

(2017) 06 CAL CK 0038
In the Calcutta High Court
Case No : 4596 (W) of 2017

Md. Alauddin Molla & Ors.

APPELLANT

Vs

The State of West Bengal & Ors.

RESPONDENT

Date of Decision : 29-06-2017

Acts Referred:

[Constitution of India](#), [Article 311\(2\)](#) -
Dismissal, removal or reduction in rank of persons employed in civil capacities under
the Union or a State
[Code of Civil Procedure, 1908](#), [385](#)

Citation : (2017) 06 CAL CK 0038

Hon'ble Judges : Arijit Banerjee

Bench : SINGLE BENCH

Advocate : Bikash Ranjan Bhattacharyya, ?Biswarup Biswas, ?Sarwar Jahan, ?
Debabrata Sen, ?Amalendu Mitra, ?Arabindo Chatterjee, ?Bhaskar Prosad Vaisya,
Gourav Das, ?Sagnik Chatterjee, ?Ratul Biswas, ?Kaushik Chowdhury, ?Tapan Kr.
Mukherjee

Judgement

1. Common questions of fact and law are involved in these three writ applications and as such they are taken up for hearing and disposal together. The subject matter of challenge in all the three writ applications is a Memo bearing No. 46/L/DPSC/S. 24 Pgs dated 14 February, 2017 (in short the "impugned Memo"). By issuing the impugned Memo the Chairman of the South 24 Parganas District Primary School Council (in short "the said DPSC") terminated the services of the writ petitioners with effect from 15 February, 2017. The legality and validity of the impugned Memo falls for determination in these writ applications.

2. The writ petitioners participated in the selection process initiated in 2006 for recruitment of Primary School Teachers, as Exempted Category candidates. The writ petitioners in WP 4596 (W) of 2017 and in WP 4798 (W) of 2017 were appointed as Primary Teachers in February, 2010 and the writ petitioners in WP 4598 (W) of 2017 were appointed as Primary Teachers in April and August, 2012.

3. It appears that in 2011 a writ petition was filed by some other candidates

claiming that they had obtained more marks in the written test held on 20 December, 2009 than the last empanelled candidate who was given appointment. The said writ petition being WP 8852 (W) of 2011 was disposed of by Ashok Kumar Dasadhikari, J. (as His Lordship then was) by an order dated 19 January, 2015 by directing the Chairman of the said DPSC to consider the matter upon giving an opportunity of hearing to the petitioners therein within six weeks from the date of communication of the said order by passing a reasoned order which was to be communicated to the said petitioners within two weeks from the date of such reasoned order.

4. The petitioners in the said writ petition filed two contempt applications which came to be marked as WPCRC 98 (W) of 2016 (Haffizur Rahaman Shaikh & Ors.-vs.-Jiban Krishna Bairagi & Ors.) and WPCRC 99 (W) of 2016 (Aparna Chakraborty-vs.-Jiban Krishna Bairagi & Ors.) alleging violation of the order dated 19 January, 2015 passed in WP No. 8852 (W) of 2011. CS Karnan, J. (as His Lordship then was) held that the respondents in the said two contempt applications committed contempt of Court and directed that the contemnors be committed to prison for a period of one week with simple imprisonment.

5. Appeals were preferred from the said order. An interim order dated 23 December, 2016 was passed by the Hon"ble Division Bench staying the operation of the said order. On 18 January, 2017 the Hon"ble Division Bench passed an order, the material portion whereof reads as follows:- "We direct the Chairman of the District Primary School Council, South 24 Parganas, to produce before this Court the recommendation for approval of appointment in favour of the eligible writ petitioners on the returnable date."

6. On 30 January, 2017 the Commissioner of School Education, West Bengal, being the respondent no. 5 in WP 4596(W) of 2017 issued a Memo which reads as follows:- "In compliance with the direction of the Hon"ble High Court, Calcutta, the proposal of the Council vide Memo No. 12/L/DPSC/S-24 Pgs dated 20/01/2017 and no. 21/L/DPSC/S-24 Pgs dated 27/01/2017 recommending the panel under Exempted Category in 2006 slot containing 15 names of the Writ petitioners is hereby approved."

7. The appeals arising out of the contempt proceedings came up before the Hon"ble Division Bench on 31 January, 2017 when the same were disposed of. The material portion of the Hon"ble Division Bench order dated 31 January, 2017 reads as follows:-

"In course of the hearing of the instant appeals this Court wanted to ascertain as to whether the private respondents in the present appeals have, in fact, secured more marks than the candidates who have already been appointed and accordingly, the Chairman of the said Council was asked to verify the records and to produce the recommendation for approval of appointment in favour of the eligible writ petitioners. Subsequent thereto, the Chairman of the said Council by a memorandum dated 20th January, 2017 recommended the names of all the

private respondents herein, save and except the name of Aliur Rahaman Sardar as he was found to have secured less marks than the last empanelled candidate in the concerned category.

