

Dibakar Kumar Sarkar Vs. the State of West Bengal and ors.

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Court : Kolkata Appellate

Decided On : Mar-23-2011

Judge : Harish Tandon, J.

Appeal No. : WP No. 21641 (W) of 2004

Appellant : Dibakar Kumar Sarkar

Respondent : The State of West Bengal and ors.

Advocate for Def. : Mr. P. S. Deb Barman Mr. Anindya Bose, Advs

Advocate for Pet/Ap. : Mr. Sougata Bhattacharya, Adv

Judgement :

1. This writ petitioner has impugned an inaction on the part of the respondent no. 3 - 5 to release the arrear salary and also to pay the entire retiral benefits.
2. The brief facts are that the petitioner was appointed as Assistant Teacher in Kamardanga Free Primary School, West Dinajpur on and from the month of September 1963. The petitioner used to put his signature on the monthly return which was submitted to the Sub-Inspector of School at the end of each month. Some discrepancy arose regarding putting the signature in the third column of the monthly return below one Sri Mahiuddin who was appointed subsequently. The salary of the writ petitioner was not paid from the months between June to November, 1979, April to December, 1980 and January to December, 1981 and from January to April, 1982. It is contended by the writ petitioner that during such

period he rendered his services continuously. Subsequently the writ petitioner was recommended to undergo the primary training from

3. March 1982 for a period of eight months and during the training period the petitioner was paid salary.

4. After successful completion of the said training the petitioner joined the said school on and from January 1983 but the salary was again stopped by the authorities. The petitioner made several representations. The then President of the District School Board issued memo no. 94/3 dated 6.5.1988 directing the members of the said Board to hold an enquiry and submit the report to the office of the Sub-Inspector of School, Primary Education. It is contended that no report has been filed as yet.

5. Sub-Inspector of School (PE) issued memo no. 40(2) dated 25.8.1988 seeking instruction from the then President of the School Board, West Dinajpur in relation to the payment of salary to the writ petitioner as the writ petitioner has rendered his services continuously. The petitioner further contends that the petitioner also rendered services as Polling Officer and was paid honorarium for the same. It is specifically averred by the writ petitioner that the District Inspector of School (PE) held an enquiry and submitted the report to the concerned District Primary School Council and a decision was taken to release the monthly salary on and from the month of May 1996 subject to filing a declaration by the writ petitioner to withdraw the pending case before the high court being C.R No. 2136 (w) of 1981 initiated by the writ petitioner complaining that he cannot be directed to put his signature on the third column of the monthly return below the said Mahiuddin, and all other claims. It is a case of the writ petitioner that on and from the month of May 1996 he has received monthly salary till the date of attainment of superannuation.

6. In this writ application, the writ petitioner not only claimed the arrear salary for the period he rendered services as aforesaid but also prayed for a direction upon the concerned authority to release the retiral benefits admissible to the writ petitioner.

7. Mr. Sougata Bhattacharya, learned Advocate appearing for the petitioner submits that the petitioner has rendered services for the aforesaid period as mentioned above and the authority cannot withhold the payment of the monthly salary to the writ petitioner. He contends that the earlier writ petition being CR no. 2136 (w) of 1981 was filed for a direction to allow the writ petitioner to put his signature in the second column of the monthly return and not in the third column after Sri Mahiuddin and thus he contends that the payment of arrear salary was not the subject matter in the said writ application. He further contends that the declaration dated 24.5.1996 has no nexus to the payment of arrear salary and the same was executed for release of the monthly salary on and from the month of May 1996. He further submits that the authorities concerned have not paid the admissible retiral benefits on and from 1 st November 2001. He concluded his argument by saying that the petitioner is entitled to be compensated in monetary terms by awarding an interest over and above the arrear salaries and the payment of retiral benefit.

8. Mr. Partha Sarathi Deb Barman, learned Advocate appearing for the respondent no. 3, District Primary School Council, Uttar Dinajpur, contends that the district West Dinajpur was bifurcated into two districts i.e. North Dinajpur and the West Dinajpur and now the school where the petitioner is working comes within the control and management of the District Primary School council, North Dinajpur. He submits that the then Chairman of the Council North Dinajpur resolved the long pending disputes by issuing memo no. 252/2 dated 14.5.1996 for release of the pension to the writ petitioner on and from the month of April 1996. He further contends that in absence of any attendance register and in view of the issuance of memo no. 223 dated 3.2.1983 by which the salary was withheld, there is no available record for cancellation of the said memo no. 223 dated 3.2.1983 excepting that by a subsequent memo no. 252/2 dated 14.5.1996 by which the salary was released on and from the month of April 1996. He further contends that the petitioner thereafter received the monthly salary up to the age of superannuation and was granted the extension of service up to the age of 65 years. He further contends that during the pendency of the writ application the authorities have paid the provisional pension. He strenuously argued that the petitioner himself executed and submitted a declaration on 24.5.1996 and

abandoned the claim of the arrear salary, if there be any. He thus submits that the claim of the writ petitioner is not tenable.

