

(2004) 06 CAL CK 0018
In the Calcutta High Court
Case No : Writ Petition No. 8671 (W) of 2003

Hrishikesh Maity and Others

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 16-06-2004

Acts Referred:

Constitution of India, 1950 — Article 226
Management of Recognized Non Government Institutions (Aided and Unaided) Rules,
1969 — Rule 28(1)
West Bengal School Service Commission Act, 1997 — Section 10, 9(2)

Citation : (2005) 3 CALLT 89

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

Advocate : P.K. Roy and S.K. Dutta, for the Appellant; Asoke De, B. Bhattacharya and Jayanta De, for the Respondent

Final Decision : Allowed

Judgement

Indira Banerjee, J.—In this writ petition, the petitioners have challenged an order being Memo No. 115/1 (5) LC dated 14th May, 2003 of the Respondent Director of School Education, West Bengal rejecting the prayer of the petitioners for regularisation of their services by approval of their appointments against vacant sanctioned post in Keuchia Nilkantha Vidyaniketan, which is hereinafter referred to as the school, at Keuchia in Purba Midnapore.

2. The school was recognised as a Four-class Junior High School with effect from 28th April, 1965 with Classes from V to VIII. There was a demand from guardians and students for upgradation of the school by addition of Classes IX and X. In view of such demand Classes IX and X were started with effect from 1975.

3. The school authorities applied for recognition of Classes IX and X with the requisite fee in 1975. No action was, however, taken on the said application. In the aforesaid circumstances, proceedings were initiated in this Court. Pursuant to

orders of this Court, the school was inspected on 18th December, 1996 by the District Level Inspecting Team, and after several rounds of litigation, the Board ultimately -recognised the upgradation of the school with effect from 1st May, 2001.

4. The Petitioner Nos. 1 to 5 claimed to have been appointed teachers of the school long prior to recognition of Class IX and X. It is submitted that on the date of inspection of the school by the District Level Inspecting Team for the purpose of recognition of Class IX and X, the Petitioner Nos. 1 to 5 were working as teachers of the school and the Petitioner No. 6 as a non-teaching employee. The names of all the petitioners were duly recorded in the report of the District Level Inspection Team.

5. It appears that the Petitioner No. 1 was appointed to the school on 12th January, 1979, the Petitioner No 2 on 19th January, 1988, the Petitioner No. 3 on 20th June, 1987, the Petitioner No. 4 on 26th December, 1994, the Petitioner No. 5 on 25th August, 1995 and the Petitioner No. 6 on 25th August, 1992.

6. The Petitioner No. 1 has been working for over 25 years and the junior most teacher has been rendering service to the school for almost 9 years. The teachers have for long been claiming regularisation of their services by approval of their appointment against posts sanctioned pursuant to recognition of Classes IX and X.

7. After recognition of Classes IX and X the petitioners and also one Mantulal Pramanik, another organizing teacher filed a writ petition in this Court being W.P No. 8914 (W) of 2001 for approval of their appointments.

8. By all order dated 1st August, 2001 a learned single Judge of this Court was pleased to direct the concerned District Inspector to consider "the issue of approval of the petitioners and the said Mantulal Pramanik after giving all concerned persons opportunity of hearing.

9. Pursuant to the said order of this Court, the concerned District Inspector approved the appointment of Mantulal Pramanik by an order dated 11th September, 2001. By the aforesaid order the District Inspector rejected the prayer for approval of appointment of the petitioners.

10. Being aggrieved the petitioners moved a writ application being W.P. 16236 (W) of 2001 which was disposed of on 9th January, 2002 by inter alia a direction on the Director of School Education to consider the question of approval of the petitioners. Thereafter the respondent Director of School Education, by an order dated 20th November, 2002 rejected the case of the petitioners for approval of their appointments.

11. By an order dated 5th February, 2003 the learned single Judge of this Court (G.C. Gupta, J.) set aside an order dated 20th November, 2003 passed by the Director of School Education rejecting the prayer of the petitioners for regularisation of their services and directed the said Director of School Education

to consider the question of regularisation of the services of the petitioners by approval of their appointment to vacant sanctioned posts in the light of the circular No. 2605 (16)-SC dated 20th December, 1984.

12. Pursuant to the aforesaid order, the Respondent Director of School Education passed the order dated 14th May, 2003 impugned in this writ application once again rejecting the prayer for approval of the appointments of the petitioners.

