

(2016) 03 CAL CK 0048
In the Calcutta High Court

Case No : W.P. Nos. 29665 (W) of 2013, 24062, 24027 (W) of 2012 and 19898 (W) of 2014

Asim Kumar Giri and Others

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 18-03-2016

Acts Referred:

West Bengal Primary Education Act, 1973 — Section 106, Section 107

Citation : (2016) 03 CAL CK 0048

Hon'ble Judges : Debangsu Basak, J.

Bench : Single Bench

Advocate : Bimal Kumar Chatterjee, Sr. Advocate and Soumen Kumar Dutta, Advocate, for the Appellant; Animesh Banerjee and Tarak Karan, Advocates, for the Respondent

Final Decision : Disposed off

Judgement

Debangsu Basak, J.—1. Four writ petitions have been taken up for hearing together.

2. The petitioners have assailed a panel prepared by the members of the Selection Committee for the purpose of recruitment to the post of primary teachers on the basis of the advertisement of 2009 under the Purba Medinipur District Primary School Council.

3. For the sake of convenience the fact scenario of W.P. No. 29665 (W) of 2013 has been taken into consideration. It has been contended on behalf of the petitioners that, the rules of the selection process were changed midstream subsequent to the advertisement inviting participation in the selection process. The authorities had published an advertisement on August 30, 2009 inviting applications for the post of primary teacher of Purba Medinipur District Primary School Council. The authorities by a Notification dated April 23, 2010 which is subsequent to the commencement of the selection process has changed the rules of the selection. Apparently the panel has been prepared on the basis of the April

23, 2010 notification. The authorities should have applied the rules as notified by the Notification dated July 27, 2009. Having not done so, the panel is bad. In support of the contention that, rules of the selection process cannot be changed midstream, reliance has been placed upon , 2013 Volume 4 Supreme Court Cases page 540 (Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.) and , 2008 Volume 3 Supreme Court Cases page 512 (K. Manjusree v. State of Andhra Pradesh & Anr.).

4. Referring to the marks awarded to the candidates appearing in the examination it has been contended that, about 1,900 candidates have been given the same marks. Award of the same marks for such vast amount of candidates raises suspicion. Such a fact is beyond the probabilities of a normal situation. Such facts would allow a reasonable person to infer that the preparation of the panel was not fairly done, at the very least. Referring to the marks obtained by the panelists, and comparing the marks in the academic qualification and it has been commented that a number of panelists who had obtained 64.25% marks had been called for the interview. The cut-off mark in the selection process is 64.25%. Persons receiving less than 64.25% are in the panel. These facts amply demonstrate the illegality in the selection process. In view of the wide scale illegalities the selection process should be directed to be done afresh. Reliance has been placed upon , 1994 Volume 4 Supreme Court Cases page 165 (Krishan Yadav & Anr. v. State of Haryana & Ors.), , 2002 Volume 3 Supreme Court Cases page 146 (Union of India & Ors. v. O. Chakradhar), , 2005 Volume 8 Supreme Court Cases page 180 (Union of India through the Secretary, Ministry of Home Affairs & Ors. v. Joseph P. Cherian) and , 1970 Volume 1 Supreme Court Cases page 648 (The Bihar School Examination Board v. Subhas Chandra Sinha & Ors.) for the contention that, when the selection process stands vitiated the entire panel must be set aside. Individual cases of innocence would not be relevant. The fact that all the panelists are not parties in the writ petition would also not impede the grant of the relief of setting aside of the panel.

5. It has been submitted that, the composition of the Selection Committee is not in accordance with the rules prescribing the composition of the Selection Committee. He has further submitted that, the Selection Committee comprises of persons who have a particular political disposition. The political disposition of the members of the Selection Committee vitiates the entire selection process. In view of the political disposition of some of the members of the Selection Committee, it would be biased. Persons with a particular political disposition in a Selection Committee would allow such Committee to discriminate on the basis of the political disposition of a candidate. Similarly situated and circumstanced candidates would be unfairly discriminated against on the basis of a political disposition of such candidate. The selection process, therefore, has not been fair to the candidates.

6. Referring to the affidavit in reply, it has been submitted that, the relatives of

the Selection Committee had appeared before the Selection Committee and that, such relatives have been given appointment. This, according to the petitioners, is a gross irregularity.

