

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Justice Amrita Sinha

WPA 29065 of 2013

Swapan Kumar Hazra & Ors.
Vs.
The State of West Bengal & Ors.

With

WPA 18303 of 2015

Sabitri Mahata
Vs.
The State of West Bengal & Ors.

For the Writ Petitioners	:- Mr. Rabindranath Mahato, Adv. Mr. Lal Ratan Mondal, Adv. Mr. Dilip Kumar Sadhu, Adv. ...In WPA 18303 of 2015 Mr. Sakya Maity, Adv. ...In WPA 29065 of 2013
For the State	:- Mr. Subhabrata Dutta, Adv. Mr. Tapas Kumar Mandal, Adv. ...In WPA 18303 of 2015
For the respondent school	:- Mr. Ekramul Bari, Adv. Ms. T. Basak, Adv. Sk. Imtiazuddin, Adv.
For the respondent no. 7	:- Md. Shahjahan Hossain, Adv. Mr. Sakya Maity, Adv. Mr. Prithwiraj Biswas, Adv. Ms. Prubasha Goswami, Adv. ...In WPA 18303 of 2015
Heard concluded on	:- 17.02.2023
Judgment on	:- 24.03.2023

Amrita Sinha, J.:-

Swapan and two others filed writ petition being WP No. 24339 (W) of 2013 seeking regularization of service alleging that they were rendering continuous service in the Goaltor High School (H.S.) but the school did not regularize their service against the vacant posts. The petitioners claimed that they were eligible for

being appointed in the post of non-teaching staff but the school was trying to fill up the vacant posts through direct recruitment without considering their case.

The petitioners averred in the writ petition that there were several vacancies in the post of non-teaching staff and the school management engaged/ appointed the petitioners as non-teaching staff in the vacant posts. Swapan was appointed as Group-C employee and all the petitioners performed their work satisfactorily. The school paid monthly honorarium to the petitioners.

Despite repeated requests the managing committee did not issue any appointment letter in favour of the petitioners, but they were able to obtain a written declaration from the employees of the school that the petitioners were serving in the school.

An advertisement was published by the managing committee of the school in the daily newspaper on 14th September, 2013 for recruitment in one vacant post of Group-C and two vacant Group-D posts. Being aggrieved by the act of the managing committee of the school to fill up the vacant posts by ignoring the claim of the petitioners for regularization, Swapan and two others filed yet another writ petition being WPA No. 29065 (W) of 2013 which was taken up for consideration on 26th September, 2013 when the Hon'ble Court was pleased to direct the parties to file their affidavits. The point of maintainability of the writ petition was kept open. The interim order prayed for by the petitioners stood refused. The Court, however, directed that steps taken by the respondents on the basis of the impugned advertisement shall abide by the result of the writ petition.

Affidavits have since been filed by the parties and the matter is being decided by the court on merits.

The earlier writ petition filed by Swapan and two others being WP No. 24339 (W) of 2013 seeking regularization was also taken up for consideration on the same day i.e, 26th September, 2013. The Court after hearing the parties recorded that the petitioners failed to produce any document in support of their appointment to the

posts under reference adhering to the provisions of the West Bengal Schools (Recruitment of Non Teaching Staff) Rules, 2005. The Court observed that it is the settled principle of law that the recruitment rules have to be followed strictly and not in breach. The Court found that the prayer of the petitioners to regularize or give approval of appointment cannot be allowed as the petitioners do not have any legally enforceable right. The writ petition was dismissed.

Challenging the order of dismissal the petitioners preferred an appeal before the Hon'ble Division Bench being MAT 1622 of 2013. The said appeal was taken up for consideration by the Hon'ble Division Bench on 19th November, 2013. The Hon'ble Division Bench recorded that pursuant to the advertisement published on 14th September 2013 the appellants / writ petitioners applied. The appellant no. 1 i.e. Swapan has not been called for interview. As it was submitted that the petitioners were serving in the school for the last eleven years, the Court allowed Swapan to participate in the interview to be held subject to the result of the appeal.

The order records that Swapan has crossed the age bar and would otherwise not be eligible for the post but as he has been allowed to continue in service temporarily, not allowing him to participate in the interview would be to deprive him for all times to a permanent post. The said reasoning was in view of the decision reported in 2013 (1) CHN (Cal) 9 (Gobinda Chandra Mondal vs. Principal, Rabindra Mahavidyalaya).

Swapan participated in the recruitment process and his name was empanelled in serial no. 1 of the merit list.

