

11.01.2021

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MAT 142 of 2019
With
CAN 1 of 2019
(Old No. CAN 1661 of 2019)
with
CAN 2 of 2019
(Old No. CAN 3601 of 2019)

The District Inspector of Schools (S.E.) Nadia
Vs.

Munsur Ali Mondal & Ors.

(Via Video Conference)

Mr. Joytosh Majumdar, Ld. G.P.
Mr. Raja Saha
Mr. Subhrangshu Panda
..for the appellant.

Mr. Supriyo Chattopadhyay
Ms. Saswati Adhikary
.. for the writ petitioner/respondent no.1 .

There is a delay of 2959 days in preferring the
appeal.

The appeal is directed against an order dated
19th November, 2010 in connection with a writ petition in
which the writ petitioners claimed absorption by reason of
long continuous service in the institute in question as
teaching/non-teaching staff by the concerned District
Inspector of Schools. It was the contention of the writ
petitioners before the learned Single Judge that by virtue
of the long length of service a legal right has accrued in

their favour for appointments as a permanent staff on granting approval by the concerned District Inspector of Schools.

The learned Single Judge after hearing all the parties which include the present appellant recorded that the State did not dispute that the writ petitioners worked in the school in question and the school had revived the service of such petitioners and accordingly the learned Single Judge proceeded to direct the concerned authorities to give appointment based on judgement of the Hon'ble Supreme Court in U.P. State Electricity Board – vs.- Pooran Chandra Pandey reported in (2007) 11 SCC 92.

There cannot be any doubt that there has been a considerable delay in preferring the appeal.

The learned Government Pleader appearing on behalf of the State strenuously argued that the order under challenge is contrary to several decisions of the Hon'ble Supreme Court, palpably wrong and in violation of the statute.

The learned counsel for the writ petitioners have submitted that there is a culpable negligence on the part of the appellant in preferring the appeal at such a belated stage. By reason of such long unexplained delay the rights of the writ petitioners have crystallized and as such today the position is irreversible.

It is submitted that the court need to be satisfied to that. There is “sufficient cause” for the delay before exercising its discretion in favour of the appellant by extending the time under Section 5 of the Limitation Act, 1963.

Learned counsel for the writ petitioner has submitted that the State cannot be regarded as a favoured litigant in a court of law and reminded us that some of the decisions of the Hon’ble Supreme Court including the judgement of the Hon’ble Supreme Court in Office of the Chief Post Master General and others –vs.- Living Media India Ltd. and another reported in (2012) 3 SCC 563 has reiterated such principle.

Before we consider the submissions on the aspect of delay, we feel that it is also necessary to look at the order under challenge since we feel that an order if perpetuates and perpetrates injustice and contrary to law and if it is established that the order relied upon by the learned Single Judge in support of the direction was declared as a obiter or is overruled by a subsequent decision but such decision was not noticed when the order was passed or brought to the attention of the learned Judge, we feel that court is duty bound to look into such order to prevent miscarriage of justice. Considering the state as the model employer and is supposed to uphold equality before law and cannot be

directed to act contrary to any statute, some reflection on the conduct of the parties and the position of the parties vis a vis governing the statutes assume significance. There cannot be a straight jacket formula where the court should extend its benevolence either in favour or against granting condonation of delay. However, in appropriate cases the power of the court to condone the delay has been well recognised. There is no requirement in law that an applicant is required to explain everyday's delay. An applicant does not stand to benefit by resorting to delay. (See Collector, Land Acquisition, Anantnag and Anr. –vs. Mst. Katiji and others : 1987 (2) SCC107)

In the impugned judgement under reference the procedure for recruitment and appointment of the non-teaching staff in Madrasah was not followed as it was incumbent upon the Madrasah authorities to make recruitment in terms of the recruitment rules i.e. guidelines for recruitment under Memo No. 1736(21) –GA dated prevalent at the material point of time. There is no reflection in the order that the Madrasah authority had followed the procedure of the recruitment rules in respect of selection and/or appointment of Assistant Teacher, clerk, Group-D staff of the said Madrasah. There was no prior permission for the purpose of appointment of Assistant Teacher, Clerk and Group-D staff from the District Inspector of Schools (S.E.) Nadia before initiating

process of the appointment to the applicants/petitioners sometimes in 2002. The appointment letters issued by the Madrasah authority on the face of the procedure adopted for the recruitment in respect of selection and appointment of such teaching and non-teaching staff is bad in law.

