

(2000) 09 CAL CK 0012
In the Calcutta High Court
Case No : MAT No. 1471 of 1999

State of West Bengal and Others

APPELLANT

Vs

Krishna Kumar Majumdar and Others

RESPONDENT

Date of Decision : 26-09-2000

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 142, 16
West Bengal Panchayat Act, 1973 — Section 37, 6

Citation : 105 CWN 794

Hon'ble Judges : Satyabrata Sinha, J;Pratap Kumar Ray, J

Bench : Division Bench

Advocate : Sumitra Dasgupta and Washef Ali Mondal, for the Appellant;
Phalguni Sarkar and Ipsita Chakraborty, for the Respondent

Final Decision : Allowed

Judgement

Satyabrata Sinha, J.—This appeal is directed against the judgment and order dated 4.2.99 passed by a learned Single Judge of this court in W. P. No. 12810(W) of 1999 whereby and whereunder the writ application filed the respondents herein has been allowed. The respondents herein are said to have been appointed as Tax Collectors. Such appointment had allegedly been made on commission basis. The respondents before the learned Trial Judge have inter alia, contended that they had been appointed for a long time by their respective Gram Panchayats purported to be in terms of Section 37 of the West Bengal Panchayat Act (hereinafter referred to for the sake of brevity as the said Act).

A writ application had been filed before this court by the respondents and by an order dated 3.12.97 the said writ application was allowed directing the District Panchayat Officer to consider their cases. The District Panchayat Officer by reason of his order dated 12.6.98 as contained in annexure "C" to the writ application, inter alia, held that the reliance placed by the said employees on the circular letters dated 3.8.79, 28.3.96 have no application. It was held:

The above three memorandums describe the principles to be followed in the

matter of absorption of casual and Such other-categories of workers under the State Govt. Here the petitioners are the employees of the Gram Panchayats and they are appointed by the Gram Panchayat for a period of not exceeding two years at a time, in this connection I make reference of Rule 33 of the West Bengal Panchayat (Gram Panchayat Miscellaneous Accounts & Audit) Rules, 1990. In my consideration the provisions of the three memorandums herein mentioned above are not applicable in case of the petitioners as they are not appointed by any establishment/Deptt. of Government of West Bengal."

The learned Judge having regard to some decisions of the Apex Court, inter alia, held that as the petitioners had been appointed as Tax Collectors in terms of Section 37 of the said Act, they were entitled to the relief, prayed for.

Mr. Dasgupta, learned counsel appearing on behalf of the appellant submits that having regard to the decision of this court in the case of Biplab Kumar Das Mahapatra & Ors. vs. State of West Bengal & Ors., (MAT No. 4027/99) disposed of on 27.4.2000, the learned Judge must be held to have committed an error in allowing the writ application. In Biplab Kumar Das Mahapatra's case the petitioner prayed for promotion. Having regard to the fact that they had not been regularly appointed, in terms of the decision of the Apex Court in the case of State of M.P. vs. Dharambir, reported in 1998(6) SCC 145, it was directed that they were not entitled to the promotion.

Section 37 of the West Bengal Panchayat Act, 1973 reads thus:

Dafadars, Chowkidars and Gram Panchayat Karmees-

(1) For general watch and ward, prevention of crime, protection of life and property (running of office of the Gram Panchayat) and discharging all functions relevant thereto as hereinafter provided within the local limits of the jurisdiction of Gram Panchayat every Gram Panchayat shall, unless otherwise directed or other provisions are made by the State Government may by general or special order determine.

(2) The manner of maintenance of Dafadars, Chowkidars and Gram Panchayat Karmees by a Gram Panchayat the salary, allowances and gratuity to be paid to them and the cost of their equipment and all matters relating to their recruitment, conditions of service, superannuation, discipline, punishment and dismissal shall be determined in accordance with such rule as may be made:

Provided that the Gram Panchayat shall have disciplinary control over Dafadars, Chowkidars and Gram Panchayat Karmees.

2. From the aforementioned provision it would appear that the concerned Gram Panchayat is not entitled to appoint the Tax Collector and other employees mentioned therein. The petitioners had not been able to produce any appointment letters, according to them, they had been appointed by the Prodhan of the Gram Panchayat.

3. The Gram Panchayat is a local authority within the meaning of Article 12 of the Constitution of India. There cannot be any doubt whatsoever that the appointment of the employees of the Gram Panchayat must be made keeping in view the provisions of Articles 14 and 16, of the Constitution of India. It appears from the West Bengal Anchal and Gram Panchayat (Account and Audit) Rules, 1959 which has since been replaced by the West Bengal Panchayat (Gram Panchayat Miscellaneous Account and Audit) Rules, 1990 that the Collecting Sarkar for collection of taxes is appointed in terms of Rule 33 of the Rules which reads thus:

33. Collecting Sarkars-

(1) If considered necessary and expedient. Gram Panchayats may, at its meeting resolve to engage for a specified period, not exceeding two years at a time, not more than two persons to work on commission basis, as Collecting Sarkar for collection of rates, taxes and fees assessed by the Gram Panchayat. The Gram Panchayat shall also determine at the meeting the rate of commission payable to Collecting Sarkar subject to the maximum limit fixed by the Government from time to time and also the amount of security deposit to be pledged by the Collecting Sarkar, subject to the minimum as may be fixed by the Government from time to time.

