

(1986) 05 CAL CK 0005
In the Calcutta High Court
Case No : C.O. No. 16401 (W) 1984

Bakul Rej and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 22-05-1986

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21, 23, 39(d)

Citation : 91 CWN 298

Hon'ble Judges : Bhagabati Prosad Banerjee, J

Bench : Single Bench

Advocate : Mani Bhusan Sirkar and Shephali Sarkar, for the Appellant; Santosh Chatterjee for State, Durgadas Roy for the Respondent No. 9, for the Respondent

Final Decision : Allowed

Judgement

Bhagabati Prosad Banerjee, J.—The point involved in this case in short is that whether the petitioners who are working in the respective schools for a number of years as approved part time and qualified teachers should be thrown out of employment and at the same time newly recruited teachers should be allowed to be appointed in permanent post created or fallen vacant without absorbing and/or regularising these part time teachers in the post of full time teachers. The petitioner Nos. 1 and 2 are the part time teachers of Burdwan Municipal Girls High School, Burdwan and were appointed as Assistant Teachers of the said school in Economics and Sanskrit. The petitioner No. 1 worked as Assistant Teacher temporarily from August 7, 1975 to May 15, 1977 in deputation vacancy for two consecutive years and thereafter she was appointed as a part time teacher in the said school on August 17, 1977 and is still serving in the said post as a part time teacher. The petitioner No. 2 was appointed in August 21, 1978 in the said school and since then, is serving in the said school as Assistant Teacher. The petitioner No. 1 is an M.A. with Special Honours in Economics who passed from the University of Calcutta in the year 1971 and also obtained B.Ed, degree from the University of Calcutta in the year 1973. She also obtained Sangit

Prabhakar Diploma in Hindusthani Classical Music (Vocal). The petitioner No. 2 is an M.A. in Sanskrit with Special Honours in Sanskrit from the University of Burdwan passed in the year 1973. She also obtained the B.Ed, degree from the said University in the year 1978.

2. The petitioner No. 3 is an M.Sc. in Mathematics from the Jadavpur University. He was appointed as a part time teacher of Mathematics on January 19, 1977 in the Higher Secondary Section of Manteswar Sagarbala High School. But during the period from March, 1978 to August 26, 1979, the petitioner No. 3 could not work in the said school, but joined again in the said post on August 27, 1979 and is still serving in the said post in the said capacity. The petitioners' main grievance in the writ application is that inspite of vacancy having been created, the petitioners have not been absorbed and/or appointed as full time teachers in full time post and the respondents were attempting to take direct recruits to such post by denying the petitioners' right of absorption to their respective posts in which they were working as part time teachers. The petitioners were not regularised and/or absorbed in the full time posts and were kept as part time teachers for these long years and the Respondents were taking steps to fill up the posts of full time teachers by new and fresh recruits and consequently the petitioners would loose their services altogether.

3. It was contended on behalf of the petitioners that the petitioners were entitled to be absorbed in such full time posts in view of the Government Order being Memo No. 150 Edn. dated September 15, 1978 which is Annexure "C to the writ petition where it was provided that -

The undersigned is directed to state that the staff pattern for the institutions imparting Higher Secondary Courses (Classes XI & XII) has not yet been finalised. Pending determination of the staffing pattern, Government have decided, as an interim measure, to allow the schools and independent institutions (not attached to any school or college but subject to the supervisory control of the West Bengal Board of Secondary Education) to make adequate arrangement for teaching in these classes by appointing qualified teachers on part time basis.

Subject to availability of fund and subject to fulfillment of the conditions herein specified by the schools and independent institutions, the Director of Secondary Education or officers authorised by him may release to the schools and institutions concerned necessary grant-in-aid for the purpose. Conditions to be fulfilled by a school or an independent institution to become eligible for grant-in-aid under the scheme are as follows :

i) The number of part-time teachers to be appointed, by a school independent institution shall be determined on the basis of sections of each class, number of subject and other relevant factors.

ii) Teachers selected for appointment should have the minimum qualification prescribed by the West Bengal Council of Higher Secondary Education.

iii) Since the school functions" as an integrated institution fees realised from the students of classes XI and XII should be credited to the fund of the school/ institution from October, 1978, Para 3 of the G.O No. 61-Edn. (HS) dated 11.5.78 stands modified to that extent.

iv) Selection and appointment of teachers will be made by the Managing Committee of each school/institution subject to the approval of the Director of Secondary Education or an officer, not below the rank of a District Inspector of Schools, authorised by him.

v) Schools/Institutions intending to appoint part time teachers should immediately send a report to the Director of Secondary Education or to the officer authorised by him to receive such reports, indicating the number of part-time teachers proposed to be appointed, the number of class-units the number of subjects introduced the number of students on the roll and furnish such other particular as the Director, may require for a proper assessment of the requirement of part time teachers appointed, in excess of the number approved by the Director of Secondary Education or the officer authorised by him in his behalf.

