

(2010) 11 CAL CK 0043
In the Calcutta High Court
Case No : M.A.T. No. 1264 of 2010

Chairman, W.B. Central School Service Commission	APPELLANT
Vs	
Mukul Biswas	RESPONDENT

Date of Decision : 12-11-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16(4)

Citation : (2011) 2 CHN 304

Hon'ble Judges : Dr. Mrinal Kanti Chaudhuri, J; Amit Talukdar, J

Bench : Division Bench

Advocate : Bikash Ranjan Bhattacharya, Tapabrata Chakraborty AGP, Abhijit Barman, Kumaresh Dalal, for the Appellant; Samiran Giri for the State; Rameswar Bhattacharjee, R.U. Bhattacharyya for the Respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

1. 1. "And an appellate power interferes not when the order appealed is not right but only when it is clearly wrong. The difference is real, though fine".
2. Applying the litmus test set out by V.R. Krishna Iyer, J. more than two decades ago while speaking for the majority view in Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, we will be required to absorb the impact of the decision tendered by Dipankar Datta, J. in Mukul Biswas v. State of West Bengal and Ors., in W.P. 13489 (W) of 2010 on 29.6.2010 in this intra Court appeal.
3. In contemplation of our exercise thereof we must not lose sight of the fact that after all we are performing nothing else but the extended power of Judicial Review already undergone before the first stage. Even though technically before us is a Mandamus Appeal, our area of decision obviously would be confined to a very narrow conspectus yet in an expanded vision in respect of Judicial Review of executive decision that has been fallen for consideration before the learned Trial Court.

4. It is not that every decision of the Hon"ble Trial Court, which is brought in appeal, will be viewed from pedagogy as if the decision rendered, was of a subaltern nature. Although in a Mandamus Appeal, the Constitutional sweep gathers more momentum in a wider horizon, yet while in exercise of such power we have to simply establish whether the legal right or in other words enforceable legal right have been breached and how the same has been dealt with at the first instance. Thus far and no further.

5. Echoing the majority voice of V.R. Krishna Iyer, J. in Gujarat Steel Tubes Ltd. Etc. v. Gujarat Steel Tubes Mazdoor Sabha and Ors. (supra), Sinha, J. in Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa and Others, had held:

36. It is now also well-settled that a Court of Appeal should not ordinarily interfere with the discretion exercised by the Courts below.

6. A picture perfect, state of art finding returned by the learned Trial Court which has been carried at the instance of the Appellant, Chairman, West Bengal Central School Service Commission before us in appeal would be necessitated for us to see as to whether the same can pass muster.

7. The story of the Respondent No. 1 is required to be, tracked down in this appeal so as to have a whole hog of the entire issue in question.

8. Fortune smiled on her when she was selected on a very high position in the merit list of the Respondent No. 1 for the purpose of empanelment of an Assistant Teacher in the discipline of Philosophy. Lurking apprehension that she may be situated in a distant school from her place of residence as she was placed in the 25th position in the merit list without considering her status in the reserved category she approached the Writ Court.

9."....should an applicant for a post be worse off for acquitting herself

creditably in a recruitment examination and thereby stand deprived of a choice posting which she otherwise would have been entitled to had she not be treated at par with general candidates."

10. Posing the aforesaid question Dipankar Datta, J, the Hon"ble Trial Judge upon making an exhaustive analysis and upon considering the decisions operating in the field concluded:

The Rules of 2007 do not also stipulate that a reserved category candidate on being treated as a general candidate would not be entitled to the benefits of reservation in the sense that the reserved vacancies pertaining to his or her category would not be open for exercise of option by him or her in respect thereof.

11. Restoring the lost smile in her face Dipankar Datta, J, the Hon"ble Trial Judge said OMEGA "The Petitioner is thus entitled to have the cake and eat it too."

12. Shri Bikash Ranjan Bhattacharya, learned Senior Counsel in support of the appeal assisted by Shri Tapabrata Chakraborty, learned Additional Government Pleader with Shri Abhijit Barman and Shri Kumaresh Dalal assailed the decision returned by the Hon''ble Trial Judge mainly on the ground that it had missed the essence with regard to the benefit of reservation in juxtaposition to a single candidate vis-a-vis the constitutional concept of benefit attributed to the class of reserved category as a whole.

13. He also put stress on the fact that in the event the order which has been impugned is given effect to, it would lead to ouster of a reserved category candidate from the panel already prepared and published and further it would disturb the entire chain and break the sequence of merit of the other candidates, who have already been positioned in respect of their individual merit.

14. Shri Bhattacharya, learned Senior Counsel submitted that it is quite well-settled that when a candidate had performed well in the reserved category he/she will be treated on merit in the general category.

