

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE RABINDRANATH SAMANTA

WPA 25043 of 2015

Md. Selim

....Petitioner

-Vs-

The State of West Bengal & Ors.

..... Respondents

- - - - -

Mr. Saibal Acharjee, Adv.

Mr. Zakir Hossain, Adv.

..... for the Petitioner

Mr. Himadri Sekhar Chakraborty, Adv.

Mr. Manas Kr. Sadhu, Adv.

..... for the State Respondents

Md. Sarwar Jahan, Adv.

Mr. Sumit Naskar, Adv.

.....for the Respondent No.2

Heard On : 31.01.2023

Judgment on : 14.02.2023

Rabindranath Samanta, J:-

1. Aggrieved by the non-payment of honorarium to him the petitioner by preferring this writ petition seeks direction upon the concerned respondent authorities to release honorarium to him as a Samprasarak of a Madhyamik Shiksha Kendra since May, 2011.
2. This writ petition has a chequered background which in a nut shell may be stated as under:

The petitioner Md. Selim passed Madhyamik examination in the year 1993 and higher secondary examination in 1995. He obtained B.A degree in 1998. An advertisement vide memo dated 16.10.2008 was published by the Secretary of Fatepur Madhyamik Shiksha Kendra inviting applications from eligible candidates for engagement of two Samprasaraks- one in english and the another in bengali in the Shiksha Kendra. The petitioner having requisite qualification applied for engagement as a Samprasarak in the said Shiksha Kendra. By a resolution dated 03.11.2008 adopted by the Managing Committee of Fatepur Madhyamik Shiksha Kendra the petitioner was selected as a Samprasarak in english. Thereafter, the managing committee forwarded the proposal of his engagement to the Siksha-Sanskrit-Tathya-O-Krira-Sthayee-Samity of Suti –I Panchayat Samity for approval. After the proposal was approved, the Secretary of the Managing Committee of the Shiksha Kendra issued the engagement letter dated 03.11.2008 to the petitioner. In terms of the engagement letter the petitioner joined his duty as Samprasarak in english in the said Kendra on the same date i.e 03.11.2008.

3. Subsequently, the Siksha-Sanskrit-Tathya-O-Krira-Sthayee-Samity of the said Panchayat Samity in its meetings held on 26.09.2008 and 27.11.2008 postponed the approval to the selection of the petitioner and one Rafiqul Hasan who was engaged as Samprasarak in bengali of the Shiksha Kendra. However, Siksha-Sanskrit-Tathya-O-Krira-Sthayee-Samity in its subsequent meeting held on 25.06.2009 approved the selection of the petitioner and vide resolution dated 02.09.2009 approved the service of the petitioner as Samprasarak in english.
4. Pursuant to such approval he got honorarium for his service up to the month of April, 2011.

5. All on a sudden the honorarium of the petitioner was stopped. The petitioner came to learn from the respondent authorities that one Rafiqul Alam by preferring a writ petition being WP No. 9615(W) of 2010 challenged the selection and engagement of the said Rafiqul Hasan as Samprasarak in bengali in the said Shiksha Kendra. Ultimately, the writ petition was dismissed on 14.07.2010 recording therein that selection to the post of Samprasark in bengali of Fatepur Madhymik Shiksha Kendra has been stayed by the resolution dated 27.11.2008. To give honour to the solemn order of this High Court the Additional Executive Officer, Murshidabad Zilla Parishad vide memo dated 29.09.2011 passed a direction to this extent that no effect would be given to the engagement of Rafiqul Hasan.
6. The concerned respondent authorities, banking upon the memo dated 29.09.2011 stopped the honorarium of the petitioner. The petitioner submits that the Memo dated 29.09.2011 has no nexus with his engagement.
7. The petitioner submits that being misled by wrong advice he filed a writ petition being WP No. 21105 (W) of 2011 with Rafiqul Hasan challenging the said Memo dated 29.09.2011 instead of challenging the purported actions of the respondents in not releasing honorarium to him. But, the writ petition filed by them was dismissed on 05.07.2012.
8. The petitioner states that the writ petition being WP No. 9615(W) of 2010 was filed challenging the engagement of one Rafiqul Hasan as a Samprasarak in bengali and the writ petition was dismissed in the light of a resolution dated 27.11.2008 of Siksha-Sanskrit-Tathya-O-Krira-Sthayee-Samity. The petitioner was not a party to this writ petition. In terms of the order dated 14.07.2010 passed in this writ petition, the Additional Executive Officer of Murshidabad Zilla Parishad by Memo dated 29.09.2011 directed that no effect could be given to the appointment of said Rafiqul Hasan. Such direction of the

Additional Executive Officer has no binding effect upon the engagement of the petitioner as a Samprasarak. But, the writ petition filed by the petitioner along with Rafiqul Hasan was dismissed on technical reason that the order under challenge was passed in compliance of the order dated 14.07.2010 passed in WP No. 9615(W) of 2010 and the petition was thoroughly misconceived. The petitioner avers that no order was ever passed by any competent authority or by any court of law cancelling his engagement and approval of his engagement as Samprasarak of the said Madhyamik Shiksha Kendra. In such factual matrix, the stoppage of his honorarium since May, 2011 is illegal and not sustainable in law. Hence, the writ petition has been filed seeking direction upon the concerned respondents to release current and arrear honorarium in favour of the petitioner since May, 2011.

