

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side**

Present:
The Hon'ble Justice Aniruddha Roy

W.P.A. 226 of 2016

**Biswatosh Chaudhuri
Vs.
State of West Bengal & Ors.**

For the petitioner : Mr. Ekramul Bari
Mr. Syed Mansur Ali.

For respondent No. 5 Mr. Saibal Acharyya

Heard on : December 13, 2023

Judgment on : December 13, 2023

Aniruddha Roy, J. :

Mr. Ekramul Bari, learned counsel with Mr. Syed Mansur Ali, learned advocate appear for the petitioner.

Mr. Saibal Acharyya, learned counsel appears for the managing committee of the school, the respondent no.5.

None appears for the State nor any accommodation has been prayed for.

Re : I.A. No. CAN 2 of 2023

1. This is an application filed by the petitioner praying for recalling of the order dated **September 12, 2023**.
2. On the basis of a mistaken submission made on behalf of the petitioner, the order was passed recording that, the issue involved in this writ petition is pending before the Larger Bench.
3. Mr. Ekramul Bari, learned counsel submits that, the issue involved in this writ petition is totally different and not pending before the Larger Bench and, therefore, there is no embargo upon this Court to proceed with this writ petition for its disposal on its own merit.
4. Mr. Saibal Acharyya, learned counsel appearing for the managing committee of the school supports such contention of the petitioner.
5. In view of the above, the order dated **September 12, 2023** stands **recalled** and the writ petition is taken up for final consideration.
6. Accordingly, **I. A. No. CAN 2 of 2023** stands **allowed**.

Re : WPA 226 of 2016

1. The State is not represented. The departmental note dated **September 7, 2016** suggests that, despite there being a direction dated January 18, 2016 no affidavit-in-opposition was filed.

2. The order of this Court dated **August 10, 2023** depicts that, the learned State counsel has filed a report in the form of an affidavit affirmed on July 20, 2023, the same is on record. Syed Mansur Ali, learned counsel for the petitioner has confirmed this Court that, the petitioner has not filed any exception to the said report.

Facts :

3. Pursuant to and in terms of an approval dated **June 15, 1988** issued by the respondent no.3, the ***petitioner was appointed as an Assistant Teacher at Sitalatala Harimoti Vidyamandir, Hooghly*** (for short the school) with effect from **May 9, 1988, Annexure-P1** at **page 33** to the writ petition. Approval was made for the petitioner with the qualification – **Bachelor of Arts (B.A.)** only. The petitioner was teaching **History** and **English** at the relevant school.

4. For the purpose of enhancement of his qualification to the Master's level, the petitioner applied before the managing committee of the school to grant necessary permission for the same. The managing committee of the school, by its resolution dated **January 15, 1991** at **page 27** to the writ petition granted such permission. By a further resolution dated **September 14, 1997** at **page 29** to the writ petition, the managing committee of the school allowed the petitioner to grant the higher pay scale on and from **December 23, 1989** as because the last day of M.A. Examination of the petitioner was **December 22, 1989**. The said higher pay scale was granted by the managing committee after adhering to the

provisions laid down under **Clause 16(3)** of the Government Notification bearing no.**33-Edn.(B)** dated **March 7, 1990** (for short ROPA 1990). After allowing such higher pay scale to the petitioner, the managing committee of the school transmitted all the relevant records before the respondent no.3 for its approval with the necessary **Option Form** for revised scale under the said ROPA 1990 appearing at **page 35** to the writ petition, which shows that, the higher pay scale commensurating with the M.A. (History) degree of the petitioner granted upon receiving a provisional approval endorsed by the respondent no.3 on **July 29, 1991**. Such endorsement is glaring on the said **Option Form** appearing at **page 35** to the writ petition. The relevant certificate of the petitioner for his qualification, M.A. (History) is appearing at **page 32** to the writ petition.

5. With the introduction of **ROPA 1998** the higher fixation of pay was also allowed and granted to the petitioner under the Government **Memorandum No.25 SE (B) dated February 12, 1999** (for short the ROPA 1998) appearing at **page 37** to the writ petition. The said grant under ROPA 1998 in favour of the petitioner was also provisionally approved by the respondent no.3 and such approval is glaring at **page 38** to the writ petition.

6. By a resolution dated **March 8, 2015**, the managing committee of the school decided to forward and transmit all the relevant records of the petitioner to the office of the respondent no.4 for according the necessary approval, as required under law, in support of the payment of higher pay

scale to the petitioner with the enhancement of his qualification, at **page 39** to the writ petition. The records were then sent at the office of the respondent no.4.

