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ITEM NO.201

Court No.2

SECTION XVI

SUPR EME COUR T OF I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No(s).20345/2005

(From the judgement and order dated 14/06/2005 in FMA No.
1115/1999 of The HIGH COURT OF CALCUTTA)

APURBA KUMAR SEN

Petitioner(s)

VERSUS

RATAN KUMAR SAHA & ORS.

Respondent(s)

(With prayer for interim relief and office report)

Date: 31/07/2009 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE S.B. SINHA
HON'BLE MR. JUSTICE DEEPAK VERMA

For Petitioner(s) Mr. S.K. Bhattacharya, Adv.
Mr. Parthasarathi Bhattacharya, Adv.
Mr. B.P. Yadav, Adv.
Ms. Sarla Chandra, Adv.

For Respondent(s) Mr. K.V. Mohan, Adv.
Mr. A.K. Yadav, Adv.
Mr. A.K. Choubey, Adv.
Mr. K.V. Balakrishnan, Adv.

Ms. Naresh Bakshi ,Adv

UPON hearing counsel the Court made the following
ORDER

Leave granted.

The appeal is allowed in terms of the signed order.

(KALYANI GUPTA)
SR. P.A.

(PUSHAP LATA
BHARDWAJ)
COURT MASTER

[SIGNED ORDER IS PLACED ON THE FILE.]
IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2009
ARISING OUT OF S.L.P. (C) NO. 20345 OF 2005

SRI APURBA KUMAR SEN

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APPELLANT

VERSUS

RATAN KUMAR SAHA & ORS.

.....

RESPONDENTS

ORDER

Leave granted.

Respondents were candidates for appointment in the primary schools maintained by the State of West Bengal. Recruitment to the post of primary teachers is governed by the West Bengal (Fundamental & Primary) Education Act, 1973 and the Rules, regulating the Recruitment and Leave Rules of Teachers in Primary Schools in West Bengal framed thereunder.

In terms of the said Rules, the District Councils are constituted. Appellant herein was the Chairman of District Primary Council Dakshin Dinajpur. Without going into the fact of the matter in greater details, we may notice that the respondents filed a writ petition before the Calcutta High Court praying for issuance of writ in the nature of mandamus directing the District Primary Council to appoint them. In the said writ petition, it was contended that some juniors have been appointed in preference to them. No stay had been granted by the learned Single Judge. Aggrieved by and dissatisfied therewith they preferred an intra court appeal before the Division Bench of the High Court in terms of clause 15 of Letters Patent. An application for stay bearing FMAT No. 3168/1996 was filed in the said appeal. The High Court upon noticing that some injustice was said to have been done as the respondents having been appointed for long time and in the meantime they could not be appointed because of the age bar directed as under:

"Accordingly we are of the view that it is a fit and proper case where the case of the petitioner/appellants should be considered after condonation of the age bar for which they have not at all any responsibility. They are all unemployed youth and are admittedly duly qualified for the post as pointed out by the Chairman of the Council.

Accordingly, we are directing the local Employment Exchange to forward the names of 21 petitioner/appellants if their names have not yet been forwarded for appointment in the post of primary teachers as there are at present 497 vacancies in the said post under the Dakshin Dinajpur District Primary School Council and for which requisition has already been made and the Employment Exchange has forwarded

some trained and untrained teachers. Petitioner's names should be so forwarded within ten days from the date of the communication of this order by the Employment Exchange and the authority concerned shall consider the cases of the petitioners along with other eligible candidates and select them if they are found suitable condoning the age bar.

In this connection it is also made clear that at the time when the appellant/petitioners have obtained training there was no marking system and they were simply declared passed. Subsequently, marking system was introduced. Accordingly, the authority concerned shall evolve reasonable approaches for the purpose of doing justice to the candidates and they should not act mechanically as there was no marking. Their cases should be considered sympathetically in view of the facts and circumstances of the case and without creating any precedence.

The application is disposed of on the above terms.

In view of the above order we think that no useful purpose will be served in keeping the appeal pending. Accordingly, by consent of parties appearing the appeal is also treated as on day's list and disposed of accordingly. It is recorded that since no affidavit-in-opposition has been filed by the respondents, allegation made in the appeal and the application are not admitted."

By reason of the said order it is not only that the Division Bench of the High Court disposed of the application for stay, it also disposed of the appeal pending before it and although it was not mentioned explicitly, the writ petition pending before the learned Single Judge also.

