

Item-10. 28-08-2023

MAT 1281 of 2022
CAN 1 of 2022
CAN 2 of 2022

sg Ct. 8

The State of West Bengal & Ors.
Versus
Bharat Ghosh & Ors.

Mr. S.N. Mookherjee, Ld. AG
Mr. Anirban Ray, Ld. GP
Mr. Tapan Kr. Mukherjee, ld. AGP
Mr. Rejaul Hossain, Adv.
Mr. Avishek Prasad, Adv.

...for the appellant

Mr. Bharat Ch. Simai, Adv.

...for the School Authority

1. The writ petitioners are not represented. Even on the earlier occasion, the writ petitioners were not represented. In spite of notice, none had appeared to argue on behalf of the writ petitioners. This matter was heard on earlier occasion. Mr. Advocate General appearing on behalf of the appellant/State on the earlier occasion had argued extensively and also filed notes of submissions.
2. The matter was adjourned on the earlier occasion in order to enable the writ petitioners to make a representation. On the earlier occasion, Mr. Subir Sanyal, learned Counsel had appeared and prayed for adjournment in order to obtain instruction. However, Mr. Sanyal today had submitted that he has no proper instruction.
3. Mr. Bharat Ch. Simai, learned Counsel appears on behalf of the School authority.
4. We have heard the learned Advocate General and the School authorities. We also gone through the record and the affidavits filed before the learned Single Judge.

5. The petitioners filed a writ petition being WP 25988(W) of 2008. Although a tender number was obtained showing urgency on 11th April, 2008 the writ petition was never moved until as on 24th December, 2010 as an unlisted motion. It was last day before the winter recess. Notice admittedly was not served upon the State respondents. The writ petition was not printed in the daily cause list. Although, the order records that one Mr. S. Pal appeared for the State however, the learned Advocate General has confirmed that he was not an advocate empanelled with the State of West Bengal and there is no record of any engagement in his favour.
6. The order impugned was unknown to the State appellant until 19th December, 2013 when a contempt application was served. In the contempt application, it was alleged that the said order was communicated to the District Inspector of Schools on 21st June, 2011 but the appellant upon enquiry, could not trace out any such letter from their record. They became aware of the said letter only when the contempt application was served on 19th December, 2013. The affidavit accompanying the contempt application being CPAN 2053 of 2013 was filed relying upon a certified copy of the impugned order which was applied on 9th December, 2013 and made available only on 23rd September, 2013. The appellant, after became aware of the said order, ascertained from the Headmaster of Bagula High School on 22nd January, 2014 that there was no record available with the school wherefrom it would appear that Bharat Ghosh was engaged

as a non-teaching staff. This fact was communicated to the D.I. of Schools on 22nd January, 2014. This would clearly show that the impugned order was obtained without full disclosure.

7. On 29th January, 2014, the District Inspector of Schools by abundant caution sought for further information and thereafter on 2nd April, 2014 the appellants filed an affidavit in the contempt application.
8. The writ petitioner did not file any affidavit-in-reply. The Headmaster of the Bagula High School upon concluding exhaustive searches informed the District Inspector of Schools on 10th August, 2015 that there is no record of any appointment of the writ petitioner. Upon receipt of the aforesaid information on 26th August, 2015 from the Headmaster of Bagula High School, the appellants filed an affidavit of compliance on 26th August, 2015 along with the recalling application in which the fraud committed by the writ petitioner was narrated in full. It was clearly reiterated that there is no existence of sanctioned non-teaching post in the school at the relevant time.
9. A recalling application was filed in the nature of a procedural review seeking re-examination of process culminating in the impugned order. The writ petitioner alleged in the said proceeding that on 21st January, 2018, the District Inspector of Schools alleged to have approved the appointment of the writ petitioner. Curiously, 21st January, 2018 was a Sunday and being a holiday, the official business is not conducted by the State Government employees in Sunday. This letter could

not be traced from the record. The State has contended that the said appointment is a fabricated and manufactured document which would have evident from the fact that it is dated 21st January, 2018 which is Sunday in which the date of appointment of the writ petitioner was shown as 24th December, 2010 which contradicts all records relating to the appointment of the writ petitioner. Moreover, the Memo dated 21st January, 2018 does not contain any signature of the dealing assistant. The District Inspector of Schools however, on 1st March, 2019 made a further enquiry. On 19th March, 2019, the school authorities have reiterated that there has been no record of the writ petitioner in the records of the schools.

10. The Headmaster and ex-officio Secretary of the Managing Committee of the school has filed an affidavit affirmed on 30th January, 2023. In the said affidavit it has been clearly stated that after through search of all the school records namely records of Staff attendance Registers, Resolution Book, acquaintance rolls and all other relevant papers/documents including selection process for appointment of the writ petitioners a report was sent to the Defendant no.1 on 22nd January, 2014 informing that there was no teaching staff named Bharat Ghosh.

