
(2003) 08 CAL CK 0024
In the Calcutta High Court
Case No : Writ Petition No. 3596 (W) of 2002

Aloke Jyoti Maitra

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 01-08-2003

Acts Referred:

Constitution of India, 1950 — Article 226
West Bengal Board of Secondary Education Act, 1963 — Section 45
West Bengal School Service Commission Act, 1997 — Section 9(2)

Citation : (2004) 1 CHN 297

Hon'ble Judges : Bhaskar Bhattacharya, J

Bench : Single Bench

Advocate : Dipankar Dutta, S.N. Mukherjee, Subrata Mukherjee and Arjun Kr. Samanta, for the Appellant; Sundarananda Pal, L.K. Pal, Debashree Mukherjee for the respondent Nos. 5 and 6 and Bhudeb Bhattacharjee and Arati Ghosh, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—By this writ application, the writ petitioner, claiming to be an organiser teacher, has prayed for setting aside the order dated January 29, 2002 passed by the Director of School Education and has further prayed for direction upon the respondents to grant order of approval to the appointment of the petitioner, as such organiser teacher.

2. The case made out by the petitioner may be summarized thus:

- a) Thiba Anchal Junior High School (hereinafter referred to as "the school") was initially recognized as a IV Class Junior High School by the West Bengal Board of Secondary Education w.e.f. 1.5.1991.
- b) The Managing Committee and other interested persons of the locality decided to open Class IX and X in the school as there was no other high school in the said locality.
- c) The petitioner was appointed as Assistant Teacher in Physical Education to

teach the students by a resolution dated 9th July, 1993 and that the petitioner had sufficient qualification for being appointed as Assistant Teacher.

d) The petitioner had been discharging his duties by teaching the students since his appointment and ultimately the school was upgraded to Class X High School by the West Bengal Board of Secondary Education w.e.f. May, 1998.

e) When the school became upgraded to Class X High School by order dated July 27, 1998, the appointment of the petitioner and other teaching and non-teaching staff were not approved by the concerned authority although they were working in the school since 1993.

f) In the past, the petitioner along with other teaching and non-teaching staff filed a writ application being W.P. No. 22882(w) of 1998 before this Court and Amitava Lala, J. while entertaining such writ application directed the respondent to hold an enquiry and to submit a report before this Court. On the basis of such order, an inspection was held on January 29, 1999 when the petitioner along with other organizing teaching and non-teaching staff were present.

g) On January 29, 1999 although inspection was held but no notice was served upon the petitioner either from the District Inspector of Schools or from School Authority but nevertheless all the organizing teachers including the petitioner were present at the time of inspection. The inspection team did not ask anything from the petitioner. At that time teacher-in-charge of the school was not present and in his absence an Assistant Teacher viz. Bijoy Kumar Mondal was in-charge of the school. The said Assistant Teacher was compelled to write down the names of only approved teachers as desired by District Inspector of Schools by excluding the names of the organiser teachers.

h) Ultimately, the said writ application came up for final hearing on March 15, 2001 before D.P. Kundu, J. and His Lordship after hearing the parties was pleased to dispose of the said writ application directing the Director of School Education to treat the copy of the writ application as the representation of the petitioners therein and to consider and dispose of the same by a reasoned order.

i) Pursuant to such order, the Director of School Education by the order impugned herein has turned down the prayer of the organiser teachers including that of the petitioner for being absorbed.

3. Being dissatisfied, the petitioner has come up with the instant writ application.

4. This application is opposed by the respondents by filing different sets of affidavits-in-opposition. A preliminary objection has been taken by the respondents as to the maintainability of the writ application on the ground that other alleged organiser teachers challenged the aforesaid order passed by the Director of School Education by filing a separate writ application but the same was dismissed and on an appeal preferred by those persons, a Division Bench of this Court has dismissed such appeal affirming the order of the learned Trial Judge. According to the respondents, a Division Bench of this Court having

already affirmed the order impugned herein, the said decision is binding upon this Court and the petitioner.

5. The respondents have also supported the order passed by the Director of School Education on merit claiming that the petitioner could not be alleged service.