Indisputably, the State of West Bengal or the District Primary Council did not prefer any appeal against the said order. It, however, stands accepted that pursuant to or in furtherance of the said directions all requisite formalities for appointment of teachers in the 447 vacancies had been taken. A written examination was held wherein all eligible candidates including all those who were appellants before the High Court were called upon to take part. Out of the 20 original writ petitioners 8 passed the said written examination. They are:-

i) Ratan Kumar Saha

- ii) Mujibar Rahaman
- iii) Sahidur Rahaman son of Mujibar Rahaman
- iv) Sipra Chaki
- v) Dhananjoy Pramanik
- vi) Md. Akimuddin Mondal
- vii) Manju Karmakar
- viii) Sahidur Rahaman son of Late Maniuddin Ahmed

12 respondents, however, were not selected as they could not pass the written examination. On or about 2.2.1997, they filed an application for contempt alleging that the appellant herein did not strictly comply with the said judgment and order dated 6.12.2001 passed by the Division Bench.

By reason of an order dated 6.12.2001, the Division Bench directed the Primary Council to give a further chance to those unsuccessful 12 candidates who are respondents herein. They were called to appear in the interview for a viva voce test on 3.2.2002, but they declined to do so on the premise that the rules governing their candidature did not permit them to appear at the interview. The matter came up for hearing before the Division Bench which was allowed by reason of the impugned judgment opining:-

"Thus, having regard to the order of the Division Bench dated 27 January, 1997 and having regard to the affidavit-in-opposition of the Council and the submissions made on behalf of it, we are of the clear view that the Council totally failed to comply with the order of the Division Bench and since a contempt proceeding in a civil matter clearly aims at execution of the order of the Court, rather, than punishing the contemnor, we are of the view that although we hold the Council guilty of contempt, instead of prescribing any punishment, we would like to see the Council to execute the order of the Division Bench both in its letter and spirit.

Accordingly, we direct the Council to hold interview of all the 12 petitioners through a Selection Committee to judge their suitability and if the report of the Selection Committee goes in favour of the petitioners, the Council would give appointment to the petitioners for the post of primary teachers. We desire that Council must complete the entire exercise within a month from communication of this order.

Thus, we dispose of the present application in the light of our above observation and let the matter be placed after six weeks and by that time we direct the Council to submit a compliance report.

There will be no order as to costs of this

proceeding."

It is now a well-settled principle of law that for the purpose of arriving at a decision of guilt as against an alleged contemnor it is necessary to arrive at a conclusion that they have willfully and intentionally disobeyed the order of the court. It is also well-settled that when two views are possible, a proceeding under the Contempt of Courts Act would not lie.

In *J.S. Parihar v. Ganpat Duggar And Others* reported in (1996) 6 SCC 291, this Court has clearly held that when action had been taken pursuant to the order complained against the subsequent decision cannot be questioned by way of objecting to the application and the remedy lies in filing a separate writ petition.

In view of the aforementioned legal proposition, in the event, the respondents intended to question the applicability of the amended rules in their case, then remedy would have been to file a fresh writ application and not a contempt application.

Mr. Mohan, the learned counsel for the respondent however, would rely upon a recent decision of this Court in *In Re: Destruction of Public and Private Property v. State of Andhra Pradesh And Others* (2009) 5 SCC 212 wherein this Court has discussed the nitty-gritties of the law relating to maintenance of peace and order. We do not see as to how the said decision is applicable in the instant case.

The respondents furthermore are estopped for challenging the order of the High Court in view of their conduct. They have appeared at the written examination without any demur whatsoever. It was, therefore, not open to them to contend that they are not bound to appear in the written examination. We have noticed herein before that at least out of the 20 original writ petitioners, 8 not only appeared at the written examination but

also appeared at the interview and they had been appointed.
Remaining 12 were not successful and Primary Council arranged
for their fresh written test but they failed to appear therein. The
operative part of the order of the decision principally that the age
bar of the respondent should be relaxed. It has not been
contended that their age bar had not been relaxed.

For the reasons aforementioned, we are of the view that
the division bench of the High Court had committed a serious legal
infirmity which must be held to be sustainable and is, therefore,
set aside.

The appeal is allowed in the aforesaid terms.

.....J
[S.B. SINHA]

.....J
[DEEPAK VERMA]

NEW DELHI
JULY 31, 2009.