9. Since no affidavit-in-opposition was invited from the respondents, the allegations/averments in the writ application shall be deemed to have been not admitted by the respondents.
10. As it appears from an advertisement dated 16.10.2008 made by the Secretary, Fatepur Madhyamik Shiksha Kendra (Annexure P/2), applications were invited from the eligible candidates for engagement of two Samprasaraks- one in bengali and the another in english. Admittedly, the petitioner Md. Selim was engaged as a Samprasarak in english and one Rafiqul Hasan was engaged as Samprasarak in bengali in the Shiksha Kendra after their engagement was approved by Siksha-Sanskrity-Tathya-O-Krira-Sthayee-Samity of Suti –I Panchayat Samity.
11. Challenging the engagement of Rafiqul Hasan as a Samprasarak in bengali one Rafiqul Alam preferred a writ petition being WP No. 9615(W) of 2010. The writ petition brought by Rafiqul Alam was dismissed by a learned Single Judge by an order dated 14.07.2010 recording the following observation:

“Having considered the submissions of the parties, the Proddhan of Nurpur Gram Panchayat has issued two letters each contradictory to above. In the event one is believed then no credence can be given to the other letter. As by the one letter he has certified that no notice was published (19th July, 2008) while by the other letter dated 6th November, 2008 he has sought approval of the successful candidate. Therefore, no credence can be given to the letters issued by the Proddhan.

From a reading of resolution dated 27th November, 2008 it appears that the issuance of the notice is in doubt and for all such purposes the appointment of Samprasarak/Samprasatika in Bengali language has been stayed. As the process has been stayed and the relief sought in this writ petition is publication of fresh advertisement, no order need be passed on this writ application as in effect the relief sought by the petitioner has been granted by the resolution of November, 2008, that is, not to give effect to the appointment of the private respondent by staying the selection process. Accordingly, no order is passed on this writ application and the same is dismissed.”

12. In compliance of the order passed by the learned Single Bench in the aforesaid writ application, the Additional Executive Officer, Murshidabad Zilla Parishad vide Memo dated 29.09.2011 made the following direction:

“Hon’ble Justice N. Patherya, High Court, Calcutta on 14.07.2010 disposed of the above mentioned Writ Petition without passing any order since the relief sought by the Petitioner has been granted by the resolution of 27th November, 2008 of the Shiksha-Sanshkiti-Thatya-O-Kriya-Sthayee-Samity, Suti –I Panchayat Samity that is, not to give effect to the

appointment of the private respondent by staying the selection process.

But from the record it is found that the same panel was approved by the Shiksha-Sanshkiti-Thatya-O-Kriya-Sthayee-Samity, Suti –I Panchayat Samity on 25.06.2009 and the private respondent is getting all benefit as a Samprasarak of Fatepur MSK.

In this context to give honour on observation of the Hon'ble High Court as relief to petitioner, you are directed not to give any effect to the appointment of the Private Respondent as a Samprasarak of Fatepur MSK.

Additional Executive Officer

Murshidabad Zilla Parishad”

13. As excerpted above, the aforesaid Memo dated 29th September, 2011 evinces that the Additional Executive Officer, Murshidabad Zilla Parishad in fact has not given any effect to the appointment/engagement of the private respondent namely Rafiqul Hasan as Samprasarak in bengali of Fatepur Madhymaik Shiksha Kendra. As to engagement of the petitioner Md. Selim as Samprasarak in english of the said Siksha Kendra there is no order or direction from any of the concerned authorities staying his engagement or keeping his engagement in abeyance. What I feel, the effect of engagement of the petitioner remains unaffected.
14. Be that as it may, the fact remains that the petitioner Md. Selim and said Rafiqul Hasan, Samprasarak in bengali jointly filed a writ application being WP No. 21105(W) of 2011 in this Court challenging the Memo dated 29th September, 2011 issued by the Additional Executive Officer, Murshidabad Zilla Parishad.

15. By order dated 05.07.2012 the writ application jointly filed by them was dismissed by a learned Single Bench recording the following observations:

“ Perusing the impugned order, it appears that the same has been issued in consonance with the observations made by Patherya, J. in her order dated, 14th July, 2010, passed in WP 9615(W) of 2010, wherein the petitioner no. 2 was the private respondent. There is no ambiguity noticed and the order has been passed solely in compliance of the order of the Court dated 14th July, 2010.

Having regard to the facts and circumstances of the case, this Court is of the view that the writ petition is thoroughly misconceived and is liable to be summarily dismissed and is accordingly dismissed.”

16. Mr. Saibal Acharjee, learned counsel appearing for the petitioner submits that the petitioner along with Rafiqul Hasan preferred the writ petition on wrong legal advice. Learned Counsel points out that in none of the writ petitions either WP No. 9615(W) of 2010 or WP No. 21105(W) of 2011 the engagement of the petitioner as a Samprasark in english was ever raised for adjudication, nor such issue was decided by any of the learned Single Benches. According to learned counsel, the engagement of the petitioner since 03.11.2008 in legal parlance remains operative. Learned counsel argues that since the issue relating to engagement of the petitioner was not heard and finally decided by the learned Single Bench in WP No. 21105(W) of 2011, the order dated 05.07.2012 passed by the learned Single Bench does not operate as ‘res judicata’ in respect of this writ application. In support of his contention learned counsel has cited a decision in the

case of ***Monahar Lal-Vs- Narayan Dass and Anr*** reported in ***AIR 1987 Delhi 226***.

17. Mr. Himadri Sekhar Chakraborty, learned counsel appearing for the state respondents and Md. Sarwar Jahan appearing for the respondent no.2 submit that the petitioner along with Rafiqul Hasan preferred the writ application being WP No. 21105(W) of 2011 seeking direction upon the concerned respondents so that both the petitioners may resume their duties as Samprasarak in english and bengali in the same Madhyamik Shiksha Kendra. Learned Counsels argue that since the writ application containing the aforesaid relief was finally disposed of by a learned Single Bench, the order passed by the learned Single Bench will operate as constructive Res Judicata in the instant writ application. On such score, learned counsels argue that the writ application is liable to be dismissed.
18. Admittedly, the petitioner Md. Selim was engaged as a Samprasarak in english in Fatepur Madhyamik Shiksha Kendra on 3rd November, 2008. One Rafiqul Hasan was selected as a Samprasarak in bengali in the Shiksha Kendra. Challenging the selection of Rafiqul Hasan one Rafiqul Alam brought a writ application being W.P No. 9615(W) of 2010 before this Court wherein Rafiqul Hasan was impleaded as a private respondent. As it appears, this writ application was disposed of by a learned Single Bench by an order dated 14.07.2010 which is quoted hereinbefore. It has been observed in the order that since by virtue of a resolution dated 27.11.2008 adopted by Siksha-Sanskrit-Tathya-O-Krira-Sthayee-Samity of the concerned Panchayat Samity the engagement of the private respondent namely Rafiqul Hasan has been stayed, no order need to be passed by the Bench. With such observation the learned Single Bench has disposed of the writ application. Undisputedly, the Additional Executive Officer, Murshidabad Zilla Parishad, in compliance with the aforesaid solemn order of the learned Single

Bench, directed the executive officer, Suit- I Panchayat Samity not to give any effect to the engagement of private respondent Rafiqul Hasan as Samprasarak of Fatepur Madhyamik Shiksha Kendra. There is no mention in the order that either the selection process relating to the petitioner Md. Selim or his engagement as a Samprasarak in the said Shiksha Kendra has been stayed or kept in abeyance. A conjoint reading of the order dated 14.07.2010 in the writ petition and the Memo dated 29.09.2011 of the Additional Executive Officer, Murshidabad Zilla Parishad shows that both the order and the Memorandum are confined to the engagement of Rafiqul Hasan as a Samprasarak in bengali. There is no iota of whisper relating to the engagement of the petitioner as a Samprasarak in english.

19. It is stated by the petitioner in the writ application that due to wrong legal advice he along with Rafiqul Hasan filed the writ petition being WP No. 21105 (W) of 2011 challenging the Memorandum dated 29.09.2011 issued by the Additional Executive Officer, Murshidabad Zilla Parishad. In fact his engagement remains unaffected by the Memo dated 29.09.2011. The learned Single Bench dismissed the writ petition observing therein that since the Memo dated 29.09.2011 was issued in consonance with observations made by the learned Single Judge in WP No. 9615 (W) of 2010, the writ petition was thoroughly misconceived.
20. Now, the seminal questions which fall for consideration are as follows :
 - i) Whether the order dated 05.07.2012 passed in WP No. 21105(W) of 2011 will operate as res judicata in respect of the instant writ petition?
 - ii) Whether the engagement of the petitioner as a Samprasarak in english has legal force?.
21. It is trite to say that the principle of res judicata under Section 11 of the Code of Civil Procedure is applicable to a writ application. As

the doctrine of res judicata denotes, no Court shall try any issue in which the matter directly and substantially in issue in a former proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent proceeding in which the issue has been subsequently raised and has been heard and finally decided by such Court.

