

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Before:

The Hon'ble Justice Soumen Sen

and

The Hon'ble Justice Hiranmay Bhattacharyya

WPST 61 Of 2020

The Public Service Commission, W.B & Anr.

Vs.

Minarul Islam Mondal

With

WPST 62 of 2020

The Public Service Commission, W.B. & Anr.

Vs.

Pronob Mandal & Ors.

For the Petitioners in both the writ applications	:	Mr. Pradip Kumar Roy, Mr. Shraboni Sarkar..... advocates
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For the State in WPST 61 of 2020	:	Mr. Tapan Kumar Mukherjee.... Ld. AGP Mr. Somnath Naskar..... advocate
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For the State in WPST 62 of 2020	:	Ms. Sutapa Sanyal, Mr. Anand Fermania.....Advocates
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For the Private Respondent in both the writ applications	:	Mr. D.N. Ray, Mr. M.N. Ray, Mr. Sourav Halder, Mr. Biswarup Nandy.... Advocates
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Heard On	:	26.08.2021
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Judgment On : 22.09.2021

Hiranmay Bhattacharyya, J.:-

Both the writ petitions were heard analogously as common questions of law and fact arise therein.

The respondent no. 1 in WPST no. 61 of 2020 (for short “WPST-1”) filed an original application being Original Application no. 293 of 2017 (for short “O.A.-1”) challenging the selection process initiated by the Public Service Commission (for short “PSC”) for recruitment of Principal in Government Primary Teachers’ Training Institute in West Bengal (for short “the GPTTI”).

The respondent no. 1 in WPST no. 62 of 2020 (for short “WPST-2”) filed the Original Application being no. 292 of 2017 (for short “O.A.-2”) before the West Bengal Administrative Tribunal challenging the selection process initiated by the Public Service Commission for recruitment of Principal in GPTTI in West Bengal.

The learned Tribunal by separate judgments and orders both dated 14.02.2020 allowed the O.A.- 1 and O.A.- 2 by directing the PSC to recommend the name of the original applicants to the Secretary, School Education Department for the posts of Principal in the GPTTI under OBC (A) and Schedule Caste category respectively.

Being aggrieved against the aforesaid judgment and order, the PSC preferred the instant writ petitions.

The undisputed facts are as follows :-

- (i) The PSC published an advertisement on December 27, 2014 being advertisement no. 16/2014 inviting applications from intending candidates for recruitment to the post of Principal in GPTTI in West Bengal under the School Education Department.
- (ii) The total number of vacancies declared for the said post were 11. Out of the said posts 2 were reserved for Schedule Caste and one each for Schedule Tribe, OBC category (A) and OBC category (B) candidates.
- (iii) The respondent no. 1 in WPST-1 participated in the selection process for the post of Principal under OBC (A) category.
- (iv) The respondent no. 1 in WPST-2 participated in the selection process for the post of Principal under Schedule Caste category.
- (v) The aforesaid respondents were found eligible for the post of Principal and they were asked to appear for an interview.
- (vi) They appeared in the said interview but their names were not included in the panel of five candidates.
- (vii) Respondent no. 1 of WPST-1 scored 36 marks in the interview and the respondent no. 1 of WPST-2 scored 30 marks in the interview.

The case made out by the original applicants before the Tribunal was that they were eligible for the post of Principal in GPTTI and they participated and performed satisfactorily in the interview. However, the PSC did not recommend their names for the respective posts in spite of available vacancies. It was specifically contended that there was no cut off marks in the interview.

The original applicant in O.A.-1 contended that since he was the only participant under OBC (A) category the PSC ought to have recommended his name.

The original applicant in O.A.-2 contended that though in the advertisement 2 vacancies were declared under Schedule Caste category but the PSC recommended only one candidate and the original applicant was not recommended for appointment.

PSC contested the original applications before the Tribunal by filing an affidavit-in-reply denying the allegations contained in the original applications. It was specifically contended therein that as the original applicants failed to secure minimum qualifying cut off marks in the interview prescribed in the resolution taken in the Full Commission meeting held on September 19, 2014, the names of the original applicants were not recommended.

