

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Shekhar B. Saraf

W.P.A. 191 of 2021
Subhasis Negel
Vs.
The State of West Bengal & ors.

W.P.A. 195 of 2021
Soumi Kundu Patra
Vs.
The State of West Bengal & ors.

W.P.A. 840 of 2021
Moumita Maity
Vs.
State of West Bengal & ors.

W.P.A. 843 of 2021
Soma Das Samanta
Vs.
The State of West Bengal & ors.

W.P.A. 1482 of 2021
Bhagirath Sardar & ors.
Vs.
The State of West Bengal & ors.

W.P.A. 906 of 2021
Bikash Das & ors.
Vs.
The State of West Bengal & ors.

For the Petitioner in
W.P.A. 840 of 2021 and
W.P.A. 843 of 2021

: Mr. Biswaroop Bhattacharya
Mr. Saktipada Jana
Mr. Ujjani Pal
Mr. Tamal Taru Panda

For the Petitioner in W.P.A. 1482 of 2021	: Mr. Sourav Mitra Mr. Amit Halder Mr. Nilay Baran Mandan
For the Petitioner in W.P.A. 906 of 2021	: Mr. Sarwar Jahan Mr. Mostafijur Rahaman Mr. Goutam Paul
For the Petitioner in W.P.A. 191 of 2021 and W.P.A. 195 of 2021	: Mr. Dwarika Nath Mukherjee Mr. Pradip Kr. Ghose
For the S.S.C. in W.P.A. 840 of 2021	: Dr. Chapales Bandyopadhyay Mr. Sunit Roy
For the S.S.C. in W.P.A. 840 of 2021 and W.P.A. 843 of 2021	: Dr. Chapales Bandyopadhyay Mr. Sunit Roy Ms. Supriya Dubey
For the S.S.C. in W.P.A. 906 of 2021	: Ms. Supriya Dubey
For the State in W.P.A. 840 of 2021	: Ms. Sanghamitra Nandy Mr. Bhaskar Chakraborty
For the State in W.P.A. 843 of 2021	: Mr. Malay Singh Mr. Raja Ram Banerjee
For the State in W.P.A. 1482 of 2021	: Mr. Susanta Pal Ms. Kakali Samajpaty

Heard on : January 15, 2021 and January 19, 2021

Judgment dictated in Court on January 19, 2021.

Shekhar B. Saraf, J.:

1. Several writ petitions have been filed in relation to the same issue, and therefore, this batch of writ petitions have been taken up and heard conjointly.

2. This is an application under Article 226 of the Constitution of India wherein the writ petitioners pray for a writ in the nature of mandamus

commanding the Respondents, particularly the Respondent no. 4, namely, the Secretary of the West Bengal Central School Service Commission (hereinafter referred to as “the Commission”) to allow the writ petitioners to add their enhanced training qualifications, as prescribed in the Recruitment Rules, 2016 in the process of selection for appointment to the post of Assistant Teacher in Upper Primary Level of schools in pursuance of the Appointment Notification dated September 23, 2016 as well as to consider their candidatures as trained candidates as per verifications to be submitted online in terms of the latest verification notification dated December 28, 2020.

3. Mr. Biswaroop Bhattacharya, learned Counsel appearing on behalf of the writ petitioners submits that since the process of selection has been set aside after four years from the initial date of such advertisement, dated 23rd September, 2016 by an order dated December 11, 2020, candidates who have enhanced their qualifications should be allowed to avail the benefit of the same. He further submits that it is the responsibility of the recruiting authority that is, the Commission, to get the best talent available in the market and that such a proposed course of action was in furtherance of public interest.

4. Mr. Bhattacharya buttresses his arguments by relying on a judgment of the Supreme Court in ***Rakesh Bakshi & Anr. –v- State of Jammu & Kashmir & ors.***, reported in ***(2019) 3 SCC 511***. He further relies on a judgment of the Supreme Court in ***Vijay Kr. Pandey –v- Arvind Kr. Rai &***

Ors., reported in **(2013) 11 SCC 611** to support his argument that during the intervening period of four years, candidates would have acquired enhanced qualifications, and accordingly, these enhanced qualifications should be considered by the Commission.

