
Rabi Kanta Barman

Vs.

State of West Bengal & Ors.

Mr. Sunit Kumar Roy

...For the Petitioner

Mr. Shamim ul Bari

...For the State

This is the third round of writ litigation by an Assistant Teacher. The petitioner has joined at the post of Assistant Teacher in the year **1994**. The petitioner applied for acquiring **Master's Degree qualification (M.A. in History) in the year 1998** before the Managing Committee of the relevant school. The **Managing Committee then granted "Study Leave" for the period from December 14, 1999 to December 24, 1999 for Part I Examination and for the period from December 5, 2000 to December 14, 2000 for Part – II M.A. Examination.**

The petitioner went on study leave and ultimately has qualified the M.A. Part – II examination and the last date of examination was **December 15, 2000**. The petitioner then **after acquiring M.A. Degree in History applied for higher pay scale**. Pursuant to the application made by the petitioner, the relevant school forwarded all records before the respondent no.3 **for granting post facto approval in favour of the**

petitioner for acquiring higher qualification. Such ***approval*** was ***rejected*** by the ***respondent no.4*** on ***October 16, 2003 Annexure P-6 at page 49*** to the writ petition.

The petitioner filed the first writ petition being ***WP 14770 (W) of 2004*** which was ***disposed of by the Hon'ble Division Bench by its order dated January 31, 2014 Annexure P-12 at page 59*** to the writ petition with the following observation :

“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 recognised 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.

The writ petition is thus, disposed of with a direction upon the concerned District Inspector of Schools (SE) 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 hereinabove after hearing the petitioner and the school authority viz. the erstwhile employer of the petitioner, and decide the petitioner's claim by passing a reasoned order in support of his conclusion positively within a period of eight weeks from the date of communication of this order.

The writ petition is, thus disposed of.”

Pursuant to the said direction, the respondent no.3 passed its ***impugned order dated May 27, 2014, Annexure P-13 at page 68*** to the writ petition ***whereunder the claim of the petitioner was rejected*** on the ground that, ***the claim of the petitioner was hit under the “Staff Pattern” provision of the relevant ROPA.***

The second round of writ petition had commenced being ***WP 19666 (W) of 2015*** challenging the said ***impugned order of D. I. dated May 27, 2014.*** The second writ petition was ***disposed of by setting aside the said impugned order dated May 27, 2014 by a coordinate Bench by its order dated September 23, 2015, Annexure P-14 at page 69*** to the writ petition with the following direction:

“I direct the concerned District Inspector of Schools (S.E.), Dakshin Dinajpur, to consider the petitioner’s claim for higher scale of pay for the period from 15th December, 2000 to 15th October, 2007 in the light of the decision, as indicated above, within a period of eight weeks from the date of communication of this order after giving an opportunity of hearing to the petitioner and/or his authorised representative and other interested parties and thereafter communicate the decision to the petitioner within a period of two weeks.

It is needless to mention that at the time of hearing the petitioner is at liberty to rely on the relevant Government Circulars/Government Orders and the decisions time to time passed by the Hon’ble Division Bench and the Hon’ble Supreme Court.

With this direction, the writ petition is disposed of.”

Pursuant to and in terms of the said direction of the coordinate Bench dated **September 23, 2015**, the **respondent no.3 has passed the impugned order dated January 28, 2016, Annexure P-15 at page 73** to the writ petition. The respondent no.3 **rejected the claim of the writ petitioner** with the following findings:

- “3. As per W.B.B.S.E’s letter number 5806 dated 18/11/02 it is clear that the petitioner could not submit the all wanting papers to the W.B.B.S.E for granting of study leave and the situation is still exist.
4. Comparing the case with Ashim Kumar Khan-Vs- The State of West Bengal, it is seen that Ashim Kumar Khan was an assistant teacher of Graduate category and here the petitioner is an assistant teacher in Honours category. Thus this two cases are not identical.
5. In the case of Ajoy Kumar Sahu-Vs-. The State of West Bengal, it is seen that the petitioner was appointed in the year 3/04/01. And he was passed the master degree examination in the year 1992, i.e. before his date of joining. In this order the Hon’ble High Court quoted the case vide namely Partha Chatterjee-Vs- The State of West Bengal, where the petitioners claim was rejected by the District Inspector of Schools (SE) by applying 155-SE(P) dated 13/7/1999, was set aside. There the petitioner was appointed through School Service Commission on 26/6/1999 and the date of publication of 155-SE(P) is 13/7/1999, so it is seen that the date of publication of 155-SE(P) dated 13/7/1999 is later than the date of joining of the petitioner. In the Hon’ble Courts order in the above said matter (i.e. Ajoy Kumar Sahu-Vs.- The State of West Bengal referring the case Partha Chatterjee-Vs- The State of West Bengal), the rejection of 155-SE(P) dated 13/7/1999 may be justified, but in the instant matter 155-SE(P) dated 13/7/1999 is not applicable as the order is only applicable for SSC teacher and so

we can not compare the instant case with the aforesaid cases.