6. Mr. Dutta, the learned Advocate appearing on behalf of the School Service Commission, has taken a further pure question of law on the merit of the application contending that the school having been recognized after coming into operation of West Bengal School Service Commission Act (hereinafter referred as "the Act"), no approval of any organiser teacher can be granted and all subsequent appointments of teachers must be made on the recommendation of the West Bengal School Service Commission and in accordance with the procedure for appointment prescribed under the Act. Mr. Dutta further submits that even under the management rule there was no scope of appointment of any "organiser teacher". When the West Bengal Board of Secondary Education Act or the Rules framed thereunder does not provide for appointment of organiser teacher, Mr. Dutta continues, such appointment cannot be made on the basis of executive instruction of the Government. In support of such contention, Mr. Dutta has relied upon an unreported decision of Barin Ghosh, J. dated July 3, 2003 passed in W.P. No. 2945 of 1990.

7. I, at the very outset, propose to deal with the preliminary objection taken by the respondents as regards maintainability of the instant writ application that in view of the Division Bench decision in other matter affirming the selfsame order passed by Director of School Education, this writ application is not maintainable.

8. There is no dispute that the other writ application was moved by four other persons who claimed to be organiser teachers along with the petitioner. But the petitioner did not join in the said writ application. It further appears that the case of the petitioner is to some extent different from those persons in view of the fact that the petitioner has some additional materials to show that the petitioner really worked as a teacher in the said school in or around 1993 and in support of such contention he has relied upon certain documents such as order of the Managing Committee permitting the petitioner to complete Work Education course, and the documents showing that the B.D.O. asked him to be present at a programme as he was an organiser teacher of the school.

9. Since the petitioner was not a party to the earlier writ application, by no stretch of imagination, it can be contended that the present writ application is barred by the principle of resjudicata or constructive resjudicata. In my view, the Division Bench decision approving the order impugned herein can only be relied upon as a precedent provided all the conditions, required under law for treating a decision as precedent, are fulfilled. In the previous writ application the learned Trial Judge dismissed the case of the writ petitioners on the ground that the fact that those writ petitioners were organiser teachers were not established.

Therefore, the scope before the Division Bench in appeal preferred by those persons were whether the Trial Court was justified in holding that those petitioners were not organiser teachers. Thus, the scope of the said appeal before the Division Bench was restricted to the question whether those writ petitioners were really organiser teachers of the school. In the said appeal there was no occasion for deciding whether the present petitioner was also an organiser teacher. In such a situation, the Division Bench decision, approving the order of the learned Trial Judge cannot be said to be binding upon the petitioner. The said Division Bench has also not laid down as a law anything which will stand in the way of the petitioner in maintaining the instant writ application. Thus, the earlier Division Bench decision cannot stand in the way of the petitioner in maintaining the instant writ application on any of the aforesaid grounds.

10. The next question is whether after coming into operation of the Act, there can be approval of any "organiser teacher" in a school which has been recognized after the operation of the Act. Mr. Mukherjee, the learned Counsel appearing on behalf of the petitioner, strongly asserted before this Court that this is not a case of appointment of any teacher but this is a case of approval of the service of the petitioner as organiser teacher and, as such, notwithstanding the provision contained in the Act, the respondents are entitled to recognise the petitioner as organiser teacher. Mr. Mukherjee further contends that according to Rule 28(1) of the Management Rules, in an aided institution, the committee shall subject to the provision of any Grant-in-aid or pay revision scheme or any order or direction or guidelines issued by the State Government or the Director in connection therewith and in force for the time being has power to appoint teachers and other employees on permanent basis against permanent vacancies available within the sanctioned strength of teachers and other employees. Therefore, according to Mr. Mukherjee if the State Government issues direction for recognition of organiser teachers on fulfillment of certain conditions it necessarily follows that the managing committee can also under these circumstances appoint organiser teachers. Mr. Mukherjee contends that Barin Ghosh, J. while holding that in the absence of any rule or statute recognising the posts of organiser teachers there cannot be any appointment of such organiser teacher totally overlooked the aforesaid provision that such appointment can be given subject to the guidelines or direction of the State Government even in the absence of statutory support. Mr. Mukherjee, in this connection, relies upon the Circular No. 117-SE(S)/4A-50/93 dated 24th February, 1995 showing that the Government has taken decision to grant approval of the appointment of organiser teachers and non-teaching staffs upon the concerned school being recognized or upgraded by the West Bengal Board of Secondary Education on the recommendation of the State Government on conditions mentioned therein.

