
(2020) 04 CAL CK 0033

In the Calcutta High Court

Case No : Wp. Central Tribunal (WPCT) No. 294, 313, 315 Of 2016, 31, 49, 67, 68, 69, 70, 71, 72, 73, 132, Of 2017

Bipul Kumar Biswas And Others

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 24-04-2020

Acts Referred:

Citation : (2020) 04 CAL CK 0033

Hon'ble Judges : Dipankar Datta, J; Protik Prakash Banerjee, J

Bench : Division Bench

Advocate : Bikash Ranjan Bhattachary, Sudipta Dasgupta, Bikram Banerjee, Tanushree Roy, Riya Das, Dipa Acharya, Arka Nandi, Sakti Nath Mukherjee, S.K. Datta, Barun Chatterjee, Pratik Dhar, Kartik Kumar Roy, Samir Halde, Jayanta Banerjee, Soma Roy Chowdhury, Tapas Kumar Ghosh, Tanmay Roy Chowdhury, Tarun Jyoti Tewari, Animesh Paul, Bhaskar Seth, Sujay Kumar Halder, Priyakshi Banerjee, Protik Majumder, Amit Kumar Pan, Avinash Kankan

Final Decision : Allowed

Judgement

Protik Prakash Banerjee, J

1. Since common questions of law and fact arise in this clutch of writ petitions brought before this Court in terms of the law laid down by the Hon'ble Supreme Court in L. Chandrakumar-v-Union of India reported in AIR 1997 SC 1125 from the order dated October 6, 2016 passed by the learned Central Administrative Tribunal dismissing the original application in each case, with the consent of the parties the hearing of all these writ petitions are consolidated and heard analogously. I take OA No.350/2047 of 2015 wherein such order was passed from which WPCT No.49 of 2019 arises, as the lead case.

2. The undisputed facts of the case are that the respondent no. 1 through its Railway Recruitment Board represented here by the respondents No.2 and 3 (officers of the railway recruitment cell) issued a notification No.0112 dated August 16, 2012 calling for applications for the post of Group D

employees. Admittedly this amounted to a binding representation to the public at large of the matters mentioned in it, since it was in the form of an advertisement to the public. Clause 16 contained the entirety of the selection procedure as represented to the public at large. According to the petitioners, selection was to be on the basis of merit only which means according to them, the raw marks which each candidate obtained in the written examination. No other mode of evaluation of the candidates on merit was advertised to be available to the respondents.

3. Perhaps, before proceeding any further, I had better extract the part of the said Clause 16 on which the petitioners place such strong reliance.

"16. Selection Procedure:

16.1. Selection will be based on MERIT only. First there will be Written Examination. Candidates to a limited extent, in order of merit, out of those who obtained the prescribed minimum pass marks in Written Examination will be called for Physical Efficiency Test (PET). Those who will qualify in the Physical Efficiency Test (PET) will have to go through the original document verification. Candidates who will found eligible after Physical Efficiency Test (PET) will be called for Medical Examination of relevant standard as shown against each category of post at page 1 of this notification. There will be no interview."

4. It is the common and undisputed case of the petitioners, that they were called for Physical Efficiency Test (PET) which means that they must, in order of merit, have obtained more marks above the prescribed minimum pass marks, than others who were not so called; the petitioners were asked to submit their original documents after they were declared successful in the Physical Efficiency Test (PET). However, they were not called for medical test, but instead some other candidates were called for medical test. That is why they approached the learned tribunal. In the course of the hearing before the learned tribunal of their original application, the respondents submitted that they had applied a procedure for "normalization" of the marks whereafter the said other candidates were found to be more meritorious and were asked, strictly on the basis of merit, to appear for the medical test.

5. The petitioners have taken the point that the notification had not mentioned anywhere that evaluation of merit would be on the basis of a procedure for normalization but the language of the selection procedure clearly indicated that merit was to be reckoned on the basis of the raw marks beyond the prescribed minimum pass marks. Therefore, this could not have been resorted to in the middle of the selection procedure and the respondents could not have changed the rules of the game - if the process of providing livelihood to the unemployed by the State can ever be said to be a game - after play had commenced. This was also contrary to the binding representation made to the public by the said notification. That apart, after allowing the petitioners to participate in the Physical Efficiency Test (PET), the respondents were estopped from alleging that

they were less meritorious than the candidates called for the medical test, since the stage of participation in the Physical Efficiency Test (PET) came only after satisfaction that the candidates who were allowed to participate were more meritorious than those who had not been so allowed - on the basis of the same raw marks, without normalization.

