
(2010) 08 CAL CK 0105
In the Calcutta High Court
Case No : F.M.A. No. 1195 of 2008

Smt. Radha Giri (Pradhan)

APPELLANT

Vs

Ananda Ghorai and Others

RESPONDENT

Date of Decision : 31-08-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2010) 4 CALLT 261 : (2010) 127 FLR 910

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

Bench : Division Bench

Advocate : Saugata Bhattacharya, Anup Dasgupta, Subal Banerjee, Md. Safiur Rahaman, Goutam De and S. Panda, for the Appellant; Fazle Rabi, in F.M.A. 1195/08, 165/09, Debabrata Karak in F.M.A. 1195/08, Santi Das in F.M.A. 165/09 for State, Kamalesh Bhattacharya, Md. Mojnu Sk. and Sk. Mustak Ali, in F.M.A. 165/09, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—These Mandamus-Appeals were heard analogously as the points involved in these two appeals are identical and relate to the filling up of the vacancy of a non-teaching staff of the selfsame educational institution.

2. Both the appeals have been preferred by one Smt. Radha Giri (Pradhan), a third party to the two separate writ-applications, and are directed against two separate orders, both dated 26th December, 2006, passed by a learned Single Judge of this Court in the two writ-applications, one filed by Ajoy Kumar Bej and the other, by Ananda Ghorai, by which His Lordship disposed of those two writ-applications filed by the above-named two persons on the very first day of moving the same by permitting them to appear at the interview for the post of clerk in a school along with the sponsored candidates from the Employment Exchange.

3. It appears from record that pursuant to those two orders passed by the learned Single Judge, the aforesaid two writ-petitioners appeared at the

interview and they appeared in the selection panel as the first and second candidates respectively, whereas Smt. Radha Giri, the appellant before us, whose name was sponsored by the Employment Exchange stood at the third position in the panel.

4. After coming to know that the first two candidates in the selection list were not the sponsored candidates by the Employment Exchange but appeared at the interview by virtue of the orders passed by the learned Single Judge, the appellant with the leave of the Appellate Court has preferred these two appeals.

5. The case made out by the appellant may be summed up thus:

(a) A post of Group "C" (Clerk) had fallen vacant in Chunkhabari Sridurga Balika Vidyamandir, Post Office - Brajolahchak, Police Station - Chandipur, District - Purba Medinipur (hereinafter referred to as the school). As per requisition, the concerned District Inspector of Schools (SE) granted prior permission to fill up the said post and consequently, the school authority sought for names from the concerned Employment Exchange as provided in the Recruitment Rules. The Employment Exchange, on the basis of such requisition, forwarded a list of candidates including the name of the appellant before us for being considered for the post in question. The school authority issued interview letter in favour of the applicant by fixing 18th February, 2007 as the date for interview.

(b) The appellant appeared before the selection committee along with the other sponsored candidates and on the same day the applicant came to learn that some of the candidates who appeared at the interview were not sponsored by the concerned Employment Exchange but by virtue of the orders passed by this Court, they were allowed to appear at the interview.

(c) On 10th March, 2007, the appellant from the secretary of the school came to know that a panel had been prepared on the basis of interview and the appellant was placed in the third position while Ajoy Kumar Bej has been placed in the first position and Ananda Ghorai has been placed in the second position.

(d) Subsequently, the appellant after making enquiry from the Computer Section of this Court came to learn that a writ-application being W.P. No. 28565 (W) of 2006 was moved before the Vacation Bench and a learned Single Judge of this Court by order dated 26th December, 2006 disposed of the writ- application by permitting Sri Ananda Ghorai to appear at the interview. Similarly, on the selfsame day, by virtue of the other writ-application being W.P. No. 28563 (W) of 2006, the same learned Judge also allowed Sri Ajoy Kumar Bej to appear at the interview.

