
(2016) 10 CAL CK 0029
In the Calcutta High Court
Case No : W.P. No. 8822 (W) of 2015

Gadadhar Mondal

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 05-10-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 1 CalLT 549

Hon'ble Judges : Sahidullah Munshi, J.

Bench : Single Bench

Advocate : Mr. Rajendra Banerjee and Mr. Moniruzzaman, Advocates, for the Petitioner; Mr. Asim Kumar Ganguly and Mr. Bellal Sheikh, Advocates, for the State; Mr. Subir Sanyal and Mr. Sumita Sen, Advocates, for the Council

Final Decision : Allowed

Judgement

Sahidullah Munshi, J.—The writ petitioner claims to have been appointed as Assistant Teacher of Chakmondala Primary School under Rampurhat, West Circle by the then President of ad hoc committee, District School Board, Birbhum on 3rd January, 1983. It has also been claimed by the petitioner that he had already completed B.Ed. Degree in the year 1981 prior to his joining to the said school. It is stated that the Chairman, Birbhum District Primary School Council issued an order in respect of Rampurhat South Circle vide memo no.831(28) dated 26th July, 2005 and, thereby, published a panel of Head-teacher in different schools with an information to the empanelled Head-teacher to join the school within thirty days from the date of order and to submit a report to the concerned sub-Inspector of schools. The petitioner was enlisted in the said panel under serial no.7 and the petitioner was promoted as Head-teacher for Bargachia Prathamik School under Rampurhat South Circle. In pursuance of the said panel dated 26th July, 2005, the petitioner submitted his joining letter on 17th August, 2005 as Head-teacher which has been duly recognised by the then Head-teacher-in-Charge of the school. The said joining letter has been annexed as Annexure

P-3 to this writ petition. It has been stated by the petitioner that while the petitioner was appointed in the year 1983, at the relevant time, West Bengal Primary Education Act, 1973 was in vogue but no rule at that point of time was framed under the said Act. The rule has been framed only in the year 1991. Before 1991 rule came into effect 1940 rule was governing the field. It has been stated that the petitioner completed his B.Ed. Degree prior to his appointment in 1983 and in terms of Department Memo No.306-SC/P dated 7th February, 1967 the Director of Public Education, West Bengal declared that there would not be any objection to treat the M.A./B.A./P.G.B.T. Teachers of aided Primary Schools as "A" category Teachers for the purpose of payment of Government grants on deficit basis. The petitioner was served with a copy of the Memo being No.3068 dated 11th November, 2014 by Birbhum District Primary School Council addressed to the sub-Inspector of Schools, Rampurhat South circle. By the said order the Council held that B.Ed. Degree cannot be considered for appointment of Head-teacher from the panel in terms of Memo No.1920 dated 2nd September, 2014. It was indicated that the sub-Inspector of Schools overlooked the training qualification and made wrong entry in the Head-teacher panel. Therefore, the teacher was directed to be degraded from Head-teacher to Assistant Teacher and overdrawn amount should be refunded. The said order of the District Primary School Council, Birbhum, is under challenge.

2. In this writ petition, the petitioner has prayed for a writ of mandamus commanding the respondent-authorities, particularly the respondent no.4, Chairman, Birbhum District Primary School Council, to act as per the panel prepared in terms of the letter vide Memo No.831(28) dated 26th July, 2005 by withdrawing the impugned Memo dated 11th November, 2014 issued by the Birbhum District Primary School Council.

3. In support of the case made out by the petitioner the learned advocate appearing for the petitioner placed reliance in the case of Bishnupada Ghosh & Ors. v. State of West Bengal & Ors. an unreported decision decided on 1st September, 2014 by a Hon"ble Division Bench of this Court.

4. In support of his case the petitioner has further relied upon the following judgments, namely,

? Nihar Ranjan Biswas v. State of West Bengal reported in 2016 (3) CHN (Cal) 516.

? State of Punjab & Ors. v. Rafique Masih (white washer) & Ors. reported in (2015) 4 SCC 334.

