(2010) 05 CAL CK 0055

Calcutta High Court

Case No: F.M.A. No. 757 of 2005 With C.A.N. No. 7119 of 2005

Rina Dutta and Others	APPELLANT
Vs	
Anjali Mahato and Others	RESPONDENT

Date of Decision: May 18, 2010

Acts Referred:

- Constitution of India, 1950 - Article 14, 16

Citation: (2010) 3 CALLT 232 : (2010) 126 FLR 892

Hon'ble Judges: Mohit S. Shah, C.J; Tapen Sen, J; Aniruddha Bose, J

Bench: Full Bench

Advocate: Saptangshu Basu and Rudranil Dey, for the Appellant;Balai Ch. Ray, S.P. Ghosh and Ms. Jolly Chakraborti for the State and Saibal Acharyya, for the Respondent

Final Decision: Dismissed

Judgement

Mohit S. Shah C.J., Tapen Sen and Aniruddha Bose, JJ.
This appeal has been placed before us on reference made by a Division Bench of this court by order dated 29th July, 2008 for consideration of the following question:

When a particular qualification is laid down in an advertisement, specially creating a distinct class of candidates that would be eligible, can the candidates possessing qualifications higher than those advertised be considered and appointed on the post?

2. The facts giving rise to this appeal, broadly stated, are as under:

2.1. The Children Development Project Officer, Jhalda No. 1 issued an advertisement dated 6th December, 1996 inviting applications for the posts of Anganwadi Worker stating that in the age group of 18 to 45 years "who have passed in Matriculation or equivalent examination with Bengali are eligible to apply. Graduate women are not meant for the said post."

The advertisement also indicated as under:

The candidates will belong to the concerned village panchayat of that centre for which the candidates will be recruited.....

Candidates from the neighbouring villages will be considered for the posts of the Anganwadi Workers in the event proper candidates are not available from the concerned villages.....

2.2. The appellants herein, three in number, as well as another person (respondent No. 6 in the writ petition) and the writ petitioners amongst others applied in response to the advertisement. After written test and interview, the respondent authorities prepared a select list and appointed the appellants and others on the posts of Anganwadi Worker in the year 1998. The writ petitioners, two in number, who were unsuccessful candidates at the said selection, filed the writ petition in the year 1999 challenging the selection and appointment of respondent Nos. 6 to 9 in the writ petition on the ground that they were graduates and, therefore, barred from applying for the post of Anganwadi v. Worker. The private respondents did not controvert the fact that they were graduates at the time of applying for the post but contended that graduates were not ineligible to apply for the post. It was also contended by the private respondents that by memorandum dated 9th November, 1983 issued by the State Government graduate anganwadi workers were eligible to be appointed as supervisors and, therefore, by necessary implication graduates were not debarred from applying for the post of Anganwadi Worker which was the feeder cadre for supervisors.

2.3. After hearing the learned Counsel for the parties, the learned Single Judge held that when the advertisement specifically mentioned particular qualification of matriculation (Madhyamik or equivalent qualification) and also provided that graduate candidates were not to apply, the private respondents being graduates they were not entitled to be appointed on the posts of Anganwadi worker. The learned Single Judge further took the view that when the advertisement indicated that since the graduate women were not to apply and that if the private respondents were eligible, the other graduate women would also have been eligible, but they were denied their right of being considered for appointment and, therefore, there was violation of Articles 14 and 16 of the Constitution. The learned Single Judge accordingly allowed the writ petition and quashed and set aside the appointment given to the private respondents, four in number, out of whom three have filed the present appeal.

2.4. During pendency of the appeal, the Division Bench had granted stay against the implementation of the order of the learned Single Judge and that is how all the four private respondents including the three appellants have continued in service.

3. When the appeal reached hearing, two judgments were brought to the notice of the Division Bench: In District Collector and Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and Another Vs. M. Tripura Sundari Devi, ,

the Apex Court held that when the advertisement mentions a particular qualification and an appointment is made in disregard to the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualification than the appointee or appointees but who had not applied for the post because they did not possess the qualification mentioned in the advertisement. It amounts to a fraud on public to appoint persons with inferior qualifications and that in absence of a clause in the advertisement that qualifications are relaxable, no Court should be a party to the perpetuation of the fraudulent practice.

