

(2010) 12 CAL CK 0113
In the Calcutta High Court

Case No : M.A.T. No. 544 of 2009 and C.A.N. 5513 of 2009

Sudipta Mondal

APPELLANT

Vs

Arjun Kumar Dey and Others

RESPONDENT

Date of Decision : 16-12-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 142, 226

Citation : (2010) 12 CAL CK 0113

Hon'ble Judges : Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Biswarup Biswas, for the Appellant; Jaydip Kar, Rabiul Islam for the Respondent No. 1, Ekramul Bari, K.M. Hossain and J. Basak for the School Authority, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This Mandamus-Appeal is at the instance of a third party in a writ-application and is directed against an order dated 19th March, 2008, passed by a learned Single Judge of this Court by which the learned Single Judge, on the first day of moving the writ-application, disposed of the same by permitting the Writ Petitioner to appear at the interview for the purpose of selection for the post of Group-D staff of a school along with other sponsored candidates. His Lordship further directed that the case of the writ-Petitioner should be considered at par with other sponsored candidates for such selection and the age-bar of the Writ Petitioner should be condoned.

2. Pursuant to such direction given by His Lordship, the writ-Petitioner appeared and stood first in the selection whereas the Appellant before us was the second candidate in the panel.

3. The Appellant, with the leave of this Court, has preferred this appeal on the allegation that the writ-Petitioner was not eligible to be selected for the post as he had crossed the age limit fixed for the said post. According to the learned

Advocate appearing on behalf of the Appellant, the learned Single Judge erred in law in condoning the age-bar of the writ-Petitioner when statute has fixed a particular age limit for the post.

4. Mr. Ekramul Bari, the learned advocate, appearing on behalf of the School Authority and Mr. Jaydip Kar, the learned advocate on behalf of the writ Petitioner, have opposed the aforesaid contention of the Appellant and have contended that a High Court sitting in a writ-jurisdiction has the power and authority of condoning the age-limit created for a post in a given situation.

5. According to the learned advocates, the writ-Petitioner was acting as a Group D staff in the selfsame school for a long time on an ad hoc basis and at the time of entering the said service of school on an ad hoc basis, he was within the prescribed the age limit. According to those learned advocates, the learned Single Judge did not commit any illegality in condoning the age-bar fixed under the statute. In support of such contention, they relied upon the following decisions:

1. Sayadul Islam v. State of West Bengal and Ors., reported in 2010 (1) CHN 497;

2 Hindustan Petroleum Corpn. Ltd. Vs. Ashok Ranghba Ambre,

3. Shakur Basti Shamshan Bhumi Sudhar Samiti (Regd.) Vs. The Lt. Governor, National Capital Territory of Delhi and Others, ;

4. Union of India and Anr. v. B.C. Chaturvedi, reported in (1995) 6 SCC 750 (para 20,21,23);

5. Khagesh Kumar and Ors. v. Inspector General of Registration and Ors., reported in AIR 1996 SC 471;

6. Sm. Debirani Bhattacharjee and Anr. v. District Inspector of Schools (S.E.), Burdwan and Ors., reported in 1996 (2) CHN 415.

6. Mr. Biswas, the learned advocate appearing on behalf of the Appellant, has, on the other hand, relied upon the following decisions:

1. Sanjay Kumar Manjul Vs. The Chairman, UPSC and Others,

2. Kendriya Vidyalaya Sangathan and Others Vs. Sajal Kumar Roy and Others,

3. State of Uttaranchal Vs. Alok Sharma and Others,

4. Rina Dutta and Ors. v. Anjali Mahato and Ors., reported in 2010 (3) CHN 168 ;

5. Kanailal Kumar v. Union of India and Ors., reported in 2010 (3) CHN 174;

6. Sri Sukumar Mondal v. State of West Bengal and Ors., reported in 2009 (1) CLJ 642 ;

7. Chairman, Ad-hoc Committee, District Primary School Council, Burdwan v. Rabindra Nath Ghosh and Ors., reported in 2001 (2) CLJ 161;

8. State of Jharkhan and Ors. v. Bijay Kumar and Ors., reported in (2008) 17 SCC 617.

7. Therefore, the questions that fall for determination in this appeal is whether the learned Single Judge could dispose of the writ-application without passing any direction for filing affidavit on the very first day of appearance and whether a High Court entertaining a writ-application under Article 226 of the Constitution of India has the power to condone the age-bar created by a statute when legislature has provided no provision for relaxation in a given situation.

