

(2007) 10 CAL CK 0040
In the Calcutta High Court

Case No : M.A.T. No. 1653 of 2007 and C.A.N. No. 3462 of 2007

Radha Giri (Pradhan)

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 03-10-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 16, 162, 226

Citation : (2008) 2 CHN 661

Hon'ble Judges : S.S. Nijjar, C.J.; Pinaki Chandra Ghose, J

Bench : Division Bench

Advocate : Subir Sanyal, Sakti Pada Jana and Anup Dasgupta, for the Appellant; Balai Chandra Roy, Santi Das, Saikat Banerjee, Debabrata Karan, Kamallesh Bhattacharjee, Mojnu Sk. and Sk. Mustak Ali for writ petitioner and Fazle Rabi, for the Appearing Parties

Judgement

S.S. Nijjar, C.J.—We have heard the learned Counsel for the parties at length. We have perused the order passed by the learned Single Judge which reads as under:

The petitioner is permitted to appear for the interview for the purpose of selection for appointment to the post in question, as prayed for in the writ petition, along with other sponsored candidates on or before 30th of December, 2006 or any other subsequent date or dates. The case of the petitioner will be considered at par with other sponsored candidates for such selection.

This writ petition is, thus, disposed of.

There will be no order as to costs.

Learned Advocate for the writ petition is given liberty to communicate the gist of the order to the concerned authority.

2. A perusal of the aforesaid order shows that the same has been passed at the first hearing of the matter. We are of the considered opinion, that the aforesaid order cannot be sustained on the simple ground that the order finally disposing

of a writ petition must be a speaking order. Such an order can only be passed after hearing the Counsel for all the affected parties. In normal circumstances it ought to be made only after the parties have been given an opportunity to place on record their respective cases by way of affidavit, written statement or otherwise. On numerous occasions the Supreme Court has observed that short cryptic orders disposing of the writ petitions are not appropriate for disposing of the matters finally. In our opinion, this appeal cannot be disposed of finally at this stage as a large number of writ petitions have been disposed of and are being disposed of by this Court relying on a Special Bench judgment of this Court in the case of Rabindra Nath Mahata v. State of West Bengal and Ors.. In our opinion, the aforesaid judgment does not lay down the proposition that as soon as an individual files a writ petition and claims that he has not been considered, as his name has not been sponsored by the Employment Exchange would automatically be entitled to the order that he be interviewed along with the sponsored candidates. Such a direction would be contrary to Article 14 of the Constitution as well as the law laid down by the Supreme Court in a catena of judgments. The Supreme Court has categorically laid down in the case of Arun Kumar Nayak Vs. Union of India (UOI) and Others, that advertisement for vacancies in a newspaper having wider circulation, announcement on Radio, Television and Employment Newspaper bulletins are essential requirements for filling up vacancies on Government posts as well as posts in Government instrumentality such as Boards, Corporations and Co-operative Societies etc. Employment in a school would certainly fall within the definition of "public employment". Such employment cannot be limited only to candidates who have been sponsored by the Employment Exchange. The relevant observations in paragraph 9 of the said judgment are as under:

9. This Court in Visweshwara Rao, therefore, held that intimation to the employment exchange about the vacancy and candidates sponsored from the employment exchange is mandatory. This Court also held that in addition and consistent with the principle of fair play, justice and equal opportunity, the appropriate department or establishment should also call for the names by publication in the newspapers having wider circulation, announcement on radio, television and employment news bulletins and consider all the candidates who have applied. This view was taken to afford equal opportunity to all the eligible candidates in the matter of employment. The rationale behind such direction is also consistent with the sound public policy that wider the opportunity of the notice of vacancy by wider publication in the newspapers, radio, television and employment news bulletin, the better candidates with better qualifications are attracted, so that adequate choices are made available and the best candidates would be selected and appointed to subserve the public interest better.

3. Similar observations have been made in the case of Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao and Others, . In paragraph 6 of the judgment it has been observed as follows:

6. Having regard to the respective contentions, we are of the view that contention of the respondents is more acceptable which would be consistent with the principles of fair play, justice and equal opportunity. It is common knowledge that many a candidate is unable to have the names sponsored, though their names are either registered or are waiting to be registered in the employment exchange, with the result that the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the employment exchange. Under these circumstances, many a deserving candidate is deprived of the right to be considered for appointment to a post under the State. Fetter view appears to be that it should be mandatory for the requisitioning authority/ establishment to intimate the employment exchange and employment exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news bulletins; and then consider the cases of all the candidates who have applied. If this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates.

4. The aforesaid two judgments of the Supreme Court have also been followed by a Division Bench of this Court in the case of *Gaya Nath Rajbanshi v. State of West Bengal and Ors.* reported in 2007(2) CLJ 105. After taking note of the law laid down by the Supreme Court in the case of *Visweshwara Rao (supra)* and *Arun Kumar Nayek (supra)* it has been clearly observed:

15. Hence, it appears that *Visweshwara Rao (supra)* is a judgment not in personem but a judgment in rem and the same was a judgment declaring the law under Article 141 of the Constitution of India taking into account reasonableness and fairness doctrine, equality of opportunity in employment in terms of Article 14 of the Constitution of India. From the judgment of *Visweshwara Rao (supra)* it appears that an individual non-sponsored candidate got no right to appear suo motu and/or by decision of the Managing Committee and/or employer concerned allowing any individual non-sponsored candidate to appear in the interview as per their sweet will unless the right of a non-sponsored candidate for appearance in the interview matures on the contingency of advertisement of the concerned vacancy in the daily Newspaper and/or Employment Exchange notification having a wide publication and/or other media advertisement, radio and television as held by the Apex Court. As a corollary thereof since an individual non-sponsored candidate got no right to appear in the interview simpliciter in the absence of the aforesaid contingency of advertisement of the post in the Newspapers and other media, the High Court also sitting in the writ jurisdiction cannot allow the appearance of the individual candidate until and unless there is an advertisement of the particular post inviting the names of the general candidates by publishing the same in the State