The other judgment brought to the notice of the Division Bench was a decision of this Court in the case of Ganga Chowdhury v. B.D.O. Tamluk II and others 1996 W.B.L.R. (Cal.) 213, wherein the Division Bench took the view that over qualification prima facie does not disentitle a person from being considered for appointment, In terms of Article 16 of the Constitution each person who is entitled to be considered for appointment should be considered. The fact that a candidate is over-qualified by itself cannot be a ground for setting aside his/her appointment, otherwise mere will be infringement of Article 16 of the Constitution.

The Division Bench was of the opinion that the issue needs to be resolved by a larger Bench as it is likely to affect a large number of candidates for the post which is meant for upliftment of rural areas of West Bengal. Accordingly, the question above quoted has been referred for our opinion.

4. Mr. Basu, learned Counsel for the appellant has submitted that the minimum qualification for the post of Anganwadi workers is Madhyamik or equivalent examination with Bengali, i.e. Matriculation and, therefore, a person who has obtained a graduate degree after matriculation is also eligible and she cannot be disqualified on the ground of over qualification. It is submitted that it would be in violation of Articles 14 and 16 of the Constitution to deny the person''s right to be considered for appointment on the ground that she possesses higher qualification. It is also submitted that the Apex Court has frowned upon such a practice in the decision reported in Mohd. Riazul Usman Gani and Others Vs. District and Sessions Judge, Nagpur and Others, .

It is further submitted that Integrated Child Development Scheme is a Central Government Scheme and in the Scheme framed by the Central Government, while indicating that preference will be given to matriculate women from the local area, the Scheme does not debar a graduate from applying for the post of Anganwadi worker. The State Government is merely an Implementing agency for the Scheme and, therefore, the State Government has no power to modify the scheme or to take away the right of eligible persons or to restrict the zone of consideration to matriculates and to exclude the graduates. Thirdly, it is submitted that in any view of the matter, the advertisement did not debar the graduate women from applying for the post of Anganwadi worker. After mentioning that those who have passed

Madhyamik or equivalent examination with Bengali are eligible to apply, it was merely indicated that graduate women are not meant for the said post. This did not amount to "disqualifying or debarring graduate women from the posts of Anganwadi worker.

5. On the other hand, the learned Advocate General appearing for the State authorities has supported the Scheme as framed by the State Government and has placed on record the Scheme dated 8th April, 1985 and the Scheme as contained in the Memorandum dated 25th January, 2006. It is submitted that in both the Schemes it was clearly mentioned that while the minimum educational Qualification of Anganwadi workers should be a pass certificate in matriculation, candidates who are graduates are not eligible to be appointed as voluntary workers. It is further submitted that as held by the Apex Court in State of Karnataka and Others Vs. Ameerbi and Others, , Anganwadi workers are not holders of civil post, but they are mere voluntary workers who are engaged for honorarium. They do not hold post under a statute and the State is not required to comply with the Constitutional Scheme of equality as adumbrated under Articles 14 and 16 of the Constitution.

It is further submitted that in any view of the matter the State Government is justified in considering graduates as not eligible, because of the nature of services which the Anganwadi workers are required to render in rural areas where they have to deal with illiterate and semi illiterate women who are pregnant and lactating mothers and who are required to be informed about child nutrition and other health care activities for women who generally belong to the lower socioeconomic strata of the society. It is also submitted that the Anganwadi workers are to be selected from the village/local community. They are to be persons who are acceptable to the local community so that they can effectively serve the preschool children, pregnant women and nursing mothers. They should be able to work with women and children of scheduled caste and scheduled tribes and other weaker sections of the community. It is submitted that if graduates women are engaged as Anganwadi workers, they may not be able to do such work effectively and in any case graduate women would get other employment opportunities and they would very soon leave the service as Anganwadi workers. This will not be conducive to proper and effective implementation of the Integrated Child Development Scheme (ICDS).

