

Sri Subir Banerjee and ors. Vs. Sri Sunil Kumar Dasgupta

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Court : Kolkata

Decided On : May-15-1998

Reported in : (1998)3CALLT98(HC)

Judge : Satyabrata Sinha and;Dibyendu Bhusan Dutta, JJ.

Acts : [Contempt of Courts Act, 1971](#) - Sections 2 and 3;; West Bengal Primary Education Act, 1973 - Sections 106 and 106(1) - Rules 3 and 11;; Bengal Rural Primary Education Act, 1930 - Section 66(2)

Appeal No. : Special Jurisdiction (Contempt), C.R.No. 3354 of 1997 with C.R.No. 2670 of 1996

Appellant : Sri Subir Banerjee and ors.

Respondent : Sri Sunil Kumar Dasgupta

Advocate for Pet/Ap. : Mr. Arabinda Chatterjee and ;Ms. Amrita Sinha, Advs.;Mr. Pabitra Kumar Basu, Adv.

Judgement :

S.B. Sinha. J.

1. An application under the Contempt of Courts Act has been filed for furnishing Sri Sunil Kumar Dasgupta. Chairman, Ad-hoc Committee, District Primary School Council, 24-Parganas(N) Barasat for alleged violation of a judgment and order

dated 22. 9.95 passed by a division bench of this court in FMAT No. 910/95, FMAT No. 927/95 & FMAT No. 1163/95.

2. This application has been filed by petitioners who are 12 in number in the following premises:

3. They were appointed by the Managing Committee of various Schools in Halisahar and Bljpur Circles between 1976 and 30th June. 1977. Allegedly such appointments were made pursuant to a Government order.

4. According to the petitioner, despite the fact that they fulfilled all the condition laid down under the said circular, as the District Inspector of Schools. 24-Parganas. did not grant approval, they filed the writ application and G.R. Bhattacharya, J. by an order dated 17th September. 1992 relying on or on the basis of a decision of S. Chatterjee, J. in C.O. No. 8691(W)/ 88 allowed the said writ application. As the said order was not complied with, a contempt rule was issued against the then District Inspector of Schools, Primary Education. 24-Parganas. by G.R. Bhattacharya, J.

5. Admittedly the State of West Bengal enacted the West Bengal Primary Education Act, 1973 and in terms of section 106(1) of the said Act made rules in the year 1991. The Ad-hoc Committee. District Primary School Council, North 24-Parganas came into being on 11th March, 1994. The Chairman, Ad-hoc Committee. District Primary School Council and the Director of School Education were added as parties respondents in the contempt proceedings.

6. The Ad-hoc Committee. District Primary School Council through its Chairman filed an application for recalling the said order in the aforementioned contempt application wherein a stand was taken that he is not competent to allow approval of appointment of a Primary School Teacher and the proper procedure was that the panel prepared by the selection committee for primaryschool which is to be placed before the Director of School Education, West Bengal for approval and upon obtaining the approval of the Director of School Education, the Chairman will issue appointment letter to the empanelled teachers for filling up the available vacancies. A stand was also taken by the Director of School Education that the

appointment of the petitioner having not been made in accordance with law the same cannot be approved. The application for recalling the order was dismissed. The learned Judge also held that the District Inspector of Schools. Primary Education. 24-Parganas (North) is guilty of Contempt of Court. In that case an order was also passed by directing the Director of School Education to accord approval of the appointment of the petitioner within four weeks from the date and communicate the same to the alleged contemner herein who was to issue appointment letter within two weeks from the date of approval accorded by the Director of School.

7. Three appeals were preferred before a division bench of this court from the said order. FMAT No. 910/95 was directed against the judgment and order dated 6th April, 1995 and the subsequent order dated 10th April, 1995 passed by G.R.Bhattacharya in exercise of his contempt jurisdiction in C.R. No. 2375(W)/93. FMAT No. 927/95 was filed by the Chairman, Ad-hoc Committee against the order dated 6th April, 1995 in C.O. No. 3308(W)92 as also the subsequent order dated 10th April, 1995 in FMAT No. 910/95 was filed by the Slate of West Bengal against the said order.

