
(2011) 09 CAL CK 0084
In the Calcutta High Court
Case No : W.P.S.T. No. 568 of 2009

The State of West Bengal and Another	APPELLANT
Vs	
Ratan Chandra Bera and Others	RESPONDENT

Date of Decision : 01-09-2011

Acts Referred:

Citation : (2012) 1 CALLT 363 : (2012) 4 CHN 341

Hon'ble Judges : Mrinal Kanti Chaudhuri, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Anindya Kumar Mitra, A.G. and Jayatosh Majunder, for the Appellant; Surajit Samanta and Biswajit Samanta, for the Respondent

Final Decision : Allowed

Judgement

Ashim Kumar Banerjee. J.

1. In the year 1994 the State initiated a recruitment process for the post of Homoeopathic Compounder-cum-Dresser. Accordingly, a regular recruitment process was had vide notification dated January 28, 1994 issued by the State through Health and Family Welfare Department. Two interview boards were constituted for the said purpose. Accordingly, interview was held and the Director of Homoeopathy published a panel. However, the State decided not to implement the said panel in view of illegality and irregularity being complained and found justification. The Joint Secretary, Health Department submitted a report with regard to the illegality committed in the process of selection. The successful candidates approached the Tribunal. The Tribunal vide judgment and order dated November 26, 1996 asked the Police Authority to investigate into the complaint. The Police submitted Enquiry Report dated February 20, 1997 before the Tribunal that found justification in support of the illegality and/or irregularity committed during the selection process. Ultimately, the Tribunal directed holding a fresh selection process through Public Service Commission (hereinafter referred to as P.S.C.) that was approved by the Division Bench of this Court. The order of the Division Bench dated April 7, 1998 appearing at pages 54-60 would show that

the Division Bench observed that it was a fit and proper case for the State to conduct the fresh selection through P.S.C. By a subsequent order dated June 21, 2000 appearing at page 61 the Division Bench granted liberty to the P.S.C. to follow the rules and procedure with such modification as may be found suitable to implement the judgment and order dated April 7, 1998. Accordingly, P.S.C. conducted the selection process and prepared a panel. The P.S.C. sent the panel to the State on November 24, 2000 for appropriate action on the same. The State however, changed their policy and decided not to fill up the post vide order dated May 5, 2003. Such policy decision of the State became the subject matter of challenge before the Tribunal in O.A. No. 100 of 2004 and 731 of 2005. The Tribunal disposed of the said applications vide judgment and order dated February 19, 2008. The Tribunal held that the State was not entitled to change their stand and, as such, directed implementation of the panel by giving appropriate appointment to the selected candidates.

2. Being aggrieved and dissatisfied to the judgment and order of the Tribunal, the State filed application for review. The Tribunal dismissed the same vide judgment and order dated August 19, 2008 finding it devoid of any merit.

3. Being aggrieved by the judgment and order of the Tribunal dated February 19, 2008, State filed an application before this Court. The Division Bench vide judgment and order dated May 11, 2009 dismissed the said application by observing that since the original order merged in the order of review the challenge to the original order did not subsist.

4. In view of the order of the Division Bench the State approached us by filing a composite application challenging the order dated February 19, 2008 so merged in the judgment and order dated August 19, 2008 being W.P.S.T. 568 of 2009. We heard the said application on August 12, 2011 and August 23, 2011 when the hearing was concluded and judgment was reserved.

5. The learned Advocate General appearing for the State contended that merely the names appeared in the select list, would not give any indefeasible right to the selectees demanding employment. He contended that the State conducted a selection process that was found to be vitiated by illegality. Accordingly, the Tribunal cancelled the same. Such order of cancellation got approval from the Division Bench of this Court and the P.S.C. was asked to conduct a fresh selection process. The P.S.C. accordingly, implemented the said decision by conducting a fresh selection process and prepared a panel of the selectees. The State as a policy, decided not to fill up the post. Hence, the selectees were not entitled to ask for a writ of mandamus compelling the State to give them appointment. To support his contention the learned Advocate General cited the following Apex Court decisions:

- i) Punjab State Electricity Board and Others Vs. Malkiat Singh,
- ii) S.S. Balu and Another Vs. State of Kerala and Others,

iii) Secretary, Board of Basic Education, U.P. Vs. Rajendra Singh and Others,

6. The learned Advocate General prayed for setting aside the order of the Tribunal and dismissal of the Tribunal application.

