
(2007) 03 CAL CK 0084

In the Calcutta High Court

Case No : F.M.A. No. 123 of 2007 and C.A.N. No. 345 of 2007

Gaya Nath Rajbanshi

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 06-03-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 16, 226

West Bengal Board of Secondary Education Act, 1963 — Section 45, 46

Citation : (2007) 3 CALLT 192 : (2008) 2 CHN 879

Hon'ble Judges : Tapas Kumar Giri, J;Pratap Kumar Ray, J

Bench : Division Bench

Advocate : P.N. Chatterjee, K.J. Tewari and Y. Mondal, for the Appellant;Dilip Kumar Das Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Pratap Kumar Ray, J.—Heard the learned Advocates appearing for the parties.

2. The appeal and application both are taken up for hearing.

3. Challenging the Judgment and order dated 26th August, 2005 passed by the learned Trial Judge in W.P. No. 1"O016(W) of 2001 this application has been preferred. The writ application was dismissed and all interim orders were vacated. The appellant/writ petitioner moved the writ application praying the following relief:

a) For that the writ of or in the nature of Mandamus commanding the Respondents Nos. 6 and 7. The Secretary and the Headmaster of Nabapally J.C.S. High School, Post Office-Gantla, Police Station-Kandi, Murshidabad, to allow the petitioner to appear before the Selection Committee prepared for appointment to the post of Peon of the said High School along with the other candidates sponsored by the Employment Exchange concerned, as and when the interview will be held for the said post of Peon on 05].08.2000 or so soon thereafter; "

b) For a writ of or in the nature of Certiorari calling upon the Respondents to certify and produce or cause to produce to the Registrar, Appellate Side of the Hon"ble Court, all the papers, documents and records relating to and/or arising out of this so that conscionable justice may be done to your petitioner by considering the same;

c) For an Ad-interim order of Injunction, restraining the Respondents, their Subordinates and agent from holding interview for the post of Peon of Nabapally J.C.S. High School, amongst the candidates sponsored by the Employment Officer concerned on 05.08.2001 or any adjourned day till the disposal of this writ application;

d) Rules in terms of prayer (a) and (b) above;

e) An Ad-interim order of Injunction in terms of prayer;

f) To make the Rule absolutely if the Respondents fail to show sufficient cause or return;

g) Such other or further order or orders as to Your Lordships may seem fit and proper.

4. It was the case made out in the writ application by the writ petitioner that a post of "Peon", a Group-D staff under the cadre of non teaching post of Nabapally J.C.S. High school got its prior permission of the District Inspector of Schools concerned for being filled up on interviewing the candidates by inviting the names from the Employment Exchange. The Employment Exchange referred the names of twenty candidates, some of them were juniors to writ petitioner as alleged and, as such, there was denial of sponsorship of the name of the petitioner arbitrarily by the Employment Exchange Authority. At the same time another point canvassed that as a non-sponsored candidate the writ petitioner got the right to appear for which he filed a representation but the same was rejected by the Managing Committee of the school. Right of the writ petitioner to appear as a non-sponsored candidate was pleaded with the foundation of the case of the Apex Court Excise Superintendent, Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao and Others, . Paragraph 9 of the writ, speaks about the foundation on the basis of the said Supreme Court Judgment, which reads such:

9. Your petitioner states that in a case being Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao and Others, very recent the Supreme Court of India held that restricting the Selection only to the candidates by the Employment Exchange is not proper and in addition to requisitioning the names from the Employment Exchange name should also be called for by publication in newspapers having wide circulation and display on office notice board or announcement in Radio, Television and Employment News Bulletin and the Hon"ble Supreme Court further observed in the said case that such a procedure would subserve fair play as provided in the Articles 14 and 16

of the Constitution of India.

5. By an interim order dated 23rd July, 2001-Ashim Kumar Banerjee, J. allowed the appearance of the writ petitioner in the interview solely on the basis of the grievance of the writ petitioner as alleged that juniors were sponsored by the Employment Exchange. The interim order dated 23rd July, 2001 reads thus:

23.7.2001-It is the grievance of the writ petitioner that juniors to the writ petitioner are being sponsored by the local Employment Exchange in the subject interview held on 5.8.2001 or any subsequent date. In such event, I direct the respondent Nos. 6 and 7 to allow the writ petitioner to participate in the interview provided it is found that any junior to the writ petitioner in the matter of registration has been sponsored by the employment exchange.

In case the writ petitioner succeeds in the interview, his appointment will be subject to the result of this writ petition.

Affidavit-in-opposition by 16th August, 2001, affidavit-in-reply by 31st August, 2001....

