IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present :- **Hon'ble Mr. Justice I. P. Mukerji**
Hon'ble Mr. Justice Biswaroop Chowdhury

FMA 3477 of 2016
With
CAN 7 of 2022

The Director of Technical Education & Training Govt. Of W.B.

Vs.

Madan Mohan Sarkar & Ors.

For the Appellant/State :- **Mr. Tapan Kumar Mukherjee,**
Mr. Pranab Halder,
Ms. Tuli Sinha, Advs.

For the Respondents :- **Mr. Kamalesh Bhattacharya,**
Mr. Arunava Banerjee,
Sk. Qareeb,
Ms. Mamata Dutta,
Ms. Sudipa Mandi, Advs.

Judgment On : - **22.03.2023.**

I. P. MUKERJI, J.:-

This matter relates to the non-teaching employees of the hostel/ mess of Malda Polytechnic, in our state. They filed the instant writ application asking for an order in the nature of mandamus commanding the Malda Polytechnic and the respondent authorities to treat them as the employees of the college and to grant them the scale of pay and other allowances including service benefits that were being received by the non-teaching employees.

The learned single judge by his judgment and order dated 21st May, 2010 held the writ petitioners (respondents in this appeal) to be permanent non-teaching Group- D employees of that college and on that basis were entitled to salaries and allowances.

In the impugned judgment and order the learned judge has observed and held the following:-

a) The petitioners were appointed as cooks, assistant cooks, helper in accordance with the rules and formalities in the hostel and mess of the college.
b) Their names were sponsored by the employment exchange. They were so appointed after their names were entered in an approved panel after undergoing an interview procedure.
c) The appointments were approved by the Director of Technical Education by a memorandum dated 7th December, 1981.
d) Since 1981 the petitioners have been serving the institution. The petitioners were declared to be the permanent Group –D employees of the college being entitled to salary and allowances contained in the letter of appointment from the respective dates of appointments and other "admissible benefits". The petitioners are "legally entitled to the pay scale Rs.2600-4175."
e) It is impossible to comprehend "how in the above circumstances" the petitioners could be treated as employees of the hostel committee.
f) In an identical situation, a division bench of this court in **West Bengal vs. Sridam Sarkar and Ors.** reported in **(1996) CWN 237** held the petitioners before it to be permanent employees of the Kalyani University hostel.

Now, some facts need to be noticed.

By a notification dated 4th December, 1975 issued by the technical branch of the Education Department of the Government of West Bengal, it was stated that Malda Polytechnic was being taken over by the government and "its reorganization and maintenance as a government polytechnic"……was "with effect from the date of this order."

Another notification was published on 7th December, 1981. It stated that in every mess and hostel attached to an engineering and technological

college, polytechnic or junior technical school or institution for the handicapped, there would be a hostel committee of central students welfare committee to be constituted in the manner prescribed by the Director of Technical Education, West Bengal. The Committee was entrusted with the duty of maintaining the "service records of the employees concerned." The scale of pay was prescribed. It said that these employees would be entitled to 50% of the dearness allowance sanctioned by the state government for their employees of comparable scale of pay. The employees would retire at the age of 60 years and be entitled to the retirement gratuity of half months' pay for each completed year of service subject to a maximum of fifteen months.

By a government order dated 7th October, 1996 in modification of the circular dated 7th December, 1981 the dearness allowance and basic pay of these employees were increased.

By another government order dated 20th July, 2000 the basic pay of the employees of the aforesaid institutions was increased with effect from 1st January, 1996 notionally and actually from 1st January, 2000.

On 5th April, 2002 the revised pay to be fixed notionally was to be from 1st February, 1999.

By a subsequent notification dated 28th October, 2014 the hostel and mess employees of state aided universities in West Bengal were to be treated as non-teaching employees of the respective institutions. Their salaries and allowances including other service benefits would also be the same as those of other non-teaching employees. These employees would also be entitled to general provident fund, death or retirement gratuity or pension including family pension and such other retirement benefits available to the non-teaching employees of the college.