13. Significantly, the Respondent Director of School Education accepted the contention of the petitioners that they were all appointed prior to the date of final inspection of the school on 18th December, 1996 and were within age at the time of their initial appointment.

14. The Director of School Education accepted that two teachers Hrikesh Maity and Haripada Mondal satisfied all the conditions in the circular dated 28th December, 1984 and could fit in as Teachers of the Language group. With regard to the Petitioner No. 6 the Director of School Education found that he was over qualified to be appointed Group "D" employee. The Director was, however, of the view that apart from 2 Language group teachers, the upgraded Classes IX and X required one teacher of the Science and Mathematics group, one Physical Education Teacher" and one Work Education Teacher but none of the petitioners had the requisite qualifications for appointment as teachers of the aforesaid subjects.

15. The relevant portion of the impugned order is extracted hereinbelow for convenience:

"The last two paragraphs contain the sum and substance of my findings on consideration of the question as to whether the petitioners who claim to be organising employees can be approved consequent to upgradation of the school, as directed by the Hon"ble Court in the order dated 05-2-2003 in the present writ petition.

But, I must mention in this connection the following facts and constraints:

a) the circular No. 2605 (16)-Sc/S dated 20-12-94 which was issued by the Director of Secondary Education was superseded by the Government order in No. 895-Edn(S) dated 30-9-92, which again was superseded by Government order in No. 117-SE(S) dated 24-2-95 and the last order dated 24.2.95 has been cancelled by Government order in No. 97-SE(S) dated 21-01-03. As of now, there is no order allowing approval of service of organising teaching/non-teaching, staff.

b) the School was upgraded to a X -class high school with effect from 01-5-2001 and 3 posts of-assistant teachers, including a qualified Headmaster as there is none already, are admissible with effect from 01-5-2002. According to the Clause (i) of Sub-rule (1) of Rule 28 of the Management of Recognised Non Government Institutions (Aided and Unaided) Rules, 1969, as amended in terms of Government order No. 900-SE(S) dated 22-11-97, the Managing Committee of a

Secondary School is authorised to appoint only a candidate recommended by the School Service Commission of the concerned region. The Director of School Education has no authority to ask the School's Managing Committee to appoint any person as a teacher, who is not recommended by the School Service Commission of the concerned region; and

(c) the school became entitled to additional 6 posts of teachers and the second post of Group D employee with effect from 01-5-2001/01-5-2002, against which the petitioners are claiming for approval/regularisation of their service. The petitioners had been appointed by the school authority without any post and also without following the prescribed rules of recruitment. The Hon"ble Supreme Court in a recent Judgment/order passed on 15-3-2002 in Civil Appeal No. 2146 of 2002, arising out of SLP (Civil) 8399 of 2000 (Nanigopal Chaudhury and Ors. v. State of West Bengal and Ors.) have observed "A Government aided School is bound by the rules governing creation of posts and appointments thereagainst. No post can be created besides the rules and no appointment can be made otherwise than in accordance with the rules."

In the circumstances, I regret that for the constraints aforesaid and under the existing provisions of law, I am unable to accord any relief to the petitioners as they have asked for.

16. In spite of directions, the Respondents have chosen not to file any Affidavit-in-Opposition to the writ petition. The factual averments in the writ petition are not controverted.

17. Mr. P.K. Roy appearing on behalf of the petitioner submitted that the petitioners who were all organising teachers and organising non teaching and/or organising non-teaching employees and in service with the school at the time of inspection of the school for recognition of Classes IX and X were entitled to be absorbed upon recognition of the school by appointment against vacant sanctioned posts.

18. In this context, reliance was placed on a Judgment of a learned single Judge of this Court in the case of Namita Chowdhury v. The State of West Bengal and Ors. reported in (2003)2 CAL LT 63) where the learned single Judge held that organising teachers who were in service at the time of DLIT inspection for the purpose of recognition, had a right to be absorbed.

19. Reliance has also been placed on the decision of another single Judge of this Court in the case of Sk. Md. Salimar Rahaaman v. State and Ors. reported in 2001(1) CLJ 501 where this Court held that teachers in service at the time of recognition were entitled to be regularised by appointment against vacant sanctioned post.

20. Mr. Bhattacharya appearing on behalf of the State respondents argued that the appointment of the petitioners was not in accordance with the rules. The procedure for appointment of teachers was not followed. Moreover, some of the

petitioners do not have the requisite qualifications for appointment against vacant sanctioned posts.

