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Court : Jammu and Kashmir

Decided On : Jan-16-2003

Reported in : 2003(3)JKJ7

Judge : Nisar Ahmad Kakru, J.

Acts : [Constitution of India](#) - Article 226

Appeal No. : IA No. 2196/2002 and IA. No. 2556/2002 in SWP. No. 1252/2002

Appellant : Bashir Ahmad Bawan and anr.

Respondent : State of J and K and ors.

Advocate for Def. : M.H. Attar, Adv. for the respondents 3 to 5

Advocate for Pet/Ap. : R.A. Jan, Adv.

Judgement :

Nisar Ahmad Kakru, J.

1. This application for grant or interim relief has arisen out of a writ petition which calls in question inter-se-seniority of the petitioners and the respondents 3 to 5. It has come up for consideration in pursuance of the order of the court dated 28.12.2002. There is an ad-interim direction in favour of the petitioners dated 9.9.2002 placing a restraint on the official respondents from according

consideration for promotion to the respondents 3 to 5 on the basis of impugned seniority list, consequent upon which a motion (IA. 2556/2002) came to be laid by the respondents 3 to 5 for recalling the order. This motion is treated as objections to the application of the petitioners by order of the court dated 16.12.2002 and is read in its opposition.

2 For perceptual clarity the contention of the petitioners which forms basis of this writ petition needs to be appreciated in the light of the averment made by them in para 21 of the writ petition which suggests that no right can flow to the respondent No. 5 under law by tint of his induction in the wait list relating to the selection concluded in the year 1982 by the public Service Commission for the posts of Assistant Engineers. On this assumption placement of respondents 3 to 5 ahead to the petitioners in the seniority list is said to be unsustainable. This contention needs to be appreciated in the light of three judgments produced by the respondents 3 to 5 in support of their objections of three coordinate benches of this court pronounced in exercise of writ jurisdiction in petitions 138/86 titled Navdeep Kumar v. State of J&K; and Ors., 597/87 titled Tej Krishen Dhar v. State of J&K; and Ors. and 742/90 titled Raj Kumar v. State of J&K; and Ors. It transpires from perusal of these judgments that the controversy questioning legality of appointment on the basis of a wait list has been adjudicated upon by the court in the aforementioned writ petitions declaring the waiting list to be legally valid and incidentally petitioners herein happen to be the party in the array of contesting respondents excepting in writ petition 742/90. This finding having not been questioned by the petitioners before the Superior Court stands settled which is sought to be reopened through the writ petition.

3. Much emphasis is laid on the judicial pronouncement handed down by the Apex Court in Suraj Prakash Gupta v. State of J&K;, AIR 2000 SC 2386 to canvass that a direct recruit cannot claim the seniority from a date prior to his appointment. Law is well settled that before applying the law. Similarity of facts has to be ascertained and law will apply only if the facts are similar. The difficulty for the petitioners is that the facts of the writ petition are not similar to the case of Suraj Prakash Gupta and dissimilarity is evidenced even by the very averments made by the petitioners in the writ petition wherein it is specifically pleaded by them that they were

adjusted on ad hoc/officiating basis on the posts of Assistant Engineers in the year 1985 and continued in the said capacity till 1987. Conversely the writ court declared the respondents 3 to 5 as rightful beneficiaries of the process of selection for the posts of Assistant Engineers concluded in the year 1982 by judgements of the court which have attained finality. It is pertinent to mention here that in an attempt to escape the fall out of the judgments of the writ court the learned counsel for the petitioners has contended that in absence of a definite direction in the operative part of the judgments of the writ court the respondents are not entitled to regularization and seniority from 1984. The contention does not appear well founded because operative part of the judgment cannot be read in isolation of the context of the judgment. It is not only legitimate but proper as well to read the judgment in its context and reading of the judgment as a whole leads to the conclusion that the writ court's direction confers a right of appointment upon the respondents from 1984 as direct recruits and entitles them to their placement in the seniority list on the basis of such year of appointment. It is also gathered from these judgments that official respondents had denied appointment to the respondents 3 to 5 in violation of the quota rule and such denial of appointment has not been approved of by the writ court. The writ Court has also arrived at a definite conclusion that last appointment from the selection list of 1982 was made in the year 1984. It was in the peculiar facts of the case that the High Court directed consideration for the appointment of the respondents 3 and 5 herein in the category of direct recruits from 1984 a date subsequent to their selection. Not only this but the operative part of the judgement in writ petition 597/87 titled Tej Krishan Dhar v. State and Ors. is categorical and unambiguous to the effect that petitioner's (respondent 4 herein) appointment and seniority shall begin on the basis of his selection made in the year 1982 which entitles him to regularization from 1984. Suffice it to say that the view taken is provisional in character and effect. The facts narrated in this para are not true of Suraj Prakash Gupta's case where none of the parties had a judgement in his favour which had settled the date of appointment and seniority retrospectively and had attained finality having gone unchallenged. Thus dissimilarity of facts is manifest.

4. It will be advantageous to see how the Apex Court has couched the relief clause in para 81 of the judgement which reads:

'In view of our decision on the points 1 to 4, the appeals will be governed by our findings on points 1 to 4'

5. The expression used makes it very clear that the findings returned are with respect to the merits of the appeals which had evoked attention of the Apex Court in the matter. Needless to say that law laid down by the Apex Court is binding on this Court but if facts are dissimilar the judgment will have no application. Being of the considered opinion that there is no similarity of facts, the judgment in Suraj Prakash Gupta's case is of no help to the petitioners. In taking this view, I am fortified by judgment of the Apex Court itself in Regional Manager v. Pawan Kumar, AIR 1976 SC 1766 para 7 wherein the court has held:

'7. It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.'

6. At the risk of repetition it needs to be reiterated that the writ court has decided the legality of waiting list in three writ petitions but amazingly no mention even worth the name is made in the present writ petition about the judicial decisions passed in the above-said writ petitions to which petitioners happened to be party in the array of contesting respondents excepting in writ petition 742/90. Thus suppression of material facts being writ large, the conclusion that arises is disentitlement of the petitioners to the interim relief, for, one who seeks a discretionary relief must approach the court with clean hands which is wanting on the part of the petitioners. What will be the effect of such suppression in the main petition, I refrain from expression of opinion and leave it open to be considered when writ petition evokes the attention of the court.

7. It is next contended by the learned counsel for the petitioners that the decisions of the writ court are rendered non-est by judgement of the Supreme Court in Suraj Prakash Gupta's case. On this proposition it is canvassed that both retrospective appointment and seniority accorded to the respondents 3 to 5 is liable to be set aside. Controverting the submission the learned counsel for the respondents 3 to 5

submitted that denial of benefit to the direct recruits when examined in the light of the facts of Suraj Prakash Gupta's case, dissimilarity is eminent. He has further submitted that court is not powerless to accord such benefit where a direction to that effect is called for in the facts of a particular case. To bring home the point, reference is made by him to a judicial pronouncement handed down by the apex court in Surinder Narain Singh v. State of Bihar, AIR 1998 SC 1841. Relevant para may be extracted:

'25. For the forgoing conclusions we are of the view that the respondents 3-34 who are appointed to the vacancies of 15th examination under 1955 rules will have to be given seniority over the appellants in Civil Appeal Nos. 1381-84/91 although they came to be appointed latter than 23/5/1975 but against 33 vacancies which were then existing to which these appellants have no right.'

8. Being conscious of the fact that I am not to examine the matter as an appellate court, there is neither any cause nor any power available to me to go into the legality of the judgement of the writ court. However, a moot question arises as to what is the consequence of a judgement which has not been challenged and what will be the impact of the judgement of a superior court on an unassailed judgement. Contention of the LC for the respondents is that Suraj Prakash Gupta's judgement will not alter the mandate of the judgment of the writ court even if a view is taken by the superior court contrary to it. In support of his contention he has referred to several decisions of the Supreme Court. A few relevant to the issue may be noticed hereinafter.

In Punjab v. Joginder Singh, AIR 1963 SC 913 at page 916 para 9 the Constitution bench of the Apex Court held:

'.....The state however has preferred no appeal against the orders in the other three petitions and Mr. Agarwala, learned counsel for the respondent raises the contention that as the orders in the other three petitions have become final, any order passed in this appeal at variance with the relief granted in the other three petitions would create inconsistent decrees in respect of the same matter and so we should dismiss the present appeal as incompetent. We, however, consider that this would not be the legal effect of any order passed by the court in this appeal

and that there is no merit in this objection as a bar to the hearing, of the appeal. In our opinion, the true position arising, if the present appeal by the State Government should succeed, would be that the finality of the orders passed in the other three writ petitions by the Punjab High Court would not be disturbed and that those three successful petitioners would be entitled to retain the advantages which they have secured by the decision in their favour not being challenged by an appeal being filed....'

In *Vallapally Plantations Pvt. Ltd. v. State of Kerala*, (AIR 1999 SC 1796) the Supreme Court dealing with a situation near similar to the one posed in this writ petition relied upon an earlier judgement passed in *Authorised Officer (Land Reforms) v. M.M. Krishnamurthi Chetty*, (1998) 9 SCO 138. Paras 25 and 26 may be extracted:

'25. A somewhat similar question arose before this Court in the case of *Authorised Officer (Land Reforms) v. M.M. Krishnamurthi Chetty*, (1998) 7 JT (SC) 503. In that case about 4.81 standard acres of land belonging to the respondent were declared surplus. Ultimately the matter came to the High Court. The learned Judge of the High Court set aside the order and remanded the case for fresh consideration in the light of the judgement of the High Court in the case of *Naganath Aiyer v. Authorised Officer*, (1970) 84 Mad. LW 69. While the matter was pending before the authorised officer the Supreme Court reversed the aforesaid judgement in the case of *Authorised Officer v. S. Naganatha*, AIR 1979 SC 1487. The Authorised officer decided the proceeding in the light of the judgement of the Supreme Court. The land holder went in revision before the High Court challenging the order of the Authorised Officer. A stand was taken before the High Court that the order of remand passed by the High Court directing the Authorised Officer to decide the dispute in respect of the ceiling area in the light of the judgement of the High Court was not challenged by the Authorised Officer before the Supreme Court and as such it had become final. In other words the Authorised Officer was bound by the order of remand passed by the High Court and it was not open to the Authorised Officer to consider the dispute in respect of the ceiling area in the light of the judgement of the Supreme Court. The High Court accepted this contention and allowed the Civil revision filed by the land holder- the

respondent. This Court confirming the order of the High Court observed as follows:

'The order passed by the High Court directing the Authorised Officer to examine the dispute in the light of the judgement of the High Court in the case of Naganatha, Ayyar v. Authorised Officer became final although the judgement on which the grievance had to be examined itself was reversed later by this court. We find no fault with the reasoning of the High Court. It is well settled that even orders which may not be strictly legal become final and are binding between the parties if they are not challenged before the superior courts. In the result the appeal fails and it is dismissed.'²⁶ On giving our anxious consideration to the entire matter we have no hesitation to hold that on the facts and in the circumstances of the case the Taluk Land Board rightly held that it had no power to reopen to proceeding in exercise of the powers vested in Section 85 (9) and the High Court was in error in interfering with the said order of the Taluk Land Board.'

9. The contention of the LC for the petitioners that Suraj Prakash Gupta's case has to govern the seniority of the petitioners and respondents 3 to 5 notwithstanding the fact that the petitioners have not appealed against the judgements of the High Court is completely answered by the judicial decisions supra, The ratio deducible from these judgements makes it very clear that the orders passed by the court are binding between the parties if they are not challenged before the court of competent jurisdiction even if they may not be strictly legal. Admittedly the judgements passed in three writ petitions by the High Court have not been assailed and have attained finality, obviously, the inter se seniority of the petitioners and respondents 3 to 5 determined by the official respondents in compliance with the decisions of the High Court has to govern their rights till final disposal of the writ petition. More so, direction for staying the operation of seniority list cannot be conceived of because such direction will not only amount to unsettling the decisions of the High Court, that too at an interlocutory stage, but it will also compel undoing of action taken by the Government in pursuance of these decisions. Thus what emerges is that the petitioners have no prima facie case to sustain their claim and withholding of relief is not going to cause any loss to them much less one which cannot be compensated in terms of money. Apart from that granting relief will also mean disturbing the seniority brought into being by the

Government after an exercise made in compliance with the direction of the court, obviously balance of convenience is not in favour of grant of relief but is other way round.

9. The for the respondents has also contended that the copies of the representation enclosed with the writ petition is an after thought effort otherwise fact remains that no representation was ever made against the tentative seniority list or final seniority list and support to the submission is sought from the fact that the representations do not bear any date and are also without proof of delivery. He has further submitted that writ petition is not maintainable because seniority fixed in the post and grade of Assistant Engineer was neither represented against nor challenged by the petitioners and is not questioned even through the present writ petition. To substantiate the contention, he has placed reliance on *Kaushal Kishore Singh v. Director Education*, AIR 2002 SC 488. Reliance is also placed on the judgement of the Supreme Court in *P.R. Sinha and Ors. v. Inder Krishna Raina and Ors.*, (1996) 1 SCC 681 para 6 to canvass that while entertaining the writ petition, the High Court should not pass interim order, the nature of which is to grant a relief which can be granted only at the final disposal of such a writ petition.

10. Considering the matter in totality of the circumstances the irresistible conclusion I have arrived at is that it is not a case for grant of interim relief and the ad-interim direction dated 19.9.2002 passed in CMP 2196/2002 arising out of writ petition 1252/2002 which has otherwise also lived its life because it had to be in force till next date only shall stand vacated. As a corollary the official respondents are free to accord consideration to the respondents 3 to 5 for next higher promotion on the basis of impugned seniority list. However, with a view to do substantial justice between the parties, it is provided that in case such consideration be gets promotion to the respondents 3 to 5, it shall be subject to out-come of writ petition.

11. It goes without saying that when court is called upon to decide an application for grant of interim relief taking mental note of the reasons will not suffice but some reasoning has to be reduced into writing. When reasoning is recorded, observations are inevitable and to avoid any controversy about the effect of these

observations on the main petition, I make it clear that expressions and observations made in this order shall restrict to the interim relief only and the writ petition shall be decided in accordance with law uninfluenced by the observations made hereinabove

12. CMPs disposed of accordingly.

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