

SUPREME COURT OF INDIA

Vijoy Kumar Pandey

Vs.

Arvind Kumar Rai & Ors.

C.A.No.1310 of 2013

(T.S. Thakur and M.Y. Eqbal,JJ.)

13.02.2013

JUDGMENT

T.S. Thakur, J.

1. Leave granted.

2. This appeal by special leave is directed against the judgement and order dated 29th January, 2010 passed by the Division Bench of the High Court of Judicature at Calcutta whereby in FMA No.1415/2009 filed by the respondent No.1 has been allowed, the order passed by the Single Judge of that Court set aside and the respondent-School Service Commission directed to act in terms of an earlier order dated 12th March 2009 passed by that Court in Writ Petition No. 6117(W) of 2004. The controversy arises in the following backdrop.

3. Against the vacant post of Headmaster at Howrah Siksha Niketan, as many as five candidates applied for appointment to the School Service Commission, West Bengal. The Commission found two of those applying for the post to be ineligible but short listed the remaining three for consideration. Kavindra Narayan Roy, one of the candidates found ineligible questioned the rejection of his candidature in Writ Petition No.6117 (W) of 2004 filed before the High Court of Calcutta and obtained an interim order staying publication of the panel. That order continued to remain operative for nearly five years till 2009 when the writ petitioner-Kavindra Narayan Roy withdrew the said petition as he had by that time attained the age of superannuation. The Single Judge of the High Court of Calcutta while dismissing the writ petition as withdrawn vacated all interim orders but directed that the period during which the panel could not be operated due to the interim order passed in the writ petition should be excluded for computing the life of the panel.

4. The School Service Commission, it appears, took no further steps in the matter nor was the panel published. This led to the filing of the two writ petitions one of which happened to be Writ Petition No.5866 (W) of 2009 filed by respondent No.1-Shri Arvind Kumar Rai in

which the said petitioner sought a mandamus directing the School Service Commission to recommend his name for appointment against the available vacancy. His case was that since the Rajaram Choudhary who was placed at serial no.1 in the merit list had retired from service, he alone could be considered for appointment as he figured at serial No.2 of the list.

5. The above petition came up before Dipankar Datta, J. and was dismissed by an order dated 27th July, 2009 holding that since more than five years had elapsed ever since the selection process was initiated and since no panel had been published by the School Service Commission it was not possible to direct the Commission to appoint the petitioner-Shri Arvind Kumar Rai as Headmaster of the school. The Court further held that during the intervening period of five years several other candidates would have acquired eligibility for consideration/appointment against the post of Headmaster of school and that in fairness to all of them they ought to be given a chance to offer their candidature. The Court further held that as the panel had not been published the writ petitioner could not claim a recommendation as of right and that discretionary remedy under Article 226 of the Constitution could be exercised only when the Court was satisfied that it was equitable to do so.

6. The appellant-Vijoy Pandey, too, in the meantime, filed Writ Petition No.7310 (W) of 2009 in which he prayed for a direction to the respondents to rescind, cancel and withdraw the panel for the post of Headmaster of the school prepared on the basis of the interview held on 6th January, 2004. A Single Bench of the Calcutta High Court entertained the said petition and by an order dated 4th August, 2009 directed status quo to be maintained regarding appointment to the post of Headmaster. Three appeals came to be filed in the above background before the Division Bench of the High Court. One of these appeals filed by Arvind Kumar Rai was directed against order dated 27th July, 2009 passed by Dipankar Datta, J in Writ Petition No.5866 of 2009. The second appeal, too, was filed by Arvind Kumar Rai assailing order dated 4th August, 2009 passed by Soumitra Pal J. in Writ Petition No.7310 of 2009 directing status quo to be maintained. The third appeal was filed by appellant-Vijoy Kumar Pandey against order dated 12th March, 2009 passed by Dipankar Datta, J. in Writ Petition No.6117 (W) of 2004 whereby the School Service Commission had been directed to exclude the period during which there was an interim order, while computing the life of the panel.