Wide published daily Newspaper for the reason that allowing of any individual candidate in absence of those contingencies in exercising the power under Article 226 of the Constitution of India would be nothing but an exercise of power which per se violative of Article 14 of the Constitution of India as the other identically placed candidates who may be the next door neighbour of the writ petitioner who since could not approach the High Court due to financial stringency or for any other reason would be denied to appear in the interview despite fulfilment of qualification alike, the writ petitioner. On considering that aspect of the matter, the Apex Court accordingly in the case of Visweshwara Rao (supra) opened the right of non-sponsored candidates to appear in the interview only in the contingency when such post would be advertised in the newspaper and/or any employment news publication along with displaying on the notice boards etc. as has been quoted in Paragraph - 8 of Arun Kumar Nayek (supra). In the case Visweshwara Rao (supra) the Apex Court accordingly held "Better view appears to be that it should be mandatory for the requisitioning authority/establishment to intimate the employment exchange, and employment exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their notice boards or announce on radio, television and employment news bulletins, and then consider the cases of all the candidates who have applied. If this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates".

16. The writ petitioner though in Paragraph -10 pleaded accordingly that as per Visweshwara Rao (supra) the post was required to be advertised so that the non-sponsored candidates could appear subserving the fair play doctrine as postulated in Articles 14 and 16 of the Constitution of India, but did not pray for any such order in the writ application. In the writ, the writ petitioner prayed in paragraph (a) - a writ of mandamus commanding the respondents to allow the writ petitioner only to appear in the Selection Committee for consideration of his candidatures. Hence, the prayer (a) aforesaid which is the only prayer in the writ even on the basis of the pleadings of the writ application was not a just prayer to allow the same. The writ petitioner in the writ pleaded one thing namely the right of all non-sponsored candidates to appear in the interview and for that reason referred the case of Visweshwara Rao (supra) whereby the open advertisement of the vacancy was directed to be made but in the prayer portion the writ petitioner simply prayed for only his appearance without any advertisement of the vacancy in the newspapers which per se, if allowed would be violative of Article 14 of the Constitution of India, which is within the field of basic structure of the Constitution. Hence, on that pleading also vis-a-vis the prayer as made, the same cannot be allowed by the Writ Court as the same would be nothing but a breach of Article 14 of the Constitution of India, denying right of other

identically situated candidates.

5. We are in respectful agreement with the observations made by the Division Bench. Learned Counsel for the respondents has, however, submitted that the only claim made by the petitioner was that the respondents could not have been interviewed without being sponsored by the employment exchange. The claim of the petitioner itself was that he is entitled to be considered and appointed on the basis of the sponsorship from the employment exchange. Therefore, in view of the law laid down by the Supreme Court in the case of Visweshwara Rao (supra) and Arun Kumar Nayek (supra), the petitioner suffered from the disability as the respondents. Therefore, no relief could have been granted to the writ petitioner. Learned Counsel further submitted that at best the appointment was irregular and not illegal and, therefore, the appointment ought not to be stayed. We are unable to accept the aforesaid submissions of the learned Counsel. We are of the opinion, that the judgment in the case of National Fertilizers Ltd. and Others Vs. Somvir Singh, is of no assistance to the petitioner. Rather the observations made by the Supreme Court would tend to show that any appointment in the public sector, which has been made by following a procedure other than the open advertisement would be violative of Articles 14 and 16 of the Constitution of India. Both the questions raised by the learned Counsel have been answered in paragraphs 22 and 23 of the aforesaid judgment which we may reproduce hereunder:

22. Taking note of some recent decisions of this Court, it was held that the State does not enjoy a power to make appointments in terms of Article 162 of the Constitution of India. It further quoted with approval a decision of this Court in Union Public Service Commission Vs. Girish Jayanti Lal Vaghela and Others, in the following terms:

...The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial, through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the Employment Exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution.

23. It was clearly held:

These binding decisions are clear imperatives that adherence to Articles 14 and

16 of the Constitution is a must in the process of public employment.

6. In view of the aforesaid, we are of the considered opinion that the Trial Court had erred in issuing a positive direction to the respondents that the petitioner be permitted to appear for the interview as no legal right of the petitioner had been infringed. Admittedly, the vacancies were never advertised. Therefore, neither the petitioner nor the respondents had any legal right to be either considered or appointed on the aforesaid posts. Any appointments made are clearly violative of Articles 14 and 16 of the Constitution of India. The appointments would also be contrary to the law laid down by the Supreme Court in the cases of Visweshwara Rao (supra) and Arun Kumar Nayek (supra).

7. In view of the above, we stay the operation of the order passed by the learned Single Judge until further orders.

8. Let affidavit-in-opposition to the stay application be filed within a period of two weeks after vacation and reply thereto, if any, be filed one week thereafter.

Let the matter appear in the list three weeks after the vacation.

Liberty is given to the appellant to prepare and file requisite number of informal paper books in the meantime.

Xerox plain copy of this order duly countersigned by the Assistant Registrar (Court) be given to the learned Counsel for the parties on usual undertaking.

Pinaki Chandra Ghose, J.

9. I agree.