6. Though the respondent no. 1 was served and appeared through learned advocates, it made no submission defending the act of the Railways through the Railway Recruitment Board. It was left to the Railway Recruitment Board through the respondents No.2 and 3 to mount their own defence in respect of the allegations made by the petitioners.

7. The respondents no.2 and 3 first pointed out that the writ petitioners offering their candidature in the selection process of 2012, from their own admission, had notice and knowledge of the selection procedure beyond the notification of August 16, 2012. This is apparent from paragraph 3 of the writ petition being WPCT 49 of 2017, which refers to the selection procedure as laid down by the competent authorities pursuant to RBE No. E (NG-II/96/RR-1/62 dated July 18, 2005 which they have themselves annexed as Annexure P/2 to the writ petition. Therefore, it is not the case that they relied only upon the notification of August 16, 2012 and what was contained in it. They point out clauses 7.3, 7.4 and 7.5 of the said recruitment procedure.

7.3. Answer scripts shall be readable on Optical Mark Reader (OMR) and evaluation of answer scripts shall be on computers. After the examination, the original OMR sheets shall be sent to the Evaluating Agency (identity of which is known only to Deputy Chief Personnel Officer (Recruitment). Duplicate OMR sheets will be kept in the custody of GM/AGM.

7.4. Result of the written examination will be declared based on the Evaluation Agency's Report and scrutiny of the records. Minimum pass marks will be 40% for General Candidates, 30% for SC/ST and OBC candidates. In order to eliminate the advantage of guesswork, one mark shall be deducted for three wrong answers (assuming choice of answers in objective type question papers is four in each question). Result of written examination should be tabulated in order of merit of candidates. While preparing the merit list of the written test, due care should be taken to ensure adequate availability of candidates to meet the requirement of reservations prescribed for SC, ST and OBC.

7.5. Candidates to the extent of 10 (Ten) times the number of vacancies in order of merit out of those who have obtained the prescribed minimum pass marks in the written test as in para 7.4 above will be called for being subjected to PET as per standards mentioned in para 7.6 below. Candidates will be called for PET in order of merit separately for each group of General, SC, ST and OBC. Applications of all candidates to be called for PET should be scrutinized carefully in order to check their eligibility.

8. Mr. Kankani tried to argue that taken together, these clearly showed that the

evaluation of merit was not restricted merely to the raw marks, but that the Evaluating Agency's duty extended to more than merely tabulating the raw marks, and the Evaluating Agency had to submit a report, and the result of the written examination was based on the records and the report - here the records would indicate the raw marks and the report would indicate special circumstances such as whether the examinations had been held on the same day simultaneously or on more than one day, whether the same question papers had been set for all candidates on each such day, the degree of difficulty of the different sets of questions, on the basis of which the answers would be weighted and the raw marks processed. When we expressed ourselves to be less than impressed with such an exegesis, with the remotest connection to the advertisement and even the recruitment procedure, Mr. Kankani referred to the letter of the Railway Board dated July 18, 2005 to which the recruitment procedure is an annexure, and according to him, it incorporates by reference the Manual of 2000 and the letter dated August 10, 2004 under which shortcomings under those schemes could be addressed.

9. Seeing that this submission also left us cold, Mr. Kankani submitted that the very process of evaluation by itself, included "normalization" or "equalization" of the marks, obtained by the candidates in the written examination, id est, weighting of the raw marks on certain parameters. Mr. Kankani relied upon the judgment in the case of Mahinder Kumar and Others-v-High Court of Madhya Pradesh through Registrar General and Others, reported in (2013) 11 SCC 87. Several paragraphs of this judgment were relied upon by the parties, but so far as the above submission is concerned, Mr. Kankani very aptly relied upon paragraph 37 and its sub-paragraphs, paragraphs 38 and 39 of the report. It will be convenient to consider the extracts given hereinbelow: -

"37.4. Once the written examination part is fulfilled, the High Court has to formulate a procedure by which the answer papers are to be evaluated in order to ascertain the marks scored by the respective candidates. Therefore, in Para 9(iv) it has been specified that before calling any of the candidates for interview who appeared for the written examination, an evaluation will have to be made and based on the evaluation and performance, the High Court will decide as to who should be called for the interview.

37.5. The expression "evaluation" would, therefore, take into its fold the minimum marks to be scored, the manner in which the evaluation is to be made and in the event of any requirement, to equalise the merits of the candidate in the written examination and follow any appropriate procedure in consonance with law, in order to ultimately arrive at a fair process by which the candidate can be called for interview, based on the evaluation of the marks in the written examination.