From the said memorandum, it was thus apparent that in spite of securing more marks, the private respondents have not been given appointment and as such, this Court asked the Commissioner of School Education to consider issuance of necessary approval to the eligible writ petitioners. Pursuant to such direction the Commissioner of School Education by a memorandum dated 30th January, 2017 approved the proposal of the Council recommending the panel under Exempted Category in 2006 slot containing 15 names of the writ petitioners/respondents herein. A copy of the said memorandum has been handed over to Mr. Ray, learned advocate appearing for the private respondents.

As the names of all the private respondents herein, save and except that of Aliur Rahaman Sardar, have been recommended by the said Council and as such recommendation has also been approved by the Commissioner of School Education, there can be no embargo towards issuance of appointment letters in favour of all the private Respondents, save and except Aliur Rahaman Sardar.

Mr. Vaisya, Learned advocate appearing for the Chairman of the said Council submits that on the basis of memorandum dated 30th January, 2017 formal letters of appointment shall be issued in favour of all the private respondents, save and except Aliur Rahaman Sardar, within a period of two weeks from date. Upon perusal of the records and upon hearing the arguments advanced by Mr. Gupta, Mr. Vaisya, we are satisfied that there had been no deliberate and willful violation of the order passed by the learned Single Judge in the writ petition on the part of the appellants. In fact, a delay occasioned due to exchange of correspondence amongst the parties. Such delay, in our opinion, is neither deliberate nor willful and that as such the appellants are not guilty of contempt. For the reasons discussed above, the order of the learned Single Judge dated 20th December, 2016 imposing penalty upon the appellants is set aside."

8. In above background, the Chairman of the said DPSC being the respondent no. 3 in WP No. 4596 (W) of 2017 issued the Memo dated 14 February, 2017 which is under challenge in the present writ applications.

9. Learned Senior Counsel for the petitioners submitted that the petitioners were served with a Memo dated 8 February, 2017 whereby they were called upon to be personally present in the chamber of the Chairman of the said DPSC on 14 February, 2017 along with their original appointment letters and other relevant documents in original. He submitted that the petitioners had no idea as to why they were asked to attend the chamber of the Chairman of the said DPSC. However, the petitioners duly attended the chamber of the Chairman of the said DPSC on 14 February, 2017 when copies of the impugned Memo were handed over to the petitioners. The material portion of the impugned Memo reads as follows:- "In compliance with the Order dated 18/01/2017 passed by the Hon"ble

Division Bench comprising of Hon''ble Chief Justice, Nishita Mhatre and Hon''ble Justice Tapabrata Chakraborty of Hon''ble High Court, Calcutta along with the Circular of the Commissioner of School Education, Govt. of West Bengal to the Chairman, DPSC, South 24 Parganas vide Memo No. 45-SC/P dated 20/01/2017, the undersigned was directed to take necessary steps for recasting the panel by considering the eligibility of the Appellants/Writ Petitioners of the above stated cases according to the merit in their respective categories for the recruitment process of Primary School Teachers, 2006 within the notified vacancies for such recruitment process.

The incumbents as per recasted panel prepared under the guidance/direction of Commissioner of School Education, Govt. of West Bengal for recruitment process of primary School Teachers ? 2006 were informed & explained the above stated Ref. Memo No and the Order dated 18/01/2017 of the Hon''ble High Court, Calcutta The incumbents asked at the time of hearing what they will do if their service is terminated. They also prayed for continuation of their service.

In view of the above, THE SERVICES OF THE FOLLOWING 13 NOS. OF PRIMARY TEACHERS UNDER SOUGH 24 PGS. DISTRICT ARE HEREBY TERMINATED WITH EFFECT FROM FIFTEENTH DAY OF FEBRUARY, TWO THOUSAND SEVENTEED (15-02-2017)."

10. Learned Counsel for the petitioners in WP No. 4596 (W) of 2017 and WP No. 4598 (W) of 2017 submitted that none of the orders passed by the Hon''ble Division Bench in the contempt proceedings arising out of the earlier writ petition directed or permitted termination of the services of the petitioners. The services of the petitioners cannot be terminated as outcome of Court proceedings to which the petitioners were not parties. The petitioners are confirmed permanent teachers working for more than six years and their services cannot be terminated without a proper showcause and without following due process of law. Learned Counsel submitted that the petitioners have settled in life on the basis of their employment and they all have families and wards, some of them have taken loan from banks and other financial institutions, i.e. home loans, medical loans etc. which are being repaid from their salary month by month. Learned Counsel further submitted that the termination order is in violation of Rules 8 and 9 of the West Bengal Primary Education (Conduct of Services of Teachers of Primary Schools) Rules, 2001.

