

(2005) 06 CAL CK 0016
In the Calcutta High Court
Case No : W.P.S.T. No. 1282 of 2001

Biswanath Dutta and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 13-06-2005

Acts Referred:

West Bengal Regulation of Recruitment in State Government Establishments and Establishments of Public Undertakings, Statutory Bodies, Government Companies and Local Authorities Act, 1999 — Section 4

Citation : (2006) 1 CHN 182

Hon'ble Judges : S.P. Talukdar, J;Aloke Chakrabarti, J

Bench : Division Bench

Advocate : Ashish Kumar Sanyal and Nisith Mukhopadhyay, for the Appellant; Tarun Roy and Chandra Sekhar Bag, for the Respondent

Judgement

Aloke Chakrabarti, J.—Petitioners are spray workers under District Health Department in Hooghly and as seasonal workers they were continuously working for more than five years without any break since the year 1990. Some of the petitioners belonged to scheduled caste, some belonged to scheduled tribe and backward caste.

2. Petitioners were engaged for the purpose of eradication of malaria, kalazar and encephalitis.

3. By Government circular dated 3rd August, 1979, the Government of West Bengal formulated some principles to be followed in the matter of absorption of casual and such other categories of workers. Subsequently by another circular dated 28th August, 1980 the casual workers already in employment on 3rd August, 1979 and working continuously, were held eligible for absorption in regular establishment in the same manner as laid down in paragraph 3 of the earlier circular dated 3rd August, 1979. By a further circular dated July 9, 1981 such casual workers were to be considered for absorption against any vacancy in Group "D" posts subject to their fulfillment of the conditions prescribed. The

Government again by its circular dated 13th March, 1996 laid down the principles to be followed in the matter of absorption of casual and such other categories of workers.

4. When a memorandum was issued by the Department of Health and Family Welfare, Government of West Bengal, asking for report showing the number of seasonal spray workers absorbed since 3rd August, 1979, the petitioners made a representation to the concerned authority for their absorption in regular establishment. The Deputy Chief Medical Officer, by his letter dated 21st March, 1996 sent a list of spray workers who have completed five years of service. The Administrative Officer of the office of Chief Medical Officer of Health, Hooghly recommended the case of the petitioners holding that 100 spray workers had been found eligible for absorption to the regular establishment having completed engagement in perennial type of job for five years.

5. In similar circumstances seasonal DDT spray workers of Murshidabad moved a writ petition being Civil Rule No. 2058(W) of 1991 seeking absorption in regular service on permanent basis on condition of age bar and thereupon by order dated 8th December, 1994 the Court directed absorption of the DDT spray workers in regular establishment under Department of Health, Government of West Bengal and restrained the authorities from taking any step for fresh recruitment before the said DDT spray workers were absorbed.

6. On refusal of the respondents to absorb the said spray workers in terms of the said order, a contempt petition was moved whereupon a contempt rule was issued. In course of hearing of the said rule, the Government issued a circular dated 13th March, 1996 declaring a principle to be followed in the matter of absorption and by order dated 16th April, 1996 the contempt rule was ultimately discharged.

7. On an appeal (FMAT No. 1466 of 1996) from the said order though the judgment of the Trial Court was affirmed but for the purpose of fixing the time-limit to consider their absorption in service, fresh application before the State Administrative Tribunal was directed. Accordingly, the said Tribunal was moved by filing Original Application No. 199 of 1997 which was dismissed by the learned Tribunal holding that dispute between the parties had been finally decided and the application was barred by the principle of res judicata.

8. A writ petition was filed being WPST No. 2290 of 1997 by the said writ petitioners in this Court whereupon the Division Bench decided the same on 15th September, 1997 holding that the principle of res judicata did not apply as no time-limit was earlier fixed and the matter was remanded back to the Tribunal.

9. The Tribunal decided the matter afresh on 12th February, 1998 directing the State authorities to give appointment to the seasonal DDT spray workers according to their seniority in accordance with rules against the existing vacancies and if the vacancies are not existing at the moment then the State authorities would give appointment to the unemployed candidates without

consideration of their age bar as and when vacancies would arise and no outsider should be appointed until at the spray workers were given appointment. Three months time period was fixed for the said purpose.

10. Challenging the said judgment of the Tribunal the State authorities moved writ petition being WPST No. 260 of 1998 which was dismissed by the Division Bench on May 13, 1999 clarifying the notification dated 3rd August, 1979, 20th August, 1980 and 3rd March, 1996 and approving the view taken by the learned Tribunal. The SLP filed before the Hon'ble Supreme Court filed by the State authorities was dismissed on 1st February, 1999.