38. In a situation like this, where nearly 3000 candidates appeared for the written examination and the answer papers were evaluated by several District Judges, it cannot be held that there was every scope for variation in the

assessment of the answers and the award of marks valued by different valuers. The High Court in exercise of its authority under Rule 7, read along with Para 9(iv) adopted a fair procedure to normalise the marks of the candidates in order to assess their respective merits. Therefore, the expression "evaluation" used in Para 9(iv), should be held to fully empower the High Court to even resort to such a step in a case like this, where more number of District Judges evaluated the answer sheets and thereby, it required the intervention of the High Court on its administrative side, to find a fair method by which the normalisation of the marks could be worked out.

39. We are, therefore, in full agreement with the learned Senior Counsel for the High Court when he submitted that Para 9(iv), read along with Rule 7, fully empowered the High Court to prescribe a procedure from the stage of evaluating the answer sheets of the candidates, initially by different District Judges and after noticing different standard adopted by different District Judges in the matter of valuation of answer sheets of the candidates, for adopting the normalisation process in order to streamline the whole selection in a fair manner. Therefore, the submission of Shri Marlapalle that every minute detail of the procedure, which the High Court followed in evaluating the answer sheets of the candidates, were not disclosed to them in the advertisement and on that the whole selection stood vitiated, cannot be accepted.

10. Therefore, he submits, the law has been laid down that evaluation of merit necessarily includes a process of normalization or equalization:and that this was not specifically mentioned in the advertisement does neither vitiate the selection procedure, once normalization is adopted, nor does it amount to changing the rules of the game after play has commenced.

11. In fact, by order of the Hon'ble Supreme Court in the lead case of Disha

Panchal and Others-v-Union of India through the Secretary and Others reported in (2018) 17 SCC 278 a formula for normalization was adopted after the Common Law Admission Test for the year 2018 was held, and it was held to be the correct methodology instead of annulling the entire examination particularly when the purity of the examination is not in issue and no allegation of mala fides in holding such examination has been raised.

12. The writ petitioners of course contended that the advertisement and the recruitment procedure being silent about evaluation, the said provision could not be read into them and they also attempted to distinguish the judgment in Mahinder Kumar (supra) as being different on facts from the present case. The writ petitioners contended that the selection procedure in Mahinder Kumar (supra) was not the same as that in the present case and here, the preliminary screening was not there; secondly, they submit that in Mahinder Kumar (supra) the High Court in its administrative side was compelled to evolve a procedure for equalization of marks because there were different examiners being the different District Judges who adopted different standards while evaluating the candidates,

whereas in the present case, the answer scripts readable by the Optical Mark Reader are examined by the same person, id est, a computer and therefore, the question of different examiners adopting different standards of evaluation of candidates does not arise.

13. One rather inconvenient fact, however, stares the writ petitioners in the face when they contend that normalization can be adopted only when different examiners, adopting different standards, evaluate the answer scripts. This is the decision of the Railway Board dated October 30, 2007 bearing No. E(RRB)/2007/25/21 directed to the chairmen of all railway recruitment boards. So that there is no confusion, the text of the same is quoted hereinbelow: -

"Sub: Normalization of marks after holding examination for more than one session/day - clarification reg.

Ref: Item No.1 of RRCB meeting held on 25.10.2000.

A copy of minutes of RRCB meeting referred to above is enclosed. It is clarified that wherever written examination is conducted in more than one session or on more than one day, normalization of marks is required to be done and a second stage written examination in a single session shall be conducted calling candidates 10 times the number of vacancies."

14. The dissimilarities of fact pointed out by the writ petitioners amount to differences without distinction, and the basis of the judgment in Mohinder Kumar (supra) appears to be a circumstance which puts one candidate or set of candidates at a disadvantage compared to the other. This survives the so-called differences. Therefore, while it is no longer open, in view of the law settled by the Hon'ble Supreme Court, to the writ petitioners to dispute that the process of evaluation on merits necessarily involves a process of equalization or normalization, the contention that it can only be done if there are different examiners adopting different standards, under the rules of the game applicable from long before the selection procedure of 2012, is not tenable in view of the decision of the Railway Board dated October 30, 2017 above, which has not been challenged.

15. Thus, of the four questions we had raised by our order dated January 10, 2020 in this matter, two were answered. These are respectively, how Clause 16 of the Advertisement could be construed to include 'normalization' as a part of determination of merits and in what manner do the Railways contend that the writ petitioners had notice of anything but their raw marks in the written test being considered to construe merit.

