

18.04.2024
rpan/01-2

WPA 15864 of 2010
Bithika Singha (Barman)
– *Versus* –
State of West Bengal & Others
with
WPA 15923 of 2010
Smt. Tapasi Shit (Dhal)
– *Versus* –
The State of West Bengal & Others

Mr. Biswarup Biswas,
Mr. Kamal Mishra,
Mr. Pratap Sanfui
... for the Petitioner
[in WPA 15864 of 2010].
Mr. Partha Sarathi Deb Barman,
Mr. Santu Das Adhikari
... for the Petitioner
[in WPA 15923 of 2010].
Mr. Biswajit De
... for the State
[in WPA 15864 of 2010].
Mr. Santanu Kumar Mitra,
Ms. Anandamayi Ghosh
... for the State
[in WPA 15923 of 2010]

Upon consent of the parties, both the writ petitions are taken up together for hearing in view of a thematic unity between them.

The facts need to be adumbrated for effective adjudication of the writ petitions are as follows:

(i) One selection process was undertaken by the managing committee of Bajkul Balai Chandra Vidyapith (High School) [in short, the said school] to fill up the post of Group – ‘D’ in the school. The concerned employment exchange was asked to sponsor the names of eligible candidates. In addition thereto, by an advertisement published in a leading newspaper of the State on 15.07.2008,

applications were also invited from the eligible and intending candidates for the post.

- ii) In response to the advertisement, one Smt. Tapasi Shit (Dhal), the writ petitioner in WPA 15923 of 2010 (hereinafter addressed as Tapasi) claiming herself to be an eligible candidate offered her candidature for the post.
- iii) In terms of an interim order passed in a writ petition *vide*. WP no. 27952 (W) of 2008, the petitioner in WP no. 15864 (W) of 2010, namely, Bithika Singha (Barma) (hereinafter called as Bithika) was allowed to participate in the selection process.
- iv) On 9.8.2008, an interview was held and on the basis of the marks obtained in the interview, Tapasi was placed at the top of the panel. Bithika secured 2nd position in the panel. Tapasi joined the post on 26.09.2008.
- v) Bithika lodged a complaint to the competent authority alleging that Tapasi could not pass Class- VIII examination. An enquiry was commenced and the same was concluded by the Additional D.I. of Schools declaring that the progress report which Tapasi submitted as proof of her educational qualification was genuine. Finally, Additional D. I. of Schools *vide*. his memo. no. 1317-C dated 12.09.2007 approved Tapasi's appointment in the post w.e.f. 26.09.2008.

vi) Bithika questioned the legality of Tapasi's appointment by preferring a writ petition vide. WP no. 27952(W) of 2008. Tapasi was impleaded in the array of the respondents. By an order dated 30.04.2009, the writ petition was disposed of directing Bithika to place a copy of the writ petition along with all annexures thereto to the Director of School Education who was directed to consider the matter in proper perspective after affording an opportunity of hearing to Bithika and Tapasi and take appropriate action in accordance with law within a specific time frame.

vii) In deference of the said order dated 30.04.2009, the Director of School Education decided the issue and in his order dated 28.06.2010, he expressed his doubt regarding the genuineness of the Class – VIII pass certificate of Tapasi and eventually, he rejected the candidature of Tapasi.

viii) Simultaneously, by the said order dated 28.6.2010, the Director of School Education cancelled the prior permission, approval of panel and the approval of appointment of Tapasi. The Director concluded his order directing the D. I. of Schools to forward the vacancy to the concerned Regional School

Service Commission in terms of the notification dated 09.07.2009.

- ix) The order of the Director of School Education dated 28.6.2010 dragged both of them in this legal battlefield and forced them to institute two different writ petitions vide. WPA 15864 of 2010 and WPA 15923 of 2010. The first one was instituted by Bithika challenging the concluding part of the order whereby the prior permission was cancelled and the D.I. of Schools was directed to forward the vacancy and seeking her appointment in the post after re-casting the panel whereas the 2nd one was preferred by Tapasi assailing the entire order of the Direction of School Education to save her job.

By an interim order passed by a coordinate Bench of this Court on 09.08.2010, Tapasi was allowed to continue to render her service in the post in the following words:

“ .. Until further orders of this Court, her service shall not be disturbed. However, it is made clear that Smt. Shit shall have to bear all consequences, if her writ petition fails and she shall not claim any equity.”

Mr. Biswas, learned advocate appearing for Bithika seeks to contend that the essential eligibility criterion for the post was Class-VIII passed from any recognized school. Inviting my attention to the progress report of Tapasi, he

argues that Tapasi secured only 169 marks out of 900 and she could not secure pass marks in any subject except in Work Education but somehow managed to get promotion in next Class. He seeks to urge that even in the oral examination of second language, Tapasi was awarded 11 out of 10.

