

(2016) 01 CAL CK 0074
In the Calcutta High Court
Case No : W. P. No. 3962 (W) of 2014.

Sri Tanmoy Mandal

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 29-01-2016

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2016) 2 CalHCN 89 : (2016) 5 SLR 746 : (2016) 3 WBLR 118

Hon'ble Judges : Dipanker Datta, J.

Bench : Single Bench

Advocate : Usuf Ali Dewan & Arup Sarkar, Advocates, for the Appellant;
Suprabhat Bhattacharya, Advocate and Dipak Kumar Ghosh & Ranajoy De,
Advocates, for the Respondent

Final Decision : Allowed

Judgement

Dipanker Datta, J. - The West Bengal Power Development Corporation (hereafter the Corporation) by issuing a public notice (advertisement in a widely circulated Bengali daily on 22nd February, 2011), invited applications from eligible candidates for filling up various vacant posts immediately for its corporate office and power stations/projects located at different places in West Bengal. Inter alia, against serial no.11, number of vacant posts of assistant teachers was advertised. Although the Corporation is engaged in the business of generation of electricity in the State of West Bengal, it runs four schools and it stands to reason that the posts of assistant teachers in such schools were sought to be filled up by the process initiated by the said public notice.

2. The break up of vacant posts of assistant teachers, as indicated in the public notice, is given below :

English - 5

Bengali - 5

History - 1

Geography - 2

Hindi - 1

Sanskrit - 2

Physical Education - 2

Work Education - 1

3. However, such notice was silent in identifying the reserved posts out of the 18 vacant posts.

4. The petitioner was interested in obtaining appointment on the post of an assistant teacher in Physical Education. Perceiving that he is a qualified candidate who could offer his candidature in terms of the qualification mentioned in the said notice, the petitioner duly responded. The application was considered by the Corporation whereupon he was called upon to take a written test (5th February, 2012) followed by preliminary interview (25th May, 2012) and final interview (13th September, 2012).

5. The petitioner not having heard thereafter from the Corporation in regard to the fate of his candidature but deriving knowledge of some candidate having been appointed on a reserved post, he made an application dated 6th January, 2014 under section 6 of the Right to Information Act, 2005 calling upon the General Manager (HR) of the Corporation to provide information on five (5) points. Since the application was in vernacular, the translated version of his queries were relatable to :

(1) marks obtained by him in the written test, preliminary interview and final interview and marks obtained by the selected candidate in such test and interviews;

(2) the position of the petitioner in the panel vis-à-vis the position of the selected candidate;

(3) validity of the panel;

(4) whether the selected candidate was appointed on a reserved post or not;

(5) the reason for appointing only one candidate despite applications having been invited for filling up two vacant posts of assistant teacher in Physical Education; and

(6) steps taken for filling up the second vacant post.

6. The application of the petitioner was replied to by the Public Information Officer of the Corporation. The answers to the different queries read as follows :

"Query No. 01. ??????????????..

Reply : You obtained in (1) Written Test 63 (2) Preliminary Interview 31 and (3) Final Interview 43 and Marks of the selected candidate is (1) Written test 57 (2) Preliminary Interview 32 (3) Final Interview 30.

Query No.02. ??????????????????.

Reply: Your position is first and position of selected Candidate is fifth. Position has been filled by SC Category candidate as per Roster Point.

Query No.03. ??????????????????

Reply: One year w.e.f.25.09.2012.

Query No.04. ??????????????????.

Reply : Yes.

Query No.05. ??????????????????

Reply : Upon further evaluation it has been decided to fill up one vacancy against Physical Education.

Query No.06. ??????????????????.

Reply : As stated in reply no. 05."

7. Upon receipt of the aforesaid reply, the petitioner presented this writ petition dated 7th February, 2014 seeking, inter alia, an order on the Corporation to rescind the selection and/or appointment of the respondent no.7 on one post of assistant teacher in Physical Education [prayer (a)] and for further order on such Corporation to take proper steps for appointing him on a post of assistant teacher in Physical Education [prayer (b)].

8. The writ petition was admitted on 30th March, 2015, when the parties were directed to exchange their affidavits. Upon exchange of affidavits, the writ petition was listed for consideration on 27th November, 2015. Having heard learned advocates for the parties, this Bench had requested Mr. De, learned advocate for the Corporation to sit with its officers to ameliorate the grievance of the petitioner which prima facie appeared to be wholly justified.

9. Today, when the writ petition is taken up for consideration, Mr. De submits that the Corporation would stand by the version reflected in its counter affidavit.

10. Three points have been taken in the counter affidavit to oppose the petitioner's claim, viz.

(1) The respondent no. 7 has been appointed on one post of assistant teacher in Physical Education, reserved for Scheduled Caste candidate. Since the petitioner is not a Scheduled Caste candidate, he cannot claim that the selection and consequent appointment of the respondent no. 7 should be set aside.

(2) Although two vacant posts of assistant teacher in Physical Education were

advertised, there is no requirement of a second teacher and, therefore, the Corporation did not consider it necessary to appoint the petitioner who was the first empanelled candidate.

(3) The panel had life till 24th September, 2013 and after its expiry, none of the empanelled candidates can seek offer of appointment.

11. Referring to the counter affidavit of the Corporation, Mr. Dewan, learned advocate for the petitioner has pointed out that the Corporation proceeded to appoint teachers in excess of what was advertised.

12. Insofar as the subjects Bengali and English are concerned, he pointed out that while applications were invited for appointment on 5 vacant posts each, 8 and 7 candidates respectively had been appointed. Similar is the case with History, Geography and Sanskrit; whereas 1, 2 and 1 post(s) had been advertised, appointments of 4, 5 and 3 candidates respectively were made. He has urged that no explanation worth the name has been offered in the counter affidavit as to how candidates in excess of the posts advertised could be appointed whereas, although two vacant posts in respect of Physical Education were advertised, only one appointment was made and that too, without offering any cogent reason, the petitioner being the first empanelled candidate was excluded from the zone of appointment.

13. I have heard learned advocates for the parties and perused the materials on record.

14. The public notice, as printed on 22nd February, 2011, while indicating the teaching posts that were sought to be filled up did not specifically mention how many of such posts were reserved for SC/ST/OBC candidates. It is only in the notices available on the website of the Corporation that the Corporation stipulated reservation being followed as per the guidelines issued by the Government of West Bengal from time to time.

15. Although in the counter affidavit the Corporation has not given the details of vacancies in a particular subject and the specific posts that were reserved in terms of the 100 point roster of the Government of West Bengal, this Bench would proceed assuming that one of the two posts of assistant teacher in Physical Education was reserved for a Scheduled Caste candidate and the respondent no. 7 was appointed on such post being a Scheduled Caste candidate. Despite the fact that the respondent no. 7 obtained lesser marks than the petitioner in the qualifying written test/interviews, there is no reason to disturb the appointment of the respondent no. 7. Prayer "a" of the writ petition accordingly is not granted.

16. This Bench now proceeds to consider the point as to whether the petitioner has been unjustly treated or not.

17. The Corporation in the counter affidavit has referred to the Constitution Bench decision of the Supreme Court reported in *Shankarsan Dash v. Union of*

India, (1991) 3 SCC 47 and the decision reported in State of Orissa v.- Raj Kishore Nanda, (2010) 10 SCC 777 in support of its contention that mere inclusion of a candidate's name in the panel does not result in acquiring any indefeasible right of appointment and that it is open to the employer not to fill up all the vacancies. There can be no dispute with regard to such proposition but it also ought to be noticed that Shankarsan Dash (supra) lays down the law that an employer has no licence to act arbitrarily and the decision not to fill up all the vacancies has to be taken bona fide for appropriate reason. It would, therefore, be necessary to examine the counter affidavit of the Corporation to ascertain as to whether the same contains any reason for which the petitioner was sought to be deprived.

18. In paragraph 23 of the counter affidavit, it has been stated as follows :-

23. ??? It may be mentioned that although the answering Respondents notified for two posts of Assistant Teacher in the subject of Physical Education was subsequently decided to fill up 1 no. of position for Assistant Teacher in the subject of Physical Education. It is well settled that the State as an Employer has a right to fill up all the posts or not to fill them up."

(emphasis supplied)

19. There is no evidence annexed to the counter affidavit that the competent authority of the Corporation did in fact take a decision not to fill up the second vacant post of assistant teacher in Physical Education.

20. In its decision reported in AIR 1988 SC 2181 (Bharat Singh v. State of Haryana), the Supreme Court has held as follows :

"????????? In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it. So, the point that has been raised before us by the appellants is not entertainable?????????"

(emphasis supplied)

21. There being no documentary evidence annexed to the counter affidavit in support of the contention urged in paragraph 23 thereof, it is difficult to accept

that there was a conscious decision taken on due application of mind by the Corporation that it did not require the services of a 2nd assistant teacher in the subject Physical Education. No reason, far less any cogent reason for depriving the petitioner, the first empanelled candidate, of an appointment having been shown, the stand of the Corporation is indefensible.

22. It is true that a Court may not direct an employer to offer an appointment to an empanelled candidate, but such restraint is exercised only if a justifiable explanation is offered. In the absence thereof, there is no reason as to why the Court may not so direct. This statement of law is found in the decision reported in 1995 Supp. (2) SCC 230 (R.S. Mittal v. Union of India)

23. In the present scenario, where the Corporation has chosen to appoint candidates in other subjects in excess of the posts advertised, the action of depriving the petitioner of a legitimate claim without any reason has to be viewed with suspicion. In the absence of any supporting evidence annexed to the counter affidavit, the claim of the Corporation that there is no requirement of a 2nd assistant teacher in the subject of Physical Education is found to be not bona fide and is unacceptable and, therefore, the contention stands overruled.

24. The decision in Raj Kishore Nanda (supra) has once again been relied on in paragraph 29 of the counter affidavit to contend that a candidate having approached a Court after expiry of the select list, cannot claim appointment.

25. There can again be no dispute with regard to this proposition. However, it has not been shown that the recruitment was conducted in accordance with any statutory rule in terms whereof a panel or merit list, once prepared, would have a particular life span. No supporting evidence is once again annexed to the counter affidavit to show that there is a conscious decision of the Corporation to the effect that a panel/merit list would be valid for one year from the date of its publication. Although, normally one year is treated as the life span of a panel, in the decision reported in AIR 1988 SC 162 (State of U.P. v. Rafiquddin), the Supreme Court in the absence of any provision in the rules as to the period for which a select list shall remain valid or alive, proceeded to hold that a reasonable period has to be adopted as the criteria. In that view of the matter and particularly having regard to the facts that the petitioner apart from not being informed that he shall not be appointed and there was no publication of the merit list in any newspaper having wide circulation, and also that approach to the Court is not unduly delayed, the Corporation without justifiable reason for not appointing the petitioner ought not to be allowed to urge the point that the panel/merit list having expired, he cannot claim appointment.

26. In paragraph 11 of the counter affidavit, the Corporation has given the number of candidates who had taken the recruitment test. It appears that the petitioner secured the 1st position out of 73 general candidates. One cannot ignore that the petitioner is the 1st empanelled candidate overall (general and reserved candidates taken together) and had secured marks much in excess of

the reserved candidate who ultimately came to be appointed on one such vacant post. It would be a travesty of justice if despite such meritorious performance, the petitioner's claim is over-looked. In the decision reported in AIR 1966 SC 81 (Dwarka Nath v. I.T.O.), the Supreme Court held that Article 226 is deliberately couched in comprehensive language so that it confers wide power on the High Courts to "reach injustice wherever it is found". In such circumstances, the petitioner is held entitled to relief as claimed vide prayer clause "b".

27. The writ petition stands allowed with a direction upon the Corporation to issue letter of appointment in favour of the petitioner within four weeks from date of receipt of a copy of this order, where after the parties shall be entitled to proceed in accordance with law.

28. There shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be furnished expeditiously.