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Ct-17

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**FMA 284 of 2021
with
I.A No. CAN 1 of 2020
CAN 2 of 2020
CAN 5 of 2021
(via video conference)**

**Smt. Bharati Bhattacharya
Vs.
State of West Bengal & Ors.**

Mr. M. Bhattacharyya
Mr. B. Sahoo
Mr. Uttam Kumar Bhattacharya
... For the Appellant/Petitioner

Mr. Raja Basu Chowdhury
... For the Respondents

Mr. Swapan Dutta
... For the State Respondent

Although the matter is appearing under the heading application, by consent of the parties we take up the appeal itself for hearing by treating the same as on day's list.

The appeal is directed against an order dated 16th August, 2017 in connection with a writ petition filed by the Smt. Bharati Bhattacharya, Lecturer in Midnapore College.

The present appeal is filed by Smt. Bharati Bhattacharya. During the pendency of this appeal the sole appellant, namely, Smt. Bharati Bhattacharya, died on February 04, 2021 and accordingly, substitution application being CAN 4 of 2021 was filed and the said application was allowed by us on 17th March, 2021. Accordingly, the legal heirs of Smt. Bhattacharya are the appellants before us.

Being aggrieved by and dissatisfied with the impugned order dated 16.8.2017 passed by a single bench of this court the appellant preferred

the present appeal.

Smt. Bharati Bhattacharya was a Lecturer in Sanskrit in the morning section of Midnapore college. Due to inadequate students in the morning session she was shifted to in afternoon session, which Mrs. Bhattacharyya did not like. Ultimately, she filed a writ petition challenging the departmental proceedings initiated against her for her absence in duty as a lecturer in afternoon session.

The writ petition was filed in 2002 when she was in employment. Before the learned single judge it was contended on behalf of the petitioner that the petitioner was not given an opportunity to cross-examine all the prosecution witnesses by the enquiry officer. It was also contended that the enquiry officer did not invite Mrs. Bhattacharya at any stage of the proceedings.

Learned single judge on consideration of the aforesaid facts and having regard to the gravity of the allegations made observed that it would be proper to give some protection to Mrs. Bhattacharya and accordingly disciplinary authorities were directed not to take any further step till 23rd April, 2002 or until further orders, whichever is earlier, pursuant to the second show cause notice, which proposed removal from service.

On 23rd April, 2002 learned single judge extended the interim order in view of the prima facie finding in the earlier order dated 12th April, 2002. It seems that the learned single judge at the admission stage recorded the grievance of the writ petitioner and presumed that the allegations made by the writ petitioner, at the admission stage, to be correct for the purpose of admitting the writ petition and extending some protection to the petitioner and such protection appeared to

have continued from time to time. Ultimately, the matter came up for consideration before another learned single judge, which resulted in the impugned order dated 16th August, 2017.

There are allegations and counter allegations about the nature of proceedings before the enquiry officer under the disciplinary authority while the respondents would contend that every drop of a hat the writ petitioner would approach the writ court with a view to stall the disciplinary proceedings. The writ court contended that shifting the roster of the petitioner from morning session to afternoon session is in violation of West Bengal College Service Commission Act.

The report of the enquiry officer suggests that shifting of duty of the petitioner from the morning session to afternoon session was due to gradually decreasing the number of students in Sanskrit in the morning section and Mrs. Bhattacharya attended the college irregularly and even did not take any class on most of the occasions. She attended the college (vide report of the Principal dated 1st July, 1997). In the morning session Sanskrit was taught for pass students only and during that period the degree (Pass) was of two years duration. Whereas in the morning shift the number of classes of Smt. Bhattacharya were much below the optimum number of classes, which a teacher is required to take as per University statutes (24 periods per week). On retirement of Dr. S.P Har with effect from 1st August, 1995 a good number of classes in the day shift was going untaken for which Smt. Bhattacharya was requested to take some classes in the day shift along with her class load of the morning section (Degree Pass only –12 classes per week in the busy session i.e. from August to January and six classes per week

during the black session i.e. from February to July). Smt. Bhattacharya did not take the class allotted to her in the day shift on different excuses.

On academic requirement of the college and on the basis of the Government Order No. 586-Edn(CS) dated 13th June, 1997 and on application of Smt. Bhattacharya, she was transferred to the day section protecting her continuity and seniority in service. The transfer of Smt. Bhattacharya from morning shift to day shift was also approved by the West Bengal College Service Commission(vide letter no. 252/Cell/CSC/97, dated 30.7.1997 from the Secretary, West Bengal College Service Commission) wherein it was stated inter alia that the transfer of teacher from one shift to another shift is a matter of the Governing Body and the College Service Commission had nothing to do.

