(2008) 1 CHN 140 : (2008) 1 ILR (Cal) 230

Calcutta High Court

Case No: M.A.T. No. 1610 of 2005

Anup Kumar Kundu		APPELLANT
	Vs	
Registrar of Co-operative Societies and Others		RESPONDENT

Date of Decision: Oct. 15, 2007

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 7
- Industrial Disputes Act, 1947 - Section 12
- Writ Proceedings Rules, 1977 - Rule 53

Citation: (2008) 1 CHN 140 : (2008) 1 ILR (Cal) 230

Hon'ble Judges: Bhaskar Bhattacharya, Acting C.J.; Rudrendra Nath Banerjee, J

Bench: Division Bench

Advocate: Prasanta Kumar Mukherjee, for the Appellant;Anupam Chatterjee and Ashit Chakraborty for Respondent No. 3, Ajoy Debnath, Sujit Saha and Gautam Debnath for Respondent No. 7 and Keshab Bhattacharyya, for State, for the Respondent

Judgement

Bhaskar Bhattacharya, ACJ.

1. This mandamus appeal is at the instance of an unsuccessful writ petitioner and is directed against order dated March 22, 2005 passed by a learned Single Judge of this Court by which His Lordship not only dismissed the said writ application filed by the appellant but also passed a direction upon the respondent No. 3 to permit the respondent No. 7 to join her duty with immediate effect notwithstanding the fact that no writ application was filed by the said respondent No. 7 praying for such direction.

2. By the said writ application, the appellant, inter alia, prayed for the following relief:

A declaration that the advertisement published in the Ananda Bazar Patrika dated 26th February, 2002 for recruitment to the post of Chief Executive of the respondent No. 3 and

all the subsequent proceedings pursuant to the said advertisement by the respondent No. 2 in connection with the recruitment of the Chief Executive of the respondent No. 3 are not sustainable in law.

Injunction to issue restraining the respondents and/or their agents and subordinate from giving any effect and/or further effect to the impugned purported recruitment proceedings of the respondent No. 2 and further restraining the respondent No. 3 from acting upon the recommendation of the respondent No. 2 in selecting the Chief Executive of the bank pursuant to such purported proceedings.

3. The case as made out by the appellant in the writ application was that he was a B. Com (Honours) and was employed with the respondent No. 3, the Cooperative Bank, as an Assistant for the last 15 years and as such, had attained sufficient experience in the matter of functioning and management of the Cooperative Bank. For the purpose of recruitment to the post of Chief Executive of the said bank, it was decided by the Board of the respondent No. 3 after discussion with the respondent No. 2, the Co-operative Service Commission, that the minimum, qualification for such post should be B. Com with honours but subsequently, the respondent No. 2 changed the said minimum qualification and gave an advertisement in the newspaper for the recruitment to the said post thereby prescribing the following required qualification:

(i) C.A./Cost Accountant/M.B.A. (Financial)

(ii) Special qualification in computer literacy with at least 6 months in UNIX/ ORACLE.

(iii) Experience preferably 2 years in a bank.

4. According to the appellant, the said publication was not only illegal but also gives reflection of an abuse of authority and jurisdiction of the respondent No. 2 in fixing up the minimum educational qualification, which was contrary to the decision taken by the Board of the respondent No.3. The appellant contends that for enhancing the minimum qualification as stated above, the appellant and other similarly placed persons have been eliminated from the process of selection. According to the appellant, in Rule 108 of the West Bengal Co-operative Societies Rules, 1987, the minimum qualifications for appointment of different categories of the employees of the Co-operative Societies are prescribed and in terms of such rule, the minimum qualification should be a bachelor''s degree of a recognized University for the said post. The appellant contended that the said rule although empowered the Board to prescribe a higher qualification if it thought fit and proper, yet, the said rule did not authorise the respondent No. 2 or the respondent No. 4, the then Secretary of the respondent No. 3, to alter such qualification or to prescribe any higher qualification than what had been decided by the Board of Directors of the respondent No. 3.

5. The writ application was opposed by the respondent No. 2 and the State of West Bengal therby contending that the representative of the respondent No. 3 in the meeting

of the Commission approved the qualification for the post and that the selection was in conformity with law.

