OD-2

ORDER SHEET
APO 262 of 2018
GA 2582 of 2018
With
WP 116 of 2016
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

BRAHMA DEO MISHRA
Versus
STATE OF WEST BENGAL & ORS

BEFORE:

The Hon'ble JUSTICE HARISH TANDON

The Hon'ble JUSTICE SHEKHAR B. SARAF

Date : 10th October, 2018.

Appearance:
Mrs. Santi Das, Adv.
Mr. Amar Mitra, Adv.
…for the petitioner

Mr. Tapan Kumar Mukherjee, Sr. Adv.
Mr. Somnath Naskar, Adv.
…for the State

The Court : This is an application in an appeal filed against an order passed by the learned Trial Judge dated 11th July, 2018. By consent of the parties we have taken up both the application and the appeal.

The impugned order was passed in relation to an application for recalling of an earlier order dated 19th September, 2016. The operative portion of the order dated 19 September, 2016 is quoted below:

> "Considering the submissions recorded as above and the materials placed, this Court directs the DI(SE), Kolkata to take steps for approving the petitioner against the vacant Group 'D' posts lying in the School in issue within a period of four weeks from the date of communication of this order. The petitioner shall be entitled to all regular and arrear benefits admissible in law in terms of the approval so granted by the DI(SE), Kolkata.
>
> For the above reasons the conclusion arrived at by the DI(SE), Kolkata pertaining to the non-approval of the petitioner as a Group 'D' staff vide the impugned Memo No. 521/1(9)/Law dated 16th November, 2015 stands set aside."

The impugned order also dealt with a contempt petition that was filed in relation to the order dated 19th September, 2016.

The learned Trial Judge took both the applications of recalling and contempt analogously and modified his earlier order in the following manner an excerpt of the order is reproduced as under:

> "This Court is, accordingly, of the further view that the matter be remanded to the Commissioner of School Education, Government of West Bengal, to take a complete view by affording an opportunity of hearing to the parties or their authorised representatives, including the School. The School shall extend every cooperation as asked for by the Commissioner, without conveniently insisting on the alleged non-traceability of its records.
>
> It is expected that the above directed exercise shall be completed not later than a period of six weeks from the date of

communication of this order with the reasoned order of the Commissioner being communicated to the parties heard.

In the light of the above direction, the operation of the Order of this Court dated 19th September, 2016 stands permanently stayed.

Both CC No.7 of 2017 and GA No. 1035 of 2017 stand accordingly disposed of."

Counsel on behalf of the appellant submits that the impugned order is against the principally established law as the learned Trial Judge proceeded to recall his earlier order and pass fresh orders in spite of the fact that the learned Judge did not have determination to hear the writ petition. The learned Counsel further submitted that the Trial Judge had no power to modify his own order in sitting in contempt jurisdiction and accordingly the order is illegal and needs to be set aside.

Mr. Mukherjee, learned Additional Government Pleader, submits that the Trial Judge was correct in passing the above order as upon hearing the entire matter once again he chose to recall his earlier order. According to him, this power is very much deal with the Trial Judge and he can recall his own order. He further submitted that there is no bar in the contempt jurisdiction that the learned Trail Judge cannot pass directions for compliance of his earlier order.

We have gone through the materials on record and heard Counsel appearing on behalf of both the parties. We are of the view that the learned Trial Judge should have dealt with in a segregated manner. In the event he chose to hear the recalling application first, he should have

the jurisdiction to recall the same. However, since he did not have determination to hear the matters in relation to education when these orders were recalled, he could not have issued fresh directions upon the respondents in the said matter. Once he had recalled the order, the contempt petition could have been disposed of accordingly and the matter should have been thereafter heard by the Hon'ble Bench having determination in the matter.

Furthermore, if the impugned order is to be read as an order passed in the contempt jurisdiction, we are of the view that the learned Trial Judge erred in law in modifying a mandatory order passed in the writ jurisdiction subsequently in the contempt jurisdiction. In the contempt jurisdiction, either the power of the writ Court is to hold the contemnors in contempt or reject contempt petition. Power of modification of an order passed in contempt, which is sought, is not available to the Trial Judge.

The aforesaid proposition of law can further be fructified from the decision of the Apex Court rendered in the case of Union or India Versus Subedar Devassy PV reported in (2006) 1 Supreme Court Cases 613, wherein the Apex Court held as follows:

> "While dealing with an application for contempt, the court is really concerned with the question whether the earlier decision which has received its finality had been complied with or not. It would not be permissible for a court to examine the correctness of the earlier decision which had not been assailed and to take a view different

> from what was taken in the earlier decision. A Similar view was taken in *K.G. Derasari v. Union of India*. The court exercising contempt jurisdiction is primarily concerned with the question of contumacious conduct of the party who is alleged to have committed default in complying with the directions in the judgment or order. If there was no ambiguity or indefiniteness in the order, it is for the party concerned to approach the higher court if according to him the same is not legally tenable. Such a question has necessarily to be agitated before the higher court. The court exercising contempt jurisdiction cannot take upon itself the power to decide the original proceedings in a manner not dealt with by the court passing the judgment or order. Though strong reliance was placed by learned counsel for the appellants on a three-Judge Bench decision in *Niaz Mohd. v. State of Haryana*, we find that the same has not application to the facts of the present case. In that case the question arose about the impossibility to obey the order. If that was the stand of the appellants, the least it could have done was to assail correctness of the judgement before the higher court."

In view of the above, it is clear that the examination of the correctness of the earlier decision that has been done in the present case is bad in law. In view of the same we set aside the order dated 11th July, 2018, and direct both the CC No. 7 of 2017 and GA No.1035 of 2017 be restored to its original file and number. The learned Trial Judge is requested to dispose of both the applications as expeditiously as possible.

With the aforesaid observation, the application along with the appeal are disposed of.

(HARISH TANDON, J.)

(SHEKHAR B. SARAF, J.)

S.De/S.Bag