

(1998) 05 CAL CK 0012

In the Calcutta High Court

Case No : Ordinary Original Civil Jurisdiction W.P. No. 1933 of 1997 and W.P. No. 1934 of 1997

Sri Debasis Dutta

APPELLANT

Vs

State of West Bengal
 Sri Chandan Kumar Biswas Vs
State of West Bengal and Ors

RESPONDENT

Date of Decision : 13-05-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 309

West Bengal Board of Secondary Education Act, 1963 — Section 2, 27, 27(1), 27(4), 31

Citation : (1998) 2 CALLT 398 : (1998) 1 CHN 544

Hon'ble Judges : Probha Shankar Misra, C.J.; Vinod Kumar Gupta, J; Satyabrata Sinha, J

Bench : Full Bench

Judgement

S.B. Sinha, J.—These writ applications have been referred to a larger bench by Samaresh Banerjea, J by an order dated 19th September, 1997 as his Lordship was of the opinion that the decision of the Supreme Court in Excise Superintendent, Matkapatnam, Krishna District, A.P v. K.B.N. Visweshwara Rao & Ore. reported in 1996(3) SCC 216 and also a Division Bench judgment of this court in M.A. No. 433 of 1997 (since reported in 1997(2) CLJ 428) cannot have any application in the facts and circumstances of the present case in view of the decision of the apex court in Union of India (UOI) and Others Vs. N. Hargopal and Others, , According to the learned judge although Hargopal (supra) has been noticed in Excise Superintendent, the same has not been overruled. The learned Judge was also of the view that in Excise Superintendent (supra) Their Lordships have not decided the question as to what would be the position where in a particular case the Recruitment Rules Itself provides that such recruitment may be made by calling for names of the candidates from Employment Exchange. The fact of the matter may be noticed from W.P. No. 1933 of 1997

The writ petition was filed by the appellant, inter alia, praying for the following

reliefs:--

"a) Writ of or in the nature of Mandamus directing the respondents and each one of them not to hold any interview for selection in the post of non-teaching staff (clerk) in sanctioned vacancies in Burdwan Municipal High School, P.O. Burdwan, Dist. Burdwan excluding your petitioner therefrom;

b) A writ of or in the nature of Mandamus directing the concerned Employment Exchange Authority (being respondent No. 5) to sponsor the name of the petitioner for interview, for appointment in the post of non-teaching staff (clerk) in the concerned school within 24-hours of the communication of the order.

c) A writ of or in the nature of Mandamus directing the respondent school authority including the Selection Committee to permit your petitioner to appear before the said Selection Committee for interview for the post of non-teaching staff (clerk) in Burdwan Municipal High School. Burdwan, along with candidate sponsored by the Employment Exchange."

2. The writ petitioner is a Graduate and as such qualified for being appointed in the post of Clerk in a High School. He also got his name registered with the local Employment Exchange. According to the petitioner he has come to learn that the school authorities of Burdwan Town High School are proceeding to fill up the post and called the candidates for interview for the said purpose. The writ petitioner had been excluded from being granted an interview.

3. Mr. P.K. Chatterjee the learned counsel, appearing on behalf of the petitioner submitted that keeping in view the recent decision of the apex court in Excise Superintendent, Malkapatnam, Krishna District, A.P. v. K.B.N. Visweswara Rao & Ors. reported in 1996(3) SCC 216. the principle of fair play, Justice and equal opportunity demands that apart from intimating the Employment Exchange in terms of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 all the candidates eligible therefore should be allowed to take part in the interview.

4. Mr. M.C. Das, the learned counsel, appearing on behalf of the respondent, on the other hand, submitted that the writ petitioner having got himself registered under the Employment Exchange cannot now turn round and contend that he should also be interviewed despite the fact that his name has not been sponsored. The learned counsel contends that recruitment rules framed by the Director of School Education is a statutory one, and thus, the Managing Committee of the said school cannot Issue an advertisement which would be contrary to and inconsistent with the said rule.

