
(2008) 12 CAL CK 0045
In the Calcutta High Court
Case No : Writ Petition No. 7496 of 2004

Ashok Banik

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 16-12-2008

Acts Referred:

Constitution of India, 1950 — Article 226

West Bengal Schools (Control of Expenditure) Act, 2005 — Section 14

Citation : (2009) 1 ILR (Cal) 519

Hon'ble Judges : Debasish Kar Gupta, J

Bench : Single Bench

Advocate : Amal Baran Chatterjee and Amar Mitra, Kallol Basu, Taraprasad Halder, for the Appellant; Gautam Wilson, for the Respondent

Judgement

Debasish Kar Gupta, J.—This writ application is filed by the petitioner for a direction upon the respondent authority to give him appointment to the post of Assistant Teacher of Mathematics in the post graduate scale of pay on the basis of the recommendation made by the West Bengal Regional School Commission (Northern Region).

2. The West Bengal Regional School Service Commission (Northern Region) conducted a selection process for preparation of panel of 2002 and recommendation of the names of selected candidates for the purpose of appointment of Assistant Teachers in different Government aided schools under Northern Region. The petitioner participated in the above selection process under un-reserved category having qualifications of M.Sc. in Mathematics(First Class) with distinction in 1999 and B.Ed. Examination(First Class) in 1999. By a communication issued under memo No. Math(02) AT/40/(2) WBRSSC/NI/REC/2003 dated December 08, 2003(annexure P-1 at page 16 to this writ application) the respondent No. 2 recommended the name of the petitioner for appointment as an Assistant Teacher in Mathematics in post graduate scale of pay in Siliguri Netaji High School P.O. Subhaspally, Siliguri District-Darjeeling.

But in reply dated December 15, 2003 the authority of the above Siliguri Netaji High School, P.O. Subhashpally, Siliguri District- Darjeeling (annexure P-2 at page 17) informed the respondent No. 2 that there was no vacancy in the post of Assistant Teacher in post graduate scale of pay in which the name of the petitioner had been recommended. On receipt of the above communication the respondent No. 2 directed the respondent No. 3 as per his communication issued under memo No. 922/1(2) WBRSSC/NR dated December 31, 2003, to arrange for issuing letter of appointment in favour of the writ petitioner in terms of the recommendation made by the respondent No. 2. Since, the respondent authorities did not take further steps for appointment of the petitioner as Assistant Teacher in Mathematics in the aforesaid school in terms of the recommendation of the respondent No. 2, the petitioner filed the instant writ application. By an order dated August 27, 2004 passed in this matter, the court directed the respondent authorities to allow the petitioner to join as Assistant Teacher in the unreserved post in Siliguri Boys' High School. It was further directed that the question of payment of remuneration commensurate to the qualification of the petitioner would be decided at the time of final disposal of the writ application. The above interim order was passed without prejudice to the rights and contentions of the parties.

3. The above order dated August 27, 2008 is quoted below:

W.P. 7496(W) of 2004.

Mr. D.P. Mukherjee.

Mr. Sunil Kumar Pal.. For petitioner.

Mr. Goutam Wilson.. For respondent No. 1,2 and 3.

Mr. Kallol Basu.. For School Service Commission.

Pursuant to may earlier order. The D.I. Siliguri is present in Court. So, earlier order of arresting him. Is recalled. Personal appearance of the D.II is dispensed with. Upon instruction, the learned Lawyer for the D.I. submits that in the Siliguri Boys' High School, two posts of Mathematics teachers have fallen vacant, one of which is reserved for scheduled caste and another one is for general category. However, the general category post does not carry the scale of pay of Post-Graduate degree qualification and this is meant for Bachelor degree. Since the petitioner is having the qualification of M.Sc., so, he cannot be accommodated under the law, in this post. However, in another school viz. Ambari High School, Siliguri, a post of Assistant Teacher in Mathematics has fallen vacant and this post carries the pay scale of Post-Graduate degree. According to him, if the petitioner is agreeable to join in the said school, there will be no difficulty, as this will be commensurate to his qualification and claim.