Madrasah authority did not follow the procedure of recruitment for the Group-D staff or any of the teaching or non-teaching staff. No advertisement or public circulation or prior permission was obtained by the authorities of the Madrasah. Before a court exercise its jurisdiction to pass an order the writ petitioners have to satisfy the court that they have a legal right for the appointment. It is *sine qua non* for a writ of mandamus. The reliance on Pooran Chandra Pandey (supra) by the learned Single Judge, with due respect, was not the law at the relevant point of time has rightly pointed out by the learned Government Pleader. It was not shown to the learned Single Judge that the said decision held to be obiter by a Larger Bench of the Hon'ble Supreme Court in Official Liquidator –vs.- Dayanand and Others reported in (2008) 10 SCC 1 delivered on 4th November, 2008. In paragraph 92 of the said judgement it was categorically mentioned that in the light of what has been stated above “we deem it proper to clarify that the comments and observations made by the two-Judge Bench in U.P. SEB v.

Pooran Chandra Pandey should read as obiter and the same should neither be treated as binding by the High Courts, tribunals and other judicial foras nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench.”

The impugned order was passed on 19th November, 2010 which was much after the law laid down by the Hon’ble Supreme Court in the Official Liquidator (supra). There cannot be any doubt that the State is not a favoured litigant. But the judgement in Living Media India Ltd and another has considered the decision in Mst. Katizi (Supra) where six cardinal principles have been enunciated by the Hon’ble Supreme Court and which has been followed consistently. One of the six principles stated therein said that there is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

If the present writ petition is allowed it would be legalising a back door entry and contrary to the recruitment norms prevalent at the relevant time. The court was aware that it is also not the procedure contemplated under the law but relied upon Pooran Chandra Pandey (supra) possibly with a view to give a relief to the writ petitioners who approached the court

with a plea that they had served the institutions and the institutions was benefited. The State ought not to be allowed to incur any expenditure or to spend any amount from its exchequer in such a situation. The State also cannot discriminate between the equals or give favour to one class over the other to bypass its own policy to accommodate any candidate. In this connection, it may be useful to refer to the affidavit-in-opposition filed by the writ petitioners to the application under Section 5 of the Limitation Act.

In the said affidavit-in-opposition the writ petitioners have very fairly relied upon an affidavit-in-opposition to the contempt application filed by the present District Inspector of Schools before the learned Single Judge.

The purpose of relying on such affidavit was to show that the said authorities were aware of the said order and cannot now at this stage contend that they were not aware of the impugned order and thereby prevented by sufficient cause in preferring the appeal.

It is important to note that in paragraph 4 of the said affidavit the present incumbent to the office of the District Inspector of Schools has briefly indicated the reasons as to why the implementation of the said order would cause injustice and would result in backdoor appointment for the writ petitioners.

For the sake of convenience paragraph 4 of the said affidavit-in-opposition filed before the learned Single Judge in the contempt proceeding is set out.

“4. That before dealing with and contempt application to the various allegations and statements made in different paragraphs of the said application, I state the following facts :-

- i) The applicants /writ petitioners obtained an order on 19.11.2010 by misleading the Hon'ble Court in the fact of the case and law of the subject matter of the case.
- ii) The school authority of the Tulshi Darus Sunnat Siddiquia Senior Madrasah, had given appointment letters to the applicants /petitioners for the post of Clerk , Assistant Teacher and Group-C and D staff of the said Madrasah without maintaining recruitment rules framed by the Government time to time.
- iii) There was no prior permission for the post of Assistant Teacher, Clerk and Group-D staff from the District Inspector of Schools (SE), Nadia at the time of issuing an appointment letter to the applicants/petitioners. The appointment letter issued by the Madrasah authority were absolutely illegal and de-hors provisos of law when the appointment were offered and given to the applicants/petitioners.
- iv) It is also statements that the concerned Madrasah authority had not followed the procedure of the recruitment rules in respect of selection and/ or appointment of Assistant Teacher, Clerk, Group-D staff of the said Madrasah , no advertisement /no public circulation, no prior permission was not taken by the Selection Committee of the said Madrasah and appointment has been given to the applicants/petitioner in the way of illegal and back door appointment . The Madrasah authority has no power to issue appointment in the post of teaching and non-teaching of the school without prior permission /approval of the District Inspector of Schools (SE), Nadia and no information regarding appointment was also intimated to the concerned District Inspector of Schools (SE), Nadia. The entire action made by the school authority and applicants/petitioners is

