive salary for the period between August 1, 2005 to December 14, 2011 because he had not rendered his duty due to the pending dispute and the period should be treated as leave without pay. The last part of the memo dated August 3, 2011 by which the payment of salary of the petitioner commencing from August 1, 2005 to December 14, 2011 was withheld with a direction to treat the said period as leave without pay, has been impugned in this writ petition. The said portion of the order is set out below:-

“For issue no.(iii), he is advised that the said teacher should not receive salary for the period between 01/08/2005 to 14/12/2011 because he had not rendered his duty due to dispute in respect of his date of birth as recorded in his service book and the said period should be treated as leave without pay to regularize his absence.”

8. Mr. Anami Sikdar, learned advocate appearing on behalf of the petitioner submitted that once the suit was decreed ex parte against the defendant No.3, on contest against the defendant Nos.4 and 5 and on the basis of the solenama against the defendant Nos.1 and 2, the Commissioner of School Education could not have passed the impugned direction to withhold of the salary for the period between August 1, 2005 to December 14, 2011. According to him, the defendant Nos.4 and 5 in the suit were the D.I. of the school (S.E.) and the State of West Bengal against whom the suit was decreed on contest. The said defendants preferred an appeal against the decree of the civil suit and were unsuccessful. The judgment and decree of the Civil Court attained finality. Thus, when the admitted position was that the school authorities had accepted their mistake in wrongfully restraining the petitioner from joining the school despite an order of injunction of the civil court and inspite of several instructions from the D.I. of schools, the question of not paying salary to the petitioner did not arise. An appeal preferred by the state respondents against the judgment and decree of the court was also dismissed and the state respondents who were defendants in the suit and appellants in the Title Appeal (which was dismissed) could not sit over the order of appeal court and deny the implementation of the decree of the Civil Court. Admittedly, when the respondents/school wrongfully restrained the petitioner from joining his duties and the the D.I. of schools came to know of it he cautioned the school, that the respondents were bound to regularize the period as 'on duty'. He submitted that the petitioner did not stay away from work on his own volition and had made

sincere attempts to join his duties. In support of such contention, Mr. Sikdar relied on the complaint lodged by the petitioner with the local police station and also on the several communications sent to the school authorities by the DI of Schools. Mr. Sikdar relied on the decision of the Hon'ble Apex Court in the matter of **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D. ED.) & Ors.**, reported in **(2013) 10 SCC 324** in support of his above submissions.

9. Mr. Shamim Ul Bari, learned advocate appearing on behalf of the state respondents referred to the combined affidavit-in-opposition filed on behalf of the respondent Nos.1, 2 and 3 namely, State of West Bengal, Commissioner of School Education and District Inspector of Schools (S.E.) Purba Medinipur, Tamluk, and submitted that if the school authorities had wrongfully restrained the petitioner from joining the school during the disputed period, the state respondents were not duty bound to pay the salary to the petitioner for the period August 1, 2005 to December 14, 2011. According to him, the said period should be treated as leave without pay as the petitioner had not performed any duty. That the state authorities were not responsible for the resistance on the part of the school authority who had kept the petitioner away from work. He further submitted that on the basis of the decree of the learned civil court, the mistakes in the service book of the petitioner, were rectified and the petitioner was allowed to resume his duty on December 15, 2011 and continue in service upto September 13, 2012. He further submitted that the part of the decree of the civil court which could be implemented under the law was done by the Commissioner of School Education, but the

question of regularizing the period when the petitioner did not work and payment of arrear salary were not the subject matters of the suit and could not be implemented. He further submitted that an executing court could not go beyond the decree and the prayer for direction upon the respondents to regularize the leave, and pay the entire arrear salary during the period between August 1, 2005 to December 14, 2011 were beyond the scope of the decree of the Civil Court.

10. Mr. Kanai Lal Samanta, learned advocate appearing on behalf of the school authority submitted that the school authorities, that is, the respondent Nos.4 and 5 were always willing to comply with the direction of the learned civil court.

11. Heard the parties.

12. There are few admitted facts which are required to be mentioned. The writ petition filed by the petitioner being W.P. No.4840 (W) of 2004 for correction of his date of birth and the date of joining in the records of the employer school and in the service book, was dismissed. In an appeal carried from the said order of dismissal being MAT No.2188 of 2004, the petitioner was granted liberty to file a civil suit for redressal of his grievances. The petitioner filed Title Suit No.68 of 2005 before the learned Civil Judge (Junior Division), 1st Court at Tamluk, an ad interim order was passed by the civil court on July 25, 2005 restraining the defendants in the suit from giving any effect to the approval letter dated November 29, 1983 in which the date of birth of the petitioner was wrongly recorded and further restraining the defendants from giving effect to the superannuation notice by which the petitioner was directed to retire

