

(1996) 05 CAL CK 0009

In the Calcutta High Court

Case No : Appeal from Original Order Tender No. 1476 of 1995

State of West Bengal and Others

APPELLANT

Vs

Bibhuti Bhusan De and Others

RESPONDENT

Date of Decision : 28-05-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1
Constitution of India, 1950 — Article 14, 226

Citation : (1997) 1 CALLT 309 : 100 CWN 1111

Hon'ble Judges : Satyabrata Sinha, J; Satya Narayan Chakrabarty, J

Bench : Division Bench

Advocate : Kalipada Mukherjee and Sitaram Samanta, for the Appellant; B.C. Chakraborty and R. Mondal, for the Respondent

Final Decision : Allowed

Judgement

Satyabrata Sinha, J.—This appeal is directed against a judgment and order dated 26.4.95 passed by a learned single Judge of this court In Civil Order No. 793(W) of 1993, whereby and whereunder the writ application filed by the writ-petitioners-respondents, who are two in number, was allowed. The fact of the matter lies in a very narrow compass.

2. The petitioner-respondent No. 1 had been working as Superintendent of Narasinghadas Kothari Social Welfare Home, Unit-2 P.O. Banipur and Satya Narayan Chatterjee had been working as a clerk in the office of the Chief Superintendent of the said institution. Admittedly, qualification of the petitioner No. 1 is M.A. in Political Science and that of petitioner No. 2 is M.A. in Islamic History and Culture. Both the petitioners also had B.Ed. Degree. The State Intended to fill up the post of Assistant Teacher in the said institution, where for vacancies notified to the Employment Exchange in the year 1984. An interview was held but therein candidates sponsored by the Employment Exchange did not appear and a panel of the petitioners had been formed. However, the said panel was not given effect to. By reason of a letter dated 6th May, 1985 the Director of

School Education addressed to the Chief Superintendent of Rastriya Kalyan Abas, Banipur, intimated that the said panel has been cancelled. It appears that a second interview was also held on 16.6.85. It further appears that in the year 1987, one post was sanctioned and the vacancies for the said post was notified to the Employment Exchange. From the statement made in the said application, it appears that in the said notification the essential qualifications required therefore was stated to be M.A. in English and desirable qualification is training in teaching as also experience in teaching English In Higher classes. In the notification of vacancy to the Employment Exchange it was clearly stated that number of vacancy was one and the essential qualifications therefore were trained Honours or M.A. in English; training in English teaching and experience in teaching English in higher classes. Admittedly, the writ-petitioners did not appear before the interview Board pursuant to the interview held in terms of the aforementioned notification. The writ-petitioners thereafter filed the writ application in the year 1993 praying inter alia for the following reliefs :--

" A writ of or in the nature of Mandamus commanding the respondents to show cause as to why appointments should not be given to the petitioners in the post of Assistant Teachers in the State Welfare Homes High School, Banipur, forthwith:

A writ of or in the nature of Mandamus commanding the respondents to produce all records relating to preparation of panel on the basis of interview held on by the selection committee for filling up the vacancies of Assistant Teachers of State Welfare Homes High School including the panel itself so that conscionable justice is done to the petitioners:

A writ of or in the nature of Mandamus commanding the respondents to show cause as to why the petitioners should not be absorbed appointed on transfer in the existing vacancies herewith."

3. The learned trial Judge by reason of the impugned judgment, Inter alia, held that as the petitioners had been working in the said institution for a long time, they were entitled to the reliefs prayed for. The learned trial Judge directed, "I accordingly, directed the respondents to appoint them as teachers of the school to which they are attached within 31st of May, 1995. I would like to make it clear that the petitioners were not be entitled to any pecuniary benefit or promotion with retrospective effect though they will be entitled to appointments to the post of teacher of the said school entitling them to future promotion along with others on the basis of their length of service."

