

IN THE HIGH COURT AT CALCUTTA
Civil Writ Jurisdiction
Appellate Side

Present: - Hon'ble Mr. Justice Subhendu Samanta.

W.P.A. No. -8498 (W) of 2022

IN THE MATTER OF

K.P. Gopa Kumar
Vs.
The State of West Bengal & Ors.

For the Petitioner : **Mr. Piush Chaturvedi, Adv.,**
Mr. Tarun Kumar Das Adv.

For the UGC : **Mr. Anil Kumar Gupta, Adv.**

For the State : **Mr. Suman Sengupta, Adv.**
Ms. Amrita Panja Moulick Adv.

Heard on : **30.01.2024**

Judgment on : **23.02.2024**

Subhendu Samanta, J.

1. The present writ petitioner is aggrieved against a memo of Rabindra Bharati University, Kolkata dated 1st December, 2021 wherein the present writ petitioner was instructed to perform some official norms as he would retire on superannuation at the age of 60 years with effect from 30.05.2022.

2. The brief fact of the case is that the present writ petitioner was selected in a process of appointment to the post of "Accompanist" as a "Shenda" player by the selection

committee of Rabindra Bharati University and was appointed by Rabindra Bharati University by an office order dated 10th March, 1993 as an “Accompanist” teacher in dance for playing “Shenda” in the faculty of Arts, Department of Dance, thereby requesting him to join in the said post at an early date and in response thereto, the petitioner has joined in the post on 1st April 1995 for a period of one year on probation from the date of the joining and upon being satisfied service expiring of one year probation period, the Concern Authority confirmed the service of the writ petitioner by memo dated 19th September 1994 with effect from 1st April 1994 and since then the present petitioner has been discharging his duties having without any adverse remark from any point of time.

3. The Rabindra Bharati University Act 1981 was amended in 1985 incorporating the ward “Accompanist” teacher of the University

In Section- 2(21), 2(22) as follows:

(21) "Teacher" means a Principal, Professor, Assistant Professor, Reader, Lecturer, Demonstrator, Tutor, Inspector, Accompanist or any other person, either whole-time or part-time, imparting instruction or conducting research or assisting in the teaching of music or dance by providing instrumental or vocal accompaniment, in the University or in any college, institution or centre affiliated to the University;

(22) "Teacher of the University" means a Professor, Reader, Lecturer, Accompanist or any other person, appointed or

recognized as such by the University, either whole time or part time, for the purpose of imparting instruction or conducting research or assisting in the teaching of music or dance by providing instrumental or vocal accompaniment, in the University;

4. Vide notification dated 29.11.2022 the Government of West Bengal Labour Department introduced the West Bengal University Laws (Amendment), 2012 thereby substituted Section 2(21) Section 2(22) of the Act, 1981 as follows:

“(21) “Teacher of College” means a Professor or an Associate Professor or an Assistant Professor or a Reader holding a whole time substantive teaching post and appointed in a permanent vacancy in a college or recognized as such by the State Government”.

“(22) “Teacher of University” means a Professor or an Associate Professor or an Assistant Professor or any other person, holding a whole-time substantive teaching post and appointed in a permanent vacancy in a University or recognised as such by the University with prior approval of the State Government”.

5. However, the University was treated the present writ petitioner as the teacher of the University and has imposed several duties upon the petitioner as an “Accompanist teacher”. The pay slips of the present petitioner also designate him as an “Accompanist teacher”.

6. The Government of West Bengal vide notification dated 27.01.2017 and subsequent notification dated 24th January, 2019, the age of retirement of the teacher of the University has been enhanced from 60 years to 62 years and 62 years to age 65 years respectively.

7. The change of the status of the present writ petitioner including other “Accompanist” of the same University was under challenge before the Single Bench of this Court as well as the Division Bench and it has been finally held that as on the date of resolution adopted by the University, the appellants were treated as teacher of University and not non-teaching employees since the substantive laws operate prospectively, unless, off course, they are made to operate with retrospective effect.