6. The respondent No. 7 is the selected candidate for the said post who filed an application for being added in the writ application and the learned Single Judge allowed such prayer. The respondent No. 7 opposed the prayer of the appellant.

7. The bank, however, supported the writ petitioner.

8. As pointed out earlier, the learned Single Judge not only dismissed the writ application but at the same time, also directed the respondent No. 3 to give immediate appointment to the respondent No. 7.

9. Being dissatisfied, the writ petitioner has preferred this appeal. Another appeal was preferred by the respondent No. 3 thereby challenging the direction of the learned Single Judge upon the respondent No. 3. The said appeal has already been disposed of by this Bench by setting aside such direction on the sole ground that the respondent No. 3 having filed no separate writ application praying for such direction, there was no scope of passing such direction in the writ application filed by the appellant.

10. After hearing the Learned Counsel for the parties and after going through the materials on record, we find that Rule 108 of the West Bengal Co-operative Societies Rules, 1987 prescribes the qualification of the various posts in the Co-operative Society. According to the said provision, for a Class-I post in the Society, the qualification of the candidate should be the graduate of a recognized University. But in the said rule, power has been conferred upon the Board of the Co-operative Society to prescribe higher qualification or minimum marks or division in the qualification. The said rule further provides that for the post of Accountant, a degree in Commerce or a diploma in Chartered or Cost Accountancy shall be essential. We, thus, find that the respondent No. 2 did not commit any illegality in prescribing higher qualification of diploma in Chartered or Cost Accountancy in the post concerned when the holder of such post is undoubtedly required to be proficient in accountancy. Similarly, the demand of knowledge of Computer cannot be said to be unreasonable as the banking are now done through the process of computer.

11. At the time of hearing of this appeal, a new dispute arose as to whether the respondent No. 7 at all possessed the qualifications prescribed in the advertisement. As the respondent No. 7 did not file any affidavit-in-opposition before the learned Single Judge, we directed the respondent No. 7 to file a supplementary affidavit before this Court disclosing her qualification and annexing the certificates in support of such statement. Pursuant to such direction, the respondent No. 7 filed supplementary affidavit, and in such affidavit, the relevant certificates were annexed. So far as the certificate disclosing her knowledge about the computer was concerned, the same indicated that she completed the training course in ORACLE only in the month of May, 2002 whereas

the last date of submission of the application was much earlier in the month of April, 2002 and one of the essential qualifications is that the candidate must have special qualification in computer literacy with at least six months in UNIX or ORACLE and as such, it is apparent that she did not even complete the training course in ORACLE on the last date of submission of the application as per the advertisement and consequently, was not in a position to disclose such qualification in the application.

12. It is now a settled law that if on the last date of filing any application for appointment to a post, a candidate does not possess the required qualification, in such a situation, the acquisition of such qualification on a subsequent date should not be taken into consideration. See: Ashok Kumar Sonkar Vs. Union of India (UOI) and Others, . Therefore, at the relevant point of time, the respondent No. 7 had no requisite qualification prescribed in the advertisement for such post.

13. Therefore, although the writ petitioner himself had no requisite qualification for the post concerned, he is, however, entitled to maintain a writ application on the ground that the person selected is also not entitled to be selected to such a post, as his position is no better than that of the writ petitioner and if he knew that the qualification mentioned in the advertisement would not be strictly followed, he could apply for the job.

14. The learned Advocate appearing on behalf of the State-respondents and the respondent No. 7, at this stage, vehemently contended before us that in the writ application, the writ petitioner not having prayed for setting aside the appointment of the respondent No. 7 but having prayed for declaration and the injunction quoted above, this Court should not set aside the appointment of the respondent No. 7 in this appeal. They further contended that this Court should not give any relief to the writ petitioner on the ground of delay in filing such application.

15. Therefore, the first question that falls for determination at this stage is whether an Appellate Court dealing with an appeal against the dismissal of a writ application can grant any relief in favour of the writ application if such relief is not specifically prayed for in the writ application.

