

(2012) 07 CAL CK 0127
In the Calcutta High Court

Case No : Writ Petition No's. 6339 and 24041 (W) of 2006

Rana Bhattacharjee and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 04-07-2012

Acts Referred:

Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 — Section 4
West Bengal Primary Education Act, 1973 — Section 19, 60

Citation : (2012) 4 CALLT 498

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Arunabha Banerjee and Ms. Simantika Dasgupta in W.P. No. 6339 W/06 and Mr. Amal Baran Chatterjee, Mr. Samiran Mondal and Mr. Debasish Mukherjee in W.P. No. 24041 W/06, for the Appellant; Amal Baran Chatterjee, Samitan Mondal and Mr. Debasish Mukherjee, Uttam Kr. Majumder and Mr. Debasish Mukherjee, Kamalesh Bhattacharjee and Ms. Barnali Mitra and Mr. Kamalesh Bhattacharjee for the State in W.P. No. 6339(W)/06 and 24041 (W)/06 and Mr. Bidhan Biswas for the State in W.P. No. 24041 (W)/06, for the Respondent

Judgement

Harish Tandon, J.—These two writ petitions are directed to be heard analogously as the decision in one writ petition has an impact on the other. The facts as emerges from the aforesaid writ petitions are that the District Primary School Council notified the vacancies to the Employment Exchange for sponsoring the name of the eligible candidates to the post of primary teacher. 262 post were reserved under the exempted category out of which 195 post were earmarked for Bengali Medium Schools whereas 40 and 27 posts are shown to be reserved for Hindi Medium and Nepali Medium Schools respectively.

2. It is relevant to note that the petitioners of both the writ petitions offered their candidature for a Bengali Medium School within the district of Jalpaiguri and therefore, the consideration in this writ petitions are restricted to the Bengali Medium Category Candidates where admittedly all the post notified by the District Primary School Council, Jalpiguri are already filled up.

3. The petitioners of both the writ petitions are registrants of the Employment Exchange under the exempted cell of land losers" category. In fact, their names were sponsored by the Employment Exchange under such category. They were allowed to participate in the selection process wherein the petitioners of W.P. 6339 (W) of 2006 were declared unsuccessful whereas the petitioners of W.P. 24041 (W) of 2006 were declared as successful candidates. Even after declaring the candidates as successful, the District Primary School Council was not taking steps for appointment of those candidates. Some of the successful candidates approached this Court by filing a writ petition W.P. No. 6339 (W) of 2004 and a point was taken by the District Primary School Council that the said registrant under exempted cell in land losers category are neither the relative nor the family of the land losers and as such, the appointments could not be made. By judgment and order dated 21st April, 2004, the Court disposed of the said writ petition by observing that the registration of those candidates with the Employment Exchange cannot be doubted by the District Primary School Council and it is only the Employment Exchange who can take steps for cancellation and/or deletion of their name if the person get himself registered by making misrepresentation. The appeal against the said order being MAT 1673 (W) of 2004 though pending, but an application for stay filed therein is dismissed by the division bench of this Court. In the contempt proceeding initiated for alleged violation of the said order dated 21st April, 2004, an affidavit of compliance is filed evidencing that the appointments have already been made to the successful candidates.

4. Since an observation was made by this Court relating to the competency of the Employment Exchange to cancel and/or delete the names of the candidates under exempted cell in land losers category, the inquiry was held and a list of 48 candidates was submitted which includes the names of the petitioners in W.P. No. 24041 (W) of 2006 who by making misrepresentation registered themselves in land losers" category. In other words, the Employment Exchange found those candidates being non-land losers and thus cancelled their registration meaning thereby the sponsorship stood cancelled and/or recalled. The writ petition at the instance of the unsuccessful candidates being W.P. 6339 (W) of 2006 is based upon the said report who seeks an order for cancellation of the appointment of those candidates with further prayer for appointment of the petitioners in their place.

5. The successful candidates have challenged the said decision by which they were not found to be a land losers on the ground of violation of principles of natural justice. On the basis of an application for addition of party, the petitioners being in W.P. 24041 (W) of 2006 were made party respondent in the writ petition initiated by the unsuccessful candidates.

