

**(2004) 04 CAL CK 0016**  
**In the Calcutta High Court**  
**Case No : W.P.S.T. 846 and 1013 of 2003**

Subhro Mukherjee

APPELLANT

Vs

Abhijit Dey

RESPONDENT

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**Date of Decision :** 20-04-2004

**Acts Referred:**

Administrative Tribunals Act, 1985 — Section 19

**Citation :** (2004) 1 ILR (Cal) 451

**Hon'ble Judges :** Jyotirmay Bhattacharya, J;Altamas Kabir, J

**Bench :** Division Bench

**Advocate :** Amal Baran Chatterjee and Anadi Banerjee, in W.P.S.T. No. 846 of 2003, Dibyendra Narayan Roy, Nilendra Narayan Roy and Manujendra Narayan Roy, in W.P.S.T. 1013/03, for the Appellant; Amal Baran Chatterjee and Anadi Banerjee, in W.P.S.T. 1013 of 2003, Dibyendra Narayan Roy, Nilendra Narayan Roy and Manujendra Narayan Roy for Respondent No. 1 in W.P.S.T. 846 of 2003, Rabi Lal Maitra and Sampa Sarkar for State, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Altamas Kabir, J.—Two writ applications, being W.P.S.T. 846/03 and W.P.S.T. 1013/03, have been filed against the judgment and order passed by the West Bengal Administrative Tribunal on September 24, 2003 in O.A. No. 3334/99.

2. The first of the two writ applications has been filed by one Subhro Mukherjee, who was the private Respondent before the learned Tribunal. The other writ application has been filed by Shri Abhijit Dey, who was the Applicant before the learned Tribunal and whose application u/s 19 of the Administrative Tribunal's Act, 1985 succeeded.

3. By the impugned judgment of the learned Tribunal the selection of Shri Subhro Mukherjee, the writ Petitioner in the first writ application was quashed and a direction was given by the learned Tribunal to the Respondents to hold selection test afresh fixing marks for viva voce test as per the norms laid down by the Hon'ble Supreme Court in the case of Ashok alias Somanna Gowda and Another

Vs. State of Karnataka by its Chief Secretary and Others, or as per the norms followed by the West Bengal Public Service Commission or in terms of any recruitment rules that may have been finalised in the meanwhile. The first writ Petitioner was naturally aggrieved by the judgment of the learned Tribunal quashing his selection. The second writ Petitioner, whose application succeeded was also aggrieved by the direction given by the learned Tribunal to hold the selection process afresh since according to him and relying upon the decision of the Hon''ble Supreme Court in the case of Ashok Kumar Yadav and Others Vs. State of Haryana and Others, contended that he ought to have been given appointment in place of Subhro Mukherjee whose appointment should have been individually quashed without the entire selection process being interfered with.

4. Appearing in support of the first writ application, Mr. Amal Baran Chatterjee, learned Advocate, urged that the decision in the case of Ashok Kumar Yadav and Others Vs. State of Haryana and Others, had subsequently been considered by the Hon''ble Supreme Court in other matters even as late as in the case of Jasbinder Singh and Ors. v. State of Jammu and Kashmir and Ors. 2003 (3) S.C.C. 132. Before citing the aforesaid decision Mr. Chatterjee referred to and relied on a decision of the Hon''ble Supreme Court in the case of Anzar Ahmad v. State of Bihar and Ors. AIR 1994 S.C. p. 141, in which selection was made on the basis of 50% marks allotted for academic performance and 50% for interview. In the said decision the Hon''ble Supreme Court noted its earlier decisions, including its decision in the case of Ashok Kumar Yadav and Others Vs. State of Haryana and Others, relied upon by the Learned Counsel appearing for Shri Abhijit Dey and held that in accordance with past practice the Commission had made selection on the basis of interview while keeping in view the academic performance and with that and in view the Commission had allocated 50% marks for academic performance and 50% marks for interview. It was observed that it could not be held that the said procedure adopted by the Commission suffered from the vice of arbitrariness. Both the earlier decisions of the Hon''ble Supreme Court in the case Ashok Kumar Yadav and Others Vs. State of Haryana and Others, as also Anzar Ahmad Supra were considered by the Hon''ble Supreme Court in the case of Jasbinder Singh and Ors. 2003 (3) S.C.C. 132 referred to hereinabove and in distinguishing the decision in Ashok Kumar Yadav and Others Vs. State of Haryana and Others, the Hon''ble Supreme Court observed that in Ashok Kumar Yadav's case Supra case both written examination and viva-voce test were accepted as the essential features for proper selection and there could not be any hard and fast rule regarding the precise weight to be given as against the written examination which may vary from service to service according to the requirement of that particular service, the minimum qualification prescribed, the age group from which selection is to be made, the body to which the task of holding the viva-voce is entrusted and a host of other factors. Referring to the decision in Anzar Ahmad's case Supra case the Hon''ble Supreme Court also observed that in the said case the Hon''ble Supreme Court had exhaustively reviewed the entire case law on the subject, including the one in Ashok Kumar

Yadav's case Supra case and upheld the selection method which involved allocation of 50% marks for academic performance and 50% marks for interview. It was observed further that the very observation in Ashok Kumar Yadav Supra case would go to show that there cannot be any hard and fast rule of universal application for allocating marks for viva-voce vis-a-vis the marks for written examination and consequently the percentage indicated therein alone cannot be the touchstone in all cases. What ultimately is required to be ensured is as to whether the allocation, as such, is with an oblique intention and whether it is so arbitrary as capable of being abused and misused in its exercise.

5. Distinguishing the decision in Ashok Kumar Yadav's case Supra case in the aforesaid manner, the Hon'ble Supreme Court upheld the distribution of weightage given to the written test and the viva-voce test in Jasbinder Singh's case Supra case and dismissed the appeals after holding that the decision of the learned Single Judge could not be upheld.

6. Reference was also made by Chatterjee to certain other decisions of the Hon'ble Supreme Court where the aforesaid principles had been considered and similar views had been expressed in the matter of allocation of marks between written test and oral interview.

7. Ms Sarkar, appearing for the State supported the case made out on behalf of the first writ Petitioner, Subhro Mukherjee and while adopting the submissions made by Mrs. Chatterjee Ms Sampa Sarkar added that having proved to be unsuccessful in the selection process, it was not open to Shri Abhijit Dey to question the procedure evolved by the Respondents, particularly in the absence of any recruitment rules for recruitment to the post of Clerk cum Accountant in the David Hare Training College at Calcutta which is admittedly an institution under the administrative control of the State of West Bengal. In support of her said submission Ms Sarkar referred to the decision of the Hon'ble Supreme Court in the case of Om Prakash Shukla v. Akhilesh Kumar Shukla AIR 1986 S.C.1046 and also on a similar decision Madan Lal and Others Vs. State of Jammu and Kashmir and Others,

8. Ms Sarkar urged that the learned Tribunal had erred in setting aside the selection process and quashing the appointment made in favour of Shri Subhro Mukherjee as far back as in May, 1999.

9. Opposing the writ application filed by Shri Subhro Mukherjee and appearing in support of the writ application filed by Shri Abhijit Dey, Mr. Dibyendra Narayan Roy urged that the learned Tribunal had rightly held that the procedure adopted for selecting the appointee, Shri Subhro Mukherjee, in the aforesaid post was erroneous, but instead of quashing the entire selection process, the learned Tribunal ought to have directed the Respondents to appoint Shri Abhijit Dey in the post in question.

10. Mr. Roy urged that the decision in Ashok Kumar Yadav's case Supra case had decided certain principles relating to the allotment of marks for viva-voce and

written examination as also for academic qualifications and had been rendered by a Bench of four Judges. Mr. Roy urged that the decisions cited by Mr. Chatterjee in this regard did not really alter the ratio as decided in Ashok Kumar Yadav's case Supra case since in none of the said cases cited by Mr. Chatterjee was the Hon'ble Supreme Court considering the procedure involving both written test as well as oral interview. Mr. Roy strongly urged that as had been decided in Ashok Kumar Yadav's case Supra case and in Sumanna Gowda's case Supra case when there was provision both for written and viva-voce examination, more weightage would have to be given to the written test and less weightage should be given to the viva-voce test where there is scope of manipulation and/or favouritism. Mr. Roy pointed out that in the instant case Shri Abhijit Dey had mentioned that Shri Subhro Mukherjee was the son of a class-III employee of the institution, which could have caused bias in the minds of the Selection Committee.

11. Mr. Roy tried to distinguish the decision of the Hon'ble Supreme Court both in Anzar Ahmad's case Supra case as also in the case of Jasbinder Singh's case Supra case on the aforesaid score. Mr. Roy also submitted that in Jasbinder Singh's case Supra case the Hon'ble Supreme Court had not decided any principle as such but had merely followed the earlier decision and the same could not, therefore, be taken to be a binding precedent. In support of his said submission Mr. Roy referred to certain decisions which need not be referred to in detail since the principles are well-established. Mr. Roy sought to urge that it was also a well-established principle that in case of conflict of decisions, the decision of the larger Bench would prevail over that of a Bench comprised of fewer number of judges and that in such circumstances even if all the cases cited were to be taken into consideration, the views expressed by the Hon'ble Supreme Court in Ashok Kumar Yadav's case Supra case must prevail.

12. Mr. Roy submitted that the writ application of Subhro Mukherjee was liable to be dismissed and upon modification of the operative portion of the judgment of the learned Tribunal directing the Respondents to hold a fresh selection process, a direction should be given to the Respondents to give appointment to Shri Abhijit Dey in place of Shri Subhro Mukherjee.

13. We have carefully considered the submissions made on behalf of the respective parties and the decisions cited both by Mr. Chatterjee as also Ms Sarkar and Mr. Roy. However, before dealing with the said decisions it may be pertinent to point out that as was contended by Ms Sarkar appearing for the State, there is really no allegation as such of bias made against the Selection Committee which we are informed was comprised of the Principal of the College and two Senior Readers. No aspersion has at all been cast regarding the integrity of the three members of the Selection Committee except for a reference to the fact that Shri Subhro Mukherjee was the son of a class-III employee of the College. There is no other hint even of mala fide or bias in regard to such a statement. It may be indicated at this juncture that during the hearing it was

submitted that Shri Abhijit Dey was also related to one of the teaching staff of the institution.

14. Be that as it may, in the absence of any definite averment of bias and/or mala fide, we are not willing to accept any submissions made at this stage that the Selection Committee could have acted with bias in selecting Shri Subhro Mukherjee for the post in question despite the fact that his academic achievements were in fact the lowest amongst all the candidates.

15. We have looked into the broad-sheet which was prepared during the selection process and which has been made an annexure to the affidavit-in-opposition affirmed on behalf of Respondent Nos. 2 and 4 from which it will appear that in the absence of any recruitment rule the procedure which was adopted during the recruitment process included 50% marks awarded for written test, 50% marks in viva-voce which was split up into two groups, viz., 10% marks for personality and 40% marks for general knowledge and current affairs. As will be evident from the said broad-sheet the viva-voce test was really confined to 10% marks which was allotted for personality. As far as general knowledge and current affairs are concerned, in our view, there can be no scope of manipulation and/or nepotism since the candidates were required to deal with actual facts. As will appear from the broad-sheet Shri Abhijit Dey obtained 46 marks out of 50 marks in written test, which speaks very highly of his academic performance, whereas Shri Subhro Mukherjee obtained 32 marks out of 50 in the said category. In personality, both the candidates were given six marks each. The difference between the two candidates was really with regard to the marks allotted for general knowledge and current affairs. In the said category Shri Abhijit Dey obtained only 15 marks whereas Shri Subhro Mukherjee obtained 34 marks out of 40 marks. That is what made the difference between the said two candidates since out of the possible total of 100 marks Shri Abhijit Dey obtained 67 marks, whereas Shri Subhro Mukherjee obtained 72 marks. Inasmuch as, the scope of favouring any particular candidate was really confined to 10 marks out of 100 and since both the candidates scored equally in the said category, we do not find any irregularity in the recruitment process as adopted by the institution for selecting a candidate for filling up the post of Clerk-cum-Accountant. The learned tribunal, in our view, did not have the benefit of the later decisions and delivered judgment only on the basis of the two decisions rendered by the Hon'ble Supreme Court in the case of Ashok Kumar Yadav's case Supra and Sumanna Gowda's case Supra which have since been distinguished in Jasbinder Singh's case Supra. This, in our view, is not a case of conflict of decisions.

16. In such circumstances, we have no hesitation in allowing the writ application filed by Shri Subhro Mukherjee and dismissing the writ application filed by Shri Abhijit Dey and setting aside the judgment and order of the learned Tribunal impugned in both the writ applications. The said judgment having been set aside, the Respondents are directed to reinstate the first writ Petitioner, Shri Subhro Mukherjee, who has in any event continued in service on account of he interim

orders passed subsequent to the judgment of the learned Tribunal.

17. There will be no order as to costs.

18. Let urgent xerox certified copy of this judgment, if applied for, be given to the Applicants in both the cases, at an early date.

Jyotirmay Bhattacharya, J.

19. I agree.