15. To buttress his submission he relied on the decisions of Union of India (UOI) and Another Vs. Satya Prakash and Others, and Yoganand Vishwarsrao Patil and Ors. v. State of Maharashtra and Ors., 2005 (12) SCC 311. On the self-same line he placed before us the decision of the Supreme Court in Anurag Patel Vs. U.P. Public Service Commission and Others, Reference was also made by Ritesh R. Sah Vs. Dr. Y.L. Yamul and others, and Avinash Singh Bagri and Others Vs. Registrar IIT Delhi and Another, .

16. Placing the Constitution Bench decision in Indra Sawhney Vs. Union of India (UOI) and Others, , Shri Bhattacharya invited our attention to paragraph 811 of the Constitution Bench decision and submitted that reservations under Article 16(4) do not operate like a communal reservation and Scheduled Castes candidates who get selected in the open competition field on the basis of their own merit, will not be counted against the quota reserved for such category; but they will be treated as open competition candidates.

17. Shri Samiran Giri for the State adopts the submission of the Appellant.

18. Shri Giri has placed before us the entire case in his own way and submitted that once the Appellant had repositioned the candidates in their merit list, now if the Court intervenes, it will upset the apple cart and would lead to disastrous consequences for the entire set of candidates.

19. He felt the order passed by the Hon''ble Trial Court was required to be set aside.

Per contra:

20. Shri Rameswar Bhattacharjee has disputed each and every contention of his learned counterpart for the Appellant. Shri Bhattacharjee has distinguished the decisions relied upon by Shri Bhattacharya. Shri Bhattacharjee was of the view

that the Respondent No. 1 is not only a candidate from the reserved category; but she belonged to the physically handicapped quota. For this purpose he relied upon the finding of the Medical Board (page 30 of the present petition).

21. He further submitted that all the decisions that have been relied upon by the learned Senior Counsel also take care of the situation to the effect that at the same time provision should be made that it will not work out to the disadvantage of such candidate and he may not be placed on a more disadvantageous position than the other less meritorious reserved category candidates. In fact from all the catena of decisions relied upon by the learned Senior Counsel, Shri Bhattacharya placed this cardinal points in support that once the Respondent No. 1 had secured a rank in her capacity as a reserved candidate her placement in the general pool which operates to her disadvantage cannot be permitted and the learned Single Judge has rightly held in her favour.

22. Elaborating his submission Shri Bhattacharjee further submitted even though the learned Single Judge did not deliberate on the question of the factum of physical handicap of the Respondent No. 1 fact remains in view of the advertisement (page 62) category wise division has been made. This would at once entitle the Respondent No. 1 to achieve the said category in view of her admitted physical handicap.

23. Shri Bhattacharjee has raised another very important question, which we would deliberate in detail. He has submitted that there has been gross discrimination. According to him from the merit list the Respondent No. 1, stood first amongst the Scheduled Caste candidates and secured more marks than general candidates and she appeared as item No. 25 (page 32) in the merit list whereas in item No. 30 is a similarly situated reserved category candidate was given the same benefit as of the said category whereas the Respondent No, 1 was discriminated in such placement. This according to Shri Bhattacharjee cannot pass the test of Article 14.

24. Furthermore, he was of the view the advertisement which has categorised the various classes of candidates in which the Respondent No. 1 falls in two separate categories denial of the particular class by the authorities is not only discrimination but per se an arbitrary action of their part.

25. Wrapping up, he submitted that prima facie it would appear that there has been some colorable exercise of the decision arrived at by the authority even though 42 candidates have been shown in the merit list vacancy appears for 48. The rest of the candidates had not figured.

26. In reply Shri Bhattacharya, learned Senior Counsel for the Appellant has submitted that since he had no scope to use a return before the Trial Court the question of arbitrariness in placement of the Respondent vis-a-vis the others of his own peer level to a beneficial position should not be taken into account by us as he would stand to prejudice in the absence of an opportunity to present his case on record.

27. Shri Bhattacharya, learned Senior Counsel, in reply further clarified the arguments advanced by Shri Bhattacharya for the Respondents to the effect that she has been already working in a school in Bardhaman, as such, under no situation she would stand to lose in the event of her placement made by the Appellant is accepted by her.

28. As we have seen the initial cheers were snuffed out by the arbitrary action of the Appellant which was countenanced by the Hon''ble Trial Judge.

Avenging the finding returned by the Hon''ble Trial Judge this appeal on the aforesaid premises has been brought before us in the fashion that we have noted.

29. Primarily, we would be required to see as to whether the aforesaid decision has been borne out from the concept of just justice.

30. We have very carefully perused the decisions cited at the Bar and have taken note of the decisions put forward by the learned Senior Counsel in support of the appeal and the Learned Counsel for the Respondent. In our opinion, the decisions relied upon by Shri Bhattacharya is quite distinguishable and, we are very afraid, will not have axiomatic application in the factual matrix of the present case.