9. In reply, the writ petitioner contends that the President, District School Board, West Dinajpur issued memo no. 1638/1 dated 12.8.1988 directing the sub-Inspector of School to release the salary of the writ petitioner on and from the month of September 1988 in a regular course and also to pay all arrear payments upon taking into account the existing rules. Thus he contends that in view of the issuance of the subsequent Memo No. 1638/1 dated 12.8.1988 the earlier circular by which the salary of the petitioner was withheld stood superceded. He thus submits that the stand of the respondent authority is not tenable.

10. Having considered the respective submission of the respective parties, it appears that the petitioner was appointed as assistant teacher in the year 1963. It is also not in dispute that the salary of the writ petitioner was stopped by issuing a memo no. 223 dated 3.12.1983. The petitioner filed writ petition being CR no. 2136(w) of 1981 before this court which was ultimately withdrawn and a declaration to such effect was executed on 24.5.1996. on perusal of the said declaration it is beyond any doubt that the writ petitioner withdrew the said writ petition and declared not to take any further legal opinion regarding the affairs. Though the said declaration is not couched with perfect precision but on overall reading of the said declaration one can unhesitatingly come to the conclusion that the petitioner has abandoned and/or foregone and/or waived his right to claim arrear salary prior to the execution of the said declaration.

11. From the length and breadth of the writ petition there is no assertion made by the writ petitioner that he ever attempted to claim the arrear salary after the resumption of salary from the month of April 1996. It is only after attaining the age of superannuation and that too just one month before the expiration of the fifth extension, the petitioner, for the first time, claimed the payment of the arrear salary. The petitioner, having received the salary from the month of April 1996, did not raise any objection nor asserted any claim for arrear salary and on exercising an option enjoyed up to the five extension. Thus it cannot be conceived of that if the petitioner was not paid salary for few months in the year 1979, 1980, 1981 and

1982 till 1996, he will not lay his claim to the authority. Even if it is taken that by a subsequent memo no. 1638/1 dated 12.8.1988 the earlier order issued vide memo no. 223 dated 3.2.1983 was superceded, no explanation is forthcoming as to the fact for non-payment of the salary up to the month of March 1996. It is true that a person has legal right which he can claim and it is also true that such person can also forgo/waive/acquiesce such legal right.

12. It is inconceivable that a person who rendered services for such a quite long period and was not paid salary, shall sit tight over the matter and merrily accepts the payment of salary from the month of April 1996 without any demur and objection.

13. Thus the conduct of the petitioner lead to an inevitable conclusion that the petitioner is not entitled to arrear salary. Thus the claim of the petitioner for arrear salary is rejected. The petitioner has been allowed to receive salary from the month of April 1996 and was further allowed to enjoy the extended period for five times upon exercising an option, it cannot be said that such payment is not legal or irregular. In fact no such case is also made out by the concerned authority. Thus the person who has retired has a legal right to receive the retiral benefits admissible under the law.

14. In affidavit-in-opposition the concerned respondent have asserted to have paid the provisional pensionary benefit to the petitioner in terms of order passed by this court in this writ application. Thus the full retiral benefit is admittedly not paid to the petitioner. The concerned authority cannot withhold the payment of the retiral benefit which is neither a bounty nor a charity but the payment of the deferred salary (see (2001) 6 SCC 591, Gorakhpur University & Ors. v. Dr. Shitla Prasad Nagendra & Ors.).

15. The concerned authority cannot be allowed to take any plea for non-payment of the retiral benefit as the same is to be paid to the retiring employee on the attainment of age of superannuation. Such withholding of the retiral benefit is unjustified and not condonable.

16. For such lapses on the part of the concerned authority the writ petitioner is entitled to be compensated in monetary terms by awarding an interest in his favour. Thus so far as prayer for payment of the retiral benefits is concerned, the petitioner is entitled to such prayer and the writ petition is allowed to such extent only.

17. The concerned authority is directed to pay the full admissible retiral benefit to the writ petitioner within three months from the date of communication of this order together with an interest @ 10 % from the date attainment of the age of superannuation till its actual payment. In the event the concerned authority fails to pay the admissible retiral benefit along with interest as directed above, the writ petitioner is further entitled to an additional interest @ 2% over and above the percentage directed above, till its actual payment.

18. The writ petition is allowed to the extent indicated above.

19. However, there shall be no order as to costs.

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