
(2006) 09 CAL CK 0081
In the Calcutta High Court
Case No : F.M.A. No. 1425 of 2003

Manindra Nath Sinha and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 06-09-2006

Acts Referred:

Constitution of India, 1950 — Article 162, 309

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

Citation : (2006) 4 CHN 513

Hon'ble Judges : Jayanta Kumar Biswas, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : S. Deb and K.H. Dasan, for the Appellant; M.C. Bhattacharya and Soma Chakraborty for the respondent No. 7, P.K. Roy, for the respondent No. 9 and S. Banerjee and S.K. Acharya, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This mandamus appeal is at the instance of unsuccessful writ petitioners and is directed against the order dated July 5, 2002 passed by a learned Single Judge of this Court thereby dismissing the writ application filed by the appellants. In the said writ application, the writ petitioners challenged the order dated 17th May, 2000 passed by the District Inspector of Schools (SE), Midnapore, by which he said District Inspector of Schools dismissed the representation of the appellants for the approval of their appointments in the concerned school as organizer-staff.

2. The facts leading to the filing of the present mandamus appeal may be summed up thus:

(a) The writ petitioners are eight in number. The petitioner No. 1 claimed to be the organizer-Headmaster, the petitioner Nos. 2 to 6 as organizer-teachers, the petitioner No. 7 as organizer-clerk and the petitioner No. 8 as organizer Class-IV staff of one Sardiha Anchalik Junior High school, Village Baharakotha, P.S. Jhargram, District Midnapore (hereinafter referred to as the concerned school).

According to the writ petitioners, the said school had been functioning continuously with effect from 16th January, 1986 and they entered into the service of the said school after being duly appointed by the Organizing Committee of the said school. They, however, claimed that the school really started on January 1, 1974 but due to financial stringency, after two academic sessions, the school ceased to function and was subsequently, started operating from January, 1986 after the local public decided to revive the same by forming an Organising Managing Committee and appointing organising-staff through the said committee.

(b) The West Bengal Board of Secondary Education for the first time recognized the said school as IV-Class Junior High school for three years with effect from 1st May, 1994 and subsequently, the recognition of the said school was extended for further three years with effect from May 1, 1997.

(c) After the first recognition of the school, the writ petitioners prayed for approval of their appointments as regular staff and also for payment of salary and allowance from 1st May, 1994 before the District Inspector of schools (Secondary Education) Midnapore. Since no reply was given by the District Inspector of schools, they moved a writ application before this Court praying for direction upon the District Inspector of schools for the approval of their appointment being C.O. No. 19073 (W) of 1994.

(d) Shyamal Kumar Sen, J. (as His Lordship then was) on 13th March, 1997 appointed Mr. Amal Kumar Das, a learned Advocate of this Court as Special Officer to carry on the day-to-day administration of the said school since the life of the Managing Committee of the said school had already expired and the learned Special Officer was directed to take all steps necessary to reconstitute the Managing Committee as early as possible. The Special Officer was further directed to send the names of the organizing-teachers, who, he considered, were entitled to be approved by the District Inspector of schools, Midnapore and His Lordship also directed the District Inspector of schools, Midnapore to take appropriate decision on the question of approval of the appointment of the writ petitioners in accordance with law.

(e) The learned Special Officer considered the cases approval of appointments of the writ petitioners and decided that all the writ petitioners were entitled to be approved in their respective posts and accordingly, by his letter dated 25th June, 1997 recommended the names of the writ petitioners for being approved to the District Inspector of Schools (SE), Midnapore, since the date of first recognition of the School, namely, May 1, 1994.

(f) By memo dated 11th December, 1997, the Acting District Inspector of schools (SE), Midnapore, rejected the case of the writ petitioners for being approved and accordingly, the writ petitioners challenged the aforesaid order of the Acting District Inspector of schools (SE), Midnapore by filing an interlocutory application being CAN No. 27 of 1998 in the writ application and Shyamal Kumar Sen, J., by

order dated 27th October, 1998, directed the District Inspector of schools (SE), Midnapore to take appropriate steps regarding the report of the Special Officer dated 25th June, 1997. After the receipt of the order, the District Inspector of schools (SE), Midnapore approved the appointments of the writ petitioners.