It was in the aforesaid background and her failure to attend classes the charge sheet and the second show cause notice against proposed punishment issued were challenged by Smt. Bhattacharya as she declined to accept such order and refused to perform her duties. The second show cause notice recommended removal of the petitioner from service. The departmental proceedings could not continue since the second show cause notice was stayed by a learned single judge and the writ petition was pending when she retired, which gave her an unfair advantage to argue that because of the retirement the departmental proceedings could not be continued. She took advantage of the law's delay. However, during the pendency of the proceedings the Joint Secretary to the Government of West Bengal, Higher Education Department, dated 6th May, 2013 and on 26th

June, 2015 directed revision of pension of Smt. Bhattacharya, which is important and taken note of.

On 6th May, 2013 the Joint Secretary to the Government of West Bengal, Higher Education Department considered the petitioner's past service for the purpose of pensionary benefits. The communication of the Joint Secretary to the Director of Public Instruction, West Bengal reads as follows:-

*"The Governor is hereby pleased to approve counting of past service of Smt. Bharati Bhattacharya, Ex-Lecturer, Midnapore College, for the period from 01.07.2000 to 28.02.2005 for the purpose of pensionary benefit only. I am further directed to say that the Governor is further pleased to grant extraordinary leave without pay for the aforesaid period since as per the records she did not attend the College during the said period and she did not take any class, and accordingly no salary was paid to her for the period from July 2000 to February 2005. This order is issued **in relaxation of normal rules as a special case and shall not be cited as precedent in future.**"*

Thereafter on 26th June 2015 on consideration of the revision of pension the following order was passed by the Joint Secretary to the Government of West Bengal, Higher Education Department:-

"I am directed to say that the Department has already issued an order vide no. 423-Edn(CS) dated 06.05.2013 (copy enclosed) counting the service of Smt. Bhattacharya for the period from 01.07.2000 to 28.02.2005 for the purpose of pensionary benefit granting her extra-ordinary leave without pay for the said period. You are therefore, requested kindly to revise the pension

of Smt. Bhattacharya in terms of the said order of this Department and to release the revised pension accordingly with immediate effect.

In this connection, I am further directed to request you to release the arrear pension, if any, to Smt. Bhattacharya immediately in order to avoid contempt proceedings before the Hon'ble Calcutta High Court."

It is pertinent to mention that the said release order was issued in view of the order passed by a single judge on 27th April 2016 by which contempt rule was issued upon a prima facie finding that by the earlier order dated 21st November, 2014 the college authorities were directed to take immediate steps towards release of the pensionary benefit to Mrs. Bhattacharya and to continue her salary till her retirement.

We, however, hasten to say that the first interim order does not cover the aforesaid two issues and it appears to us that her pensionary and other retiral benefits could not finally decided as the writ petition was not finally heard and disposed of. It seems that the learned single judge, while deciding the said matter in 2014, possibly overlooked the scope of the writ petition and the nature of the interim relief granted to the writ petitioner. The writ petitioner seems to have been given an unfair advantage by the aforesaid two orders in the contempt proceeding.

The communication dated 27th June, 2015 cannot be treated as an admission.

In any event, it seems that the authorities concerned were benevolent in taking into consideration the period from 1st July 2000 to 28th February, 2005 for the purpose of calculation of pensionary benefit by granting her extraordinary leave without pay. The previous order dated 6th May, 2013 has categorically

stated that such extraordinary leave without pay was extended since as per the records she did not attend the college during the said period and did not take any class.

Lastly it has been contended that she should be paid the arrear salary from 1st July 2000 to 28th February, 2005 as she should be treated to be in service and in support of that two documents were disclosed in the writ petition. Unfortunately, the original writ petitioner is dead. This requires a factual examination, which may not be convenient in absence of the original writ petitioner. Moreover, we cannot assume that the contents of the communication dated 6th May, 2013 has been issued recklessly and carelessly without examining the records. In fact, the communication dated 6th May, 2013 clearly says “as per records” she did not attend the college.

On such consideration, we do not find any reason to interfere with the order passed by the learned single judge. However, on the basis of the direction passed by the learned single judge the D.P.I ought to have issued a fresh order for release of terminal benefits. However, Mr. Swapan Dutta, learned counsel appearing on behalf of the State respondents, is unable to inform this court whether any such fresh order has been passed. The present appellants have informed that no such order has been passed by D.P.I.

Accordingly, we direct D.P.I to issue fresh order to release the retiral benefits in favour of the appellants in accordance with law within three weeks from the date of communication of this order, if not already issued.

The order of the learned single judge is modified to this extent only.

The appeal and all connected applications are disposed of accordingly.

There shall be no order as to costs.

Urgent photostat copy of this order, if applied for, be given to the parties upon compliance of all undertakings.

(Saugata Bhattacharyya,J.) (Soumen Sen, J.)