5. Mr. Bhattacharya thereafter places reliance on a recent unreported coordinate Bench decision of this Court, passed by Moushumi Bhattacharya, J. in **W.P.A. No. 9597 of 2019 (Aktarul Islam Kayal & ors. -v- State of West Bengal & Ors.)** to submit that such judgment has set aside the process of recruitment in the present selection process and does not in any way limit or disallow the use of enhanced qualifications in the fresh process of selection, as directed by the Court. He specifically makes reference to paragraph 30 of the said judgment.

6. Mr. Bhattacharya has also fairly submitted that the judgment of the Supreme Court in **Ashok Kumar Sharma and Ors. -v- Chander Shekhar and Anr.**, reported in **(1997) 4 SCC 18** is the guiding precedent with regard to the ratio that a person acquiring the prescribed qualification subsequent to such prescribed date cannot be considered at all. The principle underlying the ratio of such judgment is the fact that “an advertisement or notification issued/published calling for applications constitutes a representation to the public and the authority issuing it is bound by such representation. It cannot act contrary to it. One reason behind this proposition is that for if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the

interview, other similarly placed persons could also have applied. Just because some of the persons had applied notwithstanding that they had not acquired the prescribed qualifications by the prescribed date, they could not have been treated on a preferential basis. Their applications ought to have been rejected at the inception itself.”

7. However, Mr. Bhattacharya submits that the present case marginally differs from the judgment rendered in **Ashok Kumar Sharma (supra)**. He distinguishes the above judgment on the ground, that in the present case, all the writ petitioners were eligible at the time of the initial notification dated 23rd September, 2016 and the only consideration that they are seeking now is with regard to their enhanced qualifications, which they have obtained in the interregnum. He submits that the Commission should consider all candidates, and not merely the writ petitioners, who have obtained the enhanced qualifications as trained candidates. He further submits that the judgment of the coordinate Bench in **Aktarul Islam Kayal (supra)** specifically deals with candidates that may become ineligible to participate in the fresh selection process on account of age and the directions as issued by the Court, upon the Commission, to treat such cases in a uniform manner. He submits that the corollary should also follow *apropos* those candidates who have enhanced their qualifications, and accordingly, should be treated as trained candidates.

8. Mr. Biswaroop Bhattacharya strenuously submitted that this Court exercising its jurisdiction under Article 226 of the Constitution of India has

the requisite powers to mould the advertisement dated December 28, 2020 alongside the prayers that have been stated for in the writ petition. Mr. Bhattacharya places his reliance on Section 151 of the Code of Civil Procedure, 1908 read with the Rules relating to the Applications under Article 226 of the Constitution of India, framed by this Court.

9. Mr. Chapales Bandyopadhyay, learned counsel appearing on behalf of the Commission, submitted that the judgment in ***Aktarul Islam Kayal (supra)*** did not set aside the notification dated September 23, 2016 but merely directed the process of selection to continue from the stage under Rule 12(3). He submitted that the Court had directed the Commission to continue with the selection process subsequent to the stage under Rule 12(2) in a time-bound manner. He accordingly submitted that since the parameters of the advertisement have not changed in any manner, the question of enhanced qualification being taken into consideration does not and cannot arise. He relied on ***Ashok Kumar Sharma (supra)*** to buttress his arguments.

10. I have heard the learned counsels for the appearing parties, perused the materials on record as well as the judgments cited before this Court.

