
(2012) 04 CAL CK 0077
In the Calcutta High Court
Case No : W.P.S.T. No. 49 of 2012

Md. Mainuddin Mondal and Another APPELLANT
Vs
The State of West Bengal and Others RESPONDENT

Date of Decision : 30-04-2012

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19, 21, 21(3)
Constitution of India, 1950 — Article 14, 16, 309
Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 — Section 4(1)

Citation : (2012) 3 CALLT 436 : (2013) 3 WBLR 302

Hon'ble Judges : Nishita Mhatre, J; Anindita Roy Saraswati, J

Bench : Division Bench

Advocate : Tapabrata Chakraborty, Mr. Sajal Kanti Bhattacharya and Mr. Sankar Halder, for the Appellant; Aninda Mitra, Ld. Advocate General, Mr. Kamallesh Bhattacharya Ld. AGP and Mr. Swapan Kumar Pa and Mr. Moloy Mrishna De and Mr. Dilip Kr. Chakraborty for the Private Respondents No. 6 and 7, for the Respondent

Final Decision : Dismissed

Judgement

Nishita Mhatre, J.—The petitioners have impugned the judgment and order of the West Bengal Administrative Tribunal dated 27th January 2012 passed in original Application O.A. No. 1139 of 2010. The application filed by the private respondents that is respondent Nos. 6 & 7 has been allowed and the State has been directed to arrange for a fresh recruitment process for the post of Lower Division Clerks in the Registration Office of Nadia. Twelve posts of Lower Division Clerks in the Registration Office of the District of Nadia were vacant and, therefore, the District Registrar called for names of eligible candidates from the District Employment Exchange in 2006. After scrutiny of the names, the written test was held in October 2006. The petitioners participated in the written test along with other eligible candidates. In the year 2010, the petitioners moved an application u/s 19 of the Administrative Tribunals Act before the West Bengal

Administrative Tribunal being O.A. No. 236 of 2010. The petitioners sought the publication of the results of the written test held in October 2006. The application was disposed of by the Tribunal on 26th June 2010 directing the State to publish the results of the written test within three months of the date of the order.

2. Before the results were declared, respondents No. 6 & 7 moved an application before the Tribunal being O.A. No. 1139 of 2010 on 21st September 2010. They challenged the selection process which had commenced in 2006 on the ground that it was restricted to the candidates sponsored by the employment exchange and was, therefore, illegal and contrary to the judgments of the Supreme Court and of this Court. They contended that the Courts had repeatedly held that it was necessary to give wide publicity regarding vacancies arising in the Government Departments or Public Sector Undertakings before any selection process was commenced.

3. In the meantime the petitioners were informed that the viva-voce test was scheduled to be held on 14th February 2011 and 15th February 2011. The respondents No. 6 & 7 filed M.A. No. 13 of 2011 seeking a stay of the viva-voce test as the Tribunal did not grant any relief to the respondents No. 6 & 7 the viva-voce was held as scheduled. The petitioners have admittedly appeared for the test. Respondents No. 6 & 7 then moved a writ petition being W.P.S.T. No. 120 of 2011 before this Court seeking certain relief. By an order dated 8th June 2011, the Division Bench of this Court directed the Tribunal to hear the matter early and further directed that any appointments made pursuant to the interview held, would be subject to the result of the pending application before the Tribunal.

4. The original application was heard and disposed of on 27th January 2012. The Tribunal quashed the selection process commenced in 2006. It has further directed the State to arrange for a fresh recruitment process of Lower Division Clerks in the Registration Office of Nadia by following the rules and regulations governing recruitment. The petitioners being candidates who were invited for the viva-voce test are aggrieved by this decision. According to the petitioners the selection process was commenced in accordance with West Bengal Regulation and Recruitment in State Government Establishments and Establishments of Public Undertakings, Statutory Bodies, Government Companies and Local Authorities Act, 1999 (hereinafter referred to as the Recruitment Act). The petitioners contend that in view of the provisions of section 4 of the Recruitment Act vacancies which arise in Government departments or establishments must be filled by only such persons who are sponsored by the Employment Exchange. According to the petitioners the Act does not contemplate issuance of any advertisement for the posts which fall vacant in the State Government Departments, Local Authorities or Government Companies and, therefore, the judgment of the Tribunal is erroneous and is required to be set aside.

