

ANUP KUMAR KUNDU
v.
SUDIP CHARAN CHAKRABORTY AND ORS.

AUGUST 8, 2006

[ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Service Law:

Appointment of Professor—Applicant filed an application before the State Administrative Tribunal praying for appointment to the post of Professor and to set aside the appointment of another Professor—The Tribunal set aside the appointment of that Professor but found the prayer of the applicant for appointment to the post of Professor untenable—However, the High Court, having found that that the prayer of the applicant untenable, went on to examine the correctness of the appointment of an incumbent Professor which was not raised before the Tribunal and held the appointment of the said incumbent Professor to be illegal—Correctness of—Held: There was no dispute about non-challenge to the appointment of the incumbent Professor—After the disposal of the matter by the Tribunal, the High Court was not justified in holding that the incumbent Professor's appointment was illegal—The High Court, therefore, was not justified in considering a new case which was not the case of the parties before the Tribunal—High Court's judgment set aside—Practice and Procedure.

Respondent No. 1 filed an application before the State Administrative Tribunal praying for appointment to the post of Professor and to set aside the appointment of respondent No. 9. The Tribunal partly allowed the application setting aside the appointment of respondent No. 9, but found that the prayer of respondent No. 1 for appointment to the post of Professor was not tenable.

A writ petition was filed before the High Court questioning the correctness of the Tribunal's judgment. The High Court found that the prayer of respondent No. 1 for appointment to the post of Professor was untenable. However, the High Court went on to examine the correctness of the appointment of the appellant which was not raised before the Tribunal and held the appointment of the appellant to be illegal. Hence the appeal.

A Allowing the appeal, the Court

HELD: 1. A bare perusal of the High Court's order makes the position clear that there was no dispute about non-challenge to the appointment of the appellant as Professor. The grievance made in the interim application cannot be a substitute for a definite challenge to the appointment in the writ petition.

B In any event, after the disposal of the matter by the Tribunal, the High Court was not justified in holding that the appellant's appointment was illegal. The subject-matter of controversy and the area of dispute were entirely different. Though respondent No.1 submitted that in fact challenge was made to the appointment of the appellant, but in view of the categorical finding recorded by the Tribunal, the High Court concluded that there was no such challenge made before the Tribunal. The High Court, therefore, was not justified in considering a new case which was not the case of the parties before the Tribunal. The High Court's judgment, therefore, deserves to be set aside.

[434-G-H; 435-A-B]

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3415 of 2006.

From the Judgment and Order dated 30.10.2003 of the High Court of Calcutta in W.P.S.T. No. 675/2002.

E Pradip K. Ghosh, Anindita Gupta, Rameshwar Pd. Goyal and Ujjawal Banerjee for the Appellant.

Maninder Singh, Pratibha M. Singh, Gaurav Sharma, Rahul Ajatshatru, Tejveer S. Bhatia, Avijit Bhattacharjee, Saumya Kundu, P.K. Dey, K.K. Joshi, Kaushik Dey, Santanu Ghosh and Abha R. Sharma for the Respondents.

F The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Leave granted.

G Challenge in this appeal is to the judgment rendered by the Division Bench of the Calcutta High Court holding that the appellant's appointment as the Head of the Department was not legal and further that the appellant was required to satisfy the authority that he possessed the requisite qualification to be entitled to continue in the post of Professor on a regular basis.

Background facts in a nutshell are as follows:

H Respondent No. 1-Sudip Charan Chakraborty filed an Original Application

before the West Bengal Administrative Tribunal (hereinafter referred to as the 'Tribunal'). Essentially, two challenges were made before the Tribunal by him. He prayed for appointment to the post of Professor and to set aside the appointment of Dr. Dilip Karmakar (who was respondent No.9 before the Tribunal). By its judgment and order dated 18.12.2001 the Tribunal partly allowed the application setting aside the appointment of aforesaid Dr Dilip Karmakar, but found that the prayer of the applicant i.e. respondent No.1 before it in this appeal for appointment to the post of Professor is not tenable.

A Writ Petition (W.P.S.T.No.675 of 2002) was filed before the Calcutta High Court questioning correctness of the Tribunal's judgment. Dr. Dilip Karmakar had not questioned the legality of the Tribunal's judgment, so far as he is concerned. The High Court affirmed the view of the Tribunal that prayer of the writ petitioner (respondent No.1 in this appeal) for appointment to the post of Professor is untenable. Had the High Court rested there, the present appeal would not have been necessary to be filed. But the High Court went on to examine the correctness of the appointment of the present appellant who was respondent No.10 before it as the Head of the Department of Urology and his appointment as a Professor.

