
(2010) 08 CAL CK 0005

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction F.M.A. No. 355 of 2010

Motin Saikh

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 19-08-2010

Acts Referred:

Citation : (2010) 3 CALLT 458

Hon'ble Judges : J.N. Patel, C.J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Kashi Kanto Moitra, Mr. Swapan Banerjee and Md. Mojnu Sk, for the Appellant; Kamalesh Bhattacharyya for the Respondent 4, Mr. Ekramul Bari and Mr. Biswarup Biswas for the Respondent 6, Mr. Kanai Lal Samanta and Mr. Nabanita Pal for the State, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This Mandamus-Appeal is at the instance of an unsuccessful writ-petitioner and is directed against an order dated 19th August, 2009 passed by a learned single Judge of this Court by which His Lordship dismissed the writ-application filed by the appellant with further direction that the West Bengal School Service Commission (Selection of persons for Appointment to the Post of Non-Teaching Staff) Rules, 2009 having come into force with effect from 8th July, 2009, the process of selection in question should now be entrusted to the Regional School Service Commission having jurisdiction over the matter. The District Inspector of School, consequently, was, directed to report the vacancy to the Regional School Service Commission concerned for filling up the vacancy in accordance with law.

2. Being dissatisfied, the writ-petitioner has come up with the present Mandamus-Appeal.

3. The writ-petitioner and the respondent No.6 were the contenders for an appointment to the post of Group-C staff in Pathardanga Sarbapalli High School

(hereinafter referred to as the school). An interview was conducted on 14th November, 2008 wherein both of them along with others participated. A panel was prepared by the selection committee in which the writ-petitioner secured the first position while the respondent No. 6 secured the third position. The managing committee of the school accepted the said panel and the same was forwarded to the office of the District Inspector of Schools (S.E.), Burdwan. The District Inspector of Schools approved the panel on the very same date, namely, 17th November, 2008. Pursuant thereof, the school issued the offer of appointment in favour of the writ-petitioner and he joined service on 19th November, 2008. The District Inspector of Schools also approved his service on 7th December, 2008.

4. In the meantime, the respondent No. 6 invoked the writ-jurisdiction of this Court by which he challenged the process of selection. The said writ-application was disposed of by Tapen Sen, J. on 23rd February, 2008 by passing the following order:

With the consent of the Parties, this Writ Petition is therefore disposed of by directing the Director of School Education, Government of West Bengal to look into the affairs of the School and if necessary, cause an investigation to be made by a competent Officer and taken action in accordance with law. The Director of School Education is directed to take a decision after giving an opportunity of hearing to the Petitioner, the respondent No. 9 as well as the School Authorities and also to the Secretary of the Managing Committee as well as the District Inspector of Schools, if necessary. The decision of the Director of School Education should be taken within a period of eight weeks from the date of receipt of a copy of this Order. This Court, at this stage, is not inclined to pass any interim Order save and except to only observe that the preparation of the panel and/or its effect shall be subject to the decision that is taken by the Director of School Education.

5. Pursuant to the said direction given by Tapen Sen, J., the Director of School Education heard the parties and by an order contained in a Memo dated 30.4.2004/4.5.2009 held that the process of selection suffered from various infirmities and that the panel prepared by the school authority was not in conformity with the prevailing rules/procedures for recruitment.

6. By the said order, the District Inspector of Schools was directed to cancel the approval of the panel as well as the service of the writ-petitioner who was the first empanelled candidate. The District Inspector of Schools was further directed to cause an internal enquiry by himself and to submit a report within a fortnight on the aspect of preparation of the panel in a hurried manner, keeping in mind the fact that the panel was approved on the very date it was submitted by the school authority. Ultimately, the Director of School Education directed the school authority to hold a meeting for the purpose of formation of a selection committee afresh as per the existing rule and to fix up a date of interview of the candidates who were called upon to participate earlier and to submit a panel afresh as per

existing rule to the District Inspector of Schools within the prescribed time.

7. In view of the aforesaid direction of the Director of School Education, the District Inspector of Schools cancelled the panel forwarded to him by the managing committee of the school, as a result, the writ-petitioner lost his job.

8. Such order of the Director of School Education referred to above is the subject-matter of the writ-application filed by the writ-petitioner out of which the present mandamus-appeal arises.