5. The Judgment dated 21st February, 2014 passed in M.A.T. No.278 of 2013 in the case of Prabhat Kumar Bhattacharya & Ors. v. Susmita Bhowmik (supra) was against the decision of a learned Single Judge of this Hon"ble Court where it was held that the entire recruitment process was conducted in clear contravention of the order passed in the case of Chittaranjan Bhunia v. State of West Bengal and thereby ineligible persons were included in the panel. The learned Single Judge

was of the view that the irregularities in preparation of panel were of such magnitude that justice cannot be rendered to the deserving parties merely by recasting of the panel. The learned Single Bench held that it is a fit case where the entire recruitment process should be undertaken de novo. Accordingly, the entire recruitment process including the panel prepared thereupon was set aside and the authorities were directed to initiate fresh proceeding or recruitment in the light of the observations made in Chittaranjan Bhunia (supra) in respect of those candidates who were considered earlier in the said recruitment process. The Hon''ble Division Bench in an appeal therefrom held that the finding of the Hon''ble Single Bench that illegality of a great magnitude was not so apparent from the facts and circumstances of the case. Therefore, no interference was called for in the selection process. The appeal was allowed and the order passed by the Hon''ble Single Judge was set aside.

6. It is not understood as to how the judgment in the case of Prabhat Kumar Bhattacharya & Ors. (supra) has any bearing in the present case and the ratio of the said judgment has no bearing in the present case.

7. In the case of Bishnupada Ghosh & Ors. (supra) the petitioner filed an appeal being M.A.T. 474 of 2014 challenging an order of a Hon''ble Single Bench. The Hon''ble Single Bench, by its order, interfered with a panel prepared by the Kolkata Primary School Council for Head-teachers as it was not prepared in conformity with the National Commission for Teachers'' Education notification dated 25th August, 2010 which, according to the learned Single Judge, will apply mutatis mutandis in respect of the appointment of Head-teachers. The Appeal Court held that Primary Education Act does not prescribe the procedure for appointment of Head-teacher in the primary school. The eligibility criteria of the teachers for being considered for appointment as Head-teacher has also not been prescribed under the West Bengal Primary Education Act, 1973. Section 106 of the said Act vests the rule-making power with the State Government. In exercise of such rule-making power provided under Section 106 of the said Act, the State Government has framed Primary Teachers Recruitment Rules, 2001 which has statutory force. Appointment of Head-teacher is dealt with in Rule 17 of the said rules. Hon''ble Division Bench held that for being considered as Head-teacher -

- (1) A teacher must be a primary teacher;
- (2) He or she must have possessed requisite qualifications as laid down in sub-Rule (1) and sub-Rule (2) of Rule 6;
- (3) He or she must have a Junior Basic Training certificate or Primary Teachers Training certificate or equivalent.

8. According to the Hon''ble Division Bench, a panel will be prepared by the Government for appointment of Head-teacher in different primary schools in the Council right from the date when Rule of 2001 was framed. It has been mentioned by the Hon''ble Division Bench that problem started when the Right to Children to Free and Compulsory Education Act, 2009 was enacted and certain

notifications were issued by the concerned authority under the said Act prescribing minimum qualification for appointment of the teachers imparting primary education.

9. The ratio of the said judgment is also not applicable in the present case save and except the fact that the qualification for the appointment of Head-teacher has been mentioned in the said judgment.

10. The decision in the case of Nihar Ranjan Biswas (supra) relates to "A" category pay-scale by a Head-teacher. A Hon"ble Single Bench of this Court in the said decision held that a Head-teacher can be appointed from out of persons enjoying category "A" pay-scale. A Head-teacher can be appointed out of teachers who were appointed prior to 3rd September, 2001 and teachers appointed between 3rd September, 2001 and 31st September, 2005 possessing academic qualification as per the Government norms and completing one year/two years" teachers training course from the State recognised Institutions. It was held that the petitioner was appointed on July, 20, 2000. Therefore, the petitioner would be entitled to category "A" pay-scale. Payment of category "A" pay scale has not been disputed by the Council. The Council has only disputed that his name was brought on the panel as Head-teacher wrongly and he should not get any benefit out of such wrong incorporation of his name in the panel.