21. On behalf of the State it was also argued that after commencement of the West Bengal School Service Commission Act, 1997 all vacancies in teaching posts in the school, which is aided by the State, have to be made on the recommendation of the School Service Commission.

22. In the instant case at least one organising teacher, namely, the said Mantulal Pramanik has been absorbed by approval of his appointment against the sanctioned post. It is, therefore, not open to the State respondents to now contend that all appointments have to be made on the recommendation of the School Service Commission notwithstanding the long service rendered by the petitioners to the school even before the school was recognised.

23. In the case of *Sengara Singh v. State of Punjab* reported in AIR 1984 SC 1499 on which reliance was placed by Mr. Roy, the Hon'ble Supreme Court held that employees similarly circumstanced would not be discriminated against.

24. Mr. De appearing on behalf of the Managing Committee supported the writ petitioners and submitted that the writ petitioners are entitled to regularisation of their services by approval of their appointments against sanctioned posts.

25. Mr. De justified the appointments of the petitioners and pointed out that all the petitioners had the requisite educational qualifications for appointment. Mr. De submitted that the Petitioner Nos. 1 and 2 undisputed have the requisite qualifications for appointment as Language group teachers. The Petitioner Nos. 2 and 4 are also graduates with their teaching subject as one of the subjects at the graduation level. So far as the Petitioner Nos. 3 and 5 are concerned they do not have the requisite training. However, in terms of a Government Order No. 1036(16)-Sc/S/7R-28/81 dated 21st April, 1982 they could be granted provisional approval on condition of their undergoing requisite training in Physical Education or Work Education whenever required.

26. Admittedly the petitioners have been rendering service to the school for several years. At the material time when the school was finally inspected by the District Level Inspection Team for the purpose of recognition of classes IX and X all the petitioners were in service and their names were recorded by the District Level Inspection Team.

27. It is also not in dispute that at least two of the petitioners have the requisite qualification for appointment as Language group teachers and the Petitioner No. 6 has qualification higher than that required for appointment to a Group "D" post.

28. The grounds set forth in the impugned order for rejection of the claim of the petitioners to absorption are patently misconceived. Government Orders indicate that minimum requisite educational qualification for appointment as Assistant Teacher of a High School is pass graduate.

29. The minimum requisite qualification for appointment as teacher of a High School being Pass Graduate, the organising teachers who have a right to be considered for absorption upon recognition of the school cannot be denied regularisation just because as per the staff pattern the requisite qualification for some of the posts should be Honours graduate/Post graduate.

30. If the organizing teaching concerned is a Pass graduate with the relevant teaching subject as one of the subjects at the graduation level such a teacher cannot be denied regularisation on the ground of his/her being under qualified.

31. Moreover as rightly pointed out by Mr. De Physical and Work Education teachers might be granted provisional approval on condition of their undergoing training in Physical Education and/or Work Education as and when required as this has been done in numerous cases.

32. Relying on the decision of the Supreme Court in the case of The Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another, Mr. Roy submitted that this Court would in exercise of jurisdiction under Article 226 of the Constitution of India had wide powers to pass mandatory orders. There could be no dispute that the proposition that the powers of the Court exercising writ jurisdiction conferred under Article 226 of the Constitution of India are wide and this Court may if it deems fit and proper pass mandatory orders.

33. In the facts and circumstances of the instant case, this Court is of the view that gross injustice has been done to the petitioners who have time and again been constrained to approach this Court. The case of the petitioners for regularisation has been rejected on misconceived grounds. The different authorities of State have from time to time been shifting their stand and taking new grounds every time, the issue has been referred to them.

34. The order impugned in the instant writ application is patently misconceived. At least two of the teachers admittedly have the requisite qualifications for appointment as teachers in the Language group. Moreover, over qualification cannot be a ground for not absorbing a Group "D" employee. In the instant case, the case of the Petitioner No. 6 has arbitrarily been rejected on the ground of his having passed Madhyamik qualification when, in fact, the minimum requisite qualification for the post in question is Class VIII passed.

35. Furthermore, from the Government Orders regarding the minimum requisite educational qualifications for teaching posts in Junior High Schools and High Schools, it is patently clear that the minimum requisite qualification is pass graduate with the concerned subjects as one of the subjects at the graduation level.