Taking me to annexure R-4 to the affidavit-in-opposition used by Bithika as private respondent no. 7 to Tapasi's writ petition, it is contended by him that while giving response to application of one Swapan Kumar Barman preferred under the relevant provision of Right to Information Act, 2005, the West Bengal Board of Secondary Education (in short, the Board) declared that Tapasi could not be declared to be a Class-VIII passed candidate. My attention was drawn to annexure –R-5 of the same affidavit to contend that though in the same academic year some students secured more marks than Tapasi but it was only Tapasi who was promoted to Class-IX for some mysterious reason. Referring to a report of the Board and its annexure, he seeks to argue that in terms of the extant rules, the Board has declared that Tapasi could not pass Class-VIII examination.

He next contends that the candidature of Tapasi can never be declared to be valid. He asserts that Tapasi's appointment is void *ab initio*. He argues that Director of School Education rejected Tapasi's candidature but committed an error by directing the D.I. of Schools to forward the vacancy to the Commission. He laid immense emphasis on an unreported decision of a coordinate Bench

of this Court passed in WPA 2740 of 2008 to contend that the Director of School Education ought to have passed an order directing exclusion of the name of Tapasi from the panel and appoint the petitioner upon re-casting the panel.

In response, Mr. Deb Barman, learned advocate for Tapasi drawing my attention to the provisions of Rule 2(c) of the West Bengal Schools (Recruitment of Non-teaching Staff) Rules, 2005 seeks to contend that one of the qualification for the post is '*a certificate of passing Class VIII from a recognized school*'. He argues that the petitioner was promoted to Class- VIII and on being so promoted, she pursued her study of Class-IX but subsequently dropped out. He seeks to explain that such promotion is to be construed to passing of Class-VIII. He claims that Tapasi fulfilled the eligibility criteria for being appointed in the post and no illegality was perpetrated in giving her appointment in the post.

Quite apart from the above, he argues that participation of Bithika in terms of an order of this Court is bad. Citing a decision reported at 2008(2) CHN(Cal)879(DB), he argues that in this case, a Hon'ble Division Bench ruled that the High Court sitting in writ jurisdiction cannot allow appearance of a non-sponsored candidate unless and until by an advertisement, applications are invited from eligible and intending candidates for the post.

In his last-ditched attempt to defend the appointment of Tapasi, Mr. Deb Barman invites the Court to take a pragmatic view and deal with the issue sympathetically

taking note of the fact that Tapasi has been rendering her service in the post since 2008.

In a prompt reply, Mr. Biswas seeks to remonstrate against the claim of Mr. Deb Barman contending that in the given case, advertisement was published. He claims that judgment of Gaya Nath Rajbanshi will not come in rescue of Tapasi. He argues that in her writ petition, Tapasi never pleaded that Bithika's appearance in the interview is illegal. He cites an unreported decision rendered in Civil Appeal Nos. 5798-5799 of 2008 (Bachhaj Nahar vs. Nilima Mandal & Anr.) for the proposition that in absence of pleading, no argument can be advanced on any issue.

Heard the learned advocates and perused the materials on record.

Therefore, the epicenter of the dispute in the case at hand has brewed up on a primal question whether or not Tapasi passed Class-VIII examination or whether or not Tapasi could be treated as an eligible candidate for the post.

A bird-eye's view of Tapasi's progress report will reveal that Tapasi secured only 169 marks out of 900 marks and she failed to secure qualifying marks in any of the three subject-wise groups. She was awarded 38 out of 100 in work-education group. Admittedly, in oral examination of second language, Tapasi was awarded 11 marks out of 10.

In the report of the Board, in unequivocal terms it was declared that Tapasi, who secured 54 marks out of 300 in language group, 40 marks out of 300 in science group and 37 marks out of 200 in the group of India and her people had failed to pass Class-VIII examination. As such, having

failed to secure 30% in the aforesaid three subject-wise groups, she could not pass in the Annual Examination of Class-VIII. Tapasi was promoted to Class-IX on consideration. From annexure –R-5, as referred above, it would be explicit that a certain number of students securing more marks than Tapasi had not been considered for promotion to the next Class by the school authority but for some mysterious reason, Tapasi was promoted. The school authority concerned under the impression of having unfettered power to award promotion, promoted Tapasi to next class. Tapasi did not continue her studies but utilized her progress report to secure a job in a Government-recognized school claiming her to be a Class-VIII passed candidate.

It is unfortunate to comment that a school authority which comprised of respectable teachers engaged in building moral character of the students and imparting quality education to them for the reason best known to them had promoted Tapasi to next class keeping other identically circumstanced students stuck to their old class only to facilitate her to use such progress report as a Class-VIII pass certificate.