22. In the decision in the case of ***Manohar Lall -Vs- Narain Dass and Anr*** reported in ***Air 1987 Delhi 226*** a learned Single Bench placing reliance on a decision in the case of ***P.V. Subha Rao -VS- V. Jagannadha Rao*** reported in ***AIR 1967 SC 591*** has held that to create the bar of res judicata the matter in the earlier case, inter alia, must have been heard and finally decided by the Court.
23. It is argued on behalf of the answering respondents that the plea of the petitioner is barred by the principle of constructive res judicata. Explanation IV to Section 11 of the Code of Civil Procedure speaks of constructive res judicata. This explanation enjoins that any matter which might and ought to have been made ground of defence or attack in former proceeding shall be deemed to have been a matter directly and substantially in issue in such proceeding. It is true that the petitioner in the writ application being WP No. 21105(W) of 2011 sought direction upon the concerned respondent authorities so that he may resume his duties as Samprasarak in english and honorarium may be released in his favour since the month of May, 2011. As indicated above, the writ application being WP No. 21105(W) of 2011 was dismissed on technical ground that the writ application was thoroughly misconceived. On reading of the order dated 05.07.2012 passed in this writ application I do not see that any finding or observation has been made by the learned Single Bench to decide the legality of the engagement of the petitioner as a Samprasarak in english and his entitlement to honorarium which he claimed in the

writ petition. In such factual matrix it will not be wise to say that the order dated 05.07.2012 by which the writ application was dismissed finally decided the matter which was brought by the petitioner in the writ application. If any proceeding was brought on wrong advice of a counsel and the proceeding was disposed of on technical ground such as misconceived one, the order by which the proceeding was disposed of will not operate as res judicata in respect of the subsequent proceeding filed on the self-same subject matter removing the obstructing technicalities. In my view, since the matter in the instant writ application was not finally decided on merits by this Court in the aforesaid writ application, the order dated 05.07.2012 will not operate as res judicata in respect of the instant writ application.

24. The order dated 14.07.2010 in WP No. 9615(W) of 2010 and the Memorandum dated 29.09.2011 made by the Additional Executive Officer, Murshidabad Zilla Parishad in compliance of the solemn order of this Court as quoted above are restricted to the engagement of another petitioner Rafiqul Hasan as a Samprasarak in bengali. The effect of the engagement of the petitioner as a Samprasarak in english remains unaffected throughout. No specific challenge has been thrown on the part of the answering respondents to the engagement of the petitioner as a Samprasarak in english questioning its legality. Rather, a Memo dated 05.03.2020 issued by the Executive Officer, Suti -I Panchayat Samity, Murshidabad annexed to a supplementary affidavit affirmed by the petitioner evinces that the petitioner at least up to 05.03.2020 worked as a volunteer teacher in english in Fatepur Madhyamik Shiksha Kendra. Having regard to the aforesaid factual and legal scenario it may be said without any cavil of doubt that the continuity of service rendered by the petitioner shall be termed as the continuity of his engagement as a Samprasarak in english in the said Madhyamik Shiksha Kendra since his joining on 3rd November, 2008.

25. In view of the above, question No.1 is answered in the negative and question No.2 is answered in the affirmative.
26. It is stated in the writ application that the concerned authorities disbursed honorarium to the petitioner up to April, 2011. The petitioner claims release of arrear honorarium since May, 2011 and release of current honorarium. As the Memo dated 05.03.2020 issued by the Executive Officer, Suti –I Panchayat Samity reveals and in the absence of any document to the contrary, this Bench finds that the petitioner has been discharging his duties as a Samprasarak in english in Fatepur Madhyamik Shiksha Kendra since joining his duties.
27. As discussed above, I hold that this writ petition has merit to succeed.
28. Accordingly, the writ petition is allowed on contest.
29. The concerned respondents are directed to release the arrear honorarium to the petitioner as a Samprasarak in english in Fatepur Madhyamik Shiksha Kendra since May, 2011 within six weeks from date. The concerned respondents are further directed to go on releasing the current honorarium to the petitioner as a Samprasarak in english in the Shiksha Kendra so long his engagement as Samprasarak will lawfully subsist.
30. With the aforesaid directions the writ petition stands disposed of. Connected application, if any, also stands disposed of.
31. No order as to costs.
32. The case records of WP No. 9615 of 2010, RVW 279 of 2012 in connection with WP No. 9615 of 2010 and WP No. 21105 of 2011 as called for be sent back to the concerned department.
33. Parties may act on Server Copy of this judgment and order duly downloaded from the Official Website of this Court.

34. Urgent Photostat/certified website copies of this judgment, if applied for, be given to the parties upon compliance with all requisite formalities.

(Rabindranath Samanta,J.)