Since part-time teachers will be appointed in addition to the whole time teachers including the two sanctioned G.O. No. 61-Edh (H.S.) dated the 11th May, 1978, teaching load should be calculated after taking into account the teaching work allotted to the whole time teachers of the school within the prescribed work load. For the purpose of grant-in-aid, rates of remuneration for the part-time teachers will be as follows :

a) Rs. 75/- per month for a minimum work load of four periods per week.

b) Rs. 100/- per month for a minimum work-load of six periods per week.

Teaching work should be so distributed as to keep the number of part time teaches to minimum ensuring full utilisation of the services of the whole time and part time teachers of the schools/institutions.

3. Grant-in-aid may also be paid to a school/institution for payment of remuneration to the non-teaching employees for their additional works at the following rates:

a) Rs. 45/- per month to one Class III employees.

b) Rs. 30/- per month to one Class IV employees.

4. The expenditure on payment of salaries of the whole time and part time teachers sanctioned specifically for classes XI & XII, will be met from 1.10.78 out of the grant-in-aid payable to each school from the students of Higher Secondary Sections should be credited to the fund of the schools and should be taken into account in determining the amount of grant payable to each school/institution. The cases of school/institutions", if any, which are not covered by the salary defect scheme may be referred to the Government for further orders. The grant-

in-aid to the sanctioned from the current financial year to the Higher Secondary Institutions to enable them to meet incidental charges should be reduced proportionately and determined separately.

5. Sanction of the Governor is now accorded to the payment of grant-in-aid to eligible" schools/institutions under the conditions and according to principles set forth in the proceeding paragraph.

6. The charge involved will be met from the provision under the head "D-Pre-University Education-III-Assistance to non-Government Institution - state plan (fifth plan) Assistance to Non-Government Higher Secondary Institution Grant-in-Aid/ contributions" in the current years 277-Education (Excluding Sports & Youth Welfare) Budge.

7. This order issued with the concurrence of the Finance Department vide their U.O. No. Group B 2215 dated the 2nd September, 1978.

4. Reliance was also placed on the Memo No. 1464 (16) G.A./3B-49/81dated August 28, 1981 which, inter alia, pro-dives as follows :

2. The Managing Committee of a School wherein appointment of a teacher and/ or non-teaching employee is to be made shall first enquire of the District Inspector of Schools (S.E.) if there is any approved surplus staff to be absorbed in recognised schools or any dependant of the number of approved staff who died in harness of any physically handicapped candidates. If the District Inspector of Schools (S.E.) has a list of such candidates, he shall send the Memo (s) to the Schools within a fortnight for appointment in the post(s) if otherwise considered suitable, if, however, the Managing Committee, found it difficult to absorbed such person(s) they will intimate within a month the reasons thereof in writing to the District Inspector of Schools (S.E.), seeking his approval to make direct recruitment to the post in a manner laid clown hereinafter. The District Inspector of Schools (S.E.) will convey his decision in the matter within a month and his decision shall be final.

5. Admittedly, the petitioners have been working in the posts of assistant Teachers in the schools concerned which were all approved posts. According to the petitioners the posts in which they were working have been made permanent posts and accordingly they were entitled to be absorbed in such permanent posts as full time teachers as they worked as part time teachers in such part time posts for so many years and had acquired adequate experience in such posts.

6. It was further contended that as the circulars referred to above by the petitioners contain a promise or assurance that they will be permanently absorbed in such posts and on the basis of such assurance or promise contained in the said circulars, the petitioners continued in the said post for so many years with the hope and expectation that they would be appointed and absorbed in the full time posts, as and when available in this behalf and by that time, the age of the petitioners increased and also gained adequate experience as teachers and

that thereafter the respondents cannot resile from the said position and cannot throw the petitioners out of employment altogether and at the same time fill up such posts by freshly recruited teachers who have no or little experience in teaching profession. It was further contended that there has been no abolition of the posts to which the petitioners have been working and that there was no bona fide reasons or ground for such abolition, if any, and at the time of such appointment, the necessity of creation and retention of such part time posts as considered and it was found that such teachers for teaching such subject were necessary in the interest of the education in the schools concerned. It was further stated that if fresh recruitment or appointment is made in such schools in such posts, in that event, the petitioners would be rendered surplus and consequently the same would be abolished. It was further contended by the petitioners that since their respective appointments have been made in terms of the Government Order in Memo No. 150 Edn. dated 15th September, 1978, rights had accrued to them to be absorbed in such full time posts before any direct recruitment could be made by-passing and/or circumventing the right of the petitioners to be absorbed in such posts.

