

(2015) 03 CAL CK 0101

In the Calcutta High Court

Case No : 21805(W) of 2009 and W.P. 7029(W) of 2010

Tapan Das

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 27-03-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 16

Citation : (2015) 03 CAL CK 0101

Hon'ble Judges : Ashoke Kumar Dasadhikari, J

Bench : Single Bench

Advocate : Ajoy Debnath, Debranjana Das and Suman Sohanabis (Mondal), for the Appellant; Jaharlal De and Shamim ul Bari, Advocates for the Respondent

Final Decision : Allowed

Judgement

Ashoke Kumar Dasadhikari, J—Both the writ petitions filed by the writ petitioner being W.P. No. 21805(W) of 2009 and W.P. No. 7029(W) of 2010 were taken up together for disposal since the issues involved in both the writ petitions are same.

2. In the first writ petition, writ petitioner made a prayer for issuing a mandamus declaring sub-rule (1), (2) and (3) of Rule 8 of the West Bengal Primary School Teachers Recruitment Rules, 2001 vide Notification No. 57-SE (Pry)/10R-1/91 dated 15th January, 2002 are ultra vires to Articles 14 and 16 of the Constitution of India since it takes away the fundamental rights of the petitioner as stipulated under those two Articles.

3. Further prayer was made for issuance of a writ in the nature of Mandamus commanding the respondent no. 4 i.e. the Employment Officer, District Employment Exchange, Kakdwip, South 24 Parganas, to sponsor the name of the writ petitioner to the South 24 Parganas District Primary School Council for the purpose of selection of assistant teacher in primary school under the said District Primary School Council along with other candidates to appear in the selection process to be held on 20th December 2009.

4. It was also prayed that a writ in the nature of Mandamus to be issued commanding respondent authorities to arrange for a wide publication and/or advertisement for the post in question and to invite applications from amongst eligible candidates along with the petitioner.

5. Writ of Certiorari is also prayed directing the respondents to produce all relevant records relating to the case. Prayer for interim order was also made to allow the petitioner to sit for interview for the post of assistant teacher in the primary schools in South 24 Parganas District Primary School Council, scheduled to be held on 20th December 2009, etc.

6. The second writ petition moved by the petitioner containing a prayer for issuance of writ in the nature of Mandamus commanding the respondent authorities particularly the respondent no. 3 to issue appointment letter in favour of the petitioner for the post of assistant primary teacher under the aforementioned District Primary School Council cancelling the appointment of the private respondent by recasting the panel prepared for the post in question

7. At the time of moving the first writ petition, the learned Single Judge issued a direction for filing affidavits and passed an order as an interim measure directing that the Council to permit the petitioner to participate in the written examination scheduled to be held on 20th December 2009, strictly without prejudice to the rights and contentions of the respondents in this petition. It was made clear that mere participation shall not create any equity in favour of the petitioner and such participation shall abide by the result of the writ petition. The Council shall be at liberty to proceed in accordance with law for the purpose of preparation of panel for recruitment to the vacant post of primary teachers in schools under its jurisdiction but no appointment shall be given to any of the selected candidates without obtaining leave of this Court.

8. It was also clarified that the interim order is passed because the Hon''ble Apex Court in a number of decisions has held that restricting selection to employment exchange sponsored candidates is violative of Articles 14 and 16 of the Constitution and in the event Rule 8, which is under challenge, is struck down, the process of recruitment initiated by the Council without advertising the vacancies would become vulnerable. Writ petition was fixed for hearing on 28th January, 2010.

9. Pursuant to such direction, the petitioner, although not sponsored by employment exchange, was allowed to proceed in the selection process and he secured requisite marks for being empanelled for appointment as primary teacher. He has also secured more marks than the last appointed candidate.

10. The matter was taken up for hearing finally on 28th January 2010 in absence of the learned advocate for the petitioner. After hearing the learned State counsel and taking note of the Hon''ble Division Bench decision of this Court reported in Tanmoy Ramaya Lahiri and Others Vs. The State of West Bengal and Others, (2008) 3 CALLT 205 wherein Rule 8 has been found to be logical and rational, the

Court formed an opinion that the petitioner can have no grievance in respect of the selection process being confined only to employment exchange sponsored candidates. The learned Court also held that the Recruitment Rules, 2001 do not permit the Council to consider the candidature of any candidate not sponsored by the employment exchange and since the petitioner's name was not so sponsored, the Council suo motu could not have issued call letter in his favour to participate in the written examination. Accordingly, the learned Single Judge was of the view that the Hon''ble Division Bench decision binds the learned Single Judge and therefore, the petitioner is not entitled to any relief. Writ petition was, accordingly, dismissed.