The appellant has raised the following points on appeal:-

The decision of the Supreme Court in **L. Chandra Kumar vs. Union of India and Ors.** reported in **(1997) 3 SCC 261** made it explicit that any dispute between the state and its employees was to be decided by the State Administrative Tribunal under Section 28 of the Administrative Tribunal Act, 1985. The writ court could not be directly approached. A party aggrieved by a decision of the Administrative Tribunal could approach the writ court but not directly.

The Supreme Court deprecated direct approach to the High Court also in **Rajeev Kumar and Anr. vs. Hemraj Singh Chauhan and Ors.** reported in **(2010) 4 SCC 554**. A division bench judgment of this court to the same effect was **Smt. Anjali Mukherjee vs. The Commissioner of Police, Lal Bazar & Ors.** reported in **(2007) 3 Cal LT 456**.

In approaching the writ court directly, the respondent writ petitioners had acted in derogation of the said judgment of the Supreme Court.

The impugned judgment and order is a nullity. This court had no jurisdiction over the subject matter. It suffered from inherent lack of jurisdiction. Therefore, the impugned judgment and order was non est in the eye of law, according to the ratio laid down in **Kiran Singh and Ors. vs. Chaman Paswan and Ors.** reported in **AIR 1954 SC 340**.

For this reason, the writ application should be dismissed and the appeal allowed.

It was also argued on behalf of the appellant that to claim to be an employee of the state or a civil post there ought to be a relationship of master and servant as held in **State of Assam and Ors. vs. Shri Kanak Chandra Dutta** reported in **AIR 1967 SC 884**. There must be a statutory requirement of maintaining a hostel in a government polytechnic as held in **The State of West Bengal vs. Prabir Chakraborty** reported in **(2007) 3 Cal LT 545**. A pillar of the argument of Mr. Tapan Mukherjee, was the case of **The State of West Bengal vs. Prabir Chakraborty** reported in

(2007) 3 Cal LT 545, a division bench pronouncement of this court. A writ application was filed claiming that the non-teaching employees of the Raiganj Polytechnic be paid on the same scale of pay and allowances including service benefits as paid to the employees of the state in non-teaching posts in polytechnic colleges. The court held that the cooks and helpers in the hostel of Raiganj Polytechnic, who had been appointed by the mess committee of the college and claiming to be treated as Group-D employees of the college, could not be considered as such.

Mr. Mukherjee contended that the decision of a subsequent division bench of this court in the Director of Technical Education and Training, Government of West Bengal vs. Chunilal Chakraborty and Ors. was delivered without considering the ratio in the case of **The State of West Bengal vs. Prabir Chakraborty** reported in **(2007) 3 Cal LT 545.**

DISCUSSION

The point that this court in the exercise of its writ jurisdiction should not entertain this matter and that it should have been filed before the State Administrative Tribunal was not raised at all till the stage of final hearing of the appeal.

It is now fairly well settled that this kind of jurisdictional question relating to exercise of writ jurisdiction should be raised at the earliest possible opportunity. If not raised, the respondent should be prevented from raising it. It is quite true that a question of law can be raised at any stage of the proceedings, even at the appellate stage. If the proceedings were undertaken in a court without jurisdiction, and hence a nullity, the court would not refrain from declaring it as such at any stage. In the case of **L. Chandra Kumar vs. Union of India and Ors.** reported in **(1997) 3 SCC 261**, followed in **Rajeev Kumar and Anr. vs. Hemraj Singh Chauhan and Ors.** reported in **(2010) 4 SCC 554**, the Supreme Court held that the High Court could not be approached before the

tribunal in matters relating to the Administrative Tribunals Act, 1985. They key findings in the **L. Chandra Kumar** case on this point are as follows:-

> *"**91.**.....Having regard to both the aforestated contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.*
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> ***92.**.....no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution.*
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> ***93.**.....The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the*

particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned."

