
(2008) 01 CAL CK 0087
In the Calcutta High Court
Case No : F.M.A. No. 178 of 2005

Zorina Khatun

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 16-01-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (2008) 3 CALLT 331 : (2008) 2 CALLT 244 : (2008) 3 CHN 611

Hon'ble Judges : Surinder Singh Nijjar, C.J.; Jayanta Kumar Biswas, J

Bench : Division Bench

Advocate : Ajit Kumar Panja and Durga Prasad Dutta, for the Appellant; Asish Kumar Sanyal and Rajendra Banerjee for Managing Committee and Saikat Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Surinder Singh Nijjar, C.J.—We have heard the learned Counsel for the parties.

2. This letters patent appeal has been filed by the writ petitioner against the judgment of the learned single Judge dated 22nd July, 2003. We may notice the relevant facts as pleaded by the petitioner.

3. In July, 1997 a vacancy arose in the post of Assistant Teacher (Arabic) at the Rampurhat Jitendra Lal Vidyabhaban School, the respondent No. 5 herein. The petitioner who possesses a degree of B.A. in Arabic applied for the aforesaid post. The advertisement was issued by the school on 15th September, 1997 without any direction having been issued by the District Inspector of Schools (SE) Birbhum according permission to fill the vacancy. The petitioner appeared for the interview on 9th November, 1997. She was selected and appointed by the school authorities on a temporary basis at a salary of Rs. 600/- per month for a purely temporary tenure of three months. On 17th November, 1997 she joined in the aforesaid school.

4. After serving the school for a continuous period of three years, she submitted

a representation to the Secretary of the concerned school for her absorption on the aforesaid post. On 18th January, 2001 the Secretary of the School informed her that she could not be absorbed on the aforesaid post as according to the 100% roster, the aforesaid post was reserved for the Scheduled Tribe candidates. Being aggrieved against the aforesaid decision she filed a writ petition being W.P. 17198 (W) of 2001. This writ petition was disposed of with a direction to the District Inspector of Schools to dispose of the representation of the petitioner by passing a speaking order. The representation of the petitioner was considered and she was duly heard by the competent authority on 20th March, 2003. Thereafter, a detailed order was passed on 7th April, 2003. On behalf of the school it was submitted by the Headmaster that the vacant post was a fourth vacant post on the 100 point vacancy Roster of the school. As such the post was reserved for Schedule Tribe candidate and, accordingly, the vacancy statement for filling up the post had already been sent to the School Service Commission, Burdwan Region through the District Inspector of Schools (SE), Birbhum. The Secretary and the President of the school who were also present at the hearing before the District Inspector of Schools (SE) made the statement that "they agreed to the statement of the Headmaster of the School and they have nothing to add further any in this matter." Thereafter, the District Inspector of School clearly came to the conclusion as follows:

On going through the statement made and documents submitted by the parties and representation made by the writ petitioner to the writ application, it transpires that the appointment of the petitioner was made in violation of recruitment Rules.

5. This order was challenged by the petitioner by filing a writ petition being W.P. 8885 (W) of 2003 which has been dismissed by the learned single Judge on 20th July, 2003. Hence the present appeal.

6. The learned Counsel for the appellant submitted that even if the appointment of the appellant had been made in an irregular manner, she would be entitled to absorption as she has already served the school for a period of ten years. Learned Counsel further submitted that the petitioner had in no manner misrepresented either her qualification or about the fact that she did not belong to Scheduled Tribe at the time she made the application. Therefore, the school authority cannot now be permitted to state that she had been wrongly appointed against the vacancy which had been reserved for the Scheduled Tribe. On the other hand, learned Counsel Mr. Saikat Banerjee, appearing for the State has submitted that the appointment was clearly in violation of the statutory Rules for a number of reasons. Firstly, the recruitment process had been initiated by the school without the appropriate permission from the District Inspector of Schools. Secondly, the petitioner had been appointed against a reserved vacancy when in fact she belonged to the general category. Thirdly, the school authorities have granted the appointment without any authority of law as the appointment can only be made in accordance with the procedure prescribed under the West

Bengal School Service Commission Act, 1997 and the Rules made thereunder. Fourthly, no relief can be granted to the petitioner in view of the law laid down by the Supreme Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, . The petitioner having been appointed illegally cannot get any benefit from having served the school for ten years. The learned single Judge has, therefore, rightly dismissed the writ petition.

