HIGH COURT OF TRIPURA
AGARTALA

W.P(C) No.1189 of 2016

Sri Tutan Biswas, S/o. Jatindra Biswas, R/o. Vill-Nayabari, P.O-Maiganga, P.S-Teliamura, District-West Tripura.

…… Petitioner(s).

Vs.

Tripura State Co-operative Bank Limited, Represented by its Managing Director, Head Office Near Amulya Market, Post Office Chowmmuni, P.O-Agartala, P.S-West Agartala, District-West Tripura and others.

…… Respondent(s).

BEFORE
HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI

For Petitioner(s) : Mr. A. Bhowmik, Advocate.

For Respondent(s) : Mr. S. M. Chakraborty, Sr. Adv.
Mr. G. S. Bhattacharjee, Adv.
Mr. T. D. Majumder, Adv.
Ms. Bratati Chakraborty, Adv.

Date of hearing & judgment : **3rd June, 2020**.

Whether fit for reporting : NO.

J U D G M E N T & ORDER (O R A L)

This petition is filed by an individual challenging the action of respondent No.1, Tripura State Co-operative Bank Limited of not selecting and appointing the petitioner on the post of Assistant Grade pursuant to selection process which was undertaken in terms of advertisement dated 06.01.2015.

[2] Brief facts are as under:

Respondent No.1 is a Co-operative Bank. On 06.01.2015 the bank had issued a public advertisement notifying various vacancies which would be filled up through the selection process which the bank would undertake. This advertisement included 42 vacancies for the post of Assistant Grade Officers. The petitioner possessed the requisite educational qualifications. He in fact held the qualification of MBA against the preferred qualifications of BCA, BBA and B.Com as advertised by the bank. The petitioner belonged to the SC community. He applied for the post in question. The selection process included a written test and computer test followed by *viva voce*. At the end of the selection process, the bank prepared a select list which did not include the petitioner. After some inquiries with the bank the petitioner realised that the bank had appointed a total of 70(seventy) candidates in the said grade as against 42 notified vacancies. The petitioner thereupon challenged the selection process and sought his appointment on various grounds.

[3] The bank has raised a preliminary ground of maintainability of this petition contending that the bank is not a State within the meaning of Article 12 of the Constitution of India. Meeting with this ground, learned counsel for the petitioner submitted that the State Government has deep and pervasive control over the bank functioning and management. He

pointed out that the creation of posts and prescription of pay scales for the bank employees has to be approved by the Government. The Government also is a principal investor and thus finances the bank. The State Government thus has financial as well as complete administrative control over the functioning of the bank clearly signifying that the respondent No.1, bank is a State within the meaning of Article12 of the Constitution.

[4] Learned counsel for the petitioner, Mr. Arijit Bhowmik submitted that the written examination consisted of multiple choice questions. The correct answer had to be indicated with a pencil which would make the selection process open to manipulations. He further submitted that initially only 42 vacancies were notified. However, as many as 72 persons were appointed meaning 28 additional posts over and above those notified were filled up through this selection process which was wholly impermissible. In support of his contention learned counsel relied on following decisions:

(i) In case of ***Mukul Saikia and Others Vrs. State of Assam and Others:*** reported in ***(2009) 1 SCC 386.***

(ii) In case of ***Rakhi Ray and Others Vrs. High Court of Delhi and Others:*** reported in ***(2010) 2 SCC 637.***

[5] Learned counsel for the petitioner drew my attention to the decision of the Supreme Court in case of ***Amlan Jyoti Borooah Vrs. State of Assam and others:*** reported in ***(2009) 3 SCC 227*** to contend that in the said case looking to the emergency involved in filling up the vacancies the Supreme Court had refused to interfere. In the present case, however, the bank has not shown any such emergency.

[6] Learned counsel for the petitioner further submitted that going by the last reply of the bank dated 26th May, 2020, the bank had created and the creation of posts was approved by the State Government of 38 additional vacancies in the cadre. As against this the bank had filled up only 28 of such vacancies, thereby leaving 10 vacancies unfilled. If at all, therefore, the bank was to be allowed to fill up vacancies over and above those which were notified, the bank must fill up the remaining 10 vacancies also. The petitioner having qualified in the written and oral examinations, must be offered appointment on such unfilled vacancy.

