

(2002) 07 CAL CK 0048

Calcutta High Court

Case No: M.A.T. No. 3169 of 2000 and C.A.N. No. 8725 of 2000

The Managing Committee of
Barisha Girls' High School and
Smt. Kasturi Chatterjee and
Others

APPELLANT

Vs

Smt. Smritikana Biswas and
Others
 Barisha Girls' High
School Vs State of West Bengal
and Others

RESPONDENT

Date of Decision: July 15, 2002

Acts Referred:

- Constitution of India, 1950 - Article 14, 19, 21, 226
- West Bengal Board of Secondary Education Act, 1963 - Section 46

Citation: (2003) 2 CALLT 1

Hon'ble Judges: Ashok Kumar Mathur, C.J.; Jayanta Kumar Biswas, J

Bench: Division Bench

Advocate: S.K. Kapoor, Nadira Patheria, Momak Bose, Dipak Dey and Biswarup Chowdhury, in M.A.T. No. 3168 of 2000, Jayanta Mitra, P.K. Chatterjee and Ranjit Chatterjee, in M.A.T. No. 3169 of 2000 and M.A.T. No. 3382 of 2000 and Sandip Bhattacharya, for the Appellant; Ashok Banerjee, Biswanath Samaddar, Soumya Chakraborty and Soumya Roy for Respondent No. 1 and Bhudeb Bhattacharjee and H.A. Begum for the D.I. of Schools, for the Respondent

Final Decision: Dismissed

Judgement

A.K. Mathur, C.J.

All these three appeals arise out of the same judgment and order dated 17th August, 2000. Therefore, they are being disposed of by a common judgment.

2. The brief facts which are necessary for disposal of these appeal are that in pursuance of selection to the post of assistant English Teacher in Barisha Girls' High

School (hereinafter referred to as school) a panel was prepared of three persons, namely, (1) Smt. Susmita Das; (2) Smt. Smritikana Biswas (writ petitioner) and (3) Smt. Kasturi Chatterjee (added respondent), Smt. Susmita Das stood first, Smt. Smritikana Biswas stood second and Smt. Kasturi Chatterjee stood third in the panel./ Smt. Biswas filed a writ petition being W.P. No. 13517 (W) of 1997 and alleged that she stood second in the panel of the selected candidates and she was interested to join this post as the present place in which she is working, that is in Baduria Kadambini Girls' High School, Baduria, is 90 kilometers away from the place of her residence. It was contended that since Smt. Sushmita Das, the first candidate in the panel, has not joined the post, therefore the chance of the writ petitioner in getting the appointment has become bright and she should be given the appointment. This writ petition was disposed of by Bhagabati Prosad Banerjee, J by the order dated 7th August, 1997 directing the District Inspector of Schools to take action on the basis of the representation made by the writ petitioner. It was observed that in case the first candidate of the panel does not join the post then appointment should be offered to the second candidate i.e. the writ petitioner. Thereafter, the school authorities made an application for recall of this order dated 7th August, 1997 passed by Justice Banerjee. However, that application was disposed of by giving liberty to the school authorities to challenge the said order dater 7th August, 1997 in any other co-lateral proceeding. Meanwhile, in compliance of the above order the District Inspector of Schools directed the school authorities to give appointment to Smt. Smritikana Biswas as Smt. Sushmita Das did not join the post.

3. Thereafter another writ application being W. P. No. 335 of 1999 (in the Original Side) was filed by the third empaneled candidate. Smt. Kasturi Chatterjee praying for appointment on the basis of the same selection. The said writ petition was disposed of by N.K. Mitra, J. by order dated 22nd July, 1998 directing the school authorities to give effect to the approved panel in terms of the Government Circular dated 7th February, 1963.