8. Another appeal being FMAT No. 1163/95 filed by Samarendra Nath Bandapadhyay, Ex-Director of School Education and Ex-District inspector of Schools impugning the said order passed in C.R. No. 2375 (W)/93. A division bench comprising of by M.G. Mukherjee (As the learned Chief Justice then was) and A.K. Dutla, JJ. held:

'We, however, make it clear as regards the main grievance of the Appellants that the Schools do not exist and the writ petitioners do not have the requisite qualification and the appointment should be in accordance with law i.e. keeping parity with teachers-students ratio 1:40. we think the District Primary School Council should be vested with appropriate powers to shift them from one school to another if the teachers-students ratio does not justify the retention of the teachers. As regards the existence or otherwise of the school concerned, the order dated 6.4.95 or the order dated 10.4.95 would not have any application in so far as the rights of the District Primary School are concerned regarding taking proper

measures as may be deemed justified and proper confirming to the principles of natural justice.'

9. It was further noted that an appeal had been filed by the State of West Bengal against the order dated 17.9.92 but the same was barred by limitation and the aforementioned direction was made subject to another order that may be passed in the aforementioned appeal against the order dated 17.9.92, for violation of the aforementioned judgment this contempt application has been filed.

10. It is stated that despite the said order as the same had not been complied with. a contempt application was filed. A report in the said proceeding was filed by the Chairman. District Primary School Council but the same was returned back. However, interpreting the order of the division bench, U.C. Banerjee, J. (As His Lordship then was) issued rule whereafter the District of School Education conveyed his grant of approval of the appointment. Thereafter, the contempt rule was discharged with a direction upon the Director of School Education to follow the matter with the District Primary School Council. The instant contempt application has been filed on the ground that despite the same the alleged contemnor has got issued the appointment letters.

11. A counter affidavit has been filed by the contemner stating his difficulties in complying with the order as he had no jurisdiction in relation thereto.

12. The question as regard the Jurisdiction of the Ad-hoc Committee vis-a-vis the District Inspector of Schools under the 1973 and 1930 Acts had been considered by a division bench of this court in West Bengal Board of Primary Education v. State of West Bengal & Ors. reported in 1997(1) CLJ 165.

13. It has not been disputed that in terms of the provision of the West Bengal Primary Education Act, 1973 and the rules framed thereunder it is only the District Primary School Council which can make appointment after the Urban Advisory Committee considered the candidature of the candidates concerned. The alleged contemner. as noticed hereinbefore, has brought to the notice of the court that he was not a party in the writ application nor the Ad-hoc Committee was a party to the writ application. A copy of his report in FMAT No. 987/95 has also been annexed

wherein he categorically stated that he had personally inspected the schools in question, viz. Halisahar Primary School, Benitirtha Pralhmik Vidyalaya, Barulpara Primary School, Jonepur U.P. School and Ramabati Vidyamandir and from the records it appeared that the services of all teachers have been approved and no other unapproved teachers were working in the school. He further stated that there exists no normal vacancy in those schools. He further stated that he was incompetent to issue any appointment letters to any teacher outside the panel of primary teachers prepared by the statutory Council and thereafter approved by the Director of School Education except in case of appointment of the members of the family of teachers who died in harness. He has also referred to Rule 11 (a) framed under section 106 of the West Bengal Primary Education Act, 1973 and published in the Gazette on 25th November, 1991. It further appears that he had also written a letter to the Director of School Education on 16.10.97, wherein it was averred:

'I may mention in this connection that on enquiry I have ascertained that the teacher-student ratio of each of the schools in question does not justify creation of any additional posts in those schools. In any event, if the posts are created by the State Govt. even then, in my view none of the petitioners is eligible to be considered for appointment in additional post as none of them possesses Training qualification as required in the aforesaid Rule 3-n, Clause 6 of the Rules, following the principles of natural justice, they can only be appointed in normal vacancies available in other primary schools within the District of North 24-Parganas as desired by their Lordships as per the aforesaid clarificatory directive provided I am vested with such power by the State Govt. In relaxation of the restrictive statutory directive in Rule 11(a).