11. For the purpose of appreciating the question raised by Mr. Dutta, we must bear in mind that West Bengal School Service Commission Act, 1997 came into force from 1st November, 1997, and subsequently in the month of January, 1998, the procedure for selection of teaching and non-teaching staffs has been

published in the Official Gazette. According to Section 9 of the Act notwithstanding anything contained in other law for the time being in force or in contact or custom or usage to the contrary, appointments to the post of teacher in a school shall be made by Managing Committee by whatever name called or by an ad-hoc committee or by the Administrator on the recommendation of the Regional Commission having jurisdiction. According to Sub-section (2) of Section 9 any appointment of a teacher made or on after the commencement of the Act and in contravention of the provision of the Act shall be invalid and shall have no effect and the teacher so appointed shall not be a teacher within the meaning of the Act.

12. In the present case, the school was recognized in 1999 after coming into operation of the Act. Therefore, after such recognition, no teacher can be appointed except in accordance with the provision contained in the Act. Admittedly, the petitioner has not been appointed as such but he claims that he was appointed earlier by the Managing Committee and his appointment should be approved by the State Government in accordance with various circulars issued by the Government.

13. Therefore, the real question is whether the petitioner could be appointed by the Managing Committee of the School prior to the commencement of the Act in accordance with law. To appreciate the aforesaid question. Rule 28 of the Management Rules providing power of the Managing Committee of a School may be referred to. At this stage, it may be mentioned here that the Parent Act in this case is the West Bengal Board of Secondary Education Act, 1963 and according to Section 45 of such Act, the State Government may after previous publication make rules for carrying out the purpose of this Act. By virtue of such power conferred u/s 45 of the said Act, the Management Rules were enacted. The provision of Rule 28 as it stood prior to the coming into operation of West Bengal School Service Commission Act, 1997, is quoted below:

"Power of the Committee.--(1) In an aided institution the Committee shall, subject to the provisions of any Grant-in-aid Scheme or Pay Revision Scheme or any order or direction or guidelines issued by the State Government or the Director in connection therewith and in force for the time being, Have the power--

(i) to appoint teachers and other employees on permanent basis against permanent vacancies, if available, within the sanctioned strength of teachers and other employees, approval for such appointment being thereafter sought for from the Director or any other officer authorised by him, ordinarily within a fortnight from the date of decision of the Committee;

(ii) to appoint teachers and other employees on temporary basis against permanent or temporary vacancies, if available, within the sanctioned strength of teachers and other employees, approval for such appointment being thereafter sought for from the Director or any other officer authorised by him, ordinarily within a week from the date of decision of the Committee;"

14. According to the aforesaid provisions, the Managing Committee of a school was vested with power subject to provisions of any Grant-in-aid scheme or pay revision scheme or any order or direction or guidelines issued by the State Government or Director and in force for the time being to appoint teachers and other employees on permanent basis against permanent vacancies if available within the sanctioned strength of teachers and other employees and approval of such appointment should be thereafter sought for from the Director or any other officer authorised by him within a specific period. Similarly, such Managing Committee had also power to appoint teachers and other employees on temporary basis against permanent or temporary vacancies within the sanctioned strength of teachers and other employees in the similar manner.

15. But in the rules no power has been given to the Managing Committee of a school to appoint any teacher or non-teaching staffs beyond the sanctioned strength of teachers or other employees. The petitioner is claiming that he was appointed by Managing Committee of a school as organiser teacher at a point of time when Class IX and X were not recognised. Therefore, according to the case made out by the petitioner himself, he was appointed by the Managing Committee in a post beyond the sanctioned strength of teachers. In the Parent Act or Rules framed thereunder, there is no provision for appointment of any teacher beyond the sanctioned strength by the Managing Committee. Therefore, the appointment of the petitioner as so called organiser teacher was not in conformity with the Parent Act or the Rules. Although, there are several notifications issued by Government giving instruction for approval of organiser teacher in a school, the term "organiser teacher" is unknown in the Parent Act or in the Rules. Moreover, no instruction has been given permitting Managing Committee to appoint teaching or non-teaching staffs as "organiser teachers" beyond the sanctioned strength. Therefore, it is apparent that the appointment of the petitioner by the Managing Committee even, if the same is true, is without any authority of law.

16. In my view, Mr. Dutta is justified in his contention that when there is a Parent Act viz. The West Bengal Board of Secondary Education Act and the Rules framed to achieve the object of such Act and in such Act or Rules there is no provision for appointment of any "organiser teacher" nor is there any authority conferred upon the Managing Committee to appoint any teacher beyond the sanctioned strength prescribed under such Act, the Secretary of the Education Department by issuing certain circulars cannot lay down the guidelines for approval of any teacher illegally appointed by Managing Committee. If the initial appointment is illegal according to the Parent Act and the Rules, the Government by issuing notification through Joint Secretary cannot approve such illegal appointments.