11. The appellant has filed affidavit including the supplementary affidavit in the pending proceeding in which full facts have been disclosed. It further appears that the writ petitioners claimed to have been appointed as a non-teaching staff in the concerned school on 16th April, 2004 and 16th April, 2005.

However, the school concerned was recognized as Xth Class High School with effect from 1st January, 1948 and upgraded to Higher Secondary School on 19th May, 1976. The petitioners were not at all organizing teaching staffs of the concerned school. The petitioner no.2 is a son of the then Secretary in the Managing Committee and he issued letters in favour of his son and Bharat Ghosh when he was not the Secretary of the School at the time of writ. In paragraph 6 of the said affidavit he has explained the procedure. It reads:

“I say that there are some procedure for approval of appointment. These are as follows:-

a) That after an appointment is made in an aided secondary school, it is the responsibility of the school authority to forward all the papers related to the said appointment to the District Inspector of Schools (SE) for verification/examination and thereafter for approval of appointment. No teaching and non-teaching staff of school will get his/her salary until or unless his/her appointment is approved by the District Inspector of Schools (S.E) concerned.

b) That the concerned school authority submit the proposal for approval of appointment of the concerned teaching/non-teaching staff of that concerned school with supporting papers and documents to the receiving section of the office of the D I of Schools(SE).

c) That after receiving the file from the dealing officer, The District Inspector of Schools check the note sheet and documents by himself And after going through the papers in details and note sheet of the dealing officer, the District Inspector of Schools(S.E) if found that all the papers and documents are okay then he sign on it. Thereafter, the file is returned to the dealing assistant for preparing draft communication (fair copy and office copy) disclosing the approval of the District Inspector of

Schools (S.E).

d) Then after finalization of the draft copy by the District Inspector of Schools (S.E), the dealing assistant after making fair copy and office copy of approval of appointment with all details signed on it and sent to the dealing officer. The dealing officer after checking the fair copy and office copy signed on it and sent it to the D I of Schools (S.E). Thereafter the D I of Schools (S.E) signed the fair copy and office copy of approval of appointment. Once the fair copy is signed by the District Inspector of Schools (S.E), it will be placed to the dealing assistant for disbursement.

e) The dealing assistant makes 3 sets of fair copy and office copy, one set is kept as an office copy and gives 2 sets to the concerned school authority one for school's copy and another for the incumbent. Thereafter the issuing section wherein the said communication is to be recorded in the register maintaining a serial number which is called issue register. With the issue number, the communication bearing approval is to be handed over to the school authority with Memo number and date. There is no alternative of this procedure only because of ensuing the transparency the business of the office of the District Inspector of Schools(S.E).

f) That it is crystal clear that each and every copy of approval of appointment bears the signature of the District Inspector of Schools(SE) alongwith the signature of dealing assistant and dealing officer.”

12. The paragraphs 7 and 8 are also relevant and are reproduced below:

“7. That in the instant case school authority never submitted any proposal for approval of appointment in favour of Bharat Ghosh and neither the school authority received any original copy of approval of appointment in the name of Bharat Ghosh from the D I of Schools(S E)Nadia by hand nor by post nor the incumbent produced the original copy of approval of appointment to the school

authority

In the copy of approval of appointment dated 21/01/ 2018 only the D.I. of Schools(S E) Nadia namely Smt Mitali Dutta allegedly signed on it but it is very unfortunate that there is no signature of dealing clerk and dealing assistant which is mandatory as per law.

8. That I have never seen said Bharat Ghosh and Sirshendu Sekhar Biswas since the date of my joining the school on 19.7.2011 in our school and no documents in favour of writ petitioner are lying the school records. After going through the letter of appointments dated 16.4.2004 and Memo of approval dated 21.01.2018 of Bharat Ghosh and after searching the school records no such documents are lying in the office of the school records and it is crystal clear that same were may not be genuine and doubtful.”

13. In the writ petition, the petitioners have not been mentioned the date of making of the application for consideration, date of interview and the appointment letter. The Headmaster of the School has confirmed that there is no Managing Committee resolution and the approval order for the appointment of the petitioners. The school, however, has reiterated that no copy of the writ petition was served upon the school. It thus appears that D.I. of School and the Headmaster of the concerned School had no knowledge about the order of appointment of the writ petitioner no. 1 on 21st January, 2018. The said letter appears to have been procured from the office of the D.I. of Schools. In fact the statute does not permit the D.I. of Schools (SE) to approve such appointment.

14. In fact the record will reveal that when Mr. Khagendra Nath Roy, the incumbent to the post of D.I after Mitali Dutta

became aware of the said alleged approval letter, he searched the record but was unable to find any letter. He lodged a general diary on 19th March, 2019 reporting that the issue register relevant to law affairs from 10th May, 2014 to 11th February, 2018 are missing. Simultaneously Mr. Roy wrote a letter to Miss Dutta vide Memo No.344/LAW/SE dated 13th February, 2019 enquiring from her if she had issued any such letter Miss Dutta curiously did not respond to such letter.