7. Following the grant already made under the said **ROPA 1990** and **ROPA 1998**, as narrated above, the ***petitioner had enjoyed the higher pay scale since December 23, 1989 till his retirement on September 30, 2019.***

8. The respondent no.4 then issued a communication dated December 31, 2015, ***Annexure-P3*** at ***page 41*** to the writ petition whereby and whereunder referring to a government memo ***DSE/WB Memo No.112-GA/4G-36/2014*** dated ***January 29, 2015*** informed the Headmaster of the school that, the petitioner was not eligible to receive the Post Graduation scale and a refund was claimed on the ground of overdrawal by the petitioner. Challenging this decision and the communication dated December 31, 2015, the instant writ petition has been filed.

9. Upon the said writ petition being moved, a coordinate Bench on ***January 18, 2016*** passed an interim order staying operation of the said impugned decision dated December 31, 2015.

Submissions :

10. Mr. Ekramul Bari, learned counsel for the petitioner submits that, the petitioner after approval being granted with effect from ***May 9, 1988***,

had joined the school. He has **retired on September 30, 2019**. Immediately after enhancement of his qualification to Master's degree though he was appointed as a B.A. teacher, his prayer for higher pay scale was allowed and in terms of the provisional approval for pay fixation made by the respondent no.3, he has enjoyed the higher pay scale both under ROPA 1990 and ROPA 1998. The school authority transmitted all the relevant records at the office of the respondent no.4 seeking its approval for higher pay scale but no decision had been taken contemporaneously or even thereafter until the impugned decision came on **December 31, 2015**. Referring to **Clause 16(3) from ROPA 1990**, learned counsel for the petitioner also submits that, all teachers who have improved their qualifications, like the petitioner, in the subject or group relevant to their teaching/appointment are eligible, as the petitioner is, eligible to receive the higher pay scale with effect from **January 1, 1986** or the date of improving of qualification, whichever is later.

11. Referring to the managing committee **resolution** dated **September 14, 1997 at page 29** to the writ petition, Mr. Bari submits that, the school rightly granted permission for higher pay scale with effect from **December 23, 1989** as the last date of the M.A. Examination for the petitioner was **December 22, 1989**.

12. In the light of the above submissions, learned counsel for the petitioner submits that, the impugned decision of the respondent no.4

dated December 31, 2015 at page 41 to the writ petition should be set aside and quashed and the higher pay scale which the petitioner has already enjoyed should be directed to be continued and approved.

13. In support of his contention, Mr. Bari has referred to a judgment of the Hon'ble Division Bench dated **December 4, 2023 In the matter of : State of West Bengal & Ors. -vs.- Jayanti Basak & Anr.** rendered in **MAT 513 of 2014** and a judgment of the Single Bench delivered by this Court on **December 8, 2023, In the matter of : Sri Amal Kumar Tewari -vs.- The State of West Bengal & Ors.,** rendered in **WPA 11881 of 2011.**

14. As the State is not represented, this Court proceeds on the basis of their stand taken on oath in the report filed in the form of affidavit affirmed on behalf of the respondent no.3 on July 20, 2023.

15. The relevant paragraph indicating the stand of the State is quoted below :

“5. That pursuant to the above direction the District Inspector of Schools (S.E) Hooghly, being respondent No.3 herein, filling this instant report before the Hon'ble Court :-

- i. That the petitioner was an Assistant Teacher of Chatra Shitalatala Harimoti Vidyamandir, Hooghly (Formerly known as Shitalatala harimoti Vidyamandir Junior high School). He was appointed on 09.05.1988 having qualification B.A. which was approved by the District Inspector of Schools (SE), Hooghly vide memo no.2132/JH/Ser dated 15.06.1988.*
- ii. That the petitioner was allowed to draw higher scale of pay for attaining M.A. in History w.e.f. 23.12.1989 by the Managing Committee of the school without approval of the District Inspector of Schools (S.E.), Hooghly.*

