

(2007) 04 CAL CK 0037
In the Calcutta High Court
Case No : F.M.A. No. 1779 of 2003

Banibrata Ghosh	Vs	APPELLANT
State of West Bengal and Others		RESPONDENT

Date of Decision : 02-04-2007

Acts Referred:

Citation : (2007) 3 CALLT 390 : 111 CWN 495

Hon'ble Judges : Pranab Kumar Chattopadhyay, J;Arunabha Basu, J

Bench : Division Bench

Advocate : Debabrata Roy, Kashi Kanta Moitra, Alok Ghosh and Sankar Haider, for the Appellant; Sandip Srimani and Somnath De for Respondent Nos. 1, 2 and 4, for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : State of West Bengal and Others Vs. Banibrata Ghosh and Others, AIR 2009 SC 1845 : (2009) 121 FLR 220 : (2009) 2 JT 159 : (2009) 2 SCALE 170 : (2009) 3 SCC 250 : (2009) 1 SCC(L&S) 638 : (2009) 2 SCR 790 : (2009) 5 SLR 1

Pranab Kumar Chattopadhyay , J.—This appeal has been preferred at the instance of the writ petitioner from the Judgment and order dated 15th July, 2003 passed by the learned single Judge while deciding the writ petition being CO. No. 18711(W) of 1992.

2. The facts of this case are briefly narrated hereinafter:

A vacancy was caused in the post of Assistant Teacher (Bio-science) in Shimulia High school; a recognised aided high school in the district of Nadia as the permanent teacher went on leave for six months initially. The Managing Committee decided to fill up the said leave vacancy and obtained permission from the District Inspector of Schools (S.E.), Nadia in this regard. An advertisement was thereafter published in the daily Amrita Bazar Patrika on December 11, 1990 inviting applications from eligible candidates. In response to

the said advertisement, the appellant herein alongwith others submitted applications.

Upon completion of the selection procedure, a panel was prepared empanelling three applicants where the appellant featured at the first position and the same was forwarded to the District Inspector of Schools (S.E.), Nadia, who approved the same on January 18, 1991. Thereafter, the Managing Committee appointed the appellant on temporary basis on January 23, 1991 in the said leave vacancy for a period of six months with effect from January 24, 1991 to July 2, 1991. Such appointment was duly approved by the concerned District Inspector of Schools (S.E.), Nadia on February 14, 1991. As the leave vacancy continued beyond six months and as the panel already prepared was for a period of one year, the Managing Committee, on expiry of the initial period of six months, extended the period of appointment for a further period of six months. Thereafter, again the District Inspector of Schools (S.E.), Nadia by an order informed the Managing Committee that the candidate, who had stood first amongst the empanelled candidates, i.e. the appellant herein, could be reappointed for a further period of six months. The said order was complied with.

After completion of one year, the post was again advertised by the school authorities upon obtaining necessary permission from the District Inspector of Schools. The school authorities published an advertisement in the newspaper "Overland" inviting applications from eligible candidates. The appellant herein applied again alongwith others. In accordance with the Recruitment Rules, the candidates were called for interview and a panel was prepared on the basis of performance of the candidates in the said interview. The appellant stood first in the panel. The school authorities appointed the appellant as an Assistant Teacher in the said leave vacancy w.e.f. 3rd April, 1992 till 30th June, 1992. The said appointment of the appellant was duly approved by the District Inspector of Schools (S.E.), Nadia by Memo dated June 2, 1992.

The original appointee, who had gone on leave, thereafter resigned from service on and from July 2, 1992 as a result whereof a substantive vacancy arose in the permanent sanctioned post of Assistant Teacher in the Bio-science group. On July 2, 1992, the appellant was appointed on ad-hoc basis for a further period of six months w.e.f. July 3, 1992 by the school authorities subject to the condition of approval by the District Inspector of Schools (S.E.). Nadia.

On August 11, 1992, the appellant submitted a representation stating, inter alia, that he had worked in the school as Assistant Teacher on and from January 24, 1991 to June 30, 1992, in the leave vacancy that arose due to leave of Sri Sankar Biswas, Assistant Teacher and after submission of resignation by him, the appellant was working on ad hoc basis and as such he may be regularised in the said vacant post.

In view of non-consideration of the aforesaid representation of the appellant and alleged inaction on the part of the concerned District Inspector of Schools (S.E.),

Nadia, a writ petition was filed before this Court by the appellant. Upon hearing the submissions of the respective parties, learned single Judge of this Court passed an order on December 15, 1992 directing the District Inspector of Schools (S.E.), Nadia to regularise the appointment of the appellant within January 15, 1993. Since the aforesaid order of this Hon''ble Court dated December 15, 1992 was not complied with by the concerned authority, the appellant herein filed a contempt application wherein certain directions were issued by the learned single Judge. Ultimately, the District Inspector of Schools (S.E.), Nadia by Memo dated October 5, 1993 accorded approval to the appointment of the appellant as an Assistant Teacher of the concerned school w.e.f. January 4, 1993.