6. *Section 20 of Control of Expenditure Act 05 has an overriding effect to all previous orders regarding this matter.*

Considering the above, the claim of the petitioner is rejected and the School authority of Teor K.A is directed to take step for refunding the drawn amount for the period 7/12/99-24/12/99 [part I exam] and 28/11/2000-14/12/2000[Part II exam].

Thus the matter is disposed of.”

In this third round of writ litigation the said ***impugned order*** dated ***January 28, 2016*** has been assailed.

Mr. Sunit Kumar Roy, learned counsel for the petitioner referring to the previous order of the Division Bench on the issue dated ***January 31, 2014*** submits that, the order of the Hon’ble Division Bench has made a finding ***that if the conditions provided in the said provision of Rule 12(3) of the ROPA 1998 is satisfied then the prayer of the petitioner for grant of higher scale of pay for his enhanced educational qualification cannot be denied notwithstanding he acquired such degree without obtaining prior permssion from the concerned D.I. in terms of the Government Order dated January 24, 1997 provided, however, degree which has acquired is recognised as per the Government Order dated January 24, 1997.***

There is no doubt that the Master’s Degree was obtained by the petitioner from a recognised University. Learned

counsel then submitted that, the rigor of “**Staff Pattern**” would not be a bar for granting higher scale of pay. In support, he relies upon a judgment of a coordinate Bench ***In the matter of: Ashim Kumar Khan vs. The State of West Bengal & ors., reported at (2014) 3 CHN 163*** and also upon a previous coordinate Bench judgment ***In the matter of : Raghunath Mondal vs. The State of West Bengal reported at (2013) 3 WBLR 556.***

Learned counsel for the petitioner further submits that, the principal ground on which the claim of the petitioner was rejected under the said impugned order dated ***January 28, 2016*** was that, the claim of the petitioner was barred under ***Section 20*** of the ***West Bengal Schools (Control of Expenditure) Act, 2005*** (for short the ***2005 Act***) ***which otherwise has a overriding effect to all the previous order on the issue.*** He submits that, the ***2005 Act came into force on December 27, 2005. The said Act did not have any retrospective operation*** and the ***petitioner has acquired his Post Graduate qualification in December, 2000.*** Mr. Roy also submits that, the impugned order is not sustainable in the eye of law and should be quashed and the petitioner shall be granted his claim for higher pay scale during the period from December 15, 2000 to October 15, 2007.

Learned counsel for the petitioner then placed reliance on the document appended to the writ petition

being **Annexure-P17 at pages 75 to 85** to the writ petition and submits that, contemporaneously all the records, papers and documents were sent by the relevant school authority to the appropriate authority of the West Bengal Board of Secondary Education for sanction of “**Study Leave**” for the period mentioned above to enable the petitioner to prepare for his Master’s Degree Examination. Referring to **page 76** to the writ petition, Mr. Roy, submits that, the Board has raised certain clarifications and sought for certain documents from the school which were also submitted to the Board, according to his instruction.

Mr. Shamim ul Bari, learned counsel appearing for the respondent nos. 1, 2 and 3 referring to the impugned order dated **January 28, 2016** submits that, there was a specific finding made by the respondent no.3 that, the “**Staff Pattern**” of the relevant school in terms of **Rule 12(3) of the ROPA, 1998** did not permit the petitioner to acquire higher qualification in view of the conditions laid down in the **Memo No.670 – SE(S) dated September 4, 1998, Annexure-P16 at page 74** to the writ petition. He further submits that, there was no authorised “**Study Leave**” granted to the petitioner during the period from **December 7, 1999 to December 24, 1999 (for Part –I Examination) and from November 28, 2002 to December 14, 200 (for Part-II Examination) in M.A.** as the leave was not sanctioned by the respondent no.3. He

submits that, since such leave was not sanctioned, the ***respondent no.3 in the impugned order had asked the petitioner to refund the amount he has received during this period in an unauthorised manner.*** He further submits that, ***Section 20*** of the ***2005 Act*** having an overriding effect, the petitioner was not entitled to receive his claim as rightly decided by the respondent no.3 in the impugned order.