4. Mr. Mukherjee, learned counsel appearing on behalf of the appellant, inter alia, submitted that keeping in view of the fact that the petitioners did not fulfil the requisite qualifications and further in view of the fact that there is only one vacancy, the impugned order could not have been passed. The learned counsel pointed out that the writ-petitioners also suffered from inordinate delay inasmuch as such vacancies were notified to the Employment Exchange as far back as in the year 1983 and thus the petitioners relying on or on the basis of their

purported employment in the year 1985, could not have maintained the said writ application. It was also submitted that the state imposed a ban on the employment in the year 1990 and in that view of the matter, the impugned order must be held to be bad in law, Mr. Mukherjee further submitted that from a perusal of the office memorandum dated 1st August, 1981 as contained in annexure "X" to the said application it would appear that the selection committee is required to prepare a panel of three eligible candidate for each post in order of priority after holding interviews of the candidates. The learned counsel, therefore, contends that as panels of only two persons were prepared in the year 1985, no cognizance thereto could be taken. The learned counsel has further drawn our attention to the fact that a panel remains valid only for one year.

5. Mr. Chakraborty, learned counsel appearing on behalf of the respondents, on the other hands has drawn our attention to the circular letter dated 29th January, 1972 as contained in annexure "F" to the writ application and submitted on the basis thereof that Superintendents are considered to be teachers. Our attention was further drawn to the circular letter dated 25th October, 1983 as contained in annexure "G" to the writ application for the purpose of showing that as the Superintendents and Assistant Superintendents perform the duties similar to that of Head Masters of Junior High School and Head Masters of Junior Basic Schools, they are entitled to the allowance at the rate of Rs.75/-per month and Rs.60/-per month respectively for performing administrative duties. The learned counsel therefore, contends that keeping in view the fact that a selection committee was constituted and the writ-petitioners having been interviewed in view of the fact that their names were forwarded thereafter, they should have been absorbed as teachers. Our attention was further drawn to the effect that from a letter dated 3rd November, 1992 as contained in annexure "E" to the writ application, it would appear that a number of vacancies including the vacancies of two posts of assistant teachers and two posts of craft teachers were vacant and thus it was incumbent on the part of the appellants to fill up the said posts. Mr. Chakrabarty, has further drawn our attention to the fact that the names of the writ petitioners appeared in the panel prepared on 18.6.85, i.e after the panel prepared by the selection committee in the year 1984 was cancelled and a fresh interview was directed to be held. According to the learned counsel, in the year 1987, no departmental candidate appeared. The learned counsel would contend that it is not correct that only a person having requisite qualifications as has been contained by Mr. Mukherjee would be appointed, as would be evident from the fact that one teacher who did not hold requisite qualifications was transferred to the School in question.

6. It was, therefore, submitted that in that view of the matter, the petitioners who had been working for a long time, should also be directed to be absorbed. The learned counsel further submitted that this appeal is not maintainable in view of the fact that although the appeal was preferred within thirty days from the date of judgment, there is nothing on record to show that the appellants had

applied for certified copy of the judgment within the aforementioned period of limitation. Reliance in this connection, has been placed on a decision in *State of West Bengal v. Bishwa Ghosh* reported in 1992(1) Cal L J 466.

7. The matter, in our opinion, can be sub-divided Into two parts. First, with reference to the prayers made in the writ application, the case of the writ petitioners was that they were entitled to be appointed in view of the fact that they were empanelled after an interview was taken on 18.6.85, which admittedly has not been given effect to, and secondly, the action on the part of the State in notifying a vacancy to the Employment Exchange pursuant whereto candidates sponsored by the Employment Exchange had appeared, but the writ petitioners did not.

