

A NADIA DISTRICT PRIMARY SCHOOL COUNCIL & ANR.

v.

SRISTIDHAR BISWAS & ORS.

APRIL 25, 2007

B [A.K. MATHUR AND DALVEER BHANDARI, JJ.]

C *Precedent—Writ Petition—By candidate seeking appointment—Order directing appointment on account of concession with clarification that the order not to be treated as precedent—In another Writ Petition similar relief given by the Court on the basis of the previous order—Similar relief by High Court in the present case on the basis of the two previous orders—Propriety of—Held: An order passed on concession does not lay down the law and cannot be followed as precedent—Court should keep restraint before passing order saddling State Government with financial burden—In the present case, D the candidates could not have been given relief on the basis of the previous orders as the same did not constitute precedent value—Service Law—Appointment—Judicial Restraint.*

E A panel of primary teachers was prepared for the purpose of appointment. The preparation of panel omitting to include trained candidates was challenged by candidate 'S' and 107 other candidates. High Court directed the State to give them appointment. The order was on account of concession and it was specifically clarified in the order that the order would not be treated as a precedent. Thereafter a Writ Petition filed by candidate 'D' and few others was allowed by High Court following the judgment in the case of 'S'. F Thereafter respondents filed another writ petition and the same was also allowed on the basis of the judgments in the cases of 'S' and 'D'. Hence, the present appeal.

Allowing the appeal, the Court

G HELD: 1. An order passed on concession followed with clarification that it shall not be treated as precedent, can not be taken as binding precedent to be followed. Any order passed on concession does not lay down the law and it cannot be followed as a precedent. The Single Judge and the Division Bench of High Court subsequently have taken it to be a law and followed the precedent

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giving relief to the persons leaving behind large number of persons who were on the panel and who were not parties before the Court. The Court should keep restrain-before passing order saddling State Government with financial burden. A panel of 1980 was kept alive up to 2004 without realizing that by this time many more aspirants are waiting in queue. That was not the correct approach. [Para 10] [595-A-C]

Mittal Engineering Works (P.) Ltd. v. Collector of Central Excise. Meerut, [1997] 1 SCC 203 and Amit Das v. State of Bihar, [2003] 5 SCC 488, relied on.

2. Therefore, the judgment given in case of 'S' is not binding as it does not decide the law. It cannot be treated as binding precedent. The view taken in the present case relying on the judgments in previous two Writ Petitions cannot be upheld as the judgment given in case of 'S' was on concession and it was clearly mentioned that it shall not be treated as a precedent.

[Paras 12 and 13] [595-E, F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1020 of 2005.

From the Judgment and Order dated 11.06.2004 of the High Court of Calcutta in E.M.A No. 313 of 2003.

Gourab Banerjee, P. Deb Burman, Arjun Krishnan, Joydeep Mazumdar and Ruby Singh Ahuja for the Appellants.

R.K. Gupta, S.K. Gupta and A.N. Bardiyar for the Respondents.

The Judgment of the Court was delivered by

A.K. MATHUR, J. 1. This appeal is directed against order dated 11th June, 2004 passed by the Division Bench of Calcutta High Court whereby the Division Bench affirmed the order of learned Single Judge directing that all the 55 writ petitioners be appointed as teachers within a period of six weeks. Aggrieved against this order, the Nadia District School Council filed an appeal before the Division Bench. The Division Bench affirmed the order of learned Single Judge by order dated 11th June, 2004 and hence the present appeal.

