Civil Appeal

Present: The Hon'ble Chief Justice Mohit S. Shah

And

The Hon'ble Justice Kalyan Jyoti Sengupta

And

The Hon'ble Justice Dipankar Datta

Judgment on: 21.05.2010.

F.M.A. 718 of 2007

Secretary, West Bengal Council of Higher Secondary Education

Vs.

Soumyadeep Banerjee & ors.

F.M.A. 355 of 2005

Secretary, W.B.Council of Higher Secondary Education

Vs.

Tanmoy Dutta & ors.

F.M.A.735 of 2007

The President, W.B. Council of Higher Secondary Education & anr.

Vs.

Moumita Banerjee & ors.

F.M.A. 27 of 2007

The Secretary, W.B. Council of Higher Secondary Education

Vs.

Supriti Sen (Minor) & ors.

F.M.A. 714 of 2007

The Secretary, W.B. Council of Higher Secondary Education

Vs.

Nityananda Maji & ors.

F.M.A. 703 of 2007

W.B. Council of Higher Secondary Education

Vs.

Sreeja Mitra & ors.

F.M.A. 683 of 2007

W.B. Council of Higher Secondary Education & Anr.

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Vs.

Indira Chatterjee & ors.

F.M.A. 708 of 2007

W.B. Council of Higher Secondary Education & anr.

Vs.

Minor Arpita Biswas & ors.

F.M.A. 684 of 2007
The Secretary, W.B. Council of Higher Secondary Education
Vs.
Subol Chandra Sannyasi & ors.
F.M.A. 707 of 2007
W.B. Council of Higher Secondary Education & Anr.
Vs.
Gargi Patra & ors.

POINTS

Production of answer script – Deposit of an amount by the examinees – Deposit, meaning of – Such deposit if should not exceed Rs.500/- , implication of the order of deposit – The examining authority if has any right to retain this amount deposited – Whether the court can pass the order of appropriation – The Court if can formulate any question – Discretion of the court to direct Pre-trial deposit – Initial order of deposit if operates as res judicata – Deposit when is directed to be made – Constitution Of India, Article 226 , Code of Civil Procedure 1908 , S - 11.

FACTS

The Hon'ble Chief Justice has constituted this Bench in view of the difference of opinion having been recorded by the Division Bench presided over by the Hon'ble Justice Ashim Kumar Banerjee and the Hon'ble Justice Tapas Kumar Giri in judgment dated 4th April, 2008 in F.M.A. 718 of 2007 (hereinafter referred to as the second judgment), while noting judgment dated 21st February,2008 of another Division Bench rendered in F.M.A. 27 of 2007 (hereinafter the"first judgment") on the same subject.

The West Bengal Council of Higher Secondary Education (hereinafter Council) preferred appeal against the order of the learned Single Judge who has passed an order for appropriation of only half the amount of deposit made at the time of admission of the writ petition. In the connected writ petition the learned trial Judge directed refund of 50% of the amount to the writ petitioner/respondent and permitted the appellant to appropriate the balance. Their Lordships while rendering the second judgment could not agree to the views expressed by Their Lordships in the first judgment that the candidate should not be asked to make pre trial deposit more than

Rs.500/- per answer script for production of the same before the Court. It is observed by the Division Bench in the first judgment further that order of retention of Rs.500/- per script out of the total deposit is more than adequate compensation. In the second judgment the Division Bench while disagreeing with this view has opined that it should not be proper to have a generalized ceiling of deposit in all the cases of this nature. It is to be noted that while referring the matter, no specific question has been formulated for inviting answer by this Bench.

HELD :-

It is absolute discretion of the Court, depending upon the facts and circumstances of the case, either to ask for pre-trial deposit or not, but not a matter of rule or compulsion. Obviously such discretion has to be exercised judiciously, bearing in mind the same does not operate as hardship against whom the order is passed. While considering the case of hardship of both the parties, if it is found that *prima facie* very strong case has been made out by the petitioner/candidate with penury, the Court in such cases may not ask for pretrial deposit, but in a matter, where prima facie case is not so strong and on the other hand the respondent is to incur enormous expenses for bringing the answer script from a distant place, obviously the balance will be tilting in favour of the respondent for adequate amount of deposit. In other words the view fixing ceiling limit of amount of deposit does not find any legal support.

