

(2011) 12 CAL CK 0091

Calcutta High Court

Case No: W.P.C.R.C. 112 (W) 2010 in W.P.S.T. 154 of 2004

Safauddin Ahmed

APPELLANT

Vs

Sri Sakti Priya
Chatterjee and
Another

RESPONDENT

Date of Decision: Dec. 21, 2011

Acts Referred:

- Constitution of India, 1950 - Article 226, 227

Citation: (2012) 1 CHN 400

Hon'ble Judges: Kalyan Jyoti Sengupta, J; Kalidas Mukherjee, J

Bench: Division Bench

Advocate: Ashok De, Mr. Asit Bhattacharya and Mr. Himadri Sekhar Chakraborty, for the Appellant; Ashok Banerjee (Ld. G.P.), Mr. Dhruva Ghosh and Mr. Shyamal Kumar Sanyal, for the Respondent

Judgement

K.J. Sengupta, J.

The above contempt proceeding perhaps is the last stage of legal battle of the petitioner in quest of getting employment in the Kolkata Police establishment for the present proceeding is brought by the petitioner alleging wilful disobedience to or of violation of order dated 27th January, 2008 passed by the Division Bench of this Court in W.P.S.T. No. 154 of 2004 (Safauddin Ahmed v. State of West Bengal & Ors.) by directing the petitioner to go for endurance test although it had been taken by the petitioner earlier, and by not taking decision for appointment on the basis of the order passed by this Hon'ble Court and taking note of the height as recorded in the order dated 27th June, 2008. The history of legal battle of the petitioner is shortly put hereunder in order to appreciate the background of this contempt proceeding.

2. In the year 1994 on his name being sponsored by the local employment exchange for taking part in the selection process for the post of Constable in Calcutta Police the petitioner went to the selection site one day in advance. The date of selection

was scheduled on 12th August, 1994 however the petitioner reached on 11th August, 1994. He was arrested on 11th August, 1994 on the allegation that he intended to bribe the Assistant Sub-Inspector of Calcutta Police with a sum of Rs.10,000/- for his selection in the said post. Subsequently on 13th August, 1994 he was released. However by that time selection test was over as such he could not participate at that point of time. According to the petitioner such allegations of attempt to bribe was unfounded and he was unnecessarily detained so much so he was prevented from appearing on the date fixed for taking test. The petitioner highlighting the aforesaid case had filed an application under Article 226 of the Constitution of India in this Hon"ble Court, and the Hon"ble Mr. Justice Altamas Kabir (as His Lordship then was) was pleased to pass order on 2nd December, 1997 disposing of the application with direction upon the respondent No.2 to consider the applicant's case for recruitment if he is otherwise eligible.

3. The petitioner contended that he was 23 years old on 12th August, 1994 being the date of interview. Pursuant to the said order a letter dated 24th July 1998 was issued to the petitioner to appear on 4th August, 1998 for selection before Selection Board of Police Training School, 247, A.J.C. Bose Road, Calcutta-700 027 with testimonials in original to support his date of birth and educational qualifications in connection with recruitment to the post of Constable/Sepoy in Calcutta Police. He was also asked to take canvas shoes and the recent passport size photograph duly attested with him positively for physical efficiency test etc. The petitioner, thereafter appeared and according to him he had undergone the physical efficiency test and other tests but he was then declared overaged and also was found to be 1/2 inch short in height. Challenging the aforesaid rejection of the candidature the petitioner filed a fresh writ petition in this Hon"ble High Court being W.P. No. 236 (W) of 1998 which however, was transferred to the learned State Administrative Tribunal (hereinafter Tribunal in short). The learned Tribunal on being transferred on 1st February, 2002 disposed of the said pending writ application by the following orders:-

In the peculiar circumstances of this case, this application along with annexures, is treated as a representation of the applicant and forwarded to the Commissioner of Police, Calcutta for necessary action. It may be considered by the Commissioner of Police if 1/2 inch shortage in height deserves to be condoned, invoking his power vide "Note" to Regulation II of Chapter XV of PRC, 1968. The age bar may be relaxed in case the applicant is found to be suitable for employment, if he can qualify in the physical efficiency test and interview, in case the shortage in height is condoned.