6. The writ petitioner appeared in the interview and it is the oral submission without any affidavit that the writ petitioner stood first in the panel. The matter came up for final hearing. Girish Chandra Gupta, J. decided the matter finally by holding that the case made out by the writ petitioner that the junior candidates were sponsored by the Employment Exchange was not the real state of affairs in view of the affidavit filed by the Employment Exchange, pointing out, inter alia, that the writ petitioner's name was sponsored in a vacancy of Class-IV staff of Tenya Santi Sudha Das Vidyamandir by the Employment Exchange Memo dated 13th October, 1999 and, as such, applying the rotational formula which provides that once the candidate's name is referred to in one vacancy, he has to wait for further one year; to avail the next chance of sponsorship, his name was accordingly not sponsored. The learned Trial Judge discussed the issue by holding, inter alia, that the writ petitioner's grievance that the junior candidates were sponsored denying his right to be sponsored by the Employment Exchange Authority had no basis. As the petitioner appeared in the interview" on the basis of such factual foundation in the writ application by making a case against the Employment Exchange Authority of arbitrary treatment in terms of Article 14 of the Constitution of India, the learned Trial Judge accordingly on the bases" of factual matrix when identified that there was no case of arbitrary action under Article 14 of the Constitution of India, rejected the writ application and as a consequence thereof, the interim order also stood cancelled.

7. Against that Judgment this appeal has been preferred; The learned Advocate appearing for the appellant at the time of hearing of the appeal and the application both, has submitted that the writ petitioner took two points in the writ application as a foundational basis of his right to appear in the interview namely, (1) junior candidates were sponsored and (2) following the case of Visweshwara Rao (supra), the Judgment of the Apex Court, as a non-sponsored

candidate he accrued a right to appear in the event any advertisement was published declaring the vacancy in terms of the said case and since the learned Trial Judge disposed of only one point namely breach of a right claimed for being sponsored as a senior candidate of the panel and other point was not considered, Appeal Court may consider that point namely the point for advertisement of the post as well as the point as raised claiming the right to appear in terms of the Apex Court view passed in the case Visheshwara Rao (supra)

8. So far as the impugned Judgment under appeal as passed as it appears that the factual foundation of discriminatory treatment as alleged was ultimately proved to be as not the real state of affairs in view of the affidavit filed the Employment Exchange Authority and in view of application of rotational rule of sponsorship as discussed by the learned Trial Judge, we are of the view that no illegality committed by the learned Trial Judge in dismissing the writ application on rejecting the said point as taken that junior candidates were sponsored leaving beside the writ petitioner. We are also satisfied on the basis of the records that the writ petitioner got no right to appear in the interview in view of the rotational formula as introduced by the Employment Exchange brochure formulating a process of rotation to accommodate maximum number of candidates enrolled in the Employment Exchange with equal opportunity for their appearance in the interview. The rotational rule of the Employment Exchange is also not under challenge in the writ application as ultra vires.

9. Hence, having regard to the rotational rule as exists, we are of the view that non-sponsorship of the name of the candidate namely, the writ petitioner cannot be considered as illegal action by the Employment Exchange in view of the fact that his name was earlier sponsored on 13th October, 1999 in identical vacancy in another school where he became unsuccessful and in terms of the rotational formula the maturity of sponsorship was required to be considered after October, 2000. Hence, that point as taken in the writ and the rejection of the writ application to that effect by the learned Trial Judge is absolutely a right Judgment and we are not interfering with that.

10. Now, the second point as urged on the basis of the case Visheshwara Rao (supra) that right of non-sponsored candidates to appear, we are of the view that such right of appearance of the non sponsored candidates is not a simplicitor right but the right with a rider that in the event of open advertisement of the post, non-sponsored candidates may appear as it appears from the decision of Visweshwara Rao (supra) which has been discussed later on.

11. To appreciate the right of non-sponsored candidates to appear in the interview the relevant rules and regulations are required to be considered first. The concerned vacancy was directed to be filled-up being a post of non-teaching staff category in, terms" of the "direction issued under Memo No. 1736(21) G.A. dated" Calcutta, the 1st November, 1999 by the Director of School Education, West Bengal in exercise of the power in terms of Rule 28 of the Rules of

Management of Recognised Non-Government Institution (Aided and Unaided) Rules, 1969 (hereinafter for brevity referred to as Management Rules, 1960) which was framed in exercise of power u/s 46 of the West Bengal Board of Secondary Education Act, 1963 "empowering the Government to frame such a rule on the subject matter as stipulated in that particular provision. The relevant Section 45 of said Act as referred, the relevant provision of Rule 28 of the Management Rules as referred and the guideline and/or direction dated 1st November, 1999 read such:

45 Power of State Government to make rules. (1) The State Government may, after previous publication, make rules for carrying out the purposes of this Act....