8. The University were also forcing one Asish Mukherjee an “Accompanist” teacher to retired from service. The Asish Mukherjee preferred a writ petitioner being WP No. 1747(w) 2019 which was disposed of by a Co-ordinate bench of this court inter alia directing the University to allow the said writ petitioner to continue serve until he reaches the age of retirement as provided in the notification dated 27th January 2017.

9. Challenging the order passed in WP No. 1747 (w) 2019, University moved an appeal being MAT No. 193 of 2019 before the Hon’ble Division Bench of this court, upon hearing the parties, the said appeal was dismissed, thereby inter alia holding that the writ petitioner therein is a teacher of the University as per Rabindra Bharati University Act 1981 as amended in 1985 on the date of his appointment, and his retirement should be considered on the basis of status he appoint on the date of his appointment; and directed the

University Authority to release the service benefit within 08 weeks from the date of the order. Challenging the said order of the Division Bench the Rabindra Bharati University preferred a Special Leave Petition before the Hon'ble Supreme Court being SLP (c) No. 3268 of 2021 which was finally dismissed; against the said order the University again moved a Review Petition being RPC No. 116 of 2022 before the Hon'ble Supreme Court which is also dismissed.

10. The University again filed one Curative Petition (c) being No. 161 of 2022 and against the order of review petition (c) No. 119 of 2022 in connection with Special Leave Petition (c) No. 3268 of 2021 filed by the University. The Curative Petition was also dismissed by the Hon'ble Apex Court.

11. The University did not comply the direction of the Hon'ble Division Bench passed in MAT 193 of 2019. Thus, the said writ petition of Asish Mukherjee filed a Contempt Application before the Hon'ble Division Bench. The Hon'ble Division Bench while discharging the Rule, inter alia, please to hold that alleged contemnors have violated the order passed on 15.12.2022 and with the order of caution the contempt application has been disposed of with certain direction upon the Higher Education Department for payment of arrear salary to the said petitioner.

12. Similarly, placed me "Accompanist teacher" of Rabindra Bharati University, namely one Dilip Mukherjee was being forcibly ordered to retire by University of issuing

communication memo dated 2nd August 2021 on the basis of reasoned order dated 10th February 2020. The memo of the said reasoned order was challenged by Dilip Mukherjee in WPA No. 1068 of 2022 which was finally heard and disposed of by a Co-ordinate bench of this Court thereby quashed and set aside the reasoned order of the University dated 10th February 2020 as well as the communication dated 20nd August 2021 and also directed the University to allow the petitioner therein to remain in service till he attains the age of superannuation i.e. 65 years of age as per the relevant notifications.

13. Challenging the said order the Rabindra Bharati University moved an appeal being No. 314 of 2022 before the Division Bench, the Division Bench do not pass any interim order and inter alia please to hold that the continuation of service of the respondent No. 1 beyond the age of 60 years and in having attributable to such service subject to the resolution of the appeal.

14. Another similar circumstance “Accompanist teacher” Partha Ghosh moved a writ petition before another Co-ordinate Bench of this court by a writ petition No. 22027 of 2022 wherein the Hon’ble Co-ordinate Bench disposed of the said writ petition inter alia direct the University to allow the petitioner therein to remain in service till he attains 65 years of age, release salary along with arrear salary with a period of 03 weeks from the date of communication of the order and further and further directed the University to issue the general order

modifying retirement of age is 65 years within 03 weeks from the date of communication.

15. Mr. Piush Chaturvedi, Learned Advocate, appearing on behalf of the petitioner submits that the issue involved in the writ petition has already been decided by the Hon'ble Division Bench of this court and two other Co-ordinate Benches. The issue has been settled finally by the Hon'ble Supreme Court in SLP as well as Review Petition and the Curative Petition filed by the university are disposed of by the Hon'ble Supreme Court.

16. In all the earlier writ petitions the submission of the University was negated. Thus, as the present petitioner is standing on the same footing to that of the other "Accompanist teacher" whose fate has been decided by this court on several occasions, the present petitioner is entitled to get the same relief as he is standing in the similar circumstances.

17. Mr. Chaturvedi further argued the opposition of the University in this case is similar to that of the early writ petitions. The submissions of the University has been specifically denied so, they are precluded to raise the same pleadings which would be the example of an abusive of process of court.

18. In support of his contention he cited a decision of Hon'ble Supreme Court in **KK Modi Vs. NK Modi** reported in **(1998) 3 SCC 573**

One of the examples cited as an abuse of the process of court is re-litigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the court. Frivolous or vexatious proceedings may also amount to an abuse of the process of court especially where the proceedings are absolutely groundless. The court then has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted. Undoubtedly, it is a matter of courts' discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The court should also be satisfied that there is no chance of the suit succeeding.

19. He also cited the decision of Hon'ble Supreme Court on the same issue in **N. Nagabhusana Vs. State of Karnataka and Ors.** reported in **(2011) 3 SCC 408**

22. In view of such authoritative pronouncement of the Constitution Bench of this Court, there can be no doubt that the principles of Constructive res judicata, as explained in explanation IV to Section 11 of the CPC, are also applicable to writ petitions.

23. Thus, the attempt to re-argue the case which has been finally decided by the Court of last resort is a clear abuse

of process of the Court, regardless of the principles of res judicata, as has been held by this Court in K.K Modi V. K.N. Modi In SCC para 44 of the report, this principle has been very lucidly discussed by this Court and the relevant portions whereof are extracted below:

" 44. One of the examples cited as an abuse of the process of the court is relitigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred as res judicata."

25. On the premises aforesaid, it is clear that the attempt by the appellant to re-agitate the same issues which were considered by this Court and were rejected expressly in the previous judgment in AIMO case, is a clear instance of an abuse of process of this Court apart from the fact that such issues are barred by principles of res judicata or Constructive res judicata and principles analogous thereto.

20. Mr. Arunagshu Chakrabarty appearing on behalf of the University submits that the present writ petitioner is an "Accompanist teacher". He cannot be termed as a teacher in any stretch of imagination. The notifications of the State of West Bengal extending the age of superannuation of the teachers of the University and Colleges is not applicable to the present writ petitioner as he is not a teacher. He submits that the UGC only recognised Lecturer, Reader, and Professor as a teacher of the University. After the amendment of UGC in the year of 2010 it recognised post of teacher as an Assistant

Professor, Associated Professor and Professor the said re-designation has been adopted by the State of West Bengal which is binding in nature. He further submits that the present petitioner has no sufficient qualification to act as a teacher in the University.

21. Mr. Chakrabarty further submits that till January 3, 1977 education was a state subject under Entry 11, List (II). By 42nd amendment, 1976, Entry 11 was deleted and it was placed in the concurrent list by enlarging the Entry 25. It is the domain of the Union of India to see that required standard of higher education of the Country is maintained. The provision of UGC cannot be violated by any of the University or the State by issuing any order.

22. Mr. Chakrabarty further argued that the judgment of Division Bench of this Court in MAT 193 of 2019 (Rabindra Bharati University Vs. Asish Mukherjee) is per incuriam. The University cannot comply with the order of Division Bench as well as the Single Benches as the orders rejecting to the UGC, 1956 and Regulation made thereunder from time to time which is a statute, and as a result the University is bound by the Regulation issued by the UGC prescribing minimum qualification of University teachers. Mr. Chakrabarty further argued that the judgment referred by the petitioner in the writ petition is judgment per incurium. In view of the binding precedents that any state legislation which stultified state as

knot an enactment validly made by the parliament would be wholly ultravires. In support of his contention he cited a decision of Hon'ble Supreme Court reported in **P. Chitrlekha Vs. State of Mysore, AIR 1964 SC 1823.**

23. Mr. Chakrabarty also referred a decision of three Judges of Hon'ble Supreme Court in **Osmania University Teachers Association Vs. State of Andhrapradesh** reported in **(1987) 4 SCC 671** held inter alia that constitution of India decides parliament with exclusive authority in regard to co-ordination and determination of standard in institution for Higher Education. The Parliament has enacted in UGC Act for that purpose.

24. Mr. Chakrabarty further argued the amendment of 1985 Rabinra Bharati Act is void, in-operative and un-enforceable. As per the UGC Regulation issued by the UGC time to time no person shall be appointed to a teaching post in University or any institution including the constituent or affiliated colleges recognised under Clause (f) of Section 2 of the UGC Act 1956 or any institution deemed to be University u/s 3 of the Act in a subject if he/she does not fulfil the requirement as to be qualification for the appropriate subject as provided in the annexures.

25. Mr. Chakrabarty further argued that the judgment of Division Bench MAT 193 of 2019, MAT 427 and MAT 653 of 2018 and WPA 1068 of 2020 and WPA 1747 of 2019 have been

passed in forgetfulness of several binding precedents wherein it is abundantly clear that the University is bound by the UGC Regulation prescribed minimum qualification of University teachers even in absence of incorporation in the University Act of the concern State.

26. He prayed for dismissal of the petition.

27. Heard the Learned Advocate. Mr. Anil Kumar Gupta, appearing on behalf of UGC, who submits that the UGC does not recognize "Accompanist teacher" as a teaching staff of University.

28. Perused the relevant observations of the Hon'ble Apex Court as cited by the parties.

29. It is very pertinent to mention herein that, the argument advanced by Mr. Chakrabarty on behalf of University is a futile attempt to misguide this court. The same plea and argument of the University has been neglected by Co-ordinate Bench and Division Bench of this Court time and again. Thus, I find no substance in the argument. The plea of the University cannot be considered by virtue of ratio of **KK Modi (Supra)**.

30. The issue in the present writ petition has already been decided in the case of Asish Mukherjee (WP No. 1747 W of 2019). The decision of Asish Mukherjee in the writ petition has reached its finality before the Hon'ble Division Bench in MAT No. 193 of 2019. Though the University has preferred SLP,

Review Application as well as Curative Petition before the Hon'ble Supreme Court against the order of Division Bench but the Hon'ble Apex Court did not entertain the University. So, the decision of Hon'ble Division Bench is passed in MAT 193 of 2019 is binding upon by this court of its true perspective. It further appears that one Co-ordinate Bench of this Court in WPA No. 22027 of 2022 has decided the issue in favour of the "Accompanist" with same unusual comments against the conduct of the university to proceed those matters time and again before this court. It further appears in the case of Asish Mukherjee, by virtue of a contempt application a ward of caution was passed by the Hon'ble Division Bench against the University and the State took the responsibility to comply with the order passed by the Division Bench. It further appears that the Co-ordinate bench of this court in WPA No. 22027 of 2022, has issued some directive to be complied with by the University; some of the directions were not complied with accordingly by virtue of direction in a Contempt Application and in compliance thereof the Registrar of the Rabindra Bharati University was placed under suspension and an office order of the Vice Chancellor of the University was issued on 15.01.2024 wherein that Executive Council has adopted the resolution on October 4, 2023 that the service of "Accompanist teacher" was extended up to their age of 65 years.

31. The present petitioner is similarly situated “Accompanist Teacher” and he is also entitled to get the relief as prayed for.

32. Accordingly, the instant writ petition is disposed of with a direction that the memorandum of University dated 1st December 2021 issued by the Registrar Rabindra Bharati University against the present petitioner is hereby quashed.

33. The Rabindra Bharati University is directed to allow the writ petitioner to remain in service till 65 years of age, by virtue of notifications of State of West Bengal dated 27.01.2017 and 24.01.2019. The University is further directed to release the arrear salary and current salary of the petitioner by allotting regular duties.

34. W.P.A. 8498 (W) of 2022 is disposed of. Connected CAN applications if any, are also disposed of.

35. Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.

(Subhendu Samanta, J.)