4. The School authorities also have filed a writ petition being W.P. No. 14754(W) of 1998 challenging the decision of the District Inspector of schools approving the panel in favour of Smt. Smritikana Biswas. Meanwhile, in view of the direction given by the District Inspector of Schools Smt. Smritikana Biswas was offered an appointment and she was directed to obtain release certificate from her existing employer, Baduria Kadambini Girls' High School, Baduria, by the School authorities by its letter dated 1st August, 1998 in order to enable the school authorities to issue appointment letter in favour of Smt. Smritikana Biswas. By this letter Smt. Biswas was asked to produce the release certificate before the school authorities by 7th August, 1998 and it was also directed that in the event she fails to bring the release certificate then appointment order will not be issued in her favour and it will be issued to the next eligible candidate in the panel. On receipt of this letter Smt. Smritikana Biswas by her letter dated 6th August, 1998 requested the school

authorities to issue the appointment letter to enable her to obtain the release certificate and join within three months in terms of the Recruitment Procedure and she alleged that the four days" time granted to her for securing the release certificate without producing appointment letter was absurd. She further contended that the letter of the school authorities dated 1st August, 1998 was received by her on 3rd August, 1998 and there were only 4 days left, out of the said four days, two days were holidays. She contended that because of such short time and absence of appointment letter it was not possible for her to obtain the release certificate. Thereafter, Smt. Smritikana Biswas filed the writ petition being W.P. No. 14641(W) of 1998 and obtained an interim order on 11th August, 1998 directing the respondents to maintain status quo with regard to appointment. Subsequently, the order dated 11th August, 1998 was modified to the extent that appointment in favour of Smt. Kasturi Chatterjee will abide by the result of the writ petition. It appears that, meanwhile, appointment letter in favour of Smt. Kasturi Chatterjee has been issued and at present she is working in the school.

5. In this background the learned single Judge considered the matter and found that the time period given to Smt. Smritikana Biswas was too short. The learned single Judge further found that as per paragraph 6(o) of the Recruitment Procedure, 1995 the incumbent is entitled to three months" time for joining and that was not given to the incumbent. The learned single Judge further directed that three months" time be given to the petitioner for joining the post and in the event she fails to procure the release certificate within this time then in that case appointment already given to Smt. Kasturi Chatterjee may be regularised. In case Smt. Smritikana Biswas produces the release certificate then the District Inspector of Schools shall take necessary follow up action and letter of appointment should be issued in favour of Smt. Smritikana Biswas and in that event the appointment given to Smt. Kasturi Chatterjee will stand set aside. Aggrieved against this order appeal being MAT No. 3168 of 2000 has been filed by Smt. Kasturi Chatterjee. Aggrieved against the same order another appeal has also been filed by the Managing Committee of Barisha Girl" High School being MAT No. 3169 of 2000. An appeal has also been filed by the Barisha Girls" High School against the order whereby the learned single Judge did not interfere with the writ petition filed by the school authorities against the order passed by the District Inspector of Schools in compliance with the order dated 7th August, 1997. Aggrieved against that MAT No. 3382 of 2000 was filed by the school. Hence all the three appeals are taken together for disposal.

6. The learned counsel for the appellants (in MAT No. 3169/2000 and MAT No. 3168/2000) have submitted that the view taken by the learned single Judge is contrary to the direction given by Justice N.K. Mitra by which the school was directed to act according to the circular of the State Government dated 7th February, 1963 whereby it has been directed that the school authorities shall ensure that before appointment order is issued the incumbent should obtain a release certificate from the existing employer. It was also contended by the counsel led by Mr. Kapoor and

counsel led by Mr. Jayanta Mitra that the school authorities had no option but to comply with the order of Justice Mitra and in pursuance of the Circular dated 7th February, 1963 the incumbent has to produce release certificate before appointment order is issued. Learned counsel have also drawn our attention to paragraph 6(o) and 7(a) of the Recruitment Procedure and submitted that paragraph 7(a) clearly lays down that the incumbent before joining the school should obtain a release certificate from the previous employer. It is submitted that since the incumbent could not obtain the release certificate from her employer, therefore, the authorities had no option but to issue appointment letter to Smt. Kasturi Chatterjee.

