

**(2006) 02 CAL CK 0052**

**In the Calcutta High Court**

**Case No :** Writ Petition No. 16039 (W) of 2005

Chinmoy Kumar Bhunia

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

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**Date of Decision :** 08-02-2006

**Acts Referred:**

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 3B, 72

**Citation :** (2006) 3 CALLT 277 : 110 CWN 566

**Hon'ble Judges :** Arun Kumar Mitra, J

**Bench :** Single Bench

**Advocate :** Dipankar Dutta, Kallol Bose and Kamal Mishra, for the Appellant; M.C. Bhattacharya and N.K. Das for Respondent Nos. 6 and 7, Ashok De and S.K. Dutta for Respondent No. 9 and P.S. Deb Barman, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Arun Kumar Mitra, J.—This writ petition concerns the challenge of appointment of respondent No. 9 herein in the post of Peon of Nazirbazar Harendra High School (hereinafter termed as said school).

Facts in Brief:

A post of Peon, the Class IV staff fell vacant in the said school. It would be relevant to mention in this context that the said school is governed by the Management of Recognised non-Government Institutions (Aided and Unaided) Rules 1969 (hereinafter termed as said Management Rules).

2. According to the petitioner he got his name registered in the District Employment Exchange Office at Contai, Purba Medinipore on 02/07/1984. Since the date of his registration he could not get any call through Employment Exchange. The name of the petitioner was not sponsored by the Employment Exchange and the petitioner moved a writ petition praying for an opportunity to participate in the interview. The said writ petition being W.P. No. 213(W) of 2005

and on the said writ petition Hon"ble Justice Indira Banerjee directed that if the petitioner makes an application to the said school for consideration of his candidature the same shall be considered if he is otherwise eligible and he shall be allowed to appear in the interview notwithstanding the fact that his name has not been sponsored by the Employment Exchange. The writ petition is still pending. Relevantly, it may be stated that respondent No. 9, Pradip Kr. Maity also moved a writ petition being W.P. No. 15384(W) of 2004. On the said writ petition order was passed and said Pradip Kr. Maity was allowed to appear in the interview. Clarifications was sought for on behalf of said Pradip Kr. Maity in respect of the said order passed by the learned single Judge on this writ petition and the Hon"ble single Judge observed that no clarification is required since the order is clear. The said Pradip Kr. Maity, respondent No. 9 herein prayed for relaxation of age alleging that he is a handicapped candidate having certificate of deafness. The Hon"ble single Judge observed that if under the rule the respondent No. 9 is entitled to relaxation as a physically handicapped candidate then he will be granted said relaxation and no further order is required. Accordingly, both the candidates that is the writ petitioner herein and the respondent No. 9 appeared in the interview for the post of Peon of the said school. The respondent No. 9 was selected for appointment inasmuch as he topped the panel.

3. From the identity card issued by the Employment Exchange in favour of respondent No. 9 it appears that his date of birth is 22nd August, 1966 and on the date of grant of prior permission the age of respondent No. 9 was 14 days" less than 39 years.

4. According to the petitioner, the respondent No. 9 is over aged and was not eligible for interview and/or selection. The writ petitioner also submits that from the identity card issued by the Employment Exchange in favour of respondent No. 9 it does not appear that respondent No. 9 has been registered as a physically handicapped candidate; he has got (or annexed) a medical certificate from Contai Sub-Divisional Medical Officer which states that respondent No. 9 is suffering from deafness and his disability is to the extent of 60%. In the identity card of the Employment Exchange, however, the factum of his said deafness does not appear. Since he is an age barred candidate he is not entitled to appear in the interview, his name cannot appear in the panel, far less the question of topping in the panel.

5. In the above facts the learned Counsel for the parties that is the respondent Nos. 6, 7 and 9 have filed their opposition and the petitioner has filed his reply on the above facts. It is also relevant to state in this context that the petitioner filed a supplementary affidavit in which he stated that the District Inspector of Schools granted prior permission through his Office Memo No. 479-L/I(4) dated 8th November, 2004 for filling up the post of Group D staff on the retirement of one Sri Ramkrishna Bera. The vacancy was shown as unreserved though prior permission was granted to fill up the post on 8th November, 2004 prior to that

Sri Pradip Kr, Maity, the respondent No. 9 moved that writ petition on 16th September, 2004 and prayed for interview. The petitioner tried to show that respondent No. 9 committed fraud and made incorrect statements.

