
(2012) 06 PAT CK 0026
In the Patna High Court
Case No : CWJC No. 19614 of 2011

Tufail Ahmad Khan

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 21-06-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2012) 3 PLJR 570

Hon'ble Judges : Navin Sinha, J

Bench : Single Bench

Advocate : Kumar Sunil, for the Appellant; Anil Kumar Sinha, Prabhakar Sinha For the Respondent No. 10, M/s. G.K. Agrawal and Satyendra Kr. Jha For the State, for the Respondent

Judgement

Navin Sinha, J.—Heard Learned Counsel for the petitioner, the State and for respondent no. 10. Notwithstanding the long passage of time since the filing of the writ petition after serving two copies in the office of the Advocate General, the second meant to facilitate filing of counter affidavit, the listing of the matter on more than one occasion, the official respondents have not considered it necessary to assist the Court by filing counter affidavit.

2. The petitioner is aggrieved by the order dated 1.10.2011 passed by the District Teachers Appointment Appellate Tribunal, Kaimur at Bhabua, in Appeal No. 165 of 2011. The termination of respondent no. 10 has been set aside and the appointment of the petitioner annulled.

3. The petitioner and respondent no. 10 inter alia were applicants for the post of Urdu Primary Teacher in the 2006 phase of appointment. Respondent No. 10 was appointed. The petitioner questioned it on the ground that respondent no. 10 possessed the qualification of Urdu as an additional subject. It could not be considered in view of the instruction dated 8.8.2006 issued by the Department of Human Resources. Upholding the objection respondent no. 10 was terminated on 27.9.2007 and the petitioner appointed on 6.11.2007. Aggrieved, respondent no.

10 preferred the appeal which has been allowed.

4. Learned Counsel for the petitioner submits that the instruction dated 8.8.2006 prohibited the taking into consideration marks of the additional or optional subject. The petitioner obtained the qualification of Intermediate in 2000 with Urdu as a compulsory subject. Respondent No. 10 obtained the qualification of Intermediate in the year 2004 in subjects other than Urdu. He again appeared at the Intermediate examination 2005 as a private candidate with Urdu only as his additional subject. The marks obtained in Urdu, as an additional subject could not have been taken into consideration for calculating the percentage inter se granting him 56.4% as compared to 52.8% of the petitioner. The Tribunal committed gross illegality in upholding that the marks obtained by respondent no. 10 in the paper of English could be treated as an optional subject and in lieu thereof the marks obtained by him in Urdu as an additional subject be reckoned for assessing his candidature. The Tribunal also erred in holding that the removal of respondent no. 10 had not been ordered by the Block Development Officer (hereinafter called "B.D.O.") who alone was the competent authority under Rule 18 of the Bihar Primary Teachers Appointment and Service Conditions Rules, 2006 (hereinafter referred to as the "Rules"). The petitioner had filed his complaint before the B.D.O. The B.D.O. was a member of the scrutiny committee also.

5. Learned Counsel for the State supported the orders for removal of Respondent No. 10 dated 16.7.2007 and 27.9.2007 urging that respondent no. 10 was not eligible to be appointed. His marks in Urdu as additional subject was prohibited from consideration by order dated 8.8.2006.

6. Counsel for respondent no. 10 contended that under Rule 6, an applicant for the post of Urdu teacher was required to have qualification in the subject only. There was no statutory restriction or limitation with regard to whether it was obtained as a compulsory subject or an additional subject. The instruction dated 8.8.2006 could not read any restriction into the Rules which was not provided for by making an irrelevant artificial distinction. The Tribunal had also held that the order for removal was without jurisdiction not having been passed by the statutory authority under Rule 18. It was lastly submitted that even if the benefit given to him for the marks in Urdu as an additional subject are excluded he is still superior in rank to the petitioner.

7. Rule 6 required a candidate for the post of Urdu teacher to hold qualification in the subject. A person not possessing the same was ineligible to apply and be considered. The respondents therefore rightly did not deny consideration to respondent no. 10. The right to consideration did not vest a right to be appointed. The issue for consideration would be if the action of the respondents in opining that they would appoint such persons who possessed qualification of Urdu as a compulsory subject excluding those who had Urdu as an optional subject is arbitrary, irrational or devoid of logic and common sense.

8. The order dated 8.8.2006 does not detract from the statutory provision of Rule 6 in any manner. It does not restrict the operation of Rule 6 or violate it in any manner. Any person with the qualification of Urdu was eligible to apply. But if Urdu was his additional subject, the marks obtained was not be taken into consideration thus lowering his overall aggregate. The decision of the respondents not to compute marks of optional subjects cannot be classified as arbitrary, irrational or devoid of reason. A person who pursues education in Urdu as a compulsory subject is presumed to be more serious for his academic qualifications than one who does it as an additional subject. Additional/optional subjects are normally chosen by the candidate keeping in mind the suitability for enhancement of overall performance or as a compulsion for the specified number of subjects. Even today, marks of optional subjects are excluded in determining the merit for admission and/or appointment, in various selections.

9. The selection process was initiated in the year 2006. The decision to exclude marks of optional subject was taken on 8.8.2006. Respondent No. 10 is therefore presumed to be aware of the same. Alternately the direction binds his application and candidature and the consideration had to be in the shadow of the same. The instruction was not challenged by anyone. Respondent No. 10 could not have been appointed and no statutory justification has been demonstrated on his behalf. There is no material to support the conclusion of the Tribunal for the legal justification of holding that the respondents had rightly treated Urdu as a compulsory subject with regard to respondent no. 10 and English as an optional subject.

10. The respondents on 16.7.2007/27.9.2007 therefore rightly held that he had been appointed wrongly by taking into consideration his marks in Urdu, an additional subject. The authority/person who appointed Respondent No. 10 acted in abuse of powers contrary to the Government direction dated 8.8.2006 and which bound his exercise of powers.

11. If the appointment of respondent no. 10 is held to be bad in law, to uphold the technical objection that his order for removal was not passed by the statutory authority under Rule 18 and was therefore bad shall amount to reviving an illegal order. In any event, the statutory authority under Rule 18 was a part of the committee which considered matters holding appointment of respondent no, 10 to be bad.

12. The order dated 1.10.2011 passed by the Tribunal in favour of respondent no. 10 is therefore held to be not sustainable. It is accordingly set aside.

13. Considering the controversy and the developments, it is directed that respondent no. 10 is held entitled to salary for any period that he may have actually discharged duties as an Urdu teacher by imparting education inside the classroom only and not otherwise.

14. The writ court under Article 226 in judicial review does not sit as an appellate forum over the order of the Tribunal. The submission on behalf of the respondent

no. 10 that he is still better suited even after his marks in the Urdu subject are excluded is an issue not urged on his behalf before the Tribunal. The Court is not inclined to examine the order of the Tribunal on grounds not urged before it and on which the parties may not have had an opportunity to address, and the Tribunal to decide. The Court is also not persuaded to issue any directions to the authorities in exercise of power under Article 226 to examine the aspect preventing finality to the controversy. If the respondent no. 10 has any perceived grievance it is beyond the scope of the present controversy, and he may pursue as he may be advised. The writ application stands disposed.