The learned Tribunal by the judgments and orders allowed the original applications. Being aggrieved, the PSC preferred the instant writ petitions.

Mr. Pradip Kumar Roy, the learned advocate for the appellant contended that the PSC being an expert body undertaking recruitment examinations has the power to fix qualifying cut off marks for all cases of recruitment examination as well as selection cases. He contended that the Full Commission in its meeting held on September 19, 2014 took a decision for fixing cut off marks for interview in respect of various categories. He contended that the applicants could not secure the qualifying cut off marks for interview and as such were not recommended for appointment to the said post by the Commission. He further, contended that the original applicants participated in the interview and only because they were unsuccessful in the interview cannot turn around and challenge the selection process subsequently. Mr. Pradip Kumar Roy relied upon the following decisions in support of his aforesaid contentions.

- (1) Ranjan Kumar and ors. Vs. State of Bihar and ors. reported at (2014)16 SCC 187
- (2) Manish Kumar Shahi vs. State of Bihar and Ors. (2010) 12 SCC 576
- (3) Anzar Ahmad vs. State of Bihar (1994)1 SCC 150
- (4) Union of India and ors. Vs. S. Vinodh Kumar and Others (2007)8 SCC 100

(5) Unreported judgment of the Supreme Court in the case of Yogesh Yadav vs. Union of India and ors. Decided on 16th August 2013 in SLP (Civil no.) 34427/2011

(6) Dhananjay Malik and ors. Vs. State of Uttaranchal (2008) 4 SCC 171

The learned advocates for the State submitted that the learned Tribunal erred in directing the PSC to recommend the names of the original applicants as they failed to secure the minimum qualifying cut off marks.

Mr. D.N.Roy the learned advocate appearing for the original applicants/ respondent nos. 1 in WPST-1 and WPST-2 disputed the contentions made by Mr. Pradip Kumar Roy. He contended that no cut off marks was fixed for the interview. He further contended that since there are available vacancies for the post of Principal in the respective categories for which the original applicants applied for and participated in the selection process, the respondent authorities ought to have recommended the names of the original applicants for appointment to the said post. He alternatively argued that in view of non-availability of candidates in the OBC category A and Schedule Caste, PSC ought to have lowered the qualifying cut off marks for the interview and recommended the names of the original applicants for appointment.

We have heard the learned advocates for the parties and have perused the materials on record.

The Rules providing the method and qualifications required for recruitment to the post of Principal in the GPTTI under the School Education Department was notified on August 20, 2013 in the Kolkata Gazette. The method of recruitment for the said post was by selection (direct recruitment) through the Public Service Commission, West Bengal. PSC published the advertisement no. 16/2014 dated December 27, 2014 inviting applications from intending candidates for recruitment to the post of Principal in GPTTI in West Bengal under the School Education Department. The original applicants were found eligible to the post of Principal and were asked to participate in the interview for the said post. They participated in the interview but their names were not recommended on the ground that they failed to secure the qualifying cut off marks in the interview.

It is evident from the minutes of the Full Commission meeting held on September 19, 2014 that in all cases of recruitment examination conducted by the examination section of PSC, West Bengal excepting West Bengal Civil Service (executive) etc. examination and West Bengal Judicial Service Examination's cut off marks will be fixed at all stages for all categories as in selection cases. It was further resolved in the said meeting that the Commission may further lower the qualifying level (category wise) as and when necessary in the event of non-availability of candidates for filling up vacancies in a particular category.

The recruitment rules authorised PSC to select the candidates. The object is to select the best candidates for the post sought to be filled up. For the purpose of choosing the best candidates the employer or the expert agency may decide to maintain a basic standard for the post in question. In order to maintain such standard it is open to the employer or the expert agency to fix cut off marks. PSC being the expert body for recruitment of candidates for various public posts have the expertise to decide on the cut off marks. Different cut off marks may be fixed for different categories of candidates. Cut off marks may also vary from one post to another.