4. Thereafter the Commissioner of Police considered the said representation and rejected the prayer, rather refuse to condone the age bar. Thereafter, the petitioner filed subsequent application before the learned Tribunal being case O.A. No. 1413 of 2002. The learned Tribunal by an order dated 2nd January, 2004 dismissed the said application and upheld the order of rejection of the Commissioner. The petitioner

thereafter filed an application under Articles 226 and 227 of the Constitution of India challenging the said order of dismissal dated 2nd January, 2004 on various grounds. This subsequent application being W.P.S.T. No.154 of 2004 filed in this Court was heard by Their Lordships the Hon"ble Mr. Justice Bhaskar Bhattacharya and Hon"ble Mr. Justice Kishore Kumar Prasad (as Their Lordships" then were).

5. On 6th March, 2007 after hearing, Their Lordships came to conclusion that disqualification of age bar could be dispensed with as on the date of the interview scheduled initially the petitioner was well within the age limit. However on the question of height Their Lordships directed the Commissioner of Police to reconsider by taking into consideration the fact the petitioner was shorter in height of 1/2 inch whether such shortage can be condoned as there has been power of relaxation. The Commissioner of Police was directed to submit a reasoned order in this respect to the Court. Thereafter the Commissioner refused to condone age bar, and the said matter came up for final hearing before another Division Bench on 10th January, 2008. After hearing the parties and, on consent by an order of the same date the petitioner was sent for being measured to resolve height issue by an independent eminent Orthopedic Surgeon, Dr. S.L.Sarkar who was asked to submit a report before Court regarding measurement of the height of the applicant. In terms of the order of the Division Bench dated 27th June, 2008 Dr. Sarkar submitted report holding that there was no shortage of height as was complained by respondent all along so also by the Commissioner and he was within the height as per prescribed norms. The said report was not challenged and basing on that report ultimately Division Bench disposed of the application passing order in the manner amongst other as follows:-

We, therefore, direct the respondents, if the petitioner"s endurance test has not been taken earlier and this disqualification was based on the basis of height only, then such endurance test shall be taken within a period of 15 days from the date of receipt of the certified copy of the order. Upon fresh endurance test being taken, if the petitioner is found suitable for his appointment then all appropriate steps shall be taken for giving the appointment to the petitioner. If the petitioner has undergone the endurance test already, no further endurance test shall be taken and the decision for appointment shall be taken on the basis of the order of this Court and taking note of the height, as recorded by our order today. It would be open for the petitioner to establish that he had already undergone endurance test in past in connection with this recruitment.

6. Thereafter, on 6th August, 2008 the Central Reserve Police Officer made a communication to the petitioner that his physical efficiency tests/endurance tests for the post of Constable/Sepoy in Calcutta Police was held at the Police Training School, Calcutta on 5th August, 2008 in which he had been found unfit for the said post. It is the complaint of the petitioner that he ought not to have been asked to undergo endurance/physical efficiency test once again as he had undergone in past.

The order dated 27th June, 2008 is very specific that if the petitioner had undergone test in past without asking him to undergo further he should have been given appointment.

7. The respondents in their respective affidavits had taken a plea that in past he had never gone endurance test because of height and overage factor, he was eliminated. Though the overage problem was adjudicated by the Court holding in favour of the applicant however, the height problem was in issue and as such there was no scope for asking the petitioner to undergo for physical efficiency test.

8. Mr. Ashok De, learned Senior Advocate submits that the petitioner was compelled to undergo the second physical/endurance test in violation of the said order and this ought not to have been done. His client thought that he was not required to do anything else except to report for getting appointment however under the compelling circumstances he had to take part in the physical endurance test with oral objection.

