

(2009) 04 CAL CK 0052

In the Calcutta High Court

Case No : Writ Petition No. 25886 (W) of 2008

Alok Kumar Maity

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 09-04-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 122 FLR 300

Hon'ble Judges : S.P. Talukdar, J

Bench : Single Bench

Advocate : Ashok De, P.K. Chattopadhyay, A. Pradhan in W.P. No. 25886 W of 2008, Subir Sanyal, Saibal Acharya and Saktipada Jana in W.P. No. 31554 W of 2008, for the Appellant; Duga Prasad Majumdar, Minal Kanti Sardar, Tarak Nath Ghosh for State-Respondent in W.P. No. 25886 (W) and 31554 (W) of 2008, Milon Chandra Bhattacharjee, Kamalesh Bhattacharjee and S. Panda of School Authority, for the Respondent

Judgement

S.P. Talukdar, J.—The facts, as ventilated in the application under Article 226 of the Constitution of India, being W.P. No. 25886 (W) of 2008, may briefly be stated as follows:

In respect of a vacant Group-D post at Sarpai Model Institution, selection process was initiated and in response to the request, local Employment Exchange sponsored the names of 35 eligible candidates. On 22nd August, 2008, Additional District Inspector of Schools (SE), Contai, gave necessary permission. Being equipped with an order of the court, the petitioner participated in the interview. He stood second having scored 0.5 marks less than the private respondent who got 7.5 marks. Members of the selection committee themselves allegedly corrected spelling mistake committed by the private respondent in order to ensure that he could top the list.

2. Though there was change in the Panchayat Samity and the name of the earlier nominee was not nominated, the selection committee was not reconstituted. This

was under the influence of the Secretary of the school who is brother of the private respondent.

3. Similar grievance was also made by one candidate, namely, Ashoke Kumar Mondal, but to no avail. The petitioner approached the Additional District Inspector of Schools (SE), highlighting the illegality and sought to be declared as the successful candidate. Since the writ court cannot be called upon to decide the factual dispute, prayer had been made for issuance of a writ of certiorari directing production of the records.

4. One Mr. Alok Kumar Maity, as petitioner filed another application, being W.P. No. 31554 (W) of 2008, seeking direction upon the respondents-authority to issue letter of appointment in his favour. He claimed that in compliance with the direction of this court, the School-authority issued an advertisement in newspaper, which was duly published on 2nd September 2008 inviting applications. The petitioner applied for the same. Interview was held on 19th September 2008. A panel was prepared with the name of the petitioner at the top of the list.

5. Such panel was then forwarded for approval. Additional District Inspector of Schools forwarded the same to the District Inspector of Schools, Purba Medinipur. Due to pendency of the application being W.P.No.25886 (W) of 2008, the authority-concerned did not approve the same and letter of appointment was not issued - though no interim order in that regard had been passed.

6. Learned Senior Counsel, Mr. Ashok De, appearing for the writ petitioner in W.P. No. 25886 (W) of 2008, submitted that the vacancy for the post under consideration arose on 1st of September, 2005 and so the Rules, the then prevailing, were required to be followed. Appreciating the position that writ court cannot be called upon to adjudicate factual dispute, it was submitted that this court in such circumstances could direct production of the score sheets. Mr. De further submitted that there had been interpolation and/or manipulation in the evaluation sheet. It was also submitted that though relative of the secretary was a candidate, he did not intimate the same. Referring to Rules 1995 and those of 2005, it was submitted by Mr. De that there was need for de novo selection.

7. Mr. Sanyal, who along with Mr. Acharya, appeared as learned Counsel for the writ petitioner in W.P. No. 31554 (W) 2008 first brought it to the notice of the court that there was regular advertisement and the writ petitioner in the said case stood first in the selection process with the writ petitioner of the other case, namely, Sri Subhendu Pattanayak, coming second in the list.

8. On behalf of the respondent-School Authority it was submitted by Mr. Bhattacharjee that the advertisement in respect of the selection process under reference was duly published. The Secretary did not participate in view of the resolution of the Managing Committee. In response to the grievances regarding the Panchayat nominee as ventilated by Mr. De, it was submitted that Panchayat nominee need not be a member of Panchayat but he must not be a member of

the School staff. On behalf of the State-respondent in W.P. No. 25886 (W) of 2008, it was submitted that the disputes raised in the two writ applications being in the nature of factual disputes, this writ court cannot perhaps deal with the same. It was submitted that since a representation addressed to the District Inspector of Schools (SE) and the Additional District Inspector of Schools (SE), Contai, were submitted, the matter may very well be referred to the said authority for necessary order. Mr. Bhattacharjee as learned Counsel for the respondent-School Authority submitted that the vacancy occurred when prior permission was given. It was contended that the Secretary of the Committee wrote a letter expressing his inability to participate in the selection process since one of his relatives was a candidate. The District Inspector of Schools gave permission for proceeding with the selection on 22nd August, 2007. The Authority-concerned fixed date for interview. It was submitted that the writ application does not contain any specific averment against any particular member of the selection committee. It was, thus, submitted that mere vague allegation of mala fide cannot deserve any consideration.

