

(2016) 02 CAL CK 0051
In the Calcutta High Court
Case No : W.P.C.T. No. 121 of 2010

Amal Kumar Jana and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-02-2016

Acts Referred:

Citation : (2016) 02 CAL CK 0051

Hon'ble Judges : Rajiv Sharma and Shivakant Prasad, JJ.

Bench : Division Bench

Advocate : Pulakesh Bajpayee, for the Appellant;

Final Decision : Dismissed

Judgement

Shivakant Prasad, J.—1. This writ application is directed against the impugned order dated 26.3.2010 passed by the learned Second Bench of the Central Administrative Tribunal in O.A. No. 67 of 2009 with O.A. 198 of 2009 and O.A. No. 606 of 2009.

2. Chronology and events of the instant case is that the applicants had applied in terms of the advertisement No. 2/2007 dated 12-18 January, 2008 for the posts of "Nursing Orderly" in Group -"D" and were called for appearing in the written tests held on 31.3.2008 and were declared qualified in the written tests vide the Cause Title of the applicants (Supra.) who are also applicants in other analogous original applicants pending adjudication before the Hon'ble Tribunal Viz. O.A. No. 67 of 2009 with O.A. 198 of 2009 and O.A. No. 606 of 2009.

3. The qualified applicants were called for interview held on various dates but due to certain extraneous reasons on the plea of short listing for favoring the near relations and friends of the working people in the ESIC Hospital and other attached units, like canteen and security units were not selected though having been declared qualified in the written tests and doing well in the interview, on the plea of short-listing the panel.

4. The provision for the process of selection is one that is written test as held on 31.8.2008 and not more. The respondents are not entitled to compel or to insist the duly qualified persons in the written test to be the party in the interview or vive voce test or both for the purpose of then indulging the imaginary process of "Short listing" as held and intimated by them in their communication No. 412A-12/24/1/MS/2008/5716 dated 07.01.2009.

5. In that position of the matter the prime criteria of the process of selection holding comprehensive written test has been made not only subordinate to the ALTERNATIVE PROVISIO VIZ. "Or interview of both" vide condition No. 8 & E ibid, in the said advertisement No. 2/2007 website No. www.exic.nic.in dated 12-18th January, 2008.

6. The stipulations run as "Or interview or both" in exclusion of the proviso Mode of Election : Open competitive examination (objective type) must not be constructed as a single set or circumstances; it has to be read as EITHER competitive written test and alternative provision (or) interview or both. It is further clarified that the existing proviso cannot be said to be capable of giving scope for indulging in and/or resorting to the proviso "Or both" such view would get support of the solemn decision/interpretation/ruling of the Hon'ble Court in course of Their interpretation "Either.....or" reported in , AIR 1958 MP-16 Dictionary Meaning of the "Either Or" is ONE nor both; if the first one is attempted the second one "or" becomes redundant. It should be construed one of the Two and not both (Ref. Pieworth 68 LT 1879 Ch. 328 and Ch. 642) Pieworth English Dictionary 1899. Hence, the said competitive written test is not capable of being subjected to and/or subordinated to the second alternative "Or always presupposes "Either"- not concurrently useable. Clause "or both" such as tea or coffee not both. It is also not interchangeable with the process of short listing" as wrongly and arbitrarily used in the respondents letter dated 07.01.2009.

7. The applicants herein further state that they have been declared successful/qualified in the process of selection as being the written tests held on 31.3.2008 and thus have acquired the right to be recruited, relying on the genuine prescribed provision, contained in the said Advertisement in terms of the confirmed and substantial proviso vide condition No. 8 and E below and Clause 14 ibid and thereby they are entitled to be recruited forthwith as per the prevailing rules or recruitments of the ESIC Hospital (EZ) getting the alleged final selection list of candidates dated 31.12.2008 set aside in limine.

8. With the above facts the writ petitioners along with some other moved original applications before the learned Central Administrative Tribunal assailing the purported selection process for filling up the post of Nursing Orderly in the Hospital and Occupational Disease Centre under Ministry of Labour and three original applications were moved before the learned Central Administrative Tribunal and heard by the tribunal analogously viz. O.A. No. 67/09, O.A. No. 198/09 and O.A. 342/09.

