
(2021) 08 CAL CK 0085
In the Calcutta High Court
Case No : Writ Petition No. 5566 Of 2021

Tanmoy Karan

APPELLANT

Vs

State Of West Bengal & Ors.

RESPONDENT

Date of Decision : 25-08-2021

Acts Referred:

Constitution Of India, 1950 — Article 16, 16(4)

Citation : (2021) 08 CAL CK 0085

Hon'ble Judges : Amrita Sinha, J

Bench : Single Bench

Advocate : Subir Sanyal, Sakti Pada Jana, Ujani Pal, Pulak Ranjan Mondal, Bandana Mondal, Subhrangsu Panda, Ranajit Chatterjee, Aniruddha Mitra, Mithu Singha Mahapatra, Swapan Kumar Dutta, Dipankar Das Gupta, Atanu Biswas

Judgement

Amrita Sinha, J

In response to the advertisement no. 1 of 2018 published by the West Bengal College Service Commission inviting applications for the post of Assistant Professor in State-aided Degree Colleges of West Bengal, the petitioner applied for being appointed in the subject Geography. He was successful in the selection process and his name appeared at serial no. 50 in the provisional merit panel published by the Commission in the unreserved category.

At the time of publication of the advertisement 37 vacancies were declared for the unreserved category in the subject Geography. The empanelled candidates were requested to attend counselling to be held on 16th March, 2020.

As the vacancies in the unreserved category were filled up by the candidates whose name appeared at the top of the merit list the petitioner did not get a chance to participate in the counselling process.

The petitioner submits that after the initial counselling, re-counselling was held on 5th November, 2020, 11th December, 2020 and 11th January, 2021.

It has been submitted that the candidate whose name appeared in the unreserved category at serial no. 46, Rejaul Islam Sana was called for re-counselling on 5th November, 2020 and the candidate at serial no. 47, Mayna Mahato was called for re-counselling on 11th January, 2021. Sandipan Ghosh was empanelled at serial no. 42 in the unreserved category and he was called for re-counselling on 5th November, 2020. Rajesh Dey serial no. 45 and Tarun Sasmal serial no. 48 under the unreserved category were called for re-counselling on 22nd February, 2021. The aforesaid Sandipan Ghosh, Rajesh Dey, Rejaul Islam Sana and Mayna Mahato's names also figured in the provisional merit list in the subject Geography in the OBC-B category.

It has been submitted that Rajesh Dey ranked 9 in the OBC-B category panel appeared in the counselling and opted to join Birpara College, Alipurduar. His name was recommended by the College Service Commission and the college issued the letter of appointment in favour of Rajesh Dey on 13th July, 2020. The appointment letter clearly mentioned that the appointment will be treated as cancelled if the appointee failed to join the post by 12th August, 2020. The said Rajesh Dey did not join Birpara College.

The aforesaid Sandipan Ghosh was empanelled as serial no. 8 in the merit panel under OBC-B category and he opted to join Hiralal Bhakat College, Birbhum. The said Sandipan Ghosh also did not join the recommended college.

According to the petitioner though initially only 37 vacancies were declared but thereafter the College Service Commission included several other subsequent vacancies and candidates up to serial no. 48 in the unreserved category were called for counselling.

It is the case of the petitioner that as the aforesaid Rajesh Dey and Sandipan Ghosh opted to join the reserved posts in the recommended colleges, accordingly, the two vacancies created in the unreserved category are liable to be filled up by the Commission by conducting fresh counselling. Petitioner's merit position being 50, he ought to be given a chance to appear in the counselling.

It has been contended that as the aforesaid persons initially opted to join in the reserved category vacancy accordingly they ought not to be permitted to switch over to the unreserved category after recommendation was made in their favour in the counselling process.

The petitioner has annexed the subsequent advertisement published by the West Bengal College Service Commission being advertisement no. 1 of 2020 for filling up the post of Assistant Professor in various subjects in State-aided Degree Colleges of West Bengal.

It has been contended that despite vacancies being available for appointment of candidates from the provisional merit panel, the Commission published further notification being advertisement no. 1 of 2020 inviting applications for the post of Assistant Professors in State-aided Degree Colleges. The Commission ought to

have filled up the available vacancies from the candidates whose names appeared in the provisional merit panel prior to publishing a fresh advertisement calling for applications, specially because the existing panel was valid till 5th March, 2021. According to the petitioners the subsequent advertisement no. 1 of 2020 is bad and illegal in the eye of law.

The petitioner relies upon the Regulations published by the West Bengal College Service Commission regarding the Manner of Selection of Persons for Appointment to the Post of Assistant Professors, Principals and Librarians in Government-aided Colleges in West Bengal.

Regulation 3 deals with the information regarding vacancies. 3(i) of the Regulations lays down that the Commission shall seek from the Government-aided colleges, through a general notification in its website, requisitions for actual existing vacancies in whole time substantive posts approved by the State Government. 3(iv) of the Regulations mentions that only on receipt of a valid and complete requisition from the Principal or Teacher-in-Charge of a college for recommending a candidate for appointment in a vacancy against an approved post, the Commission shall consider the vacancy as a valid vacancy. 3(v) of the Regulations mentions that the Commission shall notify a cut-off date in its official website up to which the vacancy requisitions shall be accepted for the purpose of a particular advertisement and selection process, and the said cut-off date shall always precede the date of the publication of the first provisional merit panel in respect of that advertisement. According to 3(vi) of the Regulations the Commission shall display a list of such recorded vacancies, category wise, in its website, prior to publishing any provisional merit panel in order to facilitate a transparent counselling process.

It has been argued that the candidates whose names appeared in both the unreserved and reserved category, but who opted to join in the reserved category post, should not be permitted to revert to the unreserved category.

The petitioner relies upon Regulation 9 relating to counselling.

9(1) mentions that the empanelled candidates under each category such as Unreserved, SC, ST, OBC-A, OBC-B, PWD may be called for counselling one by one strictly in order of their merit and be given the opportunity to choose the vacancy under respective category of his preference from amongst the ones that still remain vacant when his turn comes.

According to 9(2) the vacancy chosen by the topmost candidate in rank amongst the remaining ones in the panel shall be allotted to him.

9(3) lays down that once a candidate exercises his choice, he shall forthwith forfeit his right to choose any other vacancy and refusal to choose any of the remaining vacancies at one's turn shall automatically cancel the candidature of that candidate:

Provided, the candidature of an empanelled candidate may be treated as

cancelled, if the candidate fails to attend the counselling on the appointed day and time.

According to the petitioner as the private respondents exercised their choice in opting the vacancy reserved for OBC-B category, accordingly they forfeited their right to choose the vacancy in the unreserved category.

Plainly said, the petitioner's case is that the private respondents' names are liable to be struck off the merit panel prepared for unreserved category on account of their opting to join in the reserved category and the vacancy created in the unreserved category ought to be filled up from the remaining candidates of the provisional merit panel by conducting fresh counselling.

The petitioner prays that he may be permitted to appear in the counselling process for filling up the existing vacancies.

The learned advocate representing the College Service Commission submits that counselling in respect of all categories namely unreserved, OBC-A, OBC-B, SC, ST and PWD in the subject Geography was held on 16th March, 2020. Neither the private respondents nor the petitioner could participate in the counselling in the unreserved category as all the vacancies were filled up. On the said date of counselling the private respondents also participated in the counselling in respect of the reserved category - OBC-B and at the time of counselling Sandipan Ghosh opted to join Hiralal Bhakat College, Birbhum and Rajesh Dey opted to join Birpara College, Alipurduar.

By a letter dated 27th July, 2020 Sandipan Ghosh intimated the College Service Commission that he was not willing to join Hiralal Bhakat College and requested the Commission to recommend his name in respect of any college in the district of Nadia, Hooghly or 24 Parganas North.

Rajesh Dey by a letter dated 27th November, 2020 intimated the Commission that he was not willing to join Birpara College and he intended to participate in the next counselling.

The learned advocate for the College Service Commission contends that as the names of Sandipan Ghosh and Rajesh Dey appeared in the provisional merit panel both under the unreserved category and the reserved category, accordingly, the said candidates had the option to select any college according to their choice from any of the two categories.

It has been argued that the right of the private respondents to participate in counselling in respect of unreserved category cannot be taken away even though the said candidates opted to join the colleges in the counselling process meant for reserved category. As per the Commission, the private respondents could participate in the counselling process in respect of both the categories (reserved and unreserved) as and when their turn comes, irrespective of the fact whether they opted to join in any college in any of the categories.

It is the specific contention of the Commission that as the name of the petitioner appears below the names of the selected candidates, accordingly, there is no scope for allowing the petitioner to participate in the counselling process which takes place serially according to the merit position of the candidates.

It is the further contention of the Commission that if opportunity was not granted to the private respondents to participate in the counselling in the unreserved category but the candidates below them in the merit panel were called for counselling, then the same would have amounted to supersession, which is not permissible in law.

The Commission supports the stand of the private respondents and submits that as they did not join the respective colleges reserved for OBC-B candidates accordingly, they had the option to join the colleges in the unreserved category.

According to the Commission all the available vacancies in the subject Geography has been filled up on the basis of merit ranking during the validity period of the panel.

As regards the provision for counselling laid down in Regulation 9(3) of the Regulations it has been submitted that, when a candidate exercises his choice he forthwith forfeits his right to choose any other vacancy in the same category, but not any other category where his name is appearing. The private respondents were called for re-counselling in respect of the unreserved category in accordance with their merit ranking only after they refused to join the colleges where they opted as reserved candidates. It is only after abandoning the reserved category seats allotted to them were they allowed to participate in the re-counselling for the unreserved category, strictly in accordance with their merit position in the panel. It has been highlighted that due to non-availability of vacancy in the unreserved category in the subject Geography, the petitioner could not be called for counselling during the life time of the merit panel.

The Commission relies upon the judgment delivered by the Hon'ble Supreme Court in the matter of Rajesh Kumar Daria -vs- Rajasthan Public Service Commission & Ors. reported in (2007) 8 SCC 785 in their support.

The Commission prays for dismissal of the writ petition.

The learned advocate representing Rajesh Kr. Dey submits that Regulation 9(1), 9(3) and Article 16 of the Constitution of India have to be read in conjunction. According to Rajesh, as he gave up his right to continue in the college where he opted as a reserved category candidate, he has rightly been permitted to participate in the counselling for the unreserved category, and being successful he has joined the college. He submits that he got the chance in the counselling in respect of unreserved category as there were vacancies available to be filled up. As his name appeared above the name of the petitioner, accordingly as per his merit position he has opted for a college and joined the same.

It has been argued that the College Service Commission Regulations have to be

read in the context of Article 16 of the Constitution of India. Reliance has been placed on the judgment delivered by the Hon'ble Supreme Court in the matter of Union of India -vs- Sankalchand Himmatlal Sheth reported in AIR 1977 SC 2328 wherein the Court held that though the words used are the primary and ordinarily the most reliable source of interpreting the meaning of any writing, be it a Statute or contract or anything else, it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary, but to remember that a Statute always has some purpose or object to accomplish, whose sympathetic and imaginative discovery, is the surest guide to its meaning. The literal construction should not obsess the Court, the real object of interpretation being to find out the true intent of the lawmaker.

The learned advocate has also relied upon the judgment delivered by the Hon'ble Supreme Court in the matter of Indra Sawhney & Ors. -vs- Union of India & Ors. reported in 1992 Supp (3) SCC 217 paragraph 817 wherein the Court held that reservations under Article 16(4) do not operate like communal reservation. It may well happen that some members belonging to SCs get selected in the open competitive field on the basis of their own merits. They will not be counted against the quota reserved for Scheduled Castes, they will be treated as open competition candidates.

Rajesh submits that he left the College which he joined in the reserved category and in the counselling by the Commission he opted and later joined the College in the unreserved category and prays that his appointment may not be disturbed by the Court.

The learned advocate representing Sandipan Ghosh submits that though he was called for participating in the counselling process in the reserved category and he opted to join Hiralal Bhakat College, but no recommendation letter was ever issued to him. Sandipan Ghosh was thereafter called for re-counselling in the unreserved category where he opted for a different college where vacancy existed.

According to Sandipan Ghosh as he was never issued the letter of recommendation in respect of any college in the reserved category, accordingly, he rightly chose to opt and join in the unreserved category. Sandipan also prays that, as he joined the College after participating in the counselling process in accordance with his merit position, his service ought not to be disturbed by the Court.

In response to the argument made by the Commission that all vacancies in the subject Geography had been filled up during the validity period of the panel, the learned advocate for the petitioner has relied upon a communication dated 17th March, 2021 made by the Principal of Banwarilal Bhalotia College to the petitioner, in reply to his application made under the Right to Information Act that, though there were three sanctioned posts in the unreserved category and requisition for the posts were forwarded to the Commission, the College received

only two recommendations for appointment in the post of Assistant Professor Geography and one post in the unreserved category is still lying vacant. Petitioner prays that he may be accommodated in any College in any of the existing vacancies.

I have heard and considered the rival submissions made on behalf of all the parties.

What is to be decided in the instant writ petition is whether a candidate whose name appears in the merit panel, simultaneously, under two separate categories, one reserved and the other unreserved, can switch over from one category to the other after opting to join the post in respect of a particular category?

In the instant case, Sandipan Ghosh and Rajesh Dey's names appear both under the unreserved as well as reserved category. Both the candidates were called for counselling. When the turn of Sandipan Ghosh and Rajesh Dey came for counselling in the reserved category, they opted for joining particular colleges. Appointment letter was issued in favour of Rajesh but he chose not to join the college. However, Sandipan claims that no appointment letter was issued in his favour. Both the candidates thereafter sought for re-counselling in the unreserved category and both were called for re-counselling in the unreserved category in accordance with their position in the merit panel. Both were successful. Appointment letters were issued in their favour and they joined service.

Petitioner's name appeared at serial no. 50 of the merit panel. Though initially vacancy was declared in respect of only 37 posts, but thereafter it appears that fresh vacancies were notified and appointment has been given to candidates till serial no.

48. According to the petitioner, had Sandipan and Rajesh joined in the reserved posts, then there would have been two posts left to be filled up in the unreserved category, and the petitioner would have got a chance to participate in the counselling process.

The West Bengal College Service Commission has published Regulations regarding Manner of Selection of Persons for Appointment to the Post of Assistant Professors in Government-aided Colleges in West Bengal. Regulation 3 specifies that the College shall intimate the actually existing vacancies in whole time substantive posts approved by the government to the Commission. On receipt of the valid and complete requisition from the College against an approved post, the Commission shall treat the same as a valid vacancy. The Commission shall notify a cut-off date up to which the vacancy requisitions shall be accepted for the purpose of a particular advertisement and selection process. The cut-off date shall always precede the date of the publication of the first provisional merit panel in respect of that advertisement. A list of such recorded existing vacancies category wise is to be displayed in the official website of the Commission prior to publishing any provisional merit panel for recruitment in order to facilitate a

transparent counselling process.

For the purposes of selection, the Commission shall prepare a single provisional merit panel of candidates for each category of posts as may be found suitable for recommendation and each panel shall ordinarily include fifty per cent in excess of the number of existing vacancies. The panel shall remain valid for one year from the date of its publication by the Commission, or until all the existing vacancies are filled up through recommendation of the Commission, whichever is earlier. The empanelled candidates under each category may be called for counselling one by one, strictly in order of their merit, by giving the opportunity to choose the vacancy under respective category of his preference from amongst the ones that still remained vacant when his turn comes. Once a candidate exercises his choice, he forthwith forfeits his right to choose any other vacancy. The counselling process continues till any vacancy is left vacant under a particular category.

In the present case, the successful candidates were called for counselling on 16th March, 2020. Sandipan Ghosh whose name figured at serial no. 8 and Rajesh Dey whose name appeared in serial no. 9 of the panel under OBC-B category exercised their option to join the respective colleges. Though appointment letter was issued in favour of Rajesh, he refused to join the said college. Sandipan claims that recommendation letter was never issued in his favour. As both Sandipan and Rajesh did not join in the reserved category the Commission permitted them to participate in the counselling in the unreserved category and both were successful and have since joined service.

The petitioner is aggrieved by the action of the Commission by allowing fresh chance to Sandipan and Rajesh to exercise their option even after they opted for joining in the reserved category post. According to the petitioner, if only one chance was given to Sandipan and Rajesh, then he could have got a chance to appear in the counselling, as two posts in the unreserved category would have remained vacant had Sandipan and Rajesh joined in the reserved category post.

According to Regulation 9 the empanelled candidates under each category is to be called for counselling serially in order of their merit position in the panel and be given the opportunity to choose the vacancy under respective category of his preference from amongst the ones that still remain vacant when his turn comes.

The Commission has interpreted the aforesaid Regulation in the manner that opportunity to choose the vacancy under respective category of his preference would mean that the candidate be given opportunity in each of the categories to choose vacancy, i.e, a candidate whose name appears in two separate categories will get two opportunities to choose a college of his choice notwithstanding the fact that he opts to join in a particular category. The same implies that even if a candidate selects a college in the reserved category he will be given a further opportunity to choose a college in the un-reserved category in accordance with his position in the merit list.

The Commission interprets Regulation 9 (3) to mean that a candidate forfeits his right to choose any other vacancy in respect of a particular category once the candidate exercises his choice in that category, but he does not lose the right to choose the vacancy in respect of any other category where his name is figuring.

I am afraid I cannot accept the aforesaid contention of the Commission. A meaningful reading of Regulations 9 (1) and 9 (3) ought to mean that as and when a candidate exercises his choice to choose a particular vacancy, he forfeits his right to choose any other vacancy either in that category or in any other category where his name is featuring. If such an interpretation is not given to the aforesaid Regulations, then in that case, a candidate specially whose name appears in two categories gets two opportunities to choose two different colleges even after exercising option to join in a particular category, whereas a candidate whose name appears in the unreserved category panel gets only a single opportunity to choose a college of his choice.

It is absolutely permissible that a reserved category candidate be listed under two categories i.e., in the reserved as well as the un-reserved category and he certainly has a right to be called for counselling in accordance with his merit position in the respective categories, but the moment a candidate whether in the reserved category or the un-reserved category opts to join a particular college he forfeits his right to choose any other vacancy in any category whatsoever. If such a harmonious construction of the aforesaid Regulations is not allowed, then it may always happen that candidates, especially from the reserved category, may keep switching over from one college to the other and from one category to the other thereby disturbing the prospect of the other empanelled candidates to get an opportunity to attend the counselling process.

A candidate in the unreserved category hardly gets more than one opportunity to choose a college of his choice. If a reserved category candidate exercises option to join in the reserved category, he ought not to be given any further opportunity to participate in the counselling for the unreserved category. A candidate can always forego his right to opt in a particular category and wait for his turn in the other category, but he ought not to be allowed a further chance the moment he chooses to join a vacancy in any particular category. In that event, the remaining candidates also gets to know their respective positions in the merit panel, as to how many more vacancies are left to be filled up and as to whether or not he/she will get a chance in the counselling. The process remains transparent. Otherwise a candidate, with an appointment letter in hand, will wait for his turn to participate in the counselling in the other category, and if he is successful in securing a position according to his choice, he abandons the first vacancy and joins the second. By this way he not only disturbs the panel of the category in which appointment letter was issued in his favour but he also disturbs the other panel, inasmuch as candidates below him lose the chance of being upgraded in the position which was left vacant on account of the candidate who received appointment letter in the other category.

The Hon'ble Supreme Court in *Indra Sawhney* (supra) in paragraph 811 observed that it may well happen that some members belonging to Scheduled castes get selected in the open competition filed on the basis of their own merit; they will not be counted against the quota reserved for scheduled castes and they will be treated as open competition candidates.

The aforesaid implies that a reserved category candidate who secures a position of merit in the un-reserved category will be treated as the candidate of the un-reserved category.

Regulation 9(1) read with 9(3) leads to the only conclusion that the moment a candidate chooses a vacancy in any category, he forfeits his right to choose any other vacancy in the other category. Vacancy is offered to a candidate according to his position in the merit panel. Accordingly, when he exercises his right, in his turn, in a particular category, he does not get any other chance to exercise option in the self-same category. As per Regulation 9 (3) refusal to choose any of the remaining vacancies at ones turn automatically cancels the candidature of that candidate.

It is at this stage that the bar to exercise option in the other category comes to play. It is then that he forfeits his right to choose any other vacancy in any other category. If the aforesaid explanation is not accepted, then the panel of both the categories gets disturbed, as a candidate may switch over from one category to the other, according to his convenience, causing inconvenience to the subsequent empanelled candidates in the category. Such flip-flop action creates uncertainty in the mind of the empanelled candidates and the future of the subsequent candidates in the panel remains hanging in a balance. Transparency gets lost.

A candidate is required to exercise his choice in an informed manner and ought to stick to his choice instead of moving over from one category to the other. A candidate ought not to mis-utilise his choice or the privilege that he enjoys under the Constitution and under the respective Regulations, and at the same time, a candidate cannot stand in the way of others from getting a job taking advantage of the fact that he belongs to the reserved category.

It was clearly mentioned in the letter of appointment issued by the Birpara College in favour of Rajesh Dey that the letter of appointment will be treated as cancelled if he failed to joined the post by 12th August, 2020, but even thereafter the Commission permitted Rajesh to attend the counselling in respect of the unreserved category. The same is illegal and contrary to the Regulations.

The Supreme Court in *Rajesh Kumar Daria* (supra) laid down that if the scheduled caste candidates by their own merit, get selected to open competition vacancies it cannot be said that the reservation quota has been filled. In the instant case, the reserved category candidates, though selected in both the categories, ought to have respected the option they had exercised in the first chance and stuck to the same instead of withdrawing themselves from the reserved category and switching over to the unreserved category.

Though, alternatively it can be inferred that as the reserved category candidates withdrew their candidature from their said category, accordingly two vacancies were available to be filled up from the members of the reserved category, but this is where the restriction gets attracted.

The Commission misinterpreted the provision of Regulation 9 and permitted the reserved category candidates to participate in the counselling process once again even after they had exercised their choice to join a particular college.

The idea of reservation is to increase participation and offer opportunities to the reserved category candidates. The moment a reserved category candidate gets a chance to be selected in the open competition category then the corresponding vacancy in the reserved category may be filled up by the members of the reserved category thereby increasing their strength.

The alibi of the Commission that second time counselling was permitted only after the candidates did not join their respective colleges do not save their action from the vice of arbitrariness. Abandoning a seat after accepting the letter of appointment leads to cancellation of candidature. No further opportunity can be granted to a candidate to exercise option in any category whatsoever once he refuses to join the college he opted for.

The Commission during the lifetime of the panel and prior to filling up of all vacancies published a further advertisement 1/20 disclosing vacancies. The Commission ought to have filled up all the vacancies from the existing panel prior to publishing the fresh advertisement. The Commission ought to have acted in accordance with the Regulations and should have taken into consideration only those existing vacancies which were displayed by the Commission prior to publishing the provisional merit panel. The Commission, in utter violation of the aforesaid Regulations, went on adding up vacancies, even after publishing the merit panel and the same has resulted in chaos amongst the empanelled candidates and lack of transparency in the entire process of counselling and thereafter. Had the Commission stuck to filling up only the number of existing vacancies initially published, candidates up to the serial number 48 in the unreserved panel would not have got a chance to appear in the counselling in respect of the pending advertisement.

The Principal of the Banwarilal Bhalotia College has revealed that one post in the unreserved category for Geography is still lying vacant. The existing vacancies as published in respect of the subsequent advertisement number 1/20 are yet to be filled up. The private respondents have since joined colleges and the vacancies which they abandoned in the reserved category must have been filled up by now. At such a stage, the private respondents cannot be reverted back to the earlier colleges where they opted to join initially. Moreover, as the private respondents were directly not responsible in committing the wrong, accordingly, disturbing their service now will cause prejudice to them.

The wrong that has been committed by the Commission may be undone if two

vacancies in the unreserved category are permitted to be filled up by re-counselling from the remaining empanelled candidates of the unreserved category list and adjusting the vacancy position accordingly from the subsequent advertisement.

In view of the above, the Commission is directed to conduct re-counselling of the remaining empanelled candidates of the unreserved category in the subject Geography for filling up two vacancies notwithstanding the fact that the panel in question expired in the meantime. The re-counselling shall be held strictly in accordance with the Regulations within a period of eight weeks from the date of communication of a copy of this order.

Urgent certified photo copy of this judgment, if applied for, be supplied to the parties expeditiously on compliance of usual legal formalities.