16. The respondents have in their supplementary affidavit-in-opposition set out the principles on which normalization is done and the reason why it was done in the present case. In this connection, we extract paragraph 15 and 17 of the said supplementary affidavit-in-opposition, hereinbelow: -

Paragraph 15: "When an examination is conducted in multiple sessions for the

same syllabus, in spite of all efforts there are chances of variation in the difficulty level of the questions in various sessions. Thus the score obtained by the candidates of the same caliber is likely to vary. In order to equalize the variation in the difficulty level of question papers, a process called statistical normalization of marks is resorted to universally. This ensures level playing field for all the candidates."

Paragraph 17: "It completely depends upon statistical parameters, calculated based on the performance of candidates, in the session of the candidates of other sessions. The process involves raw score of the candidates, mean and standard deviation of raw marks of candidates in his/her session as well as other sessions being normalized."

17. In fact, on the basis of the above statements made by the respondents, we had asked two further questions in our order dated January 10, 2020. The relevant portion of the said order is set out hereinbelow: -

"Apart from these, the Court requires production of the records, being the original of the minutes or any other document which would show that a finding had been recorded by the Chairman that there was in fact variation in the difficulty levels of the question papers across different shifts. The Railways shall also produce records to show how the Chairman chose the mean and standard deviation for normalization. Information on these points are required since we have read the terms and conditions of the agreement that the Railways had entered into with the evaluation agency, which had formed the basis for normalized marks being assigned to each of the candidates."

18. Despite the aforesaid and despite adjourning the matter after hearing on several subsequent dates, the said records were not produced. When we reserved judgment, by the order dated February 4, 2020, we were therefore, constrained to record, inter alia, as follows: -

"When we pointed out that even today the records in terms of our order dated January 10, 2020 have not been produced and hence the decision that there was a difference in the level of difficulty of the question papers in different shifts and the decision that the chairman chose a certain mean and standard deviation were not disclosed, Mr. Kankani submitted that there is no such record extant. We record this only to show that the records which were expected to be in the custody, possession and control of the Railway Recruitment Board have not been produced by it in support of its submissions.

19. In terms of the above, we have no alternative but to draw an adverse inference against the Respondents that had those records referred to in the order dated February 4, 2020 read with the order dated January 10, 2020 been produced, they would not have supported the submissions of the respondents.

20. Therefore, the admitted position is that the Chairman of the Railway Recruitment Board resorted to normalization and/or directed the evaluating

agency to resort to normalization without a finding as to there being a difference in the level of difficulty of the question papers in different sessions or different days - as in the present case where examinations were held with different question papers in different sessions or on different days -and thus the said decision was incurably flawed, even in terms of the process of evaluation including normalization as laid down by the Hon'ble Supreme Court and in terms of the rules/circulars applicable to the Railway Recruitment Board. In other words, the condition precedent for invoking the normalization clause could not be shown to be present by the Railway Recruitment Board, to defend the selection process from being held to be without jurisdiction and arbitrary since on the face of the process, that which was required to adopt normalization was not shown to exist. Mr. Kankani, in fact submitted on February 4, 2020 as follows: -

"Today we commenced hearing of the matter. We heard Mr. Kankani, learned advocate appearing on behalf of the Railway Recruitment Board. He very candidly submitted that the Railway Recruitment Board has no discretion in the matter of applying the formula of normalization which it has provided to the evaluation agency through its Chairman and which is to be done in terms of a circular of 2000."

21. This refers to the minutes of the meeting of the Railway Recruitment Cell Board held on October 25, 2000 and the decisions taken therein, and this document is a part of the supplementary affidavit-in-opposition of the respondents. It is not a circular. It is longish, and provides for equalization of two sets of marks where the examination was held on two days. This too required a second stage of examination after equalization in a single session. This was also not held.