The aforesaid approval was accorded by the District Inspector of Schools pursuant to the office order issued by the Director of School Education, West Bengal by Memo dated 13th August, 1993 and the said office order was issued by the Director of School Education, West Bengal in view of the order passed by the learned single Judge of this Hon''ble Court on 15th December, 1992 and subsequently on 16th July, 1993. The said office order issued by the Director of School Education, West Bengal on 13th August, 1993 is quoted hereunder:

Memo No. 1339 - GA/4G - 761/80 Dated : 13/8/1993

From : The Director of School Education, West Bengal.

To: The Dist: Inspector of Schools (S.E.), Nadia, P.O. Krishnanagar, Dist. Nadia.

Sub: C.O. No. 1871(W)/92. Banibrata Ghosh v. State of West Bengal and Ors. Reg: Simulia High School, Nadia. In reference to his memo No. 109/Law/SE, dated 25.6.93 on the subject indicated above, the undersigned has to state that the service of the Petitioner, Sri Banibrata Ghosh as an Asstt. Teacher of the school, may be regularised Vice Sri Sankar Biswas, in compliance with the order of the Hon''ble High Court dated 15.12.92 in the matter read with the order of His Lordship Hon''ble Justice D.K. Basu dated 16.7.93 in CO. No. 1871(W)/92. He should also furnish a copy of the report to be submitted to His Lordship Hon''ble Mr. Justice on 20.8.93 to this directorate.

Sd/- J. Dutta for Director of School Education West Bengal 13.8.93.

3. Even after the aforesaid regularisation of the service of the appellant/writ petitioner pursuant to the earlier interim order passed by this Hon''ble Court, learned single Judge while deciding the writ petition finally again considered the issue relating to regularisation of the service of the said appellant/writ petitioner and quashed the approval already granted to the appellant/writ petitioner and further directed the school authorities to fill up the permanent vacancy in accordance with law. It is true that the service of the writ petitioner was approved pursuant to the earlier interim order passed by this Court but the competent authority of the State Government including the Director of School Education and the District Inspector of Schools concerned did not challenge the

said interim order before the Appellate Court and implemented the same unconditionally.

4. Under the aforesaid circumstances, it is now to be decided whether the learned single Judge was justified in considering the issue relating to approval of service of the writ petitioner once again at the time of final hearing of the writ petition when such approval was granted by the competent authority pursuant to the earlier order of this Court without raising any objection and imposing any condition. Furthermore, it has also been argued on behalf of the appellant that when the leave vacancy ceased to exist pursuant to the resignation of the teacher holding the permanent post, self-same procedure is not required to be observed and followed once again in order to fill up the said permanent vacancy instead of regularising the service of the teacher already appointed following the prescribed procedure against the said leave vacancy.

5. In the present case, the appellant/writ petitioner herein was undisputedly selected against the leave vacancy upon following the prescribed procedure but the concerned teacher holding the permanent post since tendered resignation, the said leave vacancy virtually converted into a permanent vacancy. Mr. Srimani, learned Counsel of the respondent authorities submits that after cessation of the leave vacancy pursuant to the resignation of the teacher holding the permanent post, the vacancy in question should have been treated as permanent vacancy and filled up following the prescribed procedure. There is no dispute that after resignation of the teacher holding the permanent post, the initial leave vacancy ceased to exist and the vacancy had to be treated as permanent vacancy.

6. The duration of the leave vacancy was very short. However, the prescribed procedure for recruitment of teachers both for leave and permanent vacancies is substantially the same. In the instant case, leave vacancy occurred as a result of leave of absence of the erstwhile teacher (Bio-science), Shri Sankar Biswas, who had resigned from the said post after expiry of the leave period and as a result whereof the sanctioned permanent post of Assistant Teacher in Bio-science fell vacant on permanent basis. There is no doubt that the appellant/writ petitioner was initially appointed to a leave vacancy. The writ petitioner was, however, appointed following the recruitment procedure after obtaining prior permission of the concerned District Inspector of Schools. The said writ petitioner had to undergo selection in accordance with recruitment procedure and was appointed after approval of the panel, which the appellant had topped in order of merit. Post appointment approval was given by the said District Inspector of Schools, Undisputedly, several applicants including the appellant herein submitted applications and were interviewed and finally again the Selection Committee following the recruitment procedure prepared the panel where the appellant/writ petitioner secured first position. The said panel was thereafter, approved by the District Inspector of Schools (S.E.), Nadia. The initial appointment in the leave vacancy of the appellant/writ petitioner was for a period of six months and

subsequently following the prescribed procedure the said appellant was again appointed in the said leave vacancy and on both the occasions not only were several candidates interviewed but the panel prepared by the Selection Committee was also duly approved by the concerned District Inspector of Schools. The said District Inspector of Schools on both the occasions accorded post appointment approval to the appointment of the appellant/writ petitioner in the leave vacancy.