from service with effect from August 1, 2005. Thus, the effect of the said ad interim order was that the petitioner was allowed by the civil court to continue his service as a Group D staff in the said school. It is also on record that the petitioner was not permitted to join the school and was restrained by the then headmaster. The petitioner was obstructed from signing the attendance register and finding no other alternative, the petitioner lodged complaints with Kolaghat Police Station vide G.D.E. No.33 dated August 1, 2005 and G.D.E. No.180 dated August 4, 2005. Letters were also sent to the headmaster of the school by the concerned D.I. of Schools instructing the headmaster that the order of the civil court should be complied with. The D.I. of Schools (S.E.) Purba Medinipur by letters dated October 17, 2006 and December 18, 2006 directed the school to comply with the order of injunction. The school was also directed to submit the requisition for the salary of the petitioner once the petitioner resumed his duties. These communications are a part of the writ petition and their correctness has not been denied in the affidavit-in-opposition filed in this proceedings by the state respondents. Moreover, in paragraph 7 of the affidavit-in-opposition, the D.I. of Schools has stated that the petitioner could not attend the school due to the resistance and non-cooperation of the school authorities. The ad interim order of injunction was made absolute by the Civil Court by an order dated January 20, 2006 and the application for temporary injunction filed by the petitioner in the civil suit was allowed. The civil court observed that the petitioner had raised substantial questions which needed a deeper probe and a *prima facie* case had been made out on the basis of documents produced by the

school authorities. Thus, the ad interim order of injunction was made absolute and the defendants were restrained from giving effect to the order of approval and also to the notice of superannuation treating the date of birth of the petitioner as August 1, 1945, till the disposal of the suit without prejudice to the parties, and on the condition that the petitioner would not claim any promotional benefits, incremental benefits or any benefit on the length of service and if it was found that the petitioner's date of birth was August 1, 1945 and not September 11, 1952 then the amount drawn by the petitioner during the period would be adjusted against the retirement benefits. Admittedly, the petitioner was protected by an order of temporary injunction and he ought to have been allowed to join the school. He was kept away from work wrongfully and illegally. The other admitted fact is that the school authorities in a resolution dated January 10, 2009 recorded that the headmaster admitted that the actual date of birth of the petitioner was September 11, 1952 and that in the admission register of the school where the petitioner studied, the same was recorded as September 11, 1952, whereas, the date of birth recorded in the letter of approval of the appointment of the petitioner as August 1, 1945 was incorrect.

13. It was further mentioned in the resolution that in order to protect the reputation of the school and maintain peace between the parties, the litigations should come to an end as the dispute had arisen owing to some mistakes committed by the school authorities. The school authorities recorded that the letter of approval of appointment would be rectified by inserting the correct date of birth of the petitioner. It was also

resolved that the petitioner would be asked to resume his duties immediately and all his arrear dues would be paid. It was further resolved that parties would not continue with the respective litigations. Subsequent to the said resolution, a solenama/settlement was entered into between the petitioner and the school authorities and the same was filed in the civil court. In the said solenama, it was undertaken by the school authorities, that is, by the defendant Nos.1 and 2 in the suit, that from August 1, 2005 the arrear salary of the petitioner would be paid. The school authorities were bound by the letters of the D.I. of Schools (S.E.), Purba Medinipur to allow the petitioner to join and earn his salary on and from August 1, 2005. The same was also recorded in the resolution dated January 10, 2009. It was also agreed between the parties that the suit would proceed against the defendant Nos.4 and 5, that is, the D.I. of Schools (S.E.), Purba Medinipur and State of West Bengal. The suit was heard and decreed ex parte against the defendant No.3, that is, the then headmaster of the concerned school and on contest against the defendant Nos.4 and 5 and on the basis of the solenama against defendant Nos.1 and 2. The petitioner got a declaration that his date of birth was September 11, 1952 and the date of retirement should be given effect to according to the said date of birth. The defendants in the suit were directed to make necessary correction in the approval letter and in the service book of the petitioner. The solenama which was Exhibit-7 in the said suit was made a part of the judgment and decree dated November 28, 2011. The fact that the arrear salary would be paid is a part of the solenama.

14. Aggrieved by the said judgment and decree, the State respondents preferred Title Appeal No.1 of 2012 before the learned District Judge, Purba Medinipur. The learned District Judge, Purba Medinipur by judgment and decree dated April 12, 2012 dismissed the appeal affirming the judgment and decree passed in Title Suit No.68 of 2005.

15. Two main grounds raised in the appeal by the defendant Nos.4 and 5, that is, the state respondent herein were that the solenama was collusive and was not binding upon the State and that the letters written by the defendant No.4, that is, the D.I. of Schools were in collusion with the petitioner in order to grant illegal benefit to the petitioner. The relevant ground taken by the state respondents were *inter alia* as follows:-

“(2) For that the Ld. Court below ought to have held that his date of birth is 1.8.45 as appearing in the approval letter and service book. Ld. Court below ought to have held that School authority filed a solenama petition which is collusive one and not binding upon the state.