8. After hearing the learned Counsel for the parties and after going through the Rules framed by this Court for exercise of the writ jurisdiction, we are of the opinion that if on the first day of moving the writ-application, in spite of service of the copy of the application and notice of moving the same, the Respondents do not appear, a writ-court is entitled to grant such interim order as it thinks fit; but mere absence of the Respondents on the first day of appearance does not authorize the Court to adjudicate the rights of the parties on that day without passing any direction for filing affidavit-in-opposition. In spite of giving direction for filing affidavit, if the Respondent decides not to give any affidavit, the Court is vested with the right to dispose of the writ-application on the returnable day if no further time is prayed for extending the time earlier granted by showing sufficient cause of non-compliance of the earlier order. However, in a given case, the Respondents on the very first day of moving the writ-application may agree for disposal of the case even without disputing the averments made in the Writ application on a pure question of law and in that event, the writ-court is entitled to dispose of the same. Such is not the position in this case.

9. Thus, on the aforesaid ground alone, the order impugned is liable to be set aside.

10. The next question is whether a writ-court in exercise of its power under Article 226 of the Constitution of India can ignore the age-bar created for a particular post and grant direction upon the Respondent to ignore such bar when even the selecting authority is not vested with any right of relaxation of such age bar by exercise of discretion.

11. After hearing the learned Counsel for the parties and after going through the materials on record, we find that in this case under the relevant statute fixing the age-limit for the selection, no power or authority has been given to the selecting authority to consider the question of relaxation of the age-limit of the Applicants. For Scheduled caste and Scheduled tribe, there is provision of different age-limit, and the candidates of those categories as a matter of right are entitled to the benefit thereof but no provision is made for relaxation of such age limit if a candidate crosses the prescribed one of relaxation.

12. It is now a settled law that a person can approach a High Court under Article 226 of the Constitution of India if any of his legal or fundamental rights has been infringed by the action or inaction of a "State" within the meaning of Article 12 of

the Constitution. So far the writ of Habeas Corpus or of the nature of Public Interest Litigation are concerned, a writ-Petitioner can, however, espouse even the cause of others if their legal or fundamental rights are violated.

13. But the Article 226 of the Constitution does not vest the High Court with the right to interfere when there exists no legal or fundamental right of a person over the subject-matter of the dispute alleged. In the case before us, it is not the case of the writ-Petitioner that although he has the legal right to be considered for appointment to the post concerned, the Respondents are denying such right. On his own admission, he has crossed the age-limit prescribed for such appointment on the cutoff date fixed. Thus, there was no scope of accepting his application even at the instance of the selecting authority. Such being the position, the High Court in exercise of power under Article 226 of the Constitution of India also cannot confer right to the writ-Petitioner to appear at the process of selection. Thus, by passing the direction upon the selecting authority, the learned Single Judge directed the said authority to violate the law of the land. In other words, the learned Single Judge directed the selecting authority to consider the candidature of an ineligible candidate.

14. We are also not at all impressed by the submission of Mr. Bari and Mr. Kar that the writ-Petitioner having joined the school as an employee on an ad hoc basis from the year 1997 when he had the requisite qualification, he should be deemed to have possessed due qualification. His appointment in the school in the year 1997 is not a regular appointment by following the Rules of selection and thus, such employment on an ad hoc basis cannot confer any right on him to condone age-bar which is not provided in the Rule. Such backdoor appointment would not confer any right upon the writ-Petitioner to overcome the age-bar created by statute.

15. We now propose to deal with the decisions cited by Mr. Bari and Mr. Kar.

16. In the case of Hindustan Petroleum Corporation Ltd. (supra), the Apex Court upheld the contention of the employer that the writ-Petitioner having been appointed on an ad hoc basis without following the authority of law, they could not be made permanent employees as would appear from the following observations at paragraphs 21 and 22 of the judgment quoted below:

21. In the case on hand, according to the Appellant Corporation, the workman was appointed on a purely ad hoc and temporary basis, without following due process of law. His name was never sponsored by the employment exchange nor an advertisement was issued for the purpose of filling the post to which the writ Petitioner was appointed. Cases of other similarly situated persons were not considered and the appointment was not legal and lawful. In industrial adjudication, an order of termination was quashed as it was not in accordance with law. But that did not mean that the workman had substantive right to hold the post. The High Court was, therefore, wrong in directing the Corporation to make the writ Petitioner permanent and to extend him all benefits on that basis

from 1992. The said direction, therefore, has to go.

22. For the foregoing reasons, the appeal is allowed by setting aside the direction issued by the High Court ordering the Appellant Corporation to make the writ Petitioner (the Respondent herein) permanent employee of the Corporation and to grant all benefits on that basis with effect from the date of filing of writ petition.