Para 12

It would be an absurd idea to think that the meaning of the word “deposit” in this case should be synonymous with the meaning of payment.

Para 13

The principle of res judicata pre supposes two elements viz. first there must be an assertion of fact and law by one party and denial and dispute of such fact and law by the adversary which ultimately gives rise to an issue. Unless the issue emerges from a lis, either expressly or conceptually, and there has been decision on that issue, whether raised or could have been raised, the principle of res judicata does not apply. Pre-trial deposit made in a case on hand is not the subject matter of the writ petition, as the challenge is made by the writ petitioner with regard to validity and legality of evaluation of the answer script, not with regard to incurring of the expenses. Under any stretch of imagination, the issue of deposit can never be raised, and if the

Court asks for deposit in a lis as a condition precedent, it is a matter of procedure, as opposed to the substantive law. The principle of res judicata is part of substantive law. Hence the order passed at the initial stage for deposit cannot operate as a res judicata at any stage, whether appeal is preferred or not.

Para 14

The order of deposit is nothing but keeping the money in custody of the Council as a security to see that the Council is not made to suffer in a meritless action by the examinee.

Para 15

The Court while passing order of deposit for any reason should examine the merit and demerit of the case advanced on both the sides and keeping in view the balance of convenience discretion should be exercised. How and in which manner it should be exercised cannot be inflexibly laid down. It should be left with the Court and Court alone as it sees and feels the hardship of both the parties. An appeal court cannot do it.

Para 17

Discretion is a decision of a Court which on given facts and circumstances, a reasonable prudent man will think it is possible to take such an action under the circumstances and it is also possible to accept such views, then it can be said to be discretion well exercised.

Para 18

For the Appellants: Mr. L.K. Gupta,
Mr. R. Chatterjee
Mr. Prasenjit De
Mr. P.S. Mullick
For the Petitioner: Mr. G. Patra

For the Respondent/student: Mr. Amar Kr. Bhaumik
For Respondent No.1/
Writ petitioner: Mr. Ekramul Bari,
Mr. Shamir Ul Bari.

CASES CITED :-
Secretary, West Bengal Council of Higher Secondary Education vs. Ayan Das & ors. reported in 2007 (8) SCC 242. Para 6

Satyadhyan Ghosal and others vs. Smt. Deorajin Debi and another reported in AIR 1960 SC 941. Para 8

K.J. SENGUPTA, J.:-
THE COURT. **1)**The Hon'ble Chief Justice has constituted this Bench in view of the difference of opinion having been recorded by the Division Bench presided over by the Hon'ble Justice Ashim Kumar Banerjee and the Hon'ble Justice Tapas Kumar Giri in judgment dated 4th April, 2008 in F.M.A. 718 of 2007 (hereinafter referred to as the second judgment), while noting judgment dated 21st February, 2008 of another Division Bench rendered in F.M.A. 27 of 2007 (hereinafter the "first judgment") on the same subject.

2. The West Bengal Council of Higher Secondary Education (hereinafter Council) preferred appeal against the order of the learned Single Judge who has passed an order for appropriation of only half the amount of deposit made at the time of admission of the writ petition. In the connected writ petition the learned trial Judge directed refund of 50% of the amount to the writ petitioner/respondent and permitted the appellant to appropriate the balance. Their Lordships while rendering the second judgment could not agree to the views expressed by Their Lordships in the first judgment that the candidate should not be asked to make pre-trial deposit more than Rs.500/- per answer script for production of the same before the Court. It is observed by the Division Bench in the first judgment further that order of retention of Rs.500/- per script out of the total deposit is more than adequate compensation. In the second judgment the Division Bench while disagreeing with this view has opined that it should not be proper to have a generalized ceiling of deposit in all the cases of this nature. It is to be noted that while referring the matter, no specific question has been formulated for inviting answer by this Bench.

