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MAT 540 of 2022
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IA No.: CAN 2 of 2022 [Stay]
Saktipada Hazra
- Versus -
The State of West Bengal & Others

Mr. Sourav Mitra,
Ms. Sreyasree Choudhury
... for the Appellant.

Mr. Tapan Kumar Mukherjee,
Mr. Ranjan Sana
... for the State/Respondents.

The present appeal has been preferred challenging an order dated 10th January, 2020 passed by the learned single Judge in the writ petition, being W.P. 15771(W) of 2018.

Records reveal that the appellant/writ petitioner was an assistant teacher in language group in Chaulkuri Junior High School (in short, the said school). His service was approved by the competent authority with effect from 6th February, 1997, on the basis of an order passed by the respondent no.5 *vide* memo dated 21st May, 1997 in compliance with an order passed by the learned single Judge in a writ petition, being C.R.7846 (W) of 1990 preferred by the writ petitioner/appellant herein, observing inter alia as follows:

‘The institution is a 4-class Jr. high School with 9 sanctioned posts at this stage. Both the petitioners are reportedly at work since long. It is a fact that the petitioner has crossed his prescribed age limit for entry into any service long before all though he was

within the age limit at the time of his initial appointment in the year 1975. His name appeared in different reports confirming his working in the school. The petitioner's service in the school for year together is also undisputed.'

The order further reveals that the petitioner's appointment was approved against an additional post sanctioned in the year 1987.

Subsequent thereto, the respondent no.5 issued a memo dated 25th September, 2000 granting approval to the appellant on substantive basis with effect from 6th February, 1999. The appellant thereafter again preferred a writ petition, being W.P. 22848(W) of 2005 claiming approval of his appointment in the post of Assistant Teacher on and from the date of creation of the permanent vacancy i.e., with effect from 23rd March, 1987. The said writ petition was, however, dismissed. Aggrieved thereby, the appellant preferred an appeal, being FMA 1168 of 2010. By an order dated 15th February, 2017, the Hon'ble Appeal Court did not interfere with the order denying appellant's prayer for approval with effect from 23rd March, 1987. However, the respondent no.5 was directed to examine whether the date of approval was correctly typed or not in the memo dated 25th September, 2000. Pursuant to such direction, the respondent no.5 issued a memo dated 25th September, 2017 stating *inter alia* that the appellant's approval was granted with effect from 6th February, 1997 *vide* memo dated 21st May, 1997, in compliance with the

Hon'ble Court's order and *vide* memo dated 5th September, 2000 the appointment of the appellant was approved on substantive basis with effect from 6th February, 1999. In the midst thereof, the appellant retired from his service on 30th October, 2006. Prior to his retirement, the appellant again preferred a writ petition, being W.P. 22848(W) of 2005 claiming condonation of the deficiency of qualifying service of about three months and six days and for grant of pensionary benefits in terms of the provisions of the West Bengal Recognized Non-Government Aided Educational Institution Employees (Death-cum-Retirement Benefits) Scheme, 1981 (hereinafter referred to as the 1981 Scheme). Such prayer of the appellant was, however, refused by the learned single Judge by the order dated 10th January, 2020, as impugned in the present appeal.

Mr. Mitra, learned advocate appearing for the appellant submits that there is no dispute as regards the fact that the appointment of the appellant as an assistant teacher in the said school was approved with effect from 6th February, 1997 in consideration of the past service rendered by the petitioner since the year 1975, as would be explicit from the memo dated 21st May, 1997 issued by the respondent no.5. As he reached the age of superannuation on 30th October, 2006, there occurred a deficiency of three months and six days in qualifying service. A person completing ten years of continuous service becomes entitled to grant of pensionary benefits in terms of the 1981 Scheme. The issue of condonation of deficiency of service

to the extent of six months is no longer *res integra*. It has been decided by several co-ordinate Benches of this Court that in terms of Rule 7(e)(iv) of the 1981 Scheme the competent authority has the jurisdiction to condone the deficiency of 6 months in the qualifying service. In support of such contention, reliance has been placed upon a judgment delivered in the case of *State of West Bengal Vs. Aparesh Chandra Datta*, reported in 2016(2) CHN (Cal) 494 and an unreported judgment delivered by another co-ordinate Bench of this Court on 28th May, 2021 in MAT 1917 of 2019 [*The State of West Bengal Vs. Rabindra Nath Ghosh*].

According to Mr. Mitra, the learned single Judge erroneously dismissed the writ petition on a purported finding that '*the writ petitioner admittedly does not belong to any physically handicapped or other categories entitled to relaxation of the length of service for the purpose of pension.*' Such observation is not at all applicable to the facts of this case.

He argues that the learned single Judge erroneously observed that having accepted the approval of appointment from 6th February, 1997, he cannot turn back and claim approval from 23rd March, 1987 inasmuch as the appellant's prayer in the writ petition was only for condonation of deficiency of three months six days in qualifying service in consideration of his service prior to 6th February, 1997 against a sanctioned vacancy and not for approval of appointment with effect from 23rd March, 1987.

Such arguments, as advanced, were glossed over by the learned single Judge and no finding was returned on the said issues. Such infirmities warrant interference of this Court.

Mr. Mitra informs that after retirement a pension payment order was issued in favour of the appellant *vide* memo dated 6th November, 2007. A copy of the same, as produced, be kept on record.

Mr. Mukherjee, learned Additional Government Pleader, appearing on behalf of the State respondents has vehemently opposed the appellant's payer. According to him, the appellant's service was approved on substantive basis with effect from 6th February, 1999. As such, the period of deficiency in qualifying service of the appellant was of almost three years. The appellant's qualifying service can only be calculated from the date of his substantive appointment. No authority stands conferred upon the respondents to condone a deficiency of such period of three years.