- iii. *That there is no provision which empowered the Managing Committee to allow the higher scale of pay to any teaching and non-teaching staff of the school without having approval from the competent authority.*
- iv. *That the Additional District Inspector of Schools (S.E.), Serampore, Sub-Division rejected M.A. scale in favour of the petitioner vide memo no.487/SER dated 31.12.2015.*
- v. *That being aggrieved with the communication dated 31.12.2015 of the Additional District Inspector of Schools (S.E.), Serampore, Sub-Division, Hooghly, the petitioner filed a writ application being WPA no.226 of 2016.*
- vi. *That the Hon'ble Court passed an interim order dated 18.01.2016 staying the order dated 31.12.2015 issued by the Additional District Inspector of Schools (S.E.), Serampore, Sub-Division, Hooghly.*
- vii. *That in the meantime the petitioner retired from his service on 30.09.2019. He prayed for pension and other terminal benefit. The Provident Fund amount has already been paid to the petitioner amounting Rs.11,62,274.00 (Rupees Eleven Lac Sixty Two Thousand Two Hundred Seventy Four Only) by the Additional District Inspector of Schools vide his memo no.578/SER dated 27.09.2022.*
- viii. *That the petitioner prayed for pension which was received by this office on 12.12.2018. After that this office forwarded the pension file to the office of Joint Director of Accounts (JDA in short) on 18.10.2019 for vetting. The Joint Director of Accounts raised some objection and sent back the file to this office on 22.10.2019. This office sent back the file to the end of the Head of the Institution i.e. school authority of Chatra Sitalatala Harimoti Vidyamandir, Hooghly on 07.11.2019 online with request to comply the objection raised by the Joint Director of Accounts (JDA in short). The Head of the Institution (HOI) sent back the file to the end of the Applicant on 12.11.2019. Now the file is at the end of the petitioner. This office again requested the school authority to resubmit the pension file of the petitioner after compliance vide this office memo no.154/SE dated 16.09.2022. As soon as the school authority*

resubmit the file after proper compliance this office shall take further step for release his terminal benefit except Provident Fund as this has already been paid.

Copy of the report along with all the annexures are annexed herewith and marked as Annexure "R-1" collectively."

16. Mr. Saibal Acharyya, learned counsel appearing for the respondent no.5, the school authority submits that, after enhancement of the qualification by the petitioner, the managing committee of the school decided to grant him the higher pay scale commensurating with his M.A. (History) degree as the petitioner was all along teaching also History in the school. The resolutions, already referred to above, depicts the stand of the school correctly. He further submits that, all the necessary and relevant documents for obtaining approval from the office of the respondent nos. 3 and 4 were duly transmitted and sent by the managing committee of the school to both the respondent nos. 3 and 4. He submits that, save and except the grant of higher pay scale after being provisionally approved by the respondent no.3 under ROPA 1990 and **ROPA 1998**, as would be evident from pages 35 and 37 to the writ petition, no further communication was made by the respondent no.3 and/or 4 to the managing committee of the school. The respondent nos. 3 and 4 slept over the application made by the school for approval of higher pay scale of the petitioner and only on **December 31, 2015** the respondent no.4 **rejected** the claim of the petitioner.

Decision :

17. After considering the submissions made on behalf of the parties and the stand taken on behalf of the respondent no.3 in the affidavit-report and upon perusal of the materials on record it appears to this Court that, the admitted position is that, the petitioner had acquired M.A. (History) degree and on the basis thereof higher pay scale was allowed to him by the school and the necessary pay fixation was made upon the provisional approval made by the respondent no.3 under ROPA 1990 and **ROPA 1998** respectively, as would be evident from pages 35 and 37 to the writ petition.

18. On a scrutiny of the impugned decision dated December 13, 2015, **Annexure-P3 at page 41** to the writ petition, it appears to this Court that, the respondent no.4 rejected the claim on the strength of a government memorandum dated **January 29, 2015** which has already been referred to above. In **sub-paragraph (ii) to paragraph 5** in its affidavit report, the respondent no.3 has admitted that, the petitioner was allowed to draw the higher pay scale by the managing committee of the school with effect from **December 23, 1989**. The record shows at **pages 35 and 37** to the writ petition that, subsequently in 1991 and 1999 the higher pay scale was granted to the petitioner under **ROPA 1990 and ROPA 1998** after provisional pay fixation being approved by the respondent no.3. All such events are pre government memo being dated **January 29, 2015**. A right which has already accrued in favour

of the petitioner and the petitioner was allowed to enjoy the same, such right cannot be taken away by a subsequent government memo dated **Janaury 29, 2015** on the basis whereof the claim of the petitioner was rejected by the respondent no.4 in the impugned decision dated **December 31, 2015**. Inasmuch as, the provisions under ROPA has a statutory flavour which cannot be overridden by any executive instruction.

19. The Hon'ble Division Bench ***In the matter of : Jayanta Basak & Anr. (supra)*** had referred to a judgment of a previous Hon'ble Division Bench ***In the matter of : Rabi Kanta Barman -vs.- District Inspector of Schools (S.E.) & Ors.***, rendered in ***WPA 14760 (W) of 2004*** and observed as under :

*"9. Mr. Ekramul Bari, learned counsel appearing for the respondent no. 1/writ petitioner has referred to a decision of the coordinate bench in **Rabi Kanta Barman Vs. District Inspector of Schools (SE) & Ors. decided on 31st January, 2014 in which the Hon'ble Division Bench has construed Rule 12(3) of the Ropa 1998 and the Government Order no. 549-SE(S) dated 24th June, 1997 and observed that 'we have already indicated above that the petitioner was appointed as an Assistant Teacher in the said school prior to coming into operation of the School Service Commission Act, 1997. As such, the last part of the proviso contained in Rule 12(3) wherein the subject relating to the teachers appointed through the School Service Commission is dealt with, has no application in the present case. So we will have to opt the said portion of the said Rule out of our reconsideration presently.***