5. Mr. Chakraborty, learned counsel appearing for the petitioners has submitted that the application itself was not maintainable as it had been filed after an overwhelming delay of four years. He pointed out that the application before the

Tribunal for the redressal of any grievance of an employee must be filed within one year of an adverse order being passed or within six months from the rejection of the representation of the employee by the Review or Appellate Authority. He drew our attention to the fact that the selection process had commenced in 2006. The petitioners' names were included in the panel of candidates to be called for the viva-voce test and, therefore, a right had been created in their favour which could not be abrogated after four years. According to him the cause of action arose when the names of respondents 6 & 7 were not sponsored by the Employment Exchange for appearing at the written test held in 2006. Therefore, the respondents 6 & 7 ought to have filed the original application within one year of the names of sponsored candidates being called for by the Government from the Employment Exchange or in any event immediately after the written test was held.

6. It has been argued on behalf of respondents No. 6 & 7 that there was no delay as the selection process was not complete. The learned advocate appearing for the respondents No. 6 & 7 has pointed out that the representation was submitted by them on 8th September 2010 and after it had been turned down they immediately filed the original application. This was the cause of action for filing the application before the Tribunal, according to him. The learned advocate, therefore, submitted that there was no delay at all on the part of respondents 6 & 7 in approaching the Tribunal.

7. The Learned Advocate General appearing for the State has supported the judgment of the Administrative Tribunal although the State in its reply before the Tribunal had contended that the original application had been filed beyond the period of limitation. In fact, the state had contended that the application was not maintainable because of the delay in filing the same.

8. There is no dispute that the selection process has not been completed as yet. Though the selection process commenced in 2006 the results of the written examination were not declared until the order of the Tribunal in O.A. No. 236 of 2010, directing that the results be declared. Successful candidates were invited for the viva-voce test in February 2011. The respondents No. 6 & 7 have filed the present O.A. No. 1139 of 2010 on 21st September 2010. The application was moved prior to the declaration of the results of the written test. In fact the interviews were held only after the petitioners moved an original application before the Tribunal for publication of the results of the written test. Therefore, in our opinion there has been no delay on the part of the respondents No. 6 & 7 in approaching the Tribunal.

9. Mr. Chakraborty has brought to our notice the decision of the Supreme Court in the case of Ramesh Chand Sharma v. Udham Singh Kamal reported in (1999)8 SCC 304 in support of his contention that when the application before the Tribunal has been filed beyond the period of limitation as mentioned in section 21 of the Administrative Tribunals Act 1985 the delay ought not to be condoned. In that case the applicant before the Tribunal had challenged an order of promotion.

His representation against that order had been rejected and he had filed the application before the Tribunal after the expiry of three years. The Supreme Court held that, on the basis of material on record the explanation sought to be given by the applicant for the delay could not be entertained by the Supreme Court as no foundation for it had been laid before the Tribunal. The Court observed that it would have been proper for the applicant to file an application u/s 21(3) of the Administrative Tribunals Act, 1985 for condoning the delay. Since such an application had not been filed the applicant could not be permitted to take up such a contention before the Supreme Court.

10. As we have already observed since the selection process was not completed, no vested right had been created in the petitioner, The cause of action arose only after the representation of for having a fresh selection process in accordance with law was rejected. The question of the application being barred by limitation does not arise; therefore, the findings of the Tribunal on this issue cannot be faulted.