11. Since the first writ petition filed by the writ petitioner was dismissed declaring the petitioner as ineligible to appear and participate in the selection process, the learned Single Judge is of the view that the second writ petition is also not maintainable and accordingly, the second writ petition was also dismissed.

12. The order of dismissal passed by the learned Single Judge in the aforementioned two writ petitions were challenged by the writ petitioners by filing two separate writ appeals and those two writ appeals were heard and disposed of by the Hon''ble Division Bench by two orders passed on 2nd September, 2013. The Hon''ble Division Bench set aside the order of the first writ petition dated 28th January, 2010 by which the writ petition was dismissed on merit in the absence of the learned Advocate for the writ petitioner on the ground that in view of absence of the writ petitioner's learned Advocate writ petitioner was not in a position to represent his case before the Hon''ble Court and in the opinion of the Hon''ble Division Bench in absence of the learned Advocate for the writ petitioner, the appropriate course could have been to dismiss the writ petition on default. But the dismissal could not have been made on merits without hearing the writ petitioner either in person or through his learned Advocate. Therefore, the order of dismissal of the first writ petition was set aside and the matter was remanded to the learned trial court for hearing de novo after exchange of affidavits, if affidavits have not already been exchanged. Thereafter, the order of dismissal of the second writ petition was also set aside on the ground that since the order of dismissal was passed on the reason by the learned Single Judge that the earlier writ petition in which permission to the writ petitioner to appear at the interview was granted, had been dismissed. The second writ petition automatically fails.

13. Therefore, having restored the first writ petition the Hon''ble Division Bench was pleased to set aside the order of dismissal of the second writ petition and the second writ petition was also referred to the learned Single Judge for fresh hearing. Accordingly, both the writ petitions have come up for hearing before this Court.

14. Learned Advocate for the petitioner submits that there are decisions galore wherein the Hon''ble Apex Court have clearly held that the appointing authority is

not only obliged to consider the candidates sponsored by the employment exchange but they should also invite applications from general candidates by way of giving advertisement in the newspaper having wider circulation and also by display on their notice board, by announcing on radio, television and news bulletin and thereafter they are to consider the cases of all the candidates who have applied. It was the guideline and/or mandate given by the Hon''ble Apex Court with an observation that if this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates.

15. Learned Counsel submitted that this was a decision which was taken by the Hon''ble Apex Court in case of Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao and Others, (1996) 8 AD 174 : (1997) 75 FLR 353 : (1996) 9 JT 638 : (1997) 1 LLJ 56 : (1996) 6 SCALE 676 : (1996) 6 SCC 216 : (1996) 5 SCR 73 Supp . Learned Counsel then submitted similar view was expressed in case of Raj Kumar and Others Vs. Shakti Raj and Others, AIR 1997 SC 2110 : (1997) 2 JT 688 : (1997) 2 SCALE 228 : (1997) 9 SCC 527 : (1997) SCC(L&S) 1029 : (1997) AIRSCW 1959 : (1997) 3 Supreme 572 . He further submitted that there are also other judgements in this regard.

16. Learned Counsel then submitted that in the instant case the writ petitioner moved his first writ application with a prayer that this Court should direct the concerned primary school council to advertise the post in newspaper thereby inviting applications from all candidates including the petitioner so that the petitioner can get an opportunity to compete along with others, specially when the Hon''ble Apex Court have held that selection should not be made from the candidates sponsored by the employment exchanges only but the posts should be advertised by adopting different modes so that all eligible candidates can get opportunity to compete.

17. Learned Counsel then submitted that the Hon''ble Division Bench of this Hon''ble Court in case of Manik Chandra Das Vs. State of West Bengal and Others, (2007) 2 CHN 761 held, in view of the Hon''ble Apex Court judgement rendered in K.B.N. Visweshwara Rao (supra) the executive order issued by the Government of West Bengal under memo dated 31st October, 1995 is not consistent with the law laid down by the Hon''ble Supreme court which has also been affirmed by the subsequent decisions of the Hon''ble Supreme Court where similar question arose and the Hon''ble court was of the view that the executive order should be read subject to law laid down by the Hon''ble Supreme Court. Ultimately, the Hon''ble Division Bench held that the restriction put by the aforesaid executive order to the effect that only employment exchange sponsored candidates are to be considered for employment cannot be sustained and the respondent authorities cannot prevent the appellant or anybody from participating in the interview for filling up vacant posts on the basis of or pursuant to executive order issued by the Government of West Bengal.

