
(2018) 08 CAL CK 0008
In the Calcutta High Court
Case No : Writ Petition No. 18257 (W) of 2016

Ratan Das & Ors.

APPELLANT

Vs

State of West Bengal And Others.

RESPONDENT

Date of Decision : 07-08-2018

Acts Referred:

Citation : (2018) 08 CAL CK 0008

Hon'ble Judges : DR. SAMBUDDHA CHAKRABARTI, J

Bench : Single Bench

Advocate : Chittapriya Ghosh, Samir Kumar Adhikari, Supriyo Chattopadhyay, Sabyasachi Mondal

Final Decision : Dismissed

Judgement

Sambuddha Chakrabarti, J.

The case of the petitioners, in short, is that the District Magistrate and Controller of Civil Defence, i.e., the respondent no. 4 herein, published an

advertisement dated July 30, 2015 for sponsoring the names of eligible Civil Defence Volunteers for appointment on contractual basis to the post of

Auxiliary Fire Personnel under the West Bengal Fire and Emergency Services.

In the advertisement it was mentioned that all the candidates would have to undergo a physical endurance and measurement test and those who would

pass those tests would be called for an interview on August 18, 2015. The petitioners appeared before the selection committee on the respective dates

as mentioned in the advertisement and on being selected in physical measurement test or endurance test were called for a viva voce to be held on

August 18, 2015 with all the testimonials. The respondent no. 4 prepared a list of 63 civil defence volunteers including the petitioners for sponsoring the

names for appointment to the respective posts.

It is the further case of the petitioners that subsequently the respondent no. 4 by a memo dated August 27, 2015 sponsored the names of 21 candidates

along with the names of the petitioners according to the rank from the said list of 63 candidates.

The petitioners allege that on October 13, 2015 the Director General, West Bengal Fire and Emergency Services, the respondent no. 3, directed all the

recommended volunteers including the petitioners to appear before the selection committee for a screening test in Kolkata on November 19, 2015. It

was clarified that all the candidates would have to undergo a physical measurement and physical endurance test. After the petitioners had once

appeared in the said tests and the viva voce conducted by the respondent no. 4 and after the names of the petitioners were duly recommended by him

the direction to appear further for the said tests was nothing but a means to oust the petitioners from their claim to appointment as their eligibility has

once been considered. They have alleged that the direction to appear for the same tests over and over again is absolutely mala fide and arbitrary.

The petitioners along with other candidates, however, appeared before the tests conducted by the respondent no. 3. After publication of the panel for

selected candidates on January 13, 2016 it was found that only nine candidates were selected out of 21 recommended candidates.

As per the memo dated May 22, 2015 issued by the respondent no. 3 though there was a vacancy of 30 posts for the district of Cooch Behar, and

though the respondent no. 4 recommended names of 21 candidates along with the petitioners, the respondents only appointed nine candidates to the

said posts without considering the recommendation of the respondent no. 4. The petitioners made representations to the respondent nos. 3 and 4 for

filling up the remaining posts but they have taken no initiative which has led the petitioners to approach this court by this writ petition, primarily with a

prayer for a direction upon the respondent no. 3 to revisit the vacancy position for the district of Cooch Behar for the relevant posts and to consider

the petitioners' case for being appointed to the said posts as per the recommendation of the respondent no. 4 and for other reliefs. The respondent

no. 3 has filed a report in the form of an affidavit.

The affidavit records that 1170 Auxiliary Fire Personnel were engaged in 2012-13

out of a total number of 1572. The process of engagement of the remaining 402 personnel was started on April 30, 2015. The number of posts for Cooch Behar district was 10 out of 402. 30 names were received from the Civil Defence Department. During the continuation of the process the High Court passed an order on November 30, 2015 in several writ petitions by which the respondent no. 3 was directed to revisit the vacancy position through out the state of West Bengal and if vacancies were available, to consider the case of the petitioners of those writ petitions for appointment to the respective posts, provided of course they were otherwise eligible or were entitled to in accordance with law.

The report further states that in compliance with the said order the respondent no. 3 revisited the vacancy position through out the state and found 88 vacancies available and the said vacancies for the contractual engagement of Auxiliary Fire Operator was distributed amongst seven districts, viz., Howrah, Hooghly, Burdwan, Murshidabad, Nadia, Uttar and Dakshin Dinajpur and Jalpaiguri which were the districts involved in the said writ petition.

An order to that effect was also issued on March 4, 2016. The present petitioners were called for a screening test on November 19, 2015. But the petitioners were not selected due to their low rank in the merit list.

It may be mentioned that in course of hearing of the writ petition the petitioners submitted that 88 number of revisited vacancies were only distributed among seven districts of West Bengal as the petitioners covered by the order dated November 30, 2015 heralded from the said districts. The petitioners had submitted in course of hearing that the vacancy position of the district of Cooch Behar was neither revisited nor the revisited vacancies were uniformly distributed through out the state of West Bengal.

Even if such a submission was made by the petitioners the same must be deemed to have been totally beyond the scope of the writ petition. The petitioners did not come to court challenging the order dated March 3, 2016 by which the vacancy position in respect of the seven districts were revisited. The case of the petitioners in this writ petition is that once their case had been recommended there was no reason for the respondent no. 3 to direct them to appear for the said test on a subsequent date. There has been no pleading that pursuant to the order dated November 30, 2015 the respondents failed to revisit the vacancy positions evenly in respect of all the

districts or that the number of vacancies for Cooch Behar ought to have been more.

Pursuant to the advertisement the petitioners had taken part in the selection process without any objection and therefore, now they cannot turn around and take a plea that there was no rationale behind the order dated March 4, 2016. To allow the petitioners to challenge the vacancy position for the district of Cooch Behar would be to go beyond the pleadings. That is plainly not permissible. Moreover, the respondent no. 3 has specifically stated that the vacancy position was revisited through out the state of West Bengal and it was found that 88 vacancies were available for contractual engagement of Auxiliary Fire Operator. These vacancies were distributed amongst the seven districts from which the petitioners hailed in the earlier bunch of writ petitions on which the order dated November 30, 2015 was passed. The petitioners connected with the said writ petitions belong to those districts mentioned in the order dated March 4, 2016. The reasons for such distribution of vacancies from the seven districts have been clearly stated in the order itself. The respondent no. 3 had stated that this they had done in compliance with the order of the court as the High Court had directed the respondents that if the vacancies were available, to consider the case of the petitioners in those bunch of writ petitions for being appointed to the posts in question if they were otherwise eligible. Therefore, the vacancies were distributed amongst those districts only from which the petitioners had hailed. As such the rationale is not very far to seek, and that cannot be made the subject-matter of the present dispute.

The writ petition must be disposed of on the basis of what the petitioners have pleaded and not what they deviated to in course of submission. That would be allowing the petitioners to agitate something in derogation of the settled principles of pleadings and to spring a surprise on the respondents who had no notice of it.

It is a proposition of law, settled more than six decades ago that a point which has not been taken in the pleading cannot be allowed to be agitated at the stage of hearing. In *Vhikaji Narain Dhakras vs. State of M.P.*, reported in AIR 1955 781, the Supreme Court laid down that a point not raised in the petition cannot be taken at the stage of argument. The reason for the same has been explained by the Supreme Court in *M.S.M. Sharma*

â?"Vs.- Krishna Sinha, reported in 1959 SC 395 that a point not raised in the petition cannot be raised subsequently as it would not be right to permit

the petitioner to raise the questions which depends on facts which were not mentioned in the petition but were put forward in the joinder to which the respondent has no chance to reply.

In the present case the petitioners have nowhere assailed or even questioned the manner of re-visiting the vacancy position throughout the State as

directed by this Court earlier. They have not thrown any challenge to the order dated March 4, 2016 by which 88 vacancies available for the relevant

posts were distributed amongst the seven districts of the State. They not having taken the point in the pleading and having appeared at the examination

cannot raise the plea at the stage of the argument of the case. This is plainly impermissible. The Court cannot allow the petitioners to take a point

which has not been pleaded as it cannot travel beyond the pleading and take into consideration the allegations or facts of which the respondents had no

notice in the form of averment in the writ petition. In

Dr. Anuradha Bodi â?"Vs.- Municipal Corporation of Delhi, reported in AIR 1998 SC 2093 this well settled principle was again reiterated that in the

absence of specific plea in the writ petition new plea cannot be raised at the stage of argument.

It appears that the number of posts for the district of Cooch Behar was 10 and 30 names have been received from the Civil Defence Department.

The petitioners, as it appears from the writ petition, had taken the physical endurance and measurement tests and the viva voce to be the only test in

which they had to appear. In the advertisement there was no such indication. It is also not clear why and how the petitioners alleged that there was a

vacancy of 30 posts in the district of Cooch Behar. The respondent no. 4 sent a list of 21 civil defence volunteers for the district for sponsoring the

names for engagement as Auxiliary Fire Personnel on contractual basis. If the number of vacancies was 10, as it appears from the report filed by the

respondent no. 3, there had to be a further screening test for filling up the requisite number of vacancies. There was nothing in the advertisement that

once their names were sponsored they would be automatically taken in irrespective of the vacancy position.

The respondent no. 3 directed the recommended volunteers to appear before the

selection committee for a screening test on November 19, 2015. The physical measurement test and endurance test are not to be equated with the screening test. The petitioners' challenge to the further screening test after having appeared in the selection process earlier has no justifiable basis. They had appeared before the screening test on November 19, 2015 without any objection. They had been intimated the date, time and venue of this test about a month before. After having appeared at the test without any objection or protest they cannot be allowed to challenge the same after being unsuccessful in the same. The representations made by the petitioners were all after the final list of selected candidates was published. The petitioners obviously had taken a calculated chance and were sitting on the fence. The law on the point is very well-settled that if a candidate takes such a calculated chance he cannot subsequently be allowed to turn around and challenge the selection procedure at which he had participated without any protest.

If such is the case of the petitioners that once their physical measurement and endurance tests have been done by the respondents the direction by the respondent no. 3 to appear for a further screening test was impermissible they were required to raise the issue with the respondents or at least have protested against that direction before they appeared at the screening test on November 19, 2015. The Supreme Court in the case of Madan Lal â?Vs.- State of J & K, reported in AIR 1995 S.C. 1088 observed that it is well settled that if a candidate takes a calculated chance and appears at the interview (here this screening test), only because the result of the interview (screening test) is not palatable to him, he cannot turn around and subsequently contend that the process was unfair or the selection committee was not properly constituted. A person who appears at the examination without protest has no locus standi to challenge the said examination after he is unsuccessful in the same. Thus I find no merit in the contentions of the petitioners. The writ petition is dismissed. There shall be no order as to costs.