7. Mr. Surojit Samanta, learned Counsel appearing for the selectees being the Respondents above named, while opposing the application, contended that the earlier selection process was vitiated by illegality. The cancellation of such panel was approved by the Division Bench. While doing so, the Division Bench categorically directed a fresh selection to be had. Accordingly, the change of policy of the State, not to fill up the post by giving appointment to the selectees, would amount to violation of the order of this Court and the Tribunal very rightly declined to ignore the mandate of the High Court that reached finality. He further contended that the P.S.C. filed an application for review as against the judgment and order of the Division Bench. The Division Bench dismissed the said application. Hence, such judgment and order reached finality that could not be ignored. The Second selection process, according to Mr. Samanta, was conducted as per the direction of the Division Bench. The State could not change their policy nullifying such direction and/or mandate. He lastly contended that the State allowed the P.S.C. to conduct the second selection process that reached finality when P.S.C. forwarded the panel to the Finance Department for issuance of the letter of appointment. Subsequent change of policy in 2003 could not vitiate the decision making process and that too, as per the direct mandate of this Court. He referred to a note-sheet dated April 24, 2003 wherein the officials were in favor of giving them appointment. The Joint Secretary opined that the decision to withhold filling up of vacancy should be reconsidered. He prayed for dismissal of the application.

8. While giving reply the learned Advocate General contended that the High Court order could not be construed as a mandate to give appointment. The Court could not issue such mandate as it was completely within the domain of the executives to decide whether to fill up or not to fill up any post.

9. The law on the subject is well settled. It is:

i) The selectee does not have any indefeasible right.

ii) The employer being a Public Authority is also not entitled to refuse appointment after completion of selection process without any plausible reason.

10. Very recently, we decided two identical cases being W.P.S.T. 618 of 2009 (Tapan Kumar Jash v. The State of West Bengal and Ors.) and W.P.S.T. 40 of 2010 (Supriya Sinha v. State of West Bengal and Ors.) vide judgment and order both dated August 19, 2011.

11. In the case of Tapan Kumar Jash (Supra), the State conducted a selection process however, did not issue any letter of appointment on the ground of financial embargo. Subsequently, State decided not to fill up the post and the post was declared as "dying cadre". We observed, "the panel was prepared in

2002. It was not given effect to. The State subsequently decided not to fill up the said post. Such subsequent decision, the State is entitled in their wisdom to implement. Even if the notification would have prospective effect, it would definitely affect the ultimate claim of the Petitioner. In fact, the Petitioner could not have any claim so long the State does not decide to give appointment as per said panel."

12. In the case of Supriya Sinha (Supra), the selection process was vitiated by illegality as found out on the investigation being conducted therefore. The Petitioner being a selectee was offered appointment. However, he was not allowed to join. The Tribunal upheld the decision. We also gave our seal of approval to the said decision.

13. Lot was said by Mr. Samanta on the issue of finality. He referred to a recent decision of the Apex Court wherein the Apex Court in the case of Indian Council for Environ-legal Action v. Union of India and Ors. that examined the concept of finality of judgment. While deciding the issue, the Apex Court considered the law on the subject so decided by the Apex Court of our country as well as abroad and ultimately refused to recall three judgments of the Apex Court and dismissed the application for review. Citing the said decision, Mr. Samanta tried to contend that the decision on the selection process reached finality when the review application filed by P.S.C. was dismissed by the Division Bench. Such order of the Division Bench, that reached finality *inter alia* asking the P.S.C. to conduct the selection process *de novo*, could not be rendered nugatory by a subsequent decision of the State not to fill up the post. Mr. Samanta correctly placed the proposition of law, however, he misconstrued and/or misapplied such proposition in the case before us. The Tribunal upheld the cancellation of the first selection process on the basis of the report on illegality being conducted therein. The Division Bench put their seal of approval and asked the P.S.C. to conduct such selection process. While doing so, the Division Bench made certain observations about P.S.C. that might have prompted the P.S.C. to approach the High Court again on review. However, the Division Bench dismissed the said application. Hence, the original decision of the Tribunal upholding cancellation of the first selection process reached finality that would debar any of the selectees from the first panel to ask for appointment and also debar the State from giving appointment from the said panel. The Division Bench asked the P.S.C. to hold the selection process *de novo*. P.S.C. accordingly, conducted the selection process and sent the panel to the State. Such mandate reached finality when the application for review was dismissed.

14. Such mandate was implemented as soon as the P.S.C. prepared the panel and forwarded the same to the State for onward action. There was no definite mandate either from the Tribunal or from the Division Bench on the appointment, at least, we do not find any such definite mandate on that score. In fact, neither the Tribunal nor the Court can issue such mandate compelling the State to fill up the post. Hence, the concept of finality would have no application in the instant case.

15. As we have observed earlier, the selectees did not have any indefeasible right being included in the panel as per the law laid down by the Apex Court. Question thus remains, whether the State was able to assign plausible reason behind their decision to withhold appointment. Would such decision be whimsical so as to give room for judicial scrutiny as observed by the Apex Court in the case of R.S. Mittal Vs. Union of India (UOI), .

16. Could we call such decision as arbitrary so as to apply the ratio decided in the case of State of Bihar and Others Vs. Secretariat Assistant Successful Examinees Union 1986 and Others, as relied upon for the Tribunal.