In the **Rajeev Kumar** case the Supreme Court said:

> *"**14.** The grievances of the appellants in this appeal are that they were not made parties in proceedings before the Tribunal. But in the impleadment application filed before the High Court it was not averred by them that they were not aware of the pendency of the proceedings before the Tribunal. Rather from the averments made in the impleadment petition it appears that they were aware of the pendency of the proceedings before the Tribunal. It was therefore, open for them to approach the Tribunal with their grievances. Not having done so, they cannot, in view of the clear law laid down by the Constitution Bench of this Court in L. Chandra Kumar, approach the High Court and treat it as the court of first instance in respect of their grievances by "overlooking the jurisdiction of the Tribunal". CAT also has the jurisdiction of review under Rule 17 of the Central Administrative Tribunal (Procedure) Rules, 1987. So, it cannot be said that the appellants were without any remedy.*
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> ***15.** As the appellants cannot approach the High Court by treating it as a court of first instance, their special leave petition before this Court is also incompetent and not maintainable."*

The argument of the state was incongruous. If the argument was that the respondent writ petitioners ought to have moved the State Administrative Tribunal, was it their argument that they were employees of the state, not paid in the scale of pay of state employees and claiming to be paid in that scale? Or, as Mr. Mukherjee, learned Advocate for the state contended that the respondent writ petitioners were contractual employees, appointed by the Committee looking after the hostel/mess of the Malda Polytechnic, working at the direction of the Committee and subject to the terms and conditions imposed by it. In that case, a corresponding argument ought to have been made that if a dispute was whether a worker was an employee of the state or not, even that was to be decided by the tribunal. That argument was not made. Or in other words, if one of the issues in the writ was whether a worker was an

employee of the state or not and involved service matters, the application was to be tried and heard by the tribunal. Thus, the argument that this court had no jurisdiction to hear the writ application was required to be backed by sufficient facts but was not so done.

Most fundamentally, the ground that this court inherently lacked jurisdiction to entertain the writ application was not taken when the writ was moved. It is quite well settled that the point that the writ petitioner should be relegated to an alternative remedy should be taken at the first instance. Otherwise, the court usually does not entertain it. In this case this point was not even urged in the affidavit-in-opposition or at the time of hearing of the writ application. It was taken for the first time at the time of hearing of the appeal.

Let us assume that the subject matter of the writ application could only be decided by the tribunal.

There is a difference between erroneous exercise of jurisdiction and total lack or inherent lack of jurisdiction. In the first case, the order is not a nullity. Either it may be set aside or rectified on appeal or review. But when a court exercises a purported jurisdiction which it does not possess in reality, the whole proceedings are void ab initio, the order passed a nullity. This point regarding absence of a court's jurisdiction cannot be waived by any party or ignored or overlooked by a court. Any party may take this point of jurisdiction at any point of time including at a late appellate stage.

The High Court in the exercise of its jurisdiction under Article 226 of the Constitution of India has extraordinary powers to issue writs, orders or directions to any government or any authority to enforce the fundamental rights, the provisions of the Constitution and the laws and as a matter of fact, for any other purpose. The powers are so wide. The Supreme Court and the High Courts from time to time have restrained the use of this jurisdiction by the Supreme Court and the High Courts,

by various judgments so that this jurisdiction is exercised in extraordinary circumstances when there is absence of any other legal remedy, so that this jurisdiction is not used as a matter of course by litigants by avoiding the ordinary courts and tribunals of the land.

In **L. Chandra Kumar vs. Union of India and Ors.** reported in **(1997) 3 SCC 261**, the Supreme Court has said:

> *"**79.** We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided."*

Even applying the legal principles in **Kiran Singh and Ors. vs. Chaman Paswan and Ors.** reported in **AIR 1954 SC 340**, **L. Chandra Kumar vs. Union of India and Ors.** reported in **AIR 1997 SC 1125** and **Rajeev Kumar and Anr. vs. Hemraj Singh Chauhan and Ors.** reported in **(2010) 4 SCC 554**, it could not be said that the impugned judgment and order was a nullity.

If this court had entertained the writ application, it was at best erroneous exercise of jurisdiction which may have been corrected on appeal, and not a purported exercise of jurisdiction which it inherently lacked.