11. Petitioners also filed an application being O. A. No. 1635 of 1998 in the Tribunal with a prayer for their absorption in permanent employment against the vacancies for Group "D" under the Health Department, Government of West Bengal in the light of the principles laid down by the Government of West Bengal in different circulars with a prayer for not filling up the vacancies without considering the regularization of the petitioners.

12. The said application was decided by the learned Tribunal on 26th September, 2001 holding, inter alia, that appointment of spray workers to be made subject to stipulation, inter alia, that spray workers must not be engaged after 31st December, 1991 and only those who have worked for five consecutive years and 120 days per year should come within the zone of consideration and 50 per cent vacancies to be filled up from spray workers and persons over 45 years of age should be eliminated and rest be favoured with condition of age bar. Challenging the said order, present writ petition was filed.

13. Heard Mr. Ashis Sanyal, learned advocate for the petitioners and Mr. Tarun Roy, learned advocate for the respondents.

14. Mr. Sanyal, learned advocate appearing for the petitioners first contended that judgment of the Division Bench in WPST No. 260 of 1998 did not provide for limit of 50 per cent of vacancies for absorption of petitioners therein and therefore, the presently impugned judgment to the extent it provided such limitation is to be set aside giving direction that 100 per cent vacancies to be filled up by present petitioners. It has been argued that finality of the said proposition was already noticed in the said Division Bench judgment in WPST No. 260 of 1998 and therefore, the said limitation in filling up only 50 per cent of vacancies by casual workers cannot be accepted.

15. Next contention of the petitioners is that in same judgment in WPST No. 260 of 1998 the condonation of age bar was also approved and the said position has also not been disturbed by the Apex Court as the SLP filed against it was dismissed already. Contention has been made by Mr. Sanyal that as the appointment is not at initial recruitment stage, the question of age bar should not be raised as the experienced employees will be helpful in discharge of their duties.

16. Mr. Sanyal, learned advocate for the petitioners referred to various circulars and contended that under those circulars policy reflected by the appropriate authorities has to be applied in case of absorption of casual seasonal employees and such appointments cannot be termed as "back door appointment" and that the casual workers were working though seasonally but for perennial type of work.

17. In this connection reliance was placed on the judgment in the case of Paschimbanga Tahasil Mohurrir Kalyan Samity v. State of West Bengal reported in 1993 (2) CLJ 330 and it is contended that where employees have rendered service seasonally for not less than 120 days in each year for not less than 5 years deserve absorption under the declared policy of the Government.

18. Mr. Tarun Roy, learned advocate for the respondents State authorities contended that the Apex Court treated regularization as a reservation and therefore, same being a matter of policy, cannot be decided or interfered with by the Court of Law/Tribunal. Mr. Roy, learned advocate appearing for the State authorities challenged the judgment of the Tribunal to the extent it accepted the view expressed by the earlier Division Bench and not the view expressed by subsequent Division Bench on the same question. It is contended by Mr. Roy that earlier Division Bench of this Court though decided the matter and the SLP against the same has since been dismissed, but subsequent judgment of second Division Bench was passed taking note of the earlier Division Bench judgment and giving reasons for its difference of opinion and the said judgment also was tested before the Apex Court and the SLP though has been admitted, the same actually is that law applicable and in not following the same, the Tribunal committed an error. In this connection it is contended by Mr. Roy that the second Division Bench which decided the second matter also decided another matter being Chief Medical Officer of Health v. Swapan Kumar Nayak reported in 2001(1) CLT 497 and the same was never challenged before the Apex Court and therefore, the said view has reached a finality. Mr. Roy strongly contended the reservation of 50 per cent of the vacancy for filling up vacancies was also not correctly done.

19. Mr. Roy relied on the judgment in the case of Kunhayammed and Others Vs. State of Kerala and Another, for contending that dismissal of SLP does not amount to the expression of the view of the Apex Court and it merely amounts to finality of the view expressed in the judgment which was challenged in the said special leave petition. Reliance was placed on the judgment in the case of West Bengal Essential Commodities Supply Corporation Ltd. Vs. Md. Sarif, and State of West Bengal v. Ashoke Ranjan Chandra reported in 1999(2) CHN 387.

20. Reference was also made to Section 4 of the West Bengal Regularisation of Recruitment in State Government Establishments and Establishments of Public Undertakings, Statutory Bodies, Government Companies and Local Authorities Act, 1999 (hereinafter referred as Act of 1999) for contending that when no recommendation was taken from the Employment Exchange such appointment

could not be approved.

