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Court : Guwahati

Decided On : Jun-06-2014

Judge : The Honourable Chief Justice Mr. Abhay Manohar Sapre, B.K. Sharma & a.K. Goswami

Appeal No. : W.A. Nos. 158, 159, 160, 161, 162 of 2009

Appellant : Jagadish Deka and Others

Respondent : The State of Assam, represented by the Commissioner and Secretary to the Govt of Assam and Others

Advocate for Pet/Ap. : Ms. K. Devi

Judgement :

A.M. Sapre, CJ.

In order to appreciate the controversy involved in aforementioned pending appeals and the background, which led to making of the present reference to the Full Bench in aforesaid pending appeals, it is necessary to state the relevant facts.

The State of Assam (Education Department) in the year 1988 and 1991, issued two advertisements inviting applications from eligible candidates for the posts of Assistant Teacher , Language Teacher and some other posts in the intermediate

cadre in different provincialized Higher Secondary Schools in several districts of Assam. Candidates in thousands, if not more, applied for these posts (around 300 or more).

In the selection process undertaken by committee, several persons were appointed whereas many were not selected. Those appointed then joined the respective posts at different districts. However, after sometime, the State terminated the services of some appointees on the ground that since their appointment was made against the rules and hence it could not be continued. These terminated persons became aggrieved by their termination. Similarly, those who were not selected also felt aggrieved due to their non-selection. This led to disputes between these persons on the one hand and the State on the other hand resulting in filing of several writ petitions by such persons against the State for ventilating their grievances.

One set of writ petitions was filed by the persons who felt aggrieved by their non-selection. Their grievance was two-fold first - they were wrongly denied the appointment and second selection/appointment of those selected and were given the appointments was improper and being against the rules, it was liable to be quashed.

The other set of the writ petitions was by the persons, who were given appointment and after some time, their services were terminated by the State. These persons challenged their termination orders on several legal grounds and sought their reinstatement in the services.

Since these writ petitions involved common issues, they were clubbed for their analogous disposal. These writ petitions were heard by the writ court (Single Judge) and by common order dated 9.4.2009, the learned Single Judge dismissed all the writ petitions by upholding the stand taken by the State. In other words, the learned Single Judge did not find merit in any of contentions raised by the writ petitioners. The writ petitioners felt aggrieved, filed several individual writ appeals against the dismissal of their writ petitions.

It may be pertinent to mention that though several writ appeals were filed by different writ petitioners against the common order of the writ court, they were not clubbed together as one bunch for their analogous disposal. Due to this, some appeals were heard independently by different Division Benches.

One writ appeal being WA 112/2010 which arose out of WP(C) 6468/2007 was heard first in point of time by Division Bench consisted of Justice Ranjan Gogoi (as His Lordship then was) and Justice B. P. Katakey. This Division Bench by its order dated 21.5.2010 dismissed WA No.112/2010 and upheld the writ courts order dated 9.4.2009.

The other Division Bench consisting of Justice A.K.Goel Chief Justice and Justice Ujjal Bhuyan, after three years of the disposal of WA No. 112/2010, heard another writ appeal being W.A. 154 /2009, which arose out of W.P(C) 6182 /2007 against the same order dated 9.4.2009. By order dated 19.10.2012, this Division Bench, without noticing the earlier Division Bench order dated 21.5.2010 passed in WA 112/2010, allowed the appeal (WA 154/2009) and while setting aside the order dated 9.4.2009, granted relief to the writ petitioner which he had claimed in his writ petition.

Then came a third matter. It was heard by another Division Bench comprising of Justice A. M. Sapre Chief Justice and Justice A.K. Goswami. Before this Division Bench, a bunch of five writ appeals being W.A. Nos. 158, 159, 160, 161 and 162 of 2009, all arising out of same order dated 9.4.2009, were listed for hearing on 29.11.2013. During the course of hearing, the aforesaid two conflicting orders passed by two different Division Benches referred above were brought to the notice of the Bench.

If the contention of the learned counsel for the appellants in their support was that all the five appeals should be allowed in the light of later decision of the Division Bench rendered on 19.10.2012 in W.A.No 154 of 2009, the contention of the learned counsel for the respondent (State) while opposing the appeals was that all the five appeals should be dismissed in the light of earlier decision rendered by the Division bench on 21.5.2010 in W.A.No.112 of 2010.

The Division Bench then took note of this submission and accordingly, deferring the hearing of appeals on merits, by order dated 29.11.2013, referred the matter to larger Bench to resolve the conflict by framing questions. The order dated 29.11.2013 is quoted hereinbelow for ready reference:

Heard Ms. K. Devi, learned counsel for the appellants and Mr. P. N. Goswami, learned Standing Counsel, Education, appearing for the respondents on the question of admission.