9. Mr. Ashok Banerjee, learned Government Pleader while contesting this application and defending the alleged contemnors submits that factually at no point of time the petitioner had had any occasion to take any endurance and physical efficiency test. According to him there are two steps for selection process, first stage is taking of body measurement and age limit examination, once this stage is crossed successfully by any candidate then physical/endurance test are asked to be taken. In 1998 he did not undergo such test. In terms of the said order he was asked to undergo and he was unsuccessful. He, therefore, in compliance with the said order asked to take the said test and he participated without any objection and having found himself unsuccessful in physical efficiency test consequently not being declared fit for appointment he has filed this application. He contends when on reading of the judgment and order two interpretations are possible, and the respondents proceed bona fide going by one of such interpretations there cannot be any commission of contempt of Court, hence it is not a case of deliberate and wilful violation.

10. Moreover, respondents have not done anything else in relation to violation of the order passed by this Court as alleged. Hence the Rule issued against them has to be discharged and the contempt petition has to be dismissed.

11. After hearing the learned counsels and considering the materials placed before us in order to decide this proceedings the Court has to come to finding first as to whether the petitioner had previously undergone endurance test on 13th August, 1998 or not, and consequently whether the respondents while asking the petitioner to take physical endurance test on 5th August, 2008 have violated the direction and order of this Court or not?

12. The next question is whether in totality the respondents have wilfully and deliberately violated the order and direction of this Court given in order dated 27th

June, 2008 or not? Before we discuss the argument and counter argument of the parties we set out the relevant portion of the judgment and order in order to appreciate the case properly:-

We, therefore, direct the respondents, if the petitioner's endurance test has not been taken earlier and this disqualification was based on the basis of height only, then such endurance test shall be taken within a period of 15 days from the date of receipt of the certified copy of this order. Upon fresh endurance test being taken, if the petitioner is found suitable for his appointment then all appropriate steps shall be taken for giving appointment to the petitioner. If the petitioner has undergone the endurance test already, no further endurance test shall be taken and the decision for appointment shall be taken on the basis of the order of this Court and taking note of the height as recorded by our order passed today. It would be open for the petitioner to establish that he had already undergone endurance test in past in connection with this recruitment.

13. It seems that when the aforesaid order was passed there was an issue that petitioner had not undergone endurance test earlier on the other hand the petitioner contended that the petitioner on 13th August, 1998 had undergone endurance test and he was declared fit in such test, however, in view of the question of overage and shortage in height he was denied appointment. In that context, the aforesaid two remedies were provided for.

14. Thus it is incumbent for us to find from the materials placed before us whether the petitioner had participated and passed in endurance test or not?

15. We find that the petitioner on the strength of the order of Hon'ble Justice Kabir as quoted above was asked for the first time by letter dated 24th July, 1998 to appear in the selection test. We think the relevant portion of the text of the said letter needs to be mentioned here:-

.....

.....

You are also requested to take canvas shoes and two recent passport size photograph duly attested with you positively for physical efficiency test etc.

16. Thus it is clear by the said letter, that on that day the petitioner had to take endurance test and that is why he was asked to bring canvas shoes. Admittedly, on that date he had duly appeared, but the question is whether he in fact took endurance test or not? In this context, we find from the subsequent Writ Petition being No.23698 (W) of 1998 which was later on transferred to Tribunal and also in the supplementary affidavit filed in connection therewith it has been stated specifically the petitioner duly appeared on that date and passed physical efficiency test (paragraph 18 of the writ petition at page 125 of the present contempt petition) and in paragraph 3 of the supplementary affidavit (at page 151 of the present

contempt petition) it is stated that he was subsequently called upon to appear further test on 13th August, 1998 when he was declared fit. After this writ petition was transferred to the learned Tribunal while hearing it noted that no affidavit was filed to deal with either the said statement made in the said petition as well as the subsequent affidavit. The learned Tribunal while passing the order dated 21st February, 2002 recorded that the ground for disqualification of the petitioner relate to shortage in height not other grounds. At that point of time the learned lawyer for respondents did not contend that petitioner did not participate in the endurance test. Under those circumstances learned Tribunal directed Commissioner of Police to consider whether shortage in height can be condoned or not.

