

(2014) 07 CAL CK 0069

Calcutta High Court

Case No: W.P. No. 7637 (W) of 2010 With CAN 3603 of 2014

Sabita Mondal

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision: July 21, 2014

Acts Referred:

- Constitution of India, 1950 - Article 226

Hon'ble Judges: Tapabrata Chakraborty, J

Bench: Single Bench

Advocate: Partha Sarathi Bhattacharyya, Moniruzzaman and Raju Bhattacharyya, Advocate for the Appellant; Biswajit De. and Manoj Kumar Roy, Advocate for the Respondent

Judgement

Tapabrata Chakraborty, J.

An advertisement was published on 18th October, 2007, seeking applications from eligible candidates for selection to the posts of Auxiliary Nurses and Midwifery in the Sub-Health Centres in panchayat area. Pursuant thereto, the petitioner applied for the concerned post at Baro Mollakhali Health Sub-Centre, Sub-Centre No. 24 of Gosaba block, South 24-Parganas and she was allowed to participate in the selection process. Upon emerging to be successful in the same, the petitioner was issued provisional admission for training by a memorandum dated 13th March, 2008, issued by the respondent No. 7. In compliance thereto, the petitioner underwent the training and successfully completed the same on 11th September, 2009.

2. In the midst thereof, the private respondent No. 10 preferred an application u/s 226 of the Constitution of India being W.P. No. 23699 (W) of 2008 alleging inter alia that she also applied for the post of Auxiliary Nurse and Midwifery in Health Sub-Centre No. 24 of Gosaba Block, South 24-Parganas and though she was having more marks than the petitioner, in the Madhyamik Examination, she was not selected. The said writ application was disposed of with a direction upon the respondent No. 5 to call for all records and to make the appropriate selection for the

concerned post, upon grant of an opportunity of hearing to all the parties. Pursuant to the said order, the petitioner was called for a hearing by a notice dated 25th February, 2010 and she appeared in the hearing and she was heard by the said respondent No. 5 and thereafter, an order was passed by the respondent No. 5 and communicated to the petitioner by a memorandum dated 16th March, 2010.

3. Aggrieved by the said orders communicated vide memorandum dated 16th March, 2010 passed by the respondent No. 5, the petitioner has approached this Court through the instant writ application.

4. The writ application was initially admitted with a direction towards exchange of affidavits and an interim order was passed to the effect that the petitioner should be allowed to continue with her service.

5. Upon coming to learn about the interim order passed on 25th February, 2011, the respondent No. 10 filed an application, being CAN No. 6434 of 2011, for vacating the said interim stating inter alia that though she had secured more marks than the petitioner in the Madhyamik Examination, she was illegally denied appointment. It was also averred in the said application that the writ petitioner herein availed provisional admission subject to decision of Court cases pending and that pursuant to the order impugned in the writ application the respondent Nos. 4 and 7 prepared a fresh panel for the concerned post on 1st June, 2010 and that as such question of continuance of the interim order dated 25th February, 2011, does not occasion.

6. The said vacating application was initially heard on 16th November, 2011 and an order was passed directing the respondents to send the name of the applicant, being the respondent No. 10 herein, for training subject to further order or final result of the writ application.

7. Thereafter, the vacating application again appeared before this Court on 3rd January, 2013 and an order was passed vacating the interim order dated 25th February, 2011, with liberty to the respondents to take appropriate steps in accordance with law. In the said order it was further observed that any action taken in the meantime shall abide by the result of the writ application.

8. In spite of vacation of the interim order dated 25th February, 2011, no steps were taken by the respondents to appoint the private respondent No. 10 herein in the concerned post and as such, the respondent No. 10 preferred an application being CAN No. 3603 of 2014 inter alia praying for a direction upon the competent authority to issue appointment letter in her favour. The said application along with the main writ application has appeared before this Court for final hearing.

9. Mr. Bhattacharyya, learned advocate appearing for the petitioner submits that the petitioner duly participated in the selection process and upon emerging to be successful, she was empanelled and appointed. Placing reliance upon the averments made in paragraph 8 of the writ application, Mr. Bhattacharyya further submits that

the application form of respondent No. 10 was not properly filled up and that as such her application was not taken into consideration by the concerned authorities and her application was treated to be invalid at the time of screening of the applications. The application made by respondent No. 10 was an incomplete application and that as such the same was not considered though respondent No. 10 has secured more marks than petitioner in Madhyamik Examination.

10. Mr. Bhattacharyya contends that since the application of respondent No. 10 itself was incomplete, the marks obtained by respondent No. 10 becomes irrelevant and no weightage can be granted to such fact for the purpose of appointment to the concerned post. Mr. Bhattacharyya further argues that the selection process was conducted fairly without any discrimination and the petitioner's selection was correct.

11. Mr. Bhattacharyya draws the attention of this Court to the impugned orders and submits that the respondent No. 5 himself has recorded in the order that no clarification was given by the respondent Nos. 6 and 7 as to why the application of respondent No. 10 was not considered for selection. According to Mr. Bhattacharyya having not availed such clarification from the respondent No. 6 and 7, the respondent No. 5 could not have cancelled the panel and could not have directed for preparation of a fresh panel.

12. Mr. De, learned advocate appearing for the State authorities submits that when the matter was heard by the respondent No. 5, no allegation was agitated on the part of the petitioner to the effect that the application form of respondent No. 10 was incomplete. Mr. De further submits that there is no dispute to the effect that respondent No. 10 did apply for the post and her application was accepted through issuance of an acknowledgement receipt. As the application of respondent No. 10 was accepted, she was entitled to be appointed to the concerned post since she secured more marks than petitioner in Madhyamik Examination.