(g) However, after approving the appointments of the writ petitioners, the District Inspector of schools subsequently passed an order directing withdrawal of the approval made by him in the earlier memo, as a result, the writ petitioners filed another writ application before this Court being W.P. No. 6365 (W) of 1999 and the same was disposed of by Tarun Chatterjee, J. (as His Lordship then was) by order dated 25th February, 2000 thereby setting aside the order of the District Inspector of schools and directing him to hear the writ petitioners and all other interested persons and to pass necessary order in accordance with law within a specified time. While disposing of such writ application, Chatterjee, J., however, observed that Shyamal Kumar Sen, J. while disposing of the writ application "gave a go-by to the memo dated 12th November, 1997 (sic 11th December, 1997) of the Acting District Inspector of school."

(h) Pursuant to the direction given by Chatterjee, J., the District Inspector of schools heard the matter afresh and by the order dated 17th May, 2000 came to the conclusion that the concerned school being a newly set-up one without any organizing-staff, there was no question of approval of any organizing-staff and the staff should be recruited direct in pursuance of the employment policy of the Government. The District Inspector of schools rather disbelieved the case of the writ petitioners that they were the organizer-staff of the said school.

(i) Being dissatisfied, the writ petitioners preferred a fresh writ application being W.P. No. 11542 (W) of 2000 and by the order impugned herein Subhro Kamal Mukherjee, J. has refused to interfere with the order passed by the District Inspector of schools. While dismissing the writ application, His Lordship came to the conclusion that the District Inspector of schools did not commit any error in arriving at his finding that the writ petitioners were not entitled to be approved as teaching and non-teaching staff of the school.

(j) Being dissatisfied, the present mandamus-appeal has been filed. At the time of disposal of an application for stay in connection with this appeal, a Division Bench of this Court disposed of the appeal itself by holding that in view of the disposal of the application for stay, there remained nothing more to be decided in the mandamus-appeal. The writ petitioners preferred a special leave application before the Supreme Court of India against the said order of dismissal of the appeal and the Apex Court, ultimately, set aside the order of the said Division Bench and remanded the matter back to this Court for hearing of the mandamus-appeal on merit after considering the submissions of the appellants taken in the memorandum of appeal.

3. Accordingly, the matter has been assigned to this Bench for hearing of this appeal.

4. Mr. Deb, the learned Counsel appearing on behalf of the appellant has, at the very outset, strenuously contended before us that in the past, Shyamal Kumar Sen, J. having appointed a Special Officer for the purpose of ascertaining who the organizer-staff were and pursuant to such direction, the learned Special Officer having recommended the names of the petitioners on consideration of the relevant records and those persons having already been appointed by the District Inspector of schools concerned, the said recommendation cannot be withdrawn by his successor. Mr. Deb contends that against the order of Shyamal Kumar Sen, J., the respondent authority never preferred any appeal but complied with such direction and therefore, the successor of the said District Inspector of schools could not recall the order earlier passed pursuant to the order passed by Sen, J. Mr. Deb contends that the principle of *res judicata* applies to the fact of the present case.

5. Mr. Deb next contends that the learned Single Judge failed to appreciate that the petitioners were appointed as organizer-staff by the Organising Managing Committee in accordance with the mandate contained in different circulars issued by the State Government and the Board had already recognized the school with effect from May 1, 1994 and as such, there was no reason for disbelieving the materials on record which was also corroborated by the report of the learned Special Officer.

6. Mr. Deb, thus, prays for setting aside the order passed by the learned Single Judge and restoration of the earlier order passed by the District Inspector of schools concerned approving the appointments of his clients.

