

(2006) 12 CAL CK 0041

In the Calcutta High Court

Case No : F.M.A. No. 739 of 2006, C.A.N. 4807 of 2006

Suman Bera

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 04-12-2006

Acts Referred:

Citation : (2007) 1 ILR (Cal) 315

Hon'ble Judges : Prabuddha Sankar Banerjee, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Milan Bhattacharya, Md. Idrish Ali, Debabrata Chatterjee and Aparna Samanta, for the Appellant; Arabindo Chatterjee and Pinaki Banerjee for State, Amal Baran Chatterjee and Tulsidas Roy, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This Mandamus Appeal is at the instance of an unsuccessful writ-Petitioner and is directed against an order dated April 25, 2006 passed by a learned single Judge in W.P. No. 114 (W) of 2006 thereby dismissing the writ application filed by the Appellant on the basis of the submission of the learned advocate appearing on behalf of the State-Respondent that there was no existing vacancy at that point of time for the appointment of a kerosene oil dealer and as such, there was no scope of considering the representation of the writ-Petitioner for considering his candidature.

2. The sum and substance of the allegation made by the Appellant in the said writ-application was that a vacancy of kerosene oil dealer was notified by the State Respondent on 15th June, 2005 and pursuant to such a notification, the writ-Petitioner applied for the said vacancy but the State-Respondent without considering the candidature of the writ-Petitioner was going to select the private Respondent No. 5 although the said Respondent was not qualified to be appointed as such dealer.

3. As indicated earlier, on the very first date of moving the said writ application,

Mr. Chatterjee, the learned advocate appearing on behalf of the State-Respondent submitted before the learned single Judge that there was no scope of appointment of any kerosene oil dealer by virtue of the notification of March, 1999 annexed to the writ application and as such, the said writ-application was liable to be dismissed. It appears from the order impugned, that His Lordship accepted the aforesaid submission of Mr. Chatterjee and came to the conclusion that the notification of March, 1999 did not give the writ Petitioner any right to apply for kerosene oil dealership and as such, the writ-application was liable to be dismissed. His Lordship, accordingly, dismissed the writ application.

4. Being dissatisfied, the writ-Petitioner has come up with the present Mandamus Appeal.

5. Mr. Bhattacharya, the learned advocate appearing on behalf of the Appellant strenuously contended before us that the learned single Judge did not notice the contents of the writ-application filed by his client and was misled by the submission of the learned advocate of the State-Respondent who deliberately made disingenuous statement before the Court that there was no vacancy at that relevant point of time for the appointment of a kerosene oil dealer in the area in question. Mr. Bhattacharya took us through the entire writ application and pointed out that his client made specific averments that the notification dated 15th June, 2005 was issued for filling up the vacancy of a kerosene oil dealer and that he duly applied for that vacancy. Mr. Bhattacharya submits that his client made specific allegation that the Respondent No. 5 was going to be appointed illegally without considering the candidature of his client. Mr. Bhattacharya, therefore, prays for setting aside the order impugned.

6. Mr. Arabindo Chatterjee, the learned advocate appearing on behalf of the State-respondent although initially tried to maintain his stance taken before the learned single Judge, ultimately, after going through the records of the case fairly conceded that it was a mistake on his part in making wrong submission before the learned single Judge that there was no vacancy. Mr. Chatterjee submits that he was misled by the first annexure of the writ application which was the notification issued in the month of March, 1999 and accordingly, he took instruction from his client whether there was any vacancy pursuant to such notification. Mr. Chatterjee submits that he totally overlooked the next document showing that there was really a vacancy declared by his client on 15th June, 2005 for filling up the kerosene oil dealership in question.

7. In view of such fact, we were convinced that the learned single Judge committed mistake in accepting the submission of Mr. Chatterjee that there was no vacancy at the relevant point of time and the learned single Judge also overlooked the other materials available from the writ application itself indicating that there was a vacancy declared on 15th June, 2005 and the grievance of the writ-Petitioner was that his candidature was not at all considered for the purpose of illegally giving appointment to the private Respondent No. 5. Since the private Respondent No. 5 has really been appointed in the said vacancy, instead of

remanding the matter back to the learned single Judge for fresh decision in the writ-application, we decided to hear out the main writ-application itself while disposing of this appeal as the relevant records were placed before us and were kept in the safe custody of the learned Register General in view of the allegation of the Appellant that the State-Respondent may interpolate the documents contained therein.