6. Being dissatisfied with the aforesaid orders passed by the learned Single Judge in those two writ-applications, the appellant, the third positioned candidate in the selection panel, has come up with these two Mandamus-Appeals and obtained leave to prefer these appeals.

7. Mr. Saugata Bhattacharya, the learned advocate appearing on behalf of the

appellant, has strenuously contended before us that the learned Single Judge erred in law in disposing of those two writ-applications on the very first day of moving the applications by allowing the writ-petitioners, who are the private respondents in these two appeals, thereby permitting those two persons to appear at the interview without considering the merit of their applications. Mr. Bhattacharya contends that those two writ-petitioners falsely alleged in their writ-applications that the candidates junior to them were illegally sponsored by the Employment Exchange, although, such allegation was not correct. According to Mr. Bhattacharya, such question could be ascertained by the learned Single Judge only after giving notice to all the persons concerned and enquiring from the Employment Exchange whether those persons were really senior to those whose names were sponsored.

8. Mr. Bhattacharya points out that even in the orders impugned in these two appeals, there is no indication that the allegations contained in the writ applications were correct. Mr. Bhattacharya further submits that even no reason has been given why those two writ-petitioners should be permitted to appear at the interview in violation of the Rules framed by the appropriate authority which prescribe that only the persons sponsored from the Employment Exchange can appear at the interview.

9. Mr. Bhattacharya, therefore, prays for setting aside the orders passed by the learned Single Judge and declaring his client, the appellant before us, as the first positioned selected candidate, and passing direction to that effect.

10. Mr. Kamallesh Bhattacharya, the learned advocate appearing on behalf of those two writ-petitioners, on the other hand, has opposed the aforesaid contention advanced by Mr. Saugata Bhattacharya and submitted that his clients not only alleged discrimination in sponsoring their names but also strongly relied upon the decision of the Supreme Court in the case of Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao and Others, in support of his contention that consideration of candidates only from those whose names were sponsored by the Employment Exchange was illegal. Mr. Bhattacharya also relied upon the decision of the Supreme Court in the case of Basavaraj R. Patil and Ors. v. The State of Karnataka, 2001 SCC 87. where the Supreme Court approved the order passed by the Division Bench of this Court affirming this type of an order permitting the party to appear at the interview. Mr. Bhattacharya, therefore, contends that there was nothing illegal on the part of the learned Single Judge in allowing his clients to appear at the interview.

11. Therefore, the first question that falls for determination in these two appeals is whether the learned Single Judge was justified in disposing of the two writ-applications on the very first day by permitting the two writ petitioners/respondents to appear at the interview without recording any finding as to the alleged illegality in not sponsoring the names of the writ-petitioners or giving any other reason whatsoever.

12. After hearing the learned Counsel for the parties and after going through the materials on record, we find that it was not proper on the part of the learned Single Judge to dispose of the writ-applications on the very first day without giving opportunity to the Employment Exchange or the sponsored candidates allegedly junior to the writ-petitioners to oppose the allegation levelled against the Employment Exchange regarding discrimination in sponsoring the names and on that ground alone, the orders impugned are liable to be set aside.

13. Even if we take into consideration the other submission of Mr. Kamalesh Bhattacharya that in view of the decision of the Supreme Court in the case of Excise Superintendent Malkapatnam (*supra*), the selection could not be held only from the sponsored candidates, in that event, it was the duty of the learned Single Judge to set aside the entire process of selection by directing the school authority to give advertisement by following the decision of the Supreme Court in that case. On that ground also, the orders impugned are liable to be set aside. Moreover, no name of any alleged candidate who was junior to the writ-petitioner was indicated in the said application and in such a situation, in our view, the learned Single Judge should have dismissed the application for non-joinder of necessary party.

