

**(2004) 06 CAL CK 0015**  
**In the Calcutta High Court**  
**Case No : F.M.A. No. 313 of 2003**

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|--------------------------------------------------|------------|
| Nadia District Primary School Council and Others | APPELLANT  |
| Vs                                               |            |
| Sristidhar Biswas and Others                     | RESPONDENT |

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**Date of Decision :** 11-06-2004

**Acts Referred:**

Constitution of India, 1950 — Article 14, 16

**Citation :** (2005) 1 CALLT 402

**Hon'ble Judges :** Rajendra Nath Sinha, J; Dilip Kumar Seth, J

**Bench :** Division Bench

**Advocate :** Rabilal Maitra and P.S. Deb Barman, for the Appellant; Debiprosad Pal and L.K. Pal, for the Respondent

**Final Decision :** Dismissed

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## Judgement

This Judgment has been overruled by : Nadia Distt. Primary School Council and Another Vs. Sristidhar Biswas and Others, AIR 2007 SC 2640 : (2007) 6 JT 188 : (2007) 6 SCALE 159 : (2008) 2 SCC(L&S) 946 : (2007) 5 SCR 586 : (2008) 1 SLJ 93 : (2007) AIRSCW 6455 : (2007) AIRSCW 4760 : (2007) 3 Supreme 967

Dilip Kumar Seth, J.—Facts:

A panel for appointment of primary teachers was prepared in 1980 for the District of Nadia in which 1965 candidates were included in the panel. Out of these candidates only 600 were trained candidates. Rule 3(d) of the Recruitment Rules provides that while preparing the panel for appointment to the post of primary teachers, preference shall be given to the trained candidates in such a manner that all additional posts sanctioned by the Government from time to time due to enhancement in roll strength in existing schools and at least 50% of the normal vacancies in such schools are filled up by trained candidates only, if sufficient number of trained candidates are available. By a notification dated 26th October, 1971 the Government of West Bengal, Education Department, Primary Branch recognised the training as an additional qualification for appointment as

assistant teacher. By another notification dated 5th September, 1973, it was provided that while giving appointment out of the panel already prepared, preference should be given to the trained candidates for appointment to all the additional posts and 50% of the normal vacancies irrespective of their position in the panel, provided sufficient number of trained candidates have been included in the panel. This preparation of panel omitting to include trained candidates was challenged by Sirazul Haque Mallick and 107 other candidates in CR No. 2522(W) of 1982. By an order dated 17th September 1987 the said writ petition was allowed. On appeal being FMAT No. 159 of 1988 by the State, this order was modified by an order dated 14th of February 1989 by directing giving appointment to the petitioners in the existing vacancies and in vacancies arising in immediately future, and that appointment would not be offered to any one other than the petitioners. This order was passed on concession by the State. The appointment in terms of the said order having not been given, a contempt petition was moved. Pursuant to the order passed in the contempt petition on 30th June 1989, the said Sirazul Haque Malliek and 107 others were given appointment.

1.1. On 16th July 1989, one Dibakar Pal and 87 others moved a writ petition being CO No. 11154(w) of 1989. This writ petition was allowed by an order dated 13th of March 1991 on the ground that Dibakar Pal and 87 others were similarly circumstanced with Sirazul Haque Malliek and 107 others and, therefore, there cannot be a different kind of treatment. The appeal arising thereout was dismissed by the Division Bench. Upon a contempt application being moved, pursuant to an order dated 23rd of June 1999, the said Dibakar Pal and 87 others were given appointment.

1.2. These writ petitioners filed the present writ petition on 2nd of August 1989. For some reason or other, this matter could not be taken up for hearing. Ultimately, this writ petition was allowed by an order dated 17th January 2001 since reported in 2001(1) CHN 524. It may be noted that Sirazul Haque Malliek and 107 others, Dibakar Pal and 87 others and these writ petitioners Sristidhar Biswas and 54 others were admittedly trained candidates. The petitioners claimed that their names were borne on the roll of the Employment Exchange under a separate code number being 153.10 with an endorsement that they would not get any interview calls elsewhere under the Government of West Bengal for the post of primary teachers.

