

Tulsi Roy Vs. Krishanu Roy and ors.

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Court : Kolkata

Decided On : Mar-17-2008

Reported in : (2008)2CALLT574(HC)

Judge : Ashim Kumar Banerjee and ;Tapas Kumar Giri, JJ.

Acts : West Bengal (Control of Expenditure) Act, 2005; ;[Constitution of India](#) - Articles 14 and 16; ;West Bengal Schools (Recruitment of Non-teaching Staff) Rules, 2005 - Rule 8 and 8(5); ;Management Rules - Rule 28

Appeal No. : F.M.A. 768 of 2007

Appellant : Tulsi Roy

Respondent : Krishanu Roy and ors.

Advocate for Def. : Amalesh Ray, ;Diptanil Chakraborty and ;Rumi Bhattacharyya, Advs. for Respondent No. 1

Advocate for Pet/Ap. : Ekramul Bari, ;Shamim UI Bari and ;S.M. Ali, Advs.;Saikat Banerjee and ;Moupia De, Advs.

Disposition : Appeal allowed

Judgement :

Ashim Kumar Banerjee, J.

1. Dakshin Chatra High School (H.S) in the District of 24 Parganas (North) wanted to appoint a clerical staff after obtaining prior permission from the District Inspector of Schools. The school asked the Employment Exchange to sponsor the names of eligible candidates. Accordingly, twenty candidates were sponsored by the Employment Exchange including the appellant. The respondent No. 1 was not sponsored by the Employment Exchange. He applied to this Court for permission to participate at the interview. The learned single Judge by judgment and order dated October 13, 2006 allowed his writ petition and directed the school to permit him to participate at the interview after holding that the Recruitment Rule 2005 did not cast any embargo upon the authority to entertain a non-sponsored candidate. Hence this appeal by the appellant.

2. Pertinent to mention, the respondent No. 1 became successful in such interview process as he was placed in the first position in the panel whereas the appellant was placed in the second position.

3. Mr. S.M. Ali, learned Counsel, appearing in support of the appeal contends that as per the provisions of the West Bengal (Control of Expenditure) Act 2005 no school authority is entitled to appoint any non teaching staff in the manner as may be prescribed. Rules have been framed under the said Act of 2005 being the West Bengal Schools (Recruitment of Non-teaching Staff) Rules 2005. Rule 8(5)(a) provides that on receipt of a sanction from the District Inspector the school authority shall make a requisition to the Employment Exchange for sponsoring, within 45 days, names of the candidates. It is also provided in the said Rule of 2005 that in case eligible candidates are not available from the Employment Exchange the post would be filled up by advertisement. In the instant case the requisition was sent by the school. The Employment Exchange sponsored twenty candidates. Hence there was no occasion for the respondent No. 1 to participate at the interview. The learned single Judge erred in allowing him to participate at the interview.

4. Mr. Saikat Banerjee, learned Counsel, appearing for the State supporting the appellant, contends that initially there had been guidelines or circulars prevalent which suggested appointment through Employment Exchange. The issue was

initially resolved by a special bench decision in the case *Debasis Dutta v. State of West Bengal* reported in 1998 (2) CLJ 1. Three-Judges bench of this Court held that Rule 28 of the Management Rules prescribes guidelines for the functioning of the managing committee including conducting selection process. Directions issued by the State from time to time with regard to the selection process were binding upon the school authorities and no recruitment in violation thereof could be held to be valid. It was also held that the Court could not permit a non-sponsored candidate to participate at the interview. After the said decision on the recruitment of teaching staff two Apex Court decisions in the case of *Kishore Kumar Pali* reported in (2000)9 SCC 405 and in the case of *Abani Mahato* reported in (2000)9 SCC 527 permitted the non-sponsored candidates to participate at the selection process by following the earlier Apex Court decision in the case of *Excise Superintendent* reported in : (1997)ILLJ56SC . Pertinent to mention, in the said decision the Apex Court observed that in case of appointment wide publicity should be made so that all eligible candidates could come and participate in the selection process. In view of those two Apex Court decisions the ratio decided in *Debasis Dutta* (supra) was rendered nugatory. Ultimately, this Court by a Five-Judges bench decision in the case of *Rabindranath Mahato* reported in 2005 (3) CHN 337 observed that those guidelines and/or circulars did not have any statutory force. Hence the orders passed by this Court from time to time allowing participation of non-sponsored candidates were held to be valid. After the decision of the Five-Judges bench the State enacted the law being the said Act of 2005 and framed Rules therein. According to Mr. Banerjee, once the Act was enacted and the Statutory Rules provided appointment only through the Employment Exchange the order of participation at the interview cannot be sustained.