11. Learned Counsel for the petitioners in WP 4798 (W) of 2017 submitted that it would appear from the impugned Memo that the decision to terminate the services of the petitioners was taken on 20 January, 2017 and alleged hearing was given on 14 February, 2017. Apart from the fact that the same was not at all an effective hearing, a post decisional hearing is impermissible excepting in exceptional cases of grave urgency. Learned Counsel referred to a decision of the Hon''ble Apex Court in the case of Poonam-vs.-State of Uttar Pradesh, (2016) 2 SCC 779, in support of his submission that since the present petitioners were not parties to the earlier writ petition and/or to the contempt proceedings arising

therefrom, no order passed on such proceedings can affect the present writ petitioners. In this connection, Learned Counsel also referred to an unreported judgment dated 23 February, 2016 delivered by an Hon''ble Division Bench of this Court in WPST No. 487 of 2010 (Goutam Sarkar-vs.-State of West Bengal & Anr.)

12. Learned Counsel for the Chairman of the said DPSC submitted that the persons who have been offered appointment in the re-casted panel also belonged to the Exempted Category and the said persons obtained higher marks than the present writ petitioners in the selection test. Hence, if no appointment is offered to those persons who got more marks than the present writ petitioners, the same would amount to gross injustice and in order to prevent such injustice the appointments of the writ petitioners were terminated to accommodate the persons who had filed the earlier writ petition. However, learned Counsel submitted that the School Council has no objection in accommodating the present writ petitioners if supernumerary posts are created by the State.

13. Learned Counsel for the State took a preliminary objection regarding maintainability of the writ petition on the ground that the petitioners have separate causes of action and should have filed separate writ petitions. He also contended that the new appointees being the petitioners in the earlier writ petition, are necessary parties to the present writ application and since they have not been impleaded, the present writ application is not maintainable.

14. Learned Counsel for the State further submitted that the appointment of the present petitioners was illegal since they had obtained less marks than the petitioners in the earlier writ petition. Such illegal appointment cannot create any right in favour of the present writ petitioners. Service of a person who was illegally appointed can be terminated at any time. Termination of the present writ petitioners' services is a consequence of recasting of the panel in question which was done in accordance with the orders of the Hon''ble Division Bench passed in the contempt proceedings arising out of the earlier writ application. Hence, the State has not committed any illegality.

15. Learned Counsel for the State finally submitted that the appointment of the present petitioners was void. Hence, the question of observing the principles of natural justice did not arise prior to terminating their services. In this connection learned Counsel relied on a decision of the Hon''ble Apex Court in the case of State of Punjab & Ors.- vs.-Jagdish Singh, AIR 1964 SC 521 . In that case, the Hon''ble Apex Court held that an order confirming the status of the respondents as Tahsildars was void as the authority passing such order of confirmation had no power to do so. It was observed that when a Government servant has no right to a post or to a particular status, though an authority under the Government acting beyond its competence had purported to give that person a status which it was not entitled to give, he will not in law be deemed to have been validly appointed to the post or given a particular status. Since the respondents could not in law be regarded as holding the status of confirmed Tahsildars and since

legally their status was only that of Officiating Tahsilders, the notification that was under challenge in effect only recognizes their status as Officiating Tahsilders and could not be said to have the effect of reducing them in rank by reason of correcting an earlier error. Therefore, Article 311 (2) of the Constitution of India did not come into play. Court's View:-

16. The crux of the submission made on behalf of the respondents was that the panel in question was re-casted as per direction of the Hon''ble Division Bench and as a necessary consequence thereof the services of the present writ petitioners were terminated. In my view, such argument cannot be sustained for the reasons stated hereinafter.

17. None of the orders of the Hon''ble Division Bench directed the recasting of the panel in question. The orders of the Hon''ble Division Bench as I read them, directed the Chairman of the said DPSC to produce before the Court the recommendation for approval of appointment in favour of the eligible petitioners in the earlier writ petition. 15 of the earlier writ petitioners were found to have secured more marks than the last empaneled candidate who was appointed. Accordingly, the Commissioner of School Education approved the appointment of the said 15 persons. In none of the orders, the Hon''ble Division Bench stated that the earlier writ petitioners should be given appointment by terminating the services of the present writ petitioners or any other person. In my reading of the orders of the Hon''ble Division Bench, there is nothing in the said orders which directed or permitted the respondents to terminate the services of the present writ petitioners who were given appointment between 2010 and 2012.