It is evident from the materials on record that the decision regarding fixation of qualifying cut off marks for interview in cases of recruitment examination conducted by the examination section of PSC was taken much prior to the issuance of the advertisement for the instant recruitment process. The said cut off marks was fixed for all recruitment examinations conducted by the PSC as well as in selection cases. Thus, it cannot be said that the qualifying cut off marks for the interview was fixed in the midst of the recruitment process. The said cut off marks are applied universally to all candidates appearing in the examination conducted by PSC.

The cut off marks fixed for the interview cannot also be said to be arbitrary or mala fide as there is no such challenge in that regard in the instant case.

In *S. Vinodh Kumar* (supra) the Hon'ble Supreme Court held that it is for the employer or the expert body to determine the cut off marks. The Court while exercising its power of judicial review would not ordinarily intermeddle therewith. The jurisdiction of the Court in this behalf is limited. The Hon'ble Supreme Court held thus-

“11. Respondents herein had approached the Tribunal in the year 2000. The Tribunal directed the appellants to consider this case of lowering of the cut-off marks. An inference, therefore, can be drawn from the aforementioned fact that the main prayer of the respondents was that the cut- off marks should be lowered. Appellants admittedly did not agree to the said proposal. The action of the appellants impugned before the Tribunal must, therefore, be considered from the viewpoint as to whether it had the requisite jurisdiction to do so. The Tribunal upheld the contention of the appellant. Once it is held that the appellants had the requisite jurisdiction to fix the cut-off marks, the necessary corollary thereof would be that it could not be directed to lower the same. It is trite that it is for the employer or the expert body to determine the cut-off marks. The court while exercising its power of judicial review would not ordinarily intermeddle therewith. The jurisdiction of the court, in this behalf, is limited. The cut-off marks fixed will depend upon the importance of the subject for the post in question. It is permissible to fix different cut-off marks for different categories of candidates.”

As per the recruitment rules PSC was authorised to select the candidates and recommend them for appointment. The PSC did not find the original applicants suitable to be recommended for the said post as they failed to secure the qualifying cut off marks for interview.

In the instant case the issue is whether a candidate who does not obtain the qualifying cut off marks can be selected for the post of Principal only because certain posts were still lying vacant. A selection process is undertaken for the purpose of identifying the candidates who are suitable for the post in question. Selection is to be made strictly on the basis of the criterion specified for such post. Sympathy cannot be a guiding factor in the matter of selection of candidates for a particular post. It is well settled that undue sympathy shown to the original applicants by directing their selection despite not possessing the desired merit would amount to interference with the right of the employer to appoint suitable and meritorious candidates for the post in question (see *Municipal Corporation of Delhi vs. Surender Singh and ors.* reported at (2019)8 SCC 67). An order directing selection of the original applicants by lowering the cut off marks would amount to directing the employer to compromise with the merit which should be avoided. Furthermore, the expert agency cannot be directed to lower the cut off marks by the Tribunal or the Court as held in *S. Vinodh Kumar* (supra).

It is indeed true that the advertisement for the instant recruitment process was silent with regard to fixation of cut off marks for the interview. It is evident from the materials on record that the decision was taken by the PSC fixing cut off marks for the interview in recruitment examinations conducted by it as well as in selection cases much prior to

the issuance of this advertisement. Such decision was disclosed by the PSC in its affidavit in reply before the Learned Tribunal. However, no rejoinder affidavit was filed by the original applicants before the Tribunal. Thus, the statements made in the affidavit-in-reply filed by PSC remain uncontroverted. In view thereof the original applicants shall be deemed to have knowledge of the fixation of cut off marks in the interview. Thus, we hold that the original applicants having full knowledge about the selection process participated in the interview and being unsuccessful have challenged the selection process. Thus, this Court is of the considered view that the original applicants did not suffer any prejudice for non-mentioning of the cut off marks in the advertisement.