6. Learned Counsel for the writ petitioners has supported the judgment of the learned Single Judge and has submitted that the private respondents in the writ petition had suppressed the material fact at the time of making application; that they were matriculates. By suppressing the fact they are graduates, they had obtained employment and, therefore, their services ought to be terminated on the ground of suppression of fact. Strong reliance is placed on a decision Karnataka High Court in the case of Urukundi v. Senior Divisional Manager Divisional Office, LIC, Raichur 2003 Lab. I.C. 2660 : 2003 (4) LLN 720 (Kar.).

7. Having heard the learned Counsel for the parties, we first take up the preliminary consideration urged on behalf of the writ petitioners that the appellants and other private respondents had suppressed the material fact that they were graduates. It is true that the Scheme of 1985, under which the advertisement was issued, provided that the advertisement should state that should a candidate suppress any relevant information or furnish false information particularly regarding her age, residence and educational status, her appointment may be terminated at any time. However, this was not mentioned in the advertisement and the advertisement merely stated that those who are matriculates are eligible to apply and that the graduate women are not meant for this post. This sentence in the advertisement could hardly be considered as a prohibition against graduate women applying for the post nor can it be treated as a ground to disqualify or penalize a graduate woman for not having mentioned her graduate qualification in the application.

8. Coming to the merits of the controversy, it is true that in Mohd. Riazul Usman Gani and others v. District & Sessions Judge, Nagpur and others 2002 (84) FLR 989, the Apex Court took a prima facie view that the criterion which has the effect of denying a candidate his right to be considered'' for the post on the principle that he is having higher qualification than the prescribed cannot be rational, but in the facts of that case the Apex Court upheld the application of such a criterion. The Apex Court upheld the selection process in that case on the ground that the process was already completed. But it is necessary to note that the Apex Court applied the test of equality as enshrined in Articles 14 and 16 of the Constitution.

9. That reasoning would not be available in the facts of the instant case because the very Scheme of Anganwadi workers and the nature of their engagement has been recently considered by the Apex Court in (2007) 11 SCC 661. In paragraph 20 of the said judgment, the Apex Court held that Anganwadi workers do not carry on any function of the State and do not hold post under a Statute, The State is not required to comply with the constitutional Scheme as adumbrated in Article 14 and 16 of the Constitution of India. In view of such emphatic statement of law, it clear that the contention urged on behalf of the appellants based on Articles 14 and 16 cannot be accepted.

10. It is, however, not necessary to pursue this discussion any further, because we have already held that the advertisement did not specifically debar or disqualify graduate women from applying for the post of Anganwadi workers and, therefore the engagement of the appellants and the other private respondents in the writ petition as Anganwadi workers could not be said to be illegal on the touchstone of the advertisement. It is true that if the provisions of the Scheme were to be applied, the appellants and the 4th private respondent would be in difficulty. However, having regard to the fact that the appellants and others were appointed way back in 1998 and they have continued in employment for the last 12 years and the advertisement specifically did not disqualify or debar graduate women, we are not

inclined to disturb their appointment. To that extent the appeal will have to be allowed and the order of the learned Single Judge quashing and setting aside the appointment of respondent Nos. 6 to 9 in passed the writ petition including the three appellants herein is set aside. The writ of 2009 petition will accordingly have to be dismissed.

11. As regards the question referred by the Division Bench, we are of the new that the question can be answered only after examining the scheme for the concerned post and the nature of the duties required to be performed and the nature of the services to be rendered by the holder of a post and the qualifications prescribed. Nevertheless, the general answer would be as follows:-

When a particular qualification is laid down in a advertisement relating to a distinct class of candidates, the candidates possessing a qualification higher than that advertised can ordinarily not be debarred or disqualified, but it is open to the employer to make a rule providing for disqualification of candidates possessing qualification higher than the prescribed qualification, but the burden would be on the employer to justify such a rule.

12. We make it clear that in view of the fact that the answer to the question was not free from doubt till now, the appointment of persons with higher a qualification than that mentioned in the advertisement will not be disturbed on the basis of this judgment, but in future the employer may be able to specify in the rule and in the advertisement that persons with qualification higher than the minimum qualification would not be considered eligible. It would of course be for the employer to give justification for such a rule.

13. The reference is answered accordingly.