Objection was raised by the present appellant and the State of West Bengal that the same was not the case before the Tribunal and, therefore, the said issue should not be examined. The High Court did not accept the plea and accepted the plea of present respondent No.1 on the ground that during the pendency of the original application before the Tribunal and the writ petition, some events had taken place which required adjudication of the issue relating to the present appellant. Accordingly, the impugned directions were given and appointment of appellant was held to be illegal.

Learned counsel for the appellant submitted that the High Court ought not to have gone into any issue which did not form the subject matter of challenge before the Tribunal. The High Court accepted this position that there was no challenge before the Tribunal so far as appellant is concerned. But, it proceeded to examine the issue as if it arose out of the Tribunal's order which was impugned before it. The High Court is clearly wrong in holding that the appellant was continuing illegally.

Learned counsel for respondent No.1 on the other hand submitted that the High Court took into account the overall position and rightly nullified the appointment of the appellant as Head of the Department as well as Professor. It is pointed out that though respondent No.1 had not questioned the

A appointment of the appellant as the Head of the Department, in another matter the Tribunal held that the Government Circular dated 26.12.2001 had already been quashed. The order in this regard was upheld by the High Court and, therefore, there is no scope for interference in this appeal.

B A few dates need to be taken note of. The Original Application before the Tribunal was filed on 24.5.2001. Appellant was appointed as a Professor on 22.5.2000. There was no challenge to the appointment of the appellant in the Original Application. It is the stand of learned counsel for respondent No.1, on which emphasis was laid by the High Court that interim application, was filed where certain orders were passed by the Tribunal which disposed of the matter on 18.12.2001. On 4.1.2002, appellant was handed over the charge of the Head of the Department w.e.f. 4.1.2002. In the meantime, an Original Application had been filed before the Tribunal by one Dr. Ajoy Kumar Gupta. The Government Notification dated 26.12.2001 was quashed by the Tribunal in his O.A.No.56/2002. The order of the Tribunal was questioned by the State of West Bengal before the High Court which was dismissed. The writ petition was filed by respondent No.1 on 17.5.2002 and was disposed of by the impugned judgment dated 30.10.2003.

E At this juncture, it is to be noted that in *Dr. Ajoy Kumar Gupta's* case the Tribunal quashed the notification by its order dated 26.6.2002. Though it was contended by learned counsel for respondent No.1 that the High Court was not justified in holding that there was no challenge to the appointment of appellant, we find that the High Court has categorically accepted the stand of the present appellant and the State Government to the effect that his appointment was not challenged by respondent No.1 before the Tribunal. The High Court has categorically found that there was no challenge before the F Tribunal.

It is to be noted that because of the stay order passed by this Court on 30.7.2004, the appellant is continuing as a Head of the Department as well as a Professor.

G A bare perusal of the High Court's order makes the position clear that there was no dispute about non challenge to the appointment of the appellant as a Head of the Department as well as Professor. The grievance made in the interim application cannot be a substitute for a definite challenge to the appointment in the writ petition. In any event, after the disposal of the matter by the Tribunal, the High Court was not justified in holding that the appellant's H appointment was illegal. The subject matter of controversy and the area of

dispute were entirely different. Though, learned counsel for respondent No.1 submitted that in fact challenge was made to the appointment of the present appellatant who was respondent No.10, but in view of the categorical finding recorded by the Tribunal, the High Court concluded that there was no such challenge made before the Tribunal. The High Court therefore was not justified in considering a new case which was not the case of the parties before the Tribunal. The High Court's judgment therefore deserves to be set aside, which we direct. A B

However, our setting aside the order of the High Court shall not be considered to be a bar for any party aggrieved by the order of the authorities to seek appropriate remedy. We do not express any opinion about the maintainability of the grievance on merits. Since the appellatant is continuing on the basis of an interim order it shall be open to him to move the authorities about justifiability of his continuance. This direction is given considering the fact that the appellatant as well as the State Government have accepted the position that the Government's order which was quashed did not have any effect, because of certain other earlier orders. We express no opinion in this regard also. In view of the background facts noted above, the appeal is allowed in the aforesaid extent. No costs. C D

V.S.S.

Appeal allowed.