
(2018) 05 CAL CK 0221

In the Calcutta High Court

Case No : Writ Petition 3072 (W), 27898 (W) of 2013, CAN 2913 of 2016, Writ Petition 30060 (W) of 2015

Soumik Goswami & Ors.

APPELLANT

Vs

State Of West Bengal & Ors.

RESPONDENT

Date of Decision : 17-05-2018

Acts Referred:

Right to Education Act, 2009 — Section 23(1), 23(1)(2)

Citation : (2018) 05 CAL CK 0221

Hon'ble Judges : ARIJIT BANERJEE, J

Bench : Single Bench

Advocate : Dibyendu Chatterjee, Siddhartha Roy, Arijit Pradhan, Subir Sanyal, Ratul Biswas, B. P. Vaisya, Gourav Das

Final Decision : Disposed Of

Judgement

Arijit Banerjee, J.

(1) Common issues of fact and law are involved in these three writ petitions and accordingly they are taken up for hearing and disposal together.

(2) The short question that is involved in these writ petitions is whether or not a common panel can be prepared in respect of two recruitment

processes initiated pursuant to different notifications for filling up separate vacant posts mentioned in the notifications. In other words, whether or not

two recruitment processes for different years in respect of different vacancies can be clubbed together? If not, whether the petitioners are entitled to

the reliefs claimed in the writ petitions?

(3) Pursuant to the requisition dated 22 November, 2005 made by the Purba Medinipur District Primary School Council (in short the "DPSC")

names of candidates were sponsored by the concerned Employment Exchange

for filling up 955 posts of primary school teachers out of total 1365

vacant posts since 30 per cent of the said 1365 posts were kept reserved pursuant to a Government Order issued by the Labour Department.

Subsequently, on 1 March, 2006 another requisition was sent by the said DPSC to the concerned Employment Exchange in respect of 300 newly

created posts out of which 30 per cent were kept reserved. Accordingly, requisition was sent for sponsoring the names of suitable candidates for

filling up 210 additional posts of Primary School Teachers. The candidates sponsored by the Employment Exchange in response to the requisition

dated 22 November, 2005, submitted their bio-datas and testimonials to the DPSC in the year 2006. The candidates, who were sponsored in response

to the requisition dated 1 March, 2006 submitted their bio-datas and testimonials in the year 2007. For a long time thereafter, the DPSC did not take

any further step for filling up the vacancies.

(4) On 6 August, 2009 the DPSC published a notification indicating that a new recruitment process will be initiated for recruitment to the posts of

primary school teachers. This new process was initiated in view of the amendment of the Recruitment Rules of 2001 in the year 2009.

(5) Thirty writ petitions were filed before this Court challenging the said publication and the new recruitment process. A learned Judge of this Court

passed an interim order on 23 September, 2009, the operative portion whereof was as follows:-

“so far as the prayer for interim order is concerned, as held in this order, since the vacancies occurred in the year 2006 and anticipated

vacancies in the next twelve months were taken up as total vacancies, as postulated under Rule 8(3) these vacancies form a slot by themselves; and

as the petitioners, whose names were requisitioned in 2006 pursuant to the request by the Primary School Council and submitted their bio-data and,

therefore, come under the selection procedure under Rule 9(1), in my view, a prima facie case has been made out for granting an interim order.

Therefore, let there be an interim order restraining the respondents from cancelling the selection process initiated in 2006 under the unamended Rules

for the post of Primary School Teachers and from filling up the vacancies for which the selection process was initiated in 2006 by any process other

than from amongst the candidates who had submitted their bio-data in 2006”

!..â??

(6) The said writ petitions were disposed of by another Learned Judge of this Court by a judgment and order dated 24 December, 2009, the operative

portion whereof was as follows:-

â??â?|.Without expressing any opinion on the merits of the rival claims, this Court disposes of these writ petitions by making the interim order

dated 23.09.2009 absolute with the only modification that the concerned Councils shall consider, if not already considered, all candidates who were/are

eligible, according to law, to participate in the selection process initiated in the year 2006 for filling up those vacancies in respect whereof requisitions

were sent to the concerned employment exchange strictly in accordance with the terms of the Recruitment Rules that would govern the process on

the date the same was initiatedâ?|â?|.â??