2. In order to dispose of this appeal, few facts may be recapitulated. A panel for appointment of primary teachers was prepared in 1980 for the District of Nadia in which 1965 candidates were included in the panel. Out of this panel, only 600 were trained candidates. Rule 3(d) of the Recruitment

- A Rules provided that while preparing the panel for appointment to the post of primary teachers, preference shall be given to the trained candidates in such a manner that all additional posts sanctioned by the Government from time to time due to enhancement in roll strength in existing schools and at least 5- per cent of the normal vacancies in such schools are filled up by trained candidates only, if sufficient number of trained candidates are available. By
- B Notification dated 26th October, 1971, the Government of West Bengal recognized the training as an additional qualification for appointment as Assistant Teacher. Then again by Notification dated 5th September, 1973, it was provided that while giving appointment out of the panel already prepared, preference should be given to the trained candidates for appointment to all
- C the additional posts. The preparation of panel omitting to include trained candidates was challenged by Sirazul Haque Mallick and 107 other candidates in C.R. No.2522(W) of 1981. That writ petition was allowed on 17th September, 1987. Aggrieved by that order, an appeal was preferred being F.M.A.T. No.159 of 1988 by the State. The order passed in the writ petition was modified by
- D the Division Bench by its order dated 14th February 1989 directing to give appointment to the petitioners in the existing vacancies and in vacancies arising in immediate future and that appointment would not be offered to any one other than the petitioners. This order was passed on concession given by the State. This order was not complied with. Therefore, a contempt petition was filed and on 30th June, 1989 in the Contempt Petition in case of Sirazul
- E Haque Mallick and 107 others, they were given appointment.

3. Thereafter on 16th July, 1989, one Dibakar Pal and 87 others moved a writ petition being C.O. No.11154(W) of 1989. This writ petition was also allowed by the order dated 13th March, 1991 on the ground that the petitioners are similarly circumstanced as in the case Sirazul Haque Mallick and 107
- F others. Therefore, no different treatment can be given and they were also given benefit of appointment. Against this order, an appeal was preferred before the Division Bench which was dismissed. Thereafter, a contempt petition was filed, in pursuance to that, an order dated 23rd June, 1999 was passed and Dibakar Pal and 87 others were given appointment. Thereafter the present
- G writ petition was filed on 2nd August, 1989. This writ petition was also allowed by order dated 17th January 2001 on the basis of the judgments in *Sirazul Haque Mallick and Dibakar Pal's* cases. The petitioners in this petition, i.e., petitioner and 54 others were trained candidates. Therefore, the learned Single Judge directed appointment of these 55 persons on the same rationale as in the case of Sirazul Haque Mallick and Dibakar Pal. However,
- H the learned Single Judge did not allow similar relief to other persons who were

added as parties between 1999 and 2000. Aggrieved by this order, an appeal was filed before the Division Bench and an objection of delay was raised. However, the Division Bench overruled the objection of delay but declined to give any benefit to the persons who were added in this writ petition in 1999 and 2000 and held that no relief to these persons can be given as they approached belatedly but gave benefit to 55 persons on the ground that the State did not want to expose irregularity and illegality committed in selection in *Sirazul Haque Mallick*' case and on similar reasoning Dibakar Pal's petition was also allowed and soon after Dibakar Pal's case, the present petition was filed in 1989. Therefore, the Court held that the petitioners approached on 2nd August, 1989 soon after the disposal of Dibakar Pal's writ petition dated 16th July, 1989. Hence, there is no delay in the appeal. Secondly, it was also contended that since the life of panel has been exhausted, the appointment cannot be made. This was also overruled. It was contended that *Sirazul Haque Mallick's* case and Dibakar Pal's case also cannot be treated as a precedent because in *Sirazul Haque Mallick*, the order was passed by concession. But this objection was overruled by the Division Bench. Next, it was contended on the basis of principle of sub-silentio that a decision which has not been given on consideration of merits and issues involved therein, that cannot be law declared by the Court and cannot have binding effect. This objection was also overruled by the High Court. Lastly, it was contended that even if any irregularity or illegality has been committed, that cannot be perpetuated. But this submission was also overruled by the Division Bench. Hence the Division Bench dismissed the appeal filed by the State affirming the order of learned Single Judge to give appointment to 55 persons. Justice Sinha, another member of the Division Bench, agreed with the view taken by the senior Judge, but observed that though the order passed in *Sirazul Haque Mallick's* case in 1982 and the series of litigation, these persons did not approach the court because they might be engaged in other avocations and the Court further observed that law and equality help the vigilant and not the indolent. However, the learned Judge agreed with the senior Judge and directed that only those 55 persons would be given the relief. Aggrieved by this order, present appeal was filed by the State.

4. We have heard learned counsel for the parties. Learned counsel for the appellants submitted that the persons who had not approached the Court in time and waited for the result of the decision of other cases cannot stand to benefit. The Court only gives the benefit to the persons who are vigilant about their rights and not who sit on fence. *Mallick's* case was decided in

- A 1982, in 1989 Dibakar Pal filed the petition and thereafter in 1989 respondents herein filed the writ petition. Thereafter petition filed by Dibakar Pal challenging the panel of 1980 was hopelessly belated. Likewise the present writ petition filed by the respondents herein. The explanation that the respondents waited for the judgment in *Mallick's case* or *Dibakar's case*, is hardly relevant. In this connection, learned counsel invited our attention to a recent decision of
- B this Court in *Chairman, U.P. Jal Nigam and Anr. v. Jaswant Singh and Anr.*, JT (2006) 10 500. In that case, referring to various decisions of this Court, it was observed that those who sit on the fence and wait for a favourable order and thereafter wake up to take up the matter, are not entitled to any relief. In para 13 of the judgment, this Court concluded as follows:
- C “In view of the statement of law as summarized above, the respondents are guilty since the respondents have acquiesced in accepting the retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants
- D lost time or while away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the Court should be very slow in granting the relief to the incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be
- E prejudiced if the relief is granted. In the present case, if the respondents would have challenged their retirement being violative of the provisions of the Act, perhaps the Nigam could have taken appropriate steps to raise funds so as to meet the liability but by not asserting their rights the respondents have allowed time to pass and after a lapse of couple
- F of years, they have filed writ petitions claiming the benefit for two years. That will definitely require the Nigam to raise funds which is going to have serious financial repercussion on the financial management of the Nigam. Why the Court should come to the rescue of such persons when they themselves are guilty of waiver and acquiescence.”
- G In the present case, the panel was prepared in 1980 and the petitioners approached the court in 1989 after the decision in *Dibakar Pal's case*. Such persons should not be given any benefit by the Court when they allowed more than nine years to elapse. Delay is very significant in matters of granting relief and Courts cannot come to the rescue of the persons who are not
- H vigilant of their rights. Therefore, the view taken by the High Court condoning

the delay of nine years cannot be countenanced.

5. Now, coming to the question of merit, learned counsel for the appellants submitted that subsequent two Division Benches in case of Dibakar Pal and in the present case have not properly appreciated *Mallick's* case. *Mallick's* case was firstly decided on concession and secondly, it was clearly mentioned that it shall not be treated as precedent. Despite that treating *Mallick's* case as precedent subsequent two Division Bench followed it and decided the matter. In order to appreciate the argument of learned counsel we recapitulate the history of *Mallick's* case.

6. Learned counsel invited our attention to the order passed by learned Single Judge in writ petition filed by *Mallick* which reads as under :

“After hearing learned advocates appearing for the parties and considering the facts and circumstances of the case I dispose of the above Rule on the following terms

- (a) The State respondents are directed to create and/or sanction the posts for appointment of the petitioners as primary teachers in the District of Nadia since it was submitted on behalf of the District School Board, Nadia, that there is no vacancy to appoint the petitioners;
- (b) The President, District School Board is directed to appoint and/or absorb the petitioners as Primary Teachers in different schools under the District of Nadia either in the post of created and/or sanctioned by the Government in terms of this order or in the existing vacancy, if any;
- (c) Such creation and/or sanction of posts of primary teachers would be made by the Government four weeks from the date of communication of this order and the appointment of the petitioners as primary teachers by the District School Board, Nadia would be made four weeks thereafter, after observing all the formalities as required under the law.
- (d) Leave is granted to the petitioners to correct the addresses and the number of the Interview Card sent by the Employment Exchange Card of the petitioner No.4 and correct the address of the petitioner No.1 and they are directed to communicate the same before the authority concerned.”

A 7. Aggrieved by this order dated 17th September, 1987, the matter was taken up in appeal and on 14th February, 1989, Division Bench passed the following order:

“By consent of parties, the impugned decision is vacated and it is substituted by the directions issued in the following terms

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1. That writ petitioners will be offered employment in the order in which their names appeared in the cause title of the writ petition in the posts of trained primary teachers in Nadia District in the existing vacancies and in the existing vacancies arising in immediate future, none other than the writ petitioners shall be offered employment in those vacancies until the petitioners have been first offered such appointment.

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2. In order to give effect to this direction, relaxation in the Rules/Orders will be made if necessary and none of such Rules/Orders shall be pleaded as a bar to the giving of the offer of appointment to any of the writ petitioners pursuant hereto.

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3. Those of the writ petitioners who accept the offer shall be actually appointed within the days of such acceptance. As undertaken to be given to the Court by the first respondent (State of West Bengal) and the fourth respondent (Director of School Primary Education, West Bengal) through their counsel Mr. Sankar Mukherjee, which undertaking is duly accepted, that the aforesaid directions shall be punctually implemented. The Secretary to the Government of West Bengal in the Education Department will register in the Registry an affidavit incorporating the undertaking in the record of the present case upon its being filed. The learned counsel for the first and fourth respondents has clarified that his clients have agreed to *an order being passed in the aforesaid terms as a special case and that it may not be treated as a precedent.*”

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8. When this order was not complied with, a contempt petition was filed and in that contempt petition, the Division Bench on 30th June, 1989 passed the following order :

“In the existing eighty-two vacancies as on June 30, 1989, appointments will be offered to the writ petitioners on and from July 1, 1989 as per directions No.1 contained in the Appeal Bench decision rendered on

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February 14, 1989 in Appeal from original Tender No.159 of 1988; in order to give effect to this direction, necessary relaxation in the existing rules/orders including the rules/orders relating to reservation of vacancies and appointment on compassionate grounds, will be deemed to have been made in view of the direction No.2 issued in that behalf in the decision aforementioned. A

The first eighty-two writ petitioners will report at the office of the District School Board, Nadia at Krishnagar on or before July 7, 1989 between 12 noon and 4 p.m. in order to collect the appointment letters and they will join duty on or before July 10, 1989 at the station at which they are posted. B

In the vacancies occurring hereafter, none other than the writ petitioners shall be offered employment until all the petitioners have been first absorbed; the same direction with respect to the relaxation in existing rules/orders, which were issued in the decision rendered on February 14, 1989 will apply to such appointments, which shall be made within seven days of the occurrence of each vacancies. It is clarified that the bar against appointment of any other person will cover also appointment by way of adjustment as per Government order dated November, 29, 1982. C

Liberty is reserved to the District School Board to direct any of these writ petitioners to whom appointment is offered to produce the identity slip from their Advocate on record, after joining duty, in case there is any doubt as to his identity." D

9. After this, another writ petition was filed by Dibakar Pal and others. An order in that case was passed based on the decision of *Sirazul Haque Mallick's* case following the observations made in *K.I. Shephard & Ors. etc. v. Union of India*, AIR (1988) SC 686 and the writ petition was allowed in the following terms : E

"This writ petition in my view is an instance of multiplicity of proceedings and the State respondents and the Council should have allowed the petitioners the same benefits as are made applicable to those petitioners in the aforesaid Civil Rule. In view of the pronouncement by this Court in the aforesaid appeal on the basis of the judgment of the Single Judge, I grant similar benefits to the petitioners by directing the respondents to appoint the petitioners as F

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A primary teachers against the available vacancies within a period of three months from date.”

10. Aggrieved by the order of the learned Single Judge dated 13th March, 1991, an appeal was preferred before the Division Bench and the Division Bench by order dated 26th June, 1997 dismissed the appeal on the preliminary objection regarding maintainability of the appeal, i.e., that the appeal was preferred by Primary School Council or by the Chairman, *Ad hoc* Committee, Nadia District Primary School Council was held to be not maintainable due to Section 37 of the West Bengal Primary Education Act, 1970 read with Section 93 and the Notification issued by the Government of West Bengal dated 30th June, 1990. It was contended that the Primary School Council was not formed as yet and the Ad hoc Committee is still discharging its functions in terms of Notification in 1990. Therefore, this objection was sustained and the order of learned Single Judge was upheld by the Division Bench. However, the order passed in Dibakar Pals judgment was not followed resulting in filing of the contempt petition. Thereafter, the appointment was given and accordingly the contempt petition was disposed of. Then a review application was filed against the order dated 26th June, 1997 and this came to be disposed of on 30th June, 1999. In the review petition also the Court held that the order passed on 26th June, 1997 will be without prejudice to the rights and contentions of the parties and will not be treated as a precedent by its own force in any other matter and the point remained open to be decided by any appropriate proceedings in future as all the petitioners have been given appointment in the matter. Learned counsel submitted that, in fact, the whole exercise in giving appointment starts from the order dated 30th June, 1989 in *Sirazul Haque Mallick's* case and in that case it was clearly mentioned that this will not be treated as a precedent. Despite this, *Sirazul Haque Mallick's* judgment has been used subsequently in *Dibakar Pal's* case and *Dibakar Pal's* judgment has been followed in the present *Sristidhar Biswas's* case. This clearly goes to show that both Division Bench did not apply their mind to the clear observation in *Sirazul Haque Mallick's* case that this case shall not be treated as a precedent. *Sirazul Haque Mallick's* case never examined the validity of the panel. It was only on account of the concession the matter was decided and it was clearly qualified that it shall not be treated as a precedent. We fail to understand how can *Sirazul Haque Mallick's* case be treated to be a blank cheque for passing appointment orders in subsequent writ petitions in the case of *Dibakar Pal* and *Sristidhar Biswas* (impugned order in the present case) despite the fact that in *Sirazul Haque Mallick's* case, the Division Bench presided by the Chief Justice Desai (as he then was)

clearly clarified that the order is passed on concession. Such order on concession followed with clarification that it shall not be treated as precedent, can not be taken as binding precedent to be followed. We do not want to comment further, but we must make it very clear that any order passed on concession does not lay down the law and it cannot be followed as a precedent. But regrettably the Single Judge and the Division Bench subsequently have taken it to be a law and followed the precedent giving relief to the persons leaving behind large number of persons who were on the panel and who were not parties before the Court. The Court should keep restrain before passing order saddling State Government with financial burden. A panel of 1980 was kept alive up to 2004 without realizing that by this time many more aspirants are waiting in queue. That was not the correct approach and we cannot countenance such action.

11. This Court in the case of *Mittal Engineering Works (P) Ltd. v. Collector of Central Excise, Meerut* reported in [1997] 1 SCC 203 has observed as follows:

“A decision cannot be relied upon in support of a proposition that it did not decide.”

12. Likewise, in the case of *Arnit Das v. State of Bihar*, reported in [2000] 5 SCC 488, this Court has observed as follows:

“When a particular point of law is not consciously determined by the Court, that does not form part of ratio *decidendi* and is not binding.”

Therefore, the judgment given in *Mallick's* case is not binding as it does not decide the law. It cannot be treated as binding precedent.

13. As a result of our above discussion, we are of the opinion that the view taken in the present case (*Sristidhar Biswas's* case), relying on the judgments of Sirazul Haque Mallick and Dibakar Pal, cannot be upheld as the judgment given in *Sirazul Haque Mallick's* case was on concession and it was clearly mentioned that it shall not be treated as a precedent. Hence, we set aside the impugned order of the Division Bench dated 11.6.2004.

14. The appeal filed by the appellants is allowed. There shall be no orders as to costs.

K.K.T.

Appeal allowed.