9. By order dated 26.3.2010 the learned Tribunal disposed of the original applications with the following observation:

"There is nothing in law in short listing candidates on the basis of a written test and subsequently basing the selection on the performance in the interview. It is also seen that as per the advertisement clause 8 had categorically laid down that the method of selection would be written test or interview of both. The applicants had participated in the selection process. Having participated they cannot now say that the selection process was wrong. It is also seen that the job requirements for that of Nursing Orderly is elementary knowledge of First Aid including one year's experience in handling or dressing wounds. This being the job requirement an interview was a perfectly legitimate method to establish the credential of candidates and to assess their suitability.

, AIR 1958 MP-16 Indore Bench in the case of M/s. Govindram Ramprasad v. Assessing Authority, is also not applicable in this matter as it deals with sales tax. The ratio of the case does not apply in the instant case. We are, therefore, dismissed. No costs. This also disposes off O.A. 67 of 2009 and O.A. 198 of 2009 where orders will be same."

10. The specific contention on behalf of the petitioners is that the learned Tribunal did not consider the case made by the petitioner in the original applications and only taking note of the facts and reference of the respondents as made in their reply passed the order impugned and dismissed the original application that several act of favoritism and nepotisms were pointed out by the petitioner but the learned Tribunal did not adhere to such illegalities and passed the impugned order, thereby learned Tribunal has failed to appreciate that the most of the selected 86 persons, were previously working under the authority as contractual worker or the near relatives of the candidates are working in the institute and further deviated from the facts and circumstances that pick and choose method was adopted for selecting the candidates.

11. The learned Tribunal has also failed to appreciate that in the same selection process two different methodology has been adopted, viz. in the case of Group-C staff selection process there was no interview but only on the basis of written test which was held and merit list was drawn whereas in the case of the petitioner after qualifying in the written test thereafter interview was held just to frustrate the claim of the genuine bona-fide candidates.

12. It is pointed out that one candidate namely Puspen Halder, Roll No. 151500 who is in the final panel (Sl. No. 18), But in the written panel Roll No. 151500 was the name of Swarup Paul, Puspan Halder was a illegal candidate, who has not attended any exams of ESIC.

13. Accordingly, it is contended that the selection was made following malicious intention as the petitioner No. 1 obtained 77 out of 120 in the written test and he was given only 20 out of 100 in the interview. It seems that the inspite of doing well in the written test, the petitioners were excluded from the list of selected

candidates on the basis of marks in interview, which are in the hand of the respondents and surprisingly even doing better in the written test than the others the petitioners were ousted from the zone of consideration in terms of result of interview, where as the candidates who got more or less 30 to 35 in written test have been given higher marks in the interview only to place him or her in the selected list.

14. Accordingly being aggrieved by and dissatisfied with the impugned order dated 26.3.2010 passed by the learned Tribunal the petitioners preferred the instant petition with a prayer for setting aside the order dated 26.3.2010 passed by the learned Central Administrative Tribunal in O.A. No. 67/09, O.A. No. 198/09 and O.A. 342/09 and further prayed for directing the respondent No. 2 to rescind, cancel and withdraw the entire selection process for filling up the post of Nursing Orderly under the respondents and all steps taken thereon and has further prayed for rescind of the impugned judgment passed by the learned Tribunal.

15. The respondent Nos. 2 to 4 have filed affidavit-in-opposition denying all material particular statement and allegations made in the writ petition with the contention that the allegation of short listing for favoring near relations does not and cannot arise at all as writ petitioner were not selected.

16. It is pointed out on behalf of the said respondents that in terms of advertisement the petitioners took part in such selection process without any objection and now by reason of their being unsuccessfulness in the process of selection they have no locus standi to challenge the selection process as the proposition has been well settled by the Hon'ble Apex Court that it is not open for the unsuccessful candidates to challenge the selection process in which they had also participated.