14. As regards the other decision of the Supreme Court in the case of Kishore K. Pati (*supra*), relied upon by Mr. Kamalesh Bhattacharya, we find that in that case, by two separate orders dated November 16, 1998 and December 19, 1998 passed by a learned Single Judge of this Court, the appellant before the Supreme Court and the respondent No. 7 therein respectively were permitted to appear before the interview and by taking benefit of the order, the appellant before the Supreme Court appeared at the interview and was selected but the respondent No. 7 was unsuccessful. However, those orders, passed by the learned Single Judge, were not challenged by the District Inspector of Schools (SE) or any other persons, and thus, attained finality. Subsequently, on a second round of litigation, the appointment of the appellant was sought to be challenged on the ground that his name being not sponsored by the Employment Exchange, the appointment was illegal and such point was accepted in the second round of litigation by the Appellate Court. In an appeal against such a decision of the Appellate Court, the Supreme Court observed that the first order of the learned Single Judge permitting the appellant to appear at the interview having attained finality, there was no scope of reopening such question in the second round of litigation. In the case before us, the very orders of the learned Single Judge giving such permission have been challenged in these appeals and thus, the decision of Kishore K. Pati (*supra*), has no application to the facts of the present case.

15. We, therefore, find no substance in the contention of Mr. Kamalesh Bhattacharya, the learned advocate appearing for the two writ petitioners/respondents in these appeals.

16. Our attention, however, has been drawn to the fact that subsequently, a

learned Single Judge of this Court has declared the provision contained in Rules 8(5)(a) and 8(5)(b) of the West Bengal Schools (Recruitment of Non-Teaching Staff) Rules, 2005 as ultra vires Articles 14 and 16 of the Constitution by relying upon the decision of the Supreme Court in the case of Excise Superintendent Malkapatnam (*supra*).

17. In view of the aforesaid fact, we are of the view that no purpose will be served by remanding the matter back to the learned Single Judge for deciding whether the Employment Exchange illegally sponsored the names of the sponsored candidates as the said Rule authorizing the school authority to select staff only from the sponsored candidates has been quashed.

18. Therefore, at present, a fresh advertisement should be given for the purpose of filling up the vacancy. We are quite alive to the position that by this time, the West Bengal School Service Commission (Selection of Persons for Appointment to the Post of Non-Teaching Staff) Rules, 2009 (hereinafter called Rules) have been given effect to, and as such, the recruitment is to be made in accordance with the Rules.

19. Mr. Kamallesh Bhattacharya, at this stage, vehemently contended before us that the process of selection having been initiated before coming into operation of the Rules, the present vacancy should be filled up with the earlier procedure by fresh advertisement and not through examination conducted by the School Service Commission.

20. We are afraid we are not convinced by such submission. In this case, the process of selection no doubt commenced long back and the candidate was also selected who got appointment and worked for about seven months and thereafter, due to stay order granted by a Division Bench of this Court, he could not work any further and such being the position, the process of selection must be held to be complete. The appointed candidate is also entitled to get salary for the seven months during which he worked and after this order, by which we propose to set aside his appointment being based on an illegal judicial order, a fresh vacancy has occurred and thus, a declaration of vacancy should now be made in accordance with the Rules.

21. We, therefore, find that the learned Single Judge illegally permitted the two writ-petitioners to appear at the interview and one of them has already been given appointment. We, therefore, set aside his appointment and direct the West Bengal School Service Commission to declare fresh vacancy as if the vacancy has occurred today.

22. Mr. Kamallesh Bhattacharya further submitted that if we propose to set aside the appointment of his client and direct that fresh appointment should be made in accordance with the Rules, the age bar of his client, which has become operative by this time, should be condoned.

23. In our opinion, the writ-petitioners having been illegally permitted to appear

at the interview and consequently, being selected on the basis of such illegal order, he cannot get the benefit of exemption from the age-bar created by law.

24. We, therefore, turn down such prayer of Mr. Kamalesh Bhattacharya.

25. Both the appeals are, thus, allowed and the orders impugned are set aside and at the same time selection of Sri Ajoy Kumar Bej, one of the writ petitioners to the post concerned, is also set aside.

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

J.N. Patel, C.J.

27. I agree.