15. Interestingly the said letter refers to the date of appointment as 24th December, 2010 when the impugned order was passed. The said letter was disclosed in a supplementary affidavit affirmed on 15th November, 2021. The said affidavit was handed over in Court to the learned Counsel for the appellants after the order was passed on 16th November, 2021. Unless there is a prior permission as contemplated under Rule 28 of the Rules for Management of Recognized Non-Government Institutions (Aided and Unaided) 1969, no appointment can be made in a recognized school under the West Bengal Board of Secondary Education Act, 1963. In fact it is also contrary to the provision of West Bengal School Control of Expenditure Act, 2005.

16. The learned Advocate General has submitted that the aforesaid facts would constitute suppression of materials fact and fraud that tantamount contempt of court. Learned Advocate General also submitted that the judgment relied upon by the learned Single Judge in directing the School authorities and the D.I. to approve the appointment is based on *UP State Electricity Board vs. Purna Chandra Pandey*

& Ors. reported in *2007 (11) SCC 92*. It was held to obiter in *Official Liquidator vs. Dayanand* reported in *(2008) 10 SCC 1* at paragraph 72 and 92.

17. In fact, the later decision was operating in the field when the learned Single Judge was considering the prayer of the writ petitioners. Moreover, we have no doubt in our mind that the process adopted by the writ petitioners was shirp as they did not feel it necessary to move the writ petition in 2008 when a tender number was obtained and moved the said application on the last date before the winter vacation and that too without proper service of notice upon the State Government and the School.

18. We have read the affidavits filed by the writ petitioners in the earlier proceedings. In fact, the learned Counsel who claimed to have been represented the State Government was not authorized to appear on behalf of the State. It seems that the State was not given any opportunity to refer to the relevant documents and to verify about the credentials and credibility of the writ petitioner. The School was equally deprived of such opportunities. The State appellants were rightly advised to file an application for recalling of the said order in which the credibility of the letter of appointment was not appreciated. In fact, the order dated 16th November, 2021 was obtained placing reliance on the supplementary affidavit and the alleged office Memo dated 21st January, 2018 which appears to be a product of fraud. The supplementary affidavit affirmed on 15th August, 2015 was filed only on 16th November, 2021 without giving any

opportunity to the appellants to deal with said affidavit as it now revealed that the said letter appears to be fabricated and manufactured.

19. Mr. Advocate General has submitted that if it is contended and held that there is substantial delay in preferring the appeal, the petitioner is entitled to the benefit of Section 14 of the Limitation Act as the petitioner was pursuing a remedy bonafide and after having lost in the said proceeding has preferred the appeal.

20. Accordingly, it is submitted that the period spent in pursuing the earlier proceeding cannot be excluded for the purpose of limitation. In this regard the learned Advocate General has relied upon a decision of the Hon'ble Supreme Court in *M.P. Steel Corporation vs. CCE* reported in (2015) 7 SCC 58 at para 49 and *J. Kumaradasan Nair vs. Iric Sohan* reported in (2009) 12 SCC 175 at paras 16 to 18. It is submitted that once the Court is satisfied that the applicant is pursuing a remedy bonafide, the Court shall take a lenient view and the time beginning from the date of cause of action of an appellate proceeding is to be excluded if such appellate proceeding is form an order in an original proceeding instituted in which the order was obtained by committing fraud.

21. The learned Advocate General has also relied upon the decision of a Division Bench of Calcutta High Court in *FMA 4639 of 2016 (West Bengal Board of Secondary Education vs. Charu Chandra Karmakar)* dated 17th July, 2018 in a case where the impugned order was not served

upon the State in a time bound manner, where the Court has been pleased to condone the delay of 2833 days considering the merits contained in the appeal.

22. In the instant case, from the narration of the facts, it is quite clear that the impugned order was obtained by unfair means and without disclosure of all the relevant facts. The State was not even given an opportunity to controvert the facts. It may be for such reason that the writ petitioners are avoiding the Court and did not participate in the Court proceedings, although on the very initial stage, they appeared. There cannot be any doubt that the time spent by the appellants after the parent order was passed is required to be excluded under Section 14 of the Limitation Act as the State was pursuing a remedy bona fide and thereafter has preferred an appeal against the appellate order by reason of dismissal of the recalling application.

23. From the disclosure made by the State in the stay petition as also in the affidavits filed with the Trial Court, it clearly shows that the writ petitioners are not entitled for the post. The documents relied upon are questionable and doubtful in nature and character. The writ petitioners could not remove the said doubt. The attendance Registrar does not show that they were working. Moreover, the process of appointment is clearly flawed. There was no vacant sanctioned post or prior approvals.

24. On such consideration, the appeal succeeds. The delay is condoned. The impugned order is, thus, set aside.

25. Urgent photostat certified copy of this order, if applied for,

be supplied to the parties upon compliance of all requisite formalities.

(Uday Kumar, J.)

(Soumen Sen, J.)