6. The learned Advocate appearing for the unsuccessful candidates, however, submits that the Employment Exchange has found those successful candidates not coming within the ambit of land losers" category and their appointment

should be cancelled on the basis of observation of this Court in an earlier writ petition being W.P. 6339 (W) of 2004. Even a criminal proceeding has been initiated against those candidates which would be evident from the supplementary affidavit filed therein. Lastly it is submitted that the entire vacancy has not been filled up and the petitioners could be accommodated in the said left over vacancies.

7. Per contra, the learned Advocate appearing for the successful candidates submits that after proper verification and inquiry conducted before their registration under the exempted cell in land losers category, the Employment Exchange registered their name. It is strenuously argued that the inquiry was conducted without affording an opportunity of hearing to the successful candidates and is, therefore, liable to be quashed and set aside. Lastly, it is submitted that the District Primary School Council cannot doubt the status of those candidates and the inquiry could not be contemplated by the Employment Exchange on the basis of the complaint of the District Primary School Council.

8. Before taking the core issue, the point that the council did not fill up the total vacancies as submitted by the unsuccessful candidates is not tenable. As indicated above, out of 262 posts reserved under the exempted category, 195 posts were reserved for Bengali Medium Candidates. From the supplementary affidavit filed by the District Primary School Council, Jalpaiguri, it is evident that the entire posts reserved of Bengali Medium School were filled up. Because of sponsoring of lesser candidates than the vacant post under the Hindu Medium and Nepali Medium category, those vacancies could not be filled up. The left over vacancies in school imparting education in a particular language cannot be filled up with the candidates who are not equipped to teach in the said medium. Therefore, the submission of the unsuccessful candidates that the entire vacancies were not filled up is unsustainable.

9. It is to be reminded that the Employment Exchanges are one of the wings of the Government set up for specific purposes whereas the genesis of the District Primary School Council is under the West Bengal Primary Education Act, 1973. They are assigned different duties and functions in a specific field. Exclusivity of ones domain cannot be transgressed by other. The duties of the Primary School Council as defined in section 60 of the West Bengal Primary Education Act, 1973 are as follows:

S. 60. Duties of the Primary School Council.-(1) It shall be the duty of every Primary School Council:--

(a) to prepare and maintain in such manner and containing such particulars as may be prescribed, a register showing all primary schools within its jurisdiction, together with the teachers thereof and the accommodation available therein;

(b) to maintain in such manner and containing such particulars as may be prescribed a register of teaching and non-teaching staff of all primary schools under its management;

- (c) to maintain in such manner and containing such particulars as may be prescribed a service record of teaching and non-teaching staff of all primary schools under its management;
- (d) to tabulate such further information and to prepare such plans or maps as may be necessary to enable the Primary School Council to frame an estimate of the existing provisions for primary education and of the further provisions necessary to place primary education within the reach of all children;
- (e) to prepare in the prescribed manner schemes for the extension of primary education and to make adequate provisions for facilities for the free primary education of all children to whom such schemes apply;
- (f) to arrange, in the prescribed manner and with the prior approval of the Board, for the opening of additional primary schools and expansion of existing primary schools with a view to giving effect as funds permit to such schemes;
- (g) to provide for the welfare of the children attending primary schools;
- (h) to maintain an adequate number of primary schools within its jurisdiction;
- (i) to carry on propaganda for expansion of primary education;
- (j) to construct, repair and manage, either directly or through any local authority; all primary schools under public management;
- (k) subject to the prescribed conditions, to appoint teachers and other staff in primary schools, to transfer any such teacher or other staff from one primary school to another primary school within the jurisdiction of the same Primary School Council and to pay to teachers and other staff salaries and allowances, if any, at such rates as may be fixed by the State Government;
- (kk) to set up new Primary Schools subject to fulfillment of terms and conditions and observance of the guidelines laid down in this behalf by the State Government from time to time;
- (l) to grant recognition to primary schools with or without conditions or to withdraw recognition and to grant financial aid to any such primary schools or to withdraw such aid, in such manner, as may be prescribed;
- (ll) to change the location of an existing Primary School by shifting the same to a new site subject to compliance with the necessary guidelines and instructions laid down in this regard from time to time by the State Government;
- (m) to make grants in the prescribed manner for scholarships and stipends;
- (n) to prepare and, transmit to the Director proposals for increasing the supply of trained and certified teachers;
- (o) to comply with such instructions as may be issued by the Board under clause (f) of sub-section (1) of section 19;

(p) to advise upon and to supply all information with respect to matters relating to primary education referred to the Primary School Council by the Director or the Board;

(q) subject to the prescribed conditions:-

(i) to grant pensions and gratuities to,

(ii) to form and manage a provident or an annuity fund for,

(iii) to compel contributions to such fund from, and

(iv) to supplement the contributions to such fund of, the establishment of the Primary School Council and teachers in primary schools:

(r) to exercise supervision and control over the primary schools and the work of the Welfare Committees; and

(s) to perform such other duties as may be prescribed.