In this legal battlefield, Tapasi suffered a serious blow when a coordinate Bench of this Court in its order dated 30.04.2009 passed in W.P. no. 27952(W) 2008 observed that ‘*..the private respondent (Tapasi) did not in fact qualify in the examination held for Class-VIII*’. Tapasi accelerated her defeat leaving the order dated 30.04.2009 unchallenged. In a quick succession, she suffered another

blow when the Board in its report in unambiguous words declared that Tapasi could not pass Class-VIII examination and eventually, she suffered a fatal blow from the order of the Director of School Education in which her candidature was cancelled. Mr. Deb Barman tried to rescue Tapasi from the jaws of defeat asserting that promotion to Class IX should be construed to passing of Class-VIII but the school authority concerned could not justify such promotion before the Board. The Board, Director of School Education and even this Court refused to adorn the promotion with the crown of legality.

Suffice it to observe that a decision is an authority for what it decides and not what can logically be deduced therefrom. Even a slight distinction in fact or an additional fact may make a lot of difference in decision making process. The judgment is a precedent for the issue of law that is raised and decided and not observations made in the facts of any particular case.

In the case at hand, by an advertisement, applications were invited from eligible and intending candidates for the post and as such, the decision of Gaya Nath Rajbanshi is distinguishable on facts. Moreover, Tapasi did not challenge appearance of Bithika in the interview. She even did not challenge the observation made in W.P. no. 27952(W) 2008. Therefore, there is an irresistible conclusion that Tapasi, for having failed to pass Class-VIII examination was not eligible for the post.

Mr. Deb Barman tried to draw sympathy from the Court by his impassionate submission which gives reminder

of the legal maxim, '*dura lex, sed lex*' which means, law is hard but it is the law. A decision of a Court should not be influenced by any impertinent consideration. Showering sympathy on an illegally-appointed candidate would be misplaced sympathy which is also fatal to justice delivery system.

The Director of School Education cancelled the candidature of Tapasi but simultaneously, he cancelled the prior permission, approval of panel, appointment of Tapasi, approval of her appointment and directed reference of the vacancy to the Commission. Therefore, next question comes for resolution is whether or not this concluding part of the order of the Director whereby he cancelled the prior permission and direct reference of the vacancy to the Commission can be sustained.

In this context, I hasten to reiterate the proposition laid down by a coordinate Bench of this Court in WPA 2740 of 2008 (Ashim Kumar Das –vs- The State of West Bengal & Ors.) with approval that there is no justification to deny appointment to those selected candidates whose selection were not vitiated in any manner even if an eligible candidate was permitted to participate in the selection process. If there is any illegal beneficiary from the selection process, he/she should be wedded out instead of striking down the entire selection process. It is worthwhile to observe that this proposition was based on the law laid down in the judgments of Girjesh Shrivastava and Ors. vs. State of M.P. & Ors., reported at (2010) 10 SCC 707 and Uttam Kumar

Mahato vs. State of West Bengal & Ors., reported at 2006(1) CHN 650.

Therefore, from the discussion made hereinabove, the only analogy which can be drawn is that as Tapasi could not pass Class-VIII examination, she was not eligible for the post and her appointment in the post is void *ab initio*. There cannot be any hesitation to conclude that her writ petition being WPA 15923 of 2010 fails.

In terms of the interim order passed in these matters, she has to bear the consequences and as such, her failure to succeed in the writ petition must entail cancellation of her appointment.

Bithika has successfully made out a case entitling her to get the reliefs, as prayed for in her writ petition. Consequently, the writ petition being WPA 15864 of 2010 is allowed. The part of the order of the Director of School Education vide his memo. no. 121/1-(7) L.C. dated 28.06.2010 whereby the entire selection process was wedded out by cancelling the prior permission and directing the D.I. of Schools to forward the vacancy to the concerned Regional Central School Service Commission is quashed.

The managing committee of the school in question is directed to re-cast the panel in the light of the observations made in this order and send it to the jurisdictional D.I. of Schools seeking his approval thereto. Upon receipt of such re-casted panel, the D.I. of Schools shall consider the case of its approval in accordance with law. The D.I. of Schools shall take note of the observations made in this order while

considering the case of approval of the re-casted panel to be forwarded to him.

The entire exercise shall be completed within four weeks from the date of receipt of a copy of this order.

Ex consequenti, the WPA 15923 of 2010 is dismissed. WPA 15864 of 2010 is allowed. There shall be no order as to the costs.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, upon compliance of all requisite formalities.

(Partha Sarathi Chatterjee, J.)