

(2001) 01 CAL CK 0007
In the Calcutta High Court
Case No : C.R. No. 11838 (W) of 1989

Sristidhar Biswas and Another	Vs	APPELLANT
The State of West Bengal and Others		RESPONDENT

Date of Decision : 17-01-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226

Citation : (2001) 2 CALLT 22

Hon'ble Judges : Ashim Kumar Banerjee, J

Bench : Single Bench

Advocate : S. Pal and L.K. Pal, Satyajit Mondal, Amar Nath Sen, Dipankar Ghosh and Susmita Pal, for the Appellant; Asok De, P.S. Deb Barman for the Respondent Nos. 9 and 10 and Suprakash Banerjee and Arati Sircar, for the Respondent

Final Decision : Allowed

Judgement

Ashim Kumar Banerjee, J.—55 writ petitioners came before this Court being prompted by the order of the Division Bench passed in appeal where similarly circumstanced candidates were given relief by this Court.

2. The principal grievance on which the writ petitioners prayed for redressal has been summarised in paragraph 41 of the writ petition which is quoted below:

"An and by way of recording a notorious fact in the subject, your petitioners may mention that on 11.10.1980 was Saturday, the officials of the President, Ad-hoc Committee, prepared the appointment letters of 1965 candidates out of which only 600 trained candidates were included and after the preparation of the appointment letters, the President, Ad-hoc Committee, i.e. the appointing authority had put his signatures on the appointment letters, the same were distributed at the residence of those candidates from Sunday evening to Monday morning. The appointment letters had not even been posted and all the candidates got their appointment letters at their residence. The next very day, i.e. on Monday, the 15th October, 1980, 1965 candidates went to their respective

school with the letter of appointment for Joining. Those candidates informed the head of the institution to the effect that they have come to join the said school as an assistant teacher and had requested the school authority to accept the Joining report and to return those joining report for submission in direct to the Sub-Inspector of Schools for necessary action Immediately".

3. Four orders according to me, are relevant for the purpose of disposal of the present writ petition. The first order is dated 17th September, 1989 passed in Sirazul Haque's case (C.R. No. 2522(W) of 1982) where 108 writ petitioners being similarly circumstanced with the present writ petitioners came before this Court and their writ petitions were disposed of by B.P. Banerjee, J. directing the respondents to create and/or sanction posts within four weeks for giving appointment to those 108 writ petitioners as Assistant Primary Teacher in Nadia District. The said order was appealed from by the authority and the appeal was disposed of by an order dated 14th February, 1989 wherein by consent of the parties the appeal was disposed of by the Division Bench provided over by the then Chief Justice P.D. Desai wherein the appeal was disposed of in favour of the petitioners with certain modifications. The said order was passed by consent of parties appearing in the said matter. The order of the Court of appeal is appearing at page 121 of the writ petition. Despite such order being passed the respondents authority did not act in terms of the Court of appeal which prompted the said 108 writ petitioners to file a contempt proceeding. The contempt proceeding has been disposed of by the Division Bench by an order dated June 30, 1989 wherein the respondents-authority appeared and submitted that the order of the Court of appeal would be implemented in the manner stipulated in the said order dated June 30, 1989. Another set of writ petitioners led by one Dibakar Pal approached this Court. Their writ petitions were also disposed of by the learned single Judge by an order dated January 13, 1991 wherein the said 67 writ petitioners were directed to be absorbed, here also the respondents-authority did not comply with the order resulting in a contempt proceeding which was ultimately disposed of by S.B. Sinha, J by an order dated June 23, 1999. That order is appearing at page 116 of the supplementary affidavit filed by the petitioners wherein it was recorded that the respondents-authority would comply with the said order within 10 days from the said date and on such assurance the contempt rule was disposed of. In the said order dated June 23, 1999 it was submitted by the respondents-authority that the District Primary School Council in its meeting held on June 15, 1999 decided to give employment to 88 petitioners in the case of Dibakar Pal. On the basis of such resolution the learned council, appearing for the respondents submitted before the Court that those writ petitioners would be given employment.

4. Before me there are 55 writ petitioners who are similarly circumstanced and there is no dispute on that score.

5. Mr. Pal, learned Advocate, appearing for the writ petitioners submitted that the writ petitioners are similarly circumstanced as with Sirazul Haque Mullick & Ors

and Dibakar Paul & Ors. the two groups of writ petitioners who succeeded earlier as discussed hereinbefore. According to Mr. Pal, learned counsel, since the writ petitioners are similarly circumstanced they should be given the benefit of the decision in those two proceedings. In effect, according to Mr. Pal, learned Advocate, as I have understood, since the writ petitioners are similarly circumstanced with those writ petitioners in the earlier two proceedings who got appointment by virtue of the order of this Court, they cannot be discriminated on the ground that the initial order was passed by consent in the case of Sirazul Haque Mullick where concession was made on behalf of the Council and in the second case the council was compelled to give appointment as there was a contempt proceeding initiated by the said writ petitioners.