Sabitri is a contender to the Group-C post of the school. In response to the advertisement published by the school, Sabitri applied and was called for interview. She appeared before the selection committee and claims to have performed well. Her name was empanelled in serial no. 2 of the merit list. Sabitri apprehended that if the panel is approved, then she may lose her chance of being appointed in the single vacant post. As the District Inspector of Schools was actually taking steps to

approve the panel despite pendency of the appeal filed by Swapn, Sabitri filed a writ petition before this Court being WP No. 36555 (W) of 2013.

Sabitri's petition being WP 36555 (W) of 2013 was heard and disposed of on 23rd April, 2014. The Court observed that the appeal preferred by Swapn was pending and the Hon'ble Division Bench was *in seisin* of the matter. By way of an interim measure, Swapn was permitted to appear in the interview subject to the decision of the appeal. As the Hon'ble Division Bench was yet to decide the fate of Swapn, to avoid any conflict of opinion, it would be just and proper for the parties to take steps for early hearing of the appeal so that the matter can be resolved.

Sabitri not being a party in the appeal preferred by Swapn and others filed an application for addition of party before the Hon'ble Division Bench. The Hon'ble Division Bench permitted Sabitri to be added as respondent in the appeal.

During pendency of the appeal (MAT 1622 of 2013) and the writ petition filed by Swapn (WPA 29065 of 2013) and Sabitri (WPA 18303 of 2013), the District Inspector of Schools, Secondary Education in January, 2015 approved the panel forwarded by the school authority with condition that it will abide by the final result of MAT 1622 of 2013. The name of Swapn appeared in the first position of the approved panel.

After the approval of the panel, the appellants i.e. Swapn and others submitted before the Hon'ble Division Bench that in view of the subsequent appointment of the appellants through regular selection process, the appeal have become infructuous. Prayer was made for not pressing the appeal. The Hon'ble Division Bench by order dated 30th June, 2015 recorded the submissions made by the learned senior counsel representing Swapn and others and dismissed the appeal as 'not pressed'. The Hon'ble Division Bench recorded that the Court did not decide any issue raised in the appeal on merits.

Consequent to the order passed by the Hon'ble Division Bench, the District Inspector of Schools on 12th August, 2015 withdrew the condition imposed in the

letter of approval of appointment issued in favour of Swapam and confirmed his appointment. Swapam is serving in the school till date.

The contention of Sabitri is that as Swapam was ineligible to appear in the recruitment process being overaged, accordingly, his appointment is bad in law. It has been contended that there is no order relaxing the age bar of Swapam. Till a formal order is passed condoning the overage, Swapam cannot be appointed in the said post. Formal appointment letter was never issued by the school authority in favour of Swapam and, accordingly, Swapam will not get the benefit of the judgment in Gobinda Chandra Mondal (supra).

It has been contended that Swapam was permitted to participate in the recruitment process as an interim measure, but the Court did not decide the eligibility of Swapam to participate in the said process. On dismissal of the appeal, the interim order passed therein merged with the final order and, accordingly, Swapam cannot be permitted to remain in service any further.

The moment the appointment of the first empanelled candidate is set aside, the second empanelled candidate i.e. Sabitri qualifies for appointment and she ought to be appointed in the said vacancy. Prayer has been made to direct the respondent authority to issue appointment letter in her favour as her name appeared in the second position of the merit list.

Learned advocate representing the school authority admits that Swapam is working in the school for a long time without any formal letter of appointment in his favour. After the publication of the advertisement, Swapam participated in the recruitment process where he became successful and presently his service has been confirmed by the District Inspector of Schools.

Learned advocate representing the District Inspector of Schools submits that as the Hon'ble Division Bench did not mention anything with regard to the interim order that was issued earlier and as no consequence of withdrawal of the appeal

was mentioned, the District Inspector of Schools confirmed the appointment of Swapan.

Learned advocate representing Swapan presses the issue of res judicata. It has been contended that as the earlier writ petition filed by Sabitri being WPA 36555 of 2013 with the same prayer as in WPA 18303 of 2013 was disposed of without granting any relief to Sabitri, accordingly, the subsequent petition by Sabitri will not be maintainable. It has been stressed that Swapan is working in the said school for a considerably long period of time and at this stage his service ought not to be disturbed. It has been represented that the matter has been put to rest by the order passed by the Hon'ble Division Bench in MAT 1622 of 2013 and the issue ought not to be reopened after so many years. Valuable right has accrued in favour of Swapan in the meantime.