8. Mr. Mukherji appearing on behalf of the appellants addressed us at great length so far as the second aspect of the matter is concerned, but upon a close scrutiny of the writ petition, as also the prayer made in the writ application, it is evident that the writ petitioners/appellants did not question the said advertisement, nor the panel made pursuant thereto has been questioned therein. In this view of the matter, the only question which would arise for consideration in this appeal is as to whether writ petitioners/respondent Nos. 1 and 2 were entitled to be absorbed in the teaching staff of the school. Before we proceed to consider the matter on merits, we may briefly state that a controversy had been raised before us as regards the mode of recruitment although, from the Judgment passed by the learned trial Judge, it does not appear that such a question was raised before him, whereas according to Mr. Mukherji, the school authorities had been following the procedures laid down in the recruitment rules in respect of aided and unaided institutions, framed by the Director of School Education, according to Mr. Chakrabarty such rules have no application. In the event, such rules have no application, the procedure for appointment which must be followed would be the recruitment rules of the State of West Bengal. But in our opinion, the manner and mode of appointment in the peculiar facts and circumstances of this case would hardly have any role to play.

9. We would also like to mention that although no such case has been made out before the learned trial Judge, Mr. Chakrabarty appearing on behalf of the writ petitioners/respondents with reference to a circular letter dated 29th January 1972 as contained in Annexure "F" to the writ application, as also a memorandum dated 25th October 1983, as contained in Annexure "G" thereto, sought to submit that the Superintendents are teachers of the schools attached to the Homes. If such a contention is accepted, in our opinion, there was absolutely no necessity for the writ petitioners to file the writ application In view of the fact that in terms of the aforementioned purported notifications, they are teachers. However, having read the notifications in their entirety, we are of the view that a clear distinction is made out between a teaching staff and a non-teaching staff and only for certain purposes, the Superintendent of the Home is treated to be teacher and not for all purposes. In fact, the learned trial Judge in

the very first paragraph of the impugned judgment observed:

"The petitioners have triggered off this writ application to ensure their claims dwelling on their absorption from the category of non-teaching staff to the category of teaching staff which is still sleeping in the dark cool chamber of the administrative authorities."

10. From what has been quoted hereinabove, it is thus evident that the writ petitioners claim for their absorption from the category of non-teaching staff to the category of teaching staff. No provision has been shown before us or before the learned trial Judge that any procedure for absorption exists. The case of the writ petitioners in the writ application was that they were entitled to be considered for appointment in terms of the panel prepared in the year 1985. Such panel, as has been indicated hereinbefore, was purported to have been formed pursuant to the policy decision of the State to fill up the existing vacancies, whereafter Employment Exchange was also notified and the writ petitioners were also allowed to take part in the interview as departmental candidates. Further contention of the writ petitioners, as noticed hereinbefore, appears to be that they were empanelled, but the said records were misplaced

11. Furthermore, in paragraph 12 of the writ application it has been stated:

"In the circumstances your petitioners submit to take immediate steps for appointments of the petitioners on transfer in the said school in the existing vacancies which are at present four in number so that your petitioners are not subject to further unnecessary harassment and serious prejudice."

12. Even in paragraph 14 of the writ petition, that writ petitioners claimed their entitlement to be appointed as teachers and not their absorption. There exists a distinction between appointment and absorption. If a person has to be appointed, there cannot be any doubt whatsoever that the requisite rules existing for such recruitment must be followed, whereas in case of absorption in the event there exists a statute or statutory rules or a policy decision of the State, as employee working in a particular post may be appointed by absorbing as permanent staff in the post if he had been working for a long time. The learned trial Judge unfortunately did not consider this distinction while proceeding with the matter.

13. It has been shown before us that the life of the panel was one year. Even assuming that the contention of Mr. Mukherjee to the effect that the said panel could not be given effect to and had not been taken cognizance of the fact that in terms of the extant rules, 3 names must be forwarded for each post is not correct, there cannot be any doubt whatsoever that every panel has a life both in terms of the rules framed by the Director of School Education in exercise of his power conferred upon him under the Rules for Management of Recognised Non-Government Institutions (Aided and Unaided) 1969, as also the rules framed by the State of West Bengal.

