

(2011) 05 CAL CK 0020

Calcutta High Court

Case No: Writ Petition No. 10954 (W) of 2007

Nandini Mukherjee

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: May 20, 2011

Acts Referred:

- Constitution of India, 1950 - Article 14, 15, 15(1), 15(2), 16
- Criminal Procedure Code, 1898 (CrPC) - Section 164, 364
- Recruitment Rules, 2001 - Rule 6
- West Bengal Primary Education Act, 1973 - Section 5(3), 60

Citation: (2011) 5 CHN 532

Hon'ble Judges: Harish Tandon, J

Bench: Single Bench

Advocate: S.M. Mukherjee, for the Appellant; Tarapada Halder ; Biswadeb Roy Chowdhury, Tulsidas Maity, P.K. Ghosh for the Council. for the state respondent No. 2, for the Respondent

Final Decision: Dismissed

Judgement

Harish Tandon, J.

The writ petitioner claims compensation in this writ petition for loss of income and sufferance for not being sponsored by the employment exchange in view of circular issued by the District Primary School Council wherein the candidate having Bengali as first language in Madhyamik or school final or equivalent are eligible for appointment to the post of primary teacher. Before proceeding to decide an issue involved in this writ petition, brief facts are that the petitioner passed secondary school examination from the Central Board of Secondary Education having Bengali as second language. Subsequently she obtained the primary teacher's training certificate after having qualified in the examination conducted by the directorate of the School Education, Government of West Bengal.

2. Subsequently she registered herself with the Regional Employment Exchange, Calcutta on 26.3.2003. In spite of being registered with the Regional Employment Exchange, the name of the petitioner was not sponsored in the selection process initiated in the month of January 2004 and in the month of March 2006. Though the employment exchange initially contended that the petitioner could not appear in the written examination but subsequently it is communicated to the petitioner that the district Primary School Council has set down an eligibility criteria that the candidate must have a Bengali as first language in the Secondary Examination as the recruitment is being made to a Bengali medium primary school.

3. The petitioner made several representations to the various authorities raising a protest against the incorporation of the said eligibility criteria when the statutory rules framed under the West Bengal Primary Education Act, 1973 does not have such eligibility criteria. It is further contended that the statutory authority cannot impose restrictions which is not incorporated in the statutory rules by executive/administrative instructions. The petitioner therefore has laid a claim for compensation for denying the livelihood by such executive or administrative instruction.

4. Mr. S.M. Mukherjee, learned Advocate appearing for the petitioner submits that the statutory authority should act within the framework of the statutory rules. It is further contended that there is no stipulation in the eligibility qualification as envisage under the statutory rule and the authority by such executive/administrative instruction cannot incorporate an additional eligible qualification. He strenuously argued that by imposing such restrictions the petitioner could not be employed and/or appointed to the post of an assistant teacher in primary school in a selection process of 2004 and 2006 respectively. He contends that when statutory rules provide eligible qualification, the same has to be strictly adhered to and cannot be departed from and relies upon a judgement of the Apex Court in case [Ramchandra Keshav Adke \(Dead\) by Lrs. and Others Vs. Govind Joti Chavare and Others](#), . He further argued that the petitioner has suffered a great deal of injustice at the hands of the statutory authority in depriving her livelihood for a considerable period of time. The writ for compensation is maintainable and the Writ Court can pass an order directing the authorities to pay compensation and relies upon an unreported judgment of the Supreme Court dated April 3, 2007 delivered in case of Bhagabati Das (Sarkar) vs. Calcutta University & Ors. in Civil Appeal No. 2033/07. It is further argued that the authorities by imposing such restriction have acted in malice to keep away the candidates like the petitioners from the zone of consideration and relies upon a judgment of the apex court in case of [Smt. S.R. Venkataraman Vs. Union of India \(UOI\) and Another](#), . To buttress his submission that putting restriction that the candidate who has Bengali as first language in the secondary examination, infringes Article 14 and 16 of the Constitution of India. He relies upon a judgment of the apex court in case of [A.P. Public Service Commission Vs. K. Sudharshan Reddy and Others](#), and in case of Col.