18. Accordingly, the Hon''ble Division Bench directed the appropriate authority of

the department to consider the cases of all the candidates who have applied for filling up any vacant post or posts along with employment exchange sponsored candidates strictly in accordance with law in order to ensure equal opportunity in the matter of employment to all the eligible candidates.

19. Learned Counsel then submitted that in this regard this Hon''ble Court constituted a Special Bench consisting of five Hon''ble Judges of this Hon''ble Court and the point for consideration was whether the authorities are obliged to consider the case of employment exchange sponsored candidates for filling up the vacancies or should allow the candidate who upon obtaining leave on a writ application filed by him appeared at the selection process for recruitment in the post.

20. Learned Counsel submitted that it was the decision of the Hon''ble Special Bench that the relevant statutory provisions contained in the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 only requires intimation of vacancies by the employment exchanges and no obligation was prescribed for recruiting only the candidates sponsored by the employment exchange. The Hon''ble Special Bench also held that the law settled by the Hon''ble Apex Court is the law of land and is binding on all courts under Article 141 of the Constitution of India. It was also held by the Hon''ble Division Bench that the Government may not compel statutory bodies to make appointment of persons from among candidates sponsored by the employment exchanges. It was also held that the disapproval of the decision by the Division Bench which followed the Special Bench is a disapproval of the decision by the Special Bench and as such, not being an omission but being a conscious consideration without attracting the rule of sub silentio is binding under 141 of the Constitution of India.

21. Learned Counsel then submitted that in that case the Hon''ble Special Bench also held that the Hon''ble Apex Court consciously determined the issue as to the right of a candidate to be considered for appointment without being sponsored by the employment exchange on the ground on which the right of Abu Taher, unreported decision in Civil Appeal No. 1203 of 2001, was declined by the High Court relying on decision in Debasish Dutta, reported in 1998(2) CLJ 1 which was found to be unacceptable to the Apex Court in view of decisions in K.B.N. Visweshwara Rao (supra) and Raj Kumar (supra) which expressly indicate that the Hon''ble Apex Court had borrowed and reaffirmed the ratio decided in the said two decisions to disagree with the view taken by the Division Bench following the ratio decided in Debasis Dutta's case, by the Special Bench.

22. Learned Counsel submitted that in the instant case the learned Single Judge allowed the writ petitioner to participate in the selection process although subject to result of this writ petition but the learned Judge although noted the decision of the Hon''ble Apex Court, subsequently held contrary in view of the decision of the Hon''ble Division Bench of this Hon''ble Court wherein Rule 8 was declared constitutional and valid.

23. Learned Counsel submitted that the writ petitioner who was allowed to participate being a general candidate although not sponsored by the employment exchange has a right to appear and contest in the selection process in view of the Hon''ble Apex Court judgment delivered in case of K.B.N. Visweshwara Rao (supra) and Raj Kumar (supra). According to him, the writ petition should be allowed and a direction be given to give employment to the writ petitioner who has secured more marks than the last appointed candidate.

24. The matter was contested by the council. Mr. Bari, learned Counsel appearing for the Council submits that the ratio was considered by a three-Judges Bench of this Hon''ble Court in case of (Tulsi Rai Vs. Krishan and ors.) along with (Shyamal Kumar Jana Vs. The State of West Bengal & ors.) alongwith (Rabindra Nath Pradhan Vs. The State of West Bengal & ors.) in a mandamus appeal being F.M.T. 768 of 2007. The Hon''ble Special Bench of this Court have held that in this type of writ application, it is the first duty of the Court to see whether the allegations of the writ petitioner that he has the requisite qualification for the post. If the Court is satisfied on that aspect then it should verify whether the allegation of the writ petitioner that no advertisement was given was correct or not. After being so satisfied from the materials on record and after giving an opportunity to contest the allegation, the writ petition should be disposed of by directing the authority to give advertisement for the post with liberty to the writ petitioner to apply pursuant to such advertisement.

25. Mr. Bari submitted the issue is now settled in view of Hon''ble Special Bench judgement. This Hon''ble Court should dismiss the writ petition of the writ petitioner since he is not eligible and since the direction of the Hon''ble Special Bench was not followed by the learned Single Judge.