It is brought to our notice that one Division Bench of this Court consisting of Hon'ble Mr. Justice Ranjan Gogoi (as his Lordship then was) and Hon'ble Mr. Justice B. P. Katakey, by their judgment dated 21.05.2010 passed in Writ Appeal No.112 of 2010 (Smt. Sewali Deka vs. The State of Assam and others) dismissed the appeal which arose out of the same impugned order which is under attack in these appeals, also whereas another Division Bench consisting of Hon'ble Chief Justice Mr. A. K. Goel and Hon'ble Mr. Justice Ujjal Bhuyan by their judgment dated 19.10.2012 passed in another Writ Appeal being Writ Appeal No.154 of 2009 (Sri Upen Talukdar vs. The State of Assam and others) without noticing the earlier judgment of 21.05.2010 passed in Writ Appeal No.112 of 2000 allowed the appeal which also arose out the same impugned judgment which is subject matter of these appeals.

The effect is that there are two diametrically opposite view taken by the two Division Benches on one issue by not noticing their respective view taken. We are at least fortunate that both the views are now brought to our notice while hearing these appeals.

In order to resolve this controversy with which we are now faced, we consider it apposite to issue notice to the respondents of these appeals.

Accordingly, these appeals are admitted for final hearing.

No notice need be issued to the respondents because the State is duly represented by Mr. P. N. Goswami, learned Standing Counsel, Education.

In a situation like the one where there are two diametrically opposite views holding the field on one issue without noticing either then in such event in order to resolve the conflict which has arisen, we consider it proper to refer these matters to a larger Bench so that the controversy is put to rest in accordance with law.

We, accordingly, refer the case to the Full Bench to answer the following questions:

(1) Whether order impugned in these appeals dated 09.04.2009 is legally sustainable or not?

(2) Whether judgment dated 19.10.2012 rendered in Writ Appeal No.154 of 2009 is legally correct or not, specially when the earlier Division Bench by their judgment dated 21.05.2010 passed in Writ Appeal No.112 of 2010 on the same issue had taken contrary view to the one taken on 19.10.2012 in Writ Appeal No.154 of 2009?

(3) Whether subsequent decision of Division Bench dated 19.10.2012 rendered in Writ Appeal No.154 of 2009 allowing the said appeal is legally sustainable as it did not take into consideration the earlier view taken by another Division Bench dated 21.05.2010 in Writ Appeal No.112 of 2010 on the same issue which dismissed the said appeal?

Let the matter be now placed before the Hon'ble Chief Justice on the administrative side for constituting a Full Bench to decide the aforesaid three questions referred by this Bench to the Full Bench for answer.

This is how and pursuant to order dated 29.11.2013, this Full Bench was accordingly constituted to answer the aforementioned questions.

Having heard the learned counsel for the parties and on perusal of the record of the case, we are of the considered opinion that question Nos. 2 and 3 deserve to be answered in affirmative and in the light of the answer to question Nos.2 and 3, the question No.1 need not be answered.

At the outset, we consider it apposite to state that question Nos.2 and 3 can be reworded by framing one question without changing the object, purport and meaning of question Nos. 2 and 3 for their answer. In other words, the main object of question Nos. 2 and 3 is to decide the binding effect of the decision dated 19.10.2012 rendered by Division Bench in WA No.154/2009 and hence question Nos. 2 and 3 can also be read by reframing both the questions in one question as under:

4. Whether decision of Division Bench rendered on 19.10.2012 in WA No.154/2009 is per incuriam?

In our considered opinion, the question Nos.2,3 and 4 need to be decided keeping in view the principles of Rule of per incuriam and binding precedents of the decisions rendered by the same court on the same issue . Indeed, these principles were the subject matter of several decisions of the Supreme Court and remains no longer res integra. It is, therefore, apposite to take note of the decisions on this subject which explained its true meaning, effect and consequence.

In the case reported in State of U.P. vs Synthetics and Chemicals Ltd [(1991) 4 SCC 139], the Supreme Court explained the meaning of the word per incuriam and laid down as under :-

40. Incuria literally means carelessness. In practice per incuriam appears to mean per ignoratum. English courts have developed this principle in relaxation of the rule of stare decisis. The quotable in law is avoided and ignored if it is rendered, in ignoratum of a statute or other binding authority. (Young v. Bristol Aeroplane Co. Ltd.) Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law.

Similarly in the case reported in State of Bihar vs Kalika Kuer [(2003) 5 SCC 448], the Supreme Court examined the circumstances in which a decision can be rendered per incuriam.

Quoting the passage from Halsburys Laws of England, it was held in para 5 thus:

5. At this juncture we may examine as to in what circumstances a decision can be considered to have been rendered per incuriam. In Halsburys Laws of England (4th Edn.) Vol. 26: Judgment and Orders: Judicial Decisions as Authorities (pp. 297-98, para 578) we find it observed about per incuriam as follows:

A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the court had not the benefit of the best argument, and, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake.