13. According to Mr. De, there is no allegation to the effect that the respondent No. 10 did not apply within the cut-off date, enclosing all materials and documents as sought for in the advertisement. There is no allegation in the writ application to the effect that the respondent No. 10 suffers from any disqualification detailed in the advertisement. As the competence for appointment to the concerned post was only measurable on the yardstick of marks obtained in the Madhyamik Examination, the respondent No. 10 deserved appointment to the concerned post, having indisputably secured more marks than the petitioner. The Madhyamik mark sheet of the respondent No. 10 was verified from the competent authority being the West Bengal Board of Secondary Education and found to be correct and genuine.

14. Mr. De further submits that even if the application of respondent No. 10 was not considered mistakenly and for such mistake on the part of the authorities, respondent No. 10 cannot be made to suffer and the petitioner also cannot reap any

benefit therefrom. Mr. De further draws the attention of this Court to the memorandum dated 1st June, 2010 and submits that pursuant to the order impugned in the writ application, the concerned respondents prepared a fresh panel and in the same respondent No. 10 has been placed in the first position and on the basis of such selection, respondent No. 10 has earned the right to be appointed to the concerned post. In support of his contentions, Mr. De relied upon the records produced. The petitioner and the private respondents were granted leave to inspect the said records. Let xerox copies of the document be kept in record.

15. Mr. Roy, learned advocate appearing for respondent No. 10 submits that in the writ application it was the contention of the petitioner that the application form submitted by the respondent No. 10 was an incomplete one but in the affidavit-in-reply, the writ petitioner contends that the respondent No. 10 did never make any application before the authority for the concerned post. Such contradiction maligns the petitioner's stand.

16. Mr. Roy further submits that there is no dispute to the effect that the respondent No. 10 duly applied for the concerned post and upon perusal of records and verification of the mark sheet of the respondent No. 10, the respondent No. 5 arrived at a finding that the respondent No. 10 was the most competent and eligible person to be appointed to the concerned post and on the basis of such finding the single candidate panel, in which only the name of the petitioner featured, was cancelled.

17. Mr. Roy further submits that in spite of vacation of the interim order, the petitioner is forcibly continuing in the concerned post and as a consequence thereof, the respondent No. 10 has not been able to join in spite of being selected.

18. In support of his argument, Mr. Roy has placed reliance upon the following judgments :-

1. [Krishan Yadav and another Vs. State of Haryana and others,](#)
2. [Union Territory of Chandigarh Vs. Dilbagh Singh and others,](#)
3. [Calcutta Municipal Corporation and Others Vs. Rukhsana Anjum](#)

19. The first two judgments relied upon by Mr. Roy pertain to sustainability of a selection process when the same stands vitiated with unfairness and arbitrariness and the last judgment has been cited in support of his contention to the effect that a mistake committed can always be rectified and that a person cannot take advantage of such mistake.

20. I have heard the submissions made by the learned advocates appearing for the respective parties and I have considered the materials on record.

21. There is no allegation in the writ application to the effect that the respondent No. 10 does not fulfill the eligible criteria for appointment to the concerned post. There is also no allegation to the effect that the respondent No. 10 does not fulfill the residential criterion. It is also not in dispute that the merit, of the contesting candidates, is required to be judged on the yardstick of the marks obtained by the respective candidates in Madhyamik Examination. It stands admitted that the respondent No. 10 has obtained more marks than the petitioner in the Madhyamik Examination. To be precise, the respondent No. 10 obtained 441 marks whereas the petitioner obtained 403 marks. In the backdrop of the said admitted facts, the respondent No. 5 has rightly cancelled the single candidate panel and has rightly directed for preparation of fresh panel.

22. The orders impugned in the writ application have been passed by the respondent No. 5 pursuant to the order of this Court dated 25th September, 2008 in W.P. No. 23699 (W) of 2008. The operative part of the said order runs as follows :-

The said respondent/District Magistrate 24-Parganas (South) being respondent No. 5 herein must consider the grievances in the proper perspective and must take appropriate action and pass necessary order in accordance with the Rules. While doing so, the District Magistrate must ensure that both the writ-petitioner as well as the private respondent herein, namely, Smt. Sabita Mondal are given opportunity of hearing. The entire process must be completed within a period of eight weeks from the date of receipt of the representation.

23. Upon perusal of the impugned decision of the respondent No. 5, it appears that upon consideration of all facts and circumstances of the case, the order was passed directing cancellation of the single candidate panel for the concerned post and the same stands supported with cogent reasons. Furthermore, there is no error in the decision making process warranting interference of the Hon"ble Court.

24. It is well-settled that the writ Court ought not to transpose itself as an appellate authority when a particular authority has performed its obligation to abide by the specific directions given by this Court and rendered a decision in the matter supported with cogent reasons. The discretionary jurisdiction of this Court under Article 226 of the Constitution of India ought not to be invoked in such cases, unless of course, the decision so rendered by the concerned authority is palpably wrong or is arbitrary or perverse or smacks of mala fide motive or has been rendered without adhering to the specific directions given by the Court.

25. For the reasons stated above, no interference is called for and the writ application is, accordingly, dismissed.

26. It is, however, made clear that no steps should be taken by the respondents to recover the salaries already paid to the petitioner pertaining to the service rendered by her.

27. Through the application being CAN 3603 of 2014 filed in the instant writ application, the private respondent No. 10 has sought for a direction upon the respondents to issue appointment letter in her favour but the same stands dismissed, on the limited ground that the said private respondent cannot pray for such a direction in the petitioner's writ application.

28. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.