
(2009) 06 CAL CK 0062
In the Calcutta High Court
Case No : Writ Petition No. 2127 (W) of 2009

Nilima Das

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 29-06-2009

Acts Referred:

West Bengal Board of Secondary Education (Examination) Regulations, 2001 —
Regulation 13, 13(6)

Citation : (2009) 3 CALLT 554

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Advocate : Kishore Dutta and Nabankur Paul, for the Appellant; Shibani Bhagat and Saibal Acharya, for the Respondent

Final Decision : Dismissed

Judgement

Dipankar Datta, J.—The National Rural Health Mission has introduced a scheme for engagement of a second Auxiliary Nurse and Midwife in all the health sub-centres in the State in a phased manner upto 2010. The engagement would be on a purely contractual basis by the Block Health and Family Welfare Samiti on behalf of the District Health Mission. Those aspiring for engagement must be married women in the age group of 25-35 years and a resident of one of the villages comprising the sub-centre. Once engaged, one would receive a monthly honorarium of Rs. 7,000/.

2. It has been clarified vide Memo dated 8th November, 2006 issued by the State Mission Director and Special Secretary to the Government of West Bengal, Department of Health and Family Welfare that "selection of second ANMs is to be done STRICTLY ON MERIT BASIS on the basis of marks obtained by the candidate in the Madhyamik or equivalent examination" and that "no marks have been earmarked for any other purpose i.e. viva voce etc.".

3. The petitioner and the private respondent were contenders for the post of Auxiliary Nurse and Midwife in Chauddachulli Sub-centre under Khejuri II

Development Block, reserved for Schedule Caste. The advertisement inviting applications dated 28th July, 2008 in response where to they applied made a representation to the public that selection would be made on the basis of educational qualifications of the candidates.

4. The private respondent had taken the Secondary Examination, 1995 conducted by the West Bengal Board of Secondary Education (hereafter the said Board). She could not succeed in the Science group of subjects comprising Mathematics, Physical Science and Life Science pertaining to the said examination and was issued a mark sheet which showed her result as compartmental.

5. She again took the Secondary Examination, 1996 conducted by the said Board confined to the subjects of Science group and came out successful. She obtained 143 marks in the Science group. A marksheet was issued in her favour by the said Board which showed her result as "P" (pass).

6. On the other hand, the private respondent took the Secondary Examination, 1996 conducted by the said Board and succeeded in clearing the same in her first attempt. Since she obtained 447 marks, she was placed in the 2nd division. In the Science group, she obtained 163 marks.

7. The petitioner in her application for appointment to the post of Auxiliary Nurse and Midwife mentioned that she had obtained 470 marks in the compulsory papers under column No. 7, and 52.22% as the percentage of marks obtained by her in the Secondary Examination, 1996 under column No. 8. The division under column No. 6 was shown as "P".

8. It is to be noted that the petitioner, in the prescribed form, did not mention that she had passed the Secondary Examination conducted by the said Board as a compartmental candidate.

9. Since in terms of the advertisement inviting applications copy of the marksheet is required to accompany the application, duly attested, the Selection Committee took note of the fact that the petitioner had succeeded in the Secondary Examination as a compartmental candidate. However, finding that there were candidates for the said post who had succeeded in clearing the Secondary Examination in their first attempt, the Selection Committee selected three candidates in order of merit on the basis of marks obtained at the Secondary Examination. The private respondent was placed at the first place in the panel. It is not in dispute that consequent to such selection she has been deputed for training at Jhargram S.D. Hospital and is awaiting issuance of an order for appointment as Auxiliary Nurse and Midwife.

10. The process of selection adopted by the Selection Committee leading to selection of the private respondent for engagement as Auxiliary Nurse and Midwife is the subject matter of challenge in this petition.

11. Mr. Dutta, learned Counsel appearing for the petitioner contended that she

had obtained 52.22% marks as against 49.11% marks obtained by the private respondent at the Secondary Examination conducted by the said Board. She is, therefore, superior to the private respondent and ought to have been selected. By not considering her candidature for selection, the Selection Committee had committed gross illegality to her detriment.

12. Relying on a Division Bench decision of this Court dated 16.10.2007 on MAT No. 2114 of 2007 [Kalpana Sarkar (nee Barman) v. State of West Bengal and Ors.], he contended that the issue involved in the writ petition is no longer *res integra*. The Division Bench held that since selection has to be conducted purely on merit based on the marks obtained by the candidates in the Secondary or equivalent examination, no preference could have been given to a candidate who cleared the examination in her first attempt admittedly when marks obtained by a rival compartmental candidate were higher than that obtained by the candidate succeeding in the first attempt. It was further held therein that once the selection process had commenced, a procedure for ascertaining inter-se merit that is not to be found in the applicable guidelines could not have been introduced, thereby bringing about a change in the norms of selection. According to him the State respondents after the said decision have not changed the norms of selection by mentioning that candidates clearing the Secondary Examination in their first attempt would be preferred to compartmental candidates and, therefore, the petitioner is entitled to benefit thereof.

13. He, accordingly, prayed for setting aside of the selection of the private respondent and for a direction on the concerned authority to depute the petitioner for training.

14. This Court has heard Mr. Dutta at length. If it is to be accepted that the issue is covered by the decision of the Division Bench in *Kalpana Sarkar (supra)*, the petitioner is definitely entitled to relief as claimed in the petition. However, on careful study of the said decision, this Court is unable to hold that the same constitutes a binding precedent and would have application on facts and in the circumstances of the present case.

15. That selection for engagement as Auxiliary Nurse and Midwife would be purely on merit based on the marks obtained by the candidates in the Secondary or equivalent examination, provided other conditions like age, marital status and residence requirement are fulfilled, has been noticed earlier. Thus, the marks obtained by a candidate in the Secondary or equivalent examination would clinch the issue if other qualifications were satisfied. When the marks obtained in the Secondary or equivalent examination is vital for selection, there can be no doubt that the marks obtained by the rival candidates in a particular examination conducted in a particular year must be considered and not marks obtained by a candidate in successive examinations till such time one can be said to have qualified in the Secondary or equivalent examination. The norms speak of marks obtained in "examination" and not "examinations". There is no warrant to read the singular word as plural. A reasonable interpretation of the applicable norms

for selection, in the opinion of this Court, leads to the conclusion that the merit of the candidates competing for the post must be ascertained with reference to the marks obtained in the examination conducted in the same year, provided the candidates have so appeared. If, however, they have appeared in the Secondary Examinations conducted in different years, the yardstick ought to be the marks obtained on first appearance and not on consolidation of marks obtained in two or more successive examinations.

16. In the present case, the petitioner did not mention that she had taken the Secondary Examination conducted in 1995 as well as in 1996 with two different roll numbers. Since she could clear the Secondary Examination in two attempts, despite having obtained 470 marks (both the examinations taken together), she was not placed in either of the three divisions mentioned in the marksheet. On the contrary, she was declared only to have passed the Secondary Examination without division.

17. As has been noted earlier, the private respondent succeeded in clearing the Secondary Examination with 49.11% marks and was placed in the 2nd division.

18. The facts are, therefore, clear that the petitioner and the private respondent took the Secondary Examination conducted by the said Board in 1995 and 1996 respectively for the first time. While the private respondent succeeded, the petitioner could not succeed and was declared a compartmental candidate. She again took the Secondary Examination, 1996 and succeeded. If the inter se merit of the petitioner and the private respondent is to be judged based on their respective performance in the Secondary Examinations taken for the first time, the latter has to be considered more meritorious. If the petitioner has thus not been considered for engagement, she cannot have any legal grievance to voice.

19. The issue can be looked at from a different angle. Marks obtained by an individual candidate in the Secondary Examination are decisive of the division in which the said Board places him or her. While the private respondent was placed in the 2nd division, the petitioner was declared merely to have passed the Secondary Examination without any division. On the face of the marksheets produced by the petitioner and the private respondent, there can be no two opinion that a candidate qualifying in the Secondary Examination with 2nd division marks is superior than a candidate clearing the same examination with "P" (pass). Therefore, the Selection Committee in selecting the private respondent in preference to the petitioner did not violate the applicable guidelines which ordained that merit based on marks obtained in the Secondary Examination would be the deciding factor for selection.

20. This Court has duly considered the decision in *Kalpna Sarkar* (supra). The Division Bench was considering an appeal against an order passed by the learned Single Judge who held that the procedure adopted by the respondents in giving preference to a candidate clearing the Secondary Examination in her first attempt to a candidate who had cleared the Secondary Examination as

compartmental candidate in her second attempt as reasonable. In reversing the decision of the learned Single Judge, the Division Bench appears to have taken into consideration Regulation 13 of the West Bengal Board of Secondary Education (Examination) Regulations, 2001. Sub-rule 6 thereof reads:

13. Provisions for issuing admit card, mark-sheet and other certificates:

(1)

(2)

(3)

(4)

(5)

(6) A compartmental candidate when securing qualifying marks in the subject be eligible for pass mark in Group be declared pass with Division after taking into account the marks in other subjects/groups of previous examination so that mark sheet and certificate be issued accordingly....

21. After considering the said Sub-rule, the Division Bench held as follows :

The aforesaid Examination Regulations thus specifically provides that a compartmental candidate after securing the qualifying marks would be declared not only pass but also get the Division after taking into account of the marks obtained in the other subjects/groups of the previous examination.

22. This Court has looked into the Examination Regulations of 2001 of the said Board. The said Regulations were enforced with effect from a date subsequent to 3rd July, 2001 and have no retrospective operation and, therefore, cannot be taken into consideration for deciding the relative merits of the petitioner and the private respondent who succeeded in clearing the respective Secondary Examinations much prior to introduction of such Regulations.

23. This Court has also endeavoured to ascertain the terms of the Examination Regulations of the said Board, which were in vogue in 1996. No statutory provision similar to Regulation 13(6) of the 2001 Regulations could be noticed. The petitioner, therefore, was rightly not awarded any division after taking into account the marks obtained by her in the previous examination (1995). Since the Division Bench decision is based on the Examination Regulations of 2001, which cannot be called in aid here (the petitioner having cleared the Secondary Examination in 1996), it is distinguishable and lends no assistance to the petitioner.

24. Submission of Mr. Dutta that the factual aspects before the Division Bench were same as the present case i.e. the contenders for the posts who were parties to the proceedings had passed their respective Secondary Examinations before the 2001 Regulations came into force (based on his personal knowledge for he appeared for the compartmental candidates) and, therefore, its decision is

binding on this Court has failed to impress. Had the Division Bench declared a law in absolute terms that Regulation 13(6) of the 2001 Regulations would apply to those candidates who had succeeded in the Secondary Examinations conducted by the said Board prior to its enforcement as compartmental candidates, the enunciation of the reason or the principle in support of such declaration would constitute the ratio of the decision, binding on this Court. However, in the absence of enunciation of reason or principle on which the question before the Division Bench was decided, this Court does not consider it to be judicial impropriety on its part in not following the same. Disposal of a case by blindly relying on any decision is not proper, is settled law.

25. Before parting, this Court cannot refrain from expressing a word or two in respect of the contention advanced by Mr. Dutta on the authority of the decision in Kalpana Sarkar (*supra*).

26. A candidate taking the Secondary Examination conducted by the said Board is not permitted to reappear in any subsequent examination conducted by it if he/she clears the examination. Therefore, in a given case, if a candidate, otherwise meritorious, unfortunately secures poor marks, say 42% marks, he cannot improve his/her performance by taking part in any subsequent examination. His/her fate is sealed once and for all and in future, he/she has to compete for public employment based on the poor marks obtained by him/her at the Secondary Examination. Clearing the examination in the first attempt with very low marks becomes a curse for him. He/she has to bear its consequence for the rest of his/her life.

27. On the contrary, if a candidate secures pass marks in all but one of the groups, he/she is declared a compartmental candidate and in order to clear the Secondary Examination he/she is entitled to reappear in the following year's examination as a compartmental candidate. He/she has the entire year to study on the subject in which he/she has failed. As a result of studying the same subject over again, he/she is provided with a golden opportunity of clearing the examination. Obviously, in such a case, a candidate would stand a better chance of improving his/her performance in the following year's examination. If the marks obtained by him/her in both the attempts are consolidated, he/she would, in all probability, steal a march over a candidate whose example has been given in the preceding paragraph. In his/her case, failure becomes a boon in disguise.

28. Would it be fair, just and proper to treat these candidates at par? This Court does not think so. Selection of a candidate who clears the Secondary Examination in two or more attempts in preference to a candidate who clears the examination in the first attempt would amount to giving a premium for failure. A candidate clearing the examination in the first attempt would thus be treated with unequal and deprived of equal opportunity of public employment, which would be contrary to constitutional values.

29. By referring to a Memo dated 30.4.2007, extracted in the decision in Kalpana

Sarkar (supra), Mr. Dutta urged that the Screening Committee of Gangarampur Block, Dakshin Dinajpur had solicited instructions for grant of preference to those candidates passing in the first attempt to candidates passing with compartmental status. According to him, so long as instructions are not issued by the competent authority authorising grant of preference in the matter of engagement to those passing in the first attempt, the Court ought not to lay down a criterion that is the prerogative of the administrative authorities.

30. This Court has not ventured to lay down any criterion for appointment. It is only on the basis of its own interpretation of the applicable guidelines vis-?-vis the marks obtained by the private respondent and the petitioner in the Secondary Examinations that this Court, for reasons recorded above, has held the private respondent to be superior to the petitioner and has thus upheld her selection.

31. The writ petition stands dismissed.

32. There shall be no order for costs.

33. Urgent photostat certified copy of this judgment and order shall be furnished to the applicant as early as possible but positively within four days from putting in requisites therefore.