1.3. The learned single Judge had granted the relief to these 55 petitioners on the ground that the petitioners in the other two writ petitions were similarly situated with these 55 writ petitioners and, therefore, were entitled to the same benefit. No relief, however, was allowed by the learned single Judge to the parties added as petitioners between 1999 and 2000.

Whether the petitioners can be denied relief for waiting on the fringe, delay and laches:

2. Mr. Rabilal Maltra, additional advocate general, appearing on behalf of the appellant, assailed the said decision first on the ground of delay relying on the decision in *Union of India and Others Vs. Kishorilal Bablani*, . According to him, these petitioners were waiting on the fringe for the outcome of the other writ petitions and are guilty of delay and laches. Delay defeats equity.

2.1. In the present case as we would be seeing hereafter that serious allegations of illegality and irregularity had been made in the process of preparation of the panel, and that at one point of time when the entire panel became a subject matter of investigation and as contended by Dr. Pal, if investigated upon, the panel would have been struck off, as was done in respect of certain other districts on being challenged before this Court. The facts are stinking. The panel would have been quashed if the concession was not made and there was no fair trial. Dibakar Pal's case was not decided by consent or concession. On the other hand, the appeal was dismissed. In the contempt arising thereout, a special officer was appointed for making enquiry. In order to avoid such enquiry, a resolution was passed for giving appointment to Dibakar Pal and 87 others. It was alleged and rightly by Dr. Pal that this was done only to avoid the enquiry since the enquiry would have revealed alarming situation.

2.2. Having regard to the facts and circumstances of this case, when the relief can be given to Dibakar Pal and 87 others, who had moved the writ petition on 16th of July 1989, then, we do not understand, how the relief could be denied by applying the principle of delay, defeating equity to these petitioners filing the writ petition on 2nd of August 1989, namely, just a little late than a fortnight. Therefore, we are unable to agree with the ground of delay as has been sought to be taken by Mr. Rabilal Maitra. The decision in *Kishorilal Bablani* (supra) cited by Mr. Maitra is distinguishable on facts as discussed above.

2.3. In *Rup Diamonds and Others Vs. Union of India and Others*, wherein it was held that someone sitting on the fence till somebody's else's case came to be decided, if approaches the Court with an unexplained and inordinate delay, he would not be entitled to the relief. In *B.S. Bajwa and Another Vs. State of Punjab and Others*, , the Apex Court had refused to re-open the case of fixation of seniority after a lapse of reasonable period because it would result in disturbing the settled proposition, which would not be desirable. As discussed above, these decisions are distinguishable in the present facts and circumstances of the case concerning the 55 writ petitioners, but not the writ petitioners added to in 1999 and 2000, who are hit by the above principle.

Whether the relief can be denied on the ground of expiry of, the life of the panel:

3. The next ground Mr. Maitra urged is on the question of the life of the panel. To support his contention, he relied on the decision in *District School Board, Midnapore and Ors. v. Paschimbanga Prathamik Sikshak Shikhan Prapta Bekar-O-Sikshak Samiti. West Bengal and Ors.* 1991(1) CLJ 479. According to him, the panel was prepared in 1980 and its life had long expired, now, therefore, no

relief can be had out of such panel.

3.1. In the case of District School Board, Midnapore 1991(1) CLJ 479 (supra), it was held in paragraph 20 that Rule 3(e) prescribes the life of panel for a fixed period of 12 months from the date of preparation subject to extension at the discretion of the Government for a period not exceeding six months. In *Chairman, Adhoc Committee v. Swaraj Kumar Paul and Ors.* 3) 1998 (C LTHC 94, this Court had held in a case where some persons have been given appointment illegally, the Court would not direct the appellant to follow suit, particularly, when the life of the panel had expired when no appointment could be given, in violation of Articles 14 and 16 of the Constitution of India.

