

Pranab Sengupta Vs. Alok Kumar Basu and ors.

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Court : Kolkata

Decided On : Jan-19-2006

Reported in : 2006CriLJ1601

Judge : Kalyan Jyoti Sengupta, J.

Acts : West Bengal Primary Education Act, 1973 - Sections 63, 69 and 75; ;Bengal (Rural) Primary Education Act, 1930; ;[Constitution of India](#); ;Code of Civil Procedure (CPC) - Order 22, Rule 10; ;Recruitment Rules, 1940 - Rule 11

Appeal No. : C.R. Nos. 20509 (W) of 1996 and 1019 (W) of 1995

Appellant : Pranab Sengupta

Respondent : Alok Kumar Basu and ors.

Advocate for Def. : Bikash Ranjan Bhattacharya, ;P.K. Basu, ;S. Chakraborty, ;A.K. Basu Chowdhury and ;Latika Ghosh, Advs.

Advocate for Pet/Ap. : Saktinath Mukherjee, ;S. Bhowmick and ;Manisha Bhowmick, Advs.

Judgement :

ORDER

Kalyan Jyoti Sengupta, J.

1. The aforesaid contempt application (C.R. No. 20509 (W) of 1996) has arisen in connection with an order dated 18th April, 1994 passed in the aforesaid writ petition. The said writ petition was disposed of by The Hon'ble Mr. Justice Paritosh Kumar Mukherjee (as His Lordship then was). The operative portion of the said judgment and order non-compliance of which is alleged, is set out hereunder:

Accordingly, I dispose of the writ petition by directing all the respondents particularly respondent No. 2, the Director of School Education (Primary Branch) West Bengal, Bikash Bhavan, Salt Lake, Kolkata to grant approval of the appointment of the writ petitioner from the date of his appointment forthwith, preferably within one month from the date of communication of this order and further, to release the consequential benefits as admissible to him in accordance with law including the arrear salary, allowance within the period of six months from the date.

2. This order is however being made in respect of the present writ petitioner only and is applicable to him only.

3. In the said writ petition State of West Bengal, Director of School Education (Primary Branch), West Bengal, and the District Inspector of Schools (Primary Education), North 24 Paraganas, Lichu Bagan, Pioneer Park, Post Office -- Barasat was made party respondents. It appears that the State of West Bengal, Director of School Education and District Inspector of Schools preferred appeal against the aforesaid judgment and order and also filed connected stay application (the said appeal was marked as FMAT No. 1625 of 1994). During pendency of the said appeal since the order was not carried out a contempt application was filed (hereinafter referred as the first contempt) being CR No. 1019 (W) of 1995 against Sri Samarendra Bandyopadhyaya, the then Director of School Education, Sri Dilip Adhikary, the then District Inspector of Schools (Primary Education), North 24 Paraganas, Sri G.R. Sana, the then Secretary, Department of Education (Primary Branch) and Sri Bikash Chandra Dey, the then Headmaster of Basak Bagan Primary School. It is pertinent to mention that the petitioner was directed to be regularised in the said school viz. Basak Bagan Primary School.

4. The said first contempt application was disposed of by the Hon'ble Mr. Justice S. B. Sinha (as His Lordship then was). After considering all contentions and submissions of the learned Counsel for the parties His Lordship was pleased to pass order in the said contempt application as follows:

In this view of the matter I am of the opinion that the respondents should carry out the order of this Court. The Director of School Education, however, although be not a competent authority to grant such approval is hereby directed to see that an appropriate order be passed by the Chairman, District Primary School Council, Calcutta.

Keeping in view the aforementioned directions, although the respondents have committed contempt of this Court, I am of the opinion that no punishment should be imposed on them at this stage. However, it goes without saying that the aforementioned direction shall abide by the result of the appeal that has been preferred by the State and its officers.

5. There cannot be doubt that the Appeal Court should be at liberty to pass such order or orders as it may deem fit and proper and if the order dated 18th April, 1994 is implemented by the respondent in the light of the directions made hereinabove will abide by the result of the said appeal.

6. I have gone through records and find the said appeal thereafter was dismissed for default on 1st October, 2002 by Their Lordships. The Hon'ble Mr. Justice Ashok Kumar Mathur, the then Chief Justice and the Hon'ble Mr. Justice Jayanta Kumar Biswas.