5. Before we proceed into consider the matter, the scope and purport of the provisions of the West Bengal Board of Secondary Education Act the rules framed thereunder by the State as also the recruitments rules framed by the Director of School Education as are relevant for the purpose of these cases may be considered.

6. The State of West Bengal enacted the Board of Secondary Education Act (hereinafter called and referred to as "the said Act"), to establish a Board of Secondary Education, to define the powers and functions of such board and to provide for certain other matter connected therewith. The Act read as a whole would show that despite constitution of the West Bengal Board of Secondary Education, the State Government had reserved unto itself the power to control in the exercise of such power by the Board.

7. Section 27(1) itself casts a duty upon the Board to advise the State Government on all matters relating to Secondary Education referred to it by the State Government. Sub-section (2) of section 27 of the said Act, which enumerates the powers of the Board is also subject to any general or special orders of the State Government, the provisions of the Act and Rules made thereunder. Although the Board has been empowered to make regulations in terms of sub-section (4) of section 27, the same requires an approval by the State and failure on the part of the Board to obtain such approval will render such regulation invalid. The State Government, in terms of the aforementioned provision, has also been empowered to make additions, alterations and modifications in such regulations.

8. Section 31 of the said Act provides that annual report and budget estimate shall be forwarded to the State Government within one month of the presentation thereof before the Annual Meeting of the Board and the State Government may within 2 months of the receipt of budget estimate either accord Its approval thereto or return the same to the Board with such comments and suggestions as it deems necessary if in its opinion such estimate does not fulfil the conditions enumerate therein.

9. In terms of section 32 of the said Act the State Government may make such annual or periodical grants upon considering the budget estimates, the accounts of the board and such other reports as may be called for. The amount granted by the State Government is one of the sums which would be put in the fund known as West Bengal Board of Secondary Education Fund.

10. Sub-section (1) of section 45 empowers the State Government to make rules for the purpose of carrying out the purpose of the Act Clause (d) of sub-section (2) of section 45, inter alia, empowers the State to make rules as regard composition, powers and functions of Managing Committees of institutions. Pursuant to the said power the State Government has framed The. Management of Recognised Non-Government institutions (Aided and Unaided) (hereinafter referred to as the Rules), Rules, 1969. Rule 28 enumerates the power of the Managing Committee of an aided institution subject to the provisions of any grant-in-aid Scheme or Pay Revision Scheme or any order or direction or guidelines issued by the State Government or the Director in connection therewith. Pursuant to or in furtherance of the power conferred by Clause (I) and (11) of sub-rule (1) and by clause (1) of sub-rule (4) of the Rule 28 of the Rules as amended from time to time by the Education Department the Director of

Schools has issued directions for compliance by recognised non-Government Secondary Schools in connection with the recruitment of teachers and non-teaching employees.

11. The word "Committee" has been defined in Rules 2(c) to mean Managing Committee as defined in section 2(d) of the Act which in turn states that Managing Committee used in reference to an institution includes the Governor or the Governing Body of such an institution. It is not necessary for the purpose of this matter to consider as to whether the Managing Committee is a statutory body or not and whether it has been created by or under a statute. But there cannot be any doubt whatsoever that Managing Committees having been constituted in terms of the provisions of the Rules are bound by the four corners thereof. The Managing Committee has no power to go beyond the said recruitment rules unless there exists a direction, order or guideline issued by the State Government or the Director as the case may be.

12. In terms of the recruitment rules a prior permission of the District inspector of Schools is necessary. Such permission for recruitment to be granted only against sanctioned post, and only when the concerned school has no surplus teacher or non-teaching employee, as the case may be, in its staff. The Managing Committee of the school may, thereafter, send the intimation of the existing vacancy to the Employment Exchange whereafter, the names of eligible candidates in terms of the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 may be sponsored by it. A selection committee thereafter interviews the candidates and prepares a panel. The Managing Committee If approves the panel shall forward the same with all relevant papers to the District inspector of Schools for his approval. In the event of grant of such approval, the Managing Committee may appoint a teacher from the approved panel but such appointment shall again require the approval of the District inspector of Schools.