7. As against this learned counsel for the respondent No. 1 (Smt. Smritikana Biswas), Mr. Banerjee submitted strenuously before us that the circular of 7th February, 1963 stood superseded in view of the Order of 1995 and the attention of Justice Mitra was not drawn to the said Order of 1995. He further submitted that as per Order of 1995, harmonious construction should be given provisions of paragraphs 6(o) and 7(a) and as per paragraph 6(o) the incumbent is entitled to three months time for joining. When the incumbent is already in appointment with some other employer it takes some time for getting the release certificate, therefore the authorities have contemplated three months" time. It was submitted by the learned counsel for respondent No. 1 that what the school has to ensure is that at the time of appointment the incumbent should be in possession of the release certificate.

8. We have heard learned counsel for the parties at length. The question before us is whether release certificate is condition precedent or not to offer an appointment to an incumbent on due selection. In order to decide this question we may reproduce the relevant circular, that is the circular dated 7th February, 1963 which reads as under:

"Circular No. 7/63 February 7, 1963

To: The Heads of all recognised secondary school.

Sub: Appointment of teacher coming from another school.

The undersigned is directed to state that it is often found that a permanent Teacher in the employment of a particular school joins another school without giving proper notice to the authorities of the schools where he/she was previously employed. Such action on the part of a teacher is not only highly irregular but is also detrimental to the interest of the institution he/she is going to leave.

It is therefore, necessary for a school to see before appointing any such teacher whether he/she has been duly released by the school he/she previously served. It should also be seen that while forwarding the case of a teacher concerned to the Board direct or through the District Inspector/ Inspectress of Schools regarding approval of his/her appointment, a copy of the release certificate from the school

he/she last served is enclosed along with particulars of the teachers failing which the Board may not consider the approval of appointment of the said teacher."

9. We find that the West Bengal Board of Secondary Education Act, 1963 (in short "the Act of 1963") came into force with effect from 1st January, 1964. There is no dispute that the circular in question had been issued on 7th February, 1963 i.e. before the Act of 1963 came into force. It is the admitted position that the said circular was issued by the West Bengal Board of Secondary Education. Prior to the Act of 1963, secondary education in West Bengal used to be regulated by the West Bengal Secondary Education Act, 1950 and the West Bengal Secondary Education (Temporary Provisions) Act, 1954. The Act of 1963 repealed both the said Acts. Thus, there is no doubt that the circular in question had been issued by the Board, as the competent authority, under the said Acts (and Rules framed there under) which were repealed by Section 46 of the Act of 1963. From Section 46 of the Act of 1963 it does not appear that the circulars and orders which had been issued under the repealed Acts was saved.

10. By Section 45 of the Act of 1963, the State Government was empowered to make rules, inter alia, for providing the manner of composition, powers and functions of the Managing Committees of Institutions. Accordingly, the State Government duly framed the rules which are called the Management of Recognised Non-Government Institutions (Aided and Un-aided) Rules, 1969" (in short "the Rules of 1969"). In Rule 28 of the said Rules of 1969 it has been provided that the Managing Committees of the aided Institutions shall have the power to appoint teachers in the Institution, subject to any order or direction or guidelines issued by the State Government or the Director in connection therewith. Admittedly, in exercise of powers provided by the said Rule 28 of the said Rules of 1969, the Director of School Education, West Bengal issued the order No. 2066-G.A. dated 27th October, 1995, and he issued the same for the purpose of prescribing the Procedure for Recruitment of teaching and non-teaching members of the staff of Secondary School including Madrasahs.

11. Having regard to the position of law as narrated in the two proceeding paragraphs, we are of the view that with the coming into force of the Act of 1963, the circular in question issued on 7th February, 1963 lost all its force, as it cannot be said that the said circular issued by the Board was saved by provisions of Sections 46 of the Act of 1963.

12. As far as the question of making appointment of teachers in unaided Institutions in terms of the Act of 1963 is concerned, there is no dispute that Rule 28 of the Rules of 1969 shall govern the same. In terms of the said Rule 28, the order prescribing the Recruitment Procedure of 1995 has been issued. Admittedly the process of recruitment in question was initiated and completed following the said Recruitment Procedure of 1995 only. In the circumstances, we do not find any reason, whatsoever, either to apply the said circular dated 7th February, 1963 or to read the same independent of the Recruitment Procedure of 1995.