3.2. In the facts and circumstances of the present case, the said decisions are distinguishable. The petitioners are not claiming any right on the basis of the panel prepared. On the other hand, it is alleged that despite Rule 3(d) of the Recruitment Rules providing for filling up of all additional, posts by trained candidates and at least 50% of the normal vacancies by trained candidates, the panel of 1965 candidates included only 600 trained candidates. The process of preparation of such a panel whenever came to be scrutinised, the Government, as is apparent from the record, had avoided it; once by giving concession in FMAT No. 159 of 1988 in the case of Sirazul Haque Mallick and 107 others (supra) and again in the contempt proceedings in the case of Dibakar Pal and 87 others (supra) by a resolution when a special officer was appointed for enquiry into the matter. It is not a claim based on the panel and as such the life of panel has nothing to do with the present case. It is based on a consideration in relation to the illegality and irregularity in the preparation of the panel, the validity whereof was all along being avoided to be tested. It is very difficult to presume correctness of the process when the conduct of the State as it appears from the record does not seem to be free from doubt or does not appear to be above board. Despite availability of 198 more trained candidates, the panel of 1965 candidates included even less than 50% of the vacancies namely 600 trained candidates instead of 983 trained candidates or in other words less than by 383 candidates. That apart on 21st of July 1999 when this matter came up for further hearing, the counsel for the State assured of giving appointment in the event the writ petition succeeds in order to avoid grant of a stay at a point of time when there were sufficient number of vacancies available (p-841-851 PB Vol.11).

3.3. At the same time, despite this situation, relief was granted to Sirazul Haque Mallick and 107 others who had filed the writ petition in 1982 namely after two years from the preparation of the panel and to Dibakar Pal and 87 others who had filed the writ petition on 16th July 1989 almost nine years after and instead of opposing the same the state had conceded to it, then it would be preposterous to refuse the relief to these 55 petitioners on the ground of the cessation of the life of the panel.

Whether the petitioner can be granted relief on the basis of the earlier orders not being precedents:

4. Mr. Maitra next contended that in the present case, the petitioners are seeking relief on the basis of the decisions in Sirazul Haque Mallick and 107 others (supra) and Dibakar Pal and 187 others (supra). These decisions are not precedents, Therefore, these cannot be followed in the case of the petitioners. According to him. an order obtained by consent or concession, namely, the order passed in FMAT No. 159 of 1988 would not be a precedent. Therefore, no relief can be given to the petitioners. In support of his contention, he relied on the decisions in Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another, : B.S. Bajwa and Another Vs. State of Punjab and Others, and Municipal Corporation of Delhi Vs. Gurnam Kaur, .

4.1. Admittedly, an order passed by consent is not a precedent. The order passed in FMAT No. 159 of 1988 cannot be treated as precedent. Admittedly, a decision binding between the parties to the proceeding and not to others. A decision becomes a precedent when there is a conscious adjudication. When the matter is decided on consent or concession, it is not a conscious adjudication. In the present case, admittedly, no proposition of law was decided in FMAT No. 159 of 1988. So far as the case of Dibakar Pal and 87 others (supra) is concerned, this was not decided by consent or concession. The writ petition was allowed following the decision in Sirazul Haque Mallick and 107 others (supra). Whether a decision by consent can operate as a precedent or not would not be material, when the same is followed in one case in between parties who are similarly situated in the same transaction involving same set of facts even though there was no conscious adjudication of any proposition of law, a conflicting stand, cannot be taken, particularly by the State, on the same set of facts when the parties are identically situated, denying the same relief granted to 196 writ petitioners. Then again the decision in Dibakar Pal and 87 others (supra) being a conscious adjudication of rights between the parties affirmed by the appeal Court, though following the order passed by consent or concession in FMAT No. 159 of 1988, and in course of implementation through contempt when faced with an enquiry by a special officer appointed, the avoidance of the enquiry through resolution would prevent this Court from following the principle that it would not follow the decision because it is not a precedent.