16. As provided in Rule 53 of the Rules framed by this Court regarding the procedure of disposal of the writ application, the provisions of CPC with regard to procedure would be followed as far as practicable if the same is not inconsistent with the provisions of the rules. As provided in Order 7 Rule 7 of the Code, although every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. In the case before us, the writ petitioner prayed for declaration that the advertisement prescribing the qualification the respondents from proceeding with such process of selection. There is no dispute that at the time of filing of the writ application, the respondent No. 7 was selected but no appointment letter was issued to her and as such, the respondent No. 7 was not

even made party to the writ application nor was any specific prayer made for setting aside the selection of the respondent No. 7. It was the respondent No. 7 who herself came forward with an application for being added in the proceedings on the ground that she had been selected in the post and any order passed in favour of the writ petitioner would prejudicially affect her interest. The Court allowed such prayer, she was made an additional respondent, and she was permitted to oppose the writ application. The moment the respondent No. 7 was added as a party, the scope of the writ application was enlarged and the Court was free to set aside even the selection of the respondent No. 7 after of course giving an opportunity of hearing to her although in her absence it was not proper for the Court to pass any adverse order prejudicial to her interest. If in such a writ application, it appears to the Writ Court that although the prayer made in the writ application cannot be allowed as there is no illegality in fixing the higher qualification yet if the selected candidate did not possess such required qualification, the Court can set aside the selection of the selected candidate on that ground even the person having no requisite qualification for the post can successfully maintain a writ application alleging that a person having no such requisite qualification cannot be selected to that post by violating the terms of the advertisement prescribing specific qualification; because in such a situation, the petitioner and other similarly placed persons, i.e. the ineligible persons, can reasonably argue that if they knew that the qualification mentioned in the advertisement was not mandatory, they could also try their luck. In this connection, it will be profitable to refer to the following observations of the Supreme Court in the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, :

That takes up to the next question whether the acceptance of the tender of the 4th respondents was invalid and liable to be set aside at the instance of the appellant. It was contended on behalf of the 1st and 4th respondents that the appellant had no locus standi to maintain the writ petition since no tender was submitted by him and he was a mere stranger. The argument was that if the appellant did not enter the field of competition by submitting a tender, what did matter to him whose tender was accepted; what grievance could he have if the tender of the 4th respondents was wrongly accepted. A person whose tender was rejected might very well complain that the tender of someone else was wrongly accepted, but, it was submitted, how could a person who never tendered and who was at no time in the field, put forward such a complaint? This argument, in our opinion, is misconceived and cannot be sustained for a moment. The grievance of the appellant, it may be noted, was not that his tender was rejected as a result of improper acceptance of the tender of the 4th respondents, but that he was differentially treated and denied equality of opportunity with the 4th respondents in submitting a tender. His complaint was that if it were known that non-fulfilment of the condition of eligibility would be no bar to consideration of a tender, he also would have submitted a tender and competed for obtaining a contract. But he was precluded from submitting a tender and entering the field of consideration by reason of the condition of eligibility, while so far as the 4th respondents were concerned, their tender was entertained and accepted even though they did not satisfy the condition of eligibility and this resulted in inequality of

treatment which was Constitutionally impermissible. This was the grievance made by the appellant in the writ petition and there can be no doubt that if this grievance were well founded, the appellant would be entitled to maintain the writ petition. The question is whether this grievance was justified in law and the acceptance of the tender of the 4th respondents was vitiated by any legal infirmity.

17. Even in the case of Ashoke Kumar Sonkar (supra), a point was taken by the learned Advocate for the appellant that the respondent No. 4 therein himself being ineligible, was not entitled to either file any writ application before the High Court and make representation before the visitor of the University for setting aside the selection of the appellant as would appear from paragraph 7(5) of the judgment; but in spite of such objection, the Supreme Court dismissed the appeal by upholding the order setting aside the selection of the appellant.

18. Once we hold that the respondent No. 7 had no requisite qualification to hold such post, this Court in the writ application filed by the writ petitioner can set aside at least her selection. All that is necessary is that the person selected should be given opportunity to meet the new point on the basis of which the Court proposes to set aside his selection. An Appellate Court has all the powers of the original Court and thus, we are competent to set aside her selection in this appeal by applying the principles of Order 7 Rule 7 of the CPC by taking aid of Rule 53 of the Writ Rules framed by this Court notwithstanding the fact that specific prayer for setting aside her selection was not made in the original writ application.