13. It will not be out of context to mention that the purpose for which the said circular of 1963 had been issued, has adequately been taken care of by the provisions of paragraphs 6(o) and 7(a) of the Recruitment Procedure of 1995. The spirit of the circular of 1963 was that no teacher, in employment of other school, should be appointed by another school without being satisfied that such teacher had duly been released by his/her erstwhile employer. In the said circular of 1963 there is nothing by which it can be concluded that a teacher in employment of a school can be offered appointment on selection by another school, only after the latter school is satisfied about such teachers' release by the former school. Offering appointment to and then actually appointing a teacher are two distinctly separate actions. In our view the said circular of 1963 cannot be interpreted so as to say that production of release certificate is a condition precedent to the issuance of the offer letter for appointment.

14. Be that as it may, in our opinion: in view of the provisions of the Act of 1963 and the Rules of 1969 read with the Recruitment Procedure of 1995 issued thereunder, the said circular of 1963 can have no manner of application to the recruitment in question in the present case. It appears that the whole aspect of the matter, discussed hereinbefore, was never brought to the notice of Mitra, J. Therefore, the order passed by Mitra, J. is clearly per in-curium. The order was passed by him in ignorance of the prevailing Recruitment Procedure of 1995; and he relied on the said circular of 1963 which was no longer in force because of the subsequent legislation. Besides, on the basis of the said order also, even assuming that it was a valid order in the eye of law, the Managing Committee of the school could not direct Smt. Biswas to obtain the release certificate first from her existing employer as a condition precedent to the issuance of the appointment letter in her favour. The Managing Committee was first required to issue the offer of appointment, and only at the time of giving her the appointment they were required to satisfy themselves of her release by her erstwhile employer. This was clearly the obligation cast on the Managing Committee even by the terms of the said circular of 1963.

15. Now the next question that calls for our consideration is the interpretation of paragraphs 6(o) and 7(a) which read as under:

"6. Allotment of marks: xxxxxxxxxxxxxxxx

(o) On getting approval of the panel, the Managing Committee Ad-hoc Committee/Administrator of the school shall issue appointment letter to the 1st empanelled candidate within 15 days through Registered Postcard/Registered Inland letter. The panel shall remain valid for one year from the date of approval of the panel by the D.I.S. (SE). If any candidate fails to join within 3 months from the date of receipt of appointment letter or leaves the post within the validity of the panel, the next empanelled candidate shall be offered appointment. Name of such candidates who do not join within 3 months from the date of receipt of appointment letter shall be struck off from the panel.

(p) xxxxxxxxxxxxxxxxxxxx

7(a) In giving appointment to a staff of another school the appointing authority should see that the candidate has duly been released by the institution where he/she had been serving."

16. A combined reading of both these provisions would show that the selected candidate should be given reasonable time to seek release certificate after the appointment letter is issued to him/her to join the new service. Paragraph 6(o) says: as soon as the panel is prepared the first empanelled candidate should be issued appointment letter within 15 days through Registered Postcard/Registered Inland letter and the panel shall remain valid for one year from the date of approval of the panel by the DIS (SE) and 3 months" time is to be given to join from the date of receipt of appointment letter and in case the incumbent fails to join within the said three months then the next empanelled candidate shall be offered appointment. The effect of not joining by the selected candidate within 3 months will amount to striking down his name from the panel. Therefore, the mandate of the provision is that the incumbent who has stood first in the panel has to be offered appointment and that appointment letter has to be sent to the incumbent by registered postcard or registered inland letter and he/she shall be given three months/ time to join the post and if he/she fails to do so within the stipulated time then the next candidate will be offered appointment. Therefore, the intention of the provision is very clear that the incumbent is required to be given three months" time for joining the post. It appears to be reasonable. It will be a mock formality if the incumbent is offered appointment and requested to join the post within a week with the release certificate from his/her present employer with the condition that failure thereof would result in striking down his/her name from the panel and such action is ex facie against the intention of the provision. In common experience in life also when a new appointment is offered to a person who is already in employment, he/she has to give proper notice to the existing employer, that he intends to leave, so that the employer may make necessary arrangements for a new incumbent in place of the out-going incumbent. In the present case, as facts disclosed, only one week"s notice was given with offer of appointment and mandate was given that the incumbent shall obtain the release certificate within the said period failing which the appointment will fall through. This is a mockery which cannot be sustained. It only smacks of malafide that the management had made such an impossible situation for the incumbent. That is not the intention of the duly prescribed procedure. Paragraph 7(a) of the Procedure only says before giving appointment to a staff of another school the appointing authority should see that the candidate has duly been released by the institution where he/ she had been serving. Paragraph 7(a) says that the incumbent should be permitted to join the post if he she produces the release certificate from the previous establishment, that does not mean that before appointment letter is issued the incumbent should obtain release certificate. If paragraph 7(a) is to be interpreted in the manner which learned counsel for the