6. It has been stated in the said supplementary affidavit that unless the respondent No. 9 had been provided with information by the Secretary of the said school about the order dated 17th August, 2004 there can be no question of his filing the writ application in September, 2004 and obtaining an order from the High Court for participation in the selection process.

7. It was also stated in the said supplementary affidavit that the learned advocate, who appeared for the Secretary of the said school in W.P. No. 12376(W) of 2004, also appeared for the respondent No. 9 in W.P. No. 15384(W) of 2004. The petitioner indicated collusion in between the Secretary and the said respondent No. 9.

8. The learned Counsel for the petitioner has submitted a written notes on argument so also the learned Counsel for the respondent Nos. 6 and 7 as well as the learned Counsel for the respondent No. 9. All the learned Counsels also made their oral submissions. ,

#### SUBMISSIONS

9. The learned Counsel for the petitioner made the following submissions:

The respondent No. 9 practised fraud on Court. More prior approval for appointment was granted he moved a writ petition and made incorrect statements. In November, 2004 prior permission was granted but the respondent No. 9 prayed for interview in his writ petition moved in September, 2004.

10. The learned Counsel also submitted that particulars regarding fraud committed by the respondent No. 9 as well as the collusion in between the school authority will be apparent from the factum of moving this writ petition prior to grant of prior permission as well as from the averments and annexure made in the supplementary affidavit. The respondent No. 9 obtained entry in the selection process by practicing fraud and the school authority, actively assisted him by allowing him such entry and putting him at the top of the panel.

11. The respondent No. 9 approached the High Court with the grievance that his name has not been sponsored by the Employment Exchange by order dated 16th September, 2004. The Hon''ble single Judge made it absolutely clear that he shall be allowed to participate in the interview provided that he is eligible and that the Court has not waived the eligibility criteria. By the subsequent order dated 18th March, 2005 (passed on the application for modification/clarification filed by the respondent No. 9) the learned single Judge recorded the submission that the school authorities are not allowing age relaxation on a misinterpretation of the earlier order. The learned single Judge further recorded that the order was absolutely clear and if the respondent No. 9 was a handicapped candidate and as per rules physically handicapped candidates are entitled to age relaxation, he

would also be entitled to age relaxation. Excepting these observations, no further order was passed in the nature of clarification.

12. From the aforesaid order passed on the writ petition of the respondent No. 9 it would be amply clear that the school authority allowed age barred candidate on the ground that he belongs to physically handicapped category though the learned Judge had made it clear that if any age relaxation is permissible then and then only the same shall be granted according to the applicable rules.

13. It is submitted by the learned Counsel for the petitioner that the contents of paragraph 13 of the writ petition have been dealt with by the school authority in paragraph 9 of their affidavit-in-opposition whereas the respondent No. 9 has dealt with such contention in paragraph 7 of the affidavit-in-opposition. Bare perusal of the contents of the respective paragraphs of the affidavit-in-opposition would clearly reveal that there is no counter allegation made by the writ petitioner to the extent that no specific resolution was adopted by the Managing Committee permitting the respondent No. 9 to participate in the selection process and in the absence of any such decision the submissions made from the Bar adverting to circulars and/or provisions relating to employment of disabled candidate cannot survive at all.

14. The learned Counsel submitted that it is settled law that a decision has to be tested on the basis of the grounds mentioned in support thereof and such decision cannot be sustained on the basis of grounds mentioned in the affidavit or on submissions from Bar. It is undisputed or not admitted that no decision was there justifying the permission granted to respondent No. 9 to participate in the interview, the very fact of participation of respondent No. 9 in the interview is illegal and the candidature of respondent No. 9, therefore, has to be ignored and the panel may be directed to be recast accordingly.

15. The learned Counsel for the petitioner then submitted that the recruitment rules provide age limit for appointment as 37 years in an aided institution. The age limit is relaxable in case of particular categories of candidates according to the existing Government order. It is clear that no relaxation is made applicable to candidates belonging to physically handicapped category. Therefore, it stands to reason that the maximum age limit for physically handicapped candidate is also 37 years and admittedly, the respondent No. 9 on the date of prior permission was aged 38+. By application of the provisions of clause 4(d) he was not eligible to participate in the selection process and hence ought not to have been allowed.

16. The learned Counsel for the petitioner submitted that though in view of a Full Bench decision reported in *Rabindra Nath Mahata Vs. State of West Bengal and Others*, the recruitment rules framed by the Director of School Education is not mandatory but in the absence of any other provision this guideline should be followed in the matter of appointment to avoid arbitrariness. The learned Counsel relied on a decision reported in *B.S. Minhas Vs. Indian Statistical Institute and Others*, .

17. The learned Counsel submitted that the guidelines contained in memo dated 1st November, 1999 are to be followed and the said guidelines can now be said to be a guideline for the purpose of recruitment.

18. The learned Counsel then submitted that as per the prior permission issued by the District Inspector of Schools this vacancy in respect of which the parties are contesting is an unreserved vacancy and consequently, the age limit prescribed will be 37 years as per the said guideline and nobody claim advantage or the reservation.

19. The learned Counsel submitted that clause 4(d) of the said recruitment rules provide that one, who is above 37 years can be offered appointment and therefore, the argument of the learned Counsel for the respondent No. 9 seeking to make a distinction between "selection for appointment" and "appointment" is not tenable; the respondent No. 9 had crossed 38 years of age and was hearing 39 years when the prior permission was granted and on the date of selection he was more than 39 years. In that view of the matter the distinction, as sought to be made, referred to above is misconceived.

20. The learned Counsel then submitted that the submissions made on behalf of respondent No. 9 regarding the applicability of the provisions of Section 72 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 {hereinafter termed as the said Act") or the concession of ten years age in favour of handicapped persons in recruitment to posts cannot be said to be tenable.

21. The learned Counsel also submitted that the term "deaf has been defined in a Government circular being No. 977-Edn.(S)/4A-23/82 dated 26th August, 1986. The learned Counsel submitted that the term "deaf has been defined as "those in whom the sense of hearing is fully non functional for the ordinary purpose of life and who do not hear and understands sounds at all even with amplified speech". In that view of the matter, according to the learned Counsel for the petitioner, there cannot be deafness when a Certificate has been given by a medical practitioner that the respondent No. 9 is 60% deaf.

22. The learned Counsel then submitted that the recruitment is regulated by a procedure and those who are not eligible in terms of the said procedure cannot claim appointment. The learned Counsel submitted that far less the question of appointment the respondent No. 9 cannot come within the zone of consideration even.

23. The learned Counsel for the petitioner submitted that the learned Counsel for the school authority contended on the point of maintainability of the writ application that the petitioner has participated in the selection process and being unsuccessful has challenged the selection process and in this regard reliance has been placed by the learned Counsel for the school authority on the Judgment of Hon"ble Apex Court reported in Madan Lal and Others Vs. State of Jammu and Kashmir and Others, The learned Counsel for the petitioner submitted that this

contention of the learned Counsel for the respondent school authorities is not tenable inasmuch as in that decision the Hon''ble Apex Court laid down the principle that the person knowing about the marking method, being unsuccessful cannot challenge the selection and the ratio of that Judgment is not applicable here. The learned Counsel for the petitioner placed reliance on the decisions reported in Raj Kumar and Others Vs. Shakti Raj and Others, , The University of Mysore and Another Vs. C.D. Govinda Rao and Another, and Dalpat Abasaheb Solunke and Others Vs. Dr. B.S. Mahajan and Others, .

24. The learned Counsel refuted also the submissions made on behalf of the school authority which followed the line of submissions made by the respondent No. 9 and the learned Counsel Further submitted that the writ petition cannot be termed to be premature.

25. The learned Counsel further submitted that regarding the age limit, reference may, be drawn to a Government order dated 1st November, 1999 where it has been stated that the age limit for first entry into service of non-teaching staff in non-Government Secondary Schools shall be 37 years.

26. The learned Counsel lastly submitted that the panel, which has been prepared by the authorities and sent to the District Inspector for approval should be recaste and the list should be prepared in order of merit.

27. The learned Counsel for the respondent No. 9 in reply submitted that if the vacancy is open for general candidates then it is open for all category of candidates including physically handicapped.

28. The learned Counsel for the respondent No. 9 then submitted that the writ petitioner Chinmay Kumar Bhunia, did not raise any objection about the appearance of his client Pradip Kr. Maity on the date of interview and now he is not entitled to raise various types of objections including the objection that the respondent No. 9 is age barred. Such objection, according to him is liable to be rejected and the writ petitioner is estopped from raising such objection. The learned Counsel also drew reference of clause 4(d) of the recruitment rules and submitted that there is also no dispute that by. paragraph 4 of the circular dated 21/ 01/2003 the guideline dated 01/11/1999 issued by the Director of School Education has been confirmed.

29. The learned Counsel accepted the applicability of circulars dated 01/11/1999 and 21/01/2003. The learned Counsel submitted that still then the circular dated 29/07/1990 is in the field and has not been repealed expressly or by necessary implication and had it been so, then such intimation would have been there in circular dated 01/11/1999 or 21/01/2003.

30. The learned Counsel then relied on the provisions of Section 72 of the said Act and the learned Counsel laid stress on the definition of persons with disability as given in the said Act and he submitted that a person with disability means a person suffering from not less than 40% and of any disabilities certified by

Medical Officer.

31. The learned Counsel submitted that such certificate is there in favour of respondent No. 9 and the learned Counsel claimed that his client would get relaxation of age of ten years that means in considering the case of his client the limit should be 37+.

32. The learned Counsel submitted that the said Act has been brought into force to bring the disabled persons in the mainstream of life and a disabled person has got every right to compete in a general post along with other candidates and if special law has given concession for age relaxation then the provision for age relaxation should be applied.

33. The learned Counsel further submitted that when a disabled person and a non-disabled person are competing for securing an appointment for a particular post then the general right of a general candidate is not being taken away if a special provision has been made for a disabled candidate and if the disabled candidate is entitled to relaxation of age he must be given the age relaxation.

34. The learned Counsel submitted that Section 3B has been wrongly applied in the facts of the present case and Section 3B relates to formulation of the schemes for ensuring employment of persons with disabilities. The present dispute is not a dispute within the meaning of Section 3B of the said Act.

35. The learned Counsel submitted that the circular dated 29/07/ 1990 shall prevail over the general law contained in circular dated 01/ 11/1999.

36. The learned Counsel thereafter, sought to distinguish the citations referred to and /or relied on by the learned Counsel for the petitioner Mr. Dutta.

37. The learned Counsel submitted that for the purpose of applicability of the doctrine ratio decidendi the facts of the given case are relevant and in this regard the learned Counsel relied on a decision reported in The Regional Manager and Another Vs. Pawan Kumar Dubey, . The learned Counsel laid stress on the observations made in paragraph 7 of this decision.

38. The learned Counsel then relied on a decision reported in The Statesman Ltd. and Others Vs. The Fact Finding Committee and Others, . Relying on this decision the learned Counsel submitted that in order to maintain a writ petition it is necessary for the petitioner to show that he has already suffered actual injury. The learned Counsel laid stress on the observations made in paragraph 20 of this Judgment.

39. The learned Counsel lastly submitted that the panel is pending decision before the District Inspector of Schools and no decision has been taken as yet inasmuch as there is no such conveyance on the part of the District Inspector and in that view of the matter the writ petition is premature and is not maintainable.

40. The learned Counsel for the respondent Nos. 5, 6 and 7 i.e. the school

authorities followed the line of submissions of the learned Counsel for the respondent No. 9. The said learned Counsel for the school authorities submitted that the writ petition being W.P. No. 15384(W) of 2004 where interim order has been passed on 16/09/2004 directing the school authority to consider the candidature of the petitioner therein (respondent No. 9 herein) has been challenged and is pending.

41. The learned Counsel further submitted that both the writ petitioner herein and the respondent No. 9 are the candidates not sponsored by the Employment Exchange and both have appeared in the interview as per orders passed by this Hon"ble High Court.

42. The learned Counsel also relied on the Government circular dated 29th July, 1990 and submitted that this is still valid. Concludingly, the learned Counsel for the school authorities submitted that the writ petition is not maintainable and should be rejected in limine.

43. Heard the learned Counsel for the petitioner, the respondent Nos. 5, 6 and 7 and also the learned Counsel for the respondent No. 9, considered written notes of submissions given by the learned Counsel for the parties. Considered also, the averments made in the writ petition, affidavit-in-opposition and the respective affidavits-in-reply.

#### DECISION WITH REASONS

44. The only point for decision in this case is, as to whether the respondent No. 9 had got eligibility to appear in the interview in pursuance of orders passed by this High Court and whether the selection of respondent No. 9 as first candidate in the panel is based on mala fide or not.

45. It is admitted position that both the candidates contesting here appeared in the interview in pursuance of the orders passed by this High Court. It is also admitted that nowhere the eligibility of the respondent No. 9 to appear in the interview has been challenged/ questioned.

46. The claim of the respondent No. 9 that he is a handicapped candidate or disabled candidate and he should get age relaxation and he should be declared eligible is to be tested on the basis of the said Act, the said rules, recruitment guidelines and the Government circular. First of all let me consider the provisions of the said Act. The provisions of the said Act cannot be disputed but it relates to reservation in employment and consideration of the disabled candidates in the said reserved category. It has been mentioned in the said Act that the appropriate Government will identify the posts which can be reserved for persons with disabilities and in the said reserved post the handicapped candidates or the disabled candidates will be given priority in the matter of employment. However, the said Act doesn't speak of any concession in respect of the age of disabled or handicapped candidates. Rule 22.8 of the Rules for Reservations & Concessions for Physically Handicapped, Ex-Servicemen, Sportsmen & Compassionate



Appointments provides for concession and/or age relaxation of 10 years for disabled candidates. The said Act however, contains hearing impairment as disability. But the basic question remains as to what is the handicapped. The said handicapped is deafness as per the certificate given by medical practitioner which has been relied on by the respondent No. 9 for getting age relaxation at the time of interview. Deafness certificate, which has been given to the respondent No. 9 and has been relied on by him contains that the respondent No. 9 is 60% deaf but the said rules on which the respondent No. 9 has relied upon for the purpose of age relaxation gives a definition of "deaf. In Rule 22.2 sub rule (3) under the caption "Eligibility" the following is provided.

The deaf are those whose sense of hearing is non-functional for ordinary purposes of life. They do not hear/understand sounds of all events with amplified speech. The cases included in this category will be those having hearing loss of more than 90 decibels in the better ear (profound impairment) or total loss of hearing in both ears.

47. From the above definition it does not appear that the respondent No. 9 is a deaf candidate or his disablement as deaf cannot be accepted in view of the above definition.

48. If the respondent No. 9 is not a deaf candidate as per the definition given in the said rules on which the respondent No. 9 himself relies upon then the entire thing goes. Accepting all other provisions or accepting that the selection is not mala fide in other respects, the eligibility criteria goes against the respondent No. 9 inasmuch as he is not a deaf candidate. Certificate does not come in aid and the claim of the respondent No. 9 entirely falls through.

49. In view of the discussions made above, I am not inclined to go into the citations referred to by the learned Counsel for the respective parties inasmuch as the propositions of law as cited by them are accepted and settled principles of law. The case of Madan Lal (supra) is not applicable in case of the writ petitioner inasmuch as the case of Madan Lal speaks of knowledge of marking method and thereafter appearance in the interview. Here, the petitioner cannot be in know of as to who would be selected and as such Madan Lal's case is not relevant in the context.

50. In view of the above considerations and discussions I am of the opinion that the respondent No. 9 is not an eligible candidate and he should not have been allowed to appear in the interview inasmuch as the learned Judge of this High Court directed that he would be allowed to appear in the interview subject to eligibility and he was not eligible inasmuch as he was age barred.

51. Since the recruitment guideline has been specifically framed for the purpose of recruitment in the post of Group-C and Group-D employees through memo dated 01/11/1999 amended by memo of 2003 amending the said guidelines, the circular of 1990 cannot be said to be valid inasmuch as if there are two Government circulars concerning the same subject and in respect of the same

specification, the subsequent will prevail inasmuch it cannot be that the age limit is 40 years and again 37 years. The recruitment guideline of 1999 amended by 2003 memo remained in the field and the respondent No. 9 becomes age barred since he is above 37 years.

The writ petition is, therefore, allowed.

The selection of respondent No. 9 as the first candidate is set aside. The District inspector is, therefore, directed to recast the panel accordingly and approve the same within a period of one month from the date of communication of this order.

There will be no order as to costs.

Urgent Xerox certified copy, if applied for, be given to the learned Counsel for the parties upon usual undertaking.