
(2015) 02 CAL CK 0085

In the Calcutta High Court

Case No : WP Nos. 12029 (W) of 2003 and 6085 (W) of 2004

Sibsankar Banerjee and Others

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 11-02-2015

Acts Referred:

West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1976 — Section 6(2)

Citation : (2015) 02 CAL CK 0085

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : P.S. Deb Barman and Anindya Bose, for the Appellant; Tulsidas Maity, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Harish Tandon, J.—A short but an interesting point is involved in this writ application as to whether the selection process commences on notifying the number of vacancies by the District Primary School Council to the Employment Exchange or it commences when the District Employment Exchange sent the names of the sponsored candidate or when the District Primary School Council asked for submission of bio-data and testimonials from the sponsored candidates or when the written test/interview is conducted.

2. Before advertng to the question so formulated above, it is necessary to state the brief facts.

3. The petitioners duly registered their candidatures in the office of the concerned Employment Exchanges. The petitioners have undergone Junior Basic Training course and have been awarded the certificates. The District Primary School Council notified the number of vacancies to the Employment Exchange and the Employment Exchange sponsored the candidates wherein the name of petitioners were also included. In the month of April 2002 the District Primary School Council called the petitioners and other sponsored candidates to submit

their bio-data, certificates and testimonials. After the scrutiny of the documents, the petitioners appeared in the written test but were not empanelled. The petitioners challenged such action on a very short but an interesting point that the selection process which was conducted under the Recruitment Rules of 1991 should have been conducted under the Recruitment Rules of 2001.

4. Mr. Partha Sarathi Deb Barman, learned Advocate appearing for the petitioner submits that the writ petitioners were called for submission of their bio-data, certificates and testimonials in the month of April 2002. He further submits that on 15th January 2002 the Recruitment Rules of 2001 was promulgated and given effect to. According to him the selection process should have been conducted under the Recruitment Rules of 2001 and not taking recourse to the Recruitment Rules of 1991.

5. To substantiate his submission that the recruitment process should be undertaken on the Rules existing as on the date when the candidates are invited to submit their testimonial/bio data on the basis of the names sent by the Employment Exchange. He relies upon the Division Bench judgment of this court in case of Snehansu Jas Vs. State of West Bengal and Others, (2001) 3 CALLT 155 : (2001) 3 CHN 313 for the principle that the amending Rules shall operate prospectively and cannot take away or impair the rights of the candidates by making it to operate retrospectively, he cites a judgment of the Supreme Court in case of P. Mahendran and others Vs. State of Karnataka and others, AIR 1990 SC 405 : (1990) 60 FLR 103 : (1990) 1 SCC 411 : (1989) 2 SCR 385 Supp .

6. Mr. Tulsidas Maity, learned Advocate appearing for the District Primary School Council refutes the contention of the writ petitioner. He contends that the Rule which was holding the field when the vacancy arose are the Rules to be taken into consideration at the time of selection process. According to him when an advertisement is made inviting the candidature of the eligible candidates, the Rules prevalent as on the date of the said advertisement, are applicable and any subsequent Rules cannot be applied for such selection process. To buttress such argument he relies upon judgments of the Supreme Court delivered in case of B.L. Gupta and Another Vs. M.C.D., (1998) 7 JT 225 : (1999) 1 SCALE 297 : (1998) 9 SCC 223 : (1998) AIRSCW 3969 , Ashok Kumar Sharma and Others Vs. Chander Shekhar and Another, (1997) 4 JT 99 : (1997) 1 LLJ 1160 : (1997) 2 SCALE 707 : (1997) 4 SCC 18 : (1997) SCC(L&S) 913 : (1997) 2 SCR 896 : (1997) 2 UJ 15 , Arjun Singh Rathore and Others Vs. B.N. Chaturvedi and Others, (2007) 13 JT 543 : (2007) 11 SCC 605 : (2008) 2 SCC(L&S) 387 : (2007) 11 SCR 320 : (2008) 2 SLJ 230 , Jenany J.R. Vs. S. Rajeevan and Others, AIR 2010 SC 1622 : (2010) 125 FLR 1037 : (2010) 4 JT 657 : (2010) 4 SCALE 535 : (2010) 5 SCC 798 , Mohd. Sohrab Khan Vs. Aligarh Muslim University and Others, (2009) 2 JT 666 : (2009) 3 SCALE 638 : (2009) 4 SCC 555 : (2009) 1 SCC(L&S) 917 : (2009) 2 SCR 907 : (2010) 1 SLJ 156 , Md. Raisul Islam and Others Vs. Gokul Mohan Hazarika and Others, AIR 2010 SC 3064 : (2010) 6 JT 632 : (2010) 7 SCC 560 : (2011) 1 SLR 69 : (2010) 6 UJ 3057 : (2010) AIRSCW

4831 , A.A. Calton Vs. Director of Education and Another, AIR 1983 SC 1143 : (1983) 1 LLJ 502 : (1983) 1 SCALE 316 : (1983) 3 SCC 33 : (1983) 2 SCR 598 : (1983) 1 SLJ 454 and Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, AIR 1983 SC 852 : (1983) 2 LLJ 23 : (1983) 1 SCALE 296 : (1983) 3 SCC 284 .

7. From the aforesaid submissions it appears that the District Primary School Council notified the number of vacancies to the Employment Exchange. By a letter dated 24.1.2002, the Employment Exchange to the District Primary School Council invited the answer on certain queries. The purport of the letter shows that upto 24th January 2002, the Employment Exchange did not sponsor the names of the candidates. However, none of the advocates could apprise the court as to the exact date of the notifying the number of vacancies by the Council to the Employment Exchange and the sponsorship of the names of the candidates by the Employment Exchange to the Council. But from the perusal of the letter dated 24.1.2002 issued by the Employment Exchange to the Council undisputedly the Employment Exchange did not sponsor the names of the candidates prior to 15th January 2002. The said date is relevant for the present purposes as on 15th January 2002 the new Recruitment Rules of 2001 was enacted and was given effect to. In the said Rules the eligibility of the candidate is provided to those candidates who have passed a Madhyamik examination with training certificates. According to the petitioner the selection process did not commence prior to 15.1.2002 and has reckoned after the said date, the authorities cannot conduct the selection process under the old Recruitment Rules of 1991 which was repealed by a new Recruitment Rules of 2001. The training certificate being sine qua non under the Recruitment Rules of 2001, the candidature of any candidate having no training certificate vitiates the Rules and the panel prepared is liable to be quashed and if appointment is already made the same is also liable to be cancelled.

8. The selection process has not be defined in the said Rules. There is no specific provision like in some other Acts where the commencement is provided. In both the old and the new Rules, the process are more or less similar which provides that the Council shall notify the number of vacancies to the Employment Exchange who shall sponsor the names of the candidates for being considered by the Council for filling up the said vacancies. The moment the list of sponsored candidates are received the Council calls for a bio-data or testimonials from the candidate for the purpose of interview under the old Rules and for the purpose of written test/interview under the new Rules. If I take that the selection process was initiated the moment the Council notifies the number of vacancies to the Employment Exchanges then there is no dispute that such selection process should be completed taking recourse to the Recruitment Rules of 1991 as from the facts it can be inferred that the vacancies must have been notified prior to 15.1.2002 but if I accept the contention of the writ petitioner that the selection process commences by inviting the testimonials from the candidates, it is without any pale of doubt that the new Recruitment Rules of 2001 has intervened in the

meantime. The Division Bench in case of Snehansu Jas held that the selection process commences when the candidates are invited to appear before the Selection Committee and observed thus:

"21. As against this the learned single Judge in the case of Salauddin Miah V. State of West Bengal (supra) took a different view. In this case vacancy arose and a permission was sought from the DIS to fill up the post. It was also requested to de-reserve the post in accordance with section 6(2) of the West Bengal Schedule Caste and Schedule Tribe (Reservation of Vacancies in Services and Posts) Act, 1976 (hereinafter referred to as the Act of 1976), but on account of inaction on the part of the DIS, the petitioner was driven to file a writ petition before this court and it was argued that the DIS has no power to de-reserve the post, therefore a direction was given by the learned single Judge to the Joint Commissioner for Reservation to consider the matter and pass the order in accordance with law. The Joint Commissioner after considering the matter in terms of section 6(2) of the Act of 1976 de-reserved the vacancy and directed the school authorities to approach the Regional School Service Commission for recruitment. This was again challenged before this court that since the vacancy is of prior to 1997 therefore it should be filled up according to the Rules of 1969 and not according to the Rules of 1997. The learned single Judge directed that the recruitment to the post should be made according to the Rules of 1969 and not according to the Rules of 1997. The same view was taken in the case of Kanaidighi Deshapran Vidyapith Vs. State of West Bengal (supra). There also two posts of teacher was vacant on 30th June, 1997 and 31st July 1997 that is before the coming into force of the Act of 1997. Therefore, a writ of Mandamus was sought for a direction to fill these vacancies by the management as per the Rules of 1969 and not according to the Rules of 1997. Since both these cases were contrary to earlier decision of the Division Bench of this court, the learned single Judge made this reference for our answer.

22. In view of the law laid down by the apex court and Division Bench of this court, we are of the opinion that the selection process will commence only when the candidates are invited to appear on the basis of names sent by the employment Exchange on requisition by the Managing Committee for recruitment of the teachers and if that stage has not reached then it will not amount to commencement of the selection process. The selection process is deemed to have commenced if the posts have been advertised and candidates have been called for interview and meanwhile if the rules are amended then that selection process should be allowed to continue without being affected by the amendment of the Rules unless the Acts or Rules have been amended with a retrospective effect. Thus, in this view of the matter, the view taken by the learned single Judge in the case of Kanaidighi Deshapran Vidyapith V. State of West Bengal (supra) and Salauddin Miah Vs. State of West Bengal (supra) are no more good law. The reference is accordingly answered. Let the matter be sent back to the learned single Judge to decide the same in the light of the observations made in this judgment.

9. It is noticed in case of SK. Mantaj Ali Vs. State of West Bengal, (2001) 1 ILR (Cal) 43 that the single bench of this court held that the commencement of selection process is said to have started as soon as the names are sent by the employment exchange on requisition by the Managing Committee for recruitment of teachers. It is further held therein that if the selection process is conducted on advertisement then it shall deem to have commenced on the day when advertisement is made. Another Single Bench in case of Debjani Sarkar Vs. State of West Bengal reported in 2009 (2) CHN 947 held that the selection process shall commence on the date of the publication of the advertisement and the Rules prevalent as on the date of the commencement of the selection process would be a guiding factor for conducting the selection process.

10. It is noticed that the Recruitment Rules of 1991 are replaced by the Recruitment Rules of 2001 w.e.f. 15.1.2002. Nobody before the court could satisfy as to the date of notifying the number of vacancies to the concerned employment exchange by the concerned District Primary School Council as till that day the names were not sponsored by the employment exchange. Rule 8 of the Recruitment Rules of 1991 provides for determination of the number of vacancies for being intimated to the concerned employment exchange by the District Primary School Council for inviting the names of the candidates having requisite qualification and on receipt of the names of the candidates the Council shall communicate in writing to all such candidates to produce the testimonials/certificates for computation of the marks on the basis of 100 Point Roster of which 65 marks shall be computed for academic qualification, 20 marks for training, 10 marks for written/oral interview and 5 marks are earmarked for co-curricular activity.

11. It would be relevant to take note of certain provisions contained in the Rules regulating the recruitment and leave of teachers and primary schools, 1991. Rule 3 of the said Rules provide that there shall be one teacher for every 40 pupils or part thereof, not being less than 20 and the second teacher is admissible on the increase of the roll strength if exceeds 60. An exception is carved out in case of hilly, forested and/or other thinly populated area where one teacher is provided for 15 pupils in a Primary School Council subject to the approval of the director of the school education. The District Primary School Council is empowered to determine from time to time the number of vacancies in the Primary Schools within its district to fill up the vacancies as and when necessary. Rule 8 envisaged that the vacancy so determined under Rule 4 shall be intimated by the District Primary School Council to the concerned Employment Exchange with the request to send the name of the eligible candidates having requisite qualifications in the order of seniority of registration. Rule 9 of the said Rules provides a mechanism for selection of the primary teachers wherein sub-rule (a) thereof requires the Council to communicate in writing to all sponsored candidates for production of the testimonials/certificates for computation of the marks in the score sheet for the purpose of selection.

12. It is pertinent to record that the parties before this Court have not taken a plea that the vacancies have not be advertised in the widely circulated newspaper and, therefore, this Court is not considering the said aspect but proceeds on the basis that the selection process is restricted amongst the candidates sponsored by the Employment Exchange.

13. The provisions indicated above requires the Council to determine the number of vacancies and to notify the same to the concerned Employment Exchange for sending the name of the eligible candidates and, thereafter, to communicate in writing to all such candidates to produce the testimonials/certificates for the purpose of computation of marks in the score sheet. The vacancy is defined in Rule 2(o) of the said Rules to mean vacant post of a primary teacher caused by (i) creation of a new post by the Council with prior sanction from the Government, (ii) retirement of a teacher, (iii) death of a teacher, (iv) resignation tendered by a teacher and accepted by the Council, (v) removal or dismissal of a teacher or (vi) deputation of a teacher.

14. The vacancy so notified by the Council not only includes the vacancy occurred as per the definition clause but also an anticipated vacancy within 31st December of a calendar year in which the determination is made by the Council. Therefore, it is not only the actual vacancy but anticipated vacancies within the year of the determination of the vacancy are to be included and notified by the Council to the Employment Exchange. The Rules provide a mechanism for determination of the vacancy which is undertaken in terms of the provisions made therein. The vacancy does not occur at a time but on the happening of the eventualities as indicated in the definition clause. It is a continuing and/or recurring process; not only the actual vacancy is determined but an anticipated vacancy within the calendar year is also included. Therefore, it cannot be said that the selection process would commence when the vacancies arose as on occurrence of each eventualities. A large number of vacancies have been notified by the Council and for each vacancy, there cannot be a separate selection procedure if it is taken that the selection commenced when the vacancy arose. Once the determination of vacancy is complete and the Employment Exchange notified such vacancy, the process of selection shall deem to have commenced on the said date.

15. The position would be different if the statutory Rules provide for an open advertisement inviting an application from the eligible candidates to apply. In such eventuality, it would be deemed to have commenced on the date of such advertisement as it notifies the number of vacancies and invites an application for filling up the post.

16. There is no manner of doubt that the determination of the vacancies and notifying it to the concerned employment exchange is a date of action for which the candidates cannot claim any right to be brought within the zone of consideration but the moment the District Primary School Council issued communication to the aspirant for submission of testimonials/certificates such

aspirants acquired right of being considered.

17. All the judgments cited by the District Primary School Council relates to an appointment and/or filling up of the promotional post where the Rules provide an open advertisement. In such perspective it has been held that the selection process shall commence on the date of an advertisement. However, the subsequent Division Bench in case of The Secretary of the Managing Committee, Kalinagar Girls' High School Vs. Archana Ghosh (Saha) and Others, (2010) 3 CALLT 192 ; upon relying a judgment of the apex court rendered in case of Arjun Singh Rathore and Others Vs. B.N. Chaturvedi and Others, (2007) 13 JT 543 : (2007) 11 SCC 605 : (2008) 2 SCC(L&S) 387 : (2007) 11 SCR 320 : (2008) 2 SLJ 230 , Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, AIR 1983 SC 852 : (1983) 2 LLJ 23 : (1983) 1 SCALE 296 : (1983) 3 SCC 284 and the State of Rajasthan Vs. R. Dayal and Others, (1997) 3 JT 198 : (1997) 2 SCALE 341 : (1997) 10 SCC 419 : (1997) SCC(L&S) 1631 : (1997) 2 SCR 108 : (1997) 1 UJ 479 observed that the selection process commence when the vacancy arose. In the aforesaid case the Rule provides for notifying the vacancies by an open advertisement which has been admittedly done before commencement of the West Bengal School Service Commission Rules 2009. In the present case both the Recruitment Rules i.e. the Recruitment Rules of 1991 and 2001 postulate the notification by the concerned District Primary School Council to the employment exchange and there is no provision for an advertisement inviting an application relating to the vacancies as determined under Rule 8 of the aforesaid Rules.

18. Thus the selection process cannot be said to have began when the vacancy arose but shall be deemed to have commenced when the concerned District Primary School Council determines the number of vacancy and communicates to the Employment Exchange to sponsor the names of eligible candidates.

19. Admittedly, the selection process under challenge was conducted by taking recourse to the Recruitment Rules of 1991.

20. Therefore, this court does not find any fault in conducting the said selection process. The writ petition therefore is devoid of any merit and accordingly dismissed.

21. However, there shall be no order as to costs.

22. Urgent Photostat certified copy of this judgment if applied for, be given to the parties on priority basis.