(2) The register referred to in clause (a) of sub-section (1) shall be maintained and the information referred to in clause (d) thereof shall be tabulated separately for each prescribed area.

10. The Employment Exchange is set up for the purpose of providing information and opportunity to be considered for the purpose of employment. In order to achieve the said object Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 is enacted, section 4 of the said Act provides that the employer in every establishment in Public Sector in any state or area shall, before filling up any vacancies, notified the same to the Employment Exchanges. The Employment Exchange is defined therein to mean any office or place established and maintained by the Government for the collection and furnishing of information, either by the keeping of Registrars, or otherwise respective persons who seek to engage employees, persons who seek employment and vacancies to which persons seeking employment may be appointed. To achieve the purposes as above, the Employment Exchanges registered the names of the persons under different categories and sends the name as a when the requisition is made.

11. Therefore, it is explicit that the District Primary School Council cannot peep into the duties of the Employment Exchange to see whether those are validly discharged or not and vice-a-versa.

12. Misrepresentation fraud coercion is some of the cannon of rendering the action and/or decision void and/or voidable. The inquiry was conducted on the basis of an observation made by this Court in an earlier writ petition being W.P. No. 6339 (W) of 2004. It is not reflected from the affidavits used by the respective parties that such inquiry was conducted upon giving an opportunity of hearing to the candidates whose registration was cancelled. Adherence to the principles of natural justice is a basic foundation in the field of punitive action. By

the report submitted by the authority, the successful candidates has suffered prejudice as their appointments would be declared illegal and/or invalid. I am not oblivious that mere technical violation of the principles of natural justice would not render the decisions unsustainable unless a prejudice is caused for such breach. It has been held in case of Union of India (UOI) and Others Vs. Alok Kumar,

85. The doctrine of de facto prejudice has been applied both in English as well as in Indian law. To frustrate departmental enquiries on a hypertechnical approach has not found favour with the Courts in the recent times. In *S.L. Kapoor v. Jagmohan* a three-Judge Bench of this Court while following the principle in *Ridge v. Baldwin* stated that if upon admitted or indisputable facts only one conclusion was possible, then in such a case that principle of natural justice was in itself prejudice would not apply. Thus, every case would have to be examined on its own merits and keeping in view the statutory rules applying to such departmental proceedings. The Court in *S.L. Kapoor* held as under: (SCC p. 392. para 18)

18. In *Ridge v. Baldwin* (AC 40 at p. 68: All ER at p. 73) one of the arguments was that even if the appellant had been heard by the watch committee nothing that he could have said could have made any difference. The House of Lords observed at (p. 68):

It may be convenient at this point to deal with an argument that, even if as a general rule a watch committee must hear a constable in his own defence before dismissing him, this case was so clear that nothing that the appellant could have said could have made any difference. It is at least very doubtful whether that could be accepted as an excuse. But, even if it could, the watch committee would, in my view, fail on the facts. It may well be that no reasonable body of men could have reinstated the appellant. But as between the other two courses open to the watch committee the case is not so clear. Certainly on the facts, as we know them, the watch committee could reasonably have decided to forfeit the appellant's pension rights, but I could not hold that they would have acted wrongly or wholly unreasonably if they had in the exercise of their discretion decided to take a more lenient course.

86. Expanding this principle further, this Court in *K.L. Tripathi v. SBI* held as under: (SCC p. 58. para 31).

31... it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural Justice must depend on the facts and the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth.

87. In *ECIL v. B. Karunakar* this Court noticed the existing law and said that the

theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are neither incantations to be invoked nor rites to be performed on all and sundry occasions. Whether, in fact prejudice has been caused to the employee or not on account of denial of report to him, has to be considered on the facts and circumstances of each case. The Court has clarified even the stage to which the departmental proceedings ought to be reverted in the event the order of punishment is set aside for these reasons.