Mr. D.P. Mukherjee, appearing for the writ petitioner submits that the submission of the learned lawyer for the D.I. is incorrect, as far as the Siliguri Boys' High School is concerned. According to him, the post, which has been fallen vacant,

was meant for an Assistant Teacher, having qualification of Post-Graduation and he used to get higher pay scale, commensurate to his qualification. Therefore, there cannot be any difficulty to give higher pay scale in Siliguri Boys' High School, accommodating his client. He further says that his client is agreeable to join at Siliguri Boys' High School, without prejudice, and his client is not agreeable to join at Ambari High School.

In that view of the matter, I direct the D.I. concerned and the school authority to allow the petitioner to join as Assistant Teacher in the reserved post in Siliguri Boys' High School. As far as the question of higher scale of pay, commensurate to the qualification of the petitioner is concerned, that will be decided later on. It is made clear, under the law, if the petitioner is not entitled, then he will not get any facility. Therefore, the matter shall be decided on affidavits, on the question of grant of higher scale of pay only. Affidavit in opposition may be filed within four weeks from date. Reply 7 thereto, if any, shall be filed within two weeks thereafter and the matter will appear for hearing before the appropriate Bench, two weeks after Puja Vacation.

This order is passed without prejudice to the rights and contentions of the parties. The injunction order will continue, as far as the post for unreserved category is concerned, till the petitioner joins and so far the restrain order relating to the reserved category is concerned, the same stands vacated. Accordingly, the D.I. shall advise the School Service Commission for formal recommendation for appointment of the petitioner to the aforesaid Siliguri Boys' High School, in terms of this order. In view of the aforesaid, the recommendation made earlier in favour of the petitioner, in connection with a particular school, shall be modified on the advice of the D.I., in terms of this order for filing in the post in the Siliguri Boys' High School, in the un-reserved category.

The matter will appear marked as "To Be Mentioned" fortnight hence(10.9.2004), for recording compliance of this order. Learned Registrar General is directed to communicate this order once again to all concerned, since the order of arrest has been recalled. Let Xerox plain copy of this order, duly countersigned by the Assistant Registrar(Court) be given to the learned Lawyer for petitioner, upon making application for obtaining Xerox certified copy of this order.

(Kalyan Jyoti Sengupta, J.)

4. It is submitted on behalf of the petitioner that pursuant to the above order dated August 27, 2004 the petitioner has been working in the post of Assistant Teacher in Mathematics in Siliguri Boys' High School but he has been getting his remuneration at graduate scale of pay. It is further submitted on behalf of the petitioner that his name was recommended by the respondent No. 2 for appointment as Assistant Teacher in Siliguri Netaji High School in the post graduate scale of pay which was commensurate to the qualification of the petitioner. It is further submitted on behalf of the petitioner that his name appeared in the 5th position in the panel under reference and his name was

recommended for the school considering his position in the above panel on the basis of his merit as also the preference given by him with regard to the areas of appointment. Therefore, the post graduate scale of pay cannot be denied to him because assuming that there was any mistake on the part of any respondent authority in recommending the name of the petitioner for appointment in the Siliguri Netaji High School, the petitioner cannot be compelled to accept the graduate scale of pay instead of post-graduate scale of pay without any fault or lapses on his part.

5. Reliance is placed on placed on behalf of the petitioner on Clause(3) of Memorandum No. 155-AC(B) dated July 13, 1999 to submit that keeping aside the question of staff pattern of the concerned school the petitioner is entitled to get post-graduate scale of pay for working as an Assistant Teacher in Mathematics in the Siliguri Boys' High School. Finally it is submitted on behalf of the petitioner that the petitioner has already been appointed to the post of Assistant Teacher in Mathematics in the above school. Now, the only question remains to be decided by this Court is the fixation of the remuneration of the petitioner at post-graduate scale of pay.

