

(2010) 03 CAL CK 0009
In the Calcutta High Court

Case No : Writ Petition No. 7221 (W) of 2007 with C.A.N. 6786 of 2008

Sunil Kumar Das

APPELLANT

Vs

Director of Public Instruction, W.B. and Others

RESPONDENT

Date of Decision : 01-03-2010

Acts Referred:

Citation : (2010) 2 CALLT 448

Hon'ble Judges : Kalyan Jyoti Sengupta, J; Kalidas Mukherjee, J

Bench : Division Bench

Advocate : Bidyut Kiran Mukherjee and Mr. Protap Kumar Sen, for the Appellant; Partha Sarathi Bhattacharyya, Raju Bhattacharyya and Mr. Prabu Maji, Jayanta Kumar Dutta for the Respondent No. 5 and Mr. Soumen Dutta for the Private Respondent, for the Respondent

Judgement

The Judgment of the Court was as follows:

1. This matter has been referred to by the Hon"ble Chief Justice, as learned single Judge has not been able to agree with the views on a particular point with another learned single Judge.

2. The point formulated by the learned trial Judge for which this matter has been referred to, is as follows:

Whether for the purpose of filling up of a vacant post specified in Statute 160(a) (ii) of the Vidyasagar University First Statutes, 1983 at a time the memorandum No. 924-Edn (CS)/ 10M-10/03 dated 26th November, 2007 and 585-Edn (CS)/10M-20/08 dated 9th September, 2008 have not become operational, the recruiting authority was required first to ascertain whether there was any efficient and experienced member of the lower subordinate staff having the requisite qualifications, as prescribed in Statute 163(c) and if such lower subordinate staff were found suitable, fill up such vacancy from such lower subordinate staff without following the procedure for direct recruitment or they were required to seek sponsorship from the employment exchange in terms of

memorandum No. 830-Edn(CS) dated 31st October 1995 or consider the claims of lower subordinate staff who were efficient and experienced, having suitable qualification, only if names of such staff when sponsored by the employment exchange?

3. On reading the judgment of the learned referring trial Judge, we find that another learned single Judge while considering the relevant provision of the recruitment rules of North Bengal University, had taken different view. This recruitment rule relates to recruitment for filling up of the post of clerk in a college controlled by the Vidyasagar University. Applying the doctrine of *pari materia*, the aforesaid question has been referred to, for answer:

We have checked up the relevant recruitment rules in both the universities and we find that the languages are identically same. The writ petition before the learned single Judge pertains to the question of granting approval to the appointment for the post of clerk of the college as the writ petitioner was selected on the basis of open selection method (direct recruitment). The Director of School Education, however, is of the view that the selection method is legally flawed as the interpretation given by the college authority with regard to the recruitment process in the Statute, is not correct. The Director of School Education's view is that the field of choice, while filling up the post of clerk is very restricted and shall not be extended to outsiders and it must be confined to the departmental experienced and eligible candidates, as mentioned in the relevant rules. Therefore, we need to set out the relevant recruitment rules before we express our mind on this question.

4. In Statute 160 at page 200 of the paper book, the classification of the employees of the colleges are described as follows:

Clause (a) (i)

Clause (a) (ii), Assistant, Clerk, Library Assistant, Laboratory Assistant, Store Clerk, Store-Keeper, Care-taker, Stenographer, Record Keeper, Collection Clerk and such other posts as may be approved by the State Government.

The method of recruitment has been described, in all the various non-teaching posts as mentioned in Statute 163, in the following manner:

S. 163: (a) Whenever a permanent vacancy occurs in any of the posts referred to in Sub-clause (i) of Clause (a) of Statute 160, such vacancy shall in the first instance be filled up by promotion from amongst the employees holding any of the posts referred to in Sub-clause (ii) of Clause (a) of Statute 160. In the matter of such promotion, efficiency, seniority including academic qualifications, character rolls and attendance shall have to be taken into consideration. In case no suitable candidate for such promotion is available, such permanent vacancy shall be filled up by direct recruitment in accordance with the procedure laid down for the purpose:

Provided that the provision relating to recruitment of non-teaching employees of

affiliated colleges as laid down in the foregoing Statutes shall not apply in cases where, on compassionate ground, a wife, son, daughter, or dependant of any employee - both teaching and non-teaching dying in harness is to be offered a job consistent with his/her qualifications. He/She shall have precedence over others in the matter of appointment or placement, as the case may be:

Provided further that the provision mentioned above shall also be applied in case of a college employees who is disabled permanently or otherwise incapacitated rendering him unfit to continue in service, provided this fact of disablement is certified by a medical officer authorised by the Director of Health Services.

(b) Whenever a permanent vacancy occurs in any of the posts referred to in Sub-clause (ii) of Clause (a) of Statute 160, in the matter of filling up of such vacancy, the procedure as laid down in these Statutes for direct recruitment shall be followed. (Emphasis supplied)

In the case of filling up of vacancies in the posts referred to in Sub-clause (ii) of Clause (a) of Statute 160, efficient and experienced members of the lower subordinate staff having the requisite qualifications shall get preference over others.

5. Here, on the question of recruitment in the post of clerk, Clauses (b) and (c) of Statute 163 will have to be applied.

