

11.05.2022

Court : 04
Item : 07
Matter : **MAT**
Status : DISMISSED
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MAT 48 of 2022

with

CAN 1 of 2022

Mitali Chakraborti

Vs.

The State of West Bengal & Ors

Mr. Partha Sarathi Bhattacharya, Senior Advocate

Mr. Kartick Kumar Roy, Advocate

Mr. Anadi Mohan Chakraborty, Advocate

Mr. Raju Bhattacharya, Advocate

Mr. Tanweer J. Mondal, Advocate

.....for the Appellant

Mr. Dr. Sutanu Patra, Advocate

Ms. Supriya Dubey, Advocate

.....for the WBCSSC

Mr. Bhaskar Prasad Vaisya, Advocate

Mr. Subroto Ghosh, Advocate

Mr. K.N. Nabi, Advocate

.....for the State

Admittedly the appellant was appointed in the post of Assistant Teacher on September 11, 2017, after a long battle fought successfully. The appellant offered her candidature and appeared in the Regional Level Selection Test 1998 held in the year 1999 by the West Bengal School Service Commission (Southern Region) and emerged successfully therefrom. She was expecting recommendation for appointment in any Government aided school but subsequently such recommendation was not put in reality, and the appellant realized that she has been discriminated as the general category candidate who has obtained lesser marks than her, has been recommended by the Commission.

Immediately a writ-petition being WP 19441 (W) of 1999 was filed challenging the panel prepared by the Commission with further direction to publish the panel in accordance with law. The aforesaid writ-petition was filed by several aggrieved persons including the appellant

herein and at the time of hearing it was found that all the petitioners have distinct cause of action and, therefore, cannot be joined in one writ-petition and a direction was passed upon the petitioners therein including the appellant to file afresh ventilating their individual grievances. Pursuant to such liberty, another writ-petition being WP 10623 (W) of 2003 was filed with a substantive prayer commanding the respondents to recommend the name of the appellant for appointment as Assistant Teacher in Philosophy within the jurisdiction of the School Service Commission in Southern Region in any School in terms of Regulation 9(3) of Regulation 1 of the West Bengal School Service Commission (Procedure for Selection of Persons for Appointment to the Posts of Teachers including Headmasters/ Headmistress/ Superintendents of Senior Madrasahs in recognized Non-Government Aided Schools and Procedure for Conduct of Business of the Commission) Regulations, 1998 (hereinafter referred as Regulation of 1998). The said writ-petition was dismissed by the single Bench as the validity of the said panel had expired. The said order of the single Bench was carried to a Division Bench in FMA 1270 of 2009. The Division Bench vide order dated June 12, 2017, allowed the said appeal directing the Chairperson of the Regional Commission to recommend the name of the appellant for appointment to the post of Assistant Teacher despite the fact that the life-span of the panel has expired. It was further observed while allowing the said appeal in the following: -

22. Since the writ petitioner was entitled to be recommended for appointment in the year 1999 but for no fault on her part she has not been able to discharge duty for the last 18 years, consequent where to she has also been deprived of financial benefits that could have accrued in her favour, we would exercise discretion by giving her the benefit of

discharging duty in a school in Kolkata and, therefore, we further direct the Chairperson of the regional commission to recommend her in an appropriate vacancy in a school within a radius of 10 kilometers of her residence.

It is thus apparent from the order of the Division Bench that the petitioner was found eligible to be appointed in such post and have been deprived for nearly 18 years in discharging such duties in such capacity. The Division Bench was of the view that the only solace which can be extended to the appellant, is to place her in a School under the control of the said Commission within a radius of 10 kilometers of her residence.

Undisputedly, the petitioner was issued an appointment letter on September 9, 2017, and joined the said post on September 11, 2017. Such appointment was subsequently approved on April 27, 2018. It appears from the record that the writ-petitioner though joined on September 11, 2017, was not paid the remuneration and/or salary on and from 11.09.2017 till 30.04.2018. A grievance was raised in this regard before the District Inspector of Schools (SE), Kolkata on August 7, 2019.

Subsequently, the appellant realized that her qualifying service would not meet the requirement to make her eligible to pension under the relevant Rules; so, a further writ-petition was filed for issuance of a mandamus upon the respondent authorities to compensate her for the loss suffered because of the lapses and negligence of the authority and also to extend full benefits including the pensionary benefits, gratuity and leave salary as admissible to the Assistant Teacher of the Government aided Schools. Since such grievance was not addressed by the said District Inspector of

Schools pertaining to non-payment of the salary for the service rendered by the appellant between the period from the date of her joining till the approval, further prayer was made for release the same thereof. Such being the primary relief claimed in the writ-petition, the single Bench disposed of the writ-petition directing the District Inspector of Schools to take immediate steps and look into the matter so that the appellant can get the salary for such period and if the appellant is found to be entitled the payment should be made within sixty days from the date of communication of the order.

