

(1996) 03 CAL CK 0046
In the Calcutta High Court
Case No : C.O. No. 2355 of 1995

Kishamat Adabari High School

APPELLANT

Vs

Sri Bikash Chandra Roy

RESPONDENT

Date of Decision : 22-03-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151

Citation : (1996) 2 CALLT 170

Hon'ble Judges : Basudeva Panigrahi, J

Bench : Single Bench

Advocate : P.B. Sahoo and Sanat Chowdhury, for the Appellant; Bhaskar Bhattacharjee, Mahendra Roy and Seba Roy, for the Respondent

Judgement

Basudeva Panigrahi, J.—The petitioners having been unsuccessful in the Court of the District Judge, Cooch Behar in Misc. Appeal No. 6/94 and also in the Court of Munsif, Dinhata: in T.S. No. 88/94 by an order of injunction have preferred this revisional application.

2. The opposite party No. 1 has instituted a suit challenging the recruitment procedure for appointment of an Assistant Teacher in Kishamat Adabari High School (hereinafter referred to as the School) in T.S. No. 88/94 before the Court of Munsif, Dinhata. It is Inter alia stated in the suit that the District Inspector (South East Cooch Behar) granted permission for appointment of an Assistant Teacher in Science at the aforementioned Institution. The School authority pursuant to the permission granted by the District Inspector of School addressed a letter to Dinhata Employment Exchange for sponsoring the name of the candidates for selection to the said post. The local Exchange is said to have sponsored 11 candidates including the names of the plaintiff-defendant Nos. 5 and 6. It is seriously disputed by the Plaintiff-opposite party that though the defendant Nos. 5 and 6 were ineligible to be a candidate for the interview their names have been improperly and Illegally sponsored by the local Employment Exchange. It is further alleged that in respect of an appointment of post graduate

teacher the names of such candidates have to be sponsored by the national Employment Exchange. The Managing Committee in utter flagrant of the rules had illegally selected the name of defendant Nos. 5 and 6 against serial Nos. 1 and 2 for the post of Assistant Teacher. Since the recruitment rules were violated the defendant No. 5 cannot be appointed against the vacant post of Assistant Teacher. Thus, the plaintiff-opposite party has filed; the suit for declaration that the interview held on 28.6.1994 for the selection of candidates to the post of Assistant Teacher of defendant No. 1's School is wrong, illegal mala fide and without jurisdiction. A further declaration was also sought that the Managing Committee having violated the norms for calling candidates for the interview to the post of Assistant Teacher of the defendant No. 1 the selection of defendant Nos. 5 and 6 and also if any approval made by the District Inspector of Schools is invalid, illegal and shall not bind on the plaintiff. It is further prayed that the plaintiff is entitled to be appointed to the post as per the norms and interview. The plaintiff sought for ad interim injunction against the defendant Nos. 1 and 2 prohibiting them from issuing any appointment to the post of the Assistant Teacher pursuant to the purported selection which had been made by the interview. The learned Munsif on hearing both the parties restrained the defendant Nos. 1 and 2 from taking any steps regarding the appointment of Assistant Teacher till the hearing of the suit. D.I. Schools (S.E.) was further restrained from according approval to the panel of the names forwarded by the defendant Nos. 1 and 2 till the disposal of the suit.

3. Being aggrieved by the order passed by the learned Trial Court these petitioners filed an appeal before the District Judge, Cooch Behar who too, while affirming the order of injunction, modified the same vacating the said order against the District Inspector of School.