7. Learned Counsel appearing for the school authorities has submitted that the school has given the appointment to the petitioner in accordance with the Rules which were in existence at the time when the post was advertised. Admittedly the post was advertised by the school on 15th September, 1997. Even though, the petitioner was interviewed on 9th November, 1997 and selected for appointment on 13th of November, 1997, the appointment procedure would be governed by the old Rules, i.e., under the Management Rules, 1969. The Managing Committee was competent to make the selection and appointments in accordance with the direction given by the District Inspector of Schools (SE). It was only after coming into force of 1997 Act with effect from 01.11.1997 that the power to make selection by the Managing Committee stood terminated. In the present case the school had submitted an application to the District Inspector of Schools (SE) on 3rd September, 1997 for filling up the post of the Assistant Teacher in Arabic. The District Inspector of Schools (SE) did not take any decision on the application. Consequently, the school was constrained to file Writ Petition being W.P. No. 24454(W) of 1997 in which the interim order was passed on 30th September, 1997 granting liberty to the respondent No. 5 (school) to hold the interview for the post of Assistant Teacher in question and send the panel to the District Inspector of Schools (SE) concerned for approval. A further direction was issued to grant approval of the panel to the respondent No. 5 (school) in case the District Inspector of Schools (SE) did not find any illegality in the panel proposed. In such circumstances, the selection would have to be governed under the Management Rules, 1969 and the school cannot be made to suffer for the inaction on the part of the District Inspector of Schools (SE). Learned Counsel relied on a Division Bench judgment of this Court in the case of Snehansu Jas Vs. State of West Bengal and Others, In any event, the petitioner has now been in service for more ten years. Therefore, the judgment of the Supreme Court in the case of Secretary, State of Karnataka and Ors. (supra) would not be applicable in the facts and circumstances of the case. The aforesaid judgment would be applicable only in cases where there is wholesale infringement of Articles 14 & 16 of the Constitution of India.

8. We have considered the submissions made by the learned Counsel for the parties. A perusal of the judgment of the learned single Judge would show that the learned Counsel appearing for the petitioner had submitted that for a short term vacancy for three months there was no necessity to follow the old Recruitment Rules. It was also contended that for a temporary vacancy the Rule as prescribed in the Recruitment Rules of 1995 issued by the District Inspector of Schools (SE) were to be followed. The learned single Judge after duly noticing

the relevant facts has clearly come to the conclusion that the appointment of the petitioner would not be covered under the 1995 Rules which had been relied upon by the petitioner. In our opinion, it has been correctly held by the learned single Judge that the Rule 3(C) of the aforesaid Rules would only be applicable in cases of deputation vacancies or in short term vacancies of four months or less. We may notice here Rule 3(C) which is as under:

3(C) For appointment in deputation vacancy or in short term vacancies of 4 months or less the school shall invite applications through notice which shall be displayed in the notice Board of the D.I.S. (SE), of the Zilla Parishad, of the Panchayat Samity of the Municipality/Corporation/Notified Area Authority and of the school.

9. A perusal of the aforesaid Rule would clearly show that it would "govern only appointment in deputation vacancy or vacancies which arise for a short term of four months or less. This Rule is only meant to cover emergency situations which may be caused by unexpected circumstances. It is not meant to be a regular recruitment channel. Therefore the petitioner could only have been appointed in such a vacancy for a maximum period of four months. The term could not have been continued indefinitely. Clearly therefore, the petitioner could not have been appointed on a permanent basis and could not have been allowed to continue in the post for a period of more than four months. Therefore, her illegal continuance in the post would not give any legal right for being absorbed against the permanent post. We also do not find much substance in the submissions of the learned Counsel that the claim of the petitioner would not be governed under the 1997 Act and the Rules made thereunder. Admittedly the appointment, on which approval is sought, is made on 13th November, 1997. In law the selection process could not have been initiated as the District Inspector of Schools had never granted permission for commencement of the selection process. Merely because the learned single Judge of this Court had issued interim direction permitting the school to hold the interview would not legalize an otherwise Illegal process which was never approved, even subsequently. As noticed earlier, the claim of the petitioner for permanent absorption was rejected finally on 7th April, 2003. While rejecting the claim of the petitioner it was observed by the District inspector of Schools that the petitioner could not have been appointed against the aforesaid post as it was reserved for the members of the Scheduled Tribe. The appointment of the petitioner was, therefore, clearly illegal. The learned single Judge has, in our opinion, correctly held that the appointment could only have been made in terms of the 1997 Act and the Rules made thereunder. Since the procedure was not duly followed, the question of regularization of the service of the petitioner would not arise. The judgment relied upon by the learned Counsel for the School in the case of Snehansu Jas Vs. State of West Bengal and Others, decided on 25th April, 2001 would not be applicable in the facts and circumstances of the present case. In the aforesaid case the Division Bench considered the ratio of two earlier judgments of this Court in the cases of Kanaidlghi Deshapran Vidyapith v. State of West Bengal reported in (1998)2 CLJ