8. Mr. Bhattacharya, the learned advocate appearing on behalf of the Appellant has drawn our attention to the essential qualification of an Applicant for the aforesaid dealership and has contended that the Respondent No. 5 had no such requisite qualification at the time of presentation of the application for dealership. Mr. Bhattacharya contends that in the advertisement given by the State-Respondent it was specifically provided that the Applicant must have the financial solvency to run the dealership and should be prepared to show the proof of the fact that he had at least Rs. 10,000/-. Mr. Bhattacharya submits that it will appear from the materials on record that on the last date of submission of the application, namely, June 29, 2005, the Respondent No. 5 had no such back-balance and he had procured the requisite amount in his bank account subsequently in the month of July, 2005. In view of such assertion of Mr. Bhattacharya, we directed the Respondent No. 5 to affirm an affidavit disclosing the amount lying in his bank account on the last date of filing of such application. In spite of such direction, the Respondent No. 5 did not affirm any such affidavit disclosing the amount lying in his account on that date but placed before us the passbook subsequently issued in the month of July, 2005 and from the said passbook it is not possible to ascertain what was the amount lying in his account either at the time of presentation of his application or on the last date of filing of such application. Mr. Bhattacharya further contends that there are several criminal proceedings pending against the private Respondent No. 5 involving moral turpitude and as such, the State Government erred in law in appointing such a person as the kerosene oil dealer. According to Mr. Bhattacharya if any criminal proceeding is pending against an Applicant alleging commission of offence involving moral turpitude, such fact is a disqualification and in support of such contention he placed before us advertisement given by the State-Respondent in respect of a vacancy in the Salt Lake area. Mr. Bhattacharya, therefore, prays for setting aside the appointment of private Respondent No. 5 and for selecting his client in his place.

9. Mr. Chatterjee, the learned Counsel appearing on behalf of the State-Respondent, fairly supported the contention of Mr. Bhattacharya and submitted that no material was placed by the private Respondent No. 5 showing that he had the requisites sum of Rs. 10,000/- in his bank account at the time of presentation of the application. Mr. Chatterjee points out that the private Respondent No. 5 deposited some amount in the month of July, 2005, as a result, the amount lying in his account exceeded the sum of Rs. 10,000/-. Mr. Chatterjee concedes that he has got subsequent information from his clients that the allegation of Mr. Bhattacharya that several criminal, litigations are pending

against private Respondent No. 5 of committing offence involving moral turpitude is correct.

10. Mr. Amal Baran Chatterjee, the learned advocate appearing on behalf of private Respondent No. 5 has however, vehemently opposed the aforesaid contentions advanced by Mr. Bhattacharya and has justified the appointment of his die to According to Mr. Chattrjee, in the advertisement for the dealership, all that was demanded was that the candidate should have financial solvency to run such dealership and should be able to produce proof of the fact that he had at least Rs. 10,000/- in his bank account. Mr. Chatterjee contends that nothing was indicated in the advertisement that such amount should be possessed by the Applicant at the time of filing of the application. He contends that if an Applicant at the time of verification can show that the said amount was lying in his bank account, that was sufficient compliance of the requirement. Mr. Chatterjee, therefore, contends that his client having shown document evidencing accumulation of Rs. 10,000/- in his bank account at the time of inspection, he cannot be said to be disqualified. Mr. Chatterjee on the other hand, contended that although the writ Petitioner had the requisite amount at the time of filing of the application, subsequently, in veiw of withdrawal of some amount, it came down to less than Rs. 10,000/- for some time although he thereafter deposited further amount. In other words, Mr. Chatterjee contends that even the writ Petitioner had not the requisite qualification for getting the dealership for want of the requisite amount of money in his bank account.