6. On the other hand, it is submitted on behalf of the state respondents that in accordance with the provisions of notification being G.O.670(SE) dated September 4, 1998 issued by the Deputy Secretary to the Government of West Bengal, School Education Department, the petitioner is not entitled to get postgraduate scale of pay in connection with the above services of the petitioner. Because in terms of the above order, all the District Inspectors of the State of West Bengal shall follow the staff pattern of the concerned school at the time of giving scale of pay to the petitioner. According to the State respondents the petitioner has been appointed to the post of Assistant Teacher in Mathematics in the Siliguri Boys' High School, P.O. Siliguri, Dist. Darjeeling which is a post commensurate to graduate scale of pay according to the staff pattern of that school. Relying upon the provisions of Section 14 of the West Bengal Schools (Control of Expenditure) Act 2005 it is submitted on behalf of the State respondents that the petitioner is not entitled to get post-graduate scale of pay in view of the above provisions. It is further submitted on behalf of the State respondents that the petitioner has been appointed to the post under reference on the basis of the order dated August 27, 2004 passed in this writ application without prejudice to the rights and contentions of the parties in this case.

7. Therefore, the petitioner cannot claim higher scale of pay for working in that post in contravention of the provisions of law at the time of final disposal of this writ application. Relying upon the statements made in the affidavit-in-opposition affirmed on their behalf it is submitted on behalf of the respondent Nos. 4 and 5, that admittedly no vacancy in the post of Assistant Teacher in Mathematics at the post-graduate scale of pay was in existence at the material point of time in Siliguri Netaji High School, Siliguri. Therefore, it was a mistake on behalf of the West Bengal Regional School Service Commission(Northern Region) to

recommend the name of the petitioner for appointment to that school. It is further submitted on behalf of the respondent Nos. 4 and 5 that after finding the mistake, the respondent No. 2 issued a communication to the petitioner under memo No. 32/A/WBRSSC/NR/G-113 dated April 30, 2004(Annexure P-4 at page 5 to the supplementary affidavit affirmed by the petitioner on May 12, 2004) to offer his consent as to fresh recommendation for the post of Assistant Teacher in Mathematics commensurate to his qualification in a Junior High School in Siliguri Sub-division or in a High School in any of the districts of Jalpaiguri, Cooch Behar, Utter Dinajpur etc. Drawing the attention of this Court to the order dated August 27, 2004 passed in this writ application it is submitted on behalf of the respondent Nos. 4 and 5 that after ascertaining the vacancies in different schools, offer was given to the petitioner to recommend his name in respect of Ambari High School, Siliguri in post-graduate scale of pay or to recommend his name in respect of Siliguri Boys' High School in graduate scale of pay considering the respective staff patterns of those two schools. But considering the submissions made on behalf of the petitioner, a direction was given by the above order dated August 27, 2004 upon the respondent authorities to appoint the petitioner to the post of Assistant Teachers in Siliguri Boys' High School without prejudice to the rights and contentions of the parties as also without determining the question of granting post-graduate scale of pay to the petitioner for such appointment. It is also submitted on behalf of the respondent Nos. 4 and 5 on instruction that after expiry of the above panel and after recommendation of the name of the petitioner for appointment as Assistant Teacher in respect of a school, they have no power to reconsider the case of the petitioner for appointment in any other school or for grant of higher scale of pay commencement to his qualification for appointment as Assistant Teacher in a school.

8. I have heard the submissions made on behalf of the respective parties, I have also considered the facts and circumstances of the case. It is an admitted position that on basis of the position of the petitioner in the panel of 2002 for appointment of Assistant Teachers prepared on the basis of the performance of the candidates in the selection process, the name of the petitioner was initially recommended for appointment as an Assistant Teacher of Siliguri Netaji High School in post-graduate scale of pay. Therefore, it is not in dispute the petitioner was entitled to be appointed as an Assistant Teacher in post-graduate scale of pay in the area concerned on the basis of his merit considering the position of his name in the panel prepared by the West Bengal School Service Commission(Northern Region). It is an admitted fact that initially the name of the petitioner was recommended by the West Bengal Regional School Service Commission (Northern Region) in respect of Siliguri Netaji High School inadvertently without any latches on negligence on the part of the petitioner. It is also an admitted position on the basis of materials available on record that the petitioner was requested to give his consent for a fresh recommendations in respect of any junior High School in Siliguri Sub-Division or any High School in

any of the districts of Jalpaiguri, Cooch Behar, Uttar Dinajpur. In this regard the communication issued by the respondent No. 2 under his memo No. 332/A/ WBRSSC/NR/G-113 dated April 30, 2004 is quoted below:

THE WEST BENGAL REGIONAL SCHOOL SERVICE COMMISSION NORTHERN REGION

17/18 Rabindra Avenue, P.O. & Dist. Malda, Pin Code-732101
Telephone :51709(STD-03512) Fax No. 03512-51709 332/A/WBRSSC/NR/G-113
Date. 30/4/04

To

Shri Ashok Banik. Netaji Sarani, Haiderpara, P.O. Siliguri, Dist. Darjeeling.

Ref: This office memo. No. Math(02)AT/40/WBRSSC/NR/REC/2003 dated 8.12.2003.

As per resolution adopted in item No. 5(i) of the meeting of the West Bengal Regional School Service Commission, Northern Region, dated 29.4.2004, the undersigned is directed by the Commission to request him to offer his consent, as to his fresh recommendation, the vacancy for the post of Assistant Teacher in Math (H/PG) in Siliguri Netaji High School being non-existent, in a Junior High School in Siliguri Sub-Divn. Or in a High School in the District of Jalpaiguri, or in any Higher Secondary School in the District of Cooch Behar, Uttar Dinajpur or other dist. Under the jurisdiction of Northern Region.

This is urgent.

Secretary,

W.B. Regional School Service

Commission, Northern Region,

Malda.

9. So, it is not in dispute that the West Bengal Regional School Service Commission(Northern Region) recognised the claim of the petitioner to recommend his name afresh in another school as mentioned in the above communication in post graduate scale of pay. Considering date, date of filing of this writ application(affirmed, 2004), I find this writ application was filed before expiry of the that panel.

10. In Chief Constable of North Wales Police v. Evans reported in (1982) 3 All ER 141, while referring to the scope and ambit of judicial review, Lord Hailsham said:

The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court.

11. From the facts and circumstances of the case discussed hereinabove it is now established that the petitioner was deprived of an offer of appointment as an Assistant Teacher in Mathematics in a school, in post-graduate scale of pay on the basis of his choice of area considering his position in the panel which had been prepared considering the merits of the candidates to be appointed as Assistant Teachers in High Schools in Siliguri Sub-Division in post-graduate scale of pay. Considering the facts of filing of this writ application during existence of the panel and the offer of the respondent Nos. 4 and 5 for recommendation of the name of the petitioner afresh, I find no substance in the submissions made on behalf of the respondent Nos. 4 and 5 that after the recommendation of the name of the petitioner in a school, they had no power to rectify their own error.

12. Now, the only issue which remains to be decided by this Court is whether a direction can be given to grant post-graduate scale of pay for appointment of the petitioner to the post of Assistant Teacher, Siliguri Boys' High School, though he has been appointed to that post in graduate scale of pay in accordance with the staff pattern of that school? In this regard the relevant provisions of Section 14 of the West Bengal Schools (control of expenditure) Act 2005 are quoted below:

14. (1) Every teacher of a school shall, if appointed in the post of Undergraduate teacher category, be entitled to draw pay in the scale of pay in which he is appointed and shall not be entitled to claim any additional increment or higher scale of pay for acquiring any qualification other than the qualifications specified for such post.

(2) Every teacher of a school shall, if appointed in the post of Graduate teacher category, be entitled to draw pay in the scale of pay in which he is appointed and shall not be entitled to claim any additional increment or higher scale of pay for acquiring any qualification other than the qualifications specified for such post.