7. As regards the first contention raised by Mr. Deb, we are of the view that the principle of *res judicata* cannot be held applicable to the facts of the present case. It is true that Sen, J. directed the District Inspector of schools to take appropriate decision in accordance with law on the basis of the report given by the learned Special Officer and the concerned District Inspector of schools subsequently passed an order approving the appointments of the writ petitioners. Notwithstanding such order of approval of the appointments, his successor, the Acting District Inspector of schools, however, recalled that order and against the order recalling the earlier order, the writ petitioners in the past moved another writ application before Chatterjee, J. The plea of *res judicata* was very much available to the writ petitioners before Chatterjee, J., but despite such fact, Chatterjee, J., in His Lordship's order, specifically recorded that the direction given by Sen, J. was passed on non-consideration of the order passed by the Acting District Inspector of schools. His Lordship although set aside the order passed by the District Inspector of schools recalling the earlier order, directed the said officer to rehear the matter after giving an opportunity of hearing to the writ petitioners and other interested parties. The writ petitioners did not challenge the order passed by Chatterjee, J., and as such, after the disposal of the said writ application, the said order is binding upon the parties and there is no scope of giving relief to the petitioners on the basis of earlier

order of approval pursuant to the order passed by Sen, J. We, thus, find that Mr. Dev's clients cannot take the benefit of the plea of res judicata or the earlier order passed by the District Inspector of schools pursuant to the direction given by Shyamal Kumar Sen, J. once they failed to obtain such relief from Chatterjee, J. in the subsequent writ application.

8. Before we enter into the question as regards the finding of the District Inspector of schools which is impugned in the writ application out of which the present mandamus-appeal arises, we propose to consider a preliminary objection raised by Mr. Banerjee, the learned Advocate appearing on behalf of the Board as regards the maintainability of the present writ application in view of two separate decisions of this Court given by two learned Single Judges of this Court. According to those two decisions, one unreported and disposed of by Barin Ghosh, J. on July 3, 2003 in W.P. No 2945 of 1990 and the other, in the case of Alope Jyoti Maitra v. State of West Bengal and Ors. reported in 2003(2) CLJ. 553 (delivered by one of us), there is no scope of approval of appointment of an organizer-teacher within the scope of the West Bengal Board of Secondary Education Act, 1963 or the rules framed thereunder.

9. Mr. Deb appearing on behalf of the appellant has, however, disputed the legality of those two decisions and has contended that in various notifications issued by the State Government, the concept of "organizer-teacher" or "organizing-teacher" having been recognized, the District Inspector of schools, a Subordinate Officer under Government of West Bengal, is bound to follow those circulars and the notifications issued by his superior authority.

10. Mr. Deb in this connection relied upon a decision of a Division Bench of this Court in the case of West Bengal Board of Secondary Education v. State of West Bengal and Ors. reported in 1997(1) CLJ 165 where the concepts of "organizer-staff or "organizer-teachers" were recognized by the said Division Bench.

11. Mr. Deb contends that at any rate, in view of various circulars and notifications issued by the State Government, the State is bound by the doctrine of promissory estoppel and in support of such contention he has strongly relied upon the decision of the Supreme Court in the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, , where various English decisions on the question of applicability of the doctrine of promissory estoppel were considered. Mr. Deb, thus, submits that the Government cannot claim to be immuned from the applicability of the rule of promissory estoppel and repudiate promise made by it on the ground that such promise had fettered its further executive action. Mr. Deb, thus, invites us to enter into the materials on record for the purpose of considering the merit of his clients' case and for arriving at the independent finding on that basis.

12. After hearing the learned Counsel for the parties on this question, we find that in two different decisions, two learned Single Judges have arrived at the conclusion that within the scope of the West Bengal Board of Secondary

Education Act, 1963 and the Rules framed thereunder, there is no scope of appointment of any organizer-teacher as the concept of organizer-teacher or organizer-staff is unknown in the said Act and the rules framed thereunder.