26. Mr. Bari then submitted that the Hon''ble five Judges Bench decision as referred by the learned Single Judge that the writ petition relates to non-teaching staff of the Government sponsored colleges where the Government issued guideline without framing a statutory provision and/or rule for that purpose. According to him, the ratio of that judgement has no manner of application in the facts and circumstances of this case.

27. In reply, learned Counsel for the writ petitioner submitted that the decision of Hon''ble Apex Court relates to the main issue whether the Government and/or its authorities and/or its instrumentality can consider the candidature of the employment exchange sponsored candidates only or they do have an obligation to invite applications by advertisement in widely circulated daily newspaper or by other modes i.e. radio, television, employment news, etc. and the Hon''ble Apex Court since 1996 consistently held that in case such selection is made only from the employment exchange sponsored candidates that would be violative of Articles 14 and 16 of the Constitution of India since opportunity was not given all eligible candidates to compete the selection process to be held for selection and for giving employment.

28. Learned Counsel submitted the ratio of the Hon''ble Apex Court as cited by him as well as the ratio of the Hon''ble five-Judges Bench of this Hon''ble Court is applicable and the writ petition should be allowed. However, he submits that even if it is accepted that the Hon''ble three-Judges Bench have taken a different view but in that judgement the Hon''ble five-Judges Bench decision rendered in case of Rabindra Nath Mehata, reported in 2205(3) CHN 337 was not considered. Otherwise also the decision of the Hon''ble Special Bench judgement is of much later date i.e. 29th April, 2011. Therefore, the decision of the Hon''ble three-Judges bench do not apply in the instant case.

29. Having heard the learned Counsel appearing for the parties and considering the materials available on records as well as the pleadings involved in this case, it appears that the issue in this regard is now well-settled. The Hon''ble Apex Court by their decision rendered in case of K.B.N. Visweshwara Rao (supra) considered the fair method of selection process and came to the following conclusion :-

"Having regard to the respective contentions, we are of the view that contention of the respondents is more acceptable which would be consistent with the principles of fairplay, justice and equal opportunity. It is common knowledge that many a candidate is unable to have the names sponsored, though their names are either registered or are waiting to be registered in the Employment Exchange, with the result that the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the Employment Exchange. Under these circumstances, many a deserving candidate is deprived of the right to be considered for appointment to a post under the State. Better view appears to be that it should be mandatory for the requisitioning authority/ establishment to intimate the Employment Exchange, and Employment Exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news bulletins; and then consider the cases of all the candidates who have applied. If this procedure is adopted, fairplay would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."

30. The same view was followed in case of Raj Kumar (supra). There are other judgements wherein this view of the Hon''ble Apex Court was consistently followed and the same view was accepted by the Hon''ble five-Judges Bench of this Hon''ble Court.

31. Since there is a clear and specific decision in this respect giving guideline for selection of a teacher or non-teaching staff not only from amongst the candidates sponsored by the employment exchange but also from all candidates who would apply on issuance of public notice etc. there cannot be doubt or

dispute that the writ petitioner who came up before this Hon''ble Court with a prayer that the posts be advertised and he was granted leave to appear at the interview is entitled to be considered in this selection process. The learned Single Judge had, in its mind the Hon''ble Apex Court decision, passed an interim order. Although the Hon''ble three-Judges Bench of this Hon''ble Court have placed some obligation upon the learned court below but the decision is of a much later date and moreover the decision of the Hon''ble Special Bench cannot over-ride this decision of the Hon''ble Apex Court which is recognized as law of land and binding proceeding under Article 141 of the Constitution of India.

32. In my view, the writ petitioner is legally entitled to be considered since he has participated pursuant to leave granted by this Hon''ble Court and specially when the authorities have failed to advertise the posts inviting applications from general candidates who are eligible and in the instant case the writ petitioner being the eligible candidate has got every right to contest in the selection process.

33. Accordingly, the writ petition being W.P. 21805(W) of 2009 is allowed. Since the writ petitioner has secured more marks than the last appointed candidates, the concerned Chairman is directed to give employment to the petitioner immediately on being informed by the learned Advocate for the petitioner by his letter, without waiting for the certified copy of the judgement passed by this Hon''ble Court.

34. Since the writ petition being W.P. 21805(W) of 2009 is allowed in favour of the writ petitioner the second writ petition being W.P. 7029(W) of 2010 is also allowed.

35. Urgent certified copy of this order, if applied for, be given to the learned Advocates photostat for the parties on usual undertakings.