[7] On the other hand, counsel Mr. T. D. Majumder for the bank opposed the petition contending that the bank is not a State within the meaning of Article 12 of the Constitution. This writ petition is, therefore, not maintainable. Even otherwise, the entire selection process was carried out in a transparent manner. The petitioner was not selected because of the

related performance of the petitioner as compared to other candidates. On the basis of additional affidavit dated 26th May, 2020 learned counsel pointed out that the last selected SC candidate had secured 62 marks as against the petitioner worth 55 marks which was a total of written as well as oral examinations. The petitioner was thus not found meritorious enough to warrant appointment. He submitted that the petitioner who had participated in the selection process cannot challenge the validity thereof.

[8] In the context of filling up vacancies over and above those notified he submitted that the bank had taken a decision to create additional posts long before the advertisement dated 06.01.2015 was issued. Shortly after issuance of the advertisement, the Government also approved creation of additional posts. The Board of Directors to the bank therefore, resolved on 27.3.2015 to fill up additional posts also through the said selection process. Thus, there was no *mala fide* on part of the bank in making additional appointments. All the appointed candidates had performed well in the written and oral examinations. They have been working satisfactorily since five years.

[9] Learned Sr. Counsel Mr. S. M. Chakraborty, appearing for the private respondents also adopted the said arguments and submitted that the private respondents having performed better than the petitioner in the

selection process had been appointed ahead of him. Their appointments, therefore, should not be cancelled.

[10] First, we may deal with the question of the bank being a State within the meaning of Article 12 of the Constitution. In this context the petitioner has contended that the State of Tripura is a major shareholder of the respondent No.1 bank holding more than 56% of its bid of share capital. The bank is thus a Government undertaking. Further, the Finance Department of Government of Tripura lays down the pay structure of the employees of the bank once such memorandum issued by the Finance Department dated 31.03.2015 is produced on record.

[11] The respondent No.1 bank does not seriously dispute these basic aspects of the matter. It is undisputed that State Government is a major financial stake holder. More importantly, the creation of the posts and the pay structure attached to each post under the bank has to be approved and sanctioned by the State Government. The respondent No.1 bank itself in its latest affidavit has admitted that after resolving to create additional posts in various cadres, the bank had to seek permission from the State Government. Only after granting such permission the bank would proceed to fill up such newly created posts. In clear terms thus in addition to substantial financial interests of the State Government being involved,

the State Government enjoys a deep and pervasive control over the functioning and management of the bank. Present, is not a simpliciter case of a Co-operative Bank allowed to function with its full autonomy. For the creation of every post, the bank would have to approach the State Government for its approval. The pay structure of the employees of the bank also needs to be cleared by the State Government. I am, therefore, satisfied that respondent No.1 bank is a State within the meaning of Article 12 of the Constitution and, therefore, amenable to writ jurisdiction to this Court.

[12] We may now advert to the petitioner's challenge to the selection process. We have noticed that the petitioner had secured a total of 55 marks as against the last SC candidate appointed by the bank who had secured 62 marks. The breakup of such marks was also given by the bank in its last affidavit dated 26th May, 2020 in which the bank has stated that the petitioner had scored 31 marks in the written test and 12 marks in the computer test. His total out of these two tests was 43 marks. He had been assigned 12 marks in the oral examination i.e. how his grand total became 55 marks. As against this, the selected candidate had secured 34 and 14 marks respectively in written and computer tests, total of which came to 48 marks. He was allotted 14 marks in the oral examination which is how his grand total came to 62 marks. Clearly thus, the last selected and appointed

SC candidate was found to be far more meritorious than the petitioner. The petitioner has not raised any grounds of such selection process being carried out *mala fide* in any manner. His contention, therefore, that the answers in the MCQ tests were to be given with pencil marking has to be merely recorded for rejection. No allegations of manipulation have been made. Mere suspicion or possibility of manipulation would not be sufficient to upset the selection process. Merely because the petitioner possessed preferential qualifications would not justify his selection if he is not found meritorious.