3. While appearing for the appellant Mr. Lakshmi Kumar Gupta, Senior Advocate fairly concedes that in strict sense it is not a reference which calls for the answer on question of law, but having regard to the language mentioned in Rule 1 of Clause (ii) Chapter II of the Appellate Side Rules,

decision may be rendered by the larger Bench on any other matter. The said provision is reproduced hereunder:

“Provided also that, on the requisition of any Division Bench, or whenever he thinks fit, the Chief Justice may appoint a special Division Bench, to consist of three or more Judges, for the hearing of any particular appeal, or any particular question of law arising in an appeal, or of any other matter.”

This Court can decide the matter in general, if necessary formulating the questions or otherwise. We have gone through the two judgments and having understood the dissenting note in the second judgment, we are of the view that the present reference has given rise to the following question:
(i)Wherever the court directs production of answer script(s) of examinees taking public examinations for verification, whether the view of the former Division Bench that “it is only proper that terms to be dictated as a precondition for production of answer script(s) should not exceed a deposit of Rs. 500/- per script” is correct?

4. Having heard the learned counsel in the matter and having gone through the two judgments of this Court which on the above point, are conflicting with one another, it appears the other issues focussed before us and to be answered are as under:-

(ii) Whether the order of deposit creates any right in favour of the Council to claim to retain it altogether?
(iii) If not, then whether Court has got power to pass at the time of final hearing the order of appropriation of costs from and out of the amount deposited pursuant to the earlier order?

5. It is found more often than not that the unsuccessful candidates approach this Court in the extraordinary jurisdiction under Article 226 of the Constitution of India challenging the evaluation of the answer scripts done by the Council. It is appropriate to mention in the relevant Act or regulation framed thereunder there is no provision for scrutiny of the answer script after the result is declared. The access to justice under Article 226, of the litigant or to put it differently exercise of jurisdiction under Article 226 of this Court in a fit case is a basic structure of the Constitution. Irrespective of the expressed provision in any statute the doors of the Writ Courts are ajar to any person or citizen. Hence the writ court entertains these applications. The reasons for approaching of this Court sometimes are to be unfounded, and at

times caring parents being propelled by the insistence of over confident examinees approach Court for no real ground but in some cases the challenges appear to be wholly or partly justified.

6. Taking note of the Apex Court's note of caution expressed in several cases and as reiterated in the case of *Secretary, West Bengal Council of Higher Secondary Education vs. Ayan Das & ors.* reported in 2007 (8) SCC 242, this Court has developed a practice, if not a matter of rule, in a fit and justified case to pass order at the time of entertaining the writ petition asking the petitioner to deposit an amount at particular rate or lump sum amount for production of answer script before the Court with the Council. Thereafter the Court examines the merit of the case and on scrutiny of the answer script so produced and having examined result of the scrutiny of the answer scripts, the Court is to dispose of the matter finally and while doing so the pre-trial deposit is required to be appropriately dealt with. Idea behind pre trial deposit is to test the bona fide of the action of the examinee brought before the Court.

7. Mr. Gupta appearing for the Council submits that the Division Bench in case of F.M.A. 27 of 2007 [The Secretary, West Bengal Council of Higher Secondary Education vs. Supriti Sen (Minor) & ors.] has not taken correct view while quantifying fixed amount of pre-trial deposit and appropriation thereof. The Court should bear in mind, while passing order of deposit for production of answer script, the expenses incurred directly or indirectly and hardship faced, by the Council. The answer scripts in some cases are kept in the Regional Offices which are situate far away from this Court and Council has not only to incur the expenses on account of transportation cost but also to engage extra hands to locate the relevant answer scripts for bringing before Court. If ultimately, at the time of final hearing of the matter, the action of the examinee is found to be absolutely meritless then the amount so deposited in terms of order of the Court should not be allowed to be refunded at all, for some times amount of the deposit is quantified so inadequately that it does not cover the actual costs incurred by the Council for production of answer script(s) and costs of litigation. He of course is candid to say in meritorious cases, where the Council is found to be at fault, obviously deposit should be refunded.