As a matter of fact, I am actually incompetent to issue any appointment letter to the writ petitioners in view of the embargo contained in the provisions of Rule 11(a) unless I am vested with unlimited power to issue appointment letter for appointment of Primary Teachers by amending the said Rule 11(a).

I am awaiting your wish direction in this regard.'

14. The Director of School Education by a letter dated 25th November, 1997 addressed to the Secretary to the School Education Department, stated:

'In this context it is submitted that the Contempt Rule was Issued by Hon'ble appeal court, for the violation of the order dated 22nd September. 1995, against the Director of School Education, West Bengal and pursuant to the liberty granted by the Hon'ble Court, I have to issue the order according approval of the cases of the petitioner(s) vide this office No. 686 L(P) (copies enclosed) dated 13th August, 1997 followed by a reminder vide No. 722-L (Pry.) dated 12th September, 1997 (copy enclosed).

Under the circumstances it may be stated that the vesting of power to issue appointment letter to the writ petitioner, upon the DPSC after relaxing the relevant provision of the Rules, is beyond the control and competence of the Director of School Education, West Bengal and hence it earnestly requested that Govt. In the School Education Department may very kindly issue necessary order, as has been prayed for by the DPSC in their letter as referred to in Para 1 hereinbefore, at an early date.

Immediate action is solicited.'

15. It is not the case of the petitioners that the pursuant to the observations of the division bench, any order of relaxation was passed by the State.

16. In his counter-affidavit he further stated that he had interviewed the concerned teachers and found that they were allegedly appointed in unsanctioned additional post and none of them had been appointed in any normal vacancy in the respective school and during interview none could produce any training qualification so as to become eligible to be appointed in additional post created by the school authority as provided in Rule 3(d) of the Rules framed under section 66(2) of the Bengal Rural Primary Education Act, 1930 which had become applicable in the urban area as per G.O. No. 1614-Edn (P) dated 8.11.1974. He further stated that after the aforementioned letter of the Director of School Education, the State of West Bengal has not relaxed the rules.

17. Section 2(b) of the Contempt of Courts Act defines Civil Contempt to mean wilful disobedience of any judgment, decree, direction, order, writ or other process of a court of wilful breaches of an undertaking given to a court.

18. The order passed by the division bench is hedged with conditions. If such conditions have not been fulfilled, it cannot be said that the alleged contemnor has wilfully disobeyed the order of this court. Furthermore, a person cannot be forced to do something contrary to rules. Admittedly, the alleged contemnor is bound by the statutory rules. He or the Ad-hoc Committee were not parties of the writ-application. In the earlier writ application the learned single Judge did not issue any rule against the alleged contemnor but merely asked him to file a report. Certain directions had been issued by the learned single Judge as also by the division bench although neither the alleged contemnor was heard at any point of time nor his application for recalling the order was considered. In the contempt proceeding the court's jurisdiction is limited. It cannot issue any suo moto order which would go against the parameters of the contempt jurisdiction. The only question is as to whether the contemnor is guilty of wilful disobedience.

19. In *Niaz Mohammad & Ors. v. 'State of Haryana & Ors.* reported in : AIR 1995 SC308 , the law is stated in the following terms:

'But such a proceeding is not like an execution proceeding under Code of Civil Procedure. The party in whose favour an order has been passed, is entitled to the benefit of such order. The court while considering the issue as to whether the alleged contemner should be punished for not having complied with and carried out the direction of the court, has to take into consideration all facts and circumstances of a particular case. That is why the framers of the Act while defining civil contempt, have said that it must be wilful disobedience to any judgment, decree, direction, order, writ or other process of a court. Before a contemner is punished for non-compliance of the direction of a court, the court must not only be satisfied about the disobedience of any judgment, decree, direction or writ but should also be satisfied that such disobedience was wilful and intentional.'