Mr. Bari learned counsel further submits that, the provisions laid down under the ***Memo dated September 4, 1998, Annexure-P16 at page74 to the writ petition is a guideline applicable to the teachers who are covered thereunder.*** The petitioner is also covered under that Memo. He submits that, the application of the provisions of the said Memo is a point of law that can be raised at any point of time.

After considering the rival contentions of the parties and upon perusal of the materials on record, it appears to this Court that, this is the third round of writ litigation in which the same issue is being agitated by the writ petitioner after his claim being rejected repeatedly.

It is equally settled position of law that, the “***Staff Pattern***” will have no bearing for acquiring higher qualification by a teacher. The coordinate Bench ***In the matter of : Ashim Kumar Khan (supra)*** has observed as under :

“Having heard the learned counsel appearing for the petitioner as also after considering the impugned order I find that the above claim of the petitioner was rejected on the following grounds:-

- (i) The staff pattern of the school concerned did not permit granting of the above benefit to the petitioner;*
- (ii) The State Government divided the teaching post into two categories, i.e. graduate category and honours/post graduate category. Since the petitioner was appointed in pass category there is no scope for extending the benefit of post graduate scale of pay in his favour;*
- (iii) The petitioner was not entitled to get post graduate scale of pay in view of the West Bengal Schools (Control of Expenditure) Act, 2005.*
- (iv) The petitioner did not obtain prior permission for appearing in the M.A. Examination;*

The point of law regarding staff pattern has already been decided in the matter of Raghunath Mondal Vs. State of West Bengal & Ors. reported in (2013)3 WBLR and the relevant portions of the above decision are quoted below:-

‘The provisions of the clause 2 of the departmental circular No.670-SE(S)/ 1M-14/98 dated September 4, 1998 (hereafter referred to as ‘ROPA, 1998’) are quoted below –

“2. For High School/High Madrasah/Higher Secondary (Normal Section):-

- (a) Language group – For posts (Two pass degree & two Hons./Master degree)*
- (b) Science & Mathematics – Three posts (one pass degree & two Hons./Master degree)*
- (c) Social Science – Two posts (one pass degree & one Hons./Master degree)*
- (d) Work Education, Physical and Social Service – Two posts. They must be having qualifications as mentined in the procedure 14-SE(S) dt.8.1.98.*
- (e) Headmaster/Headmistress – One. He/She must be having qualifications as mentioned in the process 14-SE(S) dt. 9.1.98.’*

After perusing the aforesaid provisions of the said ROPA, 1998, I find that the same

entitled the petitioner who was appointed with higher qualification to enjoy the benefit of the post-graduate scale of pay with effect from January, 1996 or the date of improving the qualification, whichever was earlier. with regard to the provisions of Clause 2 of departmental circulars No.670-SE(S)/1M-14/98 dated September 4, 1998, I find that the same was in operation in a different field which prescribed the staff strength in a particular ground of teaching having no nexus with the scale of pay of the assistant teachers of that school. After further scrutiny of the above departmental circular I find that the two groups of assistant teachers namely, for Pass Degree and Honours/Master degree were prescribed in the departmental circular. The petitioners belonged to the group of Honours/Master degree. Therefore, the claim for granting post-graduate scale of pay in accordance with provisions of said ROPA, 1998 cannot be rejected taking recourse to the departmental circular under reference.

That apart it is the settled principle of law that when a departmental circular is competed with statutory rules, the rule should prevail. Reference may be made to the decision of C.L.Verma vs. State of M.P., reported in (1989) Supp. (2) S.C.C. 437.

Paragraph 6 of the aforesaid judgment is quoted below:

“6. The question which arose for consideration in the writ petition before the High Court at the instance of the appellant was whether in the face of the mandate in Rule 29 the administrative order could operate. It is not the stand of the State Government that the order dated May 15, 1981, is one under the proviso to Rule 29. In fact, the tenor of the proviso clearly indicates that it is intended to cover specific cases and individual employees. An administrative instruction cannot compete with statutory rule and if there be contrary provisions in the rule the administrative instructions must give way and the rule shall prevail. We are, therefore, of the view that the appellant, in terms of Rule 29, ceased to be a Government employee on his attaining the age of 58 years, two days prior to the order of dismissal. In view of the fact that he had already superannuated, Government had no right to deal with him in its disciplinary jurisdiction available in regard to employees. The ratio of the decision in *R.T.Rangachari v.*

Secretary of State for India in Council supports the position.'