(2) On deposit of the security as fixed by the Gram Panchayat, the Collecting Sarkar shall be given a receipt book as prescribed in Form 4. Each individual collection shall be made against each individual receipt and as soon as the Collecting Sarkar has Rs.50 or more, in hand he shall make over the amount to the Secretary/the Proadhan for crediting to the Gram Panchayat Fund.

(3) Gram Panchayat may take disciplinary action against a Collecting Sarkar by earlier termination of contract and (forfeiting his security deposit in the case of misappropriation of money) on charges of incompetence, negligence of duty or any other irregularity committed by him;

Before taking such disciplinary action, the Gram Panchayat shall frame a charge against him, give him a copy thereof requesting him to submit his explanation within a specified time and also give him an opportunity of personal hearing and shall record in writing the evidence given by him, or by his witness, if any.

4. A bare perusal of the aforementioned rules clearly show that the petitioners were appointed by way of contract of service.

If they were to be appointed on regular basis, therefor, the procedure laid down under the Recruitment Rules and in any event the principle adumbrated under Articles 14 and 16 of the Constitution of India was required to be followed.

5. Mr. Sarkar, learned counsel appearing on behalf of the respondents herein has placed strong reliance upon an unreported decision of one of us in the case of Janaki Ram Mishra & Ors. vs. State of West Bengal & Ors., C.O. No. 15911(W) of 1993 and submitted on the basis thereof that in terms of the said judgment the

service of the Tax Collectors have been regularised. In the aforementioned judgment the only question which arose for consideration was as to whether the Tax Collectors in Kasba Egra-I and II Gram Panchayat which was included in the Egra Municipality became employees of the Municipality. The question which arises for consideration in this appeal did not arise therein nor there was any controversy as regard the illegality or otherwise of the appointment of such Tax Collectors. This court having regard to the provision of section 6 of the West Bengal Panchayat Act, inter alia, held that those employees, having been appointed legally would be deemed to be the employees of the Municipality.

The said decision, therefore, in our opinion, has no application in the instant case.

6. Mr. Sarkar, learned counsel, has also placed strong reliance upon a decision of the Apex Court in the case of Arun Kumar Rout and Others Vs. State of Bihar and Others, , wherein it has been held:

It may also be stated that such salaries had been paid to these appellants after a departmental inquiry indicating that even though there were irregularities in the appointment but the appellants has requisite qualifications for the respective post to which they were appointed. Although the appellants had not been appointed by following the due procedure and, therefore, they cannot claim regularisation as a matter of course. But considering the fact that they had satisfactorily served the department even without getting any salary for a long time and they were not guilty of any fraud or sharp practice and also did not lack in requisite qualification and they had been appointed against sanctioned posts, we feel that the appellants deserve sympathetic consideration in getting appointment against such sanctioned posts on humane consideration. Considering the special facts of this appeal it appears to us that it will be just, proper and consistent with ends of justice to direct that 50 per cent of the sanctioned posts which were held by these appellants should be filled from amongst the appellants on the basis of their inter se merit position by taking into account their academic qualifications by waiving question of age bar if any and usual procedures for such appointment.

7. Arun Kumar Rout's case was distinguished by a Division Bench of this court in the case Sairindhri Dolui vs. State of West Bengal & Ors., reported in 2000(1) SLR 803, wherein it has been noticed:

15. In Arun Kumar Rout and Others Vs. State of Bihar and Others, , the Apex Court held : Although in the matter of getting appointment in the Government Service, the procedure required to be followed for such appointment cannot be by passed and if the initial appointment was illegal on account of not following the procedure for appointment, the incumbent obtaining appointment without following the procedure cannot claim as a matter of right to be regularised. This Court, however, has looked with sympathy when question of regularisation came for consideration in cases of temporary or ad hoc appointments, even made improperly, if the incumbents, had been allowed to continue for a long time

because of the humane problem involved in such continued service.

8. In the said decision the Apex Court in exercise of its jurisdiction under Article 142 of the Constitution of India has directed that the 50 per cent of the sanctioned posts which were held by these appellants should be filled from amongst the appellants on the basis of their inter se merit position by taking into account their academic qualifications by waiving question of age bar if any and usual procedures for such appointment. Thus, illegal appointments even in that case had not been and could not be set aside evidently in view of the decision of the Apex Court in various decisions as for example in Ashwani Kumar and Others Vs. State of Bihar and Others, ; Dr. Arundhati Ajit Pargaonkar Vs. State of Maharashtra and others, ; State of West Bengal & Ors. vs. Tapan Kumar Sahu, reported in 1999(2) CHN 519; J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc.,); State of Madhya Pradesh and Another Vs. Dharam Bir, .

9. Arun Kumar Rout (supra) has also been distinguished by a Division Bench of this court in Swapan Kumar Banerjee vs. Union of India, reported in 1999(5) SLR 807.

