
(2010) 05 CAL CK 0025
In the Calcutta High Court
Case No : M.A.T. No. 2766 of 2005

Sambhu Sarkar and Others	Vs	APPELLANT
Shyamal Pramanik and Others		RESPONDENT

Date of Decision : 13-05-2010

Acts Referred:

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

Citation : (2010) 05 CAL CK 0025

Hon'ble Judges : Subhro Kamal Mukherjee, J; Kalidas Mukherjee, J

Bench : Division Bench

Advocate : Sakti Nath Mukherjee, Kalyan Bandopadhyay, P.S. Deb Barman and Tarun Kumar Das, s in MAT 411 of 2006 and MAT 2766 of 2005, HIRAK MITRA and AMITAVA CHOWDHURY, University in MAT 320 of 2006, Lakshmi Kumar Gupta, P.S. Basu and S. Talukdar, for Petitioners/Respondents, for the appearing parties; Lakshmi Kumar Gupta, P.S. Basu and S. Talukdar for Petitioners/Respondents, Samiran Giri, for State in MAT 411 of 2006 and MAT 2766 of 2005, Sutanu Kumar Patra, for State in MAT 320 of 2006, for the Appearing Parties

Final Decision : Allowed

Judgement

Subhro Kamal Mukherjee, J.—All these three appeals are directed against the judgment and order dated January 10, 2005 passed by the Hon"ble Single Judge in W.P. No. 18979 (W) of 2003.

2. The eight petitioners moved an application under Article 226 of the Constitution of India (hereinafter referred to as the writ petition), inter alia, challenging the notice issued by the Kalyani University inviting applications from eligible candidates for different posts, total fifteen in numbers, in the cadres of Junior Subordinate Staff and Lower Subordinate Staff, that is, (a) Junior Assistant (b) Computer Assistant (c) Junior Store-keeper (d) Junior Care-taker (e) Machine man (f) Pump Operator (g) Health Assistant (h) Office Assistant Grade II and (i) Junior Work Assistant.

3. The writ petitioners, in substance, contended that the university authorities

did not follow the recruitment procedures as provided in the ordinance of the university, particularly, Ordinance No. 42 (USC) and in confining the selection proceeding only in respect of the candidates, who were working in the said university under different status. Therefore, the action on the part of the university authorities in issuing such notice inviting applications for appointments in those posts in violation of the recruitment procedures and in denying the opportunities to the aforementioned petitioners to participate in the process of recruitment without any justifiable reason was arbitrary and illegal.

4. The Hon''ble Single Judge by the order impugned allowed the said writ petition, inter alia, with the findings that the writ petitioners were denied opportunities to offer themselves as candidates in spite of having requisite qualifications for the posts advertised by the university and that the selections were made in utter violation of the ordinance of the concerned university, which was binding on the said university. The Hon''ble Single Judge found that the university authorities, in utter disregard to the aforementioned Ordinance No. 42, did not seek names from the concerned employment exchanges. The Hon''ble Single Judge, therefore, set aside and quashed all appointments made by the university authorities as the recruitments were made by not following the recruitment procedures. However, liberty was granted to the university authorities to proceed with the matter de novo following the university Ordinance No. 42.

5. The university authorities moved an application for review before the Hon''ble Single Judge seeking review of the aforementioned judgment and order dated January 1, 2005. The application for review was tendered under RVW No. 336 of 2005.

6. In the said review application the university authorities, inter alia, stated that they requested the employment exchanges at Kalyani, Ranaghat, Krishnanagar, Berhampore, Jangipur, Kandi, Lalbagh, Barrackpore and Farakka for sponsoring the names of the candidates for the said posts following the university Ordinance No. 42. In fact, the employment exchanges sponsored certain names and the sponsored candidates duly appeared in the written test and in the interview. The candidates, who qualified in the written test and in the interview, were given appointments in different posts. The essential fact that the university authorities followed the recruitment procedures including asking for names from the concerned employment exchanges could not be placed before the Hon''ble Single Judge at the time of hearing of the writ petition, inasmuch as, the Deputy Registrar, who was actually in charge of the matter, had resigned and was not available at the material point of time. The Registrar of the university, Mr. Utpal Bhattacharya, who affirmed the affidavit-in-opposition on behalf of the university authorities, was suffering from heart problems and had to undergo balloon plasty. It was submitted that in spite of due diligence, because of the aforementioned problems, it could not be submitted at the time of hearing before the Hon''ble Single Judge that the university authorities sought for names from

the different employment exchanges for the purpose of selection of candidates pursuant to the advertisement-in-question.

7. The Hon''ble Single Judge by the order dated December 22, 2005 dismissed the application for review holding, inter alia, that His Lordship was not satisfied that there was due diligence on the part of the university authorities to find out the documents, which could be a ground for review.

8. The university authorities preferred an appeal against the said order dated December 22, 2005 dismissing the application for review, which was tendered under MAT 314 of 2006.