17. It is pointed out the Admit Card and OMR sheet bearing Roll No. 151500 shows the name of Puspen Halder who was a bona-fide candidate and that the name of Swarup Paul was shown erroneously in written panel against Roll No. 151500 of Puspen Halder. Accordingly, the respondents have submitted that the writ petition is devoid of merit and liable to be dismissed in limini with cost.

18. It appears from the cause title of the writ petition that Puspen Halder is not a writ petitioner who could had raised legitimate claim of his name replaced by said candidate Swarup Paul the verification card for the post of Nursing Orderly annexure -01 to the affidavit-in-opposition filed by Dr. Kalyan Kumar Paul clearly goes to show that his date of birth has been mentioned as 22.10.83 and his father name being Sadhan Halder bearing Roll No. 151500. A true copy of another verification card shows that name of Puspen Halder has been noted in place of Swarup Paul.

19. It would appear from the list of selected candidate at page 82 of the writ petition that on the basis of the performance of the candidate in the written test held on 24.8.2008 and 31.8.2008 for the recruitment to the post of

Physiotherapist, Occupational Therapist, Staff Nurse, Pharmacist, Audiometer Tech. Optometrist, ECG Test, Dental Tech. ANM, Lab Asstt., Jr. Radiographer, O.T. Asstt. & Jr. MRT& on the basis of interview held on and from 20.11.2008 to 26.11.2008 & 27.11.2008 to 08.12.2008 for recruitment to the post of Nursing Orderlies, the following candidates are selected provisionally subject to the verification of the original certificates in support of qualification, age, community, experience as claimed etc. up to the satisfaction of the appointing authority. The selection of candidate was purely provisional and at Sl. No. 18 the name of candidate Puspen Halder bearing Roll No. 151500 has been listed as selected candidate and against the same Roll No. at Sl. No. 215 name of Swarup Paul and inviting our attention learned Counsel for the petitioners contended that there has been mala fide and illegality in the selection process but this allegation has been duly confronted by the respondent at paragraph -9 wherefrom it is depicted OMR answer sheet and the verification card in respect of the selected candidate Puspen Halder has been given annexed to show that it was Puspen Halder who had appeared from the examination and Swarup Paul name has been erroneously written in the panel against Roll No. 151500 of the candidate Puspen Halder. According to respondents such name crept in the panel through mistake and inadvertence in the writ petition there is no verification card in the name of Swarup Paul as appearing in Sl. No. 215. The writ petitioners have also not annexed any copy of verification card bearing the said Roll No. and similar Roll No. Puspen Halder having been issued to Swarup Paul. Obviously the said Swarup Paul is not writ petitioner before us. Therefore, it can also not to be considered that intentionally or by way of illegality on the part of the authority holding the selection process, name of Swarup Paul was incorporated.

20. In compliance of this Court's order dated 06.10.2015 the learned Registrar (Administration), Appellate Side, High Court, Calcutta, verified the files being the dossier of individual candidate for the post of Nursing Orderly finally selected through the process of selection test and it has been found that on examination of each and every files separately maintain and recording the names and Roll Numbers of the selection candidates in the first column, father's name/husband's name in the second column, date of interview in the third column whether the Admit Card/verification card was lying with the file or not in the fourth column, marks obtained in interview in the fifth column and discrepancy in the record in sixth/last column. It was found that one Himangsu Das being Roll No. 150468 was placed before the Hon'ble Court but his name does not appear in the official merit list on General (UR) candidates. As such, it was not possible to mention the marks obtained by said Himangsu Das (Sl. No. 15) of UR list. Again in the select list of UR candidate, in Serial No. 15, name of one Susma Mondal (Sarkar) having Roll No. 151468 is appearing, but the individual file of the said Sushma Mondal (Sarkar) in the bundle placed before the learned Registrar.

21. It transpires from the report of the learned Registrar that while putting the marks obtained by the candidate in selection test on the separate sheet it has

been detected that the name of Himangsu Das having Roll No. 150468, whose file was produced by the ESI Authority in the bundle of UR candidates, was selected as SC candidate and his name is appearing in the merit list No. 150468.