7. The added respondents have adopted the submissions on behalf of the petitioner. Referring to various paragraphs of the affidavit of the respondent Nos. 4 and 6 it has been submitted that, the selection process having commenced in 2009, the notification dated April 23, 2010 purporting to lay down the award of marks changes the rule of the selection process. In view of the change of the rule of the selection process after its commencement the selection process should be directed to be done afresh.

8. On behalf of the respondents opposing the writ petition the maintainability of a writ petition at the behest of 51 persons not having a jural relationship amongst each other has been questioned. In W.P. No. 29665 (W) of 2013 there are 51 writ petitioners. The writ petitioners do not have a common cause of action. In any event, there does not exist any jural relationship between all the 51 writ petitioners. Consequently, the writ petition at the behest of the 51 writ petitioners is not maintainable. In support of this contention reliance has been placed on , 2011 Volume 5 Calcutta High Court Notes (Cal) page 420 (Mrinal Kanti Das v. State of West Bengal).

9. It has been submitted that, the selection process commenced on the date of the written examination. The advertisement dated August 30, 2009 is a notice to the eligible candidates that, the posts of primary teachers would be filled up through selection. The marks to be awarded in the written examination were prescribed by the notification dated July 27, 2009. Such notification lays down that a candidate appearing in the selection process would be adjudged on the basis of aggregate 50 marks out of which 30 marks would be for written examination and 17 marks for aptitude test/interview and 3 marks for extra curriculum activities. The subsequent notification dated April 23, 2010 merely clarifies the 17 marks for aptitude test/interview. The notification dated April 23, 2010 prescribes that out of the 17 marks, 12 marks would be for the marks obtained in Madhyamik or its equivalent examination and 5 marks for interview of General Knowledge.

10. Relying upon 1978 Volume 1 Calcutta Law Journal page 517 (Dwijendra Mohan Banerjee v. State of West Bengal & Ors.) and , 2006 Volume 6 Supreme Court page 395 (K.H. Siraj v. High Court of Kerala & Ors.) and 2010 Volume 1 West Bengal Law Reporter (Cal) page 483 (Gopal Sha & Ors. v. State & Ors.) it has been submitted that, the clarification made by the notification dated March 18, 2010 does not prejudice any of the participating candidates. Such a course of action is permissible.

11. The selection process was conducted in terms of the West Bengal Primary School Teachers Recruitment Rules, 2001. The panel was duly prepared in accordance with law. The prepared panel was sent to the Government for

approval. The panel was duly approved by the Government. The power of the Government to approve the panel is not under challenge. None of the writ petitioners had made any representation before the Director of School Education that the panel is not in accordance with law. A large number of persons in the panel have been given appointment. This appointment is not under challenge. There is no allegation that the Director of School Education that, he did not discharge his duties in considering the panel for approval. The performance of the candidates in the selection process has been the sole criteria for consideration in the preparation of the panel. The Section Committee has been constituted in accordance with Rule 7(2) of the West Bengal Primary School Teachers Recruitment Rules, 2001. The presence of personnel from politics is one of necessity. Their presence in the Selection Committee does not vitiate the selection process. Reliance has been placed on , 1990 Volume 1 Supreme Court Cases page 613 (Charan Lal Sahu v. Union of India & Ors.) and , 1994 Volume 6 Supreme Court Cases page 651 (Tata Cellular v. Union of India) in support of the proposition of the doctrine of necessity.

12. So far as a large number of persons receiving the same marks are concerned it has been submitted that, more than 59,000 candidates had participated in the selection process. In view of such large number of candidates there has to be repetition of the same marks for quite a few of the candidates. The same does not ipso facto vitiate the selection process. Reliance has been placed on , 2009 Volume 4 Supreme Court Cases page 516 (Jyotish Kaiborta & Ors. v. State of Assam & Ors.) in this regard.

13. On consideration of the pleadings and the rival contentions of the parties, the following issues arise in these writ petitions:--

"1. What is the date of commencement of the impugned selection process?

