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**(1981) 09 CAL CK 0009**  
**In the Calcutta High Court**

State of West Bengal

APPELLANT

Vs

Tapan Kumar Sen

RESPONDENT

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**Date of Decision :** 24-09-1981

**Acts Referred:**

Constitution of India, 1950 — Article 12, 14, 16, 226, 234

**Citation :** 86 CWN 121

**Hon'ble Judges :** M.M. Dutt, J;A.K. Sarkar, J

**Bench :** Division Bench

**Advocate :** A.P. Chatterjee and Dipak Banerjee, for the Appellant;S.N. Mukherjee, Subhas Banerjee, Madhusudan Banerjee, Parth Dutt, Parthasarathi Sen Gupta, for the Respondent

**Final Decision :** Dismissed

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## Judgement

1. In these two appeals the appellants, the State of West Bengal and the Assistant Secretary, Judicial Department, Government of West Bengal have challenged the propriety of the judgment of T. K. Basu, J, whereby the learned Judge made absolute the two Rules Nisi - one obtained by Tapan Kumar Sen, the Respondent in F.M.A.T. No. 2569 of 1981 and the other by Md. Sahad Ahmed, the Respondent in F.M.A.T. No. 2570 of 1981.

2. The West Bengal Civil Service (Judicial) Recruitment Rules were framed by the State of West Bengal under Article 234 of the Constitution of India. Rule 2 of the said rules inter alia provides as follows:

Method of Recruitment - Recruitment in the West Bengal Civil Service (Judicial) occurring in any year shall be made in the following manner, this is to say -

(i) by filling up fifty per cent of vacancies on the result of a competitive examination to be conducted by the Public Serviced Commission, West Bengal, and

(ii) by filling up the remaining fifty per cent of the vacancies by selection from

amongst the members of the Bar by the High Court, Calcutta; Provided that the State Government may, after the period of three years from the date of the first examination held by the Public Service Commission under this rule, by order vary the ratio between the number of vacancies to be filled by examination and the number of vacancies to be filled by selection by the High Court in such manner as it thinks fit.

3. In 1977, fifty per cent of the vacancies in the posts of Munsiffs to be filled up by selection from amongst members of the Bar by the High Court was nine. The High Court selected nine candidates including the respondents Tapan Kumar Sen and Md. Sahad Ahmed. Md. Sahad's name appeared in the list of the candidates selected by the High Court at Serial No. 1 and that of Tapan Kumar Sen at Serial No. 8. The Assistant Secretary, Judicial Department, Government of West Bengal sent a communication to each of the respondents. By the communication, the respondents were requested to fill up the annexed verification role in duplicate and return that on the same day, another communication was made by the Assistant Secretary, Judicial Department to the Director of Health Services, West Bengal inter alia stating therein that necessary steps might be taken at an early date for the medical examination of the candidates noted in that communication. In that communication, the name of the Respondent Md. Sahad Ahmed appeared at Serial No. 1 and that of the Respondent Tapan Kumar Sen at Serial No. 8. Pursuant to the above directions, the respondents were medically examined and found fit. The police verification was also made and nothing was found against the respondents. Thereafter, it appears that no steps were taken by the State Government in appointing the respondents to the posts of Munsiffs for which they were selected. The remaining seven candidates selected by the High Court were, however, appointed in due course. The respondents demanded justice from the appellant's through letters written by their respective Advocate. No reply in such demands for justice was given by the appellants. Thereafter, the Respondent moved this Court under Article 226 of the Constitution inter alia praying for writs in the nature of Mandamus commanding the appellants to appoint the respondents to the posts of Munsiffs for which they were selected by the High Court.

4. On the said applications, two Rules Nisi out of which these appeals arise were issued. No affidavit-in-opposition was filed on behalf of the appellants to any of the writ petitions. The Rule Nisi that was obtained by Tapan Kumar Sen was first taken up for hearing by the learned Judge. Mr. Prabir Roy Chowdhury, learned Advocate appearing on behalf of the appellants before the learned Judge made the following submissions as noted by the learned Judge in his judgment:

Mr. Roy Chowdhury, who appears for the respondents, states before me that he has gone through the relevant records pertaining to the petitioner. Mr. Roy Chowdhury further submits that he has found nothing objectionable in the records in so far as the petitioner is concerned. He further submits that he has not found any impediment to carrying out the High Court's selection in so far as

the State Government is concerned.

5. In view of the said statements made by the learned Advocate appearing on behalf of the appellants, the learned Judge was of the opinion that it was a fit case where the appellants should be directed by a writ of Mandamus to carry out the selection made by the High Court and make the appointment. Accordingly, the learned Judge made the Rule Nisi absolute and directed the issue of a writ in the nature of Mandamus commanding the appellant to effect the appointment of Tapan Kumar Sen within a period of three months from the date of the judgment. The other Rule Nisi obtained by Md. Sahad Ahmed was also made absolute on similar terms. Hence these two appeals.

6. It thus appears that there was no reason in justification of the action of the State Government in not appointing the respondents to the posts of Munsiffs although they were selected by the High Court. As submitted by the learned Advocate appearing before the learned Judge, nothing objectionable could be found in the records in so far as the respondents were concerned and there was no impediment of the State Government to the carrying out of the selection made by the High Court of the respondents for the posts of Munsiffs.

7. Mr. Arun Prokash Chatterjee, learned Senior Standing Counsel appearing on behalf of the appellants also has not given any reason before us why the State Government chose not to appoint the respondents for the posts of Munsiffs as selected by the High Court. It is, however, submitted by him that in view of Article 234 of the Constitution, the right to make appointment to the judicial service of the State is of the State Government. The only condition that has to be fulfilled by the State Government before it exercises its right of appointment under Article 234 is to consult the State Public Service Commission and the High Court. It is urged by him that the State Government is not bound to accept the recommendation of the High Court or of the Public Service Commission and it has the absolute discretion in the exercise of its right in the matter of appointment of persons to the State judicial service. It is submitted that the State Government is not bound to give any reason why it has appointed one and not the other, although both of them might have been selected by the High Court.

8. It follows from the above submissions made by the learned Senior Standing Counsel that in the matter of appointment to the State judicial service, the State Government can act arbitrarily without giving any reason whatsoever. Article 16 of the Constitution enjoins equality of opportunity in matters of public employment and Article 14 lays down the rule of equality before the law or the equal protection of the laws. In *The Manager, Government Branch Press and Another Vs. D.B. Belliappa*, it has been observed by the Supreme Court that the executive, no less than the judiciary, is under a general duty to act fairly and indeed, fairness founded on reasons is the essence of the guarantee epitomised in Articles 14 and 16(1). In *E.P. Royappa Vs. State of Tamil Nadu and Another*, the Supreme Court speaking through Bhagwati J. inter alia observed as follows:

Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Article 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.

9. The above principles of law were reiterated by the Supreme Court in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, . In that case, the Supreme Court speaking through Bhagwati J. observed as follows:

It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the Courts is not paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formal for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial or equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Art. 14 immediately springs into action and strikes down such State action. In fact the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is golden thread which runs through the whole of the fabric of the Constitution.

10. As the State Government has not given any reason why the respondents were not given appointments to the posts of Munsiffs and as to what weighed with it to pick and choose from the list of candidates selected by the High Court, it must be held that the State Government has acted arbitrarily in violation of provisions of Article 14 and 16(1) of the Constitution.

11. Much reliance has been placed by the learned Senior Standing Counsel on a decision of the Supreme Court in *The State of Haryana Vs. Subash Chander Marwaha and Others*, . In that case, the State of Haryana appointed the first seven persons as Subordinate Judges out of fifteen from the list prepared by the Haryana Public Service Commission on the basis of a competitive examination held by it for appointment to the posts of Subordinate Judges. The reason for not making the appointments of the petitioners in that case who ranked 8, 9 and 13 respectively in that list was that in the view of the State Government, which was the same as that of the High Court previously intimated to the State Government, candidates getting less than 55 per cent of marks in the examination should not be appointed as Subordinate Judges in the interest of maintaining high standards of competence in Judicial Service. Rule 8 of the Punjab Civil Service (Judicial Branch) Rules provides "No candidate shall be considered to have qualified unless he obtains 45 per cent marks in the aggregate of all the papers and at least 33 per cent marks in the language paper,

that is Hindi (in Devnagri script)". Clause (ii) of rule 10 of the said Rules inter alia provides that candidates will be selected for appointment strictly in the order in which they have been placed by the Punjab Service Commission in the list of those who have qualified under rule 8. In the said case before the Supreme Court, the first seven candidates were appointed in the order they were placed in the list prepared by the Haryana Public Service Commission on the basis of the result of the competitive examination. All the said candidates obtained more than 55 per cent marks. The State Government gave its reason is not appointing the remaining candidates in the list on the ground that they could not obtain 55 per cent marks. It has been already noticed that previously the High Court also took the view that candidates obtaining less than 55 per cent marks should not be appointed. In the context of the above facts, the Supreme Court has observed that the mere fact that a candidate's name appears in the list does not entitle him to be appointed or the mere entry in the list of the name of the candidate does not give him the right to be appointed. The Government may not make any appointment for financial or other administrative reasons and in such a case, the candidates, even the first in the list, will not have a right to be appointed. The list is merely to help the State Government in making the appointments showing which candidates have the minimum qualifications under the Rules.

12. It is, however, well settled as noted above that in making appointment the Government should not act arbitrarily. If the Government does not make any appointment, no candidate can insist on such appointments being made merely because he has been selected for one of the posts. The Government may not appoint all the candidates selected for such appointments or fill up all the vacancies, but in filling up the vacancies the Government cannot act arbitrarily. The appointments must be made in order of the rank in the list. If the Government does not choose to appoint a candidate whose rank is higher in the list than one who has been appointed, such action of the Government must be justified by reasonable grounds. The Court is entitled to know the reasons which prompted the Government to appoint a less meritorious candidate in preference to another more meritorious. If there is no reasonable ground for the exercise of such discretion the Court will at once intervene and strike down the action of the Government as violative of Articles 14 and 16(1) of the Constitution. A fair play-in-action on the part of the Government is postulated in all executive acts including the employment to State services. In *Subhas Chandra's case* (supra), the appointments of seven candidates were made in order of merit and all of them got more than 55 per cent marks. The ground that was relied on by the government in not appointing the remaining candidates from the list was held to be a valid and reasonable ground. In the instant case, however, there is no reason whatsoever why the respondents had not been appointed although others who ranked below them in the list were given such appointments. In our opinion, although the Government has the absolute right in the matter of appointment of Munsiffs that does not, however, mean that it can act arbitrarily or capriciously without any reasonable ground. Article 234 does not confer on the

State Government the right to act in a manner violative of the provisions of Articles 14 and 16(2) of the Constitution.

13. For the reasons aforesaid, the learned Judge was perfectly justified in making the Rules Nisi absolute and in directing the appellants to effect the appointments of the respondents in term of the selection made by the High Court. Both the appeals are, therefore, dismissed.

There will, however, be no order as to costs.

Prayer for stay of operation of the order made on behalf of the appellant is disallowed.

A.K. Sarkar, J.

14. I agree.