11. At the very outset, I would like to state explicitly that this Court is not rehearing the matter that was decided in ***Aktarul Islam Kayal (supra)***. The judgment is crystal clear as is evident from paragraph 30 wherein the Hon'ble Judge has held as follows :-

“30. By reason of the above discussion, this Court deems it fit to cancel and set aside the selection process for appointment of candidates to the posts of Assistant Teachers for Upper Primary Level of schools in the State pursuant to the Notification published for the said posts on 23rd September, 2016. **The West Bengal Central School Service Commission is accordingly directed to hold a fresh selection process of all the candidates who were found to be eligible under Rule 12(2) and proceed onwards from that stage. The Commission will proceed to verify the validity of TET certificate, academic and professional qualifications etc. as provided under Rule 12(3) regardless of whether candidates have approached the Court for suitable orders or not. The database and the selection of eligible candidates for verification must consist of all candidates who had applied online for the selection process.** Since this Court is aware of the serious shortage of teachers in the relevant classes in schools across the State, the dates stated above are being taken into account for fixing timelines so that the fresh selection can be completed at the earliest.

(1) The verification process under Rule 12(3) must commence on 4th January 2021 and be completed within 5th April, 2021.

(2) The Commission will proceed to prepare the Interview List and publish the same under Rule 12(4) by 10th May, 2021.

(3) The Merit List under Rule 12(5) and the subsequent stages of constituting a Panel should be completed within eight weeks from the date on which the Interview List is published on the website of the Commission.

(4) The selection process culminating in recommendation of the candidates for appointment should be completed within 31st July, 2021.

(5) The Commission will take into account specific cases where candidates may become ineligible to participate in the fresh selection process on account of age or as stipulated in the Notification dated 23rd September, 2016. The criteria for considering such cases must be uniform and be brought to the notice of the concerned candidates well in advance.

6) Needless to say, all the stages shall be conducted in accordance with the prescribed Rules for appointment to the posts of teachers in the Upper Primary level as notified on 23rd September, 2016.

The above directions shall apply to all the subjects e.g. Bengali,

History, Geography, Pure Science, English, Sanskrit, etc. in which the selection was commenced and conducted by the Commission.”

(Emphasis supplied)

12. As is palpably clear from the above paragraph of the judgment, the Hon'ble Judge has not set aside the advertisement published on September 23, 2016. The judgment has directed the Commission to hold a fresh selection of all candidates who were found to be eligible under Rule 12(2) and proceed onwards from that stage.

13. This clearly prevents any intervention with regard to such advertisement. The fresh cause of action that has been raised by the writ petitioners in this batch of writ petitions, with regard to enhanced qualifications to be considered due to the fact that the selection process has been postponed by four years, is well thought out and well argued, but unfortunately, against the well-founded principles established in law.

14. The Supreme Court judgment rendered in ***Shankar K. Mandal & Ors. –v- State of Bihar & Ors.*** reported in **(2003) 9 SCC 519** had laid down certain principles after considering previous judgments rendered by the Apex Court. The relevant portion is provided below:

“5.[W]hat happens when a cut-off date is fixed for fulfilling the prescribed qualification relating to age by a candidate for appointment and the effect of any non-prescription has been considered by this Court in several cases. The principles culled out from the decisions of this Court (see Ashok Kumar Sharma – v- Chander Shekhar, Bhupinderpal Singh –v- State of Punjab and Jasbir Rani –v- State of Punjab) are as follows:

(1) The cut-off date by reference to which the eligibility

requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules.

(2) **If there is no cut-off date appointed by the rules then such date shall be as appointed for the purpose in the advertisement calling for applications.**

(3) If there is no such date appointed then the eligibility criteria shall be applied by the reference to the last date appointed by which the applications were to be received by the competent authority.”

(Emphasis supplied)

15. Therefore, as is evident from the judgment in ***Shankar K. Mandal (supra)***, which had also consciously considered the decision in ***Ashok Kumar Sharma (supra)***, the Supreme Court has clearly reiterated the point of law that when there is no cut-off date provided for in the Rules, then such date shall be as appointed for the purpose in the advertisement/notification inviting such applications. These judgments also make it clear that the State or its constituent statutory bodies as the Commission have a right to fix a cut-off date in the advertisement for the purposes of such selection process. Furthermore, the cut-off date has to be adhered to and applied consistently for all persons and the same cannot be ignored for a particular person. This principle would apply to eligibility criteria as well as the qualification of a person on the date of cut-off. Exceptions cannot be culled out on sympathetic grounds or on grounds of public policy that the best persons should be recruited (also see, an unreported decision of this Court rendered in ***Rabiul Islam Sarkar –v- State of West Bengal & Ors.*** bearing ***W.P. No. 5082(W) of 2018 dated July 30, 2018***).