16. Upon elaborate consideration of the evidence and the records, the District Judge dismissed the appeal and held that there was no illegality or irregularity in the judgment and decree passed by the Civil Court. Thus the grounds as aforesaid which were raised by the State respondents in the civil suit were not accepted by the learned District Judge in the Title Appeal and as such the State respondents now cannot once again challenge the solenama which forms a part of the decree of the civil court and upheld in the Title Appeal. Thus the contention of the state respondents that they were not bound by the solenama was not entertained at all and this point is now barred by the principles of

resjudicata and the principle of issue estoppel. The solenama was substantially in issue before the appeal court and the challenge to the solenama did not persuade the appeal court to decide in favour of the appellant/state respondents.

17. Moreover, the State authorities who were defendants/appellants in the suit did not prefer a second appeal. Instead, by the order impugned the Commissioner who is a representative of the state (who lost the title appeal), directed partial implementation of the order of the learned civil court and the payment of arrear salaries on and from August 1, 2005 to December 14, 2011 were denied on the ground that the petitioner had not rendered any duty during the aforesaid period and as such the said period should be treated as leave without pay and could not be regularized. The Commissioner of School Education was bound by the decree which was affirmed in appeal. The West Bengal Board of Secondary Education was added in the proceeding but none appeared on behalf of the Board.

18. It is an admitted position that the petitioner was wrongfully restrained by the employer from joining his duty. The school authorities have admitted the same. The D.I. of Schools directed the school authorities to allow the petitioner to resume his duty in terms of the ad interim order and order of temporary injunction passed by the civil court with a further direction upon the school to raise the salary bills for payment to the petitioner. It is not a case where the petitioner himself stayed away from work. The solenama which forms a part of the decree of the civil court had attained finality. Records reveal that the employer had

undertaken that they would be bound to pay the salary of the petitioner from August 1, 2005. Thus, even if the money is provided by the state, when the challenge to the solenama in the state's appeal did not result in their favour in the judgment of the Appeal Court, the said issue cannot be reopened and the solenama is now binding. Thus the leave of the petitioner ought to be regularized in terms of the solenama and the arrear salary should be paid accordingly.

19. In the decision of **Shiv Nandan Mahto vs. State of Bihar & Ors.** reported in **(2013) 11 SCC 626**, the Apex Court held as follows:-

“8. Having heard the learned counsel for the parties, we are constrained to observe that the High Court failed to examine the matter in detail in declining the relief to the appellant. In fact, a perusal of the aforesaid short order passed by the Division Bench would clearly show that the High Court had not even acquainted itself with the fact that the appellant was kept out of service due to a mistake. He was not kept out of service on account of suspension, as wrongly recorded by the High Court. The conclusion is, therefore, obvious that the appellant could not have been denied the benefit of back wages on the ground that he had not worked for the period when he was illegally kept out of service. In our opinion, the appellant was entitled to be paid full back wages for the period he was kept out of service.

9. Consequently, the appeal is allowed. The order passed by the Division Bench is quashed and set aside. The appellant has already been reinstated in service. The respondents are, however, directed to pay to the appellant the entire full back wages from the period he was kept out of service till reinstatement. The full back wages shall be paid to the appellant with 9% interest. Let the amount be paid to the appellant within a period of three months from the date of receipt of copy of this order.”

20. The State respondents have acted arbitrarily and with *mala fide* intention in denying the payment of the salary of the petitioner and has now urged that this Court should enter into the validity of the solenama which cannot be permitted in view of the dismissal of the Title Appeal filed by the defendants/State respondents. The challenge to the solenama was not accepted by the appeal court. An order of court ought to be obeyed as

it is a matter of public policy. Arbitrariness in executive actions is violative of Article 14 of the Constitution of India and deserves to be struck down. The memorandum dated August 3, 2012 is set aside, insofar as, it relates to issue No.iii, which is quoted below:-

“For issue no.(iii), he is advised that the said teacher should not receive salary for the period between 01/08/2005 to 14/12/2011 because he had not rendered his duty due to dispute in respect of his date of birth as recorded in his service book and the said period should be treated as leave without pay to regularize his absence.”

21. The petitioner will be treated to be as on duty on and from August 1, 2005 to December 14, 2011.

22. The school authorities are directed to implement the order of the civil court by sending the recommendation to the West Bengal Board of Secondary Education for regularizing the period as on duty and upon such regularization the arrear salary of the petitioner shall be disbursed by the State respondents by giving the petitioner all incremental and consequential benefits as admissible during the aforesaid period and if otherwise entitled to under the law. The consequential retirement benefits if applicable shall be given. Interest on the arrear salary at the rate of 6% per annum be paid on and from August 1, 2005 upto the date of actual payment.

23. This writ petition is, thus, allowed.

24. There will be, however, no order as to costs.

Urgent photostat Certified Copy of this judgment, if applied for, be given to the parties, on priority basis.

(Shampa Sarkar, J.)