8. His next contention is that once an order of deposit is made by the Court, with the Council at initial or interlocutory stage and such order of deposit is not challenged immediately before the Appeal Court, this order of deposit

passed at initial stage reaches its finality so much so it operates as res judicata. Referring to a decision of Supreme Court in case of *Satyadhyan Ghosal and others vs. Smt. Deorajin Debi and another* reported in AIR 1960 SC 941 he contends, hence this order of deposit becomes final and at the subsequent stage the Court cannot pass any order except to allow the Council to retain it. However, he submits that there cannot be any straight jacket formula fettering the hands of the Court for passing order of appropriation of the deposit at the time of final hearing. The power of the Writ Court is unlimited and to pass any order with an obligation that no injustice is done to any of the parties. In other words, he submits it is absolute discretion of the Court and how it has to be done, depends upon facts and circumstances of each and every individual case.

9. The learned counsel for the respondent-examinee submits and agrees that it is the discretion of the Court and there cannot be any hard and fast rule nor the Court can lay down as such as a binding precedent.

10. Undoubtedly, the power of the Writ Court under Article 226 of Constitution of India cannot be fettered by any law or any rules framed thereunder, but in order to regulate the writ proceedings each and every High Court has framed rules. In exercise of power under the constitutional provision, this Court has also framed rules, called Rules of the High Court at Calcutta relating to applications under Article 226 of the Constitution. Rule 53 of the said
provides as follows:-
"**53.** Save and except as provided by these Rules and subject thereto, the provisions of the Code of Civil Procedure (Act V of 1908) in regard to suits shall be followed, as far as it can be made applicable, in all proceedings under Article 226 and nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Courts.**"**
Then again Rule 53A has recently been incorporated which is set out hereunder:

"**Rule 53A. –** The Court may in proceedings under this Chapter impose such terms as to costs
and as to giving of security as it may deem fit.Where costs have been awarded by the Court in a writ petition or in an appeal from an order passed on a writ petition, any party entitled thereto may apply to the Court for

execution of the order. The application shall be accompanied by an affidavit stating the amount of costs awarded. The Court may direct the order to be sent to the District Court of the District in which the order is to be executed. The order may be executed by such Court or be transferred for execution to any subordinate court."

11. Even Order XXV Rule 1 of the Civil Procedure Code provides as hereunder:

" O. XXV R. 1.

1. When security for costs may be required from plaintiff. –

(1) At any stage of a suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff, for reasons to be recorded, to give within the time fixed by it security for the payment of all costs incurred and likely to be incurred by any defendant:

Provided that such an order shall be made in all cases in which it appears to the Court that a sole plaintiff is, or when there are more plaintiffs than one that all the plaintiffs are, residing out of India and that such plaintiff does not possess or that no one of such plaintiffs possesses any sufficient immovable property within India other than the property in suit.

(2) Whoever leaves India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of India within the meaning of the proviso to sub-rule (1)."

12. Having regard to the language of the provisions of both the Rules as above, we think it is absolute discretion of the Court, depending upon the facts and circumstances of the case, either to ask for pre-trial deposit or not, but not a matter of rule or compulsion. Obviously such discretion has to be exercised judiciously, bearing in mind the same does not operate as hardship against whom the order is passed. While considering the case of hardship of both the parties, if it is found that *prima facie* very strong case has been made out by the petitioner/candidate with penury, the Court in such cases may not ask for pretrial deposit, but in a matter, where prima facie case is not so strong and on the other hand the respondent is to incur enormous expenses for bringing the answer script from a distant place, obviously the

balance will be tilting in favour of the respondent for adequate amount of deposit. We hasten to add the above example is neither a static nor an absolute rule, it is merely an illustrative guideline. In view of the discussion, and position of law explained above, we cannot endorse the view of the Division Bench recorded in the first judgment, that deposit for production of answer scripts should not exceed Rs. 500/- per script. Accordingly, our answer to question no. (i) is in the negative. In other words the view fixing ceiling limit of amount of deposit does not find any legal support.

13. Coming to the second question, now what is the legal implication of the word "deposit" in terms of the Court's order is to be examined in the context of submission of Mr. Gupta that once an order of deposit is made, it obviously gives rise to entitlement of the successful litigant (here, Council) to appropriate, as it becomes a vested right and cannot be taken away subsequently by the Court by passing any different order at the time of final hearing. We are unable to accept this contention for the simple reason the meaning of the word "deposit" in the Black's Law Dictionary Ninth Edition is as follows:-

"The act of giving money or other property to another who promises to preserve it……."