(3) Every teacher of a school shall, if appointed in the Honours Graduate or Post-graduate teacher category, be entitled to draw pay of Post-graduate teacher category, upon acquiring Post-graduate degree, in the manner as may be specified by order." From the above provision it is clear that the statute does not permit granting of post-graduate scale of pay to the petitioner for his appointment in the post of Assistant Teacher in Mathematics in Siliguri Boys' High School. The above appointment has been given to the petitioner against a post in graduate scale of pay. In this regard a decision of the Supreme Court in the matter of State of U. P. and others Vs. Harish Chandra and others, are quoted below:

10. Notwithstanding the aforesaid Statutory Rule and without applying the mind to the aforesaid Rule the High Court relying upon some earlier decisions of the Court came to hold that the list does not expire after a period of one year which on the face of it is erroneous. Further question that arises in this context is whether the High Court was justified in issuing the mandamus to the appellant to make recruitment of the Writ Petitioners. Under the Constitution a mandamus

can be issued by the Court when the applicant establishes that he has a legal right to the performance of legal duty by the party against whom the mandamus is sought and said right was subsisting on the date of the petition. The duty that may be enjoined by mandamus may be one imposed by the Constitution or a Statute or by Rules or orders having the force of law. But no mandamus can be issued to direct the Government to refrain from enforcing the provisions of law or to do something which is contrary to law. This being the position and in view of the Statutory Rules contained in Rule 26 of the Recruitment Rules we really fail to understand how the High Court could issue the impugned direction to recruit the respondents who were included in the select list prepared on 4-4-87 and the list no longer survived after one year and the rights, if any, of persons included in the list did not subsist. In the course of hearing the learned Counsel for the respondents, no doubt have pointed out some materials which indicate that the Administrative Authorities have made the appointments from a list beyond the period of one year from its preparation. The learned Counsel appearing for the appellants submitted that in some cases pursuance to the direction of the Court some appointments have been made but in some other cases it might have been done by the Appointing Authority. Even though we are persuaded to accept the submission of the learned Counsel for the respondents that on some occasion appointments have been made by the Appointing Authority from a select list even after the expiry of one year from the date of selection but such illegal action of the Appointing Authority does not confer a right on an applicant to be enforced by a Court under Article 226 of the Constitution. We have no hesitation in coming to the conclusion that such appointments by the Appointing Authority have been made contrary to the provisions of the Statutory Rules for some unknown reason and we deprecate the practice adopted by the Appointing Authority in making such appointments contrary to the Statutory Rules. But at the same time it is difficult for us to sustain the direction given by the High Court since, admittedly, the life of the select list prepared on 4-4-87 had expired long since and the respondents who claim their rights to be appointed on the basis of such list did not have a subsisting right on the date they approached the High Court. We may not be understood to imply that the High Court must issue such direction, if the writ petition was filed before the expiry of the period of one year and the same was disposed of after the expiry of the statutory period. In view of the aforesaid conclusion of ours it is not necessary to deal with the question whether the stand of the State Government that there existed one vacancy in the year 1987 is correct or not.

13. I do not find any substance in the submission made on behalf of the petitioner that he is entitled to post-graduate scale of pay in connection of his appointment as a teacher in Mathematics in Siliguri Boys' High School in terms of the provisions of Memorandum No. 155-SE(B) dated July 13, 1999. The relevant provisions of the above memorandum are quoted below:

GOVERNMENT OF WEST BENGAL

SCHOOL EDUCATION DEPARTMENT

BUDGET BRANCH

BIKASH BHABAN, SALT LAKE, KOLKATA-700091

No. : 155-SE(B) Dated, Kolkata, the 13th July, 1999.

MEMORANDUM

Certain points have been raised in connection with the implementation of Memorandum No. 25-SE(B)/1M-102/98 dated 12.2.1999 of this Department, regarding the revision of Pay and Allowances of Teaching & Non-teaching Employees of the West Bengal Recognised Non-Govt.. Educational Institutions. The undersigned is directed by the Order of the Governor to say that the Governor is pleased hereby to make the following amendments in the Memorandum No. 25-SE(B)/1M-102/98 dated 12.2.99(hereinafter referred to as the said Memo.):

AMENDMENTS

1. At the end of Note 2 of Para 7 of the said Memo insert the following lines:

When the date of effect from which an employee elects to draw pay in the revised scale is also the normal date of his/her increment in the existing scale of pay, the increment in the existing scale of pay shall be allowed first and the pay in the revised scale shall be fixed there after.