A.S. Sangwan vs. Union of India & Ors. reported in AIR 1981 SC 1545 and in case of [V.N. Sunanda Reddy and others Vs. State of Andhra Pradesh and others](#), Lastly it is argued that in case of a recruitment/appointment the authorities must follow the appropriate procedure under the rules and any such departure would amount to breach of Article 14 and 16 of the Constitution and relies upon a judgement of the apex court in case of [M.P. State Coop. Bank Ltd., Bhopal Vs. Nanuram Yadav and Others](#),

5. Mr. Tulsi Das Maity, learned Advocate appearing for the District Primary School Council at the very outset submits that the petitioner has been found successful for being appointed to the post of assistant teacher in primary school and in fact had been appointed in Sree Bidya Mandir (Primary), Kolkata on and from 4th March 2010. He further submits that the petitioner has already joined the service and started working in the said school. He succinctly argued that in a selection process of 2006 the authority did not impose any such condition that the candidate should have Bengali as first language in the secondary examination and relies upon a circular under memo No. 1801/PC dated 27.12.2006. He further contended that the petitioner has not been deprived of her livelihood. He further submits that though the District Primary School Council while sending the number of vacancies to the employment exchange for sponsorship of the name of the eligible candidates, put a condition that the candidate should have Bengali a first language but subsequently the authority rectified such mistake and deleted such restriction. According to him, the name of the petitioner could not have been sponsored in the year 2004 and 2006 as the sponsorship are done in order of seniority. Lastly he argues that the writ petition is not maintainable for compensation simpliciter.

6. Having considered the respective submissions, the claim of the writ petitioner is for awarding compensation which would be evident from prayer (a) of the writ petition. The selection process, in the year 2004 and 2006, was conducted under the West Bengal Primary School Teachers Recruitment Rules, 2001.

7. Before advertng to the respective submissions of the learned Advocates appearing for the respective parties it would be profitable to quote certain provisions of the said Recruitment Rules of 2001.

8. Rule 6 provides the qualification for appointment to the post of a primary teacher which reads thus :

6. Qualifications. -- (1) no person shall be appointed by the Council as a teacher unless he --

(a) is a citizen of India;

(b) has completed the age of 18 years and has not completed the age of 40 years on the first January of the year in which the requisition for sending names of candidates is made to the Employment Exchange concerned;

(c) possesses the minimum educational qualifications as mentioned in sub-rule (2)

(2) the educational qualifications for the post of a teacher shall be --

(a) School Final/Madhyamik pass under the West Bengal Board of Secondary Education or equivalent, ***** or

(b) Erstwhile High Secondary pass (XI class) under the West Bengal Board of Secondary Education, or equivalent. *****

(3) training qualification may not be compulsory for appointment on compassionate ground against the vacancies prescribed under clause (b) of sub-rule (2) of rule 8

(4) the decision of the State Government on the question of equivalence for the purpose of sub-rule (2) shall be final.

(5) no extra marks shall be given for higher academic qualifications at the time of selection of a teacher :

Provided that a trained candidate shall be given extra marks in the manner prescribed under clause (d) of sub-rule (2) of rule 9 (6) priority and preference will be given to candidates having requisiting Training from a recognized Institute (provided candidate will be recruited on merit basis if trained candidates is not available).

On a bare look of the aforesaid provision it appears that no person can be appointed by the Council to the post of a primary teacher unless he/she possesses the minimum educational qualification meaning thereby School Final/Madhyamik pass under the West Bengal Board of Secondary Education or equivalent or Higher Secondary pass (XI class) under the West Bengal Board of Secondary Education or equivalent.

9. The said West Bengal Primary School Teachers Recruitment Rules, 2001 is framed in exercise of power conferred by sub-section (1) and clause (k) of sub-section (2) of section 1.06 read with clause (k) of sub-section (1) of section 60 of the West Bengal Primary Education Act, 1973. Once the rule is framed by the State Government in exercise of power conferred in the legislation, by issuance of any departmental circular the statutory authorities cannot act in derogation with such subordinate legislation.

