Shankar K. Mandal & Ors vs State Of Bihar & Ors on 17 April, 2003

Equivalent citations: AIR 2003 SUPREME COURT 4043, 2003 AIR SCW 2980, 2003 AIR - JHAR. H. C. R. 893, (2003) 3 JCR 38 (SC), (2003) 7 ALLINDCAS 461 (SC), 2003 (4) SLT 114, 2003 (6) SRJ 332, 2003 (4) SCALE 203, 2003 (9) SCC 519, 2003 (5) ACE 1, 2003 SCC (L&S) 1145, (2003) 2 SCT 911, (2003) 2 ESC 217, (2003) 97 FACLR 907, (2003) 3 PAT LJR 63, (2003) 3 SUPREME 442, (2003) 4 SCALE 203, (2003) 5 INDLD 768

Author: Arijit Pasayat

Bench: Shivaraj V Patil, Arijit Pasayat

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           CASE NO.:
Appeal (civil)  916 of 1999

PETITIONER:
Shankar K. Mandal & Ors.

RESPONDENT:
State of Bihar & Ors.

DATE OF JUDGMENT: 17/04/2003

BENCH:
SHIVARAJ V PATIL & ARIJIT PASAYAT.

JUDGMENT:
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J U D G M E N T [With C.A. No. 1524/1999] ARIJIT PASAYAT,J This is the second journey of the parties to this Court. The basic issue is whether the appellants herein were legally recruited as teachers during the period from 1981 to 1983.

These two appeals are directed against two judgments of the High Court of Patna. While C.A. No.916/1999 is directed against the judgment dismissing the writ petition filed by 55 persons including the appellants, C.A. No.1524/1999 is directed against the judgment in Letters Patent Appeal whereby the order of the learned Single Judge was affirmed. The writ petition was filed by the present appellants.

Factual background so far as undisputed is essentially as follows:

> About 2000 persons were appointed as primary teachers in various districts of Bihar. As legality of the appointments was questioned in various forums, enquiries were

conducted. Orders were passed terminating the services of the teachers including the appellants who had been appointed during the relevant period. Such orders of termination were challenged before the High Court, which by judgment dated 11.8.1989 directed to take up the appointment of teachers in elementary schools in various districts by inviting applications from the writ petitioners as well as other persons who had been removed because they were illegally recruited by the District Superintendent of Education. It was inter alia observed that if they had become over age during the period of their service on stipend and removal, the same was not to be taken note of. The relevant portion of the judgment which has great relevance so far as the present dispute is concerned reads as follows:

"On the facts of this case, we observe that persons who are qualified for appointments deserve a consideration and appointment, accordingly on such posts for which they are qualified in preference to other candidates who may be qualified. We, accordingly, direct the respondents to proceed to take up the appointments of the teachers in the Elementary Schools on Santhal Pargana and Deoghar by inviting applications from the petitioners and other persons who have been removed because they were illegally recruited by the District Superintendent of Education and select if they satisfy the eligibility conditions and appoint them. In doing so the respondent State must relax the age limit in case of any of the petitioners are found to have become over age during the period of service on stipend and removed. The petitioners and/or any other candidate who may be appointed in the vacancy so created on account of removal of the petitioners and other persons appointed by the District Superintendent of Education shall however not claim any benefit of the appointment illegally given to them by the District Superintendent of Education but shall receive emoluments and other benefits by dint of their selection and appointment in accordance with law."

Said judgment of the High court and connected judgments were assailed before this Court in several special leave to appeal petitions. By order dated 7.2.1991, they were disposed of inter alia with the following directions:

"In these circumstances instead of taking into account the contradictory conclusions reached in these cases we have heard counsel for the parties. We notice that the High Court's direction to the State to hold afresh selection has become final against the State inasmuch as the State has not challenged the order. We direct that within three months and in any case not beyond 30th June, 1991 the selection process contemplated in the High Court's order shall be worked out. In considering the suitability for selection the Rules which were in force at the time the teachers were recruited should be taken into account and disqualification shall not be imposed on the basis of any altered Rules. It will also be open to the State to consider the claim of teachers who came after the altered Rules in terms of the Rules in force. The bar of age, we re-iterate the direction of the High Court shall not be used against the teachers for their selection."

Pursuant to the directions contained in the earlier judgment of the High Court as affirmed by this Court, a fresh exercise was undertaken. Since the present appellants were not selected, writ petitions were filed before the High Court. In the writ petition which was filed by 55 persons and disposed of by the Division Bench the conclusions were essentially as follows:(1) Some of the writ petitioners (Writ petitioners Nos. 5, 18, 23, 28, 41 and 53) were over age at the time of their initial appointment and their cases were, therefore, wholly covered by the directions given by the High Court, and they were not entitled to relaxation of age;(2) So far as writ petitioners Nos. 6, 26, 30 and 55 are concerned, the stand was that they had not crossed the age limit at the time of making the applications for appointment and, therefore, were within the age limit at the time of initial appointment and were, therefore, entitled to relaxation of age in terms of the judgment passed by the High Court earlier and affirmed by this Court. This plea was turned down on the ground that what was relevant for consideration related to the age at the time of initial appointment and not making of the application;(3) As regards writ petitioner No.24, he was under age at the time of appointment. He was permitted to file a representation before the Director of Primary Education and the High Court ordered that his case would be considered afresh;(4)In respect of writ petitioners Nos. 9 and 17, it was noted that they were refused absorption on the ground that they had not made any application in response to advertisement issued pursuant to the order passed by this Court. Since no material was placed to substantiate this stand and no reasons had been communicated for non-absorption, direction was given to consider representations if made by them within one month from the date of judgment. The said judgment is under challenge in C.A. No.916/1999. Appellants have taken the stand that in terms of this Court's judgment, a person who was not over age on the date of initial appointment was to be considered. Though it was conceded before the High Court that they were over age at the time of initial appointment, much would turn as to what is the date of initial appointment. The High Court had not considered as to what was the applicable rule so far as the eligibility regarding age is concerned. Learned counsel appearing for the respondent-State however submitted that having made a concession before the High Court that they were over age on the date of appointment, it is not open to the appellants to take a different stand. The crucial question is whether appellants were over age on the date of their initial appointment. It is true that there was concession before the High Court that they were over age on the date of initial appointment. But there was no concession that they were over age at the time of making the application. There was no definite material before the High Court as to what was the eligibility criteria so far as age is concerned. No definite material was placed before the High Court and also before this Court to give a definite finding on that aspect. What happens when a cut off date is fixed for fulfilling the prescribed qualification relating to age by a candidate for appointment and the effect of any non-prescription has been considered by this Court in several cases. The principles culled out from the decisions of this Court (See Ashok Kumar Sharma and Ors.v. Chander Shekhar and Anr. (1997 (4) SCC 18, Bhupinderpal Singh v. State of Punjab (2000 (5) SCC 262 and Jasbir Rani and ors. v. State of Punjab and Anr. (2002 (1) SCC 124) are as follows:

> (1) The cut off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules; (2) If there is no cut off date appointed by the rules then such date shall be as appointed for the purpose in the advertisement calling for applications; and (3) If there is no such date appointed then the eligibility criteria shall be applied by

> reference to the last date appointed by which the applications were to be received by the competent authority.

It has, therefore, to be decided by the authorities as to which of the three conditions indicated above were applicable to the facts of the case. In the absence of definite material, we think it appropriate to direct the authorities to take a decision within a period of four months from today, as to whether the appellants or one of them was eligible by applying the tests indicated above. These directions shall apply to the writ petitioners who are appellants in the present appeal and to nobody else. The other directions given by the High Court so far as the writ petitioners Nos. 9, 17 and 24 are concerned do not warrant any interference as there has been no challenge by the State Government.

The appellants in C.A. No.1524/1999 have taken a stand that the learned Single and the Division Bench of the High Court proceeded on the basis as if they had questioned non-inclusion in the panel prepared in 1984-85. They were appointed in the year 1983 and, therefore, the question of their assailing non-inclusion in the panel in 1984-85 does not arise. It was further submitted that there was specific challenge as regards conclusion that they were overaged. This was pointedly urged before the High Court (both before learned Single Judge and Division Bench). But the same was not considered. Learned counsel for the State Government in opposition submitted that the appellants had taken different stands before the High Court and it is not open to them to take different stands before this Court. He, however, accepted that in the memorandum of appeal before Division Bench age question was raised. Learned Single Judge proceeded on the basis as if the writ petitioners had staked their claim based on the panel which was prepared in 1984-85. This is evident from the following observations:

> "The petitioners have filed the present applications for their appointment to the post of Assistant Teachers in the district of Dumka and Sahebganj on the basis of the panel which was prepared in 1984-85."

Before the Division Bench, as the records show, there was no stand taken that the learned Single Judge proceeded on erroneous factual premises. On the contrary, the following observation of the Division Bench would show the definite stand that was taken by the appellants before it:

> "This Letters Patent Appeal arises of the impugned order dated 23.4.1988 passed by the learned Writ Court wherein the appointment to the post of the Assistant Teachers in the District of Dumka and Sahebganj on the basis of panel, which was prepared in 1984-85 was under challenge."

When the aforesaid aspects were pointed out to the learned counsel for the appellants, he submitted that the learned Single Judge and the Division Bench have erroneously recorded the submissions. They also did not consider specific plea that appellants were not overaged.

It is not open for the appellants to take such stand before this Court, as they are bound by the observations of the High Court. If there was any wrong recording of the stands, the course to be adopted is well known.

If really there was no concession, or a different stand was taken, the only course open to the appellant was to move the High Court in line with what has been said in State of Maharashtra v. Ramdas Shrinivas Nayakand Anr. (1982 (2) SCC 463). In a recent decision Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd. and Ors. (2002 AIR SCW 4939) the view in the said case was reiterated by observing that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to the appellant to contend before this Court to the contrary.

It is also not open to contend that a plea raised was not considered. In Daman Singh and others, etc. vs. State of Punjab and others, etc. (AIR 1985 SC 973) it was observed (in para 13) as follows:

> "The final submission of Shri Ramamurthi was that several other questions were raised in the writ petition before the High Court but they were not considered. We attach no significance to this submission. It is not unusual for parties and counsel to raise innumerable grounds in the petitions and memorandum of appeal etc., but, later, confine themselves, in the course of argument to a few only of those grounds, obviously because the rest of the grounds are considered even by them to be untenable. No party or counsel is thereafter entitled to make a grievance that the grounds not argued were not considered. If indeed any ground which was argued was not considered it should be open to the party aggrieved to draw the attention of the court making the order to it by filing a proper application for review or clarification. The time of the superior courts is not to be wasted in enquiring into the question whether a certain ground to which no reference is found in the judgment of the subordinate court was argued before that court or not?"

In usual course stands taken before this Court would have been ignored in view of the settled position of law indicated above. But, in view of the fact that in the connected matter, directions have been given for consideration of the age aspect, it would be appropriate if similar consideration is made in respect of the appellants. The directions shall operate in respect of present appellants also.

Appeals are disposed of on aforesaid terms. There shall be no order as to costs in both the appeals.