88. It will be useful to refer to the judgment of this Court in *Haryana Financial Corpn. v. Kailash Chandra Ahuja* at pp. 38-39 where the Court held as under: (SCC para 21)

"21. From the ratio laid down in *B. Karunakar* it is explicitly clear that the doctrine of natural justice requires supply of a copy of the enquiry officer's report to the delinquent if such enquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the enquiry officer is in breach of natural justice. But it is equally clear that failure to supply a report of the enquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the Court on that point, the order of punishment cannot automatically be set aside.

(emphasis in original)

89. The well-established canons controlling the field of bias in service jurisprudence can reasonably be extended to the element of prejudice as well in such matters. Prejudice de facto should not be based on a mere apprehension or even on a reasonable suspicion. It is important that the element of prejudice should exist as a matter of fact or there should be such definite inference of likelihood of prejudice flowing from such default which relates to statutory violations. It will not be permissible to set aside the departmental enquiries in any of these classes merely on the basis of apprehended prejudice.

13. It would be pertinent to refer another judgment of the Supreme Court in case of *Haryana Financial Corporation and Another Vs. Kailash Chandra Ahuja*, wherein it is held that non-supply of report of the inquiry officer would result in quashing and setting aside the order of punishment but the delinquent must show the prejudice or miscarriage of justice for such non-supply of report in these words:

44. From the aforesaid decisions, it is clear that though supply of report of the inquiry officer is part and parcel of natural justice and must be furnished to the delinquent employee, failure to do so would not automatically result in quashing or setting aside of the order or the order being declared null and void. For that, the delinquent employee has to show "prejudice". Unless he is able to show that

non-supply of report of the inquiry officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated. And whether prejudice had been caused to the delinquent employee depends upon the facts and circumstances of each case and no rule of universal application can be laid down.

14. However, in a subsequent decision in case of *Indu Bhushan Dwivedi Vs. State of Jharkhand and Another*, , it is held that in case of a disciplinary action, the employer is required to disclose the material sought to be used against the delinquent and should also afford a reasonable opportunity of defending himself in these words:

23. When it comes to taking of disciplinary action against a delinquent employee, the employer is not only required to make the employee aware of the specific imputations of misconduct but also to disclose the material sought to be used against him and give him a reasonable opportunity of explaining his position or defending himself. If the employer uses some material adverse to the employee about which the latter is not given notice, the final decision gets vitiated on the ground of the violation of the rule of *audi alteram partem*. Even if there are no statutory rules which regulate holding of disciplinary enquiry against a delinquent employee, the employer is duty-bound to act in consonance with the rules of natural justice--*U.P. Warehousing Corpn. v. Vijay Narayan Vajpayee*.

15. On the basis of ratio laid down in the above referred reports, the said inquiry report having made without giving an opportunity of hearing to the successful candidates who are prejudiced by such breach is not sustainable. The authorities must have given an opportunity of hearing to those candidates before making its decision and/or finding on a core issue of their entitlement to registration under the exempted cell in land loser category. The report dated 12th September, 2006 impugned in W.P. 24041 (W) of 2006 is hereby quashed and set aside.

16. The Block Development Officer who was entrusted to conduct an inquiry by the District Magistrate but no copy of the said inquiry report was ever furnished and/or hand over by the District Magistrate to the successful candidates. Before passing an order, the District Magistrate should not have treated the report as sacrosanct, but should have given an opportunity of hearing to the successful candidates before passing the impugned decision/ order. The District Magistrate is further directed to give a copy of the said inquiry report submitted by the Block Development Officer to the successful candidates and shall give an opportunity to submit their representations against the said inquiry report and shall, thereafter, proceed to decide the matter after giving an opportunity of hearing to the successful candidates.

17. It is needless to mention that in the event, the said authority finds that the successful candidates are not entitled to be registered under the exempted cell in land losers category, consequential steps would be taken by the Chairman, District Primary School Council in accordance with law. If the vacancy occurs

because of the dismissal and/or termination of the successful candidates, the authority shall consider the candidature of the petitioner if they are otherwise found eligible by giving relaxation of age if any of them is found to have crossed the upper age limit.

18. The entire exercise shall be completed by the authorities within eight weeks from the date of communication of this order. Both the writ petitions are disposed of on above observations. However, there shall be no order as to costs.

Urgent photostat certified copy of the judgment, if applied for, be given to the parties on priority basis.