Lord Godard, C.J. in Huddersfield Police Authorities case observed that where a case or statute had not been brought to the courts attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in per incuriam.

Like wise, the question arose before the Supreme Court in the case reported in Official Liquidator vs Dayanand [(2008) 10 SCC 1] as to what is the effect of the decision when it is rendered in ignorance of earlier decisions rendered by other co-ordinate bench.

It is apposite to quote the following observations of the Supreme Court:

78. There have been several instances of different Benches of the High Courts not following the judgments/orders of coordinate and even larger Benches. In some cases, the High Courts have gone to the extent of ignoring the law laid down by this Court without any tangible reason. Likewise, there have been instances in

which smaller Benches of this Court have either ignored or bypassed the ratio of the judgments of the larger Benches including the Constitution Benches. These cases are illustrative of non-adherence to the rule of judicial discipline which is sine qua non for sustaining the system. In *Mahadeolal Kanodia v. Administrator General of W.B.* this Court observed: (AIR p. 941, para 19)

19. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of coordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another Single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court.

Their Lordships then placed reliance on the earlier decision of the Supreme Court reported in *Lala Shri Bhagwan vs Ram Chand* (AIR 1965 SC 1767) in which the learned Chief Justice, Gajendragadkar, speaking for the Bench ruled as under:

18. It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned Single Judge departed from this traditional way in the present case and chose to examine the question himself.

Taking note of several other decisions on the subject, the Supreme Court, while approving the ratio laid down in *State of Bihar* (*supra*), held as under in para 84:

84. In *State of Bihar v. Kalika Kuer* the Court elaborately considered the principle of *per incuriam* and held that the earlier judgment by a larger Bench cannot be ignored by invoking the principle of *per incuriam* and the only course open to the coordinate or smaller Bench is to make a request for reference to the larger Bench.

Reading the law laid down in the case of [(1991) 4 SCC 139, *State of U.P. vs. Synthetics and Chemicals Ltd.*], [(2003) 5 SCC 448, *State of Bihar vs. Kalika Kuer alias Kalika Singh and Ors.*], [(2008) 10 SCC 1, *Official Liquidator vs. Dayanand and Ors.*] and [AIR 1965 SC 1767, *Lala Shri Bhagwan vs. Ram Chand*] quoted (*supra*), and applying the principle laid down in these cases to the facts of this case, we are inclined to answer the question Nos. 2, 3 and 4 in affirmative for the reasons mentioned *infra*.

In our considered view, since appeals i.e. W.A. No. 112/2010 and W.A. No. 154/2009 arose out of common order passed by the writ court on 9.4.2009, both these appeals including others arising out of same order should have been heard together on merits in accordance with law. Secondly: since all the writ petitions were decided by common order which suffered their dismissal, the appeals arising out of such order too should have resulted in passing of a common order either way unless any individual appellant was able to point out any distinguishing feature of his case from the bunch for its separate hearing. Thirdly: once a decision was rendered by one Division Bench in one appeal arising out of common order, *a fortiori*, such decision was binding on another Division Bench (whether consisting of the same Judges or other) to avoid passing of 2 conflicting orders in one case. Fourthly: if for any reason, the later Division Bench did not agree to the view taken by the earlier Division Bench, then it had no option but to refer the matter to a larger Bench (Full Bench) to resolve the conflict after setting out the reasons for their disagreement and the area of difference. Fifthly: the later Division Bench had no jurisdiction to decide the appeal on merits by taking contrary view except to follow the reasoning and the conclusion arrived at by the earlier Division

Bench and if they formed an opinion to take a contrary view then it was obligatory on the Division Bench to make a reference to larger Bench to resolve the conflict. Sixthly: the jurisdiction to take a contrary view or/and to declare the decision per incuriam was with the Full Bench on a reference made by the later Division Bench and lastly: since no one brought the earlier decision to the notice of later Division Bench, a situation had arisen where a judgment came to be passed, which is in conflict with the earlier Division Bench judgment.

It is for these reasons, we are of considered opinion, that the decision dated 19.10.2012 rendered by the Division Bench in W.A. No.154/2009 is per incuriam.

Accordingly, we answer the question Nos. 2, 3 and Question No. 4, reframed by this court, in affirmative. We, however, decline to answer the question no. 1 which we feel may not be necessary to answer once question Nos. 2, 3 and 4 are answered and secondly, it cannot be answered on merits because it is now for the Division Bench to decide the appeals on merits in accordance with law keeping in view the questions answered by the Full Bench.

We, however, make it clear that we have not applied our mind to the merits of the issue involved in the appeal and this reference was answered only on the basis of legal principles applicable to situation which had arisen due to 2 conflicting orders passed in 2 appeals arising out of one order.

Reference is answered accordingly.

Let all the five appeals be now listed for final hearing before the Division Bench as per roster.

No cost.

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