9. By order dated August 17, 2007 passed in MAT 320 of 2006 a division bench of this Court permitted the learned Advocate General, who was appearing for the university authorities, to withdraw the aforesaid appeal in the interest of justice.

10. The successful candidates, who were appointed by the university, were not made parties in the writ petition. The Hon''ble Single Judge in the order impugned, inter alia, set aside and quashed their appointments holding that their recruitments were made by not following the recruitment procedures. Therefore, those persons were removed from their services in terms of the order passed by the Hon''ble Single Judge.

11. Thirty five successful candidates preferred an appeal against the impugned judgment and order dated January 10, 2005 and their appeal has been tendered under MAT 2766 of 2005. The memorandum of appeal was presented together with an application for leave to prefer the said appeal.

12. This Court by order dated May 6, 2008 allowed their application and granted them leave to prefer the said appeal particularly when an appeal by the university authorities against the order impugned was pending before this Court. The delay in filing the said appeal was, also, condoned.

13. Eight other successful candidates, also, preferred a separate appeal, which was tendered under MAT 411 of 2006 together with an application for leave to prefer the said appeal as also with an application for condonation of delay in filing the said appeal. 14. This Court on May 6, 2008 passed similar order and granted leave to those appellants to prefer the said appeal and the delay was, also, condoned.

15. The appellants filed an application for stay of the operation of the order passed by the Hon''ble Single Judge. This Court by order dated May 6, 2008 disposed of those applications for stay, inter alia, by directing that the termination of those appellants would abide by the result of the said appeals.

16. As we have indicated herein above, the university authorities, also, preferred an appeal against the judgment and order dated January 10, 2005 passed by the Hon''ble Single Judge and the appeal filed by the university authorities has been tendered under MAT 320 of 2006.

17. This Court, to avoid conflicting judicial opinions and by consent of the parties heard all the said appeals analogously.

18. Mr. Hirak Mitra, learned senior advocate, appearing for the university authorities and Mr. Sakti Nath Mukherjee, learned senior advocate, appearing for the appellants in the other two appeals, submit that the basis of the order of the Hon''ble Single Judge allowing the writ petition was not correct. The Hon''ble Single Judge allowed the writ petition only on the ground that the university authorities did not comply with the requirements of Ordinance Nos. 40 and 42 of the university thereby denying opportunities to the writ petitioners to offer themselves as candidates in spite of having requisite qualifications for the posts advertised. The learned senior advocates submit that the university authorities followed the requirements of the aforementioned ordinance and requested the various employment exchanges to sponsor the names of the candidates; in fact names were sponsored and the sponsored candidates were, also, considered for appointment. Moreover, some of the writ petitioners were not entitled to be considered in any post except one and in such circumstances setting aside of the entire selection at the instance of ineligible persons cannot be sustained.

19. Our attention was drawn to the affidavit-in-opposition of the appellants filed in MAT 411 of 2006 pursuant to the leave granted by the Appeal Court. In such affidavit it was stated that the different employment exchanges were notified and the appellant Nos. 1, 2, 4, 5 and 8 were sponsored by the concerned employment exchanges. The appellant Nos. 3, 6 and 7, however, applied in response to the advertisement displayed in the notice board.

20. Finally, Mr. Mukherjee, learned senior advocate for the appellants, who were successful candidates, submits that these appellants were not parties before the Hon''ble Single Judge, but the order impugned operates harshly against them, inasmuch as, their services have been terminated pursuant to the order impugned, but without giving them any opportunity of hearing.

21. Mr. Lakshmi Kumar Gupta, learned senior advocate, appearing for the writ petitioners, who are the respondents in these appeals, submits that these appeals are not maintainable as an application for review was filed by the university authorities on the same facts and the Hon''ble Single Judge rejected the said application for review on merits. The university authorities preferred an appeal, but the same was withdrawn.

22. Mr. Gupta, with reference to the decisions in the cases of Biswa Ranjan Sahoo and others Vs. Sushanta Kumar Dinda and Others, and Nagendra Chandra and Ors. v. State of Jharkhand and Ors. reported in (2008) 1 SCC 798, submits that when recruitment rules provide for notification of the vacancies to the employment exchanges and as the university authorities did not notify the vacancies to the concerned employment exchanges asking them to sponsor candidates, selection made in infraction of the recruitment rules is violative of the Articles 14 and 16 of the Constitution of India and being nullity is liable to be

cancelled. He, further, submits that the persons, who have been selected in infraction of the recruitment rules, are not entitled to notice as their appointments were made not in accordance with law.

23. On merits we feel that rehearing of the writ petition by the Hon''ble Single Judge is necessary. The Hon''ble Single Judge set aside the notice of recruitment and all selections made in terms of such notice only on the ground that the university authorities did not follow the recruitment procedures in terms of their ordinance. Infraction is, according to the Hon''ble Single Judge, university authorities did not notify the vacancies to the concerned employment exchanges asking them to sponsor names of the candidates.