21. Considering the above contentions, we find that issue was decided from time to time by various Division Benches in different proceedings on similar facts and the first of such decisions was in Civil Rule No. 2058(W) of 1991, wherein seasonal DDT spray workers of Murshidabad District were given relief of absorption of Health, Government of West Bengal. The said direction was affirmed in appeal by a Division Bench as regards absorption but as regards the time limit to consider their absorption in service, the Division Bench directed fresh application to be filed before the State Administrative Tribunal. The Tribunal though dismissed the application upon holding that dispute between the parties had already been decided and the application was barred by the principles of res judicata, when writ petition was filed challenging the said order of the learned Tribunal, the Division Bench held that there was no application of the principles of res judicata in the case as no time-limit was earlier fixed. Upon such finding the matter was remanded back to the Tribunal. This time on remand the Tribunal granted full relief to the petitioners directing appointment of the petitioners as seasonal DDT spray workers according to their seniority in accordance with the rules against existing vacancies and in case vacancies are not available then the State authorities would give appointment to the unemployed candidates without consideration of their age bar as and when vacancies would arise and no outsider should be appointed till then.

22. Challenging this order the State authorities moved a writ petition which was dismissed by a Division Bench (hereinafter referred as first Division Bench) on May 13, 1999 clarifying the relevant notifications and approving the view taken by the learned Tribunal. SLP filed before the Hon"ble Supreme Court was also dismissed.

23. Therefore, in view of the policy of the Government declared in their three notifications, the right of such seasonal DDT spray workers admittedly working on ad-hoc basis for a long period and the law relating thereto reached a finality having been decided by the first Division Bench when no interference was made by the Apex Court. A perusal of the said judgment dated 13th May, 1999 shows that the first Division Bench considered the law decided by the Apex Court from time to time in various judgments. The said first Division Bench came to a categorical finding rejecting the contention of the authorities that policy in such case must be taken to be the 1979 and 1980 notifications in terms whereof the employees should be absorbed in all the vacancies available not limited to a percentage of the available vacancies and when Appeal Court sent the matter on remand, the remand was restricted to the aspect of fixing time-limit to consider the absorption in service and the above aspect reached finality at that stage. The first Division Bench further considered that notifications do not contain any percentage limitation. The first Division Bench further recorded finding that Tribunal correctly directed absorption as against the vacancies as and when they would arise.

24. With regard to condonation of age bar also, the first Division Bench considering the entire matter on this aspect held that absorption should be irrespective of the age bar.

25. The said judgment of the first Division Bench was passed on 13th May, 1999. The same question again cropped up before another Division Bench (hereinafter referred as second Division Bench) in WPST No. 362 of 1999 which was decided on 29th September, 2000. While considering the said proceeding the second Division Bench considered the law taking note of the various judgments of the Apex Court on the question of regularization of ad-hoc casual employees. But the second Division Bench did not notice that the said cases were decided holding that casual employment in violation of recruitment rules, does not create a right for regularization and in none of those cases policy as contained in the said three notifications was available or explained. The notifications involved in the proceeding before the second Division Bench and the policy reflected therein were already considered and decided by the first Division Bench as stated hereinabove. It is the settled law that in case of difference of opinion a subsequent co-ordinate Bench should not decide the matter finally following its own opinion and it has to refer the matter to a larger Bench.

26. In such circumstances, the law and the right flowing from the said notifications having been decided by the first Division Bench, the said is binding so far as application and explanation of the policy and the notifications are concerned.

27. With regard to restriction of relief upto 50 per cent we find that in terms of the said policy restriction of limit to 50 per cent of the available vacancies, has been held to be not acceptable by the first Division Bench and it was observed therein as follows : "In any event the notifications do not contain any percentage limitation as far as the petitioners are concerned." Therefore, in the present case also in absence of any material applicable to the petitioner, percentage limitation is not to be applied.

28. With regard to the condonation of age bar is concerned, the finding was recorded by the first Division Bench considering several decisions and therefore, in the present case also we do approve that the petitioners are entitled to get exemption as regards age bar in respect of their appointments particularly when petitioners are already in service and it is case of regularisation only and not of initial recruitment.

29. It appears that in the impugned order the policy of the authorities as contained in the notifications dated August 3, 1979, August 29, 1980 and circular dated 13th March, 1996 were taken into consideration and without considering individual cases of the petitioners directions have been given and we have no reason to interfere with the said directions except the modifications in view of our findings as regards condonation of age bar and percentage limitation of the available vacancies as indicated hereinabove.

30. Therefore, the impugned judgment stands modified and the writ petition is disposed of. No order as to costs.

S.P. Talukdar, J.

31. I agree.