With regard to the scope of extending the benefit of post graduate scale of pay in favour of an Assistant Teacher who has appointed under graduate category has been decided in the matter of Partha Chatterjee vs. State of West Bengal reported in (2004) 2 CALLJ 493 and the relevant portions of the above decision are set out below:-

'(23). IN the circumstances, the question which arises for determination in this Court is whether two sets of teachers, possessing the same educational qualifications and performing the same work and hence similarly circumstanced whether working in the same school or different Government aided schools, can be treated differently in the matter of fixation of salary only because the minimum requisite educational qualification fixed by the district Inspector for the post in question is lower.

(24) FIXATION of different scales of pay for teachers of the same or different aided schools, with the same qualifications, who perform the same duties and functions and are hence equally circumstanced violates principles of equal work for equal pay and offence Article 14 of the Constitution of India, more so in the absence of specific rules prescribing the requisite educational qualifications for teachers of different classes.

(25) IN this context, it may be relevant to record, as pointed out by learned Counsel appearing on behalf of the petitioner, the prescribed minimum requisite qualification for the post of Assistant Teacher of Physical Education is a Bachelor of Physical Education.

(26) ACCORDINGLY, the Government Order dated 22nd November, 1993 was issued clarifying that Physical Education teachers with Masters degree in Physical Education from recognised Universities would be entitled to get higher scale of pay notwithstanding the fact that post graduate degree in physical education was not necessary for appointment as Assistant Teacher of Physical Education.

(27) THE Government Order dated 22nd November, 1993 is a specific order which pertains to Assistant Teachers of Physical Education. It I doubtful whether the Circular dated 13th July, 1999 which is a general circular can supersede a specific circular with regard to Assistant Teachers of Physical education which

has no till date been withdrawn, rescined , cancelled or superseded. On the other hand, the said Government order has been clarified by an Order No.417-SE (S)/5p 33/98 dated Calcutta 8th March, 2000 the relevant portion whereof is extracted hereinbelow. “2. Now in clarification of para 3 of Government Order No.759- edn. (S) dated 22.11.93 the under signed is directed to say that the benefit of higher scale of pay is admissible to those Physical Education teachers only who have obtained such degree on completion of two years regular course from the recognised University. This order will take effect from the date of issue of this clarification.”

Question of obtaining prior permission for enrolment for pursuing post graduate study has been dealt with in the matter of Sutapa Kundu Vs. State of West Bengal & Ors. (In Re : FMA 2199 of 2013 with CAN 10370 of 2012) and the relevant portions of the above decision are quoted below :-

“Nothing has been produced before us to show that the writ petitioner was required to take prior permission from the Board for prosecuting her studies in master degree course through correspondence course and as such notwithstanding no permission was granted by the Board, her entitlement to get higher scale of pay for her enhanced educational qualification cannot be denied in view of the Government Circular dated 3rd June, 2002 as mentioned above.

Before concluding we also want to record here that since the petitioner prosecuted her study through correspondence course even she was not required to take any permission for study leave from the Board.

As such, we hold that the learned Single Judge of this Court was not justified in rejecting the petitioner’s said writ petition.

The concerned authority is thus directed to grant higher scale of pay to the writ petitioner for her enhanced qualification if it is found that she acquired such qualification in the relevant subject, with effect from the date following the last date of M.A. Part-II Examination in which she appeared. Such exercise including grant of financial benefit and the arrears thereof should be extended to the petitioner positively within a period of eight weeks from the date of communication of this order.’

So far as the applicability of the West Bengal Schools (Control of Expenditure) Act,

2005 is concerned, the same has no manner of application in this case. In view of the fact that the petitioner obtained M.A. degree in Bengali in the year 2004, the last date of examination being September 18, 2004 which was prior to the above enactment. Needless to point out that the provisions of the above act had no retrospective effect.

In view of the discussions and observations mentioned hereinabove none of the grounds reflected in the impugned order is sustainable in law. Therefore, the impugned order is quashed and set aside.