4. Mr. Sahoo, the learned counsel appearing for the revision-petitioner has strenuously urged that both the courts in the instant case have improperly, exercised a discretion while granting the ad-interim injunction against the School authority for the appointment of an Assistant Teacher. The learned courts below did not visualise the exigencies that if ad interim injunction is granted at this stage it might have a serious consequences which may amount to granting the final relief to the plaintiff-opposite party. It was further argued that the School authority have never asked the local exchange for sponsoring the post graduate candidates to the post of Assistant Teacher. The post-graduate qualification of the defendant Nos. 4 and 5 was also never considered by the Selection Committee. From the further argument it appears that Mr. Sahoo has highlighted that Rule 4 for Management of the recognised non-Government Institutions (Aided and unaided), 1969 Education Act has never been violated by the School Authorities vis-a-vis the order passed by the Courts below having been improperly made those are liable to be vacated. He further maintained that even assuming that there was infraction of Rule 4 it being directory and regulatory in nature such non observance of Rules would not render the selection of defendant No. 5 otiose. The plaintiff having failed to prove any mala fide that is said to have

occasioned in the manner of selection of Assistant Teacher the learned courts below should not have as a matter of course brushed aside the selection made by the selection committee. Plaintiff has no right to maintain the suit since by not being selected by the appointment committee does not afford him the justiciable right to approach the court. One of the most important ingredients regarding irreparable injury having neither been pleaded nor proved the learned courts below should have been slow in granting ad-interim injunction. While striking the balance of convenience the learned Trial Court ought to have considered that the balance of inconvenience is still greater in granting injunction than the balance of convenience that was considered in favour of the plaintiff.

5. Mr. Bhattacharjee, the learned counsel appearing for the plaintiff opposite party, has however, made a fervent plea that there is utter violation of Rule 4 as a result of which both the courts below after having considered the merit of the plaintiffs application were inclined to exercise their/lawful discretion in granting injunction against the petitioners. Since the grant or refusal of injunction is based on sound judicial principle and such discretion has already been exercised in favour of the opposite party-plaintiff the revisional court should not ordinarily interfere with such grant of injunction. The selection committee with the avowed purpose to select defendants 4 and 5 has invited candidates from the local employment exchange for selection to the post of the Assistant Teacher. At the last moment the name of expert was; abruptly changed and the accommodation of a new expert was made with a view to select the defendants 4 and 5 to the aforesaid post. Therefore, the entire selection process being violative of the mandatory Rule 4 it was accordingly held invalid by the courts below.

6. Mr Bhattacharjee further seriously contended regarding the maintainability of the appeal and also the revision against an order of injunction granted u/s 151, namely the inherent powers of the Court of the Code of Civil Procedure. In the instant case, it is argued that by violation of Rule 4 an irreparable injury which could not be compensated otherwise had been caused to the plaintiff the learned Trial Court as well as the court of appeal were, therefore, perfectly justified in directing the order of injunction.

7. While appreciating the contention of the parties it is necessary to quote Rule 4 :-

"4. (a) On receipt of the prior permission the school authorities shall approach the local Employment Exchange for sponsoring the names of the candidates up to Honours Graduate Level and National Employment Exchange for Post Graduates candidates, according to prior permission within 7 days.

(b) 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. candidates. If names are not sponsored within the time limit mentioned above, the school authorities shall approach the D. I./S(SE) for permission for

advertisement in State level daily newspaper. No permission of |D.I./S(SE) for advertisement will be necessary in case of receipt of non-availability certificate from the Employment Exchange. In the advertisement, name and full address of the institution shall be mentioned irrespective of whether the vacancy is permanent or temporary."

8. On a clear reading of the rule it has to be carefully considered whether aforementioned rule is mandatory or directory. In case, it is held to be mandatory infraction of such rule would render the selection process illegal and consequently the order of injunction passed by the courts below is to be maintained. On the other hand, if it is found that the Rule 4 is directory in nature, in other words if it is regulatory even assuming that the provision of the said rule is violated it cannot be said that the process of selection would be illegal. While considering the nature of rules whether it is mandatory or directory the question has come before this court on a number of occasion for consideration. In a case reported in 1995(2) CHN 238, [Samarendra Goswami v. The Dabuk Gram Panchayat and Ors.) a Single Bench of this Court Satya Brata Sinha, J. held on the basis of a judgment reported in K. Narasimhiah Vs. H.C. Singri Gowda, in the case of K.Narsimhtah v. H.G. Singh Gowda and Ors. that when time limit stipulated in the provision for performing a special Act in default of such act within the stipulated period would not render the action taken by the authority as invalid. At the most, it can be said to be a procedural illegality if it dose not affect prejudicially against the interest of any person. In another case reported in 1992(2) CHN 229 in the case of Md. Asraf Ali Mondal v. Block Development Officers and Ors. had an occasion to consider the proviso to Section 16 of West Bengal Gram Panchayat Act. It was held that the period of time mentioned in the proviso was a directory provision and not a mandatory one.