6. In the context as above, Mr. Bidyut Kiran Mukherjee, learned Senior Advocate appearing for the writ petitioner submits that views taken by the learned single Judge in the writ petition is correct one and having regard to the language mentioned in both the Clauses (b) and (c) of Statute 163, there cannot be any interpretation other than what has been arrived at by the learned single Judge. He submits that by the aforesaid clauses, field of choice cannot be restricted. According to him, while assessing the performance of the respective candidates, efficient and experienced members of the lower subordinate staff having requisite eligibility qualification, will have a weightage, but they are to participate in the selection process along with other candidates who have applied in response to the public notification as well as sponsorship by the employment exchange. He further submits that this post has to be filled up essentially by the method of direct recruitment. While Clause (a) of Statute 163 has provided for filling up of vacancy in other post primarily by mode of promotion, in case of non-availability of such candidate in the department then direct recruitment can be resorted to. If it is read as a whole then it will be clear that there cannot be any interpretation other than what has been arrived by the learned trial Judge. He further submits, true that another learned single Judge in another matter, while interpreting the same provision, has taken a different view; but such view cannot be accepted, for it will lead to an anomalous situation, if not absurdity.

7. Mr. Jayanta Kumar Dutta, the learned counsel appearing for the college authority adopts and supports the submission of Mr. Mukherjee. He did not advance any submission apart from supporting Mr. Mukherjee.

8. Mr. Partha Sarathi Bhattacharyya learned counsel appearing for State submits that while interpreting a portion of the Statute, the same has to be read as a whole and purposive meaning has to be given. He submits further that the intention of the subordinate legislature is to give primacy to the departmental staff who are efficient and, having experience with the requisite qualification. They are to be chosen first and if they are not available according to him, direct recruitment from other sources may be resorted to.

9. The same argument has been advanced by Mr. Soumen Dutta appearing for the private respondent in the writ petition as done by Mr. Bhattacharyya. He further submits that if clauses (b) and (c) are read conjointly, the intention is very clear that post has to be filled up by direct recruitment but candidates should be chosen, at the first instance, from the departmental staff and no other source.

10. Having considered the rival submission of the respective parties, we are called upon to decide what should be true and correct interpretation having regard to intention of legislature for applicability of Clauses (b) and (c) together.

11. Mr. Bhattacharyya and Mr. Dutta say that Clauses (b) and (c) should be construed in such a way that the efficient and experienced members of staff should get first preference in the matter of appointment and in case of failure, candidates from outside sources may be invited. From this submission it is very clear that the object was to boost up working spirit of the subordinate experienced staff and it can only be fulfilled if the aforesaid methodology is adopted.

12. We are unable to accept the submissions of Mr. Dutta and Mr. Bhattacharyya. If we import this interpretation, this will lead to absurdity in the matter of operation of any statute. However, Mr. Bhattacharyya is correct in saying that these particular clauses of the entire Statute have to be read as a whole relating to recruitment and promotion.

13. When we read clause (a) of Statute 163 with proviso, we notice that there is no ambiguity that the post mentioned therein has to be filled in by promotion at the first instance. In the event, those candidates are not available, such permanent vacancy shall be filled up by direct recruitment in accordance with the procedure laid down for the purpose. This clause leaves no manner of doubt or any ambiguity to make it operative for any eventualities. When we read Clause (b), which is a relevant provision for filling up the post of Clerk, we find that the method is direct recruitment.

14. We need not explain the difference between promotion and direct recruitment. However, while making direct recruitment, the employer can have the option to decide the field of choice. Here, the question is whether the field of choice should be restricted to the departmental candidates only, as mentioned in Clause (c) or candidates from outside should also be invited. If we accept Mr. Dutta's interpretation that departmental candidate should, at the first instance,

be chosen as an eligible candidate for selection and in the event of non-availability, direct recruitment from outside source maybe resorted to.

15. We do not find any express provision in the Statute unlike Statute 163(a), what should be the methodology in case of non-availability of suitable departmental candidate. If we accept the submission of Mr. Dutta, then we are to supply the words of the legislature for applying the principle "casus omissus" particularly in the same situation in the same statute expressed provision is made in case of non-availability of departmental candidate.

16. It is settled position of law "casus omissus" doctrine can be applied in rare cases. It would no proper for Court to supply missing words and phraseology. We think if we read two clauses conjointly, intention of the legislature can be gathered and deduced as follows:

The intention of the legislature is very clear that the appointment must be made by direct recruitment but field of choice, according to us, should be not only amongst others the departmental candidate having requisite qualification, but also the candidates from other sources, namely, from the advertisement and sponsorship of the employment office, and all the candidates who are eligible, shall be allowed to participate in one selection process and while assessing their performance, obviously at the time of appointment, efficient and experienced members of the lower subordinate staff shall have a weightage over the other candidates who may be from departmental candidate having no experience nor efficiency and also the candidates from outside. If the interpretation sought to be given by Mr. Dutta, is accepted, it will lead to absurdity for the simple reason, if no efficient or experienced members of the lower subordinate staff is available then there cannot be any filling up of the post for there is no expressed methodology provided in that situation. On the other hand the interpretation given by us, as above, if adopted, then intention of the subordinate legislature can also be fulfilled.

17. It is settled position of law that the Court should make an endeavour to see that any portion of the Statute as far as practicable, is to be made operative rather than to allow it to be rendered nugatory.

18. Under those circumstances, we answer the question, as above, in the manner as follows:

The college authority is entitled to fill up the permanent post of clerk by the method of direct recruitment and the field of choice shall be from departmental candidates including the candidates as mentioned in Clause (c) as well as the candidates who shall be responding to public advertisement or public notification and candidates sponsored by the employment office However, while assessing their performances and giving appointment, efficient and experienced members of the lower subordinate staff should be given preference and weightage. Thus, this reference is disposed of.

19. Now this matter should be placed before the learned trial Judge to decide the matter for disposal.

20. The application being C.A.N. 6786 of 2008 is thus disposed of.

No order as to costs.

Xerox certified copy of this order shall be supplied to the applicants.