22. The parties have relied upon several other judgments to show first, that the rules of the selection process cannot be changed after the selection process has commenced, but these do not apply to the present case since we have held that the process of normalization is part of evaluation on merits, and once it is advertised that there will be an evaluation on merits, parties have notice of the possibility of normalization; second, that a selection process ought not lightly to be interfered with in the absence of allegation of mala fides or widespread corruption, but here what the respondents have done is worse than corruption. Therefore, the question of lightly interfering with the process does not arise here, nor is that test applicable. The respondents have judged candidates not on the basis of their performance but on the basis of a system which could not have been triggered without a decision that there were varying levels of difficulty in the two sets of question papers. There is something fundamentally wrong for a person to be judged not on his own merits, but on a hypothesis of different level of difficulties for the question papers in an examination held across different sessions without a decision being taken that there was a variance in the level of difficulty. Thus, we choose to intervene in this matter, while holding that the process of evaluation includes equalization or normalization so long as the

conditions to invoke them are satisfied. What the respondents have done mechanically and with disdain for those they are examining, is not a light matter and if this decision wakes them from the torpor and inertia which causes them to avoid taking decisions, then justice will be served.

23. Therefore, even if we hold the official respondents to the standards and norms and the procedure it states it has followed, having the force of law, we find that the official respondents are in default, and the question of normalizing/equalizing the marks was dealt with mechanically and there was no decision on the basis of which it could have been directed. As a result of this, the writ petitioners have shown, those who had got lesser raw marks than they had, were shown to have higher 'normalized' marks, and thus, ahead of the petitioners on merit as evaluated without the decision to normalize having been taken. Clearly, the said selection process for the year 2012 in Group D posts by the Railway Recruitment Board/Railway Recruitment Cells cannot be held to have been conducted in a manner free from arbitrariness. Since the order dated October 6, 2016 was passed by the learned tribunal wholly missing these aspects of the matter, and without even advertent to whether normalization could be made without deciding that there was a difference in the level of difficulty in the question papers in different shifts/different sessions, the order was clearly passed without considering all the relevant materials on record, and to that extent, is perverse within the meaning of law. The said order dated October 6, 2016 is therefore set aside. Now we come to the reliefs sought by the petitioners and what they can be granted in law.

24. The writ petitioners have not impleaded all the persons who were selected as private respondents. Some of those persons who were selected were arrayed as private respondents in some of the writ petitions, but not all of them and they appeared in the initial stage before us, and were heard to defend the decision of the selectors substantially on the points raised by the official respondents, which we have negated. They did not appear at the final hearing. Not only were all of the candidates who were selected finally in the recruitment process not arrayed as private respondents, but only some of them were impleaded, even they were not arrayed in a representative capacity. We find that the number of applicants were in lakhs and thousands of persons were selected. A point was taken that this violates the principles of natural justice so far as those persons who are not arrayed is concerned, if we interfere with the selection process, It is true, that the Hon'ble Supreme Court has laid down the principle that the rule of audi alteram partem need not be complied with in connection with the cancellation of examinations where it would be impracticable to apply the said principle, inter alia, in the judgment in the case of Bihar School Examination Board-v- Subhas Chandra Sinha reported in (1970) 1 SCC 648 and reiterated in Nidhi Kaim-v- State of Madhya Pradesh and Others reported in (2016) 7 SCC 615. At the same time, in the case of Ranjan Kumar and Others-v-State of Bihar reported in (2014) 16 SCC 187 the Hon'ble Supreme Court has laid down that where a selection process is challenged, but all the persons selected or appointed were

not arrayed as parties, no adverse order could be passed against those persons not impleaded. Therefore, even while we hold that the selection process had been vitiated by arbitrariness, it will not be proper to set aside the selection process as a whole since it will affect those who are not parties. At the same time we must ensure that the respondents are not rewarded for their arbitrariness.

25. We therefore adjust the equities in the case and direct that those candidates in the selection process initiated by notification No.0112 dated August 16, 2012 for Group D posts by and/or under the Indian Railways and the Railway Recruitment Board/Railway Recruitment Cell, who have come before us, and have not appeared in any subsequent selection process held by the same authorities, shall be forthwith and no later than 4 (four) months from the date that this order is communicated, appointed in the Group "D" posts and vacancies advertised by the respondents, subject to being found fit in the medical test in respect of such vacancy and without regard to any age bar. We make it clear that only those persons who did not appear in any subsequent selection process but waited for the result of this writ petition, shall be entitled to this benefit, and neither any successful candidate in a subsequent selection process or an unsuccessful candidate in a subsequent selection process shall get this benefit. The age of the candidates on the date when they applied in terms of the notification No.0112 dated August 16, 2012 is material in this regard, and the respondents will ignore the passage of time and its effect on the age of the candidates due to the challenge to the selection process and its result. All benefits shall be operative prospectively. We consciously and expressly do not interfere with the appointments already made in terms of the said advertisement. The writ petitions are all allowed, but only to the extent mentioned above. In the facts of the case, there shall be no order as to costs.