17. It appears that Commissioner of Police himself while going through the Board papers and other relevant records noted that petitioner was found unfit due to shortage in height and not on other grounds. It appears that the learned Tribunal by its judgment and order dated 21st February, 2002 observed that in case applicant is fit such bar may be relaxed in case applicant is found to be suitable for employment, if he can qualify in the physical efficiency test and interview, and in case the shortage in height is condoned. The petitioner subsequently filed another application in this Court under Articles 226/227 of the Constitution of India contending that the aforesaid direction of the learned Tribunal for taking physical efficiency test was not required as he had already undergone the same and he was found to be fit. When subsequent application came up for final hearing, by that time the Commissioner has considered the representation in terms of the learned Tribunal's order, thus taking note of subsequent event the Division Bench granted liberty to file fresh application before the learned Tribunal challenging the order of the Commissioner. It is appropriate to record that there was no decision as there was no issue by the learned Tribunal that the petitioner did not undergone endurance test.

18. In our view, plea of not taking endurance test by the petitioner previously had been taken first time in this Court when this Court passed order dated 27th June, 2008 and this plea was never taken before. This position would be clear from the judgment and order of the Division Bench of this Court dated 6th March, 2007 in the same petition (W.P.S.T. No.154 of 2004). Their Lordships clearly recorded as follows:-

It appears from record that pursuant to such direction, the petitioner appeared in the process of selection, but the respondent authority found him not eligible specially for two reasons. First he was 1/2 inch shorter in the height and secondly he was overage." Having taken note of the said two issues Their Lordships were pleased to condone overage as discussed in the said judgment. However, the overage issue was again sent to the Commissioner of Police for fresh decision. We are of the view that at that point of time the respondents could have contended that petitioner did not undergo physical endurance test. In the context aforesaid, we need to consider the contention with the support of xerox copies of the Board Sheet

recording performance of the respective candidates on 13th August, 1998 that he was not called upon to take physical endurance test as he was found disqualified in not only in age but also in height.

19. Issue of taking physical endurance test is essentially factual one, which can be substantiated by the statement and averment made by the respective parties and by producing the records. No-doubt contemporaneous records overweigh the statements and averments made by the respective parties in the pleading. A Board Sheet purported to be original was produced before us and a xerox copy thereof is annexed and we had taken note of the original. While doing so we do not find any difference between the original document said to be of 13th August, 1998 and the xerox copy thereof. We note from this document the significant features that petitioner's name is written in hand and he appears to be the candidate bearing Serial No.54 and below him there are two candidates whose names were also written in hand. Above the petitioner and the two candidates, the names of other candidates are typed written. It appears that there is no recording of the result of endurance test in the said document, nowhere it is mentioned why such recording is not done even in the notification regarding endurance test relating to recruitment it was not mentioned that physical measurement test has to be passed through first, thereafter successful candidates would have to take endurance test. In other words a particular candidate has to pass through two stages. It further appears that this documents have been signed only by one of the Members of the Selection Board namely Assistant Commissioner, 2nd Battalion. Admittedly, on that date as it has been stated in Clause (b) paragraph 4 of the affidavit of Humayun Kabir, one Mr. Ranvir Kumar, I.P.S., then Deputy Commissioner of Police 4th Battalion, Kolkata Armed Police and Mr. Ananda Mohan Ghosh, the Assistant Commissioner of Police 2nd Battalion, Kolkata Armed Police were Members of the Selection Board. Therefore this recording of the result sheets are not signed by the senior officer member. Significantly in terms of the last order of this Court the petitioner's endurance test was recorded and the said Board Sheet was signed by the two officials namely the Deputy Commissioner, Wireless Branch and concerned Assistant Commissioner of Police in accordance with relevant Rule. That apart it seems to us there must be two separate sets of records as it could be reflected from the order of the Commissioner who has gone through same and found the petitioner's height was 1 inch short of the required height whereas in the Board Sheet which has been signed by the Assistant Commissioner of Police records 1/2 inch short in height. Even Their Lordships the Hon'ble Mr. Justice Bhaskar Bhattacharya and Hon'ble Mr. Justice Kishore Kumar Prasad (as Their Lordships then were) found that 1/2 inch shortage, perhaps going by the Board Sheet produced before us.