9. Mr. De, in course of his reply, invited attention of the court to the purported advertisement at page 20, being Annexure P-2 in W.P. No. 31554 (W) of 2008. According to him, it is not an advertisement in proper sense. He submitted that neither the Rules of 1995 nor the Rules 2005 permit such "walk in interview". It was also submitted that such advertisement did not even disclose as to the nature of the vacancy. Reference was further made to the materials on record indicating that the brother of the selected candidate received application on 6.9.2008 and responded to the same.

10. Referring to the decision of the Apex Court in the case of State of Rajasthan Vs. R. Dayal and Others, , it was submitted by Mr. De that the selection process for the posts which fell vacant prior to the amendment of the Rules would be governed by the original Rules and not by the amended Rules. The Apex Court in the said case held that as a necessary corollary, the vacancies that arose subsequent to the amendment of the Rules are required to be filled up in accordance with the law existing as on the date when the vacancies arose. Even a carried-forward vacancy is required to be considered in accordance with the Rules existing unless suitable relaxation is made by the Government. Referring to the decision of the Apex Court in the case of B.L. Gupta and Another Vs. M.C.D., , it was submitted that if there are statutory Rules, the appointments and promotions are to be made in accordance with the statutory Rules. According to Mr. De, the vacancies which had occurred prior to the amendment of the Rules would be governed by the old Rules and not by the amended Rules. Referring to the decision in the case of Madan Mohan Sharma and Another Vs. State of Rajasthan and Others, , it was submitted that the subsequent amendment of the Rules made during the pendency of the advertisement which was prospective cannot be made retrospective so as to make the selection on the basis of the Rules which were subsequently amended. While submitting that the vacancies which occurred prior to the amended Rules would be governed by the old Rules

and not by the amended Rules, Mr. De referred to the decision in the case of Y.V. Rangaiah & Ors. vs. J. Sreenivasa Rao & Ors., as reported in AIR 1983, SCC, 852. In the case between Arjun Singh Rathore and Others Vs. B.N. Chaturvedi and Others, , the Apex Court relied upon the decision in the case of Y.V. Rangaiah (Supra). In the case between N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others, the Apex Court held that whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication, if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the Rules and orders, which were in force on the date of advertisement.

11. In response to this, the learned Counsel, Mr. Sanyal, appearing for the writ petitioner in W.P. No. 31554 (W) of 2008 submitted that the writ petition filed by the petitioner, Subhendu Pattanayak, does not have any specific pleadings regarding such applicability of the Rules. It, thus, amounts to a new case de hors the pleadings. Referring to the decision of the Apex Court in the case of Pundlik Vs. State of Maharashtra and Others, and the case between The Lt. Governor & Ors. vs. M. Deepa & Anr., as reported in (2008) (1) CLJ (Cal), 34, it was submitted that to permit a party to take a new point, on facts, at the stage of argument, causes injustice to the other side.

12. In the present case, however, by raising such plea regarding applicability of Rules, it cannot be said that any new fact was sought to be raised by Mr. De. It is rather a legal point, which demands consideration. It was further submitted that the court cannot grant relief which has not been claimed in the application. Mr. Sanyal referred to the decision of the Division Bench of this court in the case of Snehansu Jas vs. State of West Bengal and Ors., as reported in 2001 (2) CLJ 558, while submitting that any subsequent amendment of the Rules during pendency of the litigation cannot govern the promotion in respect of vacancies which arose before amendment for the simple reason that the incumbents in the feeder posts had a vested right to be selected according to the existing Rules. It was further submitted that since the process of selection did not start before coming into force of the statutory Rules of 2005 which came into effect on 26th December, 2005, the stand as taken by Mr. De regarding applicability of Rules cannot have any sound rational basis. It was emphatically submitted that mere fact that the vacancy arose prior to coming into force of the Rules cannot be a decisive factor. In the case of Snehansu Jas (supra) the learned Division Bench of this court after taking into consideration the case of Rangaiah (supra) and the judgment passed in many other cases held that once the selection process has already started, meanwhile if the Rules are amended, then in that case selection process should be allowed to continue as per the un-amended Rules and the amended Rules will not affect the selection process which has commenced under the un-amended Rules.