The respondent no.3 is directed to extend the benefit of post graduate scale of pay to the petitioner in connection with his service under reference with effect from the date following the last date of his M.A. Part – II examination after taking necessary steps to refixation and to release his remuneration including arrears within two months from the date of communication of this order.

The writ petition is thus disposed of.”

Upon reading the said judgment of the coordinate Bench ***In the matter of : Ashim Kumar Khan (supra)***, I am also in respectful agreement with the ratio laid down thereunder.

Inasmuch as, the Hon’ble Division Bench in the said order dated ***January 31, 2014*** directed the respondent no.3 to look at whether the condition provided under ***proviso 2 to Rule 12(3) of the ROPA, 1998*** was satisfied in case of the petitioner or not and in terms thereof the respondent no.3 passed its reasoned order dated ***May 27, 2014 Annexure-P13 at page 68*** to the writ petition and considered the same. The petitioner being aggrieved thereby challenged the same in the second writ petition when a coordinate Bench by its order dated ***September 23, 2015, Annexure-P14 at page 69***

to the writ petition ***set aside such consideration of the respondent no.3 in view of the law already settled then, inter alia, In the matter of : Ashim Kumar Khan (supra) . There was no appeal carried out by the State respondent from the said order dated September 23, 2015. The order has achieved its finality*** and is ***binding upon the parties***. The issue is no more ***res integra***. The issue is finally decided. The respondent no.3, therefore, cannot agitate that issue once again and ought not have rejected the claim of the petitioner on the ground of “***Staff Pattern***”. The reason of the respondent no.3 on the ground of “***Staff Pattern***” after the said order dated ***September 23, 2015*** is barred under the principle of issue estoppel. ***The State respondent has accepted the said order dated September 23, 2015 by not challenging the same and thereby has accepted the proposition of law that, the “Staff Pattern” would have no bearing for acquiring higher qualification by a teacher.***

Inasmuch as, since the time of the first writ petition till today, it was never contended before the Court that, the leave obtained by the petitioner was unauthorised and without sanction as approval by the West Bengal Board of Secondary Education (for short the Board). The said contention of the State which has been raised before this Court today including the ground being there in the impugned order, was never contended before the Court at

any point of time when one after another writ petition was filed by the petitioner. The State respondents could have taken the plea in the previous rounds of litigations but did not raise it.

The documents from **pages 75 to 85** to the writ petition clearly show that, the school authority had placed all the relevant papers before the Board and the Board did not take any step on the issue. ***The State respondents also did not raise the said issue during the previous two rounds of writ litigations but has raised for the first time in this writ petition and was raised by the respondent no.3 for the first time in the said impugned order.*** It shows that the State respondents being aware of the said issue chose not to agitate the same before the Court during the past two rounds of writ litigations. ***Such plea on the part of the State today is now barred by the principles of waiver, estoppel and acquiescence. The State is now estopped from taking the plea today.*** Since the Board has not raised any objections contemporaneously as to the “***Study Leave***” obtained by the petitioner, the State respondents cannot and should not take any plea on that count in any manner whatsoever including at the time of granting the superannuation benefit to the petitioner.

In any event the **2005 Act** having no retrospective effect, the provision of **Section 20** thereunder would also not operate with a retrospective effect.

It is made clear that, the State respondents shall not raise any objection whatsoever on the plea of “**Study Leave**” during the period from **December 7, 1999 to December 24, 1999 (for Part-I Examination) and from November 28, 2000 to December 14, 2000 (for Part-II Examination)** for granting the higher pay scale payable to the petitioner since the petitioner has already acquired his higher qualification and such benefit shall be granted to the petitioner strictly in accordance with law **positively** within a period of **six weeks** from the date of communication of this order.

In view of the foregoing reasons and discussions, the impugned **order dated January 28, 2016** passed by the respondent no.3, **Annexure-P15 at page 73** to the writ petition stands **set aside and quashed**.

However, the **petitioner shall be at liberty to apply before the West Bengal Board of Secondary Education for regularisation of his “Study Leave” during the period from December 7, 1999 to December 24, 1999 (for Part-I Examination) and from November 28, 2000 to December 14, 2000 (for Part-II Examination)**.

In the event, such an application is made, the Board shall consider the same and take step sympathetically as expeditiously as possible.

With the above observations and directions this writ petition, **WPA 7787 of 2016** stands allowed, without any order as to costs.

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

(Aniruddha Roy, J.)