16. The sophistry of the arguments of Mr. Bhattacharya, learned counsel

appearing on behalf of the writ petitioners, especially those in relation to the wholesome and unbridled power of the High Courts under Article 226 of the Constitution of India has indeed caused my grey cells to be taxed ferociously and I have pondered over this several times. However, on contemplation, I am of the view that one cannot lose sight of the fact that the courts in this country including the High Courts, are institutions tasked to adjudicate and not to legislate. One may go down memory lane and examine a few precedents laid down by the Apex Court with regard to the principles of judicial review and judicial discretion to be exercised by the High Courts.

17. The Supreme Court in its judgment rendered in ***Hari Krishna Mandir Trust –v- State of Maharashtra and Ors.*** reported in **(2020) 9 SCC 356**, had reiterated the scope of the powers of a High Court exercising its powers under Article 226 of the Constitution of India, in the following words:

“104. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner’s right to relief, questions of fact may fall to be determined. In a petition under Article 226, the High Court has jurisdiction to try issues both of fact and law. **Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles.**”

(Emphasis supplied)

18. It is trite law that any relief sought under Article 226 is a discretionary remedy and the Supreme Court reiterated this point in ***Hari Krishna Mandir Trust (supra)*** that such discretion needs to be exercised by this Court based on “sound judicial principles”. One such established principle is the non-inclination of Courts to interfere in any policy matter/decision taken

by the State, under its judicial review powers prescribed under Article 226 of the Constitution of India.

19. Now before I deal with the Supreme Court precedents which expressly indicate the prescription of non-interference in policy decisions taken by the State under the judicial review powers of the Court, the true intent of judicial review needs to be laid bare and reiterated. The House of Lords in its decision in ***Chief Constable of the North Wales Police –v- Evans*** reported in **(1982) 2 All ER 141 (HL); (1982) 1 WLR 1155**, set the limits of judicial review in the following words:

“...the function of the Court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law....the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court...”

Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.”

“Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.”

20. Moving on to the precedents of the Supreme Court that prescribe non-interference in policy decisions of the State under this Court’s judicial review powers, the Supreme Court had held in ***Ekta Shakti Foundation –v- Govt. of NCT of Delhi*** reported in **(2006) 10 SCC 337** as follows:

“11. The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or [is violative of] the fundamental rights of

the citizen or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the court, it cannot interfere.”

21. Subsequently, the Supreme Court in ***Directorate of Film Festivals –v- Gaurav Ashwin Jain*** reported in **(2007) 4 SCC 737**, while dealing with the entrenched scope of judicial review concerning governmental policy stated in paragraph 16 as follows:

“16. The scope of judicial review of governmental policy is now well-defined. Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not wisdom or soundness of the policy, is the subject of judicial review.”

(Emphasis supplied)

22. The Supreme Court in ***Union of India –v- J. D. Suryavanshi*** reported in **(2011) 13 SCC 167**, while recording its past precedents on the point, including ***Gaurav Ashwin Jain (supra)*** as well as relying on the dictum of the House of Lords in ***Chief Constable of the North Wales Police (supra)***, had cautioned Constitutional Courts of the country in the following words:

“11. This Court has repeatedly warned that courts should resist the temptation to usurp the power of the executive by entering into arenas which are exclusively within the domain of the executive.[T]his Court has repeatedly held that courts should not interfere in matters of policy or in the day-to-day functioning of any departments of Government or statutory bodies. Even within the executive, the need for separation of roles has been voiced.”

(Emphasis supplied)

23. Finally, a three judge bench headed by the then Chief Justice T.S. Thakur in ***Centre for Public Interest Litigation –v- Union of India*** reported in **(2016) 6 SCC 408**, had extensively discussed the scope of judicial interference in government policies as follows:

“21. Such a policy decision, when not found to be arbitrary or based on irrelevant considerations or mala fide or against any statutory provisions, does not call for any interference by the courts in exercise of power of judicial review. This principle of law is ingrained in stone which is stated and restated time and again by this Court on numerous occasions.