497 and Salauddin Miah Vs. State of West Bengal and Others, . The Division Bench came to the conclusion that the aforesaid two judgments did not lay down the correct law. This apart in the aforesaid case the District Inspector of Schools (SE) had granted permission for filling up the post on 01.10.1992. The permission was, however, qualified that the post shall be reserved for Schedule Cast as per Roster vacancy. The school authority sought for de reservation of the post on 10th October, 1993. This request was rejected by the District Inspector of Schools (SE) on 26th July, 1994. The Managing Committee of the school had filed writ petition which was disposed of by order dated 25th April, 2000 with the direction to the Secretary Education Department to treat the writ petition as a representation and dispose of the same in accordance with law. Pursuant to the aforesaid direction the Secretary, Education Department observed that since the post of Headmaster is a single post it cannot be reserved. But since by that time the 1997 Act had come into force it was also observed that the post had to be filled up in accordance with the procedure prescribed under the 1997 Act. The District Inspector of Schools (SE) was directed to release the prior permission. Aggrieved against the aforesaid order the school had filed the writ petition in which the reference was made to the Division Bench. It was contended on behalf of the Management that since prior permission had been granted before coming into force of the Act of 1997, the selection procedure had to be concluded in accordance with the Rules then existing and not in the manner prescribed by the Act of 1997. Taking note of the fact situation it was observed by the Division Bench that in the facts and circumstances of that case no accrued rights of the school were sought to be violated. It was clearly held that the Managing Committee had no vested right to fill the vacancy which arose in 1992 as only a qualified permission had been granted by the District Inspector of Schools (SE) on 1.10.1992 to fill that vacancy by the Management from amongst the Schedule Caste candidates but that was not acceptable to the Management. It was only on 25th April, 2000 that a direction was issued by the Secretary, Education Department that the vacancy could not be reserved. But at the same time it was held that since the Act of 1997 had come into force the vacancy shall be filled up in accordance with the said Act. The Division Bench has clearly observes as follows:

It is true that the management has sought permission under the Management Rules, 1969 for filling up the vacancy, but somehow it could not be filled up prior to coming into force of the Act of 1997. It would have been a different matter if the permission was availed of and they had invited candidates for interview. But that is not the case here.

10. The aforesaid ratio would clearly be applicable in the present case.

11. As noticed earlier the initial application of the school for granting permission which was dated 3rd September, 1997 was not decided by the District Inspector of Schools which had prompted the school authorities to file the writ petition being W.P. No. 24454 (W) of 1997. In the aforesaid writ petition an interim

direction was issued on 30th September, 1997 permitting the school to hold the interview subject to the approval being granted provided it was found that the selection process did not suffer from any illegality. Ultimately the claim of the school was rejected by the District Inspector of Schools by order dated 7th April, 2003. Therefore, it cannot be said that the prior approval had been granted to the school before coming into force of the 1997 Act.

12. Furthermore in view of the law laid down by the Supreme Court in the case of Uma Devi (supra) no relief could have been granted to the petitioner. In that case it has been categorically held that any appointment which was made in violation of Articles 14 & 16 of the Constitution of India cannot subsequently be regularized merely because the candidate illegally appointed has continued on the post for a number of years. We may notice here some of the relevant observations made therein:

It is time, that the courts desist from issuing orders preventing regular selection or recruitment at 6th instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance tends to defeat the very constitutional scheme of public employment. It has to be emphasized that this not the role envisaged for the High Courts in the scheme of things and their wide powers under Article 226 of the Constitution are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten.

13. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant Rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme.

14. In fact, without making reference to the aforesaid observations, the learned single Judge also seems to have dismissed the writ petition for the same reasons. It has clearly been held that the petitioner had no legal right to hold the post. Therefore, she cannot pray for an order of injunction to fill up the vacancy which is reserved for the scheduled tribe candidates. It has also been correctly observed that since the petitioner had no legal right to hold the post the petitioner has no right to pray for the change of nature of vacancy from reserved category to unreserved. The petitioner has no locus standi to argue that the

vacancy could not be filled up following the Recruitment Rules of 1997 in terms of the West Bengal School Service Commission Act, 1997 and on the basis of the roster as maintained by the School. Since the petitioner had no legal right, the Court had correctly rejected the writ petition being devoid of any merit.

15. We find no merit in the appeal and the same is accordingly dismissed.

Jayanta Kumar Biswas, J.

16. I agree.