However, the other prayer relating to the payment of full salary and all other benefits attached to the said post of Assistant Teacher, the Court after noticing the observations made by the Division Bench, declined to grant such relief.

Mr. Partha Sarathi Bhattacharya, learned Senior Advocate, appearing for the appellant fervently submitted before us that the order of the Division Bench cannot act as a deterrent to the relief claimed in the instant writ-petition, which is independent, distinct and separate from the cause of action pleaded in the earlier writ-petition. It is further submitted that since the Division Bench noticed the lapses and negligence on the part of the authorities in not recommending the name of the appellant which deprived her of the considerable period of service, the writ-petitioner cannot be further deprived in not treating the said appointment from a date when the last candidate was appointed on the basis of the said examination. In other words, it is submitted that there is no impediment on the part of the Court to grant such relief claimed in the writ-petition as such relief was not available in the earlier

round of litigation and, therefore, the single Bench have overlooked the specific observation of the Division Bench as quoted above.

It is submitted that the provisions contained in Order II Rule 2 of the Code of Civil Procedure is not applicable to a writ proceeding and has a restricted applicability to the suit and, therefore, the prayer made in the instant writ-petition cannot be denied on such ground and placed reliance upon the judgments of the Supreme Court in case of **1) Devendra Pratap Narain Rai Sharma Vs. State of Uttar Pradesh & Ors.** reported in **AIR 1962 SC 1334** **2) Gulabchand Chhotalal Parikh Vs. State of Gujarat** reported in **AIR 1965 SC 1153** and **3) Raju Jhurani Vs. Germinda Private Limited** reported in **(2012) 8 SCC 563**.

On the other hand, Mr. Vaisya, learned Advocate appearing for the State submitted that the prayer of the earlier writ-petition would evince that the relief claimed by petitioner was refused and if the Court has denied the same and the order attained finality, it cannot be reopened. It is further submitted that the grievance was restricted to non-payment of salary between the period from the date of joining and the approval and the appellant cannot claim something beyond the circumference thereof and, therefore, the single Bench rightly rejected such claim.

On the conspectus of the aforesaid submission advanced before us, the point which in our considered opinion falls for consideration is whether the relief as couched in the said writ-petition, can be granted in view of the categorical observations of the Division Bench in

the earlier writ-petition.

Though Order II Rule 2 of the Code incidentally arose as a hurdle to the appellant in granting the relief as claimed in the writ-petition, it may not be required to deal with the same as such point becomes academic on disclosure of the materials from the record of the earlier writ-petition.

In the case of **Devendra Pratap Narain Rai Sharma (supra)**, the Tehsildar who was on probation, was suspended and the enquiry commenced on certain charges of misdemeanor. Ultimately, the said Tehsildar was reverted to the post of Naib Tehsildar but the disciplinary authority recommended dismissal from service and forwarded the papers to the State Government who accepted such recommendation and dismissed the said employee from service. The dismissed employee filed a suit challenging the legality of the order of dismissal principally on the ground that he was not afforded an opportunity to defend himself. The said suit was dismissed but the decree was reversed by the High Court basically on the principle that the dismissed employee must have been afforded an opportunity to defend before any penalty is inflicted. While setting aside the decree, the High Court granted a declaration that the order of the State Government in dismissing the service was void and inoperative and, therefore, such dismissed employee should be treated to have continued in service. Pursuant to the said order the dismissed employee was reinstated in the original post of Tehsildar and, thereafter, applied for payment of the arrears and salary and allowances due to him. The Accountant General raised an objection to such claim

and did not accede to the prayer. To his misfortune the Tehsildar was further suspended by the Board of Revenue and direction was passed to hand over the charge to the Naib Tehsildar. A writ-petition was filed before the High Court challenging the order directing enquiry into the allegation regarding his work and conduct as Tehsildar and for setting aside the order of suspension issued by the authority. The High Court held that the second enquiry by the Board of Revenue was not barred by virtue of the previous decision and the said employee cannot be deemed to have been confirmed with effect from April 1983. A plea was taken, since the declaration was made in a civil suit, the order passed in the writ-petition and the subsequent action of the authority would be barred by the Order II Rule 2 of the Code. In the backdrop of the aforesaid facts emanates from the said report, the Apex Court held that the scope in an earlier round of litigation was restricted to a procedure adopted for imposing penalty which was found by the High Court to be irregular which cannot prevent the State to take a decision for another enquiry in respect of the same subject matter. In such backdrop, it is held that the provision contained in Order II Rule 2 of the Code is fundamentally applicable to a civil suit and the bar under the aforesaid provision may not apply to a petition of high prerogative writ under Article 226 of the Constitution.