Ropa 1998 was notified on 12th February, 1999 and the effect of the said Ropa was given retrospectively from 1st January, 1996 as per recommendation given by the Pay Commission. Thus, when the new revised scale of pay of the teachers and non-teaching staff was introduced by framing revision of Pay and Allowances Rule 1998, the Government

was aware about its earlier Government order issued on 24th June, 1997. When despite having knowledge of the earlier Government Order dated 24th June, 1997, the Government, while framing revision of Pay and Allowances Rule 1998 did not specifically mention in the said Rule that such financial benefit cannot be given to those Assistant Teachers who acquired higher qualification in the relevant subject without obtaining prior permission from the concerned District Inspector of Schools (SE), grant of higher scale of pay to such Assistant Teachers after they have acquired higher qualification in the relevant subject, in our view cannot be denied provided however, they satisfy the condition mentioned therein. In fact, the condition for grant of higher scale of pay to such Assistant teacher is qualified in the said Rule which provides that such higher scale of pay can be granted to those teachers only when such higher qualified teacher in the relevant subject or group is justified as per approved staff pattern of that school.

Thus, in our considered view, if the said condition as provided in the said proviso of Rule 12(3) of the ROPA 1998 is satisfied then the petitioner's prayer for grant of higher scale of pay for his enhanced educational qualification cannot be denied notwithstanding he acquired such degree without obtaining prior permission from the concerned District Inspector of Schools (SE) in terms of the Government Order dated 24th June, 1997. Provided however degree which he acquired is recognized as per the Government Order No. 549-SE(S) dated 24th June, 1997.

Thus, we endorse the conclusion which was drawn by the other Division Bench of this Hon'ble Court in the case of Samir Kumar Saha Vs. State of West Bengal & Ors. (Supra) by holding that the petitioner herein is entitled to get higher scale of pay for his enhanced qualification subject to satisfaction of the conditions as mentioned above.'

10. The above decision cited by Mr. Bari is squarely applicable in the instant case. In the cited decision the District Inspector of School (SE) was directed to consider the petitioner's claim for grant of higher scale of pay for his enhanced educational qualification from the date of enhancement of his educational qualification in the relevant subject, afresh in the light of the observations made in the said decision.

11. In view of the fact that all the conditions stand fulfilled, the D.I could not have denied financial benefit to the petitioner as there was no legal embargo at that relevant point of time.

20. While dealing with the issue raised before this Court whether a teacher is eligible to receive higher pay scale with the enhancement of qualification, ***In the matter of : Sri Amal Kumar Tewari (supra)*** this Court had observed as under :

“20. Grant of higher pay scale commensurating with the higher qualification of a teacher, is a benevolent policy of the State for encouraging the teachers for enhancement of their qualification for imparting education to the students at large for their benefit. Such a policy is required to be construed liberally in favour of the teacher, but of course, within the framework of law.”

21. The law is well settled that, the provisions of a government memorandum, issued in the executive fiat cannot take away the right of a person with a retrospective or a retroactive effect. A government memorandum issued in the executive fiat cannot be considered as a statute. Even if a statute is promulgated, unless a specific provision is contained therein to the effect of the application of the same with a retrospective or retroactive effect, substantive right cannot be taken away with retrospective effect on the basis of such provisions. In the fact of this case, the government memorandum was admittedly issued on ***January 29, 2015*** as referred to in the impugned order dated December 30, 2015 and the petitioner had been receiving the higher pay scale since 1989 and thereafter. The petitioner had retired on September 30, 2019. Hence, on the strength of the government memorandum, issued in the executive fiat by the State should not and cannot take away the right of

the petitioner which have been accorded and granted to him since 1989 in terms of **ROPA**.

22. In view of the foregoing discussions and reasons, the impugned order dated **December 31, 2015, Annexure-P3 at page 41** to the writ petition stands set aside and quashed.

23. All the superannuation benefits shall be released in favour of the petitioner, if not released already, taking into account the higher pay scale he had enjoyed. If anything is payable to the petitioner on this score, the same shall be paid to the petitioner by the respondent no.3 forthwith but positively within a period of **six weeks** from the date of communication of this order upon compliance of all the formalities required in law.

24. With the above observations this writ petition, **WPA 226 of 2016** stands **allowed**, without any order as to costs.

25. Photostat certified copy of this order, if applied for, be furnished expeditiously.

(Aniruddha Roy, J.)