5. In support of his contention Mr. Banerjee has relied upon a recent Division Bench decision in the case of *Gaua Nath Raj Banshi v. State of West Bengal and Ors.* reported in 2007(2) CLJ 105 in which one of us (Tapas Kumar Giri, J.) was a party. In the said case twenty candidates were sponsored and twenty-first candidate with the permission of the Court participated at the selection process. However, his writ petition was finally dismissed on merit when his allegation that junior names were sponsored, was found to be incorrect. The Division Bench upheld the order of the learned single Judge. Their Lordship held that it would not

be proper to allow one candidate to participate along with the sponsored candidates without having wide publicity allowing others to compete for the post. Mr. Banerjee has also referred to another Division Bench decision in the case of *Uttam Kumar Matty v. State of West Bengal and Ors.* reported in 2007 (4) CHN 499. There on an identical situation the Division Bench directed publication of notice in newspaper and considered the applicants along with sponsored candidates.

6. Mr. Banerjee has also referred to one single bench decision in the case of *Sri Kartik Pandit v. State of West Bengal and Ors.* 2007(1) CLJ 505 wherein the learned single Judge held that the provisions of Clause 5(a)(b) of Rule 8 is binding upon the school authority.

7. Mr. Amalesh Ray, learned Counsel, appearing for the respondent No. 1 on the other hand, has based his argument on the ratio decided in the case of *Excise Superintendent (supra)*. He cited various Apex Court decisions apart from *Excise Superintendent* to support his contention that restriction imposed in a selection process offends Articles 14 and 16 of the Constitution. He has relied on the following decisions in this regard:

i) *Union of India and Ors. v. N. Haragopal and Ors.* reported in : (1987)ILLJ545SC .

ii) *Raj Kumar and Ors. v. Shakti Raj and Ors.* reported in : AIR 1997 SC2110 .

iii) *Excise Superintendent Malkapatnam, Krishna District, A.P v. K.B.N Visweshwara Rao and Ors.* reported in : (1997)ILLJ56SC .

iv) *Arun Kumar Nayak v. Union of India and Ors.* reported in : (2006)8SCC111 .

8. He has also relied upon a Division Bench decision of this Court in the case of *Bhaskar Ranjan Ghosh v. Kamal Sen and Ors.* reported in 2000(2) CHN 246.

9. Mr. Ray has also cited a Division Bench decision in the case of *Gopal Sinha v. Palas Sarkar* reported in (2007)1 WBLR (Cal) 356 in which one of us (Ashim Kumar Banerjee, J.) was a party.