2. At the end of para 8, insert the following lines:

Increment in the revised scales of pay shall be drawn with effect from 1st day of the month in which it becomes otherwise due.

3. For the existing sub-para (3) of para 12 substitute the following sub-para:

3. All teachers, including Physical Education teachers and Librarians of Secondary Schools who have improved/will improve their qualification or who were appointed with higher qualification in the subjects or group relevant to their teaching/appointment shall get higher scale of pay appropriate to their qualifications, with effect from the 1st January, 1996 or the date of improving qualification, whichever is latter, provided that such higher qualified teachers in the relevant subjects or group is justified as per approved staff pattern of that school. If such teacher is appointed through West Bengal School Service Commission, his/her pay will be fixed in the scale of pay as per his/her qualification mentioned by the West Bengal School Commission.

4. For the existing para 13 substitute the following para:

13. The Teaching and Non-teaching employees of aided/sponsored educational institutions who will come under the revised scale of pay as per memorandum No. 25-SE(B) dated 12.2.99, will be allowed to enjoy the retirement benefit as

per revised Pension Order of this Department according to the option exercised by them under West Bengal Recognised Non-Govt. Educational Institutions Employees (Death-Cum-Retirement Benefit) Scheme, 1981.

This order issues with the concurrence of Finance Department vide their U.O. No. Group P-1607 dated 28.6.1999.

By order of the Governor,

Sd/- Nikhilesh Das,

Secretary to the Govt. of West Bengal.

14. From a bare perusal of the above provisions, I have no hesitation to hold that the petitioner is not entitled to get post-graduate scale of pay in terms of provisions of the above memorandum in connection with his appoint as an assistant teacher in Mathematics in graduate scale of pay in Siliguri Boys' High School, Siliguri. Further, such appointment has been made by way of interim order dated August 27, 2004 passed in this writ application. Since this Court is deciding the issue involved in this writ application finally, the interim order will merge with the final decision of this case.

15. Considering the above facts and circumstances and on the basis of the observations made hereinabove, I find that the petitioner is entitled to get a relief by way a direction upon the respondent authorities to appoint him in the post of Assistant Teacher in Mathematics in Siliguri Region in a Higher Secondary School in post-graduate scale of pay in the next available vacancy. Secondly, it appears from the order dated August 27, 2004 that the petitioner accepted his appointment as an Assistant Teacher in Siliguri Boys' High School even after the submissions made on behalf of the state respondents that the above vacancy was earmarked for graduate scale of pay as per staff pattern of that school and without prejudice to the rights and contentions of the parties in this writ application. So, the petitioner is not entitled to get the benefit of difference in between post-graduate scale of pay and graduate scale of pay for rendering his above services till his appointment is made to any other school in the concerned region in the post of Assistant Teacher in Mathematics in postgraduate scale of pay.

16. Therefore, a writ of mandamus is issued commanding the respondents to appoint the petitioner, upon due recommendation to the post of Assistant Teacher in Mathematics in post graduate scale of pay in any Higher Secondary School in the Siliguri Region. It is made clear that the petitioner will be entitled to enjoy the post-graduate scale of pay from the date of his appointment in a Higher Secondary School in Siliguri Region as and when a vacancy for the post of Assistant Teacher in Mathematics in Post graduate scale of pay will occur in that school according to staff pattern. The respondents are further restrained from filling up any vacancy in the post of Assistant Teacher in Mathematics in postgraduate scale of pay in Siliguri Region until and unless the petitioner is

appointed in terms of the above directions.

17. This writ application is, thus, dispose of.

18. There will be, however, no order as costs.

19. Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.