11. The decision in State of Punjab (supra) has been relied upon to show that where payments have mistakenly been made by the employer in excess of the entitlement to the employees, recoveries by the employers would be impermissible in law. In that decision, the Hon"ble Supreme Court has laid down the instances where such recoveries would be impermissible.

(1) Recovery from the employees belonging to Class-III and Class-IV service or Group-C and Group-D service;

(2) Recovery from the retired employees or the employees who are due to retire within one year of the order of recovery;

(3) Recovery from the employees when the excess payment has been made for a period in excess of five years beyond the order of recovery is issued;

(4) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work in a most inferior post;

(5) In fact, any other case where the Court arrives at the conclusion, that recovery, if made from the employee, would be iniquitous or harsh or arbitrary. An extent, as would far outweigh the equitable balance of the employer's right to recover.

12. Mr. Subir Sanyal, learned advocate appearing for the District Primary School Council, respondent no.4, has submitted before this Court that on 1st January, 2004, a panel of Head-teacher had been prepared by the sub-Inspector of

Schools, Rampurhat South circle where the name of the petitioner was shown against serial no.18 wrongly by recording his training qualification as J.B.T., a copy of the said panel has also been annexed to the affidavit-in-opposition. According to the Council, the petitioner is not entitled to be considered for appointment as Head-teacher because the sub-Inspector of Schools, in connivance with the petitioner, introduced the qualification of the petitioner as J.B.T. It has been submitted that item no.17 shows the name of one Netai Chandra Let and in the column under qualification the sub-Inspector of Schools wrote S.F.J.B.T. The next name is of the petitioner under serial no.18 and in place of his qualification it has been written "do". According to the Council, this was not correctly done and no benefit is available to the petitioner. The learned advocate for the Council submits that the petitioner was appointed as Assistant Teacher in 1982. West Bengal Primary Education Act, 1973 came into force with effect from 2nd July, 1990 and recruitment rules 1990 framed under the Act of 1973 came into force with effect from 22nd November, 1991. Therefore, at the time of appointment of the petitioner as Assistant Teacher, the Bengal Rural Primary Education Act of 1930 and the rules of 1940 under the said Act were in force. The petitioner's appointment should, therefore, be guided under rules of 1940. It has been submitted by the learned advocate Mr. Sanyal that qualification for Headmaster under the 1940 rule was School Final pass and two years' continuous service as a teacher or School Final pass in the 2nd Division. Training was an additional qualification and a trained teacher was made entitled to "A" category scale of pay [Rule 2(1)(a)]. He has referred to Explanation 2 of Rule 2 which says a teacher being deemed :

(a) To have passed the School Final examination and passed any public examination declared by Education Department for appointment in a teaching post and

(b) (i) Any examination held in West Bengal and conducted or recognised by the Director of Public Instructions (D.P.I., West Bengal) or completion of a course of J.B.T. or Primary Training or;

(ii) An examination of any other course of training declared to be equivalent to Junior Basic Training by the Education Department of the State Government.

13. Mr. Sanyal says that according to recruitment rules 1940, Explanation 2 requires that B.Ed. Degree has to be issued by the Government. He says that at the time of appointment as Assistant Teacher, the petitioner did not possess the requisite training qualification within the meaning of rules of 1940. He further submitted that in 2005, at the time of appointment of the petitioner as Head-teacher, the recruitment rules, 2001 came into force with effect from 15th January, 2002. He says Rule 2(P) of the recruitment rules, 2001 defines the word "training" which means J.B.T. certificate of Primary Teachers Training certificate or equivalent issued under the authority of Director or any other Officer. Rule 17 says that appointment of Head-teachers from a panel of senior most primary teachers possessing requisite qualification and as laid down in sub-Rule (1) and