24. The university authorities prayed for leave before the Appeal Court to file an affidavit to bring on the record the materials, which ought to have been rightly brought on record before the Hon''ble Single Judge, for the just decision in the matter. The Appeal Court, in the interest of justice, permitted the university authorities to file the affidavit together with the documents. Pursuant to such liberty, an affidavit has been filed by the university authorities. It was disclosed that the vacancies were notified to the employment officers of the various district employment exchange offices requesting them to send the names of the candidates according to the norms. University received the lists of candidates from the employment exchanges. The university directed the eligible candidates sponsored by employment exchanges to appear in the written test for the posts applied for. On the basis of written test a list of successful candidates was published calling upon the candidates successful in such written test to participate in the interview. Therefore, the university authorities conducted the selection process strictly in accordance with law as laid down in Ordinance Nos. 40 and 42 inasmuch as the university had obtained names from concerned employment exchanges. 25. The aforesaid relevant facts and materials could not be placed before the Hon''ble Single Judge and the Hon''ble Single Judge did not get the opportunity to deal with such facts that were essential for adjudicating the issues involved. It is necessary to decide as to whether the university authorities followed the recruitment rules as provided by the ordinance of the university and whether the writ petitioners are entitled to maintain the writ petition.

26. Moreover, the successful candidates were not notified. They participated in the selection process and being successful they were appointed. Their appointments have been set aside and cancelled because of the decision of the Hon''ble Single Judge.

27. It is not a case where we can hold conclusively, at this stage, that there were infractions by the university authorities in making the recruitments.

28. The appellants in MAT 2766 of 2005 and MAT 411 of 2006 are the successful candidates. Leave was granted to them to prefer the said appeals as we were of the opinion that they were prejudicially affected by the order impugned. We feel

that they should be added as parties in the writ petition.

29. We cannot accept the contentions of Mr. Gupta, learned senior advocate for the writ petitioners/respondents, that as the application for review was dismissed on merits and the appeal preferred by the university authorities against such order of dismissal has been withdrawn, these appeals are not maintainable.

30. The distinction between the appellate power on the one hand and the powers of review is well established. A review cannot be equated with the appellate jurisdiction. Review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. The grounds of appeal are wider than the ground of review. An appeal is continuation of the original proceeding and rehearing of the original matter. In case of an appeal, as soon as it is instituted, the matter stands reopened.

31. Therefore, the orders impugned in these appeals are set aside.

32. The candidates, who are appellants in MAT 2766 of 2005 and MAT 411 of 2006, are added as parties in the writ petition. The office is directed to carry out necessary amendments in the cause title of the writ petition.

33. Liberty is granted to the university authorities to file a supplementary affidavit to the affidavit-in-opposition already filed by them before the Hon"ble Single Judge, by June 15, 2010.

34. The added respondents waive formal service of notice of the writ petition. Liberty is, also, granted to the added respondents to file their affidavit-in-opposition to the writ petition, by June 15, 2010.

35. Consequently, liberty is granted to the writ petitioners to file their reply, if any, against such affidavits, by June 30, 2010.

36. The appellants in MAT 2766 of 2055 and MAT 320 of 2006 were appointed by the university authorities, but their services have been terminated by the order passed by the Hon"ble Single Judge. They preferred the appeals and moved an application for stay. This Court directed that the termination of the appellants would abide by the result of these appeals. The appeal is allowed. The order impugned is set aside. The writ petition is revived to its original file and number. Therefore, these appellants, who were successful candidates, should get back their jobs subject, however, to the result of the writ petition, which we are sending back for rehearing by the Hon"ble Single Judge afresh.

37. In the event the successful candidates are permitted to continue with their services during pendency of the writ petition, the writ petitioners would not suffer any injury. In the event the writ petition succeeds, continuation by the successful candidates in the meantime could not affect any of the relief prayed for in the writ petition, but if the writ petition fails and the successful candidates are not permitted to join their services, the inconveniences suffered by them would remain irremediable.

38. This appeal is allowed. The order impugned is set aside and the writ petition is sent back on remand to the Hon"ble Single Judge for reconsideration.

39. By way of abundant caution we state that we have not finally gone into the merits of the claim and the counter claim of the parties involved in the writ petition and all the issues are left open and are to be considered by the Hon"ble Single Judge in accordance with law.

40. We, however, direct the parties to bear their respective costs in these appeals.

41. I agree.

Kalidas Mukherjee, J.

Later:

42. After the judgment is pronounced, Mr. Satyajit Talukdar, learned advocate, appearing for the writ petitioners/respondents, prays for stay of the operation of this order.

43. Such prayer is considered and rejected.

44. Xerox plain copy of this judgment duly countersigned by the Assistant Registrar (Court) is to be given to the parties on their usual undertakings.