(7) The second round of controversy arose when the respondent authorities attempted to club together the two recruitment processes, one initiated in

the year 2005 and the other in the year 2006. Such attempt of the respondent authorities was challenged before this Court. A learned Single Judge

dismissed the writ petition thereby permitting such clubbing. An appeal of the writ petitioners being MAT 169 of 2010 (Nilmadhab Das & Ors.-vs.-

State of West Bengal & Ors.) was allowed by the Honâ??ble Division Bench by a judgment and order dated 3 May, 2010. The DPSC as well as

other State respondents were directed to take necessary steps to prepare separate panels for filling up separately notified vacant posts of primary

school teachers pursuant to the notifications dated 22 November, 2005 and 1 March, 2006 respectively. A Special Leave Petition was preferred by the

State respondents from the said Division Bench judgment and order. Before the Apex Court it was submitted on behalf of the State of West Bengal

that during pendency of the appeal before the High Court the State had appointed 1000 primary teachers in the District of Purba Medinipur. It was

further submitted that the State of West Bengal will not disturb those teachers in spite of disposal of the Special Leave Petition. The Apex Court

recorded such submission of learned Counsel for the State of West Bengal and disposed of the Special Leave Petition as having become unnecessary.

(8) The present writ petitions have been filed essentially for implementation of the aforesaid judgment and order of the Honâ??ble Division Bench.

Prayers (a) and (b) of WP 3072(W) of 2013 read as follows:-

â??(a) A writ in the nature of Mandamus commanding the respondents particularly the respondent no. 4 namely the Chairman, Purba Medinipur

District Primary School Council to consider the candidature of the petitioner for appointment to the post of Assistant Teacher in Primary School

pursuant to the requisition dated 22nd November, 2005 in accordance with the Recruitment Rules, 2001 and also directing them to issue appointment

letter in favour of the petitioners;

(b) A writ in the nature of Mandamus commanding the respondents and each one of them to show cause as to why the petitionerâ??s candidature

will not be considered for appointment to the post of Assistant Teacher in Primary School under the respondent no. 3 in the selection process in terms

of the Order dated 3rd May, 2010 passed in MAT No. 169 of 2010;â? Prayers (a) and (b) in WP 30060 (W) of 2015 are similar. Prayer (a) in WP

27898(W) of 2013 is also similar but is in respect of notification dated 1 March, 2006 instead of 22 November, 2005. Prayer (b) is the same.

(9) On 11 April, 2016 a learned Judge of this Court passed an order directing the Chairman of the DPSC to submit before this Court separate panels

of primary school teachers pursuant to notifications dated 22 November, 2005 and 1 March, 2006 as directed by the Division Bench order dated 3

May, 2010 passed in MAT 169 of 2010. An appeal was preferred from the said order in MAT 1833 of 2016. By a judgment and order dated 8

November, 2016 the Honâ??ble Division Bench dismissed the appeal holding that the impugned order was not appealable.

(10) Thereafter, from time to time various orders were passed granting extension of time to the DPSC to file separate panels for the years 2005 and

2006. Bifurcated panels for the said years were filed by the DPSC by way of an affidavit affirmed on 24 February, 2017 described as affidavit in-

opposition.

(11) Referring to the bifurcated panels, learned Counsel for the petitioners submitted that the petitioners are entitled to get appointment as primary

school teachers. Appointments were given in the year 2010 against the combined panel. The same was not permissible in law. However, those who

are wrongly appointed should not be displaced. New posts should be created to accommodate the petitioners.

(12) Learned Counsel for the DPSC submitted that in the Division Bench order dated 3 May, 2010 passed in MAT 169 of 2010 there was no direction

for issuing appointment letters. Hence, on the basis of the said Division Bench order the petitioners cannot claim appointment.