7. The first of the abovementioned three appeal was allowed by the Division Bench by an order dated 29th January, 2010 setting aside order dated 27th July, 2009 passed by Dipankar Datta, J. with a direction to the School Service Commission to act in terms of the earlier order dated 12th March, 2009 passed by the very same Hon'ble Judge. Taking note of the said order of the Division Bench the second mentioned appeal preferred against the interim order dated 4th August, 2009 passed by Soumitra Pal J. was held to be infructuous and was disposed of by the Division Bench by an order dated 23rd August, 2010. The Court was of the view that in the light of the direction issued by a coordinate Bench directing the School Service Commission to give effect to the order dated 12th March, 2009 passed by the Dipankar Dutta, J. it was not possible to give any contrary direction to the Commission and that the interim order passed by the Single Judge to that effect had lost its force on that count.

8. As regards the appeal filed by the appellant-Vijoy Kumar Pandey the Division Bench in its order dated 23rd August, 2010 held that in the light of the order dated 29th January, 2010 passed by a coordinate Bench there was no scope of challenging order dated 12th March, 2009 passed by Dipankar Datta, J. The Court made it clear that the appellant will be free to seek appropriate remedy before the appropriate forum in accordance with law. A special leave petition filed against the aforementioned order dated 23rd August, 2010 passed by the Division Bench was withdrawn and was dismissed by this Court by order dated 21st January, 2011.

9. The present appeal assails the correctness of the judgment and order dated 29th January, 2010 whereby the Division Bench of the High Court has allowed F.M.A. No.1415 of 2009 and set aside order dated 27th July, 2009 passed by Dipankar Datta J. in Writ Petition No.5866 (W) of 2009 with W.P. 6117 (W) of 2004 and directed that the Commission shall act in accordance with order dated 12th March, 2009 passed by the same Hon'ble Judge in Writ Petition No.6117(W) of 2004.

10. We have heard learned counsel for the parties at considerable length. Even though we have retraced in detail the chequered history of the litigation between the parties the question that falls for determination actually lies in a narrow compass. The question precisely is whether any panel of candidates has been prepared by the Commission in accordance with the provisions of the West Bengal School Service Commission (Procedure for selection of persons for appointment to the post of teachers including Head Masters/Head Mistresses Superintendent of Senior Madarasa in recognized non-Government Aided Schools and procedure for conduct of business of the Commission), Regulations, 1988; and if so, whether the same continued to be valid and subsisting to entitle the selected candidates or any one of them to a mandamus directing the competent authority to make an appointment on the basis thereof. We must regretfully say that although repeated rounds of litigation have engaged the attention of the High Court, the High Court has not adverted to the question whether a panel was indeed prepared and published. It is only in its order dated 27th July, 2009 passed in W.P. No.5866 of 2009 that Dipankar Datta, J. has noticed the non- preparation and publication of such a panel and clearly held that since the panel has not been published, no recommendation or appointment could be claimed by any one of the candidates competing for the same. We need hardly emphasise that preparation and publication of a panel was the least which any candidate seeking appointment on the basis thereof was required to establish. We repeatedly asked Mr. Dhruv Mehta, learned senior counsel appearing for Mr. Arvind Kumar Rai, the contesting respondent whether any such panel was ever prepared and published as it ought to be, having regard to the very nature of the procedure prescribed under the Regulations mentioned above. To the credit of Mr. Mehta, we must say that he fairly conceded that no such panel was ever published. Not only that, Mr. Mehta did not dispute the proposition, and in our opinion rightly so, that publication of such a panel was absolutely essential not only because the entire process was regulated by statutory regulations but also because the publication was essential in the interest of transparency and probity in matters concerning appointments to offices under the State and in matters affecting rights of the citizens in discharge of governmental functions.

11. We may at this stage refer to a decision of this Court in *State of Andhra Pradesh & Ors. v. D. Dastagiri & Ors.*, (2003) 5 SCC 373. In that case although the State Government had notified the vacancies and the process of recruitment had been initiated, the results of the interviews thus conducted were not declared and no select list was published. The recruitment process was subsequently cancelled. The respondent candidates filed writ petitions before the High Court seeking a mandamus directing the appellants to appoint them, which were allowed. However, this Court allowed the appeals against the High Court's order, observing:

“4. In the counter-affidavit filed on behalf of the respondents ... it is stated that the process of selection was cancelled at the last stage i.e. before publishing the list of selected candidates on the sole ground that the State Government wasted to introduce prohibition and obviously the Government felt that there was no need of Excise Constables during imposition of prohibition in the State. There is serious dispute as to the completion of the selection process. According to the appellants, the selection process was not complete. No record has been placed before us to show that the selection process was complete, but, it is not disputed that the select list was not published. In para 16 of the counter affidavit, referred above, the respondents themselves had admitted that the selection process was cancelled at the last stage. In the absence of publication of select list, we are inclined to think that the selection process was not complete. Be that as it may, even if the selection process was complete and assuming that only select list remained to be published, that does not advance the case of the respondents for the simple reason that even the candidates who are selected and whose names find place in the select list, do not get vested right to claim appointment based on the select list...” (emphasis supplied)