11. As regards the other allegation that there are criminal cases pending against his client alleging commission of offence involving moral turpitude, Mr. Chatterje submits that the adveristement did not disqualify an Applicant if any criminal case was pending against him. He submits that the advertisement cautioned that if any person was convicted of offence involving moral turpitude, he should not be eligible. According to Mr. Chatterjee, so long a person is not found to be guilty, he cannot be deprived of the benefit of dealership simply because some false criminal case was filed against him. According to Mr. Chatterjee, unless a person is found guilty by a competent court of law, he is presumed to be innocent during the pendency of the proceedings. He, therefore, prays for dismissal of the appeal.

12. Therefore, the first question that arises for determination in this appeal is whether the Respondent No. 5 had" the requisites financial solvency to be appointed as a kerosene oil dealer for the vacancy in question.

13. It appears from the advertisement given for filling of the vacancy that the candidate must produce the document showing proof of having Rs. 10,000/- in his possession. In the application, there is no specified column compelling the Applicant to disclose the actual amount he had in his possession. The State-Respondent at the time of verification is required to be convinced that the Applicant had such required qualification. In the case before us, the last date of submission of the appliation was June 29, 2005. We have already found that the

Respondent No. 5 could not show any material pointing out that he had that required amount in his bank either at the time of presentation of the application or even on the last date of filing of such application. If a candidate is unable to produce document evincing that he had the required amount on the date of his application, he should be declared to be disqualified. Subsequent acquisition of money will not enable an Applicant to qualify himself for the said vacancy. We, therefore, find that in the case before us, the State Respondent ought to have rejected the candidature of the Respondent No. 5 on the ground of lack of financial solvency.

14. Regarding the other point that several criminal litigations are pending against him, in our view, having regard to the advertisement given, such fact cannot disqualify a candidate. Unless it is specifically stated in the advertisement that a person, against whom any criminal case alleging offence involving moral turpitude is pending, will not be entitled to apply for the vacancy, pendency of such type of criminal cases against a candidate cannot be a ground of disqualification. In the advertisement all that has been stated is that the Applicant should not have been convicted of any criminal offence involving moral turpitude. We, therefore, find substance in the contention of Mr A.B. Chatterjee, the learned advocate appearing for the Respondent No, 5 that so long his client is not found to be guilty by the competent court of an offence involving moral turpitude, he cannot be disqualified on the ground of pendency of such litigation.

15. However, in view of our finding that the Respondent No. 5 had no requisites financial solvency at the time of presentation of his application or even on the last date of filing of such application, we are left with no other alternative but to conclude that the State-Respondent erred in law in selecting the Respondent No. 5 for the vacancy in question and as such, his appointment should be set aside.

16. The next question is whether the writ-Petitioner should be appointed in place of the Respondent No. 5. It appears from record that the State-Respondent has kept his name in the second position in the merit-list. It however, appears that although at the time of filing of the application, he had the requisite amount of Rs. 10,000/- in his bank account, subsequently, at the time of inspection, he had not that required amount in the bank due to withdrawal of some amount, although, subsequently, he made up that deficiency. In our opinion, having regard to the qualification disclosed in the advertisement, the financial solvency mentioned therein should be maintained by a candidate right from the date of filing of the application till the selection process is over. If on the date of filing of such application, he had the requisite financial solvency, but, subsequently, before the selection process is over, he ceased to be financially solvent in accordance with standard mentioned in the advertisement, he cannot be selected simply because subsequently, he regained such qualification. We therefore, find that in the fact of the present case, both the writ Petitioner and the Respondent No. 5 had financial deficiency for being considered for appointment in the vacancy in question. We are, therefore, unable to accept the contention of Mr.

Bhattacharya, the learned advocate appearing on behalf of the Appellant, that his client should be appointed in place of Respondent No. 5.

17. In such a situation, the State-Respondent should be directed to make fresh selection for filling in the said vacancy after setting aside the appointment of Respondent No. 5.

18. We, therefore, set aside the order impugned in the Mandamus Appeal and at the same time, quash the order of appointment of Respondent No. 5 for the vacancy in question with the direction to the State-Respondent to give fresh advertisement for filling in the said vacancy by initiating fresh process of selection. The selection should be completed within three months from today.

19. the Mandamus-Appeal is thus allowed. No order as to costs.

20. Let the original records be returned to the learned advocate for the State-Respondent.

Prabuddha Sankar Banerjee, J.

I agree.