36. So far as the staff pattern is concerned, a certain percentage of posts have been kept apart for pass graduates and the rest for Honours Graduates and/or Post Graduates. The fixing of qualifications have no nexus with the teaching

duties required of the concerned teacher or the classes required to be taught. Of two teaching posts of the same group teaching Classes IX and X the minimum requisite qualification for one teaching post is Pass Graduate and for the other Honours Graduate/Post Graduate.

37. In the aforesaid circumstances rejection of the case of any teacher for absorption on the ground of his not possessing a Honours degree and/or Post graduate degree is patently arbitrary, unjustified, discriminatory and unsupported by law and defeats the very purpose of the Government Orders which provide for absorption of organizing teachers.

38. The contention of the State respondents that the appointment is not in accordance with the prescribed rules, appears to be misconceived. There could be no question of prior approval in the case of all the petitioners who had indisputably been appointed prior to recognition when the posts in question were unimproved. There are no rules and regulations regulating the appointment of unapproved teachers at least no such rules have been placed before this Court.

39. Admittedly, the petitioner have rendering services to the institution for years. At the material time when they were appointed they were within age. The petitioners also have requisite qualifications.

40. In the case of Government of India and Others Vs. Court Liquidator's Employees Assn. and Others, , the Supreme Court held that the company paid-staff appointed by Court Liquidator and Official Liquidator cannot be denied regularisation on the ground that they were not employed by the Government in accordance with the Rules.

41. In the case of Arun Kumar Rout and Others Vs. State of Bihar and Others, , the Supreme Court held:

"Although the appellants had not been appointed by following the due procedure and, therefore, they cannot claim regularisation as a matter of course but considering the fact that they had satisfactorily served the department even without getting any salary for a long time and they were not guilty of any fraud or sharp practice and also did not lack in requisite qualification and they had been appointed against sanctioned posts, we fee) that the appellants deserve sympathetic consideration in getting appointment against such sanctioned posts on humane consideration. Considering the special facts of this appeal it appears to us that it will be just, proper and consistent with ends of justice to direct that 50 per cent of the sanctioned posts which were held by these appellants should be filled from amongst, the appellants on the basis of their inter se merit position by taking into account their academic qualifications by waiving question of age but if any and usual proceedings for such appointment."

42. In the case of Tapan Kumar Haldar v. State of West Bengal reported in 1999 (II) CHN 569, a learned single Judge of this Court directed a teacher who had worked in a leave vacancy for about four years is to be regularised in the

permanent vacancy that arose in the post subsequently.

43. In the case of L.N. Ghosh v. State of West Bengal reported in 1993 (1) CHN 382, Ruma Pal, J. held as follows:

"There has been a veritable flood of cases relating to the regularisation of employees in different services. The cases cited by the petitioner are a representative tickle of this flood. Upon a consideration of the authorities cited it appears that there are 2 broad streams of cases. In the first stream are the cases which raise the question whether the employee concerned appointed is made by ignoring the regular procedure provided for recruitment under a pretended need. Extraneous reasons would include the appointment of an employee as a favour or to accommodate some one. This has been characterised by the Supreme Court as an abuse of power which is unpardonable.

In such cases the Supreme Court has directed that the Court should be reluctant to grant any indulgence (See: Karnataka State Private College Stop-Gap Lecturers Association Vs. State of Karnataka and Others, . The second stream relates to those employees who were genuinely appointed due to the exigency of service. In such cases the Courts have directed regularisation subject to the fulfillment of three pre-conditions, namely; (a) The existence of a substantive post against which the employee concerned has served. (See: All Manipur Regular Posts Vacancies Substitute Teacher's Association v. State of Manipur (supra); Akhtar Hamid Sheikh v. D.I. Schools (supra) and Bakul Rej v. State of West Bengal (supra), (b)

The employee must be otherwise qualified to be appointed to the post; (See: J.M. Puthuparambil v. Kerala Water Authority (supra) and (c) The employers must have served continuously in the post against which regularisation is asked, for a reasonably long period. (See: Manik Chandra Sarkar v. State of West Bengal (supra) and Smt. Pratima Sarkar a State of West Bengal (supra). Judicial precedent also shows that the Courts have not taken happily to the refusal on the part of the State to regularise the post of an employee who has fulfilled all these preconditions merely on some technical plea. (See: Aktar Hamid Sheikh v. D.I. of Schools (S.E.) (supra)."