7. The post of Assistant Teacher in Economics in the Burdwan Municipal Girls' High School was formerly a part time post in which the petitioner No. 1 was appointed and has worked at all material time as a part time teacher. The said post was a full time post sanctioned under the District Inspector of Schools (S.E.), Burdwan by the Memo No. 7639(6) dated 26.3.80 for Higher Secondary Unit of the Schools. The part time post of Assistant Teacher in Sanskrit in Burdwan Municipal Girls' School was a part time post in which the petitioner No. 2 was appointed and worked at all material times. It was alleged that at the instance of the Headmistress of the said school, the respondent No. 9, the Sanskrit stream of the School had been abolished with effect from July, 1981 in a motivated and designed manner. It was contended on behalf of the respondent that the petitioner No. 2 had no locus standi and/or any right or claim to be absorbed as a permanent incumbent or a full time teacher when the Sanskrit stream has been abolished. According to the petitioners before such appointment was made for teaching in these subjects, the principles laid down by the Government's Circular in this behalf were observed and after proper assessment of the need, such appointment was made. It was further contended that in order to defeat the claim and/or right of the petitioner to be absorbed in such post, the respondents designed to abolish such posts and for that purpose, the school authorities adopted tactics under which no student was admitted with Sanskrit. It was further contended that in respect of the school in which the petitioner No. 2 was serving, there were altogether 12 sanctioned posts of Assistant Teachers and there were altogether 7 part time teachers in the school in Arts Stream. Out of 7 part time teachers, 2 of them left the school of their own. Out of the 5 remaining part time teachers in the Arts Stream of the school, 3 of them had already been absorbed as full time teachers whereas the petitioner Nos. 1 and 2 were the only two unfortunate teachers who have not been so absorbed although the petitioner

Nos. 1 and 2 satisfied and conformed all the requirements of being appointed as permanent/full time teacher in the Arts Stream of the school. According to the respondents, the respondents absorbed 3 part time teachers as full time teachers as the exigencies of the circumstances required. The petitioner Nos. 1 and 2 contended that this absorption of 3 part time teachers leaving out the petitioner Nos. 1 and 2 clearly amounts to discrimination violative of Articles 14 and 16 of the provision of the Constitution of India, besides the same was in clear violation of the provisions of the circulars mentioned above.

8. So far the petitioner No. 3 is concerned, the case of the petitioner No. 3 is that there was a vacancy in the Science Stream and the post being that of mathematics and the petitioner No. 3, is a fully qualified teacher in mathematics, the petitioner No. 3 should be appointed and absorbed in the same post.

9. Rule 28(1) of the Rules for Management of Recognised Non-Government Institutions (Aided and Non-aided), 1969 provides as follows:

28 Power of Committee. (1) In an aided institution, the Committee shall subject to the approval of the Director or any officer authorised by him, have the power

(i)....

(ii) to appoint teachers and other employees on temporary basis against permanent or temporary vacancy, if available, within the sanctioned strength of teachers and another employee, 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.

10. Under the said Rules, the Managing Committee have no power and/or authority and/or jurisdiction to make any appointment of teaching and non-teaching staff and that the Committee can exercise such power subject to the approval of the Director of School Education and/or any officer authorised by him. In the instant case, the Managing Committee was given power to make such appointment in terms of the circulars dated 15th September, 1973 set out hereinbefore. From this it is crystal clear that the appointment of the petitioners in their respective posts as part time teachers were made by the Managing Committee of the Schools and that it was well within the knowledge of the respondents that such appointments were made and these teachers are working in these posts and further it is not disputed that at the time of such appointment of the petitioners, it was found that such appointment was necessary on the basis of the principles laid down in the said circular. In any event, the petitioners who have worked for so many years in such part time posts, cannot be dealt with in the manner in which the respondents wanted to deal with them.