Drawing our attention to clauses 7(e)(iii) and 7(e)(iv) of the 1981 Scheme, Mr. Mukherjee argues that the above clauses were considered and explained by a subsequent memo, issued on 2nd February, 2009. Admittedly, the appellant retired prior to issuance of the said memo dated 2nd February, 2009 and as such, the said memo is not applicable to the appellant and his claim for condonation of deficiency in qualifying service is not sustainable in law.

He contends that the note appended to clause 7(e)(iv) of the 1981 Scheme cannot be segregated from the substantive provision of 7(e)(iv) of the 1981 Scheme and the contents of the note need to be read as a part of the said clause. The said note is a part of the said rule/clause. In support of such contention reliance has been placed upon a judgment delivered in the case of *Baldev Raj Chadha Vs. Union of India and Others*, reported in (1980) 4 SCC 321.

According to Mr. Mukherjee, while delivering the judgment in the case of *The State of West Bengal Vs. Rabindra Nath Ghosh* (supra), the Hon'ble Division Bench has placed reliance upon the judgments delivered in tax matters and the same has no manner of application in deciding the issue involved in the present case. In view thereof, the ratio of the said judgment is not binding upon this Court.

He contends that the appellant's claim for approval of appointment with effect from 23rd March, 1987 was, in fact, turned down by the judgment delivered by the co-ordinate Bench of this Court in the case of *Sakti Pada Hazra vs. The State of West Bengal & Ors.* (FMA 1168 of 2010). Neither any appeal nor any review application has been preferred by the appellant against the said judgment and as such, the contents of the same are binding upon the parties.

We have heard the learned advocates appearing for the parties at length and we have given our anxious consideration to the facts and circumstances of the case.

Indisputably, the appellant's service was approved in consideration of the past service rendered by him. Such rendition of past service would be explicit from the memo dated 21st May, 1997 issued by the respondent no.5. There is no doubt that the appellant rendered continuous service from much prior to 6th February, 1997. The delay of three months and six days is condonable under the 1981 Scheme. The reason for denial was clause 7(e)(iv) of the 1981 Scheme.

The delay in granting approval occurred due to lapses of the appointing authority and the appellant's appointment was approved for the intervention of the Court. Under the DCRB Rules, the service rendered by an employee on a temporary basis continuously, prior to his being conferred with the permanent status must be taken into account for computing qualifying service for payment of pension [See the judgment delivered in the case of *Nemai Ch. Chatterjee Vs. State of West Bengal*, reported in 2014 (3) CHN (CAL) 608].

A perusal of the 1981 Scheme, particularly, clauses 7(e)(iii) and 7(e)(iv) would reveal that jurisdiction had been conferred upon the competent authority to condone a deficiency to the extent of six months. The note appended to the clause 7(e)(iv) of the 1981 Scheme cannot stand in the way towards condonation of such deficiency inasmuch as the said explanatory note cannot supplant the provisions of the clause to which its stands appended.

Two different yardsticks cannot be applied for the purpose of calculation of length of qualifying service under clauses 7(e)(iii) and 7(e)(iv) of the 1981 Scheme and the benefits under the 1981 Scheme cannot be scuttled by limiting the period of condonation inasmuch as such restriction would lead to discrimination.

Pension is a retirement benefits partaking of the character of regular payment to a person in consideration of the past service rendered by him and is claimable as a matter of right and such right is in the nature of a property in the hands of the employee and the same cannot be denied. The provisions of such benevolent scheme cannot be scuttled.

The argument of Mr. Mukherjee that the judgment delivered in the case of *State of West Bengal Vs. Rabindra Nath Ghosh* is not applicable to the facts of the present case since the period of deficiency was of only 26 days, is not acceptable to this Court. Under the 1981 Scheme the competent authority can condone a period of deficiency upto six months and the appellant's deficiency is of three months and six days. In the case of *Rabindra Nath Ghosh* (supra) the writ petitioner/respondent therein retired prior to the issuance of the memo dated 2nd February, 2009 and as such it cannot be contended by Mr. Mukherjee that the said memo is not applicable to the appellant herein since he had also retired prior to the issuance of the memo dated 2nd February, 2009. In the case of *Baldev Raj Chadha* (supra) the Court was considering an issue of premature retirement

in light of the fundamental rules and explanatory note appended to the rule was defining an '*appropriate authority*'. The said judgment is distinguishable on facts and not applicable to a matter pertaining to a pension scheme.

The order impugned in the present appeal is not sustainable in law inasmuch as the appellant was not claiming any benefits under physically handicapped quota or other categories, as referred to in the order impugned. The denial of approval of appointment with effect from 23rd March, 1987 cannot be construed as a bar towards consideration of the appellant's prayer for condonation of deficiency of three months six days in qualifying service.

For the reasons discussed above, the order impugned in the present appeal is set aside and the respondents are directed to grant usual pension and gratuity to the appellant treating the appellant's service at least of a period of ten years before attaining the age of superannuation through grant of notional approval. The respondents shall condone the deficiency of three months and six days in qualifying service of the appellant and disburse the pensionary benefits in favour of the appellant along with all arrears of pension on and from the date of retirement and shall continue payment of pension month by month upon necessary rectification of the pension payment order.

The above exercise shall be completed within a period of eight weeks from the date of communication of this order.

With the above observations and directions, the appeal and the connected application are disposed of.

There shall, however, be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, upon compliance of all requisite formalities.

(Partha Sarathi Chatterjee, J.) (Tapabrata Chakraborty, J.)