2. Was the rules of the selection process changed after its commencement? If so, does it vitiate the selection?

3. Are there any illegalities in the preparation of the panel as alleged?

4. Does the illegalities alleged in respect of the preparation of the panel warrant an order of setting aside of the same?

5. Was the Selection Committee constituted in accordance with law?

6. Does the presence of political persons in the panel vitiate the selection process on the ground of bias?

7. Is a writ petition filed by a number of persons not having any jural relationship amongst each other maintainable?"

14. The selection of primary teachers for Purba Medinipur District Primary Council is under challenge.

15. The selection of a teacher for the post of a primary school teacher is

governed by the West Bengal Primary School Teachers Recruitment Rules, 2001. By a notification dated July 24, 2009 the authorities had introduced an amendment to the Recruitment Rules of 2001. The amendment relates to the total marks for assessment of a candidate. It specifies that the total marks would be 50. 30 marks would be awarded for written examination, 17 marks for aptitude test/interview and 3 marks for extra curriculum activities.

16. The advertisement for the selection process is dated August 30, 2009. By a notification dated April 23, 2010 the authorities have specified that out of the aptitude test/interview 12 marks would be awarded for the marks obtained in the Madhyamik examination and the Viva Voce would be for 5 marks. The written test of the selection process was held on June 17, 2012. The interview had commenced on and from September 4, 2012. Subsequently a panel was prepared. It is the stand of the authorities that the candidates participating in the selection process were awarded marks in terms of the notifications dated July 24, 2009 and April 23, 2010. The panel was sent for approval to the State Government. The State Government had approved of the same.

Issue No. 1

17. The contention on behalf of the respondents that the selection process commenced on June 16, 2012 being the date of the written examination cannot be accepted. The selection process was put into motion by the advertisement dated August 30, 2009. The advertisement invites application from eligible candidates desirous of offering their candidature for the selection of primary teachers. It prescribes the modalities of the selection for such post. On and from the date of the advertisement an eligible candidate becomes aware of the requirements of the selection and the factum of the selection. For all practical purposes the date of the advertisement being August 30, 2009 has to be considered as the date of the commencement of the selection process.

18. The first issue is answered accordingly.

Issue No. 2

19. The issue whether the "rules of the game" after the commencement of the selection process could be changed to impose a more rigorous scrutiny has been referred to a Larger Bench of the Supreme Court in *Tej Prakash Pathak (supra)*. It has considered *Manjusree (supra)*.

20. In *Manjusree (supra)* the Supreme Court has found the introduction of requirement of minimum marks for interview, after the entire selection process consisting of written examination and interview was completed, to be amounting to changing the rules of the game after the game was played and, therefore, impermissible.

21. In *K.H. Siraj (supra)* the Kerala High Court had prescribed cut-off marks for the interview in the selection process for appointment to the Kerala Judicial Service. It has been held that, under the Kerala Judicial Service Rules, 1991 it

was open to the High Court to supplement the rule with a view to implement them by prescribing relevant standards in the advertisement for selection.

22. Dwijendra Mohan Banerjee (supra) relates to the power of the State Government to retire a Government servant prematurely. It has been held that, it can be done so only on the recognized exceptional grounds. On facts the impugned order of compulsory retirement was set aside.

23. Gopal Sha (supra) recognizes the power of the State to make Rules under Section 106 of the West Bengal Primary Education Act, 1973.

24. Subsequent to the commencement of the selection process the authorities have introduced the notification dated April 23, 2010. The notification is as follows:--

"In exercise of power vested with the State Government under Section 107 of the West Bengal Primary Education Act, 1973, and in continuation of this Department Notification No. 383-SE(P)/10M-06/2009, dated 24.07.2009 the following guidelines are issued to lay down the distribution of marks that are required to be followed while awarding the specified 17 marks to candidates during aptitude test/interview in the selection process for appointment of Primary School Teachers:--

1. For marks obtained in Madhyamik or its equivalent examination - 12 marks.

Note: The procedure for awarding such 12 marks on the basis of Madhyamik or equivalent examination will be the percentage of total marks obtained by a candidate in the Madhyamik or equivalent examination in all the compulsory subjects taken together against the maximum (full) marks available in those subjects. Thus if the full marks in those subjects is 800 and if the candidate has also obtained 800 then he will be awarded 12 marks. If he has obtained 400 marks in such subjects he will be awarded 6 marks and so on.

