

08.08.2023  
SL No.20  
Court No.8  
(gc)

**FMA 595 of 2021  
CAN 1 of 2022**

**Smt. Latika Mondal (Ray)  
Vs.  
The State of West Bengal & Ors.**

Mr. Ekramul Bari,  
Mr. K.M. Hossain,  
Mr. Abdus Salam  
...for the Appellant.  
Mr. Arjun Roy Mukherjee,  
Ms. Tapati Samanta,  
...for the State.

1. The appeal is arising out of an order dated 13<sup>th</sup> November, 2019 passed in a writ petition filed by the appellant challenging the fixation of pension by the authorities in terms of the pension payment order dated November 29, 2016. This writ petition was dismissed on the ground of *res judicata* and/or constructive *res judicata* by reason of the fact that in the earlier writ petition although the appellant has relied upon G.O. No.57-SE (B) dated 27<sup>th</sup> January, 1995. At the time of disposal of the said writ petition, it was observed that the entire grievance of the writ petitioner with regard to the fixation of pension has been duly taken care of and remedied and respondent No.8 was directed to release

necessary cheque/pay order in favour of the petitioner as regards arrears of pension, the basis of which was disclosed in the compliance affidavit filed before the learned Single Judge. It appears that at the time of disposal of the writ petition, the appellant had accepted the submission made on behalf of the State that necessary order for fixation of pay had already been issued and the same would be disbursed in accordance with law from the Treasury Office, respondent No.8.

2. In the subsequent writ petition, the writ petitioner based her claim on the basis of the Government Order dated 27<sup>th</sup> January, 1995 issued by the Department of School Education, Secondary Branch, Government of West Bengal. According to the appellant/petitioner, the said Government Order made the petitioner eligible for grant of higher scale of pay as the petitioner had taken six classes per week in History, though the petitioner was appointed as a teacher of Work Education. In the earlier writ petition, the writ petitioner had disclosed an Audit Observation dated 27<sup>th</sup> November, 2014 whereby it was observed that a clarification

of the school regarding M.A. scale could not be acceptable as it was a matter of improvement of qualification and hence G.O. No.57-SE (B) dated 27<sup>th</sup> January, 1995 could not be made applicable and the P.S.A was requested to look into the matter and take necessary steps as per G.O.

3. However, in the said writ petition, a document was disclosed dated 17<sup>th</sup> October, 1995 in which the D.I. of Schools (S.E.), Bankura in its communication to the Secretary, school concerned had informed that the appellant was entitled to draw the Post-Graduate scale of pay with effect from 1<sup>st</sup> February, 1995 vide the said Government Order for taking 6 periods in History notwithstanding the reservation expressed in the Audit and communicated to the D.I. of Schools (S.E.), Burdwan by Government of West Bengal, Directorate of Pension, Provident Fund & Group Insurance, Finance Department. Hence in the earlier writ petition, there was a necessity for adjudication with regard to the applicability of the said G.O. to the writ petition.
4. The writ petition was finally disposed of by recording of the writ petitioner with regard

to the pension being fixed by the department concerned and admittedly, the petitioner had received the revised pension for almost 18 months before the present writ petition is filed.

5. We cannot lost sight of the fact that the petitioner although having raised the issue ultimately did not pursue it and the writ petition was disposed of on the basis of the affidavit filed by the State fixing the pension which apparently was fixed on the basis of the order passed by Justice Dipankar Datta, as His Lordship then was, on 2<sup>nd</sup> June, 2015 by which it was made clear that whatever amount to be released in favour of the petitioner and accepted by her upon rectification of the defect pointed out in the impugned Audit Observation is carried out without prejudice to her rights and contentions in the writ petition. Unfortunately, this issue was never decided at the time of disposal of the writ petition. The writ petition was disposed of by Justice Rajiv Sharma, as His Lordship then was, on 5<sup>th</sup> December, 2016 with the following observation:-

*“Learned Counsel for the State has put up appearance on behalf of the State*

*and states that necessary orders for fixation of pension has already been issued and the same shall be disbursed in accordance with law from the treasury office, respondent no.8.*

*In view of the aforesaid submission the grievance of the petitioner has already been meted out. Therefore, the instant writ petition has become infructuous and the same is dismissed as infructuous.*

*However, the respondent no.8 is directed to release necessary cheque/pay order in favour of the petitioner as regards arrears of pension and to communicate the same to the petitioner within a period of one month from the date of communication of certified copy of the order.”*

6. The learned Counsel for the writ petitioner did not raise the issue that the acceptance of the pension pursuant to the rectification of the defect pointed out in the impugned Audit Observation did not take away her right to challenge the said impugned Audit. It, thus, creates an impression that the stand taken by the State with regard to the pensionary benefits of the writ petitioner has been accepted and any other objection with regard thereto is deemed to have been waived.

7. This primarily was the reason for the learned Single Judge in the subsequent writ petition to deny the reliefs by applying principles of *res judicata* and/or constructive *res judicata* as it is settled principles of law and that in a writ proceeding, the principle of *res judicata* and/or constructive *res judicata* clearly applies. **(See Asgar & Ors. Vs. Mohan Varma & Ors., reported in 2019 SCC Online SC 131)**

8. Mr. Ekramul Bari, learned Counsel representing the appellant/writ petitioner submits that the legal right to receive pension consequent upon enhancement of qualification has been duly recognized by two Coordinate Benches in which one of us (Soumen Sen, J.) was a party and denial of such benefits would cause irreparable prejudice to the petitioner. The decisions relied upon are:-

**i) MAT 1824 of 2014 (Sujit Kumar Adhikari Vs. State of West Bengal & Ors.) dated 24.07.2023;**

**ii) Rajendra Nath Biswas Vs. State of West Bengal & Ors. reported at 2012 (2) CLJ (Cal) 320.**

9. The learned Counsel for the State has submitted that the writ petition was

required to be dismissed on the ground of acquiescence and if any right the writ petitioner had, she has consciously waived such right.

10. There cannot be any doubt that the writ petitioner did not argue with regard to the non-applicability of the said Government Order and had accepted the amount towards the pension as fixed by the Government without any demur. Hence, it cannot be said that the judgment of the learned Single Judge in dismissing the writ petition was erroneous and/or contrary to law.

11. Mr. Bari has further submitted that there are error apparent on the face of the judgment as it did not consider the view expressed by Justice Datta at the stage of the admission of the writ petition clearly preserving the right of the writ petitioner to agitate such point at the time of disposal of the writ petition and the writ petitioner may not suffer for the mistake committed by the learned Advocate in not arguing the said point and raising the said issue at the time of disposal of the said writ petition.

12. It would be open for the appellant, if so advised, to take appropriate steps in accordance with law.
13. We are not presently in seisin over the said matter and we are refraining ourselves from making any comment with regard to the submission of Mr. Bari.
14. Accordingly, the appeal and the application are dismissed.
15. However, there shall be no order as to costs.
16. Urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

**(Uday Kumar, J.)**

**(Soumen Sen, J.)**