17. In this connection, reference may be made to a Supreme Court decision relied upon by Mr. Dutta in the case of R.N. Nanjundappa Vs. T. Thimmiah and Another, . In the said case rules framed by the Governor of Mysore in exercise of power conferred under the proviso to Article 309 of the Constitution of India was

challenged. The Rules are quoted below:

"1. Title: These rules may be called the Mysore Education Department Services (Technical Education Department)(Special Recruitment) Rules, 1967.

2. Provisions relating to regularization of appointment of principal, School of Mines, Oorgaum, Kolar Gold Fields.

Notwithstanding any rule made under the proviso to Article 309 of the Constitution of India, or any other rules or Order in force at any time. Dr. T. Thimmiah, B.SC.(Hons.) Ph. D.(Lond.) F.G.S. shall be deemed to have been regularly appointed as Principal, School of Mines, Oorgaum, Kolar gold Fields, w.e.f. 15-02-1958.

By order and in the name of the Governor of Mysore

Sd/- S.N. Sreenath

Under Secretary to Government, Education Department."

18. In the aforesaid case irregular appointment of respondent to the post of the Principal, Kolar Gold Fields School of Mines was sought to be regularized by enacting the aforesaid rules in exercise of power under the proviso to Article 309 of the Constitution of India and it was contended on behalf of the State that under Article 309, the State has power to make a rule regularizing appointment irregularly made. Shelter was taken behind Article 162 of the Constitution of India and the power of the Government to appoint. Under such circumstances, the Supreme Court was of the view that nobody could deny the power of the Government to appoint, but regularization of appointment by stating that notwithstanding any rule, the appointment was regularized, stuck at the root of the rules and if the effect of the regularization was to nullify the operation and effectiveness of the existing rules, such rule itself is open to criticism on the ground that it is in violation of current rules. Therefore, the relevant rules at the material time as to the promotion and appointment were infringed and the impeached rule could not be permitted to stand to operate as regularization of appointment of one person in utter defiance of the rules requiring strength of seniority and merit.

19. In the present case, according to the existing rules. Managing Committee is not vested with authority to appoint any teacher beyond sanctioned strength. But by way of Government instruction, such illegal Act is sought to be regularized. Therefore, the present case is worse case than the one reported in R.N. Nanjundappa Vs. T. Thimmiah and Another, where statutory rule was framed to regularize illegal act.

20. I, thus, find that by merely issuing Government instruction, illegal act cannot be regularized in this way. I have already pointed out that according to Rule 28 of the Management Rules, the direction or guidelines referred to therein are meant for those directions and guidelines for appointment of teacher within the

sanctioned strength. But there is no rule giving power to the Managing Committee to appoint any teacher or non-teaching staff beyond sanctioned strength and even the guidelines or circulars, does not permit the school authority to appoint any teacher beyond sanctioned strength.

21. Therefore, it is clear that the initial appointment of the petitioner was contrary to the rules and any executive instruction issued by Government cannot approve the illegal appointments contrary to the rules.

22. I, thus, find substance in the preliminary objection raised by Mr. Dutta that even if the allegations contained in the writ application are all true, the appointment given to the petitioner by Managing Committee could not be regularized by approving his appointment. I agree with conclusion arrived at by Barin Ghosh, J. in the unreported decision relied upon by Mr. Dutta for the reasons mentioned above.

23. Even on merit, it appears from the annexure relied upon by the petitioner himself which is annexed at page 119 of the writ petition that the petitioner along with other organizing staff had been performing their duties till August, 1995 and thereafter Class IX and X had to be stopped for want of students. But the organizing teaching staffs had been attending the school and maintaining their attendance register. Thus, even on the basis of document relied upon by the petitioner it is apparent that he worked up to 1995 and thereafter for want of students the Classes of IX and X were not held but they went on attending school and maintaining their attendance register. Even according to the instruction issued by Government, only those organiser teachers could be approved who would continue till the time of inspection by DLIT leading to recognition.

24. Thus, the petitioner even could not fulfill the requirements of approval mentioned in the Government Circular.

25. I, thus, find that the petitioner is not entitled to get relief claimed in this application for the reasons mentioned above.

26. In the facts and circumstances, there will be, however, no order as costs.