19. We, thus, find no substance in the aforesaid objection raised by the learned Advocate for the respondents.

20. The next question is whether this writ application should be dismissed on the ground of delay.

21. There is no period of limitation fixed for entertaining a writ application but on the ground of delay or laches, the Court may refuse to entertain a writ application if the delay is of such nature that it would be unfair to entertain the writ application. If the Court finds that because for the inaction of the writ petitioner, somebody has altered his position and if the writ application is allowed, the same would cause prejudice to such person for the laches of the writ petitioner, the Court should summarily dismiss such application. In the case before us, although the respondent No. 2 selected the private respondent No. 7 in spite of having no eligible qualification, it appears that the respondent No. 3 had not issued any appointment letter to her nor did she of her own file any writ application for a direction upon the bank to give appointment. It is, therefore, not even a case where the private-respondent had joined the service of bank by altering her position. The direction given by the learned Single Judge in this writ application upon the respondent No. 3 to give her appointment has already been set aside in the appeal filed by the bank against the self-same order. Therefore, there is no ground of dismissing the writ application filed

by the appellant on the ground of his delay or laches.

22. We now propose to deal with the discussions cited by the Learned Counsel appearing on behalf of the State and the private-respondent No. 7.

23. In the case of Mohd. Siddiq Ali Vs. High Court of A.P. through Registrar and Others, , the writ application was filed two years after the publication of the notification of the appointment, and the selected candidate joined "long back" and as such, the Apex Court did not interfere with the dismissal of the writ application on the ground of laches. In the case, before us, the bank even did not issue even any appointment letter and as such, the principles laid down in the decisions of Md. Sidiq (supra) cannot have any application to the facts of the present case.

24. In the case of Karnataka Power Corporation Limited through its Chairman and Managing Director and Another Vs. K. Thangappan and Another, , a workman invoked writ jurisdiction after 2 decades seeking employment in terms of settlement u/s 12 of the Industrial Disputes Act and the inordinate delay in moving the writ application was not satisfactorily explained by workman. In such a situation, the Apex Court held that mere making of repeated representations to employer would not be regarded as satisfactory explanation for delay. In the case before us, the writ application was filed before giving any appointment Letter to the private-respondent and as such, the principles laid down in the case of Karnataka Power Corporation cannot have any application to the facts of this case.

25. In the case of J. Ranga Swamy Vs. Government of Andhra Pradesh and Others, , the plea of the writ petitioner was that for efficient discharge of the duties of the post in question, the diploma in radiological physics (as applied in Medicine) from the Bhabha Atomic Research Center (BARC) held by him was more relevant than a doctorate in Nuclear Physics. It was submitted that in all corresponding posts elsewhere, a diploma in Radiological Physics was insisted upon and that even in the State of Andhra Pradesh, all other physicists working in the line, except the respondent, had the diploma of the BARC. In such circumstances, the Supreme Court held that it was not for the Court to consider the relevance of qualifications prescribed for various posts. According to the Supreme Court the post in question was that of a Professor and the prescription of a doctorate as a necessary qualification therefore was nothing unusual there was nothing prima facie preposterous about those requirements and accordingly it was not for the Court to assess the comparative merits of, such a doctorate and the BARC diploma held by the petitioner and decide or direct what should be the qualifications to be prescribed for the post in question.

26. The Supreme Court, therefore, gave liberty to the petitioner, if so advised, to move the College, University, Government, Indian Medical Council or other appropriate authorities for a review of the prescribed qualifications. We fail to appreciate how the said decision can be of any help to the private-respondent when we propose to set aside her

selection on the ground that she had no Requisite qualification prescribed in the advertisement for appointment.

27. The decisions cited by the Learned Counsel for the State and that of the private-respondent, thus, do not support their clients.

28. On consideration of the materials on record, we, therefore, set aside the order passed by the learned Single Judge and allow the writ application to this extent that the selection of the private-respondent to the post of the Executive Officer is set aside as she had no requisite qualification on the last date of submission of her application. The respondents are directed to select the next person in the merit list for the post and to offer appointment if available. In the facts and circumstances, there will be, however, no order as to costs.

Rudrendra Nath Banerjee, J.

I agree.