13. In the said case, it was further held that the selection process commences only when the candidates are invited to appear on the basis of names sent by the Employment Exchange on requisition by the Managing Committee for recruitment and if that stage has not reached then it will not amount to commencement of the selection process.

14. On behalf of the petitioner, Alok Kumar Maity, it was further submitted that the petitioner in the other case namely, Subhendu Pattanayak, having participated in the selection process without any protest, he cannot be permitted to raise dispute regarding such selection process.

15. In this context, reference was made to the decision of the Apex Court in the case between Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others, .

16. As against the allegation that the members of the Selection Committee, in view of the kind of relationship the selected candidate had with the Secretary, took care of him and corrected spelling mistake, it was submitted that such vague, wild and baseless allegation which was affirmed and verified as true to the knowledge but without any supporting material does not deserve to be entertained. It also cannot be denied that there is no specific allegation against any particular member of the selection committee. Such a dispute being raised by an unsuccessful candidate does not deserve any consideration whatsoever. It was then submitted that there could be hardly any justification for raising the plea of bias. As observed earlier, such a plea can only be raised on the basis of specific material; it cannot afford to be a stray aspersion. It had not been specifically alleged that the Secretary of the Managing Committee participated in the process of selection or that he was present at the interview. It is true that likelihood of bias can also vitiate a selection process which otherwise deserves to be transparent and strictly based on merit. This is fundamental norm in a civilized society, which believes in the rule of law. Any deviation in this regard certainly demands a close scrutiny and deserves interference. It may, however, be mentioned that allegation of bias is required to be proved and established by the person who claims the same and this has to be done to the satisfaction of the judicial conscience of the court. There is no such material so as to hold that the Secretary of the Managing Committee acted in a manner, which even remotely could influence the selection process.

17. Mr. Bhattacharjee appearing on behalf of the State-respondent referred to the decision of the Apex Court in the case of University of Cochin, Rep., by its Registrar, University of Cochin Vs. N.S. Kanoonjamma and others, in support of his contention that having participated in the recruitment process, the petitioner, Subhendu Pattanayak, cannot be permitted to challenge the correctness of its procedure.

18. In response to the allegation of bias, Mr. Bhattacharjee relying upon the decision in the case of Utkal University vs. Dr. Nrusingha Charan Sarangi & Ors., as reported in (1999) 2 SC 193 submitted that mere fact that the selected

candidate is related to the Secretary of the Committee cannot be a sufficient ground to infer that the members of the Selection Committee were favorably inclined towards such a candidate. Referring to the West Bengal Schools (Recruitment of Non Teaching Staff) Rules, 2005, Mr. Bhattacharjee submitted that the restriction imposed is that no person who is related, by blood, marriage or adoption, to a candidate to be interviewed by a selection committee shall act as a member of the selection committee. It was contended that the Secretary did not at any point of time act as a member of the selection committee and as such, there could be no basis for unreasonably raising such plea of favoritism or nepotism.

19. Mr. Bhattacharjee further referred to the Gazette notification dated 27th December, 2005 while submitting that the Rules of 2005 came into effect in supersession of all previous orders and directions.

20. It thus appears that there is no merit in the grievance that respondent-authorities were not justified in proceeding with amended Rules since vacancy arose on 1st of September, 2005 i.e., prior to Rules of 2005 coming into effect. What is important is the relevant time of initiation and the date of commencement of the selection process.

21. In the case between Madan Lal and Others Vs. State of Jammu and Kashmir and Others, , the Apex Court held that mere relationship cannot be a ground for disqualifying a candidate from being considered for selection. In the present case, as would appear from the materials on record, the Secretary cannot be said to have played any role affecting the result of the selection process. Mr. De repeatedly mentioned that his client scored only 0.5 marks less than the private respondent. But that makes all the difference. Considering all such facts and circumstances, I find it difficult, if not impossible, to appreciate the grievances raised in the writ application being W.P. No. 25886 (W) of 2008, which accordingly fails and be dismissed. The application being W.P.No.31554 (W) of 2008 succeeds and be allowed. Respondent-authorities in the said case accordingly are directed to approve the panel prepared on the basis of the interview held on 19th of September, 2008 for appointment to the post of Group-D (Peon) (Unreserved) in Sarpai Model Institution (H.S.), Purba Medinipur, within a period of 8 (eight) weeks from the date of communication of this order and the respondents-school authority must issue letter of appointment immediately.

22. Pending application, if any, consequently stands disposed of.

23. There is no order as to costs.

Xerox certified copy of this judgment be supplied to the parties, if applied for, as expeditiously as possible.