7. There is no dispute that the appellant/writ petitioner has the requisite qualification and was selected in the leave vacancy following the prescribed procedure by the duly constituted Selection Committee. The said Selection Committee upon adjudging the qualification and efficiency of the appellant placed him at the top of the panel and the panel was also approved by the concerned District Inspector of Schools following the prescribed procedure. The writ petitioner was duly appointed by the competent authority, may be in a leave vacancy and such appointment was also approved by the concerned District Inspector of Schools.

8. The learned single Judge in the impugned Judgment specifically observed that it is possible, since the offered job was for a limited period, many candidates better than the appellant/writ petitioner did not respond to the advertisement. We fail to understand how the learned single Judge conceived of such possibility in absence of proper materials. Undisputedly, no such candidate better than the appellant/ writ petitioner ever approached the respondent authorities by submitting any representation nor any application has been filed before this Court questioning the approval of the appointment of the said appellant/writ petitioner. Therefore, we do not approve the aforesaid observation of the learned single Judge.

9. Mr. Srimani, learned Counsel of the State-respondents referring to the decision of the Supreme Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, submits that the service of the appellant could not be regularised and/or approved as a permanent Assistant Teacher of the concerned school without following the prescribed recruitment process. In the aforesaid decision, Supreme Court observed:

3. ...But, a regular process of recruitment or appointment has to be restored to, when regular vacancies in posts, at a particular point of time, are to be filled up and the filling up of those vacancies cannot be done in a haphazard manner or based on patronage or other considerations. Regular appointment must be the rule.

10. Initial appointment of the appellant in the leave vacancy was made on the basis of selection upon following the advertisement in the newspaper and considering the performance of various candidates, who applied in terms of the said advertisement alongwith the appellant herein. The panel was prepared by a duly constituted Selection Committee upon adjudging the merit of the respective

candidates wherein the appellant secured first position and the said panel was forwarded by the Managing Committee to the concerned District Inspector of School (S.E.), Nadia. The said panel was thereafter, approved by the said District Inspector of Schools as a result whereof the appellant was appointed and subsequently the said appointment was also approved by the concerned District Inspector of Schools. It cannot, therefore, be said that the appointment, in the instant case, was made through the backdoor or by illegal means without following the procedures prescribed.

Therefore, the principles decided by the Supreme Court in the case of Secretary, State of Karnataka and Ors. v. Umadevi (3) and Ors. (supra) has no manner of application to the facts of the present case.

11. The regularisation of the service and approval of appointment of the appellant was also opposed by the respondent No. 5 on identical grounds. Mr. Debabrata Roy, learned Advocate of the respondent No. 5 also relied on the aforesaid decision of Secretary, State of Karnataka and Ors. v. Umadevi (3) and Ors. (supra) and urged before this Court that the appellant is not entitled to enjoy the status of permanent employee. Mr. Roy further submits that regularisation cannot be the mode of appointment and Court cannot direct regularisation of Ad-hoc appointee dehors the rules.

12. In the present case, the appellant was admittedly appointed to the leave vacancy following the prescribed recruitment rules and it has been urged by the learned Counsel of the appellant that similar procedures should not be repeated once again since the leave vacancy has been converted into a permanent vacancy due to the resignation of the permanent Assistant Teacher.

13. As discussed hereinbefore there has been proper compliance with the prescribed recruitment rules and procedures in the matter of initial appointment of the appellant to the post of Assistant Teacher of the concerned school in the leave vacancy which subsequently became a permanent vacancy due to the resignation of the concerned permanent teacher. Since the selection of the appellant to the leave vacancy was made following the prescribed recruitment procedures, which are substantially similar in case of the permanent vacancy in connection with the sanctioned permanent post, we are unable to hold that the regularisation of the service and approval of the appointment of the appellant to the said post of Assistant Teacher are violative of the prescribed recruitment rules and procedures.