9. Mr. Sahoo, the learned counsel appearing for the petitioner has also cited a decision reported in State of Punjab Vs. Balbir Singh, The Apex Court in the decision cited (supra) had an occasion to examine the nature of the provision of Sections 52 and 57 of N.D.P.S. Act as to whether those are mandatory or directory in character. It has been held:-

"24. Sections 52 and 57 come into operation after the arrest and seizure under the Act. Somewhat similar provisions are also there in the Cr. P.C. If there is any violation of these provisions, then the Court has to examine the effect of the same. In that context while determining whether the provisions of the Act to be followed after the arrest or search are directory or mandatory, it will have to be kept in mind that the provisions of a stature creating public duties are generally speaking directory. The provisions of these two sections contain certain procedural instructions for strict compliance by the officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate

the trial or the conviction if otherwise there is sufficient material. Therefore, it has to be shown that such non-compliance has caused prejudice and resulted in failure of Justice. The officers, however, cannot totally ignore these provisions and if there is no proper explanation for non-compliance or where the officers totally ignore the provisions then that will definitely have an adverse effect on the prosecution case and the courts have to appreciate the evidence and the merits of the "case bearing these aspects in view. However, a mere non-compliance or failure to strictly comply by itself will not vitiate the prosecution.

10. Mr. Bhattacharjee, the learned counsel for the plaintiff in support of his submission laid stress upon the word "shall" used in Rule 4 and contended that from the very use of the word "shall" it can be assumed that the rule making authority has intended that the appointment committee shall call for the candidates to be sponsored by the local employment authority within a period of 7(seven) days and also similarly the local employment exchange shall sponsor the eligible candidates within 40(forty) days from the date of such letter received from the School Authority. Failing to sponsor the candidates within the stipulated time by the local exchange authorities will render the entire process illegal and any action taken thereunder by the appointment committee will be invalid and in operating in law.

11. Upon reading of the Rule 4 it seems that the rule making authority does not stipulate as to what consequences it would follow in case of failure of the submission of the " list by the local employment exchange. Assuming that some delay has been caused by sending the name by the local exchange to the School Authority, thereby, it cannot be argued that the plaintiff-opposite party has suffered some prejudice. On the contrary he has also participated in the interview conducted by the selection committee.

12. Mr. Sahoo, the learned counsel has indicated that the plaintiff has patently failed to bring out a case of malafide by the School Authority. In case of proper pleading or proof it was not legitimate for the courts below to grant temporary injunction. In course of hearing I could not notice that in what manner the plaintiff opposite party shall be affected if the ad-interim injunction is withheld. In case, the revision petition is allowed at the best, it can be said is that the defendant No. 5 would get some remuneration for his service. In the event, the plaintiff's suit is decreed, defendant No. 5 may go out of employment but the plaintiff cannot be allowed to be absorbed in service without a further interview. Therefore, while striking the balance of convenience and inconvenience it is found that the balance of inconvenience shall be greater in case it is granted than in case it is withheld. From the decision reported in *Km. Nelima Misra Vs. Dr. Harinder Kaur Paintal and others*, The Apex Court held as follows :-