7. I have called for the original records of the said appeal and have seen that all the factual and legal grounds challenging the said order being taken. It is appropriate to record that no step has been taken for re-admission by way of restoration of the said appeal. Rather subsequently order of the learned Trial Judge was carried out by the Director of School Education passing appropriate orders on the facts and circumstances as stated hereunder. In spite of the said order of the Writ Court as well as the order passed in the contempt proceedings the effective order of regularization for payment of salary with outstanding dues

was not passed. Hence instant contempt application has been taken out. On 20th November, 1996 a Rule was issued. This time one Sri S. K. Dasgupta, the Chairman, District Primary School Council, North 24 Paraganas was made a party respondent in the contempt application. On 20th November, 1996 having found non-compliance of the order the Hon'ble Mr. Justice D. K. Basu (as His Lordship then was) was pleased to issue Rule. Against the aforesaid order of issuance of Rule an appeal was preferred by the then Chairman, Ad hoc Committee, District Primary School Council, 24 Paraganas (North). The said appeal was disposed of on 22nd July, 2003 by Their Lordships. The Hon'ble Mr. Justice Ashok Kumar Mathur, the then Chief Justice and the Hon'ble Mr. Justice Ashim Kumar Banerjee. Their Lordships did not interfere with the order issuing Rule for contempt. Liberty was given to the appellant Chairman to place his case as to why the order passed by the writ Court could not be carried out. It is recorded in the order of Appeal Court that the Government has already complied with the order and the appointment has been approved but salary has not been released by the appellant. The said Rule was pending for a long time and the same came up before me for hearing. During pendency of this contempt application Sri Dasgupta, the original contemner No. 1, being the Chairman, was replaced by the present Chairman, Prof. Biswa Nath Roychowdhury. So he was added as a party respondent. Against this order of addition an appeal was preferred by the present Chairman. The appeal Court did not interfere with the said order rather gave liberty to the appellant viz. the Chairman to place his case before this Court at the time of hearing of the contempt application.

8. Now the matter has been heard finally. Mr. Saktinath Mukherjee, Learned Senior Advocate appearing in support of the contempt application, narrated the aforesaid fact and submits that the order passed by the Hon'ble Mr. Justice Paritosh Kumar Mukherjee has now become final and indeed the same was directed to be complied with by the order made by the Hon'ble Mr. Justice S. B. Sinha (as His Lordship then was). However, it was said by His Lordship by mistake that the Primary School Council, Calcutta would grant approval to the appointment of the petitioner. It is argued by Mr. Mukherjee, at the time of the filing of the writ petition the District Primary School Council, 24 Paraganas (North) was not constituted. At that time it was the Board formed by the West Bengal Primary

School Education in 1973 was functioning as predecessor in interest. During pendency of the writ petition, on 11th March, 1994 the said Primary Council was established and subsequently on 18th April, 1994 the Writ Court passed an order without impleading or bringing the Council as a party respondent. He submits further that in the eye of law the aforesaid omission to implead the successor in interest, order earlier passed is not invalid one and the same has full force and binding upon the successor in office. It is a case of merely devolution of interest under the provisions of Order 22, Rule 10 of the Civil Procedure Code. It is true that District Primary School Council, 24 Paraganas (North) cannot be hauled up for punishment for non-compliance of the order passed in the Writ Court but this Council being the successor in office must implement and carry out order passed by the Court in its true meaning and spirit. The devolution of interest during pendency of the litigation cannot affect enforceability of the order against the successor. In support of his submission he has relied on a decision of this Court reported in 1980 (2) Cal HN 316, and another decision of the Supreme Court reported in : [2001]3SCR1129 rendered in case of Dhurandhar Prasad v. Jai Prakash University.

9. He further contends that the legality and validity of the order sought to be enforced, cannot be questioned in the contempt jurisdiction by any of the parties particularly when in view of the dismissal of the appeal the order has reached its finality. It is not a question of inherent lack of jurisdiction for which the order can be avoided treating the same being nullity.

10. Primary School Council cannot object to implementation of the order when the State Government has accepted the same by granting approval and by passing appropriate orders. The Council is statutory body and is formed under the provisions of the particular Act and it is subject to the direction and financial sanction of the State Government. It is the duty of the Council under Section 63 of the Primary Education Act, 1973 to give effect to the approval granted by the Director and accepted by the Secretary of the Primary Education Department pursuant to the judgment and order of the Hon'ble Court. It is also one of the duties under Section 69 of the 1973 Act the budget of the Primary School Council is required to be submitted to the Director for approval and the Director is entitled

to approve it with or without modification. Again under the provisions of Section 75 of the said Act the State Government can make yearly grant and it is required to ensure compliance of the High Court's order while making the grant. It is settled position of the law that when the contempt is mere failure to comply with or carry out an order of the Court for the benefit of the private party, it is plainly civil contempt and it has been said that when the party in whose interest the order was made, moves to the Court for action to be taken in contempt against the contemner with a view to enforcement of a right, the proceeding is only a form of execution. In reference to the aforesaid proposition of law he had relied on a decision of this Court reported in : AIR1958 Cal474 (Dulal Chandra Bhar v. Sukumar Banerjee).