10. By putting a restriction in the departmental circular that the candidate who has Bengali as first language in the secondary examination, the authorities have restricted the eligible qualification enshrined under Rule 6 of the said Recruitment Rule of 2001. A three-judge bench of the Supreme Court in case of V.N. Sunanda Reddy (supra) considered the earlier judgement of the Supreme Court in case of Dr. Pradeep Jam vs. Union of India, AIR 1984 SC 1420 held that any discrimination or weightage given to a candidate who has passed in a vernacular language medium is violative of Article 14 and 16 (1) of the Constitution in following words :

13. We have given our anxious consideration to these rival contentions and have reached the conclusion that the impugned G.O.s and the consequential statutory rules framed under Article 309 proviso do not stand the test of Articles 14 and 16 of the Constitution and will have to be declared invalid. The reasons for our aforesaid conclusions may now be catalogued as under:-

1) It has to be kept in view that requirement to public service through the Andhra Pradesh Public Service Commission is an open recruitment wherein any eligible candidate is permitted to compete at par with other competitors. The minimum eligibility criterion for recruitment to such posts is graduation. Therefore, it does not mean that candidates who have passed their graduation in non-Telugu medium cannot compete for the said posts. It has to be noted that the minimum educational qualification for appearing at the selection is graduation simpliciter. If the object underlying the impugned provision of weightage of marks on the aggregate to candidates who have passed their graduation in Telugu language to occupy the concerned posts then it cannot be said that merely because a person has passed his graduation in Telugu is to permit candidates knowing Telugu medium, he alone will be proficient in Telugu and not the candidate who has passed his graduation in any other language. For appointing persons to posts in public services through direct recruitment the criterion has to be pure merits. Therefore, all candidates who possess minimum educational qualification have to be assessed on the basis of their relative merits. At the stage of assessment if 5 per cent more marks on the aggregate are added in the assessment of candidates who have passed minimum educational qualification through Telugu medium, the very criterion of relative merits would get frustrated and would become otiose. In this connection, we may usefully refer to the decision of this Court in the case of [Dr. Pradeep Jain and Others Vs. Union of India \(UOI\) and Others](#), wherein P.N. Bhagwati, J., as he then was, speaking for the Court had made the following pertinent observations at pages 954 to 956 of (SCR) : (at PP. 1424 and 1425 of AIR) of the Report:-

The entire country is taken as one nation with one citizenship and every effort of the Constitution makers is directed towards emphasizing, maintaining and preserving the unity and integrity of the nation. Now if India is one nation and there is only one citizenship, namely, citizenship of India, and every citizen has a right to move freely throughout the territory of India and to reside and settle in any part of India, irrespective of the place where he is born or the language which he speaks or the religion which he professes and he is guaranteed freedom of trade, commerce and intercourse throughout the territory of India and is entitled to equality before the law and equal protection of the law with other citizens in every part of the territory of India, it is difficult to see how a citizen having his permanent home in Tamil Nadu or speaking Tamil language can be regarded as an outsider in Uttar Pradesh or a citizen having his permanent home in Maharashtra or speaking Marathi language be regarded as an outsider in Karnataka. He must be held entitled to the same rights as a citizen having his permanent home in Uttar Pradesh or Karnataka, as the

case may be. To regard him as an outsider would be to deny him his constitutional rights and to derecognise the essential unity and integrity of the country by treating it as if it were a mere conglomeration of independent States.

Article 15, clause (1) and (2) bar discrimination on grounds not only of religion, race, caste, or sex but also of place of birth. Article 16(2) goes further and provides that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them be ineligible for or discriminated against in respect of, any employment or office under the State. Therefore, it would appear that residential requirement would be unconstitutional as a condition of eligibility for employment or appointment to an office under the State which also covers an office under any local or other authority within the State or any corporation, such as, a public sector corporation which is an instrumentality or agency of the State.