6. Mr. De, learned Advocate, appearing for the Council strenuously argued that the Judgment in the case of Sirazul Haque is in sub silentio and cannot be considered as precedent. Mr. De, learned Advocate, cited the passage from Salmond on Jurisprudence which is quoted below:

"The rule that a precedent sub silentio is not authoritative goes back at least to 1661(m), when counsel said: "An hundred precedents sub silentio are not material"; and Twisden, J, agreed: "Precedents sub silentio and without argument are of no moment". This rule has ever since been followed (n). But the Court before whom the precedent is cited may be reluctant to hold that its predecessor failed to consider a point directly raised in the case before it (o), and this reluctance will be particularly pronounced if the sub silentio attack is levelled against not one case but a series (p)".

7. Mr. De in support of his argument cited several Supreme Court's decisions and the Division Bench decisions of this Court. The first case cited by B.S. Bajwa and Another Vs. State of Punjab and Others, . Paragraph 6 of the said judgment on which Mr. De, has placed his reliance is quoted below:

"Obviously on this conclusion alone the writ petition should have been dismissed by setting aside the judgment of the single Judge allowing the LPA without any caveat. However, the Division Bench, after reaching the above conclusion, proceeded to grant the benefit of a much earlier date, namely, 6-4-1964 as the date of appointment on the basis of a concession of the Additional Advocate General made herein without considering the effect of the same or of taking into account the inconsistency with its earlier finding. We have no doubt that the concession on this point, being one of law, it cannot bind the State and, therefore, it was open to the State to withdraw as it has been done by filing a review petition in the High Court itself. That apart that concession made on behalf of the State cannot bind D.P. Bajaj and Jagir Singh or anyone else who would be adversely affected thereby. Those persons, therefore, have an independent right to assail that view taken by the Division Bench. It is with regard to this part of the Judgment of which we say that even though the LPA is said to have been allowed but it has the effect and in reality of being dismissed because it grants certain benefits to B.S. Bajwa and B. D. Gupta who were the

respondents therein".

8. Since the other two Supreme Court judgments reported in *Municipal Corporation of Delhi Vs. Gurnam Kaur*, (*P. Nallammal Etc. Vs. State Rep. by Inspector of Police*, are on the same line, I distinguish 1998 case which according to me is relevant herein for consideration. In the case before the Supreme Court the Additional Advocate General appearing for the State made concession to the effect that with regard to the determination of the seniority the petitioner in the said case should be granted the benefit of a much earlier date than that of the date of appointment. The Supreme Court was of the view that since such concession was not otherwise permissible, the Supreme Court held that such concession cannot bind the State and it was open to the State to withdraw such concession by filing a review petition. In the instant case the Council not only gave consent before the Court of Appeal but also had chosen not to make any review application or to prefer any appeal from the said order and thereby suffered a contempt proceeding. In the next case the other group led by Dibakar Paul approached this Court. The Council adopted the same stand by not preferring any appeal from the said order. In fact an appeal was preferred by a person who was found not to be competent to prefer such appeal and the appeal was dismissed on the said score. In the second case also when the Council faced with a contempt proceeding a statement was made by the learned Advocate that the Council in its meeting took a decision to comply with the order passed in the case of Dibakar Paul. Keeping that view it is expressly clear that the fact which prompted the Supreme Court to hold such view in the case of *B.S. Bajwa v. State of Punjab* (supra) is totally different. In the said case immediately after the concession is made, the State approached the High Court by way of review petition. Herein the Council acted upon such consent. The concession made by the learned Advocate before the Court of Appeal even if was without any authority, such action on the part of the learned counsel was ratified by the action of the Council by giving employment to those writ petitioners. Hence I feel that the ratio of the said Supreme Court judgment is not applicable in the peculiar facts and circumstances of this case.

9. Mr. Pal, learned counsel appearing on behalf of the writ petitioners relied on the decision in the case of *K.I. Shephard and Others Vs. Union of India (UOI) and Others*, , especially paragraph 19 thereof which is quoted below :

"The writ petitions and the appeals must succeed. We set aside the impugned Judgments of the single Judge and Division Bench of the Kerala High Court and direct that each of the three transferee banks should take over the excluded employees on the same terms and conditions of employment under the respective banking companies prior to amalgamation. The employees would be entitled to the benefit of continuity of service for all purposes including salary and parks throughout the period. We leave it open to the transferee banks to take such action as they consider proper against these employees in accordance with law. Some of the excluded employees have not come to Court. There is no

justification to penalise them for not having litigated. They too shall be entitled to the same benefits as the petitioners. Ordinarily the successful parties should have been entitled to costs but in view of the fact that they are going back to employment, we do not propose to make orders of costs against their employers. We hope and trust that the transferee banks would look at the matter with an open mind and would keep themselves alive to the human problem involved in it".

10. Relying on the said Supreme Court's decision Mr. Pal, learned counsel, submits that even if the writ petitioners do not approach this Court since the benefit has been given to the similarly circumstanced persons the Council should have granted the benefit to all who are similarly circumstanced and the Council is not entitled to discriminate the writ petitioners as they were not made parties to the said writ application where consent was given by the Council. Mr. Pal, learned counsel, also cited a single Bench decision of this Court reported in 1986(2) CHN 450 (Lily Halder v. State). However I do not feel it necessary to discuss the said judgment as the same is almost relying on the Supreme Court judgment as discussed before. On examining the rival contentions of the parties and the ratio decided by the Hon"ble Supreme Court in the case discussed before I feel that the contention of Mr. Pal, learned counsel, is correct to the effect that since the writ petitioners are similarly circumstanced with other two groups thereof, the present writ petitioners should not be deprived of the similar benefit simply on the ground that they were not made parties in the said two writ petitions. The Council being a State authority is expected to act fairly specially when their action is under challenge before this Court on the self-same cause of action. When the respondent authorities could not justify their action in the other two proceedings they cannot, in my view, re-agitate those issues before me. In other words I am not competent to reopen the issues which have once been decided and such decision has been given effect to by the respondents.

11. Mr. De, learned counsel appearing for the respondent cited an unreported decision of this Court in the case of Swapan Kumar Tarafder and Ors. v. State and Ors. (F.M.A.T. No. 2894-2895 of 1992) delivered on August 30, 1996 by a Division Bench of this Court presided over by S.B. Sinha, J. wherein Their Lordships remitted the matter back to the learned trial Judge for hearing afresh after setting aside the order of the learned single Judge. While remanding the matter back to the writ Court Their Lordships were of the opinion that in the said case (Swapan Kumar Tarafdar) the fact in Sirazul Haque Mallick case appears to be totally different.

12. Mr. Pal, learned counsel, while distinguishing the judgment submitted that in the case of Swapan Kumar Tarafder the writ petitioners therein were not at all called for Interview and cannot be said to be as similarly situated as in the case of Sirazul Haque or Dibakar Paul. Such fact could not be denied by the respondents before me.

13. In view of the above, I feel that the writ petitioners are entitled to the similar benefits which are now being enjoyed by Sirazul Haque Mallick and Dibakar Paul

and others.

14. Mr. De, learned counsel, wanted to draw the attention of this Court that in course of time appointment has been given on the basis of the earlier panel and there are other vacancies to be filled up by a fresh panel and if I allow the writ application it will complicate the issue. This argument does not impress me as I feel that the discrimination was made to the writ petitioners as far back as in 1989 when the writ petitioners approached this Court being denied of their right after the judgment in Sirazul Haque case. Pendency of the matter is a factor which is beyond the control of the writ petitioners and for that the writ petitioners should not suffer any prejudice.

15. In the result, the writ application succeeds. The writ petitioners are entitled to the similar benefits as have been given in terms of the order of the Court of appeal presided over by P.O. Desai, C.J. on February 14, 1989 and the order dated March 13, 1991 passed in Dibakar Paul case. Such benefit should be given as early as possible and preferably within six weeks from the date of communication of this order. Since the manner and mode of giving employment has been detailed in the two orders of the Division Bench dated February 14, 1989 and June 30, 1989, I do not wish to repeat the same except by saying that both the said two orders i.e., February 14, 1989 and the order dated March 13, 1991 passed in Dibakar Paul case should be extended to the writ petitioners.

16. The learned counsel for the added respondents submits that since they are similarly circumstanced they should also be given the similar benefits. With regard to the case of the added respondents, I direct the Council to examine each and every case of the added respondents and if they are found similarly circumstanced as with the writ petitioners they should also be given the similar benefits as of the writ petitioners.

Urgent xerox certified copy of this order, if applied for, be supplied on priority basis.