4.2. On the other hand, the conduct of the State gives an impression that there was something which the State Government avoided to open up and even prevented the Court from lifting the veil in respect of a case where another 88 candidates were given the same benefit which the 108 candidates had got and thus making the relief available in respect of 196 candidates identically situated with these 55 petitioners having come at the heels of Dibakar Pal and 87 others. In our opinion, these 55 petitioners cannot be denied the same reliefs. If it is so done. It would be leading the justice delivery system into a wilderness. The precedents are followed for the purpose of maintaining a consistency and avoiding inconsistency and to set down a particular standard and guideline so that equal situations may not evoke different results. Justice is to be administered with some sense of cohesion and consistency on identical facts on

identical situation there cannot be two results. Nowhere sufficient explanation has come to show as to how Rule 3(d) of the Recruitment Rules was adhered to. It had never been sought to be explained and no materials had ever been produced before this Court as to how this trained candidates could not be included in the panel of 1965 candidates.

4.3. In *Municipal Corporation of Delhi v. Gurnam Kaur* (supra) it was held that a consent order is not binding as a precedent in a subsequent decision by some other Judge and the Court is not supposed to follow such consent order as a precedent. In *Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another*, , it was held that in order to be a precedent the point must not be disposed of on concession. An order obtained by consent is not a law declared. It is the ratio, which binds. Ratio means the principle found out upon a reading of a judgment in the light of the question the Court was called upon to decide. The principles are settled proposition of law with which there can be no reservation. Having regard to the peculiar facts and circumstances obtained in the present case, the ratio decided in *M.R. Upparao and Anr.* (supra) and *Gurnam Kaur* (supra) cannot be attracted.

Principle of sub-silentio:

5. The next contention that was raised by Mr. Maitra relying on the decisions in *Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise, Meerut*, and *Arnit Das Vs. State of Bihar*, on the rule of sub-silentio. In *Amit Das* (supra) (para-20), it was held that a decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect that which has escaped the judgment is not a ratio decidendi. This is the rule of sub-silentio, in the technical sense when a particular point of law was not consciously determined. This principle was laid down in *Amit Das* (supra) following the ratio in *State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another*, . In *Mittal Engineering Works (P) Ltd.* (supra), the Apex Court had held that a decision cannot be relied upon in support of a proposition that it did not decide.

5.1. The principle of sub-silentio as argued by Mr. Maitra is a settled proposition of law. But a legal proposition is to be applied in a given circumstances. In this case it is not merely following a decision. It is a case with some difference. Here the State itself took a stand to avoid scrutiny and a conscious adjudication as was adjudicated by the learned single Judge in CR No. 2522(W) of 1982 and agreed to give the benefit to the petitioners in *Sirazul Haque Mallick and 107 others* (supra) in the appeal through concession. Again It avoided a probe proposed In the contempt proceeding for implementing the order passed in *Dibakar Pal and 87 others* (supra) by proposing giving of appointment through a resolution. Thus, in such a case the principle of sub-silentio will not stand in the way.

5.2. On the other hand, in this case, no material has been produced on behalf of

the State to enable the Court to consciously adjudicate the Us otherwise than it was decided by the learned single Judge in CR No. 2522(W) of 1982. Thus the Court has no alternative but to pass similar order. At the same time, the State cannot be allowed to take two different stands in respect of persons identically situated in a case involving the same transaction in the same set of facts. In any event, even in normal course, we do not find that any other decision could be possible on the materials placed before the Court.

5.3. In the peculiar facts and circumstances of this case, we are unable to persuade ourselves to agree on this question with Mr. Maitra.

Court cannot direct perpetuation of illegality or irregularity:

6. Mr. Maitra's next contention was that the Court cannot direct implementation of an illegality or irregularity simply because it had granted earlier. The Court cannot direct the Government to do something, which is in utter violation of the provisions of law. No order perpetuating illegality can be passed by a Court. He relied on the decision in State of Bihar and Others Vs. Kameshwar Prasad Singh and Another, ,