10. To decide the point in issue let us go back to the stage prior to Debasis Dutta (supra). In case of recruitment of teaching and non-teaching staff guidelines were issued from time to time by the State to conduct the selection process by asking for sponsoring of names through Employment Exchange. In 1996 the Apex Court delivered the judgment in the case of Excise Superintendent (supra). Following the said decision this Court was flooded with writ petitions, inter alia, asking for permission to participate at the interview. Such prayer was acceded to. The matter went up to the Division Bench and the issue was ultimately resolved by the Three-Judges bench in the case of Debasis Dutta (supra) as discussed above. Such decision was rendered nugatory in view of subsequent decisions of Apex Court in the case of Kishore Kumar Pati and Abani Mahato. Such situation continued till the issue was resolved again by a Five-Judges bench in the case of Rabindra Nath Mahato (supra). Significant to note, in the mean time in 1997 the School Service Commission came into effect. Hence the appointment of teaching staff was entrusted to the Commission through public advertisement, Appointment of non-teaching staff still remained with the school authority. In the case of Rabindra Nath Mahato the Five-Judges bench held that those guidelines or circulars were of no consequence. Considering the said decision the State enacted the law as discussed before. Despite such law being enacted and despite such Rule being framed the learned Judge permitted the respondent No. 1 in the instant case to participate at the interview after holding that there was no fetter as contained in the Act or the Rules. Identical issue was gone into by two Division Bench decisions in the case Gaya Nath Rajbanshi and Uttam Kumar Maity (supra). We do not find any relevance of the decision in the case of Gopal Sinha (supra) as in the said case the appointment related to a period prior to the said Act coming into force. Moreover, the facts were totally different and do not have any resemblance with the instant case.

11. The Apex Court decisions cited by Mr. Ray are all on Governmental appointments whereas we are considering private appointments. We are not sure as to how those judgments would be having any relevance for the reasons we would be discussing little later.

12. Let us first consider the two Division Bench decisions of our Court referred to above. In the case of Gaya Nath Rajbanshi the school after getting prior permission approached the Employment Exchange for sponsoring of names. Accordingly, twenty names were sponsored. The appellant approached the learned single Judge with the grievance that some of the sponsored candidates were junior to him. Hence he was superseded in the matter of sponsoring. He was initially permitted to participate at the interview. However, at the final hearing his writ petition was dismissed as on verification of the fact his allegation was found to be incorrect. He preferred appeal. Before the Division Bench the appellant took the plea of the ratio decided in the case of Excise Superintendent (supra) and contended that he was lawfully allowed to participate at the interview irrespective of being sponsored by the Employment Exchange. The Division Bench observed:

In that view of the matter and having regard to the judgment of K.B.N Visweshwara Rao (supra), we are of the view that the prayer as made in the writ petition was not a fit prayer for being allowed directing his appearance only in the interview as admittedly the post was not advertised in daily newspaper inviting the names of other candidates identically placed like the petitioner.

13. The Division Bench also considered the recent Apex Court decision in the case Secretary, State of Karnataka and Ors. v. Uma Devi (3) and Ors. : (2006)IILLJ722SC . On a combined reading of the Division Bench decision we find that Their Lordships were of the view that unless there was a wide publicity permitting only one candidate being not sponsored by the Employment Exchange to participate at the interview would be illegal and improper. In the case of Uttam Kumar Maity in almost identical situation the writ petition was dismissed at the threshold by holding that there was no specific averment that writ petitioner's name was not sponsored earlier by the Employment Exchange. Here also the Division Bench considered the Apex Court decision in the case of Excise Superintendent (supra). The Division Bench, however, in the said case directed fresh recruitment process by asking the school authority to send requisition to the Employment Exchange and simultaneously publish advertisement for the said post.

14. Articles 14 and 16 although do not guarantee employment, make it obligatory on the State to give adequate opportunity and create a congenial atmosphere in a recruitment process so that all eligible candidates can compete for the said post. This interpretation has been given by the Apex Court starting from Hargopal Singh (supra). Such consistence view is still holding the field. In the case of Raj Kumar and Ors. the Apex Court did have the occasion to consider a like Rule and while considering so the Apex Court observed that such Rule should not restrict others to come and compete for the post although being eligible for the same. Our High Court also considering the consistent view of the Apex Court, in the case of Rabindra Nath Mahato held the same view.