13. Therefore, the questions before us are whether the writ petitioners were appointed by the then Organising Managing Committee of the school as organizer-staff and if appointed, whether such appointment can be directed to be approved in accordance with the existing statutory provisions.

14. To appreciate the aforesaid questions. Rule 28 of the Management Rules providing power of the Managing Committee of a school may be referred to. At this stage, it may be mentioned here that the Parent Act in this case is the West Bengal Board of Secondary Education Act, 1963 and according to Section 45 of such Act, the State Government may after previous publication make rules for carrying out the purpose of the said Act and by virtue of such power conferred u/s 45 of the said Act, the Management Rules were enacted. The provision of the Rule 28 as it stood prior to coming into operation of West Bengal school Service Commission Act, 1997, is quoted below:

Power of the 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

(i) to appoint teachers and other employees on permanent basis against permanent vacancies, if available, within the sanctioned strength of teachers and other employees, approval for such appointment being thereafter sought for from the Director or any other officer authorised by him, ordinarily within a fortnight from the date of decision of the committee;

(ii) to appoint teachers and other employees on temporary basis against permanent or temporary vacancies, if available, within the sanctioned strength of teachers and other employees, approval for such appointment being thereafter sought for from the Director or any other officer authorised by him, ordinarily within a week from the date of decision of the committee.

15. According to the aforesaid provision, the Managing Committee of a school was vested with the power subject to the provision of any Grant-in-aid scheme or pay-revision scheme or any order or direction or guidelines issued by the State Government or Director and in force for the time being to appoint teachers and other employees on permanent basis against permanent vacancies if available within the sanctioned strength of teachers and other employees and approval of such appointment should be thereafter sought for from the Director or any other officer authorized by him within a specified period. Similarly, such Managing Committee had also power to appoint teachers and other employees on temporary basis against permanent or temporary vacancies within the sanctioned strength of teachers and other employees in the similar manner but in the rules no power has been given to the Managing Committee of a school to appoint any

teacher or non-teaching staff beyond the sanctioned strength of teachers and other employees. In the case before us, the petitioners are claiming that before approval of the school, they were appointed by the Organizing Managing Committee of the school and as such, their appointments should be regularised after the recognition of the school. Therefore, the appointment of the petitioners, according to their own case, as so-called organizer-teacher was not in conformity with the Parent Act or the rules because they were not appointed by any Managing Committee constituted in accordance with the Act or the rules framed thereunder but by a purported. Organizing Managing Committee. Although, there are several notifications issued by the Government giving instruction for approval of organizer-teachers in a school, the term "organizer-teacher" is unknown in the Parent Act or the rules. Moreover, even no instruction has been given by the Government permitting any purported Organizing Managing Committee to appoint teaching or non-teaching staff as "organizer-teachers" before a school is formally recognized. Therefore, it is apparent that the appointment of the petitioners by the Organizing Managing Committee, even if the same is true, was without any authority of law.

16. In our view, in the Parent Act, namely, the West Bengal Board of Secondary Education Act, 1963 and rules framed thereunder to achieve the object of the said Act, there is no provision for appointment of any Organizing Managing Committee or organizer-teacher nor is there any authority conferred upon such Organizing Managing Committee to appoint any teacher or employee before the recognition of the school and conferment of the prescribed sanction strength under the Act and the Joint Secretary of the Education Department by issuing certain circulars cannot lay down the guidelines for approval of any teacher or employee illegally appointed by the so-called Organizing Managing Committee. If the initial appointment is illegal according to the Parent Act and the rules, the Government by issuing notification through its Joint Secretary cannot approve or regularize such illegal appointments.

17. In this connection reference may be made to a Supreme Court decision in the case of R.N. Nanjundappa Vs. T. Thimmiah and Another, . In the said case, rules framed by the Governor of Mysore in exercise of power conferred under the proviso to Article 309 of the Constitution of India was challenged. The rules are quoted below:

1. Title: These rules may be called the Mysore Education Department Services (Technical Education Department)(Special Recruitment) Rules, 1967.
2. Provisions relating to regularization of appointment of Principal, school of Mines, Oorgaum, Kolar Gold Fields.