sub-Rule (2) of Rule 6 and who have obtained Junior Basic Training certificate or Primary Teachers Training certificate or equivalent. He submitted that the petitioner was not possessing training qualification J.B.T. for P.T.T.C. or equivalent as per Rule 17 read with rule 2(P) of the recruitment rules, 2001 and, therefore, the petitioner was not eligible and entitled in law to be appointed as Head-teacher in 2005. Therefore, Mr. Sanyal submitted that before his retirement the petitioner lacked training qualification and the Chairman of the Council, by Memo no.3068 dated 11th November, 2014, relegated the petitioner from the Post of Head-teacher to Assistant Teacher for lack of training qualification and thereby making him ineligible for the Post of Head-teacher and directed for refund of the overdrawal amount. According to Mr. Sanyal, the petitioner having worked as Assistant Teacher in terms of an interim order passed on 12th May, 2015, therefore, he is bound to refund overdrawal amount as he is not entitled to be appointed as Head-teacher in terms of recruitment rules, 2001 for lack of J.B.T./P.T.T. qualification. In support of such submission he has relied upon a judgment of the Hon'ble Apex Court in the case of Ishwar Dutt v. Land Acquisition Collector & Anr. reported in (2005) 7 SCC 190. According to him, the appointment of the petitioner is a sheer mistake and mistake cannot create any legal right. In support of such proposition he has relied upon the following decisions :-

? Union of India & Anr. v. International Trading Co. & Anr. reported in (2003) 5 SCC 437.

? Union of India v. S.R. Dhingra & Ors. reported in (2008) 2 SCC 229.

14. Mr. Sanyal submitted further that the decision placed by the petitioner in the case of Bishnupada Ghosh v. State West Bengal is not applicable in the present case as the same is distinguishable on facts and points of law. He submitted that question arose in the said decision relates to appointment of primary teachers. He submitted that G.O./Memo No.306/SC/P dated 7th February, 1967 and No.245 SE (Law) dated 24th February, 2011 deals with grant of Government grant or "A" category pay to primary teachers appointed with B.Ed. qualification prior to 1.7.1996. According to Mr. Sanyal, this has nothing to do with the eligibility criteria of primary teachers training qualification for appointment of Headteachers. Mr. Sanyal submits that the writ petition is liable to be dismissed.

15. He submits that for appointment of primary teachers/primary aided teacher B.Ed. training qualification is not the requisite qualification. Primary teachers training qualification/Junior Basic Training qualification is the required qualification. B.Ed. trained candidates cannot be appointed as trained primary teacher and in support of such contention he has placed the following judgments :

? P.M. Latha & Anr. v. State of Kerala & Ors. reported in J.T. 2003 (2) SCC 423.

? Dilip Kumar Ghosh & Ors. v. Chairman & Ors. reported in (2005) 7 SCC 567.

? Director of School Education v. Bibhuti Sarkar & Ors. reported in 2002 (1)

WBLR (Cal) 181.

16. Before considering the rival claim of the parties following the undisputed facts are required to be taken into consideration -

(a) 03.01.1983 (Annexure P-1, page 25A of the writ petition) - the petitioner was appointed as Assistant Teacher on temporary basis.

(b) 26.07.2005 (Annexure P-2, page 26 of the writ petition) - the petitioner was placed in the panel of Head-teacher and was sent to Bargachia Primary School.

(c) 17.08.2005 (Annexure P-3, page 27 of the writ petition) - the petitioner joined as Head-teacher at the transferred place, namely, Bargachia Primary School.

(d) 11.11.2014 (order impugned, Annexure P-4, page 28 of the writ petition) - A Memo which was issued by the Chairman, District Primary School Council, Birbhum directing the sub-Inspector of Schools, Rampurhat, to the effect that the teacher with B.Ed. Degree cannot be considered for appointment of Head-teacher from the panel. Accordingly, the petitioner was degraded from Head-teacher to Assistant Teacher and directed to return the purported overdrawal amount.

17. The moot question involved in this case as to which rule is relevant for the purpose of considering the petitioner's appointment as Headteacher if he is at all eligible to be appointed as such Head-teacher. It has been pointed out in the written notes filed by the District Primary School Council that since the petitioner was appointed an Assistant Teacher under the Rural Primary Education Act, 1930 and at that time rules of 1940 framed under the said Act was in force, the appointment of the petitioner was under the rules of 1940. Now, let us consider the scope of the said rule with regard to the appointment of the petitioner as a Headteacher of a primary school. Rule 2 of the said 1940 rules which was notified vide notification no.1493 Edn-25 July, 1940 as amended from time to time specifies the minimum qualifications for appointment of teacher in a primary school maintained by a Primary School Council or the District School Board, as the case may be. The said qualifications are as follows :-

(a) Head-teacher - School Final pass and two years" continuous service as a teacher in a recognised primary school or School Final pass in the 2nd Division. (training shall be treated as an additional qualification and a trained teacher shall be entitled to "A" category scale of pay)

Provided that nothing in that clause shall apply to a Head-teacher who is at present serving in a primary school with approval of the Director of Public Instruction, West Bengal;

(b) Assistant teacher - School Final pass. Training shall be treated as an additional qualification and a trained teacher shall be entitled to the "A" category scale of pay.