(d) [the composition, powers and functions of] Managing Committees of Institutions.

28. Powers of Committee. (1) In an aided institution the Committee shall, subject to the provisions of any Grant-in-aid Scheme or Pay Revision Scheme or any order or direction or guidelines issued by the State Government or the Director in connection therewith and in force for the time being, have the power....

(ii) to appoint non-teaching employees on permanent or temporary basis against permanent or temporary vacancies, if any when available, within the sanctioned strength of non-teaching employees and on approval by the Director or any officer authorised by him, such approval being sought for within a fortnight from the date of decision of the Committee in this behalf".

Government of West Bengal Director of School Education

Memo No. 1736(21) G.A. Dated, Calcutta the 1st Nov. 1999. Guidelines for recruitment of Non-Teaching Staff (Librarian, Clerk, Group "D" Staff) of Non-Govt. Aided Secondary Schools, Higher Secondary Schools, Govt. Sponsored Schools, D.A. getting school and all types of Aided Madrasahs including Senior Madrasahs and newly set up Educational institution at Secondary Level in West Bengal:

Directions

(a) All appointment of non-teaching staff (Librarian, "Clerk, Group "D" Staff) shall be made with the prior permission of the District Inspector of Schools (S.E.) of the respective District against sanctioned post. (b) Prior permission shall not be necessary for appointment in vacancies of 4 months or less.

...4.(a) On receipt of the prior permission from, the School stage from the D.I. of Schools (S.E.), the School Authorities shall approach the Local Employment Exchange for sponsoring the names of the Employment Exchange candidates.

(c) Employment Exchange shall mention in the list" the qualification, date of birth, date of registration etc of the candidates Names shall be sponsored within 45 days in case of General candidates and 60 days in case of S.C. and S.T. &

O.B.C. candidates. If names are not sponsored within the time limit mentioned above the School Authorities may approach the D.I.S(S.E.) who may take up the matter with the Employment Exchange. In case of receipt of Non-availability Certificate from the Employment Exchange the School may advertise in any State level Daily Newspaper under intimation to the D.I.S. In the advertisement name and full address of the Institution shall be mentioned irrespective of whether the vacancy is permanent or temporary. The reservation rules in all cases of appointments must be followed strictly....

Mode of Selection & Selection Committee: For Newly Set-Up Educational Institution At Secondary Level.

1. Once nominee of the concerned D.I.S (S.E.)....

5. ...

(c) All the candidates sponsored by the Employment Exchange shall be called for interview.

12. If the permission for advertisement is obtained from the District Inspector of Schools (S.E.) and the number of application received through advertisement is more than 10, a preliminary screening may be made on the basis of marks obtained in the Examination as specified in prior permission. A record of receipt of names either through Employment Exchange or through advertisement should be preserved and will remain open for verification by the officers of the Education Directorate/Department."

13. Clause 4(a) of the direction dated 1st November, 1999 is the relevant provision for consideration of this case whereby it is provided that on accordal of prior permission the school authority should approach the Local Employment Exchange for sponsorship of the names of the candidates and under Sub-clause (b) of the said Clause 4 there is a provision for advertisement of the post to State Level Daily Newspaper in the event of absence of reference of the sponsored candidates from the Employment Exchange. Under Clause 5(c) of the said direction it is provided that candidates sponsored by the Employment Exchange should be called for interview and in absence of any sponsored list on fulfillment of the contingency of open advertisement of the post, names of candidate who applied in terms of such advertisement also could be considered. Hence, from the recruitment direction issued by the Director of School Education, West Bengal it appears that the selection of a candidate for the purpose of recruitment of non-teaching staff in a school covered either under salary deficit scheme of the Government and/or payment of salary by the Government, is required to follow that process by inviting the names of the candidates from the Employment Exchange. However, the aforesaid rule limiting the consideration of the names, of sponsored candidates only is not under challenge in the writ application for declaration of the same as ultra vires to the Constitution of India and or contrary to the law of the land declared by Supreme Court under Article 141 of the Constitution of India in the case Visweshwara Rao (supra). Since the

said direction was not under challenge taking the point that the selection could not be controlled or restricted with the sponsored candidates only, we are of the view that there was no scope for adjudication of that issue in the writ even.