31. Even though the question with regard to the Respondent being in the Physically Handicapped Category was not a list before the Hon''ble Single Judge although His Lordship in the preamble of the very well reasoned judgment held - "Petitioner, who hails from Chandanagore in the district of Hooghly, is a candidate belonging to S.C. Category as well as P.H. Category. However, she offered her candidature for consideration as S.C. Category candidate." From her provisional Admit Card we also find "Caste Category: S.C." The fact of her being physically handicapped has some determining effect in our decision. The situation that crops up before us in Pg. 30 of the application that is the finding of the Medical Board and that too which is staring at our face cannot be washed out from our consideration altogether. It may be, this was not a decisive issue before the Hon''ble Trial Court but we feel this being an undisputed position can be looked into by us in appeal.

32. The objection of the learned Senior Counsel for the Appellant is that the Medical Board has held in item No. 4 of their report that - "she can travel without assistance of an escort", since she has already been working in Bardhaman. What is her difficulty if she now accepts the post in response to her placement in the merit list? We feel the said objection of the learned Senior Counsel has absolutely no basis. It can be easily gathered notwithstanding the fact that she has been working in a school in the district of Bardhaman but on account of the difficulties faced by her she has opted for a placement nearer her home and she has excelled in her performance for her new job but on account of some fictional situation rustled up by the Appellant for reasons best known to them she had to come to the Court in the manner seen by us.

33. Overruling the aforesaid objection of Shri Bhattacharya we feel the allegation

of Shri Bhattacharya for the Respondent that there has been some mal-practices in the preparation of the panel as rightly pointed out by him that a candidate obtaining lesser marks than the Respondent has been retained in the reserved category whereas she has been distinguished is quite appropriate.

34. Since Shri Bhattacharya, learned Senior Counsel, has felt that he did not have any scope to use an affidavit before the Hon"ble Trial Court this issue should not be taken note of, we feel the same can remain eclipsed before us as it may not be a primordial facet as on other sustainable grounds the appeal is liable to be dismissed.

35. In our foray of the entire judgment and order under appeal rendered by Shri Dipankar Dutta, J. the Hon"ble Trial Judge, we are in complete agreement with His Lordship that "if at all a reserved candidate by reason of being treated at par with general candidature on the basis of his or her performance is to lose the benefits of reservation, as contended by Shri Bhattacharya, there would have been no occasion for the Supreme Court to make the observations, quoted (supra) which have been underlined for emphasis." His Lordship was referring to the decision of Satya Prakash (supra) and quoted relevant portions thereof.

36. We believe that there is hardly any scope for our interference as found earlier the stand taken by Shri Bhattacharya cannot have any inspiring effect in our mind. The decisions relied upon by him being quite distinguishable also would not be applicable. On the contrary, it must be kept in mind, as rightly held by the Hon"ble Trial Court that even if the candidate entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against the seat reserved for the latter category, yet at the same time provision should be so made that it will not work out to the disadvantage of such candidate and she may not be placed at a more disadvantageous position than the other less meritorious reserved candidates.

37. The decisions which Shri Bhattacharya has placed before us, we are afraid, does not fully support his case. The facts and circumstances before us in appeal are quite different. The Respondent not only applied for the post against a reserved vacancy but she was also a physically handicapped lady. Although she had opted for the first category the second question cannot be altogether lost sight off.

38. Question of the Appellant being physically handicapped, always remains a reckoning factor. In such trajectory we feel that it would be appropriate that she is situated in a placement, which is nearby to her place of residence,

39. This would not only facilitate her automation but saving the time in commutation she can fruitfully devote the same to her commitments in school, which would in a way benefit the student community at large.

40. By now we have concluded, even though we have desist ourselves from harping on the translucency in the preparation of panel, as suggested by the

learned Senior Counsel in the absence of use of an affidavit, we feel the exercise adopted by the Appellant is further from being fair. None of the situation that has transpired before us, can inspire confidence in our mind, which would persuade us to interfere in this appeal.

41. In epilogue, we will churn what we have felt in the prologue that the "order appealed is not right but only when it is clearly wrong".

42. We would say that the impugned decision of Dipankar Datta, J. which has been brought under the scanner at the behest of the Appellant is not wrong but, is clearly, if not wholly right.

43. It is time for just desert. While dismissing the appeal we would make a slight modification to the finding arrived at by Datta, J. by way of infusing little more delicacy in the same and conjoining the words "also relish it" marinating the finding of His Lordship "....the Petitioner is thus entitled to have the cake and eat it too and also relish it."

44. With the aforesaid modification we will fondly hope the above piece of delicacy, which was distanced from her due to fortuitous circumstances adopted by the Appellant has been restored to her by the Hon"ble Trial Court, now be made available to her in the fashion as directed by His Lordship and no doubt she will relish it.

45. The appeal is dismissed.

46. Parties to bear their own costs.

Dr. M.K. Chaudhuri, J.

47. I agree.