17. We find, the Tribunal observed in the judgment and order impugned that there was a specific direction contained in the judgment and order dated November 26, 1996 to the effect that in case no anomaly could be found the appointment letters should be issued on the basis of such panel. In our view, such observation was made by the Tribunal in respect of the first panel and not the second panel. The first panel was cancelled by the State on the ground of illegality. In that context, the Tribunal earlier held that if the Police could not find any irregularity or illegality after investigation the State should give appointment as per the panel meaning thereby, the decision of the State to cancel the panel would, in that case, be rendered nugatory as if there was no such decision. Such logic, in our view, could not be applied in case of the second panel.

18. Matter may be viewed from another angle. The embargo on the appointment in relation to the second panel was on a different pretext. The Tribunal was to consider as to whether such decision was amenable to judicial review or not and, in case it was so, whether such decision was apt or not. Hence, the observation and/or direction of the Tribunal as contained in the order dated November 26, 1996 would be of no assistance.

19. The Tribunal applied the logic of alteration of status. If "X" invites "Y" to do certain act and "Y" acts on such invitation expecting a follow up benefit it would mean that "Y" would have legitimate expectation once he alters his status. In the instant case, State invited applicants to participate in the selection process. The invitees participated expecting that they would be given appointment if they were successful. However, the invitees did not change their status. They remained as they were before. They applied for the post. It might be, they passed through agony as to whether they would become successful. It might be, they had to prepare themselves for participating in the selection process. Such agony and/or sufferance and/or time-spent might give them a right to claim compensation in exchange of benefit being given out of such effort. However, they would not be entitled to claim a specific performance based on the doctrine of legitimate expectation as their expectation in that case could not be called as legitimate. It is so, because despite their effort and time spent and/or sufferance of agony they do not change their status.

20. Question thus remains, is, such decision of the State being a public authority

whimsical or arbitrary, The decision of the State not to fill up the post is backed up by the following reasons:

- 1) The Government of West Bengal in the Department of Health & Family Welfare decided not to open any more State Homoeopathic Dispensary. No state homoeopathic dispensary was established after 1991. It was decided that instead of the State Homoeopathic Dispensaries the Gram Panchayat level Homoeopathic dispensaries would be established to take the system of treatment to the door-steps of the rural poor.
- 2) No Homoeopathic Compounder cum Dresser was appointed either in the State Homoeopathic dispensary or in the Gram Panchayat homoeopathic Dispensaries after 2002.
- 3) The decision of not appointing Compounder-cum-dresser was in tune with the Government decision that no Compounder-cum-dresser would be necessary to run the Homoeopathic dispensaries and therefore no more homoeopathic Compounder-cum-Dresser will be appointed.
- 4) No post of Homoeopathic Compounder-cum-dresser was created after 2002.
- 5) The decision of the Department was intimated to the O.S.D. and E.O. Deputy.

Secretary, Government of West Bengal, Panchayat and Rural Development, vide No. HF/O/ISMH/372/3H-110/2006 dated 31st May, 2007. In the year 2006, the correspondence, it was clearly stated that one part-time Homoeopathic doctor should be engaged only for gram panchayat Homoeopathic dispensary.

21. We have carefully perused the grounds quoted above. We are of the view that one may not agree with the reasoning so advanced by the State to support their ultimate decision not to fill up the post. The Tribunal or the Court is however, not competent to sit on appeal over such reasoning. It could not be said that those grounds were whimsical so to call it arbitrary to come within the scope of consideration of judicial review. Mr. Samanta, in course of hearing, handed over a bunch of documents upon copies being given to the learned Advocate General wherefrom we find that the Rogi Kalyan Samiti in D.N. De Homoeopathic Medical College and Hospital started a recruitment process of the post of compounder-cum-dresser on temporary basis. He also relied upon employment notice of P.S.C. published on May 22, 2010 wherein the post of one hundred ninety three homoeopathic Medical Officers as well as pharmacists were sought to be filled up. In our view, the first notice of Rogi Kalyan Samiti relates to a temporary arrangement. Moreover, such appointment was not State appointment. Second notice was in respect of Medical Officers and Pharmacists and not Compounder-cum-Dresser. Hence, such issue would not, in any way, alter the situation. The Xerox copies of the note sheet handed over to Court by Mr. Samanta would show that the Joint Secretary was in favor of reconsideration of the decision. Unless and until such reconsideration is made and the State changes its policy, the Court, in our view, could not compel the State to give

appointment as per the select list. The Tribunal, in our view, possibly overlooked the above aspect that would require our interference.

22. The Tribunal's application succeeds and is allowed.

23. The Judgment and order impugned dated February 19, 2008 so merged in the order of review dated August 19, 2008, is set aside.

24. There would be however no order as to costs.

25. Urgent Photostat copy will be given to the parties, if applied for.

Mrinal Kanti Chaudhuri, J.

26. I agree.