6.1. In paragraph 30 of Kameshwar Prasad Singh (supra), it was held that the benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality as enshrined in Article 14 of the Constitution of India by way of writ petition, following the decision in Secy., Secretary, Jaipur Development Authority, Jaipur Vs. Daulat Mal Jain and Others, reiterating the concept of equality, entitling someone to claim relief on the ground that founded on an illegal allotment pursuant to an illegal policy of allotment. In J.N. Ganatra Vs. Morvi Municipality, Morvi, , it was held that when the statute prescribes a particular manner for exercise of some power, the Court cannot direct exercise of power in utter violation of mandatory procedure. In State of U. P. and others Vs. Harish Chandra and others, , it was held that in order to obtain relief, one must have legal right and the mandamus can be issued restraining the Government from doing something contrary to law, but it does not permit the Court to direct the Government to do something contrary to law. In Prakash K. and Another Vs. State of Karnataka and Others, , it was held that the Court cannot direct giving of appointment in violation of law. In C.S.I.R. and Others Vs. Dr. Ajay Kumar Jain, , it was held that no advantage of an illegality can be obtained through Court. One irregular appointment would not entitle another similarly situated to seek another irregular appointment. In Gursharan Singh and others etc. Vs. New Delhi Municipal Committee and others, , it was held that the Court cannot direct to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established that the claim is just and legal and is being denied. Mr. Maitra had relied on these decisions to substantiate his contention that this Court cannot grant relief to these petitioners on these principles.

6.2. There is no doubt about the proposition of law laid down In these decisions. These are all accepted proposition of law and well settled. But each proposition has to be applied in the facts and circumstances of each case. Here is it not the question of equality clause, which is being applied for granting the relief though the same relief has been given to all the candidates but it is a case where an illegality has been perpetuated as against these petitioners, and illegally the right of the petitioners was denied. All these cases deal with the illegality perpetuated by the authority. A Court's direction can never be an illegality. When the Court grants some relief out of the same transaction, it cannot deny same relief to some other persons claiming through the same transaction. It is a case where the deprivation of the petitioners' right was done illegally; and something was done which presumably, smacks illegality and irregularity; which was kept out of bounds of the Court's scrutiny; and all attempts to do so was avoided either by giving consent or concession or by taking resolution to prevent the prying eyes of the Court to have an insight in the transaction. Thus, it was attempted to continue and perpetuate in illegality committed by the State. It is not a case of perpetuation of illegality through Court's order. On the other hand, it is a case of the respondent/ appellant's attempt to perpetuate the illegality and irregularity they had committed in contradiction of Rule 3(d) of the Recruitment Rules without allowing the Court to probe into it; this the Court cannot allow to be perpetuated at the cost of the petitioners who have been deprived by such illegal action. The Court is directing the respondents to do something, which they were bound to do legally and which they purported to do illegally. At the same time, the Court cannot allow the State to continue and perpetuate illegality, particularly when it has successively avoided the probing eyes of the Court. Therefore, in view of these distinguishing features, the decisions cited by Mr. Maitra have no manner of application in the present case.

6.3. The principle that the Court cannot direct giving of appointments when some persons were given appointment illegally as held in *Swaraj Kumar Paul C LT 1998 (3) HC 94 (supra)* cannot be attracted in this case in view of the reasons as discussed above.

Whether there was illegality in the process of preparation of the panel:

7. Mr. Maitra relied upon *Paschimbanga Prathamik Sikshak Sikshan Prapts Bakar-O-Sikshak Samiti and Others Vs. President, West Bengal Primary School Council and Others*, wherein it was held in respect of District of Malda that there had not been large scale of illegalities or irregularities in the preparation of the panels so as to entitle the Court to quash the same altogether. At the same time, the Court had found that in respect of the District of Malda all norms of fair-play and adherence to rules have been given a go-by in preparing the panel. The Apex Court had found that in respect of Midnapore, the High Court had found gross irregularities in preparing the panel and the Apex Court did not find any reason to differ from the view expressed by the learned Judge. Apart from those who districts, the Apex Court exonerated the other districts though there were some

instances of irregularities in preparation of panels for the other districts, yet considering the number of candidates; it was held that the irregularities were not of such magnitude that the entire panel should be held to be bad. Even then the Apex Court did not decline relief to the appellant altogether and, on the other hand, fresh panel was asked to be prepared and with the appointment from the fresh panel, the corresponding appointment made earlier would stand terminated. Relying on these decisions Mr. Maitra wanted to contend that the question of district of Nadia was also involved in the said decision, but the Apex Court had refrained from canceling the panel but had directed to do something.