(13) Learned Counsel for the DPSC then referred to the Honâ??ble Apex Courtâ??s order dated 26 August, 2015 and submitted that the

appointments already made cannot be disturbed. Hence, the combined panel remains. There cannot be two panels in respect of the same notification.

(14) Learned Counsel then submitted that the Apex Court disposed of the Special Leave Petition by its order dated 26 August, 2015 as the same

having become unnecessary â??in view of the subsequent development that has taken place during the pendency of the SLPâ??. The subsequent

development means total change of the recruitment process of primary school teachers in the State of West Bengal and change of the minimum

educational qualification for appointment of primary teachers as laid down by the NCTE vide notifications dated 23 August, 2010 and 29 July, 2011,

the NCTE being the academic authority under Sec. 23 (1) of the Right to Education Act, 2009. Previously, the DPSC was the recruiting authority.

Under the amended Rules, the Board of Primary Education is the recruiting authority. Under the old Rules, minimum qualification was Madhyamik

pass and training was not compulsory whereas under the NCTE notifications which are binding on all authorities throughout the country minimum

academic qualification is Higher Secondary pass with at least 50 per cent marks and two years diploma teachers training (D. El. Ed.). In view of the

change of the requisite qualification none of the petitioners are eligible for appointment.

(15) Learned Counsel then submitted that it is evident from the documents annexed to the writ petition that none of the petitioners possesses two

years diploma in teachers training. They only possess one year primary teachers training certificate obtained from institutions recognized by the State

which were subsequently declared to be unauthorized by the Court in Tulsi Bakshiâ??s case. Accordingly, the certificates issued by such institutions

are invalid.

(16) Learned Counsel then submitted that there has been inordinate delay in filing the writ petition. The petition has been filed in January, 2013 praying

for consideration of the petitioners for appointment as per recruitment notifications of 2005. There is no explanation in the writ petition why the same was filed more than three years after appointment was made from the combined panel. No interference is called for in the present writ petitions since any order passed would involve dislocation of the appointees after completion of service of more than seven years. In this connection learned Counsel relied on the decision of the Honâ??ble Apex Court in the case of G. Srinivas Rao-vs.-Union of India, AIR 2011 SC 2756.

(17) The next submission of learned Counsel was that benefit of a judgment would not be extended automatically after a long delay. The petitioners have asked for benefit of the judgment and order dated 3 May, 2010 after a long delay. In spite of knowledge of preparation of combined/single panel for the years 2005-06, they did not approach the Court earlier. Hence, they are not entitled to the benefit of the said judgment. In this connection reliance was placed on the decision of the Apex Court in the case of A. P. Steel Re-rolling Mill Ltd.-vs.-State of Kerala, (2007) 2 SCC 725.

(18) It was then submitted that an order for appointment of the petitioners would vitally affect the persons already appointed who are not parties to the writ petition. The writ petition is bad for non-joinder of necessary parties. In this connection learned Counsel referred to the decisions of the Honâ??ble Apex Court in the cases of Prabodh Verma-vs.State of Uttar Pradesh, AIR 1985 SC 167 and Ramrao-vs.-All India Backward Class Bank Employees Welfare Association, AIR 2004 SC 1459.

(19) Learned Counsel submitted that as per Sec. 23(1) and (2) of the RTE Act, 2009, no person can be appointed as primary school teacher unless he has the qualification prescribed by NCTE. The petitioners are not qualified as per NCTE notifications and hence, are not entitled to any order directing their appointment. Even assuming that the preparation of a combined panel in respect of two recruitment notifications and appointments made therefrom was not proper, appointment of the petitioners against the existing vacancies in spite of they not having the minimum educational qualification would run contrary to the salutary principle that â??one wrong order cannot justify another wrong orderâ??. In this connection, reference was made to the judgment of the Apex Court in the case of Ekta Shakti Foundation-vs.-Govt. of NCT of Delhi, (2006) 10 SCC 337.