In the case of **Gulabchand Chhotalal Parikh (supra)** the Apex Court held that the applicability of the said provision is restricted to a suit which is primarily filed for enforcement of the personal rights whereas the writ proceedings are intended to compel the performance by

a public servant of his duty of a public nature and, therefore, the declaration of a personal right is not an essential characteristic in the issue of a writ of mandamus. However, the Apex Court held that such difference would be immaterial if the issue which is directly and substantially an issue in an earlier proceeding and determined finally, is reagitated in the subsequent proceedings. It would be profitable to quote the relevant observations rendered in paragraph 29 of the said report which runs thus: -

29. it is further submitted for the appellant that a writ of mandamus, according to its nature, is to be issued mainly to compel the performance by a public servant of his duty of a public nature, while in a suit the plaintiff prays for the enforcement of his personal rights. The declaration of a personal right is not an essential characteristic in the issue of a writ of mandamus. The difference in the nature of the two proceedings is immaterial if the matter is decided inter parties in one proceeding is the same which is to be determined in the subsequent proceedings and the parties to the suit were also parties to the writ-petition. (emphasis supplied)

In the case of **Raju Jhurani (supra)** the question was whether Order II Rule 2 of the Code has any manner of applicability to a proceeding of winding-up under the Companies Act. It is thus held that the nature and the concept of winding-up proceeding is completely different than the scope in the suit for enforcement of the personal right and, therefore, Order II Rule 2 of the Code shall have no manner of applicability.

It is no doubt true that Order II Rule 2 has its applicability to a suit, which is evident, and apparent from the language employed therein. The said provision creates an embargo on the litigant to file a suit claiming a relief depended upon the cause of action for which the earlier suit was filed for the other reliefs and if such omission is apparent the subsequent claim cannot be

entertained by the Court. In other words, the said provision mandates that the person must claim all reliefs available on the principal cause of action in a suit and if he omits to claim any one or more reliefs, he shall be precluded from claiming such relief subsequently.

The reliefs pertaining to Article 226 of the Constitution framed by this Court makes it abundantly clear that the procedure provided in the Code of Civil Procedure shall apply *mutatis mutandis* to the writ proceeding. Though the rigor of the provisions may not apply yet the principles governing the procedural law may be applicable depending upon the nature of the claim and the reliefs claimed in two proceedings.

Even in case of **Gulabchand Chhotalal Parikh (supra)**, the Apex Court has indicated that the fundamental difference in the nature of the two proceedings is immaterial if the matter has been decided inter parties in one proceeding is the same which is to be determined in the subsequent proceedings and the parties to the suit were also parties to the writ-petition. The said rule is based on a public policy and does not encourage the litigations between the parties for one relief when such relief can be conveniently claimed and granted in an earlier round of litigation.

As indicated above, the subsequent facts having discerned from the record of the earlier writ-petition, virtually makes the aforesaid point more academic yet we intend to make certain observations because of the arguments having advanced in this regard.

In an earlier writ-petition namely WP 10623 (W) of

2003, the petitioner was seeking a relief in the form of mandamus to be appointed as Assistant Teacher in Philosophy after complying Regulation 9(3) of Regulation 1 and the preparation of fresh panel in terms thereof. Amidst pendency of the writ-petition, an application for amendment being CAN 6408 of 2004 was taken out by the appellant amending the prayer and/or reliefs claimed in the writ-petition to the effect that while passing the order recommending the name of the petitioner for appointment as an Assistant Teacher in Philosophy upon recasting the panel, the effect should be given from 02.11.1999. The said application for amendment was allowed by the single Bench on 22.09.2004 directing the appellant to file an amended copy of the writ-petition.

What is discerned from the aforesaid fact that though the principal relief was relatable to the recommendation for appointment to the post of Assistant Teacher, but such appointment should be given notional and retrospective effect from 02.11.1999. The appellant was quite alive of the fact that the unamended relief granted in the said writ-petition may not be adequate as it would have some impact on the benefits which is admissible to such post and precisely for such reason the appointment was sought from a retrospective date.

Initially the said writ-petition was dismissed but the Division Bench allowed the said application directing the authorities to recommend and appoint the petitioner to such post but did not grant any substantial relief that such appointment to take effect from a retrospective date. The observations made in paragraph 22 of the said judgment as quoted hereinabove exposes the clear intention that though the Division Bench found that the

petitioner have been deprived for nearly 18 years in discharging the solemn duty which has resultantly impacted upon the financial benefit, yet the Division Bench directed the Commission to place the appellant in any School within 10 KMs radius of her residence.

It is beyond cavil of doubt if several reliefs are claimed in a proceeding and the Court has passed an order granting some of the reliefs, it is implied that the other reliefs have been denied. The Division Bench was conscious of the situation that the appointment which could have been done in the year 1999 have been illegally postponed and/or willfully delayed yet did not pass an order that such appointment shall take effect notionally from an anterior date. If the relief has been denied such relief cannot be granted in a subsequent proceeding.

In view of the above, we do not find that it is a fit case where the appellant is entitled to such relief and, therefore, we do not find any illegality and/or infirmity in the order of the trial Court.

The appeal being **MAT 48 of 2022** and the connected application being **CAN 1 of 2022** are **dismissed**. No order as to costs.

(Harish Tandon, J.)

(Rabindranath Samanta, J.)