appellants/ respondents want, then it will frustrate the provisions at paragraph 6(o) and it will also be arbitrary that the incumbent should obtain release certificate before offer of appointment is issued. That is not the intention of the provisions. The intention of paragraph 6(o) read with paragraph 7(a) is that before the incumbent joins the post he/she should produce necessary release certificate from his/her previous employer. Paragraph 6(o) and paragraph 7(a) cannot be interpreted independently. If Rule 7(a) is to be read independent of paragraph 6(o), then paragraph 6(o) will be rendered otiose. In fact paragraph 6(o) laid down the procedure that required to be done by the authorities after the panel is approved. Therefore, the mandate contained in paragraph 6(o) is that soon after the approval is given to the panel the incumbent who stood first in the panel should be offered appointment and he/she should be given three months' time to join the post and paragraph 7(a) only ordains that before the incumbent joins the post he/she should produce necessary release certificate from the previous employer. Therefore, a conjoint reading of paragraph 6(o) and 7(a) leads to the conclusion that the Managing Committee will have to offer appointment first to the incumbent and if the incumbent does not join the post within three months along with necessary release certificate from the previous employer, then the appointment will fall through. But in the present case the Managing Committee insisted on production of the release certificate before issuing appointment order and that means putting the cart before the horse. That action of the Managing Committee was totally uncalled for and it cannot be countenanced in view of the conjoint reading of paragraph 6(o) and 7(a) of the said Recruitment Procedure, 1995.

17. It is not that the management does not understand the proper application of paragraph 6(o). In fact, at the time of giving appointment to the Headmistress, Smt. Shibani Chakraborty on 21st March, 1997, the Secretary of the Managing Committee of this school had directed her to join the school within 90 days from the date of receipt of the appointment letter. Therefore, the Managing Committee knew it very well that as per paragraph 6(o) they were required to give 90 days' time to the incumbent for joining, which in fact they had done in the case of Smt. Chakraborty.

18. For the foregoing reasons we do not find any reason to interfere with the judgment and order passed by the learned single Judge. Accordingly, all the appeals are hereby dismissed. We find from an affidavit filed by Smt. Biswas in MAT No. 3168 of 2000 that in terms of the judgment and order of the learned single Judge she had tendered resignation to her erstwhile employer and she was released therefrom. Admittedly, she was not allowed to join the school in question. In view of the above, while dismissing the appeals, we hereby direct the appellant, the Managing Committee of Barisha Girls' High School to issue appointment letter in favour of Smt. Smritikana Biswas within 3 (three) days, and to appoint her in the post the moment Smt. Biswas reports for joining the school. It goes without saying that the appointment of Smt. Kasturi Chatterjee, which was subject to the result of the case, shall stand terminated forthwith. There will be no order as to costs.

J.K. Biswas, J.

I agree.

Later on

15.7.2002

Request for stay as made by the learned counsel, for the appellants, is considered and refused.

Urgent xerox certified copies of this order, if applied for by the parties, be delivered to them.