12. We too have at hand a situation where no panel, as is envisaged under the provisions of the regulations, ever came into existence. That being so, the question of determining the life of the panel by excluding the period during which there was an interim stay in accordance with the order of Dipankar Datta, J. in its order dated 12th March, 2009 did not arise. It follows that the claim made by respondent-Arvind Kumar Rai for appointment on the basis of such a non-existent panel was untenable as the panel itself was still born. We need not burden this judgment by referring to the decisions of this Court in which this Court has repeatedly held that the preparation of a select list or a panel does not by itself entitle the candidate whose name figures in such a list/panel to seek an appointment or claim a mandamus. No vested right is created by the inclusion of the name of a candidate in any such panel which can for good and valid reasons be scrapped by the competent authority alongwith the entire process that culminated in the preparation of such a panel.

13. In *Shankarsan Dash v. Union of India*, (1991) 3 SCC 47 a Constitution Bench of this Court was examining whether candidates declared successful in a selection process acquire an indefeasible right to get appointed against available vacancies. The contention that they do acquire such a right was repelled in the following words:

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted.” (emphasis supplied)

14. Above decision has been followed in a long line of subsequent decisions of this Court including those rendered in *Punjab State Electricity Board v. Malkiat Singh*, (2005) 9 SCC 22; *State of Bihar & Ors. v. Secretariat Assistant Successful Examinees Union & Ors.*, (1994) 1 SCC 126; *Director, SCTI for Medicine Science and Technology v. M. Pushkaran*, (2007) 12 SCC 465; *Union of India v. Kali Dass Batish*, (2006) 1 SCC 779 [which is a three Judge Bench decision].

15. In *Rakhi Ray & Ors. v. The High Court of Delhi*, (2010) 2 SCC 637, a three-Judge Bench of this Court held:

“... A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate....”

16. Following the decision in *Shankarsan Dass* case (supra), this Court in *State of Orissa & Anr. v. Rajkishore Nanda & Ors.*, 2010 (6) SCALE 126 held:

“A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate.”

17. Even assuming the preparation of a panel gave rise to any such right, since no panel had actually ever been prepared and published nor has the same been produced before the High Court or before us, we have no hesitation in holding that the direction issued to the Commission to act on the basis of the panel was wholly unjustified and unsustainable. The view taken by Dipankar Datta, J. in his order dated 27th July, 2009 that considerable time had expired since the selection process was initiated and that other candidates who may have in the meantime become qualified for consideration may be deprived of the right to compete

was a reason enough for the High Court to decline a mandamus. In the facts and circumstances of the case, the Division Bench of the High Court, in our view, committed an error in upsetting that direction. We also see no real conflict between the orders passed by Dipankar Datta, J. on 12th March, 2009 and that passed on 27th July 2009, inasmuch as the question of the adding to the life of the panel the period during which there was a stay would arise only if there was a panel drawn in terms of the Regulations.

18. We were informed by the parties that the respondent No.1 has been appointed as Headmaster during the pendency of the litigation at the pain of contempt proceedings against the parties. That appointment has come sometime in September 2010. Since, the order passed which appears to have culminated in the making of the appointment is being set aside, the question is whether we should direct immediate removal of the respondent or continuance of the arrangement till such time fresh selection process is initiated and completed in accordance with law. In our opinion, not only because the respondent has been holding the post for two years, but also because his removal would not immediately result in any benefit either to the institution or to the appellant before us, we, therefore, permit him to continue holding the post but only till such time a fresh selection is made against the vacancy.

19. In the result, we allow this appeal, set aside the order passed by the Division Bench and affirm that passed by Dipankar Datta, J. dated 27th July, 2009 with the above direction. We make it clear that the respondent No.1 shall be entitled to all the monetary benefits for the period during which he actually works as the Headmaster of the school. The fact that he so works would not, however, create any equity in his favour nor constitute an additional weightage in the new selection process.

20. Parties are directed to bear their own costs.