2. Interview on General Knowledge- 5 marks.

Chairpersons of the District Primary School Councils are requested to strictly follow the above guidelines of distribution of marks for aptitude test/interview in the selection process for appointment of Primary School Teachers accordingly."

25. The notification dated April 23, 2010 in my view clarifies the method of award of the 17 marks under the head of aptitude test/interview. It supplements the July 27, 2009 notification and introduces a welcome transparency in the process of award of 17 marks out of an aggregate of 50. It prescribes 12 marks out of 17 marks to be given for the academic qualification that is the Madhyamik result. The process for calculating the 12 marks on the basis of Madhyamik result has been elaborately laid down. It leaves 5 marks for the interview. Award of marks in an interview is on the basis of subjective satisfaction of the interview board. It is extremely difficult for a Court to find out whether the marks given in the interview is the correct appreciation of the performance of the candidate at

the interview or not. Should the notification dated July 27, 2009 be allowed to remain in the form and manner as it stood without the notification dated April 23, 2010 then the Selection Committee would have had to decide on what quantum out of 17 marks would be reserved or granted for aptitude test and the quantum for the interview. The State is dealing with a large number of District Primary School Councils. Different School Councils, therefore, would have had the liberty to apportion the 17 marks for aptitude test/interview in the manner they deemed proper. That would have given rise to an avoidable anomalous situation arising amongst various School Councils. Different School Councils would have prescribed different modalities for award of marks for aptitude test/interview. The notification dated April 23, 2010 brings about a uniformity amongst the District Primary School Councils in this respect. It has another salutary effect. It reduces the quantum of marks available to the interview Board to be granted in an interview. It prescribes a reasonable methodology of assessing a candidate on the basis of an empirical evidence placed before the Council, that is, the Madhyamik results. The notification dated April 23, 2010 significantly reduces the scope for arbitrariness and discrimination available in an interview Board assuming that an interview Board would be discriminating amongst the appearing candidates and acting arbitrarily.

26. The notification dated April 23, 2010 has not altered the basic parameters of the award of marks for the selection as governed by the notification dated July 29, 2009. A candidate participating in the selection process is still assessed on the aggregate of 50 marks and in the three broad heads as prescribed therein. The basis for considering the 17 marks under aptitude test/interview has been specified in the notification dated April 23, 2010. In such perspective the notification dated April 23, 2010 is a supplement to the notification dated July 29, 2009 without altering its structure.

27. In such view, the notification dated March 18, 2010 cannot be construed to mean that, it has changed the rules of the selection process after the commencement of the selection process.

28. The second issue is answered accordingly.

Issue Nos. 3 and 4

29. Approximately 1,900 candidates have been awarded the same marks in the written examination as also the Viva Voce. The petitioners have relied upon 3 lists prepared on the basis of the impugned panel. The first list relates to the number of candidates securing uniform marks. A large number of aggregate of 1739 in number over all the categories participating category candidates have secured 19 out of 20 in the objective written examination. These facts by itself raise questions, if not suspicion. However, the facts and figures canvassed on behalf of the petitioners have to be examined in the light of the total number of candidates participating in the selection process. Approximately 59,000 candidates have participated in the selection process. The total marks to be

awarded is 50. 50 marks is divided in three categories, 30 being earmarked for written examination, 12 for academic performance, 5 for interview and 3 for extra curriculum activities. The award of same marks to such number of candidates has to be looked at from the point of view of the number of candidates participating in the selection process.

30. The entirety of the 59,000 odd participating candidates has to be assessed on 50 marks. 30 marks are on written examination. It is quite possible for a section of the participants to score the same marks for the written examination. 12 marks are on the basis of marks obtained in Madhyamik examination. Again the same possibility arises. 5 marks are on interview and 3 marks for extra curriculum activities. The net position may throw up a number of persons to have the same marks in each of these categories when the number of participants is in excess of 59,000. I do find any justification in the suspicion voiced on behalf of the petitioners. Moreover, mere suspicion is not sufficient to interfere with the panel.