44. Applying the above principles laid down in L.N. Ghosh's case (supra) to the facts of this case, it must be held that the petitioner's case falls within the second stream. It is nobody's case that the petitioner was appointed for any reason other than a genuine necessity.

45. Reference may also be made to a recent decision of this Court in the case of Aparna Bhattacharyya (Mukherjee) v. State reported in 2001(1) CHN 517 where P.K. Chattopadhyay, J. following the decision of the Supreme Court in the cases of Arun Kumar Rout (supra), Court Liquidator's Employees Association (supra), Shainda Hasan (supra) and Piara Singh (supra) held as follows:

"Admittedly, at the time of initial appointment the petitioner herein had the

requisite qualifications for the said post of Assistant Teacher and was within prescribed age limit and thus major part of the Recruitment Rules had been complied with. So, when the petitioner was appointed with the requisite qualifications and was allowed to continue for more than 15 years, it would be a great wrong and serious injustice to the petitioner if she is now thrown out of employment after long lapse of 15 years and such action would be certainly against the principles of socio-economic Justice. In the instant case, the recruitment norms and criteria were virtually substantially complied with."

46. In the aforesaid case, His Lordship directed the respondent authorities to forthwith take steps to regularise the service of the teacher concerned.

47. Although it is true that the period of service rendered by the teacher in that case was much longer, the period of service rendered by the petitioner in this case is also sufficiently long and there is no reason why the same principles should not apply in this case.

48. My attention has been drawn to the unreported decision of Ronojit Kumar Mitra, J. in W.P. No. 21380 (W) of 2000 (Manisha Roy and Anr. v. State of West Bengal and Ors., the relevant portion whereof is extracted hereinbelow:

"In the light of the decision of the Supreme Court, it must be understood that where, there were vacancies and in such vacancies teachers had been given appointments, the school obviously required the services of the teachers. I would also understand that whether such appointments were temporary, the fact remains that there were vacancies and the school required the services of teachers in those vacancies. Further, where the teachers had been rendering services even if on the basis of temporary appointments for years together, again in the light of the decision of the Supreme Court I would be inclined to be of the view that it would be against the public policy to interfere in the services of the teachers.

For those reasons, this application is allowed. The respondent No. 3 is directed to take all necessary steps for approval of the appointments of the petitioners as prayed for in the petition, in the light of the decision of the Supreme Court as also the observations made in this order."

49. As a Bench of coordinate strength, this Bench is bound by the decision of P.K. Chattopadhyay, J. in the case of Aparna Bhattacharyya Mukherjee (supra) and the decision of Ronojit Kumar Mitra, J. the case of Manisha Roy (supra).

50. The Petitioner Nos. 1 to 5 having initially been appointed long before the enactment of the West Bengal School Service Commission Act, 1997, the terms and conditions of his service in the employment of the school cannot be varied to disadvantage in view of the provisions of Section 10 of the said Act.

51. Section 10 said Act provides as follows:

"Section 10. Protection of Teachers--Notwithstanding anything contained

elsewhere in this Act, the terms and conditions of service of Teachers in the employment of a school immediately before the commencement of this Act shall not be varied to the disadvantage of such Teachers in so far as such terms and conditions relate to the appointment of such Teachers to the posts held by them immediately before the commencement of this Act."

52. The Petitioner Nos. 1 to 5 as Assistant Teacher of the school are entitled to the benefit of the said section. Even otherwise, ignoring the claim of an existing teacher to permanent absorption in a regular post would amount to manifest injustice.

53. In any event, the regularisation of an existing teacher who had been rendering service prior to the enforcement of the West Bengal School Service Commission Act, 1997 by appointment to a sanctioned post which fell vacant subsequently would only technically be a new appointment and, therefore, not attract Section 9(2) of the said Act, more so in view of the Judgments of the the Supreme Court referred to above.

54. The issues raised in this writ application are covered by Judgment and order dated 15th May, 2003 of this Court in W.P. No. 3758 (W) of 1999 (Smt. Sephalika Pal v. State of West Bengal and Ors.).

55. The writ petition is, therefore, allowed. The impugned order is set aside and quashed. The respondent Director of School Education is forthwith directed to take necessary steps for the regular appointment and approval of the petitioners in available vacant sanctioned posts in the school, in the light of the decisions of the Supreme Court as also the decisions of this Court referred to above.

56. Xerox certified" copy of this Judgment, if applied for, be given to the parties subject to compliance with the requisite formalities.