14. However, before us in the Appeal Court we have allowed the counsel to make submission on that issue. It appears that long back in the case Visweshwara Rao (supra), a Judgment of Three Judges Bench considering the earlier Judgment passed in the case Union of India (UOI) and Others Vs. N. Hargopal and Others, the Apex Court considered the issue as to whether the employer concerned should be, directed to advertise the post in daily newspaper or other media so that maximum number of candidates could be available in addition to the sponsored candidates from the Employment Exchange. The findings and observations of the case Visweshwara Rao (supra.) have been considered by the Apex Court in its latest decision Arun Kumar Nayak Vs. Union of India (UOI) and Others, , the paragraph 8 of the said Judgment reads thus:

8. In Visweshwara Rao a three-Judge Bench of this Court after considering Hargopal held in para 6 as under:

6. Having regard to the respective contentions, we are of the view that contention of the respondents is more acceptable which would be consistent with the principles of fair play. Justice and equal opportunity. It is common knowledge that many a candidate is unable to have the names sponsored, though their names are either registered or are waiting to be registered in the employment "exchange, with the result that the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the employment exchange! Under these circumstances, many a deserving candidate is deprived of the right to be considered for appointment to a post under the State. Better view appears to be that it should be mandatory for the requisitioning authority establishment to intimate the employment exchange and employment exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news bulletins and then consider the case of all the candidates who have applied. If this procedure is adapted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates.

15. On an analysis of Visweshwara Rao (supra), the case Hargopal (supra) the Judgment passed in the case Arun Tewari and Others Vs. Zila Mansavi Shikshak Sangh and Others, , the Apex Court, in the case Anir Kumar Nayak (supra) in paragraph 10 held to this effect:

Therefore, the decision by this Court in Arun Tewari is based on the fact of this case, namely, the time-bound scheme and exigency of service. No law has been

laid down thereunder (but in *Visweshwara Rao (supra)*, a Three Judges Bench had laid down the law and that is still holding the field

underlying by us).

16. Hence, it appears that *Visweshwara Rao (supra)* is a Judgment not in personem but a Judgment in rem and the same was Judgment declaring the law under Article 141 of the Constitution of India taking into account reasonableness and fairness doctrine, equality of opportunity in employment in terms of Article 14 of the Constitution of India. From the Judgment of *Visweshward Rao (supra)* it appears that an individual non-sponsored candidate got no right to appear suo motu and/or by decision of the Managing Committee and of employer concerned allowing any individual non-sponsored candidate to appear in the interview as per their sweet will unless the right" of a non sponsored candidate for appearance in the interview matures on the contingency of advertisement of the concerned vacancy in the daily Newspapers and/or Employment Exchange notification having a wide publication and/or other media advertisement, radio and television as held by the Apex Court. As a corollary thereof since an individual non-sponsored candidate got no right to "appear in the interview simplicitor in the absence of the aforesaid contingency of advertisement of the post in the Newspapers and other media the High Court also sitting in the writ jurisdiction cannot allow the appearance of the individual candidate until and unless there is an advertisement of the particular post inviting the names of the general candidates by publishing the same in the Statewide published daily Newspaper for the reason that allowing of, any individual candidate in absence, of those contingencies in exercising the power under Article 226 of the Constitution of India would be nothing but an exercise of power which per se violative of Article 14 of the Constitution of India as the other identically placed candidates who may be the next door neighbour of the writ petitioner who since could not approach the. High Court due to financial stringency or for any other reason would be denied to appear in the interview despite fulfilment of qualification alike the writ petitioner. On considering that aspect of the matter, the Apex Court accordingly in the case *Visweshwara Rao (supra)* opened the right of non-sponsored candidates to appear in the interview only in the contingency when such post would be advertised in the newspaper and or any employment news publication along with displaying on the notice boards etc as has been quoted in paragraph 8 of *Arun Kumar Nayak (supra)*. In the case *Visweshwara Rao (supra)* the Apex Court accordingly held "Better view appears to be that it should be mandatory for the requisitioning authority/establishment to intimate the employment exchange and employment exchange should sponsor the names of the candidates to the requisitioning department for selection strictly according to seniority and reservation;" as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication, in the newspapers having wider circulation and also display on their notice boards or announce on radio, television and employment news bulletins and then consider the cases of all the Candidates who have

applied. If this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates". "