13. Although the directions issued by the Director of School Education has been labelled as rules, the same contained merely guidelines. Such guidelines as noticed hereinbefore are subject to any directions, order or guidelines issued by the State Government or the Director of School Education.

14. The Managing Committee of school although in terms of the provision of the said Act and the Rules framed thereunder is not a statutory body but it has been constituted in terms of the provision of a statute. The said rules provide for the manner in which the committee shall be constituted. It lays down the procedures not only as to the composition of the committee but also the manner in which certain members of the committee would be elected and co-opted. The said rules also provides for the number of the members of the committee and the manner in which the officer of the committee would be appointed and removed. The said rule also provides for supersession of such committee by the Board as would appear from Rule 8 of the Rules. The constitution of a committee requires approval of the executive committee. The executive committee in terms of the Rule 8 has also the power to supersede a committee and in Its place and stead

appoint Administrator or Ad hoc Committee to exercise the powers and perform the functions of the committee. Such supersession, however, shall take place after giving an opportunity to the committee of being head. The aforementioned provisions have no manner of doubt that the Managing Committee must be constituted in terms of the aforementioned statute. Having been a body constituted in terms of the provision of a statute, there cannot also be any doubt whatsoever that the committee must act within the four corners of the statute. It has no Jurisdiction to do any act which is not expressly provided for thereunder. The committee which is the appointing authority in terms of the recruitment rules is, therefore, bound to follow the provisions of the recruitment rules subject of course to any order, direction or guidelines issued by the State Government or the Director of School Education. The guidelines issued by the Director of School Education has statutory force. The orders or directions or the guidelines issued by the State Government or the Director of School Education in the matter of recruitment has also a statutory force as the concerned authorities exercise their power to do so under a statute.

15. The writ petitioner in this application has not questioned the vires of the relevant provisions of the Act, the Management Rules or the Recruitment Rules. He, therefore, cannot seek for issuance of writ or in the nature of mandamus as he does not have any legal right to be interviewed as his name has not been sponsored by the Employment Exchange. It is well settled that writ of mandamus can be issued only when there exists a legal right in the writ petitioner and a corresponding legal duty in the respondents.

16. Furthermore, the petitioner has got himself registered in the Employment Exchange. It is not his case that the names of such persons who were registered in the Employment Exchange after the petitioner, were sponsored. It is also not the case of the writ petitioner that the Employment Exchange has committed any Illegality in sponsoring the names of the candidates or his name has wrongly been excluded from the list of eligible candidates. In this view of the matter we are of the opinion that anybody and everybody cannot approach this court and pray for issuance of writ of mandamus directing the Managing Committee of school to allow him to appear in the interview.

17. We, however, do not mean to say that the guidelines issued by the Director of School Education commonly known as provisions of the recruitment rules would be mandatory ones. They are directory in nature as the State as also the Director of School Education had the requisite jurisdiction to issue any directions or pass any order inconsistent with the provisions of the said recruitment rules, if any exigency arises therefore. Such rules should also be considered to be directory ones in view of the facts that the same do not envisage compliance of the provisions thereof in at] situations. By way of illustration we may say that if in a case where the seat is reserved and enough number of Scheduled Caste and Scheduled Tribe candidates cannot be sponsored by the Employment Exchange, it would be open to the Director of School Education to direct that such posts be

filled up by issuing advertisement in the newspapers. There may also be a case where a new discipline is intended to be taught in the institution but there may not be enough local candidates as at the local University there might not have been any facility for teaching and consequent grant of degree or diploma by the University in the same subject. However, we are also of the view that It cannot be the intention of any Legislature that in all situations an advertisement in the newspaper would be an absolute necessity. According to the writ petitioner himself the post which is sought, to be filled up is the post of a Clerk. Had an advertisement been issued in All india Newspapers or such vacancies were notified through broadcast in Radio and Television, it might have been Impossible for the Managing Committee of the School to handle thousands of applications and grant interview to all of them. But in a case where a large number of posts are sought to be filled up, the Director of School Education can issue requisite directions to the Managing Committee for advertising the post.