31. Jyotish Kaiborta (supra) relates to a select process for Lower Division Assistants in the Transport Department, Government of Assam. It has held that, a candidate who secures low or very low marks in written examination being awarded very high marks in Viva Voce might be a ground for suspicion. However, suspicion simplicitor would not be sufficient to interfere with the panel.

32. The third and the fourth issues are answered in the negative and against the petitioners.

Issue Nos. 5 and 6

33. The fifth and the sixth issues are taken up together for the sake of convenience.

34. There are persons from the political world in the Selection Committee. Their presence has been sought to be explained by the doctrine of necessity. The same doctrine has been relied upon to justify the possible empanelment of relatives of the members of Selection Committee.

35. In Charan Lal Sahu (supra) the validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 was under consideration. The Act of 1985 provided for matters relating to the processing of claims and utilization by disbursal or otherwise of amounts received in satisfaction of the claims. Under the Act of 1985, the Central Government took over the exclusive right to represent the gas victims. The validity of demanding rights of the victims and citizens to fight for and assert their own grievances was upheld, inter alia, by applying the doctrine of necessity. It was held in paragraph 105 as follows:--

"105.The doctrine of necessity would be applicable in a situation of this nature. The doctrine has been elaborated, in Halsbury's Laws of England, 4th edn., page 89, paragraph 73, where it was reiterated that even if all the members of the Tribunal competent to determine a matter were subject to

disqualification, they might be authorised and obliged to hear that matter by virtue of the operation of the common law doctrine of necessity. An adjudicator who is subject to disqualification on the ground of bias or interest in the matter which he has to decide may in certain circumstances be required to adjudicate if there is no other person who is competent or authorised to be adjudicator or if a quorum cannot be formed without him or if no other competent tribunal can be constituted. In the circumstances of the case, as mentioned hereinbefore, the Government of India is only capable to represent the victims as a party."

36. The scope of judicial review in respect of a Government contract was considered in *Tata Cellular (supra)*. In the facts of that case, the presence of a person which gave rise to the allegation of bias in the decision making process of the tender was found to be dispensable. In such circumstances it was held that, the doctrine of necessity could be applied.

37. Rule 7 of the West Bengal Primary School Teachers Recruitment Rules, 2001 prescribes the composition of the Selection Committee. Rule 7 is as follows:--

"7. Selection Committee.--

(1) A Council shall constitute a Selection Committee for the purpose of selection of eligible candidates and preparation of panel or panels of such candidates for appointment of teachers in primary schools within the jurisdiction of the Council.

(2) The Selection Committee shall consist of the following members, namely:--

(a) Chairman of the Council, ex-officio;

(b) Secretary of the Council, ex-officio;

(c) Special Officer of Scheduled Castes and Scheduled Tribes of the district, ex-officio;

(d) A representative of the District Magistrate, ex-officio;

(e) Seven members to be selected by the Council from amongst the members of the Council.

(3) The Chairman and the Secretary of the Council shall be the Chairman and the convenor of the Selection Committee respectively.

(4) Any seven members of the Committee including the Chairman shall constitute a quorum.

(5) The Selection Committee shall normally function for a period of two years from the date of its first meeting but the Council may, during the said period, reconstitute the Committee for good and sufficient reasons to be recorded in writing. Any member of the Committee, other than an ex-officio member, may resign with one month notice to the Chairman. Similarly, the Council may remove any member, other than an ex-officio member at any time, provided that

member has been informed of the reason of his removal and has been given an opportunity of being heard, if he so desires.

(6) The Selection Committee so constituted may, if necessary, constitute one or more sub-committee for conducting written test referred to in clause (b) of sub-rule (2) of the rule 9. The decision of the sub-committee/subcommittees shall be got approved by the Selection Committee."

38. The Council and the respondents have disclosed documents to establish that the composition of the Selection Committee was in accordance with Rule 7(2).

39. A Selection Committee composed in accordance with Rule 7(2) of the Recruitment Rule, 2001 would necessarily involve persons elected to the primary Council and Government servants. The elected representatives may or may not owe allegiance to a particular political party. Presence of elected representatives owing allegiance to a political party would neither ipso facto disqualify such representative to be a part of the Selection Committee nor would vitiate the composition of the Selection Committee. No law has been placed to suggest that an elected representative owing allegiance to a political party cannot be part of the Selection Committee or that such presence vitiates the Committee itself. The manner of appointment of an elected representative to the Selection Committee is not under challenge. The vires of the Act or the Rule prescribing such appointment is also not under challenge. The petitioners have not been able to demonstrate that, the Selection Committee contains any person who ought not to be present in accordance with Rule 7(2) of the Recruitment Rules, 2001.