9. The learned single Judge on consideration of the materials on record was of the view that the Director of School Education should not have directed the District Inspector of Schools for the task of causing enquiry involving the dispute raised by the respondent No. 6. The learned single Judge that on the basis of records placed before the Court it appeared that the District Inspector of Schools, in fact, submitted the report given by the two Assistant Inspectors of Schools (S.E.), Burdwan dated 28th January, 2009. It further appears that the learned single Judge by order dated 9th July, 2009 had sought for an explanation from the Director of School Education as to how he could act on the report of the two Assistant Inspectors of Schools particularly when the District Inspector of Schools was directed to cause an enquiry earlier and that having regard to the settled principle of administrative law, the District Inspector of Schools could not have delegated the function of causing enquiry to the two Assistant Inspectors. The Director of School Education was further ordered to explain why a wrong picture was given in the impugned order by observing that the District Inspector of Schools had submitted a report dated 28th January, 2009, although no such report in fact was submitted.

10. The learned single Judge further held that the Director of School Education grossly erred in referring the order of the District Inspector of Schools and the District Inspector of Schools could not delegate the function of causing enquiry to the two Assistant Inspectors of Schools.

11. Even after finding such gross fault on the part of the Director of School Education, the learned single Judge himself looked into the materials placed before the Court and found various irregularities in the process of selection for want of appropriate resolution. The learned single Judge, thus, came to the conclusion that the selection committee was not constituted according to Rules and, therefore, the ultimate conclusion reached by the Director of School Education was not interfered with.

12. Ultimately, His Lordship held that the West Bengal School Service Commission Selection of Persons for, Appointment to the Post of Non-Teaching Staff) Rules, 2009 having come into force with effect from 8th July, 2009, the process of selection now be conducted afresh in accordance with such rule. The writ-application was, thus, disposed of with the above direction.

13. Mr. Moitra, the learned senior Advocate appearing on behalf of the writ-

petitioner/appellant, has strenuously contended before us that the learned single Judge himself having found that the Director of School Education acted illegally by relying upon the report of the two Assistant Inspectors of Schools by treating the same as the report of the District Inspector of Schools, there was no justification of dismissing the writ-application. According to Mr. Maitra, in these circumstances, the learned single Judge should have allowed the writ-application by setting aside the order of the Director of School Education and affirming the appointment of the writ-petitioner. Mr. Maitra, further contends that the allegations of the respondent No.6 as regards the various irregularities are not tenable in the eye of law and it will appear from the panel placed before the Court that his client obtained the highest mark and as such, there was no justification of upsetting the appointment of his client when he worked for five months in the school.

14. Mr. Bari, the learned Advocate appearing on behalf of the respondent No. 6, has, on the other hand, supported the order passed by the learned single Judge and has contended that it will appear from the score-sheet produced before the Court that there were tampering of marks in the score-sheet and that even the Secretary of the school by affirming affidavit denied that he put his signature on the score-sheet. Mr. Bari, therefore, prays for dismissal of the appeal.

15. Mr. Samanta, the learned Advocate appearing on behalf of the State-respondent, has supported the order passed by the learned single Judge while Mr. Bhattacharya, the learned Advocate appearing on behalf of the school authority, has supported the writ-petitioner.

16. Therefore, the first question that arises for determination in this appeal is whether the learned single Judge was justified in dismissing the writ-application even after His Lordship's finding that the order passed by the Director of School Education was erroneous.

17. After hearing the learned counsel for the parties and after going through the materials on record, we find that although the learned single Judge held that the order of the Director of School Education was erroneous because the Director of School Education relied upon the report of the two Assistant Inspectors of Schools which was arrived at without giving opportunity of hearing to the parties. His Lordship, on the basis of materials on record placed before the Court, himself arrived at the conclusion that the process of selection was vitiated and such finding was recorded after giving opportunity of hearing to the learned Counsel for the parties.

18. Before us also, the original record was placed. We have gone through such record and we find that there was tampering of marks in respect of the candidates particularly the writ-petitioner. We also find that the finding recorded by the learned single Judge regarding illegality in formation of expert in the panel was quite justified. Therefore, the learned single Judge although did not approve the action of the Director of School Education in arriving at his finding, did not

commit any illegality by arriving at. His Lordship's own finding on the basis of the materials on record.

19. A Writ-Court, while deciding the writ-application, if on the basis of materials on record is satisfied that there was illegality in the process of selection, can, instead of avoiding remand for fresh decision, arrive at its own conclusion after giving opportunity of hearing to the parties when irregularities are apparent on the face of record.

20. We, therefore, find no reason to interfere with the findings recorded by the learned single Judge based on materials on record and after giving opportunity of hearing to the learned Counsel for the parties.

21. The next question is whether the vacancy in question should be filled up in accordance with the Rule of 2009 or not.

22. It was strenuously contended before us that the process of selection having been initiated at a point of time when the new Rule did not come into force, the fresh process of selection should be in accordance with the old Rule.