11. On merits Mr. Chakraborty has submitted that in view of the provisions of section 4 of the Recruitment Act it is mandatory for the state to fill in the posts which have fallen vacant only with the candidates whose names have been sponsored by the Employment Exchange. According to him the Act does not permit the Government to seek names by advertising the vacancies. He submitted that the judgement of the Supreme Court in the case of Union of India & Ors. v. N. Hargopal & Ors., reported in AIR 1987 SC 1227 recognises the fact that where there are recruitment rules which envisage the recruitment only through the Employment Exchange the State is not empowered to advertise the vacancies and invite applications for the posts which are vacant. Mr. Chakraborty has also relied on the observations of the Supreme Court in State of Karnataka v. Uma Devi reported in AIR 2006 SC page 1806 on this issue. Several other judgments have been referred to by Mr. Chakraborty which we will advert to presently.

12. The learned Advocate General has pointed out that section 4 of the Recruitment Act has been held to be ultra vires by a judgment of a learned Single Judge of this Court in the case of Tariff Hossain v. State of West Bengal & Ors., reported in (2003)1 CLJ page 41. He submitted that the judgment of the full bench of this Court in the case of Rabindra Nath Mahata v. The State of West Bengal & Ors. reported in (2005)2 CLJ (Cal) page 161 indicates that the Recruitment Rules are directory and not mandatory. He urged that in fact the action of the State Government in calling for names of the sponsored candidates alone would violate Articles 14 & 16 of the Constitution. He submitted further that wide publicity is required to be given in the media while filling up posts which are vacant in the Government Departments, public sector undertakings or local authorities as held in the judgment of the Supreme Court in the case of Exercise Superintendent Malkapatnam, Krishna District, AP. v. K.B.N. Visweshwara Rao & Ors. reported in (1996) 6 SCC 216. Therefore, according to

the learned Advocate General the requirement of calling for names from the Employment Exchange is now obliterated.

13. In the alternative, the learned Advocate General submitted even if section 4 of the Recruitment Act was on the statute book it would not bar recruitment of candidates through other avenues. According to him had there been such an embargo the expression "in no other way" would have been appended at the end of section 4; the very fact that these words do not find place in the section indicates that the section is directory. He then submitted that empanelment of any candidate does not create an indefeasible right in the candidate. It is always open for the State to decide whether to actually recruit such persons although vacancies may exist. Therefore, according to the learned Advocate General the Tribunal has not committed any error while directing the State to advertise the vacancies, widely, so that all eligible persons and not only those who are sponsored by the Employment Exchange would be able to apply for recruitment.

14. The learned Advocate General has also brought to our notice the memorandum issued by the State on 25th July 2008 in which it has been decided that, in compliance with the judgments in *Tariff Hossain (supra)*, and in *K.B.N. Visweshwara Rao & Ors., (supra)*, the State Government and its establishments and public sector undertakings statutory bodies etc. will, in addition to obtaining names from the Employment Exchange, give wide publicity of the vacancies in the newspapers having a wide circulation and also display the vacancies on the office notice boards so that a reasonable opportunity of responding to the same is available to eligible candidates.

15. We will now advert to the merits of the case. Section 4 of the Recruitment Act reads as follows:-

4. Vacancies to be filled up by persons sponsored by employment Exchange.-- After the commencement of this Act, all vacancies in the posts in any Government establishment or establishment of any public undertaking. Statutory body, (sic). Government Company or local authority shall be filled up by such persons as may be sponsored by an employment exchange.

16. In the case of *Tariff Hossain v. State of West Bengal & Ors., (supra)*, a learned single Judge of this Court has found that the section offends Articles 14 & 16 of the Constitution. It has been held that by restricting the only source of recruitment through the Employment Exchange, the Act violates the mandate of the Constitution of India. Therefore, Section 4 of the Recruitment Act has been declared ultra vires. The judgment of the Supreme Court in the case of *Union of India & Ors. v. N. Hargopal & Ors. (supra)*, was not brought to the notice of the Court. In this case the issue before the Supreme Court was whether an establishment in the public sector or in the private sector as defined in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 may make appointments, to posts to which the Act applies, of persons who are not sponsored by Employment Exchanges. The other question was, whether the Act

covers Government departments and establishments as well. It is in this context that the Court noted that an Office Memorandum had been issued by the department in which vacancies were to be filled in through the Employment Exchange alone and other permissible sources of recruitment could be tapped only if the Exchange concerned issued a "non-availability" certificate. The Court has observed that it was evident that there was no provision in the Employment Exchange Act which obliged an employer to make appointments through the agency or the Employment Exchanges in view of section 4(4) of the Act. All that was required u/s 4(1) of the Act was that the employers were required to notify any vacancies to the Employment Exchange. The Court then observed thus:-