14. The service of the appellant/writ petitioner was regularised by the Director of School Education, West Bengal by the Memo dated 13th August, 1993 and subsequently approved by the District Inspector of Schools by Memo dated 5th October, 1993. It has been argued on behalf of the State-respondents that the aforesaid decision regarding regularisation of the service and approval of the appointment of the appellant had to be taken under compelling circumstances pursuant to the specific direction passed earlier by this Court. We are, however,

unable to accept the aforesaid contention since the State-respondents did not choose to prefer any appeal from the said order passed earlier by this Court. Furthermore, the Director of School Education, West Bengal regularised the service of the appellant and the District Inspector of Schools approved the same unconditionally. The said authorities, namely, the Director of School Education, West Bengal and the District Inspector of Schools did not even choose to regularise the service and approve the appointment of the appellant subject to final decision in the pending writ petition. Therefore, the decision of the concerned respondents namely, the Director of School Education regarding regularisation of the service of the appellant/writ petitioner as mentioned in Memo dated 13th August, 1993 and subsequent approval of the appointment pursuant to the order issued by the District Inspector of Schools by Memo dated 5th October, 1993 cannot be upset and/or quashed by any subsequent decision since the aforesaid decisions of the Director of School Education and the District Inspector of Schools (S.E.), Nadia were not the subject matter of dispute in the pending writ petition filed on behalf of the appellant/writ petitioner herein.

15. Admittedly, pursuant to the earlier interim order passed by this Court, the aforesaid respondents took specific final decisions with regard to the regularisation of service and approval of appointment of the appellant herein without imposing any condition. In any event, the validity and/or correctness of the aforesaid decisions of the respondent authorities cannot be examined by this Court while deciding the writ petition finally when the aforesaid decisions were taken by the said respondents pursuant to the specific order passed earlier by this Court in this writ petition. The respondent authorities instead of complying with the aforesaid decisions passed earlier by this Court could have challenged the same before the appellate forum. The said authorities, however, decided to implement the aforesaid direction passed earlier by this Court and issued unconditional specific final orders regarding regularisation of service and approval of appointment of the appellant herein. In the aforesaid circumstances, neither the respondent authorities can question the validity and correctness of the said order nor this Court can quash the same by any subsequent order after implementation of its earlier order by the concerned respondents.

16. The learned single Judge specifically observed that because it was a leave vacancy/many people more competent than the appellant did not offer themselves for the post in question. We are unable to affirm the aforesaid view of the learned single Judge as there is no material wherefrom it would appear that candidates did not offer themselves for the post in question considering the vacancy in question was a leave vacancy. Admittedly, neither any representation was submitted before the respondent authorities nor any application was filed before this Hon''ble Court by any competent candidate challenging the decision of the Director of School Education regarding regularisation of service or the subsequent approval of the appointment by the District Inspector of Schools concerned. The learned single Judge made the aforesaid observation in absence of any materials on record and, without any reasonable basis.

17. The appellant herein was appointed to the post of Assistant Teacher in the concerned school in the leave vacancy upon fulfillment of the eligibility criteria and following the prescribed recruitment procedures, which is virtually similar and identical in respect of selection to a permanent post and therefore, when the leave vacancy was subsequently converted into a permanent vacancy due to the resignation of the permanent teacher the appointment of the appellant made earlier against the leave vacancy upon observing the recruitment procedures should be automatically regularised against the permanent vacancy instead of repeating the same recruitment procedures once again for filling up the permanent vacancy. In our opinion, the appellant herein is entitled to enjoy the benefit of the unforeseen changed situation.

18. In any event, the respondent authorities in compliance with the earlier direction passed by this Court already regularised the service and approved the appointment of the appellant way back in 1993 without imposing any condition and therefore, the learned single Judge should not have quashed the same in 2003 after lapse of ten years while deciding the writ petition finally.

19. For the aforementioned reasons, we set aside the impugned Judgment and passed by the learned single Judge, as, in our opinion, the said decision of the learned single Judge is unsustainable both in fact and in law. Accordingly, we direct the respondents to treat the appellant as an approved Assistant Teacher of the concerned school pursuant to the Memo dated 13th August, 1993 issued by the Director of School Education, West Bengal and the subsequent order of approval issued by the District Inspector of Schools (S.E.), Nadia by the Memo dated 5th October, 1993. The respondent authorities are, therefore, directed to allow the appellant to resume his duties as an approved Assistant Teacher of the concerned school immediately. Since the appellant herein was not allowed to remain in service pursuant to the impugned order of the learned single Judge, the respondent authorities herein are directed to pay only 50% of the back wages for the period the said appellant was out of service. The appellant herein will also be entitled to receive all other admissible service benefits as duly approved Assistant Teacher of the concerned school pursuant to the order of approval.

This appeal is, therefore, allowed. There will be, however, no order as to costs.

Let urgent xerox certified copy of this Judgment and order, if applied for, be given to the learned Advocates of the parties on usual undertaking.

Arunabha Basu, J.

20. I agree.

Later:

After pronouncement of the Judgment, the learned Counsel of the State-respondents prays, for stay of operation of the Judgment and order. We find no reason to grant such stay. Accordingly, the prayer for stay is refused.