20. it is well known that a consequential order can be passed only when a person is found guilty of committing Contempt of Court. In *Pallav Goswami v. Ava Rani Sinha* reported in 100 CWN 20 pages 27 and 28. it is stated:

'We are not unmindful of the division bench decision of this court in Dulal Ch. Bhar & Ors. v. Sukumar Banerjee, : AIR1958 Cal474 , Saibal Kr. Gupta & Ors. v. B.K. Sen, : AIR1959 Cal106 , and Sunil Kr. Ghosh v. The State of West Bengal & Ors., 1995(1) CHN 166, as also the decisions of the Supreme Court in Md. Idris & Anr. v. Rustam Jahangir Bapuji & Ors. : 1985 CriLJ353 and Noorali Babu Thanewala. v. Sh. K.M.M. Setty & Ors. : 1990 CriLJ316 wherein it has been held that in a Contempt Application the court is competent to issue necessary further consequential directions for enforcing its order. But such necessary further consequential direction for enforcing the order of the court is in addition to inflicting punishment to the contemner. if found guilty of Contempt of Court.'

21. In the instant case directions have been issued without any finding that the alleged contemner was guilty of committing Contempt of Court.

22. It is now well settled when there is a genuine difficulty, there cannot be any contempt of court. In Mohd. Iqbal Khanday v Abdul Majid Rather reported in : [1994]3SCR396 , the apex court stated the law in the following terms:

'The law of contempt is based on sound public policy by punishing any conduct which shakes the public confidence in the administration of justice. The order dated 21.2.1992 while directing notice also required the appellant to accord promotion to the respondent as Associate Professor. It requires to be noticed here that is the main prayer in the writ petition itself. In such circumstances, the correctness of such an interim order is open to serious doubt. For a moment, it is not to be understood that the court has no power to pass such an order but the question is whether while granting such interim reliefs the discretion of the court has been correctly exercised? If the writ petition is ultimately dismissed, the respondent would have gained an undue advantage of getting a promotion underservedly. But we are not on the merits of the interim order.

Right or wrong, the order has been passed. Normally speaking, it cannot be gainsaid that the order ought to have been obeyed but it appears that there are insuperable difficulties in implementing the order. First is that the post of Associate Professor, according to the respondent, is a selection post. Secondly, the mere seniority, even if that is assured in favour of the respondent, would not be enough

to gain such a promotion. Thirdly, the specific order of the Govt. was to exclude the period of deputation on foreign assignment from reckoning the duration of the teaching experience of the respondent. Therefore, the respondent did not possess the requisite qualification. Fourthly, such necessary qualification seem to be mandatory under rules. That being the position to accord such a promotion, will be violative of the rules. Fifthly, the promotion could be granted only by the Public Service Commission and not by the appellant.'

23. The said decision has been followed by a division bench of the Patna High Court in *TISCO v. R.M. Mittal* reported in 1998(1) All Patna Law Reports, page 444.

24. Further it is well known that any appointment made in violation of the Rules is illegal. In *Biman Chandra Karmakar & Ors. v. State of West Bengal & Ors.* reported in 1998(1) CLJ 374 , the law is stated in the following terms:

'However, having heard the learned counsel for the parties we are of the opinion that when valid statutory Rules are in operation, recruitment of Primary Teachers must be made by the respective District Primary School Council who are creature of the statute, in terms of the said Rules. It is well known that an appointment has to be made in terms of a statutory Rules and an appointment which has been made in violation thereof would be a nullity. Reference in this connection may be made to the case reported in : (1995)11LLJ589SC ; : [1996]1SCR972 . There cannot be any doubt that after framing of 1991 Rules, all the earlier circular letters and orders ceased to operate. In fact, the State Govt. also in terms of a circular letter dated 13.7.96 clarified the position that the aforementioned Director circular bearing No. DNES/SL. No.1/1987 has become inoperative.

As in *Ratan Kumar Saha's* case (1997)1 Cal LJ 501, the division bench of this court had not taken into consideration the provision of Rules 8 and 9, the said decision must be held to have been passed sub-silentio and is not binding on this Bench.'

25. As allegedly the power of the alleged contemner is circumscribed by the statutory rules and as Rule 11(a) has not been relaxed by the State, in our opinion,

it is a case where even assuming that a contempt proceeding is maintainable against the alleged contemner, he has genuine difficulty in complying with the order and thus, it is not necessary to proceed with the matter any further.

26. For the reasons aforementioned this application is dismissed but in the facts and circumstances of this case there will be no order as to costs.

D.B. Dutta, J.

27. I agree.

28. Application dismissed

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