[13] The petitioner's second contention was that the bank appointed more candidates than the number of notified vacancies, which according to the petitioner was clearly against the decision of the Supreme Court cited and noted earlier. To this principle there can be no debate. However, such principle shall have to be applied in facts of the present case. The bank in the last affidavit dated 26th May, 2020 has clarified that the bank was suffering from acute shortage of staff. The Board of Directors had, therefore, resolved to create additional 38 posts of Assistant Grade. This decision was taken in the year 2014 which was prior to issuance of the advertisement. The Government of Tripura granted approval for creation of these additional 38 vacancies under memorandum dated 18.3.2015 which was before the conduct of the interviews. These

additional 38 vacancies are, therefore, placed for the disposal of the interview committee for making selection. The bank has produced a copy of the communication of the State Government dated 18.03.2015 granting approval for creation of such additional posts. Eventually therefore, the Board of Directors in its meeting dated 27.3.2015 resolved to fill up these additional 38 posts also through the said ongoing selection process.

[14] In my opinion, the decision of the bank to make appointments of vacancies in addition to those notified was perfectly *bona fide* and justified in facts of the present case. The decision at the bank's level to create additional posts was taken before the advertisement was issued for filling up the vacancies. The bank required the approval of the State Government before such posts could be formally created. Such approval was claimed shortly after the advertisement was issued. Soon after such approval was granted on 18.3.2015 by the State Government, the Board of Directors in its meeting dated 27.03.2015 resolved to fill up these additional vacancies through the same selection process. The oral interviews at this point were yet to be conducted. The bank was suffering from acute shortage of officers in the said grade. Combination of these factors would persuade me that the selection process was validly applied to the additional posts though not initially notified in the advertisement. The decision was taken with due promptness and *bona fide*. In fact the decision

to create additional posts at the bank's level was taken before the issuance of advertisement.

[15] One small area however, remains to be inquired. The question is if 38 additional vacancies were created and the bank decided to fill up all these vacancies through the same selection process, however, only 28 appointments were issued. To this the bank counsel could give no answer either from the affidavits on record or even orally. I am conscious that ordinarily the Courts have leaned in favour of the employer choosing to fill all vacancies or leaving some vacancies unfilled for valid reasons. However, the bank cannot oscillate in its decision making process. Having created 38 additional vacancies for acute staff shortage and having decided to fill up these vacancies through ongoing selection process though the advertisement normally issued prior to creation of these posts, it must at least explain why only 28 vacancies out of these additional 38 newly created posts were filled up. This was against the very decision of the Board of Directors of the bank to fill up all 38 vacancies from this selection process itself.

[16] Learned counsel Mr. T. D. Majumder for the bank fleetingly suggested that these unfilled vacancies could belong to ST category candidates where sufficiently qualified candidates were not available. If

this is a reason, the bank may be well within its right, not to fill up these vacancies. However, this aspect is not made clear by the bank at all. The contention of the counsel for the bank is that the petitioner having participated in the selection process cannot challenge the same, cannot be applied in the present scenario. These are the developments, post completion of selection of process to which the petitioner was not privy. The petitioner cannot be prevented from challenging this action of the bank merely because the petitioner participated in selection process. However, the petitioner cannot secure appointment, if these vacancies belong to ST category which the petitioner does not belong to or if he is not meritorious enough, even if, these additional posts were to be filled up.

[17] In the result, the petition is disposed of with following directions:

> If the remaining 10(ten) unfilled vacancies are not meant for the reserved ST category candidates, and any of these vacancies are available for SC category, the bank shall to the extent such vacancies may be available for SC category, operate the list of candidates who had participated in the said selection process and if it is found that the petitioner is meritorious enough on the basis of his performance in the said

examination to be appointed for such a post in question, the bank shall offer appointment to the petitioner. Such appointment, even if so made, shall be prospective, shall not result in any benefit for the past period for either pay or seniority. In any case, the bank shall communicate its decision to the petitioner within a period of four weeks from today which decision will be taken by the bank pursuant to these directions.

[18] Petition is disposed of accordingly. Pending application(s), if any, also stands disposed of.

(AKIL KURESHI), CJ

HIGH COURT OF TRIPURA
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