22. Dr. K.K. Pal, Medical Superintendent has submitted his report vide No. 412-C-18/15/57/2010-Estt. Dated 14.10.2015 stated that this inadvertent mistake has occurred because of almost identical Roll numbers allotted to the above candidate barring difference of a single digit (fourth digit from the left). The file of Susma Mondal (Sarkar) was submitted before the Hon"ble Court to re-examine the matter with a prayer to condone the inadvertent mistake on the part of ESIC Hospital Authority.

23. In affidavit-in-reply the deponent Amal Kumar Jana averred that the respondent published advertisement dated 10th January, 2008 inviting applications for the post of "Nursing Orderly" as Group- "D" staff and total number of posts that were declared to be filled was 34 in numbers including the reservation under various categories.

24. The requisite qualification for the said post was to the extent of middle standard elementary knowledge of First Aid and one year experience in handling of Dressing Wounds and age group was fixed as 18-27 years.

25. The mode of selection was declared by open competitive examination (objective type) or interview or both.

26. The petitions being eligible and with all requisite qualifications have made application for appointment to the said post.

27. The authority conducted the written examination of candidates who were found eligible including the petitioners and the petitioners were duly qualified in the written examination. The petitioners were qualified in the written examination and the date of interview was shown by publishing the list of qualified candidates and such date of interview was mentioned against the respective names.

28. The petitioners duly appeared before the Selection Board but were declared unsuccessful in the interview although the written examination result was fairly with high marks.

29. The final selection list was published subsequently and it was alleged that large scale manipulations were done in the matter of selection and the persons who were either relatives of the higher authority or those who are in some way or the other are related to the ESI Organization, have been given employment although in the written examination such candidates have scanned very poor marks. But the petitioners failed to substantiate the said allegations or fails to proof by any cogent evidence before us the said allegation of large scale manipulations in the matter of selection process.

30. It appears that such contention is wishful thinking on the part of the

petitioners who have been unsuccessful. It is admitted fact that the advertisement published goes to show that the mode of selection was admittedly declared by open competitive examination (objective type) or interview or both. Therefore, having taken interview of the candidates for short listing was made it cannot be said that the said procedure for holding interview of the successful candidate in the written examination is beyond the rule.

31. It is admitted by the writ petitioner that they were unsuccessful in the interview board only given employment to the relatives of the higher official of the respondents does not find favour of the Court.

32. It is pointed out that Puspen Halder is the person of choice of the authority who has not participated in the written examination as well as in the interview board but the list of the selection candidates goes to show that he had participated in the examination as well as before the interview board and was offered an employment on proper scrutiny and being successful. We are unable to find that one Swarup Paul was real candidate Roll No. 151500 Sl. No. 215 because no OMR sheet and the verification card appears to have been submitted on behalf of the writ petitioner to support this fact with said allegations. Said Swarup Paul is not also the writ petitioner claiming employment in the said post. Therefore, this Court has no other alternative but to accept the contention of the respondent authority that the name appeared in respect of the self same Roll number through inadvertence.

33. It is settled principle of law that the writ petitioner being unsuccessful candidate having participated in the selection process of written examination and interview has no locus standi to maintain the writ petition.

34. The Court referred to the judgment in *Om Prakash Shukla v. Akhilesh Kumar Shukla & Ors.* [, (1986) Supp. SCC 285] where it has been held specifically that when a candidate appears in the examination without protest and subsequently found to be not successful in the examination, the question of entertaining the petition challenging such examination would not arise. The Court further made observations in para 34 of the judgment to the effect:

"There is thus no doubt that while question of any estoppels by conduct would not arise in the contextual facts but the law seem to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not "palatable" to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process."

35. In the context above, we are of the considered view and hold that the writ petitioner, being unsuccessful candidates cannot turn back and assail the selection process, more so, when the selected candidates have not been impleaded as the private candidates in the writ petition. Ergo, we find that the impugned judgment is devoid of merit.

36. The writ petition is thus, dismissed.

37. Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

Rajiv Sharma, J.—I agree.