In a case involving canteen employees and hostels and mess employees of state aided educational institutions, a Special Bench of this court comprising of three learned judges recorded that the respondents/writ petitioners therein were satisfied with the notification dated 28th October, 2014 and that the reference was answered accordingly. In fact, on 21st November, 2014 by a note, the Director of Technical Education and Training, Government of West Bengal had said that a proposal had been forwarded to the government to implement a policy of granting Group-D

status to the hostel /mess employees and to treat them as Group-D employees.

A division bench of this court in the Director of Technical Education and Training, Government of West Bengal vs. Chunilal Chakraborty and Ors. on 20th February, 2019 opined that the canteens operated by the technical department and other departments were identical in the type and quality of service rendered to the students. They were permanent employees rendering continuous service which was of the same type as other canteen employees under universities or government aided colleges as to the one dealt with by the special bench.

Under those circumstances, the appeal was dismissed. Against this appeal, a special leave petition was filed by the government which was also dismissed by the Supreme Court. In my opinion, the facts of the instant case are similar to the division bench appeal in the case of Chunilal Chakraborty and Ors.

In fact, it was brought to our notice that the order of Chunilal Chakraborty and Ors. has been complied with by the government.

It is different from the facts in **The State of West Bengal vs. Prabir Chakraborty [(2007) 3 Cal LT 545]** where it was held that the canteen employees were strictly contractual workers engaged by the committee, their services were under the committee, the terms and conditions of service regulated by the committee and the university or college had nothing to do with it. The division bench relied on **State of Gujarat and Anr. vs. Raman Lal Keshav Lal Soni and Ors.** reported in **(1983) 2 SCC 33**. In that judgment, several factors were indicated, the presence of which would determine the relationship of master and servant, namely the right to select, or the right to appoint, the right to terminate the employment, the right to take disciplinary action, the right to prescribe the conditions of service, the nature of the duties performed by the employees, the right of the employer to control the manner and method

of work of the employees, the source of fund from which the wages or salaries was paid. The division bench opined that on a consideration of these conditions and factors, it could not be said that there was a master servant relationship between the writ petitioners and the university. Secondly, it held that the hostel committee had appointed the petitioners on a temporary basis privately, there having been no statutory obligation on the part of the university to maintain a staffed canteen. Its employees could not be termed as employees of the university.

A special leave petition from that decision was dismissed by the Supreme Court.

In this appeal, the appellant has not been able to disprove the facts found by the learned first court. The facts stand uncontroverted.

On these facts, no other conclusion is possible save and except the respondents have to be treated and regularized as permanent employees of the Malda Polytechnic with a right to claim salary as an employee of the state.

For the reasons given above, the ground taken on appeal that the writ court ought not to have entertained the writ application is overruled.

On merits, again for the reasons advanced above, we find no reason to interfere with the impugned judgment and order. We affirm the same.

The appeal is hereby dismissed.

No order as to costs.

(I. P. MUKERJI, J.)

BISWAROOP CHOWDHURY, J.

I have perused the Judgement proposed to be delivered by my learned brother and agreed with the same. However, I intend to add the following views.

At the very outset, I refer to the arguments made by learned counsel for the State, Mr. Mukherjee. He submits that the writ petition is not maintainable as the writ petitioners have claimed themselves to be State government employees and in view of the provisions contained in West Bengal Administrative Tribunal Act 1995 and the decision of the Hon'ble Supreme Court in the case of L. Chandra Kumar, the State Administrative Tribunal has the jurisdiction. According to Mr. Mukherjee the writ court cannot be the court of first instance in case of the disputes of State Government employees as they are to exhaust their remedy first before the State Administrative Tribunal. It is further submitted that although the point of jurisdiction was not taken before the learned trial court, there is no bar in raising the said plea at the hearing of the appeal. It is undoubtedly a well settled principle of law that the point of inherent lack of jurisdiction can be taken at any stage of the proceedings, as an order without jurisdiction is a nullity.