Notwithstanding any rules made under the proviso to Article 309 of the Constitution of India, or any other rules or order in force at any time, Dr. T. Thimmaiah, B.Sc (Hons.) Ph.D. (Lond.) F.G.S. shall be deemed to have been regularly appointed as Principal, school of Mines, Oorgaum, Kolar Gold Fields,

w.e.f. 15.02.1958.

By order and in the name of the Governor of Mysore

Sd/- S.N. Sreenath

Under Secretary to Government Education Department.

18. In the aforesaid case, irregular appointment of the respondent to the post of the Principal, Kolar Gold Fields school of Mines was sought to be regularized by enacting the aforesaid rules in exercise of power under the proviso to Article 309 of the Constitution of India and it was contended on behalf of the State that under Article 309, the State had the power to make rules regularizing a previous appointment irregularly made. Shelter was taken behind Article 162 of the Constitution of India and the power of the Government to appoint.

19. In such circumstances, the Supreme Court was of the view that nobody could deny the power of the Government to appoint but regularisation of appointment by stating that notwithstanding any rules, the appointment was regularized, struck at the root of the rules and if the effect of the regularization was to nullify the operation and effectiveness of the existing rules, such rules itself is open to criticism on the ground that it is in violation of the current Rules. Therefore, the relevant rules at the material time as to the promotion and appointment were infringed and the impeached rules could not be permitted to stand to operate as regularization of appointment of one person in utter defiance of the rules requiring strength of seniority and merit.

20. In the present case, according to the existing rules, there is no scope of appointment of an Organizing Managing Committee and even a regularly appointed Managing Committee is not vested the authority to appoint any teacher or non-teaching staff beyond the sanctioned strength; but by way of Government instructions such illegal act is sought to be regularized. Therefore, the facts of the present case are the worse than those involved in the case of R.N. Nanjundappa (supra), where statutory rules were framed to regularize illegal act.

21. We, thus, find that by merely issuing Government instructions, illegal acts committed by the Organizing Managing Committee which is a total busybody cannot be regularized in this way. The moment the school is recognized, the Managing Committee is to be constituted in accordance with the Act and the rules framed thereunder and such duly-constituted Managing Committee can alone appoint teachers and non-teaching staff according to the provision contained in Rule 28 of the Management Rules within the sanctioned strength but even there, there is no right conferred upon the duly-constituted Managing Committee to appoint any staff who before the recognition of the school was appointed by the Organizing Managing Committee and even the guidelines or circulars did not permit the appointment of any staff before the school is recognized and the sanctioned strength is declared.

22. Therefore, it is clear that initial appointments of the writ petitioners, even if those were really made, were contrary to the rules and any executive instruction issued by the Government cannot" approve the illegal appointment contrary to the statutory rules.

23. As regards the applicability of the doctrine of promissory estoppel raised by Mr. Deb we are of the view that if the appointment itself is de hors the existing statutory enactments, there is no question of applicability of the doctrine of promissory estoppel. According to the Parent Act, namely, the West Bengal Board of Secondary Education Act, 1963 and the rules framed thereunder, there is no provision of appointment of organizer-teacher by a so-called Organizing Managing Committee before a school has been recognized by the Board. There is no statutory provision for giving appointment to the so-called organizer-staff after a school is recognized by the Board. According to the present law, a Managing Committee is to be duly constituted and such duly-constituted Managing Committee alone will appoint teachers and non-teaching staff by complying with the requirements of the Management rules. In the case before us, such formalities were admittedly not complied with. The decision of the Supreme Court in the case of Motilal Padampat Sugar Mills Ltd. (supra), relied upon by Mr. Dev rather lays down that the doctrine of promissory estoppel is not applicable against the Government if it is under the obligation or liability to act differently by operation of law. In a subsequent decision of the Supreme Court in the case of Bangalore Development Authority and Others Vs. R. Hanumaiah and Others, , it has been clearly held that the principle of promissory estoppel cannot be invoked to permit or condone a breach of law or to compel the Government to do an act prohibited by law. It was pointed out in that case, that in the absence of any statutory provision enabling the Bangalore Development Authority to reconvey the land acquired to implement scheme for framing of sites and allotment thereof, the Authority could not be directed to reconvey a part of the land merely because it had earlier promised to do so. We, thus, find no substance in the contention of Mr. Dev on the question of invocation of the principle of promissory estoppel in the facts of the present case.