- absolutely illegal and back- door appointment.
- v) The applicants/petitioners obtained an order from the Hon'ble High Court on 19.11.2010 and the order was communicated as per documents shown in the said contempt petition on 19.02.2011.
 - vi) The applicants/petitioners filed an application for contempt for violation of the order passed by the Hon'ble Justice Maharaj Sinha on 19.11.2010 in respect of the writ petition and as per document shown in the writ petition that the communication of the said solemn order on 09.02.2011 and contempt petition also filed on 23.12.2011, but the first time I received a notice alongwith a contempt application on 04.11.2018 wherein it has been mentioned that the contempt application was listed on 30.11.2018 before the Hon'ble Justice Protik Prakash Banerjee and His Lordship was pleased to adjourned the matter for a period of 4 weeks and direction was passed to the contempt for filing the affidavit for compliance when the matter will appear and date was fixed for further hearing on 07.01.2019.
 - vii) I, as a contemnor in this matter, took charge on 13.12.2018 and received the contempt notice along with the order dated 30.11.2018 passed by the Hon'ble Justice Protik Prakash Banerjee in respect of the contempt matter on 04.01.2019. Immediately after knowledge of the order and contempt application I specifically directed to the office to find out the file in respect of the particular case and I found that there is no communication of the said solemn order passed by the Hon'ble Justice Maharaj Sinha on 19.11.2010.
 - viii) However, I immediately contacted to the Director of Madrasah Education, West Bengal and on the advise of the Director of Madrasah Education, I send a proposal for preferring an appeal on 05.01.2019 being Memo No. 291/L/SE against the order passed by the Hon'ble Justice Maharaj Sinha on 19.11.2010 in respect of the matter, and also I duly appeared before the Hon'ble High Court at Calcutta before the Hon'ble Justice Protik Prakash Banerjee on 07.01.2019.
 - ix) I have also filed a Memorandum of Appeal challenging the order passed by the Hon'ble Justice Maharaj Sinha on 19.11.2010 before the Hon'ble Division Bench being M.A.T. No 142 of 2019 (District Inspector of Schools (SE), Nadia-vs-Mansur Ali Mondal & Ors.) in respect of the writ petition.
 - x) I have also filed an application for stay in

operation of the order dated 19.11.2010 , passed by the Hon'ble Justice Maharaja Sinha, and also filed an application under Section 5 of Limitation Act, 1963 for condoning the delay for preferring an appeal of the order passed by the Hon'ble Justice Maharaj Sinha on 19.11.2010. The copy of the Memorandum of Appeal and the Stay Application and also the application for Section 5 of Limitation Act has also been served to the applicants/petitioners and same also received by the Learned Advocate of the applicants/petitioners."

The aforesaid paragraphs would unmistakably show that the present incumbent became aware of the said order on 4th November, 2018 and immediately thereafter he had requested for the advice of Director of Madrasah to prefer the appeal as it was against the recruitment norms. That the procedure adopted for the purpose of recruitment based on the order of the learned Single Judge is contrary to the Recruitment Rules prevailing at the relevant point of time or not in terms of Recruitment Rules, is not in dispute.

Recently a co-ordinate Bench dealing with almost similar situation discussed the relative scope of Section 5 in **The West Bengal Board of Secondary Education & Ors. Vs. Charu Chandra Karmakar & Ors.** reported at **(2019)6 WBLR (Cal) 341**. The Division Bench after considering a catena of decision on the expression "sufficient cause" has held although lethargy at times are visible in the functioning of the government but there is a duty on the Court to take justice oriented approach in

considering an application for condonation of delay and wherein the Court is of the opinion that unless the said power is exercised “justice will be the sufferer” would, extend its discretion in larger public interest to condone the delay howsoever it may be and decide the matter on merits. Reference in this regard may also be made to the decision of the Hon’ble Supreme Court in **State of Nagaland Vs. Lipok Ao & Ors.** reported in **2005(3) SCC 752**. In paragraph 27 of the **West Bengal Board of Secondary Education (Supra)** the law summarized is thus :

“27. From the tenor of the above authorities pronounced by the Supreme Court, the Court is entitled to take a liberal approach in applications under Section 5 of the Limitation Act, 1963 to prevent grave injustice, to promote substantial justice and public interest, to prevent failure of justice by non-consideration of a meritorious case, and to overcome the dishonesty of a section of government officials delaying appeals. One must presume that, ordinarily, a person does not gain anything by delaying an appeal.”

In the instant case if we do not allow the prayer for condonation it would be legalising injustice on technical ground. Our duty is to remove injustice.

On such consideration we are inclined to allow the application for condonation of delay. Delay of 2959 days in filing the application is allowed.

Since while dealing with application for condonation of delay we have also decided the matter on merits the appeal along with all connected applications are allowed

and the impugned order is set aside.

Urgent photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Saugata Bhattacharyya, J.)

(Soumen Sen, J)