11. Besides it is the anxiety of the Government to see that primary education is given to all the children of the country up to the age of fourteen years which was once part of the directive principle of State policy and now it has become fundamental right under the [Constitution of India](#). Perhaps this new provision of Constitution has been inserted following the famous judgment rendered by the Supreme Court in case of Unnikrishnan J.P. v. State of Andhra Pradesh reported in : [1993]1SCR594 .

12. It is further submitted that a recent decision of the Supreme Court has examined the aspect of binding nature of an order passed by the Court upon the successor in interest. Accordingly, this Court at the first instance ought to direct the District Primary School Council, 24 Paraganas (North) to give formal effect and implement to the order passed by the Writ Court and also direct the Government to release necessary fund for implementation of the aforesaid order.

13. Learned Counsel, Mr. Pabitra Kumar Basu while opposing this contempt application, submits that the order of the Writ Court is not binding upon the District Primary School Council which was not party in the writ proceedings and further it is a separate statutory body. This Primary School Council had been set up during pendency of the writ petition and before the Writ Court passed the aforesaid order. The writ petitioner did not deliberately implead the Council as a party respondent. He further submits that in view of the order passed by the Hon'ble Mr. Justice S. B.

Sinha in the first contempt application it is not the Director of School Education who is to grant approval to the appointment of the petitioner. The appointment has to be done even before this Council came to be established in accordance with the Recruitment Rules and such orders are completely contrary to and inconsistent with tile previous orders. It is said further that Appeal Court has been given liberty to place all the facts and law as to why the order could not be implemented to. The appointment was wholly illegal and no appointment could be made by the Court dehors the Recruitment Rules. The mode of appointment of the primary school teacher has been provided in the appointment leave rules and conditions of service. The present Chairman of the concerned School Council has also been circumscribed by the embargo of the provision of Rule 11(a) of the aforesaid Rules. No order can be carried out which is passed contrary to the provision of the law. In this connection reference is sought for to the following judgments of the Supreme Court viz. 2001 (1) CHN 345 (sic), 2001 (1) CHN 347 : (2001 Cri LJ 1336), 2000 (1) SCC 400 (sic), : [1994]3SCR396 and 1989 (2) CHN 58. He further contends that the West Bengal Primary Education Act, 1973 came into force with effect from 2nd July, 1990 in the whole of West Bengal except the areas comprising the District of 24 Paraganas and South 24 Paraganas and hill areas. Later the provision of the said Act was extended to the District of North 24 Paraganas and south 24 Paraganas with effect from March, 11, 1994. The Rural Primary Education, 1930 was the appropriate law to govern this field. No appointment can be made without formation of panel or approval thereof. The writ petitioner was never empanelled. As such there is no question of regularization of his appointment which has not been made in terms of the circular. Besides if the Managing Committee appointed the petitioner without taking prior permission from the respondents and such appointment was not made against sanctioned quota of additional posts appointment is void ab initio. Before March 11, 1994 the District School Board was constituted under the Bengal (Rural) Primary Education Act, 1930 and it was governed by the said Act. Under Recruitment Rules, 1940 no post of a teacher could be created for primary school maintained by the District School Board without the recommendation of the District Inspector of Schools (primary education and the approval of the State Government). He has relied on a large number of decisions in this connection.

14. I have extensively heard both the learned Counsel. After having gone through the records the only question is as to whether the Rule issued against all the alleged contemnors initially by the Hon'ble Justice D. K. Basu is to be disposed of with the order of punishment holding them guilty or by passing further orders or not. I am of the view that no order of punishment or at this stage no fact findings of the case of contempt of the District Primary School Council, 24 Paraganas (North) can be made, as District Primary School Council was not a party respondent to the writ petition. From the records I find that even it has been admitted by the present Chairman of the District Primary School Council, 24 Paraganas (North) that the Director of School Education and the State Government cannot be held guilty for committing any contempt of Court as they have already carried out the order of this Court by passing appropriate orders pursuant to the order of the Writ Court and read with the order of the Hon'ble Mr. Justice S. B. Sinha as quoted above. But meaningful implementation by paying salary including arrears have not been done and this has to be done no doubt under the direction of the District Primary School Council, 24 Paragarias (North). In terms of the order of the Appeal Court now I am to examine the plea and/or contention raised by Primary District School Council. The sum and substance of the contention is that the order passed by the Writ Court was not implemented as the respondent thought that it came into being during pendency of the writ petition. Such order is not binding and furthermore the appointment order was also issued contrary to the relevant Recruitment Rules and the order passed in violation of the provision of the law can be avoided. I am of the view that the contention, raised by the District Primary School Council to avoid the order on the basis of the question of law, cannot be entertained by this Court at all for the simple reason that the grounds taken by the State Government in its appeal were dismissed for default. As such, those pleas are now hit by the principle of estoppel as rightly contended by Mr. Mukherjee that it is a case of devolution of office and/or interest during pendency of the writ proceedings. The successor in office is bound by the order even if it is not brought on record. At the time of enforcement of this order such a plea by the successor in interest is not entertainable. This question was dealt with by the Supreme Court in case of *Dhurandhar Prasad Sinha v. Jai Prakash University* reported in : [2001]3SCR1129 . In this case it is held as a principle of law amongst others that in case of

