

# SUPREME COURT OF INDIA

State of West Bengal

Vs.

Banibrata Ghosh

C.A.No.559 of 2009

(Markandey Katju and V.S. Sirpurkar JJ.)

02.02.2009

## JUDGMENT

**V.S. Sirpurkar, J.**

1. Leave granted.

2. State of West Bengal has come up against the judgment of the Division Bench of the High Court allowing the appeal filed by the respondent no.1 herein and directing the State to treat the respondent no.1 as an approved Assistant Teacher of the concerned school and further to allow the respondent no.1 to resume his duties as an approved Assistant Teacher of the concerned school immediately. The High Court has further directed the authorities to pay 50% of the back-wages for the period the said respondent was out of service. It is further ordered that the respondent would also be entitled to receive all other admissible service benefits as a duly approved Assistant Teacher of the concerned school pursuant to the order of approval. Thereby, the High Court allowed the appeal filed against the judgment of the learned Single Judge of that court who had dismissed the Writ Petition filed by the respondent no.1. In his Writ Petition the respondent no.1 had sought for a writ of mandamus for regularization of his appointment as a Teacher in Shimulia High School in the State of West Bengal.

3. The following facts would clarify the controversy.

4. There is a school called Shimulia High School at Krishnanagar, District Nadia, West Bengal. A leave vacancy occurred in the post of Assistant Teacher (Bio Science), as the permanent teacher went on leave for six months initially. As per the Rules of the Government, the Managing Committee decided to fill up the said leave vacancy and for that purpose, obtained permission from the District Inspector of Schools, Secondary Education, Nadia. An advertisement came to be published on 11.12.1990 inviting applications from the eligible candidates. In pursuance thereto, the respondent no.1 applied with other candidates and the panel was ultimately prepared empanelling three candidates wherein the respondent no.1 was at the first position. The same panel was forwarded to District Inspector of Schools,

Nadia who approved the said panel on 18.1.1991. On 23.1.1991, the respondent no.1 came to be appointed on temporary basis in the said leave vacancy for a period of six months from 24.1.1991 to 2.7.1991. His appointment was later on approved by the concerned District Inspector by his order dated 14.2.1991. Eventually, the said leave vacancy continued for more than six months and as a result, the respondent continued to work. His services were extended from 3.7.1991 to 31.12.1991 and this extension was also approved by the District Inspector of Schools. After the tenure of service ended on 31.12.1991 for some explicable reasons, the respondent no.1's appointment was extended from 2.1.1992 to 31.3.1992. However, this extension was not approved by the District Inspector of Schools, instead District Inspector of Schools requested the school to take fresh steps to fill in the said vacancy. A fresh advertisement was, therefore, published on 23.2.1992. The respondent no.1 applied and was again selected and he was thus given appointment on the previous terms for a period from 3.4.1992 to 30.6.1992. On 3.7.1992, the original incumbent on the post who had gone on leave and in whose place the respondent was appointed resigned and as a result, a substantive vacancy arose in the permanent sanctioned post of Assistant Teacher in Bio Science group. A representation came to be made by the respondent no.1 on 14.8.1992 that since he had worked in the school as Assistant Teacher on and from 24.1.1991 to 30.7.1992 on adhoc basis and since the original incumbent of the post one Shri Shanker Biswas had submitted his resignation, the services of the respondent no.1 should be regularized. A Writ Petition came to be filed by him on 25.8.1992 registered as CO No.18711 (W) of 1992. Amongst other prayers, the respondent no.1 herein sought his absorption and regularization in the permanent vacancy with effect from his appointment and also sought an injunction against the appellants herein restraining them from proceeding in any way, in filling up the said vacancy.

5. On 15.12.1992, when the Writ Petition came up before the learned Single Judge of the Calcutta High Court, an interim order was passed directing the District Inspector of Schools to regularize the appointment of respondent no.1 by 15.1.1993 and also to submit a report about the regularization by 22.1.1993. Since this interim order was not complied with, the respondent no.1 filed an application for initiating contempt proceedings on 16.2.1993. Learned Single Judge directed the District Inspector of Schools, Nadia, namely, Ranjit Kumar Ghosh to appear in person on 2.7.1993 at 10.30 and to show cause why contempt proceedings should not be drawn against him for the alleged violation of the court's order dated 15.12.1992 and that he should not leave the court without permission. It is worthwhile to mention that when the interim order was passed by the court, the Learned Single Judge merely recorded that the petitioner had served the copy of the Writ application upon the present appellants and yet nobody had appeared on behalf of the Government. Thus, the interim order came to be passed in the absence of any representation to the appellants herein. In the teeth of the contempt proceedings, the approval was accorded on 15.10.1993 w.e.f. from 4.1.1993 and then the respondent continued to serve merrily on the basis of the orders passed.

6. Ultimately after 10 years, the Writ Petition came up for hearing before the learned Single Judge of that court who posed himself a right question as to whether the approval granted in terms of the interim order should or should not be retained. The Learned Judge also posed a

further question as to whether the respondent was entitled to any such interim order at all to begin with. The learned Single Judge then went on to hold that the respondent no.1 was appointed only against the leave vacancy and was not selected against a permanent vacancy complying with the Rules for the selection of such permanent post. The Learned Single Judge further took the view that there was no rule, atleast brought to his notice suggesting that a person selected against a leave vacancy should be treated as an appointee against a regular vacancy and further should be entitled for the approval as such. The Learned Single Judge treated the appointment of the respondent no.1 as adhoc appointment that was not entitled for the grant of permanent status or as the case may be approval for a permanent appointment. In that view of the matter, the Learned Single Judge dismissed the Writ Petition holding that the petitioner in the writ petition had no right whatsoever for permanency. The learned Single Judge also found that no such interim order could have been given by his predecessor which was in the nature of a final order. Even noting that the petitioner in the writ petition and the respondent no.1 herein was in the post and serving for 10 years, the learned Single Judge refused to entertain the petition.

7. A Writ Appeal came to be filed against this judgment which came to be allowed by the Division Bench. The said Division Bench judgment has now fallen for our consideration.

8. Shri Bhaskar P. Gupta, Learned Senior Counsel, appearing on behalf of the appellants, firstly urged that the Division Bench, which allowed the Appeal, had posed itself an incorrect question and completely missed the real controversy involved. According to the Learned Senior Counsel, there could be no dispute that the approval, which was granted by the Director of Education by his order dated 13.8.1993 was in pursuance of the interim order passed by the Learned Single Judge on 16.7.1993. If that was so, it was clear that it was not the final approval, as the said approval was for a vacancy, which was admittedly not a clear vacancy, as it was a leave vacancy. According to the Learned Senior Counsel, it is also to be seen that the Learned Single Judge had not disposed of the Writ Petition, therefore, the said order could not have been treated as a final relief. Under such circumstances, the Division Bench could not have tested the propriety of the Learned Single Judge (Hon. Barin Ghosh, J.), who finally decided the petition. According to the Learned Counsel, there was nothing wrong in finally deciding upon the petition. Therefore, the Division Bench should have firstly tested as to whether the final judgment, disposing of the petition, was correctly decided or not, instead of addressing itself to a question whether the Learned Single Judge should have considered ultimate effect of the interim order. The Learned Counsel also invited our attention to the Recruitment Rules reflected in the Office Memorandum No. 2816(17) G.A. dated 4.12.1989 issued by the Director of School Education, Government of West Bengal, to suggest that there are different procedures for filling up of leave vacancy and permanent vacancy.

9. Shri Bijan Kumar Ghosh, Learned Counsel, appearing on behalf of the respondents, however, submitted that the original Writ Petitioner (respondent herein) was undoubtedly, appointed after a full-fledged advertisement, not once, but twice. He also had the necessary qualification and in fact, during long pendency of 10 years of the Writ Petition, he was also chosen and sent for doing his B.Ed. Course and thus, had bettered his qualification, which

was a proper qualification for the post of Assistant Teacher. Under such circumstances, since the petition pended, not for the fault on the part of the respondents, the Learned Single Judge (Hon. Barin Ghosh, J.) should have allowed the petition, instead of tinkering with the interim order passed by the Learned Single Judge (Hon. D.K. Basu, J.) earlier. As an alternative argument, Learned Counsel argued that it will be of no use now to send back the teacher, who is not only a qualified teacher, but has an experience of 10 years, and that would ruin the respondent financially and he would be thrown in the ditch of unemployment.

10. We have carefully seen the Division Bench Judgment and are unable to agree with the same. Very strangely, the Division Bench has expressed:-

"Even after the aforesaid regularization of the service of the appellant/Writ petitioner, pursuant to the earlier interim order passed by this Hon'ble Court, Learned Single Judge, while deciding the Writ petition finally again considered the issue relating to regularization of the service of the said appellant/Writ Petitioner and quashed the approval already granted to the appellant/Writ Petitioner and further directed the school authorities to fill up the permanent vacancy in accordance with law. It is true that the service of the Writ Petitioner was approved pursuant to the earlier interim order passed by this Court but the competent authority of the State Government including the Director of School Education and the District Inspector of Schools concerned did not challenge the said interim order....." (Emphasis supplied)

The Division Bench further posed itself a question:

"... it is now to be decided whether the Learned Single Judge was justified in considering the issue relating to approval of service of the Writ Petitioner once again at the time of final hearing of the Writ Petition, when such approval was granted by the Competent Authority pursuant to the earlier order of this Court without raising any objection and imposing any condition." (Emphasis Supplied)

11. We are afraid, this approach (highlighted by emphasis) of the Division Bench was wholly incorrect. The circumstances, under which the earlier approval was granted, were writ large before the Division Bench, firstly, it was by an interim order that the Learned Single Judge (Hon. D.K. Basu, J.) proceeded to award the approval and a direction to regularize the services of the respondent. The Learned Single Judge had not even bothered to quote any rule, under which the respondent was entitled for getting his services regularized. In fact, there is a detailed procedure for filling up the vacancies. This was a case, where that procedure was not followed. The appointment of the respondent was merely on the basis of an advertisement for filling up the leave vacancy. The respondent very well knew that it was for the leave vacancy that he was competing with others. Under such circumstances, we fail to know as to what right was there in the respondent to insist on regularization of his appointment. The Division Bench has further made a rather casual statement in the judgment to the effect that the prescribed procedure for recruitment of teacher, both for leave and permanent vacancies, is substantially the same. We were told at the time of hearing that the respondent was not even registered with the Employment Exchange, which fact could not be

and was not disputed by Shri Ghosh, Learned Senior Counsel for the respondents, before us. Again, it must be pointed out that if the advertisement was for a leave vacancy, it would not have attracted substantial number of applications, which would not be the case, if the advertisement was for a permanent vacancy. We fail to understand, therefore, as to how, even without referring to the relevant rules or procedure for recruitment of teachers in permanent vacancies, the Division Bench could make such a casual statement in its judgment.

12. The aforementioned Office Memorandum No. 2816(17) G.A. dated 4.12.1989 deals with the Recruitment Procedure. These are the directions issued by the Director of School Education, West Bengal, who is empowered by Clause (i) and (ii) of sub-Rule (I) and Clause (i) of sub-Rule 28 of the *Rules for Management of Recognized Non-Government Institutions (Aided and Unaided), 1969* (Education Department Notification No. 1598-Edn.(S) dated the 15.7.1969). Direction 1 requires a prior permission of the District Inspector of Schools (SE) of the respective District against the sanctioned post, provided the school has no surplus teacher on its staff. This pre-supposes that the District Inspector of Schools has to take an exercise to decide as to whether the concerned school had any surplus teacher at the relevant time when the permanent post is to be filled up. Direction 2 suggests that no such prior permission would be required in case of an appointment against a deputation vacancy or against a leave vacancy, provided that leave is not more than 3 months. It also suggests that in case the leave vacancy is for more than 3 months, the names of candidates should be received by an advertisement in State level daily newspaper and by hanging notice in the notice board in the office of Zila Parishad and concerned Panchayat Samity or in case of Municipality, in the notice board of concerned Municipality. Direction 2(a) suggests that in case of a permanent vacancy, the Managing Committee has to enquire of the District Inspector of Schools (SE) if there is any approved surplus staff to be absorbed in recognized schools or any dependent member of a distressed family of an approved staff of any non-Government Recognized school who died in harness after 1.4.1981. The District Inspector of Schools then has to send the names of such eligible candidates, not exceeding 3 in number, to their concerned school within a fortnight for the appointment in the vacant post(s), if otherwise found suitable. If there is any difficulty in such appointments, the Managing Committee has to intimate the District Inspector of School within 15 days of the receipt of such names, stating the specific difficulties in writing, along with the copy of Managing Committee Resolution to that effect. This can be done only after such candidates are interviewed by the Selection Committee to be constituted for the purpose. Direction 2(b) suggests that the District Inspector of Schools can issue the prior permission for appointment to the school and prior to that, the school authorities have to request the national/local Employment Exchanges to furnish the lists of eligible candidates with academic and professional qualifications and date of birth of the candidates in case of General category within 30 days and for reserved categories, within 45 days from the date of receipt. If the names are not sponsored by the Employment Exchanges within the specified period, then a request has to be made to the District Inspector of Schools. Even where the appointments are to be made by an advertisement, first a request therefor has to be made to the Employment Exchange. It is obvious from Rules 1, 2, 3 & 4 that the procedure is different for filling up of the permanent vacancy and the leave vacancy.

13. This aspect was in fact, correctly appreciated by the Learned Single Judge (Hon'ble Barin Ghosh, J.) in his judgment, which was also adversely commented upon by the Division Bench without any justification. The Learned Senior Counsel appearing on behalf of the State, had also relied on the case of *Secretary, State of Karnataka Vs. Uma Devi* reported in 2006 (4) SCC 1 and, particularly, the observations in that judgment to the effect that a regular process of recruitment had to be resorted to, when regular vacancies imposed at a particular point of time are to be filled up and that cannot be done in a haphazard manner or based on patronage or other considerations. The Division Bench strangely was of the opinion that the selection for a post in leave vacancy was the same, as the selection of the post of permanent vacancy. Even the observations of this Court in the case of *Secretary, State of Karnataka Vs. Uma Devi*<sup>1</sup> (cited supra) have not been properly realized by the Division Bench. The approval of the first panel and also the second panel was after all for a leave vacancy post and not for a permanent post, therefore, such approval was of no consequence and it did not in any manner entitle the respondent for the regularization of his post without facing a fresh selection process.

14. An observation has been made by the Division Bench to the following effect:-

"As discussed hereinbefore, there has been proper compliance with the prescribed recruitment rules and procedures in the matter of initial appointment of the appellant to the post of Assistant Teacher of the concerned school in the leave vacancy which subsequently became a permanent vacancy due to the resignation of the concerned permanent teacher....." (Emphasis supplied)

We have scanned the judgment carefully, and we find no such discussion regarding "prescribed recruitment rules". Again, a finding is given in the same paragraph of the Division Bench Judgment to the effect that both the procedures in case of appointment against the leave vacancy and the permanent vacancy, are substantially similar. It is very difficult to understand the implication of this "substantial similarity".

15. We also do not understand, as to how, the Division Bench could be impressed by the fact that the interim order was not appealed against by the State Government. It is to be understood that an interim order does not decide the fate of the parties to the litigation finally; it is always subject to and merges with the final order passed in the proceedings. The non-filing of the appeal, which seems to have impressed the Division Bench, according to us, is of no consequence.

16. The Division Bench also seems to have been impressed by the fact that the Learned Single Judge dismissed the petition in 2003, though the appointment was made way back in 1993. The mere pendency of the Writ Petition cannot be viewed against the State Government, which could not be said to be responsible for such long pendency and that could not be viewed in favour of the original Writ Petitioner (respondent herein). That logic of the Division Bench is completely faulty. We are also no less surprised by the direction of

the Division Bench that since the respondent no.1 herein was not allowed to remain in service pursuant to the impugned order of the Learned Single Judge, he should be paid 50% of the back wages for the period for which the respondent was out of service. Such could never have been the course taken in view of the settled principle of "no work no pay". Again, the order of the Learned Single Judge was a perfectly justified order, who had viewed the whole controversy in details. We are convinced that the impugned judgment of the Division Bench wholly lacks merit and would have to be set aside and the judgment of the Learned Single Judge would have to be restored. We order accordingly.

17. Shri Ghosh, Learned Senior Counsel, appearing for the respondents, at this stage, says that we should take a compassionate view of the matter, since as a result of this judgment, the respondent would be thrown in the state of unemployment. We are afraid, we cannot show any such misplaced sympathy, which was shown by the Division Bench. We are told at the Bar that this Court had issued directions to make the payment of salaries and some payments have been made to the respondent. We direct that such payments shall not be recovered from the respondent. Considering that the Writ Petition remained pending for 10 years and thereby, the respondent might now have become barred by age for fresh employment, we recommend that the Government may consider the condonation of the age bar, if any, on the part of the respondent. We accordingly set aside the judgment of the Division Bench and restore that of the Learned Single Judge and allow the appeal but without any orders as to the costs.

<sup>1</sup>2006 (4) SCC 1