23. We are, however, unable to accept the aforesaid contention in view of Rules 7 and 8, which are quoted below:

7. Manner of selection by direct recruitment. - (1) Selection to the post of-

(a)

(b) the Clerk shall be made on the basis of the results of the written examination conducted by the Central Commission, evaluation of qualifications and personality tests of the candidates in the manner as specified in Schedule II;

(c)

Explanation. - For removal of doubt, it is hereby declared that while determining the merit list, the marks obtained in the preliminary screening examination shall not be added to the marks obtained in the written examination or personality test.

(2) The Central Commission may, in its discretion, fix qualifying marks, which a candidate is required score for qualifying in Preliminary screening examination under clause (a) or clause (c) of sub-rule (1) or in the written examination or an aggregate or in both:

Provided that the Central Commission may relax the qualifying marks on reasonable grounds for reasons to be recorded in writing.

8. Information regarding vacancies.- (1) The District Inspectors of Schools (Secondary Education) shall prepare a report regarding the number of vacancies in approved posts to be filled up on the basis of direct recruitment, which exists or is expected to occur within the 1st January next ensuing, and shall furnish the same to the concerned Regional Commission at least fifteen days before the date

of publication of the advertisement.

(2) On receipt of report under sub-rule (1), every Regional Commission shall send the complied district wise vacancy report post wise, medium wise: category wise and gender wise to the Central Commission in two stages:

(a) first, seven days, before the date of publication of the advertisement inviting application; and

(b) finally, within the 1st day of January next ensuing or seven days before the date of publication of the result of the written examination, whichever is earlier.

Note. - The Central Commission shall intimate in writing to each Regional Commission the date of publication of advertisement inviting application and also the date of publication of result of written examination at least three weeks before such publication and a similar intimation shall also be made through website of the Commission.

(3) For removal of doubt, it is hereby declared that only the vacancy reported within the time specified in sub-rule (2) shall be in the final vacancy statement to be published by the Central Commission and any vacancy reported subsequently after that time shall be taken into account in the next Regional Level Selection Test.

24. Thus, after the coming into operation of the new Rule, the vacancy, which has accrued on setting aside the appointment of the writ-petitioner, should be filled up after complying with the formalities mentioned above as no fresh process of selection started after such order and before the coming into operation of the new Rules.

25. In our opinion, the original process of selection having been found to be defective and the appointment given to the selected candidate based on such selection having been set aside, on that ground, now a fresh process of selection is to be initiated and after the coming into operation of 2009 Rules, such selection should be held in accordance with the provision contained in the Rules of 2009 and the learned single Judge was quite justified in passing such direction.

26. In this connection. Mr. Maitra relied upon a decision of the Supreme Court in the case of Arjun Singh Rathore and Others Vs. B.N. Chaturvedi and Others, in support of his contention that the vacancy occurring prior to promulgation of the new Rules should be filled in accordance with the old Rules even though interview, in that case, had taken place after the new Rules had been notified.

27. We do not for a moment dispute with the broad proposition of law that if the process of selection had already been initiated, it should be finished in accordance with law that it stood at the time of initiation of process even if a new law has come into force in the meantime. However, such principle have any application to a case where such process of selection was complete, an appointment was given, the appointed candidate joined service but subsequently,

such appointment was found to be vitiated and the appointment given based on such selection has been set aside by the competent authority as a result of an enquiry, made pursuant to an order of the Court. In such a case, on setting aside the appointment given to the appointed candidate, a new vacancy has arisen in view of the order setting aside the appointment with effect from the date of such order. In such a situation, in our opinion, a fresh vacancy should be declared in accordance with the Rules of 2009 as if such vacancy has occurred on the date, the earlier appointment has been set aside. The post concerned should not be treated to have been lying vacant during the period when the writ-petitioner worked and he will be entitled to the remuneration for the said period so long his service was not terminated by the order of the Director of School Education since affirmed in this writ proceeding. On termination of the service by the order of the Director of School Education a fresh vacancy has accrued. There is no dispute that after the passing of the order terminating the service of the writ-petitioner, no fresh process of selection was initiated by the school authority before the coming into operation of the new Rules of 2009 in the month of June, 2009.

28. Thus, no process of selection having been initiated for the fresh vacancy before the coming into operation of the new Rules, the appointment should be made in accordance with the new Rules of 2009.

29. On consideration of the entire materials on record, we, thus, dismiss this appeal and affirm the order passed by the learned single Judge.

30. In the facts and circumstances, there will be, however, no order as to costs.

J.N. Patel CJ

31. I agree