7.1. But the fact remains that the appellant had never allowed the Court to probe into the process of the preparation of the panel for the district of Nadia so as to find out whether there was any illegality or irregularity or not. However, patently it appears that Rule 3(d) of the Recruitment Rules was not complied with and at every stage whenever if: was open to be probed the appellant had closed the door either by giving appointment or by taking resolution to foreclose the enquiry. Therefore, the decision in Paschimbanga Prathamik Sikshak Sikshan Prapts Baskar-O-Siksliak Samiti and others (supra) would not lead us to presume nor it. would bind us to hold that the panel prepared for the district of Nadia cannot be said to be free from irregularity or illegality. On the other hand, at the same time, principle on which a fresh panel was directed to be prepared and the corresponding appointment was directed to be terminated on appointment from the fresh panel, the Apex Court had very much found fault with the panel. Here in this case the panel was not dismissed and the petitioners were allowed to be accommodated against the existing or future vacancies. When 197 candidates have been granted the relief and 88 out of them were followed close to the hills by the petitioners who are 55 in number, they cannot be denied the relief and it would be simply a gross injustice towards them while allowing the appellant to retain the gain to continue and perpetuate the illegality, which they had protected either by consent or by resolution at different stages.

Conclusion:

8. In these circumstances, we do not find any infirmity in the order passed by the learned single Judge since appealed against. We must appreciate the assistance rendered by Dr. Pal in pointing out the areas where the facts of this case are distinguishable, as we have discussed above.

Order:

9. In the result, the appeal fails and is hereby dismissed. There order of the learned single Judge granting relief to the 55 writ petitioners appealed against is hereby affirmed. The respondents are directed to comply with the direction given by the learned single Judge in respect of the 55 writ petitioners within the extended period of three months from today.

10. There will, however, be no order as to costs.

Urgent xerox certified copy of the operative part of this order, if applied for, be given within seven days upon usual undertakings.

Rajendra Nath Sinha, J.

11. I had the privilege of going through the judgment written by my learned brother Seth, J. I fully agree with the same. However, I would like to add a few lines to support the same on an added ground.

12. It appears that besides the 55 writ petitioners, some other persons were allowed to be made parties in this writ petition on different dates as hereunder:

1) On 9.9.99 added respondents (5) filed petition for being added as party (Mono Ranjan Biswas affirmed affidavit).

2) On 7.9.99 Bidesh Kumar Biswas (47) affirmed affidavit for 12 being added as a party.

3) On 17.8.2000 Badruddin Khan (51) affirmed affidavit for 8 being added as a party.

4) On 7.11.2000 Dilip Biswas (47) filed affidavit for 7.

13. The aforesaid added persons in respect of whom the learned trial Court had ordered that their candidature are also to be scrutinised and they are also to be considered if found fit for appointment. However, there was no time limit given of the purposes of the aforesaid consideration.

14. However, as we find that the initial case of Serajul Haque Mallick was filed as early as in the year 1982, since then there were series of litigations but the aforesaid added respondents sat idle without coming to Court with their grievance.

15. That apart all the added persons (expecting a few) dates of birth were not mentioned anywhere within the four corners of the Paper Book. However, it appears that most of the candidates" were born in between the early 50s and the late 50s. Thus, they appear to be aged around or nearing 50 years when they were added as parties.

16. Their aforesaid conduct goes to show that either they were engaged in some or other avocation and/or they have/had waived their right, if any or at all, in connection with the interviews and the training they have undergone more than two decades before.

17. Law and equity help the vigilant and not an indolent. Furthermore, there must be an end of litigation.

18. Therefore, the added persons shall not be entitled to any relief. The relief is confined only to the 55 writ petitioners who moved this petition closely at the hills of (within a fortnight) Dibakar Pal and 87 others.