14. It is now also well known that a candidate cannot be said to have acquired any right for appointment only because he has been empanelled. Both the questions aforementioned, now appears to be covered by a recent Judgment of a Division Bench of this court in the case of *State of West Bengal v. Monoranjan Mondal and Anr.*, reported in 1996(1) CLJ 425. B.P.Banerjee, J. speaking for the Division Bench upon referring to the decisions of the apex court in *State of Bihar v. Secretariat Assistant Successful Examinees' Union and Ors.*, reported in AIR 1994 SC 737 and *Shankarsan Dash Vs. Union of India*, categorically held that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, successful candidates do not acquire an individual right to be appointed which cannot be legitimately denied. As regards the life of the panel, the learned Judge held:

"Further life of a panel is also for one year and in the instant case the panel was prepared in 1990. It is well settled principle that when validity period of a panel is fixed after the expiry of that period the said panel lapses and on the basis of that panel no appointment can be given."

15. This aspect of the matter has also been considered In 1995(1) S L J 9 and 1995(1) Service Law Journal 11. In the instant case, the alleged panel was framed in the year 1985. The said panel, according to Mr. Mukherji, was illegal as 3 names had not been recommended for each post. The learned trial Judge, however, considered the fact that the writ petitioner waited and hoped that they would be appointed and filed a representation on 15.2.92 to the Director of Mass Education through proper channel. If the State does not intend to revive the panel and issues a notification for the purpose of filling up a particular vacancy with which the writ petitioners are not concerned, in our opinion, no writ of Mandamus could have been issued as has been sought to be done by the learned trial Judge. The learned trial Judge, in our opinion, has also erred in observing that there is no difference between the approved and unapproved teachers in respect of duties and responsibilities and standard of teaching. Only because a person had been working as a non-teaching staff of the Home, the same does not mean that he has an indefeasible right to be appointed as a teacher. Even in terms of the circular letters issued by the State and or the concerned authorities, they were entitled to be considered therefore subject to their suitability. The learned trial Judge commented that there had been no staff pattern in the school. The said question, in our opinion, in the fact of the case was wholly irrelevant. The learned trial Judge has also observed that in the meantime another teacher was appointed by transfer. Whether the said teacher had the requisite qualification or not, is not relevant. Assuming that he did not have the requisite academic qualification, the equality clause as contained in Article 14 read with Article 38 which had been sought to be brought in aid in support of the case of the writ petitioners have no application. One illegality does not confer any right upon any other person to obtain a writ of or in the nature of Mandamus directing the respondents to perpetuate illegality. Article 14 of the Constitution of India speaks of equality before law and equal protection of law. It does not and

could not have given a protection on the basis thereof to a person who claims his right on the basis of an Illegal order. This aspect of the matter has been considered by us recently in the case of Estate Manager v. D.K. De (F.M.A. T. No. 3882 of 1995) following the decision in the case reported in AIR 1995 Ori 207. The learned trial Judge had also committed a serious error in holding that the academic qualification has no role to play. Unless there exists a clause of relaxation, a post which is required to be filled up, must be filled up by a person having the requisite qualification, as otherwise the same would be hit by the doctrine of arbitrariness and would thus attract the wrath of Article 14 of the Constitution of India in view of the decision of the apex court in Ramanna's case reported in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, The learned trial Judge further observed that the action on the part of the State was not justified while observing that unless the relevant recruitment rules so indicate the State is under no legal duty to fill up any of the vacancies. It is the positive case of the appellants that in the year 1990, the State Government imposed a ban on appointment in such posts which remained vacant for more than 6 months. The State in our opinion, had a right to impose such a ban. It is now well known that the court does not normally interfere with the policy decision of the State which would have adverse implication as regards its fiscal liabilities. Moreover, as Indicated hereinbefore, the panel was prepared in the year 1985. The learned trial Judge himself found that the representation n writing was made for the first time in the year 1992, and much prior thereto the State had notified another vacancy in the year 1987, wherein the writ petitioners were not interviewed. In view of the conduct of the writ petitioners that they acquiesced in so far as the attempt on the part of the State to fill up the vacancies are concerned, in our opinion, they cannot now be permitted to seek for the reliefs as have been prayed for in the writ application after a period of 8 year. In Ratan Chandra Sammanta and others Vs. Union of India and others, the apex court held:

"A writ is issued by this court in favour of a person who has some right. And not for sake of roving enquiry leaving scope for manoeuvring Delay itself deprives a person of his remedy available in law. In absence of any fresh cause of action or any legislation a person who has lost his remedy by lapse of time loses his right as well. From the date of retrenchment if it is assumed to be correct a period of more than 15 years has expired and in case we accept the prayer of petitioner we would be depriving a host of others who in the meantime have become eligible and are entitled to claim to be employed. We would have been persuaded to take a sympathetic view but in absence of any positive material to establish that these petitioners were in fact appointed and working as alleged by them it would not be proper exercise of discretion to direct opposite parties to verify the correctness of the statement made by the petitioners that they were employed between 1964 to 1969 and retrenched between 1975 to 1979."

16. It is a trial law that a writ of Mandamus can be issued provided the writ petitioner establishes a legal right in himself and a corresponding legal duty of

the respondents. In our opinion, they have miserably failed to do so. If the writ petitioners do not have any legal right, in our opinion, they are not entitled to any relief. Before parting, however, we may deal with the objection as regards the maintainability of the appeal. Mr.Chakrabarty has placed strong reliance upon a Division Bench judgment of this court in the case of State of West Bengal v. Biswanath Ghosh, reported in 1992(1) CLJ 466. B. P. Banerjee, J, in the aforementioned decision was considering an appeal which was filed after the expiry of the period of limitation. It is in that context, the learned Judge observed:

"The legal position is clear that an appeal under Article 226 of the Constitution of India could not be entertained by this court unless it is accompanied when a certified copy of the order appealed from. Of course, it is a consistent practice of this court that an appeal can be preferred without certified copy in case of urgency within the period of 30 days and on condition that the appellant must apply for a certified copy of the order in question within the period of limitation and must file the same after obtaining the said certified copy. It will create a deadlock in the administration of justice if the appeal has to be decided not basis of the Paper Books which do not contain any copy of the order/judgment appealed from. We cannot introduce any system which would stand in the way of dispensing with the justice in fair and proper manner and in accordance with law."

17. In the instant case, the appeal has been preferred within 30 days. In terms of Order 41 Rule 1 of the Code of Civil Procedure, the appeal court has the jurisdiction to dispense with the filing of a copy of the judgment. Provisions of the CPC have been made applicable in relation to writ proceeding in terms of Rule 53 of the Rules framed by this court in relation to matters under Article 226 of the Constitution of India. Furthermore, from the xerox copy of the certified copy filed with the stay application we find that the same contains an endorsement of an officer of this court dated 10.5.95. The judgment was pronounced on 26.4.95. It is now well known that a decision is an authority for what it decides and not what cannot be logically deduced therefrom. The observation made in paragraph 17 of the aforementioned Judgment was made in the context of the said case. In the instant case, not only the appellants were allowed to file this appeal within a period of 30 days, even they had obtained an order of stay from this court on 4.1.96, prepared Paper Books and the counsel made their submissions on merits. Furthermore, they have included a copy of the judgment in the Paper Book itself, apart from filing a xerox copy along with the stay application. Genuineness of the said copy of the judgment of the learned trial Judge is not disputed. In this view of the matter, we are of the opinion that in view of the fact that procedures are only hand-maid of justice and keeping in view the facts and circumstances of this case, we are of the opinion that there is no merit in the submission of the learned counsel that the appeal should be dismissed only on the aforementioned ground alone.

18. For the reasons aforementioned, this appeal is allowed. The Judgment and

order passed by the learned trial Judge is set aside. The writ petition of the petitioners is dismissed with an observation that if in future the State intends to fill up the vacancies, cases of the writ petitioners should be considered along with other eligible candidates, if they are suitable therefore so as to give effect to its own policy decision. However, we may observe that keeping in view the interest of the students, all the vacancies, if existing, should be filled up at an early date and the State may consider the desirability of lifting the ban if the same is subsisting till date.

Satya Narayan Chakrabarty, J.

19. I agree.