18. It is also pertinent to note that the courts have also upheld recruitments in cases where vacancies were notified only in a notice board and the same had not even been intimated to the Employment Exchange,. Reference in this connection may be made to *Jogindra Jha v. College Service Commission* reported in 1983(3) SLR page 4 and *Sardara Singh and others, etc. Vs. State of Punjab and others, .* Even in some cases in the matter of distribution of largess or invitation to treat, calling for limited tenders has been held to be Justified.

19. Furthermore, it is now a well settled principles of law that any appointment in violation of the recruitment rules will be void.

20. Furthermore It is also well settled principles of law that no recruitment can be made in violation of or in derogation-of the provision of the recruitment rules. Such recruitment rules themselves, unless clearly ultra vires must be held to have been framed in consonance with the provision of Articles 14 & 16 of the Constitution of india. Reference in this connection may be made to *Smt. Ravinder Sharma and Another Vs. State of Punjab and Others, and State of Himachal Pradesh v. Swesh K. Verma* reported in Judgment Today 1996(2) SC 455.

21. No recruitment, therefore, can be made in violation of the guidelines issued by the Director of School Education or any order or direction made by the State Government of by the Managing Committee of the School.

22. In *Excise Superintendent, Malkapatnam, Krishna District, A.P. v. K.B.N. VJsiresutara Rao & Ore.* reported in 1996(3) SCC 216. 723 posts were sought to be filled up from amongst the candidates sponsored through the medium of Employment Exchange. Although such names were sponsored, in terms of interim direction issued by the Tribunal, orders were issued to select the candidates whose names were not so sponsored. Keeping in view the factual matrix the apex court held:

"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 those circumstances, many a deserving candidate is deprived of the right to be considered for appointment to a post under the State. 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 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."

23. In that case there was nothing to show that in terms of the recruitment rules, vacancies would be filled up only from against the. candidates whose names had been sponsored by the Employment Exchange,

24. It appears that the said decision has been referred to by a Division Bench of this court in Arun Kumor Mondal & Ors. v. Brojo Copal Biswas & Ors. reported in 1997(2) CM 519 wherein the Division Bench had been considering a case of regularisation However, in that decision the points which had been taken into consideration by us had neither been argued nor considered.

25. We may also note that we have come across a decision of the Supreme Court of India wherein the aforementioned decision had been followed i.e. Raj Kumar and Others Vs. Shakti Raj and Others, In that case the fact of the matter was that the posts of canal patwaris in the Irrigation Department of State of Haryana were Class-III posts for which prior to formation of the State of Haryana the recruitment used to be governed by a rule known as Punjab Public Works Department (Irrigation Branch) Patwaris State Service Class III Rules, 1955. In terms of such rules those who passed an examination, were to be appointed almost automatically unless the name of a passed candidate who reaches the age of 25 years without having been employed temporally as a patwari was to be struck off the list. However, in terms of a circular letter issued by the Chief Engineer for recruitment to the post of Canal Patwaris was to be made through the Subordinate Service Selection Board. After formation of State of Haryana another Rule was made under Proviso to Article 309 of the Constitution of India, in terms whereof all such appointments were to be made by Subordinate Service Selection Board. The apex court found that both the 1955 Rules and 1970 notification (both statutory Rules) reveal that the former in order to fit into the

frame work of 1970 notification need suitable amendments; in particular. In the matter of the source and method of recruitment, seniority and all related issues. The apex court found that the selection and appointments to the post was not in accordance with law. The Subordinate Service Selection Board also prescribed various guidelines for selection of the candidates. The apex court observed that even if 1955 Rules occupy the field upon coming into force of the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959. Rule 12 thereof had become inoperative. It was held that the State was bound to follow the method prescribed in 1955 Rules inasmuch no executive instruction could be issued to supplant the statutory rules. The apex court found that in view of 1970 notification, direct recruitment could be made through subordinate Service Selection Board. The Government had followed sometimes 1955 Rule and sometimes 1970 notification according to their convenience, but in the case before the apex court they have dispensed with both and instead constituted a Committee for selection of the candidates which was beyond the purview of 1970 notification and that too after written examinations were conducted under Rules. The apex court held that the entire exercise was Illegal.

26. In this situation. Excise Superintendent's case (supra) was referred to and followed and observations were made to the following effect:

"in view of this legal position, the necessary requirement should be that they should necessarily not only notify but also call the names from employment exchange; in addition they should give wide publicity in the media inviting applications from qualified persons for selection. Instead, they have adopted the procedure under 1955 Rules. They did not call the names from, the employment exchange and conducted the examinations for them. After the selection of the candidates, names of selected candidates were called from the employment exchange. Obviously, the successful candidates in the written examinations were asked to approach the employment exchange of the concerned circle and accordingly, name came to be sponsored. The procedure is clearly illegal denying equal opportunity to many a candidate waiting in the register of the concerned employment exchange. Therefore, the Government hereafter should strictly following the procedure by not only calling their names from the employment exchange, but also by publishing in the local and national newspapers and giving wide publicity in the media as well as getting the written examination and the interview conducted by the SSSB: marks should be awarded strictly according to the procedure."

27. Even in a later decision of the Supreme Court in the case of Arun Tewari & Ors. v. Zila Mansau Shtshak Sangh and others reported in AIR 1998 SC 331, their Lordships while considering the ratio in Excise Superintendent's case (supra) clearly held that there are different methods of inviting applications and that the method adopted in the exigency of a situation would be relevant for a particular case as long as it is not unfair.

28. Keeping in view the facts involved in the-aforementioned three decisions we

are of the view that no law within the meaning of Article 141 of the Constitution of India has been laid down therein by the apex court. It is now well known that a decision is an authority for what it decides not can logically be deduced therefrom.

29. In *The Regional Manager and Another Vs. Pawan Kumar Dubey*, the law is stated in the following terms :-

"It is the rule deductible from the application from law to the facts and circumstances of a case which constitutes its ratio decidendi and not same conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each to similar facts."

30. In *Municipal Corporation of Delhi Vs. Gurnam Kaur*, the apex court observed:

"Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in *Jamna Das* case and to learned Judge who agreed with him, we cannot concede that this court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavements or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a pavement squatter. Professor P.J. Fitzgerald, editor of the *Salmond on Jurisprudence* 12th Edn. explains the concept of sub silentio at p. 153 in these words:

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present its mind. The court may consciously decide in favour of one party because of point A which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio".

31. It is also well known that a decision is not an authority for what it had not decided or not a point which has not been argued. Reference in this connection may be made to *Goodyear India Ltd., Gidore (India) Pvt. Ltd., Keltanator of India*

Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, and Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise, Meerut,

32. Having considered the submission of learned counsels for the parties we are of the view:--

1. The recruitment Rules although contained directory provisions, the same are required to be substantially complied with.

2. Any deviation and departure from the directions issued by the Director of School Education by reason of the said Recruitment Rules can only be made by the Director of School Education himself or by the State Government by issuing an order or a direction or guideline depending upon the facts and circumstances of each case.

3. The Managing Committee of the respondent school is bound to follow the provisions of the Recruitment Rules and the petitioners having not raised the question of constitutionality of the said rules in the writ application cannot be permitted to do so by way of argument.

4. No. direction can be issued by this court upon the Managing Committee of the School to allow any and every person to appear in the interviews although his name has not been sponsored by the Employment Exchange. The orders issued in this behalf by some of the Benches do not lay down the correct law and must be overruled.

5. The Managing Committee cannot act in contravention of the said provision unless the same is unconstitutional. This court in exercise of its power under Article 226 of the Constitution of India cannot also issue a direction asking it to violate the provision of statute.

These writ petitions are dismissed with the aforementioned directions but in the facts and circumstances of this case there will be no order as to costs.

P.S. Misra, C.J.

I agree.

V.K. Gupta, J.

I agree.

33. Petitions dismissed