17. The writ petitioner though in paragraph 10 pleaded accordingly that as per Visweshwara Rao (supra) the post was required to be advertised so that the non-sponsored candidates could appear subserving the fair play doctrine as postulated in Articles 14 and 16 of the Constitution of India, but did not pray for any such order in the writ application. In the writ, the writ petitioner prayed in paragraph (a) - a writ of mandamus commanding the respondents to allow the writ petitioner only to appear in the Selection Committee for consideration of his candidatures. Hence, the prayer (a) aforesaid which is the only prayer in the writ even on the basis of the pleadings of the writ application was not a just prayer to allow the same. The writ petitioner in the writ pleaded one thing namely the right of all non-sponsored candidates to appear in the interview and for that reason referred the case of Visweshwara Rao (supra) whereby the open advertisement of the vacancy was directed to be made but in the prayer portion the writ petitioner simply prayed for only his appearance without any advertisement of the vacancy in the newspapers which if allowed would per se be violative of Article 14 of the Constitution of India, Which Is within the field of basic structure of the Constitution. Hence, on that pleading also vis-a-vis the prayer as made, the same cannot be allowed by the Writ Court as the same would be nothing but a breach of Article 14 of the Constitution of India, denying right of other identically situated candidates.

18. In that view of the matter and having regard to the Judgment of Visweshwara Rao (supra), we are of the view that the prayer as made in the writ application was not a fit prayer for being allowed directing his appearance only in the interview as admittedly the post was not advertised in the daily newspapers inviting this names of other candidates identically placed like the writ petitioner.

19. The Judgment as referred to being *Lalu Gangopadhyay v. State of West Bengal and Ors.* is a Judgment passed by one, of us (Pratap Kumar Ray, J.) by the learned Advocate for the appellant in support of his contention for allowing the writ application, we are of the view that the said Judgment has no applicability in the Instant case as herein the issue has, been dealt with on considering, the legal aspect of the Judgment passed in the case *Visweshwara Rao (supra)* and its consequence hereof which, in fact, was not addressed in the said Judgment for adjudication. The Division Bench Judgment as referred to in the case *Gopal Sinha Vs. Palas Sarkar*, as referred to, to contend that the writ application should be allowed, we are of the view that even on reading of the paragraphs 16, 17 and 18 of the said Judgment we are not finding any merit for applicability in the instant case wherein we have applied the ratio decidendi of the Judgment passed in the case *Visweshwara Rao (supra)* and finding of the Apex Court for declaring the same as law of the land in the subsequent Judgment *Arun Kumar Nayak (supra)*, As already discussed that the Apex Court neither in

the case Visweshwara Rao (supra) nor in Arun Kumar Nayak (supra) held that a non sponsored candidate without any advertisement of the post in the daily newspapers should be allowed to appear in the interview by his own accord or as per the sweet will of the employer on breach of Article 14 of the Constitution of India, denying the identical treatment to other identically placed non-sponsored candidates duly qualified for the post, which has been considered in this case for our decision. Hence, the Judgment of Gopal Sinha (supra) is not applicable in the instant case in the angle in which we have decided the matter. However, it is made clear that since there is a vacancy in the school and it requires to be" filled up, the Managing Committee would be at liberty to fill-up the post in accordance with law as applicable at the present moment by advertising the post in daily newspaper and inviting names from the Employment Exchange.

20. Beside the point of Visweshwara Rao (supra) another point is striking in our mind that allowing of any individual non-sponsored candidate to appear in the interview will cause a breach of Article 14 of the Constitution of India as the other persons identically placed are not getting any opportunity to appear in the interview due to lack of any advertisement of the vacancy in the newspapers which also otherwise would cause an injury to the basic, structure, of the Constitution of India where equality in every respect is the basic foundation in terms of the Judgment as pronounced in the case His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, , Indira Gandhi v. Raj Naryan reported in 1975 (supp.) SCC 1, Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others, and subsequently the case Waman Rao and Ors Vs. Union of India (UOI) and Others, in the broader angle of basic structure concept. Even to allow one individual candidate to appear in the interview by the Writ Court per se would be violative of Article 14 of the Constitution of India and thereby would damage the basic structure of the Constitution which has been dealt with in the case Secretary, State of Karnataka and Others Vs. Umadevi and Others, by holding, inter alia, that in public employment adherence to the rule equality is a basic feature of the Constitution Under the service Jurisprudence the same principle is squarely applicable in the present case in hand. Uma Devi (supra) also has been relied upon by the Apex Court in the service matter to answer the point of basic feature of the Constitution in the service law on angle of equality clause of Article 14 of the Constitution of India in the case R.S. Garg Vs. State of U.P. and Others, ."

Hence, having regard to the aforesaid findings and observations" the another point as raised fails.

Both the appeal, application and the Wit all stand dismissed.

Tapas Kumar Giri, J.

21. I agree.