It is, however, true that the Commission has been left with a discretion to lower the qualifying level (category wise) cut off marks. Since cut off marks are fixed by the expert body after taking into consideration various factors, it is only for the expert body to decide whether such discretion is to be exercised in a particular case. Nature of the post for which the recruitment process is undertaken may be a relevant factor for exercising such discretion. The candidates do not have any unfettered right to claim that the cut off marks has to be lowered as there are available vacancies. Any contrary interpretation would result in frustrating the very object of fixation of cut off marks. Merely because there are available vacancies, the expert

body cannot be directed by the Tribunal or the Court to exercise the discretion in favour of the applicants. The right to exercise discretion in such matters should be left to the Commission.

It is well settled that a candidate taking part in a selection process is estopped from questioning the same after being unsuccessful. Reliance may be placed to the judgments of the Hon'ble Supreme Court of India in *Ranjan Kumar* (supra) and *Dhananjay Malik* (supra).

In *Ranjan Kumar* (supra) the Hon'ble Supreme Court held as follows-

“15. In this context, we may quote a passage from Madan Lal v. State of J&K [Madan Lal v. State of J&K, (1995) 3 SCC 486 : 1995 SCC (L&S) 712 : (1995) 29 ATC 603] with profit: (SCC p. 493, para 9)

“9. ... It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In Om Prakash Shukla v. Akhilesh Kumar Shukla [Om Prakash Shukla v. Akhilesh Kumar Shukla, 1986 Supp SCC 285 : 1986 SCC (L&S) 644] it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.”

16. In Chandra Prakash Tiwari v. Shakuntala Shukla [Chandra Prakash Tiwari v. Shakuntala Shukla, (2002) 6 SCC 127 : 2002 SCC (L&S) 830] , the Court observed as follows: (SCC p. 149, para 34)

“34. There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seems to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not ‘palatable’ to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process.”

17. In Union of India v. S. Vinodh Kumar [Union of India v. S. Vinodh Kumar, (2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792] , the Court reiterated the principle that it is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same.”

In *Dhananjay Malik* (supra) the Hon’ble Supreme Court of India held as follows:-

“10. In a recent judgment in Marripati Nagaraja v. Govt. of A.P. [(2007) 11 SCC 522 : (2008) 1 SCC (L&S) 68 : (2007) 11 SCR 506] , SCR at p. 516, this Court has succinctly held that the appellants had appeared at the examination without any demur. They did not question the validity of fixing the said date before the appropriate authority. They are, therefore, estopped and precluded from questioning the selection process.”

This Court is thus, of the considered view that the original applicants are estopped from challenging the selection process.

Let us now deal with the other judgments relied upon by the respective parties.

In *Yogesh Yadav* (supra) the authorities for the purpose of short listing of candidates for giving appointment fixed the bench mark to recruit best candidates on rational and reasonable basis. It was not a case of fixing qualifying

minimum marks in the interview. Thus, the said judgment has no manner of application in the instant case.

In *Anzar Ahmad* (supra) the employment notification stated that the selection should be made on the basis of interview but the Commission in accordance with the past practice has made the selection by giving equal weight to the academic performance as well as the interview. On such facts the Hon'ble Supreme Court held that such act of the Commission has rather reduced the possibility of arbitrariness and held that such procedure adapted by the Commission do not suffer from the vice of arbitrariness.

The said decision is not on the issue with regard to fixation of cut off marks of the interview and as such the said decision has no manner of application to the facts of the instant case.

In *Manish Kumar Shahi* (supra) the challenge was thrown to the marks prescribed for viva voce test as excessive and contrary to the law laid down by the Hon'ble Supreme Court. The Hon'ble Supreme Court held that earmarking of 200 marks for viva voce test as against 850 marks for written examination does not violate the doctrine of equality embodied in Article 14 and 16 of the Constitution.

In the instant case the challenge is not against allocation of marks between written test and viva voce test and as such the said decision do not have any manner of application to the facts of the instant case.

A Co-ordinate Bench of this Court in *Abdul Haque* (supra) held that fixation of cut off marks pursuant to a decision adapted subsequent to the selection process is not sustainable in law.

In the instant case it cannot be said that the cut off marks was fixed subsequent