In support of the submissions made herein above Swapan has relied on the judgments delivered by the Hon'ble Supreme Court in ***Abhimanyoo Ram vs. State of Uttar Pradesh & Anr; (2008) 17 SCC 73, Madras Institute of Development Studies & Anr. vs. K.Sivasubramaniyan & Ors.; (2016) 1 SCC 454, P. Bandopadhyaya & Ors. vs. Union of India & Ors.; (2019) 13 SCC 42 and Rana Pratap Singh vs. Vittiya Evam Lekha Adhikari; AIR 2020 SC 294.***

Prayer has been made by Swapan for dismissal of the writ petition filed by Sabitri and to permit him to continue in service.

I have heard and considered the rival submissions made on behalf of all the parties. Both the petitioners Swapan and Sabitri are contenders to the single Group C post of the school. Swapan claims to be working in the school for nearly eleven years prior to the recruitment process being initiated by the school to fill up the vacancies, *albeit* without a formal appointment letter being issued in his favour by the school authority.

The writ petition filed by Swapan praying for restraining the school from proceeding further with the recruitment process for filling up three posts of non

teaching staff has been admitted with order directing the parties to exchange affidavits. Point of maintainability of the writ has been kept open and steps taken on the basis of the impugned advertisement is to abide by the result of the writ petition.

The writ petition filed by Swapan seeking regularization stood dismissed. The Hon'ble appeal court by way of an interim order permitted Swapan to appear in the interview, however, subject to the result of the appeal. The Hon'ble appeal court was conscious of the fact that Swapan was ineligible to participate in the recruitment process as he had crossed the prescribed age limit. Relying on the principle laid down in *Gobinda Chandra Mondal (supra)* the interim order was passed.

Both Swapan and Sabitri participated in the recruitment process. Swapan stood first in the merit list and Sabitri stood second.

After attaining the first position in the merit list, Swapan did not press the appeal. On account of not pressing the appeal, the court did not have an occasion to decide the issue raised by Swapan. The prayer in the writ from which the appeal arose was for regularization. Had the writ been allowed, the ultimate relief which Swapan could have got is regularization in service. As Swapan got selected in a regular recruitment process, he thought it fit not to press the appeal.

What Swapan missed is that it is in the writ seeking regularization that the court permitted him to appear in the interview. The court noticed that Swapan was overaged and ineligible to participate in the recruitment process initiated by the school. But instead of shutting him away, the Court afforded an opportunity to Swapan to participate in the regular selection process along with other eligible candidates. Swapan took advantage of the interim order passed by the court, but did not follow it through. He withdrew his case before the appeal court.

The present writ petition of Swapn, has practically become infructuous as Swapn himself is a beneficiary of the recruitment process which was under challenge.

Should Swapn be permitted to enjoy the fruit of the proceeding which was ultimately dismissed as 'not pressed'? Sabitri contends that with the withdrawal of the appeal, the interim relief enjoyed by Swapn lost its force and Swapn ought not to be permitted to work on the strength of the said interim order.

Swapn must have thought that as he was able to secure the first position in the panel he was eligible for appointment, when admittedly, he was not. Swapn was overaged. He could not have participated in the recruitment process but for the interim order granted in his favour. The interim order was subject to the result of the appeal. With the appeal not being pressed further, the interim order automatically loses its force. The interim order remains valid as long as the proceeding is in existence. With the end of the litigation, the interim order ceases to exist.

Can an ineligible candidate be permitted to be appointed? The Court did not decide the eligibility of Swapn. The overage was never condoned by the Court. In paragraph 23 of the judgment of Gobinda Chandra Mondal (*supra*) the Court held that no ad hoc or temporary appointee can be absorbed or be regularized in any post in government or government aided establishment de hors the recruitment or service rule ordinarily.

In the present case, no appointment letter was issued in favour of Swapn by the school authority. Neither the school nor Swapn has disclosed before this court as to how he was appointed in the school. In the absence of an appointment letter it cannot be said that Swapn was appointed in the school. Swapn may have been hand-picked to work in the school but that does not give any legal right to Swapn to continue in service after a regular selection process was undertaken.

Permitting Swapam to continue the job will amount to perpetuating an illegality. If Swapam is permitted to continue in service, then the person who participated in the recruitment process being eligible for the same, will be deprived of the job even though the candidate is successful in the selection process. Accordingly, the ratio of the judgment in Gobindo Chandra Mondal cannot come to the aid of Swapam.

It is exactly on this ground that the earlier writ petition filed by Swapam, seeking regularization, was dismissed by the court holding that Swapam does not have a legally enforceable right to be regularized in service.

Swapam has relied on the judgment in Abhimanyoo Ram (supra) wherein the Hon'ble Supreme Court laid down that any attempt by a litigant to retain the benefit of the interim order by avoiding final adjudication, requires to be deprecated. The court held that it requires to be dealt with sternly. The court noted that sometimes, the departmental officials concerned, on account of collusion with the petitioners who obtained the interim relief, will not withdraw or reverse the benefit granted to the petitioner in pursuance of the interim order, when the petition is withdrawn or dismissed as not pressed. Appropriate consequential directions cancelling or vacating the interim order should be passed so as to restore status quo ante.