24. In the case of Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd., another decision cited by Mr. Dev, the Apex Court merely held that where a person has acted upon the representation made in the Export Promotion Scheme that import licence would be issued up to the value of the goods exported and accordingly exported the goods, his claim for import licence for the maximum value permissible under the scheme cannot be arbitrarily withheld or curtailed. Therefore, in that case, the Supreme Court enforced the promise given by the Government in accordance with scheme but in the case before us, the appellants want violation of the statutory provisions on the basis of certain illegal circulars by invoking the doctrine of promissory estoppel. The said decision, therefore, does not assist the appellants in any way.

25. Similarly, in the case of Nikhil Chandra Pal and Ors. v. West Bengal Board of

Secondary Education and Ors. reported in 2003(2) CLJ 41, a Division Bench of this Court was considering whether in the facts of the said case, the requirements of the relevant circulars issued by the Government in order to get approval of appointment as organiser-teacher in a newly upgraded recognised school were complied with and ultimately, came to the conclusion that those conditions were not fulfilled and consequently, rejected the prayer of the so-called organiser-staff. In the said decision, the question we are dealing with the legality of those circulars was not raised and as such, the Division Bench had no occasion to consider such question. Therefore, the said decision does not answer the question arisen before us and the said decision cannot be of any help to the appellants.

26. As regards the other decision cited by Mr. Deb, namely, the case of West Bengal Board of Secondary Education v. State of West Bengal and Ors. (supra), the Division Bench was considering the scope of the West Bengal Primary Education Act, 1973 and the Rule 3D framed under the said Act where the concept of organizer-teacher was recognized. Subsequently, however, the Rule 3D was amended and the right of an organizer-teacher was taken away. In such a case, the Division Bench held that after the amendment of Rule 3D, there was no scope of absorption of the organizer-teacher automatically and even the doctrine of legitimate expectation was not applicable. The said decision rather goes against Mr. Deb's clients.

27. We, therefore, approve the decision in the case of Alope Jyoti Maitra v. State of West Bengal and Ore (supra), holding almost the self-same view.

28. In view of our aforesaid finding, there is no necessity of even entering into the question whether the writ petitioners were really acting as organizing-staff. Nevertheless, we have decided to go into the question as elaborate submissions were made by Mr. Deb.

29. After going through the materials on record we are at one with the District Inspector of schools that this was a new school created by the local Panchayat and the land and the building also vested in the local Panchayat. Therefore, the claim of the writ petitioners that they had been acting as organizer-staff from an earlier point of time is on the face of it contrary to the materials on record. The findings of the learned Special Officer appointed by Shyamal Kumar Sen, J. was contrary to the materials on record and thus, even on merit, the petitioners have failed to prove their case that they were organizing-staff.

30. On consideration of the entire materials on record, we, thus, find that the petitioners have failed to prove that they had any existing legal right to have their alleged appointment regularized under the provision of the Act or the rules framed thereunder. We further hold that even the writ petitioners could not be said to be organizer-staff of the school and the school was really established by the local Panchayat long thereafter and the petitioners' names even never found place in the inspection report of DLIT.

31. The appeal is, thus, devoid of any substance and is dismissed accordingly. In the facts and circumstances, there will be, however, no order as to costs.

Jayanta Kumar Biswas, J.

32. I agree.