22. Minimal interference is called for by the courts, in exercise of judicial review of a government policy when the said policy is the outcome of deliberations of the technical experts in the fields inasmuch as courts are not well equipped to fathom into such domain which is left to the discretion of the execution.

23.

24. When it comes to the judicial review of economic policy, the courts are more conservative as such economic policies are generally formulated by experts.

25.

26.

27. The raison d'être of discretionary power is that it promotes the decision maker to respond appropriately to the demands of a particular situation. When the decision-making is policy based, judicial approach to interfere with such decision-making becomes narrower. In such cases, in the first assistance, it is to be examined as to whether the policy in question is contrary to any statutory provisions or is discriminatory/arbitrary or based on irrelevant considerations. If the particular policy satisfies these parameters and is held to be valid, then the only question to be examined is as to whether the decision in question is in conformity with the said policy.”

(Emphasis supplied)

24. Therefore, based on such precedential examination, the following

distinct principles emerge:

A. The scope of judicial enquiry apropos policy decisions/matters of the State is restricted to the “sole dimension” of whether such policy decision/matter is either :

- i. against any statutory provision;
- ii. violative of any fundamental rights of a citizen;
- iii. in the teeth of any Constitutional provision;
- iv. manifestly arbitrary/discriminatory;
- v. based on irrelevant consideration.

B. Only the “legality” of the policy decision, and not the wisdom or soundness of such decision can be a subject-matter fit for judicial review under Article 226 of the Constitution of India.

C. Constitutional Courts, such as this Court ought to be hesitant in interfering in matters of such policy or the day-to-day functioning of any departments of the government or any statutory bodies.

D. Negligible interference in policy decisions when such decisions are the outcome of deliberations of technical experts as Courts lack the expertise to determine the basis/factors based on which such decisions might have been taken. This is also inclusive of “economic policies”.

25. I must make it explicitly clear that the ruling in ***Aktarul Islam Kayal (supra)*** did not find any infirmity with the initial notification dated September 23, 2016. The learned Single Judge presiding over the coordinate

bench had categorically found the “selection process” to be vitiated, which was initiated under the notification dated September 23, 2016. In line with the observations outlined in ***Chief Constable of the North Wales Police (supra)*** ruling, the learned Single Judge had struck down the selection process from the stage of Rule 12(3) wherefrom it stood vitiated. The process till the stage of Rule 12(2) has been considered and held to be legitimate or in consonance with law and the Commission, a creature of a statute, has been directed to proceed *de novo* from the stage of Rule 12(3) onwards.

26. Therefore, in light of the principles enunciated above, to my mind, the policy decision of the Commission reflected through its initial notification/advertisement dated September 23, 2016, as a statutory body, in the present case does not touch the realm of arbitrariness and accordingly, in my view, no interference is called for. There is no need for this Court to mould such advertisement to allow a change in the circumstances that may have taken place with regard to the enhanced qualifications of the writ petitioners. An attempt by this Court to allow the same would result in an unfair treatment for those who did not enhance their qualification and are not present before this Court, not to mention taking an erroneous step in encroaching into the domain of the executive branch of the government.

27. In light of the above reasons, this batch of writ petitions is dismissed.

28. After the passing of this order, Mr. Bhattacharya submits that all the writ petitioners have not been able to upload their documents and the last

date for the same is tomorrow, that is January 20, 2021. He accordingly prays that this date may be extended by a few days to enable the writ petitioners to complete the submission process of their requisite testimonials/documents.

29. This is an innocuous prayer which can be considered by this Court. Accordingly, the last date is extended till January 22, 2021 (till 6 P.M.).

30. Since no affidavit-in-opposition is called for, allegations made in the writ petition are deemed not to have been admitted.

31. This Court would like to thank the counsels appearing on behalf of both the parties for their prodigious and adroit assistance in this matter.

32. All parties are to act on website copy of this order.

(Shekhar B. Saraf, J.)