(20) Learned Counsel for the DPSC finally relied on the decision of the Honâ??ble Division Bench of this Court delivered on 22 July, 2016 in MAT

768 of 2016 (Birbhum District Primary School Council & Anr.-vs.-Golam Murtoza & Ors.). I shall revert back to this decision later.

(21) Learned Counsel appearing for the Department of School Education, Govt. of West Bengal made submission which was substantially similar to

the submission made on behalf of the DPSC. In addition, he submitted that the posts of primary school teachers are created on the basis of total

enrolment of students in a district maintaining the teacher-student ratio as specified by the Government from time to time. Such creation of posts is

subject to the approval of the State Cabinet and subject to the concurrence of the Finance Department based on the availability of budgetary provision.

Hence, no mandatory order should be passed directing appointment of the petitioners.

(22) In reply, learned Counsel of the petitioners submitted that the Division Bench order dated 3 May, 2010 has to be carried out at any cost. The

issue of qualification as per NCTE notifications was also before the Division Bench. Yet, the said order was passed. The â??subsequent

developmentâ?? referred to in the Honâ??ble Apex Courtâ??s order dated 26 August, 2015 does not mean the NCTE Rules. The said Rules were

not argued before the Honâ??ble Apex Court although the point was taken in the list of dates/grounds in the Special Leave Petition. Learned

Counsel submitted that the respondents deliberately prepared a combined panel for two separate recruitment processes thereby wrongfully depriving

the petitionersâ?? appointment. It is now the duty of the respondents to ensure that the petitioners are accommodated.

(23) I have given my anxious consideration to the rival contentions of the parties. The petitioners seek benefit of the judgment and order dated 3 May,

2010 passed by a Division Bench of this Court in MAT 169 of 2010. They pray for an order directing the respondents to issue appointment letters in

their favour. I am unable to grant such relief to the petitioners for the reasons that follow.

(24) The petitioners had applied for appointment in the posts of primary school teachers that fell vacant in the years 2005 and 2006. In the case of

Nilmadhab Das (supra), the effort of the writ petitioners to challenge the attempt of the respondent authorities to club together the two recruitment

processes for the years 2005 and 2006, was unsuccessful before the learned Single Judge. The Honâ??ble Division Bench by its judgment and order

dated 3 May, 2010 set aside the order of the learned Single Judge and directed the respondents to prepare separate panels for filling up separately

notified vacant posts of primary school teachers pursuant to the notifications dated 22 November, 2005 and 1 March, 2006 respectively. During the

pendency of the appeal appointment was given to about 1000 primary school teachers in the District of Purba Medinipur from the combined panel in

the years 2005 and 2006 as was the submission of learned Counsel for the State before the Honâ??ble Apex Court. The Apex Court recorded the

submission made on behalf of the State that appointment of such teachers would not be disturbed in spite of disposal of the SLP. Issuance of

appointment letters in favour of the petitioners from the bifurcated panels for the years 2005-2006 would necessarily mean dislocation of those persons

who were appointed from the combined panel. Such appointments were given in the year 2010 and such appointees have been rendering service for

the last eight years. At this stage it would be wholly unjust, unfair, inequitable and unconscionable to displace them. Many of them might have started

a family or may have taken housing loans or may have made other financial commitments on the strength of the jobs that they got. Dislodging them

from their jobs at this stage would spell disaster for them and may put their survival in serious jeopardy. Further, none of the said appointees from the

combined panel are parties to the present writ petitions.