It is of course true that the aforesaid observations were made in connection with admission in M.B.B.S. and Post Graduate Course and in the light of the question whether discrimination on the ground of place of birth would be countenanced under Article 15(1) and (2). However, the sweep of Article 14 read with Article 16(1) is no less pervasive. Article 16(1) ensures equality of opportunity for all citizens in the matter of employment or appointment to any office under the State. Article 14 declares that the State shall not deny to any person equality before the law or the equal protection of laws within the territory of India. The principles emerging from Articles 14 and 16 are well-settled. The object is to ensure equality to all those who are similarly situated. In other words, all the citizens applying for employment under the State are entitled to be treated alike. If that is so, it is difficult to appreciate how having once allowed all candidates having minimum qualification of graduation in any medium to compete for the posts, a further special beneficial treatment can be given to only candidates passing minimum educational qualification, examination, namely, graduation in Telugu medium after their relative merits are assessed vis-a-vis other candidates in open competitions and how they can be permitted to steal a march over other meritorious candidates standing higher up in the merit queue by giving weightage of 35 or 40 marks, as the case may be.

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11. In case of Col. A.S. Sangwan (supra) the Supreme Court held that the legislature must confirm to the requirement of equality as enshrined under Article 14 of the Constitution of India while enacting any new policy or changing the policy.

12. The judgment of the V.N. Sunanda Reddy (supra) was applied and accepted by the apex court in case of AP Public Service Commission (supra) and it is held that any weightage to a local language while considering the recruitment or permission violates Article 14 and 16 of the Constitution of India.

13. It has been held that if a thing is required to be done in a particular manner it should have been done in such manner and no other manner at all in case of Ram

Chandra (supra) in following words :

25. A century ago in Taylor V. Taylor, (1875) 1 Ch D 426 Jessel MR. adopted the rule that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. This rule has stood the test of time. It was applied by the Privy Council, in Nazir Ahmed vs. Emperior, 63 Ind App 372= (AIR 1936 PC 253 (2)) and later by this court in several cases, [Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh](#), [Deep Chand Vs. The State of Rajasthan](#), to a magistrate making a record under sections 164 and 364 of the Code of Criminal Procedure, 1898. This rule squarely applies "where indeed, the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner id not imply a prohibition to do it in any other. Maxell"s Interpretation of Statutes, 11th Edh., pp 362-363" the rule will be attracted with full force in the present case, because non verification of the surrender in the requisite manner would frustrate the very purpose of this provision. Intention of the legislature to prohibit the verification of the surrender in a manner other than the one prescribed, is implied in these provisions. Failure to comply with these mandatory provisions, therefor, had vitiated the surrender and rendered in non est for the purpose of section 5(3)(b).

14. The petitioner has claimed the compensation for deprivation of her livelihood by the said departmental/administrative circular. It appears that in 2006 there was no imposition of such condition as to the Bengali should be the first language in the secondary examination. On perusal of the writ petition it appears that such imposition was there in the selection process reckoned in the year 2004. The petitioner did not approach the court immediately thereafter complaining such discrimination and/or imposition of a restriction being violative of Article 14 and 16(1) of the Constitution of India. He waited for the next selection process commenced in the year 2006 which as it appears from the memo produced by the Advocate appearing for the District Primary School council that no such restriction was imposed therein. The writ petitioner have come in the year 2007 making a complaint that there is a restriction which denied the right of the petitioner to be brought within the zone of consideration for being appointed to the post of a primary teacher.

15. Admittedly, the petitioner is appointed as the primary school teacher by the District Primary School Council. The authorities though committed mistake in imposing such restriction in the selection process of 2004 but such mistake on detection was rectified as no restriction was imposed in the selection process of 2006.

16. The Court cannot lose sight of the fact that the concerned employment exchanges sponsored the name in maintaining the seniority and the petitioner would not have come under the order of sponsorship for the selection process

initiated in the year 2004.

17. The authorities cannot be said to have acted maliciously to deprive the candidates like the petitioners to be brought within the zone of consideration for appointment to the post of primary teacher. The shelter under the malice can only be resorted to if it is proved that the authorities have committed such wrongful act intentionally without any just cause or excuse or for want of reasonable or probable cause as has been held by the Supreme Court in case of S.R. Venkataraman (supra). No such case of malice is made in the writ petition it is only at the bar during the argument a point is taken by the writ petitioner. There is no foundation laid in the writ petition that the case of malice is made out and in absence of such foundational fact this Court feels that such point cannot be allowed to be agitated.

18. Thus, I do not find any merit in the writ application. The same is hereby dismissed.

20. However, there shall be no order as to costs. Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis.