

81 **18.03.
2025**

Ct. No. 08

Ab

**FMA 215 of 2025
IA No. CAN 1 of 2025**

**Md. Azahar Hossain
Vs.
The State of West Bengal and others**

**Mr. Kamalesh Bhattacharjee,
Mr. Rafikul Islam.**

... for the appellants.

**Mr. Pinaki Dhole,
Mr. Avishek Prasad.**

... for the State.

**Mr. Sardar Amjad Ali,
Ms. Mekhla Sinha,
Ms. Malabika Roy Dey.**

... for the respondent no. 5.

A writ petition was dismissed by the Trial Court on the premise that the order of the Division Bench cannot be construed as an order for reinstatement upon quashing and setting aside the termination order, but has to be construed in the manner as would appear therefrom.

The writ petitioner/appellant has approached the Court by filing several writ petitions claiming initially a right to remain as Mukhya Samprasarak in-Charge, which was found to be bad, as the writ petitioner/appellant did not acquire the eligible qualification therefor.

In an earlier round of litigation, the Court found that the order of termination cannot be termed as termination of an engagement as Samprasarak and, therefore, directed the writ petitioner/appellant to be engaged to a post, which he held. It was further observed that in the event the post of Samprasarak is not available, the concerned authority will create a supernumerary post in this regard.

The pith and substance of the entire episode, as it appears, relates to the engagement of the writ petitioner/appellant as Samprasarak and not Mukhya Samprasarak in-Charge and such order of termination was found to be illegal and in firm. It is not in dispute that the writ petitioner/appellant has been engaged as Samprasarak after the matter travelled to the Division Bench in an intra Court appeal and attained the age of superannuation. After attainment of the superannuation, a writ petition is filed by the writ petitioner/appellant claiming the release of all arrear salaries from 1st November 2014 to 13th June 2024 along with an interest.

The attention of this Court was drawn to the earlier round of litigation, the pleadings filed therein and the orders passed from time to time and attention of the Counsel for the writ petitioner/appellant was drawn to the provisions under Order II Rule 2 of the Code of Civil Procedure (in short 'Code') creating an embargo in claiming such relief by filing a separate writ petition.

According to the Counsel for the appellant, there is no fetter on the part of the appellant to pray for release of arrear salaries for the period mentioned in the writ petition, as there was a delay in engagement of the writ petitioner in terms of the order of the Single Bench in an earlier writ petition. It is further submitted that the entitlement was crystallized in terms of the order passed in an earlier writ petition and, therefore, it would be unjust enrichment upon the legitimate right of the petitioner to receive the salaries for such periods.

The respondents opposes the contention of the appellant by contending that the order of the Single Bench as well as the Division in an earlier writ petition postulates the payment of the arrear salaries for the period mentioned in the writ petition. It is further

submitted that once the appellant omits to claim the relief, which could have been claimed in an earlier writ petition, he is precluded from filing the subsequent writ petition for the said relief. It is, thus, submitted that there is no infirmity and/or illegality in the impugned order and the instant appeal being devoid of merit deserves dismissal in limine.

Though the provision of the Code may not apply to a writ petition in lock stock and barrel, but the principles emanating therefrom can be applied in view of Rule 53 of Rules framed by the High Court for proceeding under Article 226 of the Constitution of India. It is a fundamental policy of the country that every litigation must reach to its final destination i.e. finality and should not be permitted to be reopened by taking recourse to a further litigation. Such principle emanating from the common law is statutorily recognized by inserting Section 11 of the Code.

The principle akin to estoppel emanates from the provisions contained under Order II Rule 2 of the Code wherein a litigant is debarred from filing a subsequent proceeding for the relief, which could have been prayed for in an earlier litigation and having omitted to do so, the omission stands as barrier in entertaining further litigation to which we do not find any incongruity in applying the said principles in a writ proceeding.

In order to ascertain the embargo so created under Order II Rule 2 of the Code, the first and foremost point to be considered is the identity of the cause of action and the relief, which is claimed in a subsequent proceeding, is based on the cause of action, which necessitated the institution of an earlier proceeding and such relief could have been claimed by the litigant therein. In other words, the cause of action in both the proceedings must in substance, identical and based upon the same. Any relief pertaining to the

said cause of action having omitted shall not be permitted to be claimed in a subsequent proceeding.

We invited the attention of the Counsel whether it is a case of omission or the relief having claimed but denied by the Court. Our attention is drawn to the fact that in earlier writ petition, the said prayer was made and even by way of an application filed before the Division Bench in the intra Court appeal, such relief was claimed and, therefore, it cannot be said to be an omission. Such facts, in our opinion, have put the appellant in a more precarious position than the case of an omission. The moment the litigant claimed a relief and such relief having not granted, it would be construed as an implied denial of such relief and, therefore, the bar of *res judicata* would immediately be attracted.

Explanation V of Section 11 of the Code can be gainfully applied wherein the principle of *res judicata* was extended to a situation where any relief claimed in the plaint having not expressly granted by the decree was for the purpose of such concept be deemed to have been refused. The moment the appellant claimed such relief and the judgment does not expressly grant such relief in view of the Explanation V of Section 11 of the Code, it would be construed to have been refused by the Court. Once the relief is refused and/or denied, it cannot be reopened in a subsequent proceeding.

The proper remedy of the litigant is to approach the higher forum and the moment such remedy is not exhausted it forecloses any such right to be re-agitated in a subsequent proceeding. From whatever angle we look at do not find that the relief claimed by the writ petitioner/appellant deserves to be allowed and, therefore, the ultimate decision of the Single Bench cannot be faulted with.

The appeal and the connected application being

CAN 1 of 2025 are dismissed.

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

(Harish Tandon, J.)

(Om Narayan Rai, J.)