" It is not unimportant to point out that in matters of appointment in the academic field the court generally does not interfere. In *The University of Mysore and Another Vs. C.D. Govinda Rao and Another*, this court observed that the Courts should be slow to interfere with the opinion expressed by the experts

in the absence of malafide alleged against the expert. When appointments based on recommendations of experts nominated by the Universities, the High Court has got only to see whether the appointment had contravened any statutory or binding rule or ordinance. The High Court should show due regard to the opinion expressed by the experts constituting the selection Committee and its recommendation on which Chancellor has acted. See also the decision in Dr. J.P. Kulshreshtha and Others Vs. Chancellor, Allahabad University and Others, and Dalpat Abasaheb Solunke and Others Vs. Dr. B.S. Mahajan and Others, . "

13. Mr. Bhattacharjee has advanced a formidable point that the ground of refusal of a discretionary relief such as injunction lies within the wide discretion of the courts below and once such a right has been exercised in either way it is not open to the parties to approach this court by filing a revision to disturb such relief granted to a litigant by the courts below. It should not be lost sight of that while relief of injunction is granted such findings must be based on sound legal principles and "ex debito justitiae". If both the courts below failed to examine the merits of the contention this court in order to meet ends of Justice can certainly interfere into such findings.

14. Mr. Bhattacharjee raised an interesting question regarding the maintainability of this revision he took an inexorable plea that since the original order of injunction has stemmed from the inherent jurisdiction of the court, such order is not amenable to appeal jurisdiction. Therefore, any revision arising from the appellate court's Judgment is equally not maintainable in law. In support of his contention he relied on a decision reported in Rathindra Nath Bose Vs. Jyoti Bikash Ghosh and Others, it is undoubtedly true that the court granted ad-interim injunction by exercising its powers u/s 151 C.P.C. But all the same it should not be forgotten that the plaintiff filed an application under 39 Rule 1 and 2. Therefore, the revision-petitioner having been aggrieved by the findings of the learned Munsif preferred an appeal before the learned District Judge. Thus, the revision petitioner was entitled to question the validity of the appellate court's order by filing this revision. Further-more, the plaintiff had not raised any objection regarding the maintainability of the appeal while it was pending before the Court below. In support of the plea, Mr. Sahoo has relied upon a decision reported in 1987(1) SCJ 17 (Pranab Kumar Sarkar v. Smt. Basanti Roy). It has been held as follows :-

"C. On the question whether the impugned order was passed under Order 39, Rule 1 or 2 which is appealable under Order 43, Rule I(r), C.P.C. or passed u/s 151 C.P.C. which is not at all appealable, the true test is what the order itself is. Where the order purports to be under an appealable provision though wrongly, an appeal will lie there from"

15. Therefore, from the ratio of the above Judgment trite position has emerged that the appellate court's order could be legitimately questioned by filing a revisional application. It is highlighted by the plaintiff that the defendants 1 and 2 all on a sudden changed the earlier expert Sri Asis Kr. Roy for the interview by

placing one Abdul Sattar Miah. Mr. Sahoo while repelling invited my attention that in fact Mr. Roy was not kept as an expert No. 1. Therefore, the plea that Mr. Roy was replaced by Abdul Sattar Miah substantially cuts no ice.

16. Rule 6 indicates allotment of marks to be assessed during interview. Mr. Sahoo in support of the revision has invited my attention that there was no violation of Rule 6 for the allotment of marks.

17. One of the predominant factor the court has to bear in mind is that while considering the prayer for injunction the court has to be satisfied that some species of injury is likely to be caused in case the prayer for injunction is withheld. In the instant case, I do not notice that any such injury has been alleged by the plaintiff that by withholding such prayer he would sustain irreparable injury. Considering the material on record, I notice that substantial injury could not be said to have occurred by withholding injunction, rather, the plaintiff could be otherwise substantially compensated in terms of money if he succeeds.

18. On the above conspectus of the case and after serious cogitation of the matter I find that the courts below have improperly exercised their discretion while granting ad-interim injunction to the plaintiff-opposite party.

Accordingly, the prayer for ad-interim injunction sought by the plaintiff is rejected.