It would be an absurd idea to think that the meaning of the word "deposit" in this case should be synonymous with the meaning of payment. Had it been an order of payment to the appellant, then the contention raised by Mr. Gupta could have been of some relevance.

14. The principle of res judicata in our view in this case is absolutely misplaced, as the principle of res judicata pre supposes two elements viz. first there must be an assertion of fact and law by one party and denial and dispute of such fact and law by the adversary which ultimately gives rise to an issue. Unless the issue emerges from a lis, either expressly or conceptually, and there has been decision on that issue, whether raised or could have been raised, the principle of res judicata does not apply. Pre-trial deposit made in a case on hand

is not the subject matter of the writ petition, as the challenge is made by the writ petitioner with regard to validity and legality of evaluation of the answer script, not with regard to incurring of the expenses. Under any stretch of imagination, the issue of deposit can never be raised, and if the

Court asks for deposit in a lis as a condition precedent, it is a matter of procedure, as opposed to the substantive law. The principle of res judicata is part of substantive law. Hence the order passed at the initial stage for deposit cannot operate as a res judicata at any stage, whether appeal is preferred or not.

15. We, are, therefore, of the considered opinion that the order of deposit is nothing but keeping the money in custody of the Council as a security to see that the Council is not made to suffer in a meritless action by the examinee.

16. How these costs should be appropriated is also again guided by Section 35 of the Civil Procedure Code by virtue of Rule 53 as above which is reproduced hereunder:

" 35. Costs.- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine
by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its
reasons in writing.**"** Thus the language of the said section is very clear that it is the discretion
of the Court how the amount deposited has to be appropriated and to what extent the costs are to be paid as rightly suggested by Mr. Gupta. While accepting above submission, we add that no hard and fast rule can be laid down as a method for appropriation. Mr. Gupta, however, entertains apprehension that sometimes the Council is not adequately compensated. We think that this is also taken care of by Section 35A of the Code which provides for compensatory
costs in respect of false and vexatious claims or defences. Section 35A is set out

hereunder:

“35A. Compensatory costs in respect of false or vexatious claims or defences.- (1) If in any suit or other proceedings, including an execution proceeding but excluding an appeal or a revision any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if, thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if it so thinks fit may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector by the party by whom such claim or defence has been put forward, of cost by way of compensation.

(2) No Court shall make any such order for the payment of an amount exceeding three thousand rupees exceeding the limits of its pecuniary jurisdiction, whichever amount is less:

……

Provided, further, that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.**”**

17. We feel it expedient to propound that the Court while passing order of deposit for any reason should examine the merit and demerit of the case advanced on both the sides and keeping in view the balance of convenience discretion should be exercised. How and in which manner it should be exercised cannot be inflexibly laid down. It should be left with the Court and Court alone as it sees and feels the hardship of both the parties. An appeal court cannot do it. We therefore, with respect, express our inability to agree with views of the Division Bench of the first judgment that twenty five percent of the deposit is more than adequate compensation in all cases. This view cannot be made applicable universally as a binding precedent. Awarding costs or order of appropriation of pre-deposit cannot be

characterized as penalty, since provision of law quoted above empowers the Court to take action.

18. However, we are in agreement with the submission of Mr. Gupta as it has been firmly established by Courts of law over the years in the judicial pronouncements that discretion means judicial discretion, not whims, caprice or fancy of a Judge. The discretion is something to be done according to the rules of reason and justice, not according to private opinion. It should not be arbitrary, vague and fanciful nor illegal and irregular. We add that discretion is a decision of a Court which on given facts and circumstances, a reasonable prudent man will think it is possible to take such an action under the circumstances and it is also possible to accept such views, then it can be said to be discretion well exercised.

19. In view of the above discussion, having already answered question no. (i) in the negative as discussed in paragraph 12 of this judgment, our answer to issue no. (ii) is in the negative and, therefore, issue no. (iii) is answered in the affirmative.

20. The matter is disposed of accordingly. All other appeals mentioned above on this issue may now be disposed of by the appropriate Benches taking note of the views expressed by us. I agree.

(Mohit S. Shah, C.J.) (K.J. Sengupta, J.)

I agree.

(Dipankar Datta, J.)