15. We, however, wish to highlight an issue which was so long not considered by any of the earlier precedents. We are faced with a problem of appointment of a non-teaching staff in a private school. All schools in the State are not Government schools. They might be aided by the Government. Salary of the teaching and non-teaching staff might be paid by the Government. Those funds are provided to cater to the need of the society at large as the State is having a bounden duty to provide appropriate infrastructure for education of our children. Since the Government is providing aid they are entitled to suggest the procedure for recruitment. In case of non-teaching staff the school authorities are free to appoint their non-teaching staff. They will, however, have to follow the recruitment process suggested by the State. Earlier guidelines were framed which were held to be of no consequence in the absence of any statutory blessings. By the 2005 Act the State imposed a condition as to how the recruitment would be made in the schools. Mr. Ray has tried to contend that the primary moto of the said Act is to control the expenditure of the State and not the appointments. While controlling the expenditure, in our view, the State is also entitled to suggest as to how such expenditure is to be incurred by the respective schools and while doing so the State has right to suggest the selection process. In this regard, we are in full agreement with the view expressed by the learned single Judge in the case of Kartik Pandit (supra). The Rules provide for selection through Employment Exchange. Rules also provide that in case such procedure fails advertisement should be published. Unless and until such system is held to be contrary to Public Policy no challenge to the same can be thrown.

16. We also wish to view this problem by considering the practical aspect. If a village school having one clerk and one peon in the staff pattern, having less than ten teaching staff approved by the State is asked to go for regular recruitment process by publishing wide publicity in print and electronic media it would have a disastrous effect apart from the expenditure involved therein. More than 65 lakhs unemployed youth are registered with our State Employment Exchange. For a post of clerk or a peon if an advertisement is published we can visualize how many applications would be poured in. It would be an impossible task to fill up the post through such process. Employment Exchange has been set up to record and register the unemployed youths. Names are sponsored maintaining seniority as per the eligibility. Rules provide that in case such system fails recruitment should be done through advertisement. If we relax the Rule by giving a wide connotation at the end of the day we would find that twenty candidates have been sponsored and the twenty-first candidate participating at the interview with the permission of the Court has been selected for the post. Such selection process would be a mockery. The situation in *Gaya Nath Rajbanshi (supra)* was common through out the State prior to coming of the said Act of 2005 in force. We cannot brush aside such aspect. In our view, since the statute and the Rules framed therein are holding the field the school authorities must adhere to the same so long they receive monetary aid from the State. Since the school authorities are not the Governmental authorities the decisions of the Apex Court may not have strict application therein.

17. Mr. Ray has also tried to contend that the appeal of the appellant should not be entertained in view of the fact that they did not make any contemporaneous protest at the time of recruitment process. In our view, such submission is of no consequence as the appellant did not know at the time of selection whether the respondent No. 1 was sponsored by the Employment Exchange or not. Moreover, since the issue has a far reaching effect, we do not wish to reject the appeal on that narrow campus. Hence such contention of Mr. Ray is rejected.

18. In our view, this appeal must succeed. The order of the learned single Judge, in our view, is liable to be set aside and the writ petition is liable to be dismissed.

19. However, since in the case of Uttam Kumar Maity (supra) the division bench directed simultaneous advertisement to be published and since the issue is common in most of the litigations in education field we feel that the controversy should be resolved by a larger bench.

20. We also feel that it is high time that the State should rethink and set up a Commission for appointment of non-teaching staff in the aided schools of the State or to entrust such duty on the School Service Commission set up for the purpose of appointment of teaching staff. This would, in our view, resolve the controversy once for all.

21. Let this matter be placed before the Hon'ble Chief Justice for His Lordship's consideration for constituting a larger bench to find out which ratio of the Division Bench in the case of Gaya Nath Rajbanshi and Uttam Kumar Maity (supra) and the present case is the correct law.

22. So far as this appeal is concerned, the respondent No. 1 is already working in terms of the order of the learned single Judge. Let him continue to do so till the disposal of the larger bench proceeding.

23. Urgent Xerox certified copy of this order, if applied for, be given to the parties.

Tapas Kumar Giri, J.

24. I agree.

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