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**(2013) 10 CAL CK 0010**  
**In the Calcutta High Court**  
**Case No : Writ Petition No. 16005 (W) of 2012**

Jayasri Ghosh

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

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**Date of Decision :** 09-10-2013

**Acts Referred:**

**Citation :** (2013) 4 CALLT 542

**Hon'ble Judges :** D. Datta, J

**Bench :** Single Bench

**Advocate :** Anjan Bhattacharya, Ms. Paromita Jati and Mr. Soubir Banerjee, for the Appellant; Debansu Basak and Ms. Paromita Pal for the respondent No. 1 and Mr. Siddhartha Banerjee for the respondents 2 to 5, for the Respondent

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## Judgement

D. Datta, J.—The Registrar General, High Court, Calcutta and Chairman of the Committee of Registrars, issued employment notification dated July 6, 2011 inviting applications from eligible candidates for filling up various vacant posts in the several district judgeships of the state. In respect of the judgeship of Murshidabad, the posts of, inter alia, process server and peon/nightguard/farash (Group D) were sought to be filled up. The number of unreserved vacancies on the posts of process server and peon/nightguard/farash were 4 and 27 respectively. The employment notification stipulated the educational qualification in respect of Group D category. The candidates were required to have a class VIII pass certificate from any recognised school or recognised madras or any other recognised equivalent institution. Regarding the mode of selection, it was further stipulated that the candidates would be required to take a written examination and on the result thereof, those who are short-listed would be called for personality test. The final panel would be prepared on the basis of the total marks obtained in the written examination and the personality test. The petitioner offered her candidature for the post of process server. She took the written examination and was selected for the personality test. On the basis of her performance in the written examination as well as the personality test, her name figured in the final panel at serial no. 6. However, to her utter surprise, she found

that the candidates whose names figured at serial nos. 1, 3, 4 and 5 had applied for the post of Group D staff. Since the number of unreserved vacancies was 4 only, she was ultimately not offered appointment.

2. Feeling aggrieved thereby, the petitioner has invoked the jurisdiction of this Court under Article 226 by presenting this writ petition dated July 23, 2012.

3. Mr. Bhattacharyya, learned advocate representing the petitioner, contended that the respondents acted illegally and in excess of their jurisdiction by including in the panel candidates who had never applied for appointment on the post of process server. Attention of the Court was drawn to the final panel to show that only the candidate at serial no. 2 had applied for the post of process server. According to him, preparation of a single panel for different categories of posts has resulted in unequals being treated as equals, thereby offending the guarantee of equality enshrined in Article 14 of the Constitution. He, thus, prayed for an order on the respondents to offer appointment to the petitioner.

4. Mr. Banerjee, learned advocate representing the respondents 2 to 5, first referred to the affidavit-in-opposition of the respondent no. 2 wherein the decision adopted in the meeting of the Committee of Registrars constituted in terms of the resolution of the Administrative Committee of this Court dated January 6, 2011, duly ratified by the Full Court, had been annexed. He submitted that the judgeship of Murshidabad had raised certain queries. One of the questions was whether those candidates who had opted for Group D posts without specifying the nomenclature of the posts given in the notification may be considered for both posts of process server and peon/nightguard/farash or not. It was clarified that the candidates opting for Group D posts without specifying the nomenclature of the posts given in the notification may be considered for process server as well as peon/nightguard/farash or otherwise by the respective District Recruitment Committee. While clarifying as to whether the pay scale of the process servers and the other Group D category posts is different, it was observed that the pay scale of the process servers and the other Group D category posts may be determined by the respective District Recruitment Committee. It was, accordingly, contended that there was no mala fide intention to prepare one final panel containing the names of the successful candidates who had applied either for appointment on the posts of process server or on other Group D category posts like peon/nightguard/farash.

5. Mr. Banerjee next referred to the list of successful candidates prepared on the basis of results of the written examination taken for recruitment of staff on February 19, 2012 for the post of process server and peon/nightguard/farash, wherein the petitioner's name figured at Sl. No. 69. He also referred to the call letter issued in favour of the petitioner inviting her to appear at the personality test scheduled to be held on June 9, 2012. According to him, a reading thereof would reveal that personality test of the candidates aspiring for appointment in the vacancies on the posts of process server/peon/nightguard/farash was to be taken. It was suggested that ever since the results of the written examination

were declared, the petitioner was well and truly aware that those who had applied for appointment on Group D category of posts, which included the post of process server, would be considered together and the petitioner not having raised any objection in relation thereto and having taken a chance of selection, cannot now on finding the results not acceptable to her, question the process of selection before the writ court. In other words, the petitioner acquiesced by her participation in the selection process and is estopped by conduct to challenge the same. In support of such contention, reliance was placed by him on the decisions of the Supreme Court reported in *Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another*, *Ferro Alloys Corpn. Ltd. and Another Vs. U.O.I. and Others*, and *Kenaram Biswas and Others Vs. Nadia Gramin Bank and Others*, . He, accordingly, prayed for dismissal of the writ petition.

6. Mr. Basak, learned advocate for the respondent no. 1, adopted the submissions of Mr. Banerjee and submitted that the petitioner having failed to establish infringement of her legal right, the writ petition is not maintainable. He too prayed for dismissal thereof.

7. In reply, Mr. Bhattacharya disputed that the post of process server belongs to Group D category. According to him, having regard to the pay scale an incumbent on the post of process server is entitled to together with the grade pay, the post of process server is a Group C post. Reference was made to the West Bengal Services Revision of Pay and Allowances Rules, 2009 (hereafter ROPA Rules) in this behalf. He further contended that the petitioner was neither made aware of the decision of the Committee of Registrars dated January 6, 2011 nor could one imagine upon perusal of the list of candidates found fit to appear in the personality test and the call letter that those who had not even applied for the post of process server would be considered along with those who did make an application therefor. He submitted that the decisions cited by Mr. Banerjee were not at all relevant for deciding the issue involved in the writ petition and hence prayed for relief in terms of the prayers therein.

8. Having heard learned advocates for the parties and on consideration of the materials on record, two main questions arise for consideration on this writ petition. They are:

(i) whether the respondents 2 to 5 were justified in allowing candidates who did not apply for appointment on the post of process server to compete with those who did apply therefor and to prepare a panel including the former, and in the process to sideline the petitioner from the track of public employment in the judgship of Murshidabad?

(ii) whether the court of equity by application of the principle of estoppel by conduct, acquiescence and or/waiver, ought to deny relief to the petitioner based on the authorities cited by Mr. Banerjee?

9. Before proceeding to decide the aforesaid questions, it would be out of context to examine whether the post of process server is a Group C or a Group D post.

Rule 13 of the ROPA Rules provides for classification of Government employees. It reads as follows:

13. Classification of Government employees. - From the dates of commencement of these rules, Government employees shall be classified as Group A, Group B, Group C and Group D in the following manner:-

10. Part C of the ROPA Rules shows the correspondence between the existing scales and the revised scales of pay. Existing pay structure of Rs. 3150-80-3390-90-4380-100-5680 in terms of the revised pay structure is in Pay Band (PB) - 2, the PB scale is Rs. 5400-25200 and grade pay is Rs. 2,300/-.

11. It would be evident from the employment notification dated July 06, 2011 that the scale of pay of process server has been mentioned there as Rs. 5400/- to Rs. 25200/- with grade pay of Rs. 2,600/-. Although the grade pay for an incumbent on the post of process server has since been reduced from Rs. 2600/- to Rs. 2300/-, as it appears from employment notification dated February 8, 2013 issued by the office of the District Judge, Murshidabad, there can be no two opinions that while the post of process server carries pay structure in PB 2 with grade pay of Rs. 2,300/- or above (upto at least Rs. 2,600/-), the pay structure for Group D staff mentioned in the employment notification dated July 6, 2011 is in PB 1 and grade pay is less than Rs. 1,900/-. Therefore, there cannot be any doubt that the post of process server is a Group C post.

12. It is clear on a bare perusal of the minutes of the meeting of the Committee of Registrars dated January 6, 2011 that number of applications had been received from candidates who had applied for recruitment to Group D posts without specifying whether they aspire for appointment either as peon or night guard or farash. In the absence of such specification, those candidates could have been considered only for the vacancies on the posts of peon/nightguard/farash. However, not having applied for the post of process server, the said candidates could not have been considered for appointment in the vacancies on such post. It passes my comprehension as to how the Committee of Registrars could allow clubbing together of the candidates (including the petitioner) who had applied for the post of process server (Sl. No. 7 in the employment notification in question) with those who had applied for appointment on Group D posts (Sl. No. 8 in the same employment notification), which meant the posts of peon/nightguard/farash. The Committee of Registrars, furthermore, created a mess by adopting the resolution in respect of the second query of the District Recruitment Authority. Whether scales of pay of process server and peon/nightguard/farash would be different or not, they ought to have referred to the ROPA Rules instead of leaving it to the members of the District Recruitment Committee to decide what should be the pay scales. The consequence was obvious, - the post of process server was treated as a Group D post by the District Recruitment Committee, although it was not so. Be that as it may, if a candidate despite being eligible in terms of the criteria mentioned in the employment notification is entitled to apply for two distinct posts but applies for

one post, it signifies that he is not interested to have an appointment on the other post. I wonder how, in the circumstances, the Committee of Registrars could allow the District Recruitment Authority to consider those candidates for appointment in the vacancies on the post of process server, when they themselves had chosen to compete for the Group D posts only. The final panel prepared for recruitment to the post of process server ought not to have been drawn by including in it candidates who had not applied for appointment on such post. It was, therefore, not fair and proper to sideline the petitioner and thereby keep her out of the arena of consideration for immediate appointment to any of the 4 unreserved vacancies.

13. Now, the other question falls for decision. It is settled law that a process of selection cannot be challenged by an unsuccessful candidate by pointing to certain irregularities here and there in the process of which he was aware, once the result is not to his liking. Relief, in such a case, is declined by applying the principles of estoppel, acquiescence and/or waiver. The decisions of the Supreme Court in this regard are legion. Paragraph 38 of the Bench decision of this Court in *Kenaram Biswas (supra)* refers to most of the decisions where the aforesaid principles were applied. It is of utmost importance to note one common thread that passes through all the decisions, i.e. awareness of the unsuccessful candidate of the manner in which the selection process would be conducted and completed. Despite the process being likely to be conducted either in ignorance or deviation of a rule, which is binding on the employer, or the constitution of the Selection Committee is strictly not in accordance with the requirement of the governing rules/guidelines, the candidate being aware thereof approached the Court and wished the Court to undo the irregularity after he had taken a chance of selection albeit unsuccessfully. There can be no doubt that such litigation must be nipped in the bud.

14. But is it the law that a selection process can never be challenged by an aspirant who does not figure in the panel? Is it the case here that the petitioner had information prior to her participation in the personality test or she could have gathered information that the District Recruitment Authority was contemplating preparation of a panel for recruitment to the post of process server from amongst candidates who had not even applied therefor? Is it a mere irregularity or an illegality to consider a candidate for appointment on the post of process server, without receiving any application from him before the last date fixed for receiving applications? Answers to these questions, in my considered view, would be vital for clinching the issue.

15. My understanding of the law on the subject does not persuade me to hold that an unsuccessful aspirant for a post can never challenge a selection process after his participation therein. Take a case where the Selection Committee selects a candidate who lacks the essential eligibility criteria for appointment, or a candidate is selected whose application was received after the last date for making applications has expired, or a candidate is selected with one of his close

relatives being a member of the selecting body and has taken active part in the selection process, - the unsuccessful aspirant may not have this vital information in the midst of the selection process. If this information is gathered by him subsequently and the selection is challenged on the ground of patent illegality or manifest bias, should the door be closed on him merely because he did not raise any objection prior to publication of the selection result? I do not think so. If that position were conceded, selection made by a selecting body would remain outside the realm of judicial scrutiny. In this regard, one may usefully refer to the decision of the Supreme Court reported in *Dalpat Abasaheb Solunke and Others Vs. Dr. B.S. Mahajan and Others*, , where it has been ruled as follows:

12. \*\*\*It is needless to emphasise that it is not the function of the court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc.\*\*\*

(underlining for emphasis by me)

16. It is the petitioner's claim that she was neither aware of the decision of the Committee of Registrars adopted in the meeting dated January 6, 2011 nor could she imagine what was in the minds of the members of the District Recruitment Authority while processing the applications received from the candidates aspiring for public employment. This claim could not be disproved by the respondents by demonstrating that she was made aware of the same. Merely because the list of successful candidates prepared on the basis of the written examination indicated that the same was for recruitment on the posts of process server as well as peon/nightguard/farash and the call letter issued in favour of the petitioner also indicated to the same effect, it is difficult to accept the contention of Mr. Banerjee that those who had not applied for the post of process server but were also being considered for appointment on such posts could have been ascertained on a bare perusal of such list/call letter. The list reflects nothing but the names of candidates, arranged in alphabetical order, who were successful in the written examination, without any indication as to who applied for which post. I have noticed from the final panel that those who applied for appointment on Group D posts had roll nos. such as "GD ...", whereas those who applied for appointment on the posts of process server had roll nos. such as "PS ...". The roll nos. of the successful candidates were also not indicated in the list of candidates eligible to take the personality test, which could have given an impression as to who had applied for which post. Similarly, the call letter appears to have been issued in a printed format to all the candidates who successfully acquitted themselves in the written examination for further appearance in the personality test. Although the

petitioner had applied for appointment in the post of process server, the alternatives peon/nightguard/farash were not struck off. It is absolutely impossible for a person of reasonable prudence to construe such list/call letter as indicative of the minds of the members of the District Recruitment Authority to allow non-applicants for appointment on the post of process server to be considered for such post. The stand of the respondents 2 to 5 that the petitioner took a chance of selection, despite being aware that those who had not applied for appointment on the post of process server were being considered therefor, cannot thus be accepted.

17. The decisions of the Supreme Court relied on in paragraph 38 of the decision in Kenaram Biswas (supra) and the said decision itself are distinguishable on facts and can have no application here. It is to be noted that most of the decisions referred to in paragraph 38 of the decision in Kenaram Biswas (supra) rendered in this century relied on the earlier decisions of the Supreme Court reported in G. Sarana Vs. University of Lucknow and Others, and Madan Lal and Others Vs. State of Jammu and Kashmir and Others, . None of the said decisions stand in the way of defeating the claim of the petitioner.

18. In G. Sarana (supra), the aggrieved appellant who laid challenge to the selection process appeared for interview before the Selection Committee knowing fully well that two members of the Committee had close acquaintance with the selected candidate and could be branded biased. That is not the case here. The petitioner has not questioned the constitution of the Selection Committee and, therefore, this decision does not come to the rescue of the respondents 2 to 5.

19. In Madan Lal (supra), the attack was on the manner and method of conducting viva voce test and result thereof. The main contention of the aggrieved unsuccessful candidates was that the viva voce test was so manipulated that only preferred candidates, by inflating their marks in the viva voce test, were permitted to get in the select list. It is in such factual background that the Supreme Court observed as follows:

9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, 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 the Selection Committee was

not properly constituted. In the case of *Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others*, it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

10. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition we cannot sit as a court of appeal and try to reassess the relative merits of the candidates concerned who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed, in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a court of appeal over the assessment made by such an expert committee.

20. Relief was therefore declined not on the ground that the petitioners had failed to demonstrate illegality in the process of selection but on the ground that the result of the interview test on merits cannot be successfully challenged by a candidate who took a chance to get selected at the said interview and who ultimately found himself to be unsuccessful.

21. Curiously enough, although the decision in *Madan Lal (supra)* has been noticed by the Supreme Court in its subsequent decision reported in *Raj Kumar and Others Vs. Shakti Raj and Others*, and distinguished, one does not find reference to such decision (delivered by a Bench of three learned Judges) in the decisions of Division Benches of two learned Judges relying on *Madan Lal (supra)*. It was held in *Raj Kumar (supra)* that there was a glaring illegality in the selection procedure and, therefore, the principle of estoppel by conduct or acquiescence would have no application in the facts of that case.

22. Apart from the decision in *Dalpat Abasaheb Solunke (supra)*, which is also a decision of three learned Judges, the decision in *Raj Kumar (supra)* is an authority on the point that should glaring illegalities in the selection procedure be demonstrated before the Court, the principle of estoppel by conduct or acquiescence would have no application.

23. I am of the clear view that if a glaring illegality in the selection procedure is demonstrated before the Court affecting one's right protected by Articles 14 and 16, an unsuccessful candidate (if he/she can prove to the satisfaction of the



Court that such glaring illegality could not have been known to him/her before the selection process was complete and that he/she came to learn of the same after completion of the selection process) can legitimately question a concluded selection process.

24. On facts and in the circumstances of the present case, it is not a mere irregularity (to allow candidates who had applied for appointment on Group D posts to compete for appointment on Group C posts) that could be ignored. Applying the law that is deducible from the decision in *Raj Kumar (supra)*, I hold that the mode and manner for selection of successful candidates for appointment on the post of process server suffers from a gross illegality and that relief cannot be denied to the petitioner by application of the principle of estoppel by conduct/acquiescence/waiver.

25. The decisions in *Prasun Roy (supra)* and *Ferro Alloy (supra)* also do not have any application on facts and in the circumstances. In *Prasun Roy (supra)*, the respondent had challenged the appointment of the arbitrator after he had held 74 sittings which were attended by the parties and their counsel. The question that arose was, could a party be permitted to throw a challenge to his appointment at such belated stage. It was answered in the negative and held that by conduct, there was acquiescence on the part of the respondent which precludes it from challenging the proceedings. *Ferro Alloy (supra)* was a decision where it was held on facts that the appellant by its own conduct had deliberately waived its dispute. It was held that on the grounds of estoppel and acquiescence as well as waiver, the appellant can be said to have given up its challenge regarding upward revision of the assessment of its need as arrived at by the Expert Committee and as confirmed by the Central Government when it saw to it by keeping mum that the entire order of the Central Government dated August 17, 1995 got confirmed by the Supreme Court in another appeal.

26. The writ petition, accordingly, succeeds. Since number of unreserved vacancies in respect of the post of process server is 4 and amongst the candidates who had applied for appointment on such post the petitioner obtained the second position in the final panel, she is entitled to an offer of appointment subject to verification of her antecedents and other legal formalities. If there is a vacancy in the judgeship of Murshidabad on the post of process server, the petitioner shall be immediately offered appointment on such post. The offer of appointment must reach her within a week after reopening of the Court after annual vacation. If no vacancy is presently available, she shall be offered appointment as soon as a vacancy arises. There shall be no order as to costs.

Urgent photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.