devolution of interest there is neither any question of abatement nor omission to bring the successor in interest as a party to the proceedings render order passed subsequently, being void and it has got the same binding effect upon the successor-in-interest. In paragraph 7 of the said judgment it is said as follows:

Under Rule 10, Order 22 of the Code, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against persons upon whom such interest has devolved and this entitles, the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the Court for leave to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, and yet as pointed out by Their Lordships of the Judicial Committee in *Moti Lal v. Karab-ud-Din* he will be bound by the result of the litigation even though he has not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the adversary. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, for, as Lord Kingsdown of the Judicial Committee said in *Prannath v. Rookea Begum*, a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings.

15. In this very judgment enforceability and voidability of an order is also examined. After analyzing the previous judgment of the Supreme Court as well as English Courts in paragraph 22 it is held as follows : [2001]3SCR1129 :

Thus the expressions 'void and voidable' have been subject matter of consideration on innumerable occasions by Courts. The expression 'void' has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab initio void and for avoiding the same no declaration is necessary, law does not take any notice of the same and it can be disregarded in collateral proceeding or otherwise. The other type of void act e.g. may be

transaction against a minor without being represented by a next friend. Such a transaction is good transaction against the whole world. So far as the minor is concerned, if he decides to avoid the same and succeeds in avoiding it by taking recourse to appropriate proceeding the transaction becomes void from the very beginning. Another type of void act may be which is not a nullity but for avoiding the same a declaration has to be made. Voidable act is that which is a good act unless avoided, e.g. if a suit is filed for a declaration that a document is fraudulent and/or forged and fabricated, it is voidable as apparent state of affairs is real state of affairs and a party who alleges otherwise is obliged to prove it. If it is proved that document is forged and fabricated and a declaration to that effect is given a transaction becomes void from the very beginning. There may be a voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases, where legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable.

16. The point raised in this case by the Chairman of the concerned Primary School Council is that the Writ Court's order is not liable to be enforced or implemented because the same was passed contrary to provision of law. In my view it might or might not be a very good ground to him for preferring an appeal. When Primary School Council was not a party in the writ proceedings and when it felt to have been affected by the impugned order it should have preferred appeal against the said order. While exercising the contempt jurisdiction which is also one of the modes of execution and/or enforcement of the order the Court (See : AIR1958 Cal474) for reference cannot reopen the issue which has reached its finality not only by dismissal of the appeal preferred by the State but also by acceptance by the learned single Judge by entertaining a contempt application and directing the Government to implement the same. Indeed the Government has accepted. It now does not lie in the mouth of another organ created by the statute, of the Government to say otherwise. I accept the contention of Mr. Mukherjee that the Council is to function under the supervision and guidance of Government, while depending upon the financial grant released by the Government.

17. I accordingly hold that the order is squarely binding upon the District Primary School Council, 24 Paraganas North who has no scope to avoid it. The Primary School Council must accept the decision and order passed by the Government pursuant to order passed by this Court.

18. Accordingly, I direct the Primary School Council, 24 Paraganas North to formally approve the appointment of the petitioner and to do all things necessary and the Director of School Education and/or Government are hereby directed to release necessary fund in the hands of the District Primary School Council concerned forthwith. All payments arising out of the petitioner's salary both outstanding and current shall be paid. Outstanding salary may be paid by instalments but must be paid within a period of six months from the date of communication of this order. However, current salary shall be paid when it falls due. The petitioner is entitled to costs and to be paid by the District Primary School Council, 24 Paraganas North who unnecessarily fought this litigation and tried to unsettle the issue which is otherwise settled. This cost is assessed at 200G. Ms. to be paid by the Council to the Member Secretary of the High Court Legal Services Committee within ten days from the date of communication of this order.