17. After recording the aforesaid finding, the Court made the following observations in the next paragraph upon which the learned Counsel for the Respondents placed strong reliance:

23. We may, however, observe that since the writ Petitioner is working with the Appellant Corporation since 1984 and by now, he has completed more than two decades, his case for permanency be considered by the Corporation sympathetically. If there is age bar in considering the case of the writ Petitioner for permanent appointment, the Appellant Corporation will not treat the writ Petitioner ineligible on that count in view of the fact that he is already in service of the Corporation since 1984. If there are statutory rules/ administrative instructions/guidelines which require minimum educational qualification and/or experience, it is open to the Corporation to insist compliance with such rules/ instructions/guidelines. But if there is power of relaxation with the Corporation or any of its officers, the Appellant Corporation will consider that aspect as well keeping in view the fact that the writ Petitioner was appointed in 1984, has completed service of more than twenty years and is having rich experience.

(Emphasis supplied by us).

18. It is, therefore, clear that the aforesaid observations of the Supreme Court as appearing in the first portion at paragraph 23 which is not marked bold by us is subject to the observations of the latter part of the said paragraph emphasised by us. Thus, the power of relaxation can be exercised only if there exists such power of relaxation. But if there is no power of relaxation in the statutory Rules, as is the case before us, there is no scope of relaxation. Therefore, the said decision is of no avail to the Respondents before us.

19. In the case of Shakur Basti Shamshan Bhumi Sudhar Samiti (supra), all that was held by the Supreme Court was that a writ-court in exercise of its power under Article 226 of the Constitution need not quash any order if it gives rise to another illegal order. In that case, no case of relaxation of any statutory provision was involved. We fail to appreciate how the said decision can be of any help to the Respondents.

20. In the case of Union of India and Anr. v. B.C. Chaturvedi (supra), Hansaria, J., as a member of three-judges-bench, observed that a High Court can also in exercise of power under Article 226 of the Constitution of India do complete justice in the similar way the Supreme Court exercises its power under Article 142. By relying upon such observations, Mr. Kar tried to impress upon us that

we, for doing complete justice, should not interfere with the order of the learned Single Judge even if we find that the order is not in conformity with law. With great respect to Hansaria, J., we are unable to accept those observations as a proposition of law binding upon us in view of the subsequent decision of the Apex Court in the case of State of Jharkhand and Ors. v. Bijay Kumar and Ors. reported in (2008) 17 SCC 617 where it has been specifically held that the power conferred under Article 142 upon the Supreme Court could not be exercised by High Court.

21. In the case of Khagesh Kumar and Ors. (supra), the Supreme Court after specifically recording that it was unable to hold that the Petitioners who had worked as Registration Clerks on daily-wage basis form a separate class and were entitled to claim preferential treatment in the matter of appointment for the post of Registration Clerks as and when recruitment is made for the said post, passed the following direction in the next paragraph which is quoted below:

We are, however, of the view that in the event of the recruitment being made on the post of Registration Clerks on regular basis, the Petitioners or other similarly placed persons should be given one opportunity of being considered for such appointment and they be given relaxation in age requirement provided for such appointment under the rules. During the process of selection weightage may be given for their experience to the Registration Clerks who have worked on daily-wage basis and suitable guidelines may be framed for that purpose by the Subordinate Services Selection Commission.

22. In our opinion, the aforesaid direction was given in exercise of power conferred under Article 142 of the Constitution. The said direction cannot be construed as a law laid down by the Apex Court in view of its finding in the earlier paragraph quoted below:

We find it difficult to appreciate how the Petitioners can claim preference in the matter of regular appointment on the post of Registration Clerks on the basis of this decision. It cannot be said that the Petitioners had to undergo any risk when they joined as Registration Clerks on daily-wage basis. They joined the posts of their own free will knowing fully well that the said appointment was for a very short duration and would not exceed three months during the course of a financial year. We are, therefore, unable to hold that the Petitioners who had worked as Registration Clerks on daily-wage basis form a separate class and are entitled to claim preferential treatment in the matter of appointment on the post of Registration Clerks as and when recruitment is made for the said post.

23. Therefore, the above decision cannot be cited as a precedent in support of the contention that a High Court can in exercise of power under Article 226 of the Constitution relax a statutory bar when no relaxation is provided in the Statute.