9. It is clear that it is the desire of the Government of India that all Government Departments, Government Organisation and statutory bodies should adhere to the rule that not merely vacancies should be notified to the employment exchanges, but the vacancies should also be filled by candidates sponsored by the employment exchanges. It was only when no suitable candidates were available, then other sources of recruitment were to be considered. While the Government is at perfect liberty to issue instructions to its own departments and organisations provided the instruction do not contravene any constitutional provision or any statute, these instructions cannot bind other bodies which are created by statute and which function under the authority of statute. In the absence of any statutory prescription the statutory authority may however adopt and, follow such instructions if it thinks fit. Otherwise, the Government may not compel statutory bodies to make appointments of persons from among candidates sponsored by employment exchanges only. The question, of course, does not arise in the case of private employers which cannot be so compelled by any instructions issued by the Government.

17. The Court considered whether the instructions issued by the Government could in the first place be restricted to the candidates sponsored by the Employment Exchange and whether such a stipulation offends Articles 14 & 16 of the Constitution. The Court observed thus:-

10.....The object of recruitment to any service or post is to secure the most suitable person who answers the demands of the requirements of the job. In the case of public employment, it is necessary to eliminate arbitrariness and favouritism and introduce uniformity of standards and orderliness in the matter of employment. There has to be an element of procedural fairness in recruitment. If a public employer chooses to receive applications for employment where and when he pleases, and chooses to make appointments as he likes a grave element of arbitrariness is certainly introduced. This must necessarily be avoided if Arts. 14 and 16 have to be given any meaning. We, therefore, consider that insistence of recruitment through employment exchanges advances rather than restricts the rights guaranteed by Arts. 14 and 16 of the Constitution.....

It must be noted here that N. Hargopal's case (supra) was decided by a bench of two learned Judges of the Supreme Court.

18. The issue as to whether persons should be recruited only from Employment Exchanges for vacancies arising in the Government Departments or local authorities came up for consideration again before a bench of three learned judges of the Supreme Court. In the case of K.B.N. Visweshwara Rao & Ors. (supra) the Apex Court scrutinised the provisions of section 4(1) of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959. After examining the ratio in N. Hargopal's case (supra) it has held thus:-

6. It is, therefore, clear that the object of the Act is not to restrict, but to enlarge the field of choice so that the employer may choose the best and the most efficient and provide an opportunity to the worker to have his claim for appointment considered without the worker having to knock at every door for employment. We are, therefore, firmly of the view that the Act does not oblige any employer to employ those persons only who have been sponsored by the employment exchange.

In K.B.N. Visweshwara Rao & Ors., (supra), the Supreme Court has impliedly overruled its earlier decision in N. Hargopal's case (supra) on the issue as to whether eligible candidates for vacancies should be called only through Employment Exchanges.

19. The full bench of this Court dealt with the issue as to whether a person whose name is not sponsored by the Employment Exchange has a right to participate in the selection process initiated under the West Bengal Board of Secondary Education Act 1963 for recruitment of the non-teaching staff. The decision of the Supreme Court in K.B.N. Visweshwara Rao & Ors., (supra) and N. Hargopal's case (supra) besides others were noticed by the full bench of this court in the case of Rabindra Nath Mahata v. The State of West Bengal & Ors. (supra). Unfortunately, the decision of the learned single Judge in the case of Tariff Hossain (supra) was not brought to the notice of the full bench. After considering all the judgments cited before it, the full bench concluded that in view of the decisions of the Supreme Court in K.B.N. Visweshwara Rao & Ors., (supra) case and State of U.P. & Ors., v. Rajkumar Sharma & Ors. (supra) a candidate cannot be said to be ineligible for recruitment if he was not sponsored by the Employment Exchange.