(25) Moreover, the assurance of the State that such appointees would not be disturbed has been recorded by the Apex Court. If an order is passed for

issuance of appointment letters in favour of the writ petitioners, the same will certainly have adverse consequences for the earlier appointees. Hence,

they are necessary parties to the present writ petitions and without their presence no order can be passed. The Apex Court in the case of Prabodh

Verma (supra), observed that the High Court ought not to decide a writ petition under Art. 226 of the Constitution of India without the presence of

those who would be vitally affected by its judgment before it as respondents or at least some of them being before it as respondents in a

representative capacity if their number is too large to joint them as respondents individually. If the writ petitioners have not joined them, the petition

should be dismissed for non-joinder of necessary parties. Similarly in Ramrao-vs.-All India Backward Class Bank Employees Welfare Association

(supra), the Apex Court observed that an order issued against a person without impleading him as a party and thus, without giving him an opportunity

of hearing must be held to be bad in law. In that case an order of promotion was questioned by the writ petitioner before the High Court without

impleading the promotees as parties. The High Court passed certain directions which adversely affected the promotees. The matter being carried to

the Apex Court it was held that in the absence of the promotees as parties it was not permissible for the High Court to issue such directions.

(26) Another reason why I am not inclined to allow the prayer in the writ petitions is that the benefit of a judgment is not extended to subsequent

similar case automatically. As observed by the Apex Court in A. P. Steel Re-rolling Mill Ltd. (supra), while granting relief in a writ petition the High

Court is entitled to consider the fact situation obtaining in each case including the conduct of the petitioner. In doing so, the Court is entitled to take into

consideration the fact as to whether the writ petitioner had chosen to sit over the matter and had woken up suddenly. If it is found that the petitioner

approached the Court after a long delay, the same may disentitle him to obtain a discretionary relief. In the facts of the present case, the respondent

authorities prepared a combined panel for the years 2005 and 2006 way back in 2010. However, the petitioners in two of the writ petitions approached

this Court only in 2013 and the petitioners in the third writ petition approached this Court only in the year 2016. This, in my opinion, amounts to

inordinate delay and there is no explanation for such delay. The reliefs prayed for by the petitioners are equitable in nature and indeed, the Writ Court

is a Court of equity. It is well established that delay defeats equity.

(27) Another reason for dismissing these writ petitions is that admittedly the petitioners do not have the qualifications prescribed by the NCTE

notifications for primary school teachers. After the RTE Act, 2009 came into force with effect from 1 August, 2012, no person can be appointed as a

primary school teacher unless he has the qualification prescribed by NCTE. I agree with the submission of learned Counsel for the DPSC that even

assuming that it was irregular and improper to prepare a combined panel in respect of two recruitment processes and appointments made therefrom

was irregular, if I direct the respondents to appoint the petitioners against the existing vacancies in spite of they not having the minimum educational qualification, it would amount to passing a wrong order for the purpose of undoing a wrong committed by the authorities. This cannot be done. As observed by the Apex Court in *Secy. Jaipur Development Authority-vs.-Daulat Mal*, (1997) 1 SCC 35, one illegality cannot be compounded by permitting subsequent illegal or illegitimate or ultra vires acts. If I direct the respondent authorities to issue letters of appointment in favour of the petitioners in spite of they lacking the qualification prescribed by NCTE, such an order will be contrary to the provisions of the RTE Act and will thus be an illegal order. Appointment of the petitioners would be contrary to law. No order can be passed in exercise of writ jurisdiction to compel the authority to do something which the law does not permit.

(28) It may be noted that in MAT 768 of 2016 (*Birbhum District Primary School Council & Anr.-vs.-Golam Murtoza & Ors.*) a Division Bench of this

Court negated a challenge to the panel prepared in connection with the selection of primary school teachers by the DPSCs in the State of West

Bengal for the year 2006. A prayer was made for a direction on the authorities to revisit the panel from which appointments of primary teaches were

made. The learned Single Judge had allowed the writ applications. The Honâ??ble Division Bench reversed the order inter alia on the grounds of

delay and non-joinder of necessary parties.

(29) For the reasons aforestated WP No. 3073 (W) of 2013, WP No. 27898 (W) 2013 and WP No. 30060 (W) of 2015 are dismissed without,

however, any order as to costs. The application, being CAN No. 2913 of 2016, also stands disposed of.

(30) Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.