In the present case, the Hon'ble appeal court at the time of dismissing the appeal clearly recorded that, the court has not decided any issue in the appeal on merits. The same implies that there has been no adjudication of the right of Swapam to participate in the recruitment process in which, admittedly, he was ineligible to participate, far less continue in service after the appeal stood withdrawn.

In Abhimanyoo Ram (supra) though the Hon'ble Supreme Court was pleased to set aside the order of the High Court but permitted the appellant to pursue the writ petition in accordance with law. Here, both the writ petitions are being decided on merits after hearing both the contenders.

In *Madras Institute* (supra) the question before the Hon'ble court was whether a person who consciously takes part in the selection process can turn around and question the method of selection. The court reiterated the opinion that having taken part in the selection process with full knowledge the respondent waived the right to question the same. Here, Sabitri, participated in the recruitment process as she was eligible to take part in the same. She is not aggrieved with the selection process; neither does she challenge the same. Her point is that she is eligible to be appointed whereas Swapan is not. She prays for issuance of appointment letter in her favour after revoking the appointment letter issued in favour of an ineligible candidate.

In *Rana Pratap Singh* (supra) the court took into consideration the subsequent facts and thereafter passed necessary order. The appellant before the Hon'ble Supreme Court was an ineligible candidate who participated in the recruitment process and was successful. In the instant case Swapan is an ineligible candidate who participated in the recruitment process by the strength of an interim order in a proceeding which later on stood dismissed. Swapan cannot, under any circumstances, be permitted to enjoy the benefit of the interim order without a proper adjudication of his right to participate in the recruitment process.

The ground of *res judicata* as raised by Swapan cannot be accepted by the court. The issue that is being decided herein was not decided by the court in the earlier writ petition filed by Sabitri. In fact, the court relegated Sabitri to the appeal court so that the matter could be resolved conclusively once and for all. Swapan, in order to avoid the appeal proceeding, withdrew the appeal itself. Thus, the eligibility of Swapan to participate in the recruitment process remained undecided and inconclusive.

The District Inspector of Schools though issued a conditional appointment letter but thereafter erroneously withdrew the condition even though the appeal was not decided on merits. The District Inspector of schools even went to the extent of confirming the service of Swapan despite pendency of the writ petition filed by

Sabitri in connection with the self same selection process. The District Inspector of Schools ought to have taken proper legal advice prior to taking further steps in the matter.

In normal course if the first empanelled candidate is held to be ineligible for appointment, then the second empanelled candidate gets a chance to be appointed. Swapan was admittedly ineligible to appear in the selection process and accordingly appointment cannot be given to him. Sabitri being the first eligible candidate ought to be issued the appointment letter. Swapan has illegally enjoyed the benefit of the interim order for a pretty long time even after his writ petition stood dismissed and the appeal not pressed.

In view of the discussions made hereinabove, the court is of the considered opinion that the appointment letter issued in favour of Swapan is liable to be revoked and cancelled. Fresh appointment letter is required to be issued in favour of Sabitri.

Accordingly, the appointment letter issued in favour of Swapan is hereby cancelled and the District Inspector of Schools, Secondary Education, Paschim Medinipur is directed to issue appointment letter in favour of Sabitri within a fortnight from the date of communication of this order. Sabitri will be entitled to receive her pay from the date of her appointment but will not be entitled to any arrears. As the appointment of Sabitri got held up due to no fault of hers, as such, she will be entitled to get notional benefit from the date Swapan was appointed in the school.

In usual course of events, Swapan is liable to refund the money received by him on account of salary as he was not eligible to be appointed; but keeping in mind the fact that it may be a bit too harsh to direct Swapan to refund the salary amount received by him since 2013, accordingly, the court refrains from passing such direction. Swapan will not get any financial benefit hereinafter, not even the benefit which may have accrued to him on account of provident fund and gratuity.

It will, however, be open for the school authority to permit Swapan to perform duty if the school thinks that his service is required. In such case, the school will be entirely responsible to bear his financial burden and not a penny shall be paid to him from the State exchequer.

Writ petition of Swapan being WPA 29065 of 2013 stands dismissed.

Writ petition of Sabitri being WPA 18303 of 2015 stands disposed.

The parties shall bear their own costs.

The records relating to MAT 1622 of 2015, FMA 4268 of 2016 and WPA 36555 of 2013 be returned to the concerned department.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)