18. Further, the present writ petitioners were not parties to the earlier writ petition or to the contempt proceedings arising therefrom. Any order passed in the earlier proceedings cannot operate to adversely affect the valuable rights of the present writ petitioners who were not parties to the earlier proceedings. An order passed in a proceeding cannot be binding on or cannot in any manner prejudicially affect the rights of a person who was not a party to such a proceeding. This proposition of law is based on the principles of natural justice. As held by the Hon''ble Apex Court in *Poonam-vs.-State of Uttar Pradesh* (supra), an unsuccessful candidate challenging the selection as far as the service jurisprudence is concerned is bound to make selected candidates parties. This follows the principle of *audi alteram partem*. Further, in *Goutam Sarkar-vs.-State of West Bengal & Anr.* (supra), an Hon''ble Division Bench of this Court observed, *inter alia*, as follows:- "However, even considering the illegality of the action of the State Government, we cannot ignore the fact that 3500 persons have been given employment after the order dated 17th June, 2010 was passed by this Court. They have been working for almost five and half years and it would thus be unconscionable to dislodge them at this moment. They were recruited on the basis of the decision of the State Government and the interim order passed by this Court and, therefore, it would not be proper to affect their right to employment at this stage especially when not a single one of them is before

us." (emphasis is mine)

Hence, I am of the considered view that the orders of the Hon"ble Division Bench extracted above cannot be read as authorizing the respondents to terminate the services of the present writ petitioners.

19. It is true that an illegal appointment cannot create a right or equity in favour of the appointee. However, one cannot lose sight of the fact that the present writ petitioners did not induce the respondents, whether fraudulently or otherwise, to give appointment to them. They were declared to be successful candidates and the appropriate authority issued appointment letters to them. On that basis the writ petitioners have been serving as teachers for periods between 5 and 7 years. It would be grossly unfair to summarily terminate their services after such a long period of time saying that they were wrongly given appointments. A job is not easy to get now a days. I quite appreciate the stand of the writ petitioners that on the basis of the jobs that they got they have made commitments in life and have taken up responsibilities including starting a family. Throwing them out of their services at this point of time will spell complete disaster, if not destruction, for them.

20. I am unable to accept the contention of the learned Counsel for the State that the appointments of the writ petitioners were void. At the highest the appointments were contrary to the recruitment rules and cannot be said to be void in the sense of being non-est in the eye of law. Hence, the decision in the case of State of Punjab-vs.-Jagdish Singh (supra), cited by learned Counsel for the State, in my opinion, has no manner of application to the facts of the present case.

21. As regards the contention of the learned Counsel for the State that the writ petitioners have separate causes of action and ought to have filed separate writ petitions, I am unable to agree. The writ petitioners' right to relief arises from the same set of facts and if separate writ petitions were filed, same points of law and facts would be involved in all the writ petitions. The principle of O. 1 R. 9 of the CPC applies to writ petitions as well.

22. The other point urged by Learned Counsel for the State to the effect that the writ petitions are bad for non-joinder of necessary parties for non-impleadment of the new appointees, also lacks merit. The writ petitioners have not challenged the new appointments. They merely challenged the memo terminating their services. Hence, in my opinion, the new appointees are not necessary parties to the present proceedings.

23. The new appointees no doubt deserve appointment since they secured more marks than the writ petitioners in the selection process. The question is whether such new appointments should be at the cost of the livelihood of the present writ petitioners? From the facts that are before me it is clear that the writ petitioners were appointed erroneously in preference to the earlier writ petitioners who are the new appointees. It is generally true that a person who has been appointed

erroneously or in breach of applicable recruitment rules cannot insist on reaping or retaining the benefits of such wrongful appointment. However, as has been observed by a learned Judge of this Court in the case of Taraknath Das-vs.-Union of India, 2016 LAB IC 2644, when the Courts have found that the appointee is not guilty of any suppression or fraud, the Courts have taken a sympathetic view of the appointment particularly when the appointment is challenged after a long lapse of time. This, the Courts have done on equitable considerations. Several decisions of the Hon"ble Apex Court have been referred to in the aforesaid case of Taraknath Das (supra) where the Courts have not interfered with appointments given erroneously.

24. In the present case, the writ petitioners had no role to play in the erroneous appointments. It would not only be grossly unfair but also extremely unconscionable if after a lapse of a period of between 5 and 7 years the appointments of the writ petitioners are annulled on the plea that the respondents had erred in issuing the appointment letters in their favour. An action that is unconscionable cannot be just or fair by any stretch of imagination. In my opinion, gross injustice will be done to the writ petitioners if the impugned memo is allowed to stand.

25. For the reasons aforestated, the impugned memo is set aside. The respondent authorities are directed to accommodate the writ petitioners in whatever manner they deem fit and if necessary by creating supernumerary posts to ensure that the services of the writ petitioners are not interrupted. I am conscious of the fact that the creation of posts is the prerogative of the executive but in order to meet certain special exigencies such a direction has been given by Courts and in my view this is one such case where such a direction is warranted.

26. WP No. 4596(W) of 2017, WP No. 4598(W) of 2017 and WP No. 4798 (W) of 2017 are accordingly disposed of. There will, however, be no order as to costs.

27. Urgent certified copy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.