20. We, therefore, accept the contention of Mr. De the document which purport to show that no endurance was undertaken on 13th August, 1998 by the applicant is not an appropriate and acceptable document. Closely examining the nature of recording we feel that names of the petitioner was subsequently inserted in this

Board Sheet and it was signed by one person only. In order to give some semblance of authenticity two more names were written in hands. Therefore, this document cannot be said to be the proof of the fact that the petitioner had not undertaken any endurance test.

21. Our findings is also evidenced by the later act and conduct of the respondents officials when unlike previous occasion the petitioner was asked by letter dated 27th July, 2008 to appear with recent passport size photograph and relevant documents relating to age proof, qualification certificate and employment exchange card. He was not asked to take canvas shoes. This letter was issued by Sakti Priya Chatterjee the first respondent. This deponent while issuing the letter must have checked up the original record, and had he found from the record that he did not undertake endurance test on 13th August, 1998 he would have definitely asked the applicant to bring canvas shoes or at least to indicate that since he had not taken endurance test in past in terms of the judgment of this Court he must be ready to take endurance test.

22. We are unable to accept the contention of learned Government Pleader that he did not undergo any endurance test in past as we are inclined to believe and accept the statement and averment of the applicant who consistently had stated that he had undergone test on 13th August, 1998 and he was not required to take test further in terms of the last judgment of the Division Bench rendered in original application being W.P.S.T. No.154 of 2004. We also accept the case and the contention of the applicant as advanced by Mr. De the appellant was forced to take such test.

23. Whether he had taken test or not could very well have been stated either by the said Assistant Commissioner or the previous Deputy Commissioner. The two present deponents have specifically stated that they do not know anything about this. They are going by the documents produced before us, which has not been accepted rather discarded by this Court for the reasons as above. The Recruitment Rules has specifically provided that the result must be signed by each of the members of the Selection Board not by one particular Member. We fail to understand why the Deputy Commissioner of Police, Wireless Branch and concerned Assistant Commissioner of Police who has asked the petitioner to take endurance test, have not come forward to explain by filing affidavit and producing records why endurance and physical efficient test was required. We believe that the applicant was compelled under the dominating circumstances to take further test in terms of the order passed by this Court. Sub-clause 2 of Clause 11 of the Recruitment Regulation provides that

Candidates offering themselves for selection shall be paraded on the Parade Ground and inspected by a Selection Board consisting of Deputy Commissioner and an Assistant Commissioner of Police nominated by the Commissioner. Appointment shall be made of candidates included in an approved list of candidates prepared on

the recommendation of the Selection Board.....

24. Hence the content of the Board Sheet shows that the Assistant Commissioner of Police alone had inspected and evaluated nor the Deputy Commissioner did, as his name could not be found. We, therefore, in view of finding above hold that the petitioner had undergone endurance test on 13th August, 1998, and in terms of the judgment of the Division Bench dated 27th June, 2008 he was not required to take test again. He was compelled to do so in wilful, deliberate violation of the order passed by this Court. But we conclude that these two respondents are not responsible for violation. We think that Mr. Sib Sankar Datta, I.P.S., Deputy Commissioner of Police, Wireless Branch, Kolkata (2) and Mr. Himadri Nath Mukhopadhyay, Assistant Commissioner of Police, Police Training School who is said to have retired on 31st January, 2009, were responsible for violation of the aforesaid order. But those two persons are not parties before us. We are of the view that participation of the petitioner was not without objection as the respondent wrongly contended, and even if he has participated which has been done under compulsion, he is not estopped from challenging the same. He has no option but to succumb to their pressure as we are inclined to believe the version of the petitioner that these officers were adamant not to take the petitioner in employment.

25. The order declaring that he was unfit in endurance test is thus set aside. It is settled law proceeding in civil contempt is not only for taking the contemnor to task appropriately, but to see that order passed by the Court is implemented. Accordingly this Contempt Application is disposed of by directing the Commissioner of Police to give appointment to the petitioner within one month from the date of receipt of the copy of the order. We award costs of this application assessed at 300 G.Ms. to the petitioner for unnecessary harassment. The costs shall be paid by the State within one month from the date of communication of this order.

Kalyan Jyoti Sengupta, J.

26. I agree.