10. Furthermore it is a well settled principle of law that there can be no estoppel against statute. See Dr. Ashok Kumar Maheshwari Vs. State of U.P. and Another,), wherein the law has been laid down in the following terms:

Whether a Promissory Estoppel, which is based on a "promise" contrary to law can be Invoked has already been considered by this court in Kasinka Trading and another, etc. etc. Vs. Union of India and another, , as also in Shabi Construction Company Vs. City and Industrial Development Corporation and Another, , wherein it is laid down that the Rule of Promissory Estoppel cannot be invoked for enforcement of a "promise" or a "declaration" which is contrary to law or outside the authority or power of the Government or the person making that promise.

Applying the above principles to the instant case, even if it is accepted that the State Government or the Director, Medical Education & Trading, assured the appellant or any of his colleagues that they would be promoted to the posts of Lecturer, such a "promise" cannot be enforced against the respondents as the avenue of promotion for demonstrators to the post of Lecturers was not provided either under the Statute or any executive instruction. Moreover, if the post of Lecturer was filled up by promotion of Demonstrator, it would defeat the existing mode for recruitment, namely, that it can be filled up by direct recruitment only and not by promotion. It may also be stated that the appellant did not make any clear sound and positive averment as to which officer of the Government, when and in what manner gave the assurance to the appellant or any of his colleagues that they would be promoted to Lecturers. It was also not stated that the appellant had at any time, acting upon the promise, altered his position in any manner, specially to his detriment. Said pleadings cannot be made the

foundation for invoking the Doctrine of Promissory Estoppel.

11. This aspect of the matter has again recently been considered by a Division Bench of this court in the case Rama Dutta & Anr. vs. State of West Bengal, reported in 2000 CWN 671.

Decisions on this question are galore. It is not necessary to refer to the said decisions having regard to the fact that the aforementioned question came up for consideration before the Apex Court recently in Suraj Prakash Gupta vs. State of J & K, reported in 2000(4) SLR 486, wherein the Apex Court has noticed the recent trend in the decision of the Supreme Court holding:

25. The decision of this court have recently been requiring strict conformity with the Recruitment Rules for both direct recruits and promotees. The view is that there can be no relaxation of the basic or fundamental Rules of Recruitment. In Keshab Chandra Joshi vs. Union of India, 1992 (Supp.) I SCC 272 : 1998(7) SLR 469 (SC), the Rule permitted relaxation of conditions of service and it was held by the three Judge Bench that the Rule did not permit relaxation of Recruitment Rules. The words "may consult the PSC" were, it was observed, to be read as "shall consult PSC" and the Rule was treated mandatory. In Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others, , decided by a three Judge Bench, a similar strict principle was laid down. The relevant Rule - Rule 3 of the Residuary Rules (see p. 603) (para 33) in that case did permit relaxation of "Rule". Even so, this court refused to imply relaxation of Recruitment Rule and observed:

the condition precedent, therefore, is that there should be appointment to the service in accordance with Rules and by operation of the Rule, undue hardship has been caused..... It is already held that condition of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed.

26. Similarly, in State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, , it was held that though the power of relaxation stated in the Rule was in regard to "any of the provisions of the Rules" this did not permit relaxation of the Rule of direct recruitment without consulting the Commission and the entire ad hoc service of direct recruit could not be treated as regular service. Similarly, in Dr M.A. Haque and Others Vs. Union of India (UOI) and Others, , it was held that for direct recruitment, the Rules relating to recruitment through the Public Service Commission could not be relaxed. In J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., , it was held that the provision of the J & K Medical Recruitment Rules could not be relaxed for direct recruitment. Backdoor direct recruitments, could not be permitted. See also Dr. Arundhati Ajit Pargaonkar Vs. State of Maharashtra and others, . In Dr. Surinder Singh Jamwal and another Vs. State of Jammu and Kashmir and others, , this court directed the direct recruits to go before the Public Service Commission.

12. A bare perusal of the aforementioned decision of this court as also the Apex

Court leave no manner of doubt whatsoever that an appointment on regular post must be made in terms of the Recruitment Rules having regard to the principles adumbrated under Articles 14 and 16 of the Constitution of India. In the instant case, as indicated hereinbefore, neither any appointment has been made nor any averment has been made by the writ petitioner that such appointment has been made in accordance with the Recruitment Rules or in consonance with the principle laid down under Articles 14 and 16 of the Constitution of India. Such appointment, therefore, cannot be encouraged. Furthermore, a finding of fact has been arrived at by the competent authority that the writ petitioners were appointed on contractual basis and that to for a period of 2 years at one point of time.

13. For the reason aforementioned, we are of the opinion that the learned Judge went wrong in passing the impugned order as evidently the writ petitioners had not been able to prove the existence of any legal right in them and the corresponding legal duty in the respondents to obtain a writ of Mandamus.

For the reason aforementioned, the impugned judgment and order cannot be sustained which is set aside accordingly. This appeal is allowed and the applications are thus disposed of.

Pratap Kumar Ray, J.

I agree.