24. In the case of Sayadul Islam (supra), a learned Single Judge of this Court by relying upon the decisions of the Supreme Court in the cases of Dr. Surinder

Singh Jamwal and another Vs. State of Jammu and Kashmir and others, and that of State of Madhya Pradesh and Others Vs. Yogesh Chandra Dubey and Others, relaxed the age-bar by taking into consideration the past service rendered by the Applicant as ad hoc employee. We have gone through the aforesaid two Supreme Court decisions relied upon by His Lordship. It appears that in both the matters, the Supreme Court after holding against the writ-Petitioners, to do complete justice passed direction for consideration of their candidature by relaxation of the Rules. But those decisions do not lay down as a proposition of law that a High Court in spite of the finding that the writ-Petitioners are ineligible has the power to do complete justice by directing that they should be entitled to the regularization by relaxation of statutory rules even if those rules do not provide for relaxation. At any rate, the learned Single Judge in passing the said decision took no notice of the following decisions of the Supreme Court taking contrary view which we propose to refer separately in the latter part of our order:

1. Sanjay Kumar Manjul Vs. The Chairman, UPSC and Others,

2. Kendriya Vidyalaya Sangathan and Others Vs. Sajal Kumar Roy and Others,

25. In the case of Sm. Debirani Bhattacharya and Anr. v. District Inspector of Schools and Ors. reported in 1996(2) CHN 415, a Division Bench of this Court presided over by S. B. Sinha, J. (as His Lordship then was) while dismissing an appeal of the writ-Petitioner after holding that "although a court should impart justice keeping in view the dictum that ends of justice is higher than the law but justice must be administered in accordance with law and not otherwise" in the next paragraph, while dismissing the appeal held as follows:

we will hope and expect that the case of the Petitioner No. 2 in the event the vacant posts are to be filled up, shall be considered along with other eligible candidates strictly in accordance with law and in the event the Petitioner is selected, his age bar, if any shall be condoned.

26. Mr. Bari strongly relied upon the aforesaid hope and expectation expressed by the Division Bench and asked us to follow the said view. We are afraid, within the scope of Article 226 of the Constitution there is no scope of expressing "any hope and expectation" after holding that the Petitioner is not entitled to the relief claimed. The aforesaid hope and expectation cannot be said to be the ratio of the decision so as to bind as precedent.

27. At this stage, it will be profitable to refer to the following observations of a Bench of the Supreme Court presided over by Sinha, J. himself in the case of Sanjay Kumar Manjul Vs. The Chairman, UPSC and Others, :

25. The statutory authority is entitled to frame the statutory rules laying down the terms and conditions of service as also the qualifications essential for holding a particular post. It is only the authority concerned which can take ultimate decision therefore.

26. The jurisdiction of the superior courts, it is a trite law, would be to interpret

the rule and not to supplant or supplement the same.

28. Thus, when the statutory rules fix an age-bar which does not provide for any power of relaxation, there is no scope of passing such a direction while disposing of a writ-application.

29. Subsequently, another Bench of the Supreme Court presided over by Sinha, J. in the case of *Kendriya Vidyalaya Sangathan and Others Vs. Sajal Kumar Roy and Others*, specifically held that where there is no scope of relaxation of the age limit for a particular category of the candidates, the High Court erred in law in directing the authorities to consider the case of relaxation of the writ-Petitioner. The following observation of the Bench is relevant and quoted below:

11. The Respondents are not members of the Scheduled Caste or Scheduled Tribe. Age-limit is prescribed for appointment to the general category of employees. The upper age-limit for appointment to the post of LDC is 25 years. The advertisement also says so. The Rules, as noticed hereinbefore, are in two parts. The first part talks about the age-limit. The second part provides for relaxation. Such relaxation can be granted for the purpose specified i.e. in favour of those who answered the descriptions stated therein. Relaxation of age-limit even in relation to the Scheduled Caste and the Scheduled Tribe candidates or the retrenched Central Government employees, including the defence personnel is, however, not automatic. The appointing authorities are required to apply their mind while exercising their discretionary jurisdiction to relax the age-limits. Discretion of the authorities is required to be exercised only for deserving candidates and upon recommendations of the Appointing Committee/Selection Committee. The requirements to comply with the rules, it is trite, were required to be complied with fairly and reasonably. They were bound by the rules. The discretionary jurisdiction could be exercised for relaxation of age provided for in the rules and within the four corners thereof. As the Respondents do not come within the purview of the exception contained in Article 45 of the Education Code, in our opinion, the Tribunal and consequently, the High Court committed a manifest error in issuing the aforementioned directions.

(Emphasis supplied by us)

30. We, thus, find that the decisions cited by the learned advocates for the Respondents are of no assistance to their clients.

31. We, therefore, allow the appeal and set aside the order impugned and hold that the writ-Petitioner is not eligible for the post in question and consequently, set aside his selection based on the order impugned in this appeal.

32. The selecting authority is directed to proceed with the process of selection in accordance with law after excluding the name of the writ-Petitioner who is not eligible in terms of the recruitment rules.

33. In the facts and circumstances, there will be, however, no order as to costs.

34. I agree.