20. The Tribunal, in the present case, has directed that the selection process ought to be commenced after proper advertisement of the vacancies. It was of the view that candidates sponsored by the employment exchange must compete or participate in the selection process with candidates who would apply on the basis of advertisements in the media. The State has, therefore, been directed to arrange for a fresh recruitment process and the selection process of 2006 has been quashed.

21. We do not find any error in the judgment and order of the Tribunal. No indefeasible right has been created in favour of the petitioners only because they were invited to appear for the viva-voce test, having cleared the written

examination earlier.

22. It has been argued by Mr. Chakraborty that the petitioners have appeared in the written test and in the viva-voce test. The results according to him have been kept in a sealed cover and, therefore, the petitioners have acquired an indefeasible right to employment as Lower Division Clerks. Per contra, the learned advocate for respondents Nos. 6 & 7 has drawn our attention to the judgments of the Supreme Court in the case of *State of Bihar & Ors. v. The Secretariat Assistant Successful Examinees Union 1986 & Ors.* reported in AIR 1994 SC 736; *State of U.P. & Ors. v. Rajkumar Sharma & Ors.* reported in (2006) 3 SCC page 330 and in the case of *Shankarsan Dash v. Union of India* reported in AIR 1991 SC 1612 to fortify his contention that empanelment of a person does not create a vested right in him to be appointed.

23. In the case of *State of Bihar & Ors. v. The Secretariat Assistant Successful Examinees Union 1986 & Ors.*, (supra), the Supreme Court has held that a person who is selected does not acquire any indefeasible right on account of his being empaneled. It has observed that empanelment is an action based on the fulfilment of the eligibility criteria for the purposes of appointment and no vested rights are created in the person so empaneled. A similar view has been taken in the case of *State of U.P. & Ors. v. Rajkumar Sharma & Ors.* (supra) and in the case of *Shankarsan Dash v. Union of India* (supra).

24. In *Uma Devi's* case (supra) the Supreme Court held that when the rules have been framed under Article 309 of the Constitution the Government can make appointments only in accordance with those rules. It has observed that the *Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959* which was enacted to ensure equal opportunity for all employment seekers, does not oblige an employer to employ only those persons who have been sponsored by Employment Exchanges. The only obligation imposed on the employer is to notify the vacancies that may arise in the various departments and of filling up of those vacancies, based on a procedure. The Court has further held that when statutory rules are framed governing employment, no Government order, notification, or circular can substitute such rules. Therefore, the only fair means to adopt while making such appointments is to base them on the rules so framed.

25. This judgment of the Supreme Court in *Uma Devi's* Case (supra) need not detain us any further as the learned Single Judge in *Tariff Hossain's* case (supra) has struck down the provisions of section 4 of the *Recruitment Act*. There is, therefore, no mandate contained in the statute book today to appoint only those persons whose names have been sponsored by the employment exchanges. The requirement is that there must be a broad spectrum of candidates who were able to avail of the wide publicity for the vacancies and respond to the same.

26. Thus considering the catena of judgments cited before us we are of the view that the Tribunal has not committed any error, much less an error of law apparent on the face of the record. By directing the State to publicise or

advertise the vacancies, the Tribunal has sought to give effect to the constitutional mandate enshrined in Articles 14 & 16 of the Constitution. Public appointments must conform with the constitutional scheme of equality adumbrated in these Articles. The Tribunal has not committed any jurisdictional error while directing that the selection process should commence afresh, after giving wide publicity to the vacancies. The only hardship, which the petitioners may have to face is that because of the passage of time they could have crossed the age limit prescribed for such recruitment.

27. We, therefore, direct that if the petitioners respond to any advertisement issued for recruitment as Lower Division Clerks in the Registration Office, Nadia, their candidature will not be rejected solely because they do not fulfil the age criteria. The age criteria will be relaxed only in respect of the petitioners in the special facts and circumstances of this case. Accordingly the Writ Petition is dismissed without any order as to costs.

Urgent certified photocopies of this order, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.

Anindita Roy Saraswati, J.

I agree.