18. What emanates from the said rule is that a Head-teacher should possess School Final pass and two years" continuous service as a teacher in a recognised primary school if he had a training qualification that shall be treated as an additional qualification consequently, such trained teacher shall be entitled to "A" category scale of pay.

19. In the present case, the petitioner was appointed as an Assistant Teacher in 1983 having his requisite qualification according to the aforesaid rules. The petitioner was B.Ed. on the date of appointment as an Assistant Teacher. From the above rule it does not appear that training qualification is mandatory for being appointed as Head-teacher. However, the petitioner had B.Ed. qualification at the time of his appointment. In this case, if we take into consideration of a Memo being No.306/SE/P dated 7th February, 1967 issued by the Director of Public Instruction, West Bengal, it transpires that the said Director of Public Instruction, West Bengal declared that there may not be any objection to treat M.A./B.A./P.G.B.T. teachers of aided primary school as "A" category teachers for the purpose of payment of Government grants. Subsequently, a clarification Memo being No.352/S.E.(PRY) dated 31st May, 1996 was issued from the end of the Joint Secretary to the Government of West Bengal and in paragraph 4 whereof it has been clarified that cases already decided on the basis of the Memo No.306/S.E./P dated 7th February, 1967 and the D.P.I., West Bengal, need not be re-opened. It has been also mentioned that the cases of the primary school teachers, who have obtained B.T./B.Ed./P.G.B.T. Degree/Diploma before 01.07.2006, may be decided in terms of the said Memo dated 7th February, 1967 by the D.P.I., West Bengal. The said clarification memo has been annexed by the petitioner in his written notes of submission. Therefore, it transpires that teachers appointed prior to 01.07.1996, which clearly shows the petitioner is entitled to "A" category of pay-scale and training qualification B.Ed. is not excluded. Therefore, if it is not in dispute that the petitioner's case has to be considered in the perspective of 1940 rules then he is entitled to have "A" category scale and he was entitled to be included in the panel of Head-teacher. The submission made on behalf of the Council that his name was wrongly included in the panel of Head-teacher, is without any substance. The petitioner's name was included in the panel in July, 2005 and as a Head-teacher he was transferred to Bargachia Primary School in August, 2005. He functioned as Head-teacher in the said school before he was superannuated from his service on and from 31.08.2015 but, by the order impugned passed on 11th November, 2014, the concerned Birbhum District Primary School Council degraded him from the Post of Headteacher to Assistant Teacher and directed refund of overdrawal amount drawn by him in his capacity as Head-teacher. If the petitioner had requisite qualification according to the aforesaid rules, question of overdrawal does not rise consequently, order of refund cannot be sustained. As held by the Hon"ble Supreme Court in the case of State of Punjab (supra) the overdrawal cannot be insisted if a person comes within the category mentioned in the said judgment under paragraph 18. Petitioner qualifies the category no.4 under the

said paragraph 18 of the said judgment where the teacher has discharged his duties of a higher post and has been paid accordingly. According to the Council, the petitioner was wrongly given appointment as a Head-teacher. Therefore, the entire amount he has drawn, should be refunded but in view of the aforesaid judgment the same cannot be done because the petitioner has discharged his duties as Head-teacher and those apart, nothing transpires from the record that the petitioner was at fault in getting the order of appointment as Head-teacher. Therefore, the petitioner is entitled to pay of "A" category scale as also to the Post of Head-teacher.

20. The writ petition is allowed.

21. There will be no order as to costs.

22. Urgent Photostat certified copy of this judgment, if applied for, be delivered to the learned counsel for the parties upon compliance of all usual formalities.