Now the question is whether the plea that entertainment of the writ petition and passing an orders adjudicating the same, was a nullity can be taken at this stage, when the plea of jurisdiction was not raised at the first instance. The answer is definitely no. It is now well settled that existence of an alternative remedy is not an absolute bar to entertaining a writ application. When there is existence of an alternative remedy the writ Court may exercise some self imposed restraint in entertaining a writ application, or may entertain the same in the interest of justice. The position is slightly different in case of Administrative Tribunals, which are constituted to adjudicate the disputes with regard to recruitment promotion, transfer, service condition and retirement benefits of Government employees whether state or central. Where Administrative

Tribunals are already constituted government employees are to exhaust their remedy before the Tribunal at the first instance. Only in a very rare case can the High Court entertain a writ application in service matters where an Administrative Tribunal is constituted. For example, when a Tribunal is not functioning for a long period and a State Government employee has an extremely urgent matter a High Court can exercise its inherent powers under Article 226 of the Constitution of India. It is to be remembered that when a suit is barred under a particular provision of a statute civil court has no jurisdiction to entertain the same, but when a statute provides an alternative remedy for redressal of disputes it cannot be argued that Writ Petition is not maintainable. It is only when the respondents against whom writ is sought to be issued is not a 'State' within the meaning Article 12 of the Constitution of India the plea of non-maintainability of writ petition can be taken. In the instant matter it is not the case of the respondent authority that the said authority is not State under Article 12 of the Constitution of India. It appears from decisions relied upon by the learned advocate for the State respondent that in the said writ petitions regarding hostel employees of Government polytechnic Institution the plea of non-maintainability was not taken before the Hon'ble Division Bench of this Court, and the Hon'ble Division Bench was pleased to adjudicate the matter and laid down a proposition of law. Thus when a proposition of law is laid down by Hon'ble division bench of High Court as well as Hon'ble Special Bench on reference it would be reasonable to decide the issue on the proposition of law laid down by the Hon'ble Special Bench upon considering the facts of the present case, without referring the matter before Tribunal after a period of 8 years from the date of disposal of the writ petition. Thus I am of the view that this Bench should dispose of the issue involved in the writ petition by deciding this appeal.

On the argument of Mr. Mukherjee Learned Advocate for State of West Bengal that the Trial Court in this case and the Hon'ble Division Bench of this Court in the case of **Director of Technical Education and Training Government of West Bengal Vs. Chunilal Chakraborty** came to a findings without considering the ratio in the case of the **State of West Bengal Vs. Prabir Chakrabarty** reported in **(2007) 3 CAL LT-545** it is necessary to consider as to how far the decision in the case of (**The State of West Bengal Vs. Prabir Chakraborty**) is applicable to the facts of the case.

The Hon'ble Division Bench of this Court in the case of **State of West Bengal Vs. Prabir Chakraborty** (supra) held that cooks and helpers in the hostel of Raiganj Polytechnic could not be considered as Group-D employees of the college. However, as the Hon'ble Division Bench hearing **FMA-2680 of 2007, FMA 2681 of 2007 and MAT-2903 of 2005**, (**State of West Bengal Vs. Gobardhan Dalui and Ors**.) did not agree with the decision of the Hon'ble Division Bench in the matter of **State of West Bengal Vs. Prabir Chakraborty** the matter was referred to the Hon'ble Special Bench.

Upon considering the decision of the Hon'ble Special Bench the State Government adopted a policy of granting Group-'D' status to the hostel mess employees and to treat them as group D-employees of polytechnic colleges. The Hon'ble Division of which my learned brother was a member in the Chunilal Chakraborty case upon considering a note sheet dated 21st November, 2014 signed by the Director of Technical Education and Training, Government of West Bengal for implementing the policy of granting Group-D status to the hostel mess employees and to treat them as group-D employees, upheld the decision of the learned single judge where the learned single Judge opined that since the employees/writ petitioners were doing the same type of work as the canteen employees of the State the writ petition should be allowed. The Special Leave Petition

filed against the Order passed in the case of Chunilal Lal Chakraborty also stood dismissed. The State Government has complied with the Order of the Division Bench by granting the Status of group D employees of polytechnic college. Thus there is difference in circumstances between the Prabir Chakraborty and Chunilal case. Hence the decision in the matter of Prabir Chakraborty (supra) is not applicable.

In the facts and circumstances, I am of the view that there is no merit in the appeal and the same should be dismissed. Pending connected application, if any, is also disposed of.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(BISWAROOP CHOWDHURY, J.)