11. These teachers are admittedly highly qualified teachers and had the requisite qualifications for appointment: in such permanent and full time posts and that admittedly these teachers acquired sufficient experience in the said school and that it is not the case of the respondents that as because these petitioners were

found unsuitable or their performances were not upto the mark, they have been marked off for such arbitrary treatment of removal from service. In the instant case, the petitioners were reasonably expecting to be absorbed and/or appointed on full time basis whereas the respondent desired to fill up these permanent and full time posts of freshly recruited persons who have no or little experience in this behalf. Now the question is whether the respondents can terminate the services of these petitioners after as lapse of many years for no fault of them and when they were fully qualified and experienced teachers. Article 41 of the Constitution provides that "the State shall within the limits of its economic capacity and development, make effective provision for securing right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement and in other case of under served want. "Of course, Article 41 is a Directive Principle of State Policy and is in Chapter IV of the Constitution of India. Mr. Moni Bhusan Sirkar, learned Advocate appearing on behalf of the petitioners, contended that in view of the provision of Article 41 of the Constitution of India, in the facts and circumstances of the case the respondents could not avoid their liability to provide employment to the petitioners inasmuch as the posts are available and that the same was within the economic means of the State and not that the State had to shoulder heavy responsibility in finding out jobs for the petitioners. Mr. Sirkar pointed that the State under our Constitution could not be directed to provide employment to its citizens, but when posts are available and when the petitioners who are highly qualified, eligible and experienced and are rotting in part time, posts and when the scope for employment in permanent and full time posts, are available, the same could not be denied and on the contrary, the same could not be denied and on the contrary, the said posts could not be filled up by freshly recruited teachers. This, according to Mr. Sirkar, would be contrary to the constitutional goal and contrary to the public policy. The Supreme Court of India in *Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others*, at page 1806, paragraph 61 held that "The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Granville Austin's observation brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and other will lose its efficacy. They are like twin formula for achieving the social revolution, which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bed rock of the balance between Parts III and IV. To give absolute primacy to one over other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and Directive Principles is an essential feature of the basis structure of the Constitution." Further the Supreme Court of India in the case of *Randhir Singh Vs. Union of India (UOI) and Others*, held that the persons performing equal work should be given equal pay and considered the scope and effect of the provision of Article 39(d) in the Part IV of the Constitution of India and held that

It is true that the principle of "equal pay for equal work" is not expressly declared by the Constitution to be a fundamental right. But had certainly is a constitutional goal. Article 39(d) of the Constitution proclaims "equal pay for equal work for both men and women" as a Directive Principles of the State Policy...Directive principles, as has been pointed out in some of the judgments of this Court, have to be read into the fundamental rights as a matter of interpretation.

12. in the instant case it appears that the petitioners have been paid a monthly sum of Rs. 75/- for such part time work which, in my view, is nothing but a form of "begar" which is prohibited under Article 23 of the Constitution of India. In these days of inflation it is unthinkable that persons having such high academic qualification and experience would be paid a monthly pay of a sum of Rs. 75, when even a day labourer is not available at such monthly remuneration. Further in this case all other part time teachers of the said school had been absorbed in permanent and full time posts leaving the petitioners who had been marked off for arbitrary discrimination and the Respondents failed to disclose any reason or ground for such discriminatory treatment. The Supreme Court of India in the case of *Sadhuram Bansal Vs. Pulin Behari Sarkar and Others*, had protected the interest of some persons who are in possession with unclean hands, but who came for shelter and built in hutments, considered the concept of social justice as provided in our constitution. In that case a property was sold in auction by the Official Receiver appointed by this High Court and thereafter some persons who were admittedly in unauthorised possession of the disputed premises which was sold in auction and who had built hutments and were staying there, moved an application before this court, whereupon a single Judge of this court rejected the application holding that these persons were trespassers and had no right to be in possession of the premises after the Official Receiver had been appointed Receiver and further it was held that the parties had no right to grant any leave or licence after the property came in the custody of the Official Receiver as Receiver appointed in the suit. Thereafter an appeal was filed from the said decision to the Division Bench of this Court and the Division Bench was of the view that the offer made by these persons to pay a sum of Rupees One Lakh more for the purchase of the premises in dispute should be accepted. In that decision at page 1491 paragraph 70 it was observed by the Supreme Court that "The concept of social justice is not foreign to legal justice or social well-being or benefit to the community rooted in the concept of justice in the 20th Century. The Challenge of social justice as I see it, is primarily a challenge to the society at large more than to the court immediately. Social Justice is one of the aspirations of our constitution. But we, the Courts, we must remember, are pledged to administer justice as by law established. In formulating the concept of justice, however inarticulate factors that large member of human beings should not be dislodged from their possession if it is otherwise possible to do so cannot but be a factor which must and should influence the minds of judges in the facts and circumstances of the case. It is true that the persons who were alleged to be

in possession, are with unclean hands, but they came for shelter and built in hutments. They do not want to legitimate their stay by illegal entry, they want to be rehabilitated at a competitive bargain price. Should they be denied with the opportunity on the ground of their original illegitimacy? I am definitely of the opinion that in these circumstances they should not be so denied rehabilitation. In administering justice according to law, in this case, no law is breached is the view taken by the Division Bench of the Calcutta High Court. The American Bar Association in its report in 1964 had observed that jurisprudence has shifted away from fine spun technicalities and abstract rules to practical justice to a recognition of human beings, as the most distinctive and important feature of the universe which confronts our senses and of the function of law as the historic means of guaranteeing that prominence. (See 14th Amendment Centennial Volume edited by Bernard Schwartz page 10)" It is true that original entry was illegal and we are sometime urged "to do" a great right, do a little wrong". (See plea of Bassanio in Merchant of Venice). In this case, however, court has done no legal wrong at all. The court has only ignored the non-compliance of not seeking court's leave for alleged grant of licence. In administering justice, social or legal, we do well bear in mind the words of Justice Holmes "The life of law has not been logic; it has been experience. The felt necessities of time, the prevalent moral and political theories, institutions of public policy avowed or unconcious, even the prejudices which judges share that their fellow-men have had a good deal more to do than the syllogism in determining the rule by which the man should be governed....The felt necessity of time and in this case the convenience of the situation and the need for adjusting the rights of a large number of people without deprivation of any accrued right of anybody would be justice according to law. Before we reject social justice as something alien to legal justice, we should remember that a meaningful definition of the rule of law must be based on the realities of contemporary societies and the realities of contemporary aspects are - men are in acute shortage of living accommodation and if they are prepared to bargain and rehabilitate themselves on competitive terms, they should be encouraged and no technical rules would stand in their way. That would be justice "by highways" and no infiltration "by bye-lanes". In the preamble of the Constitution of India it was provided that the other things "JUSTICE, Social Economic and Political". The Supreme Court of India in the case of His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, held that the objectives specified in the preamble contain the basic structure of our constitution. So the State cannot be allowed to deny the petitioner the social justice. It was also held by the Supreme Court in the case of Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, , that right to life guaranteed in Article 21 of the Constitution of India includes right to livelihood.

13. Applying the aforesaid principles of social justice and right to livelihood, in my view, when the petitioners have been appointed as qualified teachers and when the petitioners have acquired a vast experience, it will be doing a great wrong and injustice to throw the petitioners out of employment and/or to allow

there to continue in such a precarious state of affairs when nobody has been appointed in the full time and permanent posts and as such the question of deprivation of any accrued right of anybody in this case would not arise at all if the petitioners are absorbed and/or appointed in full time and permanent posts in the respective schools in which the petitioners are serving by the respondents. Now turning to the facts of this case, the respondents should appoint the petitioners in their respective schools in permanent and full time vacancies in the respective schools in view of the circulars referred to by the petitioners and the law laid down by the Supreme Court of India in this behalf in order to secure justice, social or legal and for securing the right to work as provided in Article 41 of the Constitution of India.

14. Accordingly, I hold that the respondents should in the facts and circumstances of the case appoint the petitioners in full time and permanent posts and if necessary, to create such posts considering the fact that at the time of initial appointment, it was felt the necessity of appointing such teachers and that the petitioners were kept in the said post for a number of years and at this stage it is not open to the respondents to contend that the petitioners who were holding such posts, could not be kept for any reason whatsoever. But this is not the case. It has not been disputed that the petitioners were not qualified and/or eligible and/or had no requisite experience in this behalf. The petitioners should be absorbed in available vacancies and in respect of the petitioner No. 2, if the post of a Sanskrit Teacher is not available, steps should be taken forthwith to absorb the petitioner in other suitable post according to the qualification of the petitioner and/or in the alternative, to create such a post in that school so that the petitioner be appointed in a substantive post on regular basis in the school where they have been serving so long, and that this direction is given in the interest of these teachers and for protecting them from being unemployed after serving the school with distinction for so many years. It was the duty and/or the obligation on the part of the respondents to regularise the service of the petitioners by putting them in full time posts of teachers of the said schools long back and this court cannot permit the respondents to throw the petitioners out of employment according to their sweet will on any technical rule which will deny their right to service and right to adequate means of livelihood. This is the minimum price which the respondents have to pay if we desire a society to be governed by the rule of law and to administer social justice.

In the result, the writ application succeeds. Let a writ in the nature of mandamus do issue commanding the respondents to absorb the petitioners in their respective posts and/or available posts or permanent and full time posts and if necessary, to create new posts to accommodate the petitioners forthwith.