40. A Selection Committee would have 11 members in terms of Rule 7(2) of the Recruitment Rules, 2001. Rule 7(4) lays down the quorum for a meeting of the Selection Committee. It is seven members being present for the meeting. The Selection Committee has been empowered under the Rules of 2001 to take the interview of the candidates participating in the selection process.

41. The petitioners have brought on record some instances where relatives of members of the Selection Committee have allegedly been given appointments through the impugned selection process. In my view, the number of members in a selection Committee with the quorum prescribed for a meeting of the Selection Committee is such that a member of the Selection Committee finding a relative being called for interview could easily recuse himself from such interview meeting without jeopardizing the selection process at all by his recusal. Given the fact that the Selection Committee comprises of 11 members with a quorum of 7 being required, the presence of a Committee member whose relative is scheduled to appear the interview cannot be said to indispensable for the doctrine of necessity to apply.

42. However, the allegation of relatives of Selection Committee members receiving appointments through the impugned selection process requires further investigation. Such a state of affairs, if true, cannot be allowed to continue.

43. It has been held in *Subhas Chandra Sinha & Ors. (supra)* that it is not necessary for Board to give an opportunity to the candidates after the examinations as a whole were being cancelled when the examination was vitiated by the adoption of unfair means on a mass scale.

44. *Krishan Yadav & Anr. (supra)* has held that, where the entire selection process is vitiated by fraud and arbitrariness the same is required to be set aside. Individual cases of innocence are not relevant.

45. In *O. Chakradhar (supra)* it has been held that, where the mischief in conducting the selection is so widespread and all-pervasive, affecting the result and it was difficult to identify the persons unlawfully benefited or wrongfully deprived of, the selection as a whole could be cancelled without issuing individual show-cause notice to each person selected.

46. In *Joseph P. Cherian (supra)* it has been held that, where unfair means on a large scale were adopted in one of the centers and there was leakage of question papers and its transmission to candidates at other centers through modern modes of communication, the entire selection process has to be set aside.

47. In the present case, there may be instances where a relative of a member of the Selection Committee has been given appointment. Such cases are identifiable. Such individual cases should be dealt with accordingly. The entirety of the selection process cannot be said to be vitiated solely on the ground that few persons who are the relatives of the members of the Selection Committee may have been given appointment. Individual instances can be looked at and appropriate measures taken in respect thereof.

48. In such circumstances, the Principal Secretary, Education Department will undertake an investigation into the panel prepared for the subject selection process to find out if any panelist is a relative of any member of the Selection Committee. He will also look into any relationship between a panelist and a Selection Committee member that may give rise to a justifiable apprehension of lack of fairness on the part of such Selection Committee member. He will find out whether such Selection Committee member was present at the meeting of the interview of such panelist. If any such instance is discovered, the Principal Secretary shall take immediate steps to have the appointment, if any, cancelled.

49. The fifth issue is answered by holding that the Selection Committee was constituted in accordance with law. The sixth issue is answered by holding that the presence of the political person in the selection panel did not vitiate the selection process on the ground of bias.

Issue No. 7

50. In *Mrinal Kanti Das (supra)* it has been held that, a writ petition on behalf of a number of writ petitioners who do not have a subsisting jural relationship amongst themselves is not maintainable. The writ petition was held to survive for the first writ petitioner therein. The writ petition was directed to be heard by

treating the writ petition on behalf of one petitioner only.

51. This issue need not be answered in view of the fact that, the observations made and the directions given in this writ petition can be had by any of one writ petitioners alone in the set of four writ petitions.

52. W.P. No. 29665 (W) of 2013, W.P. No. 24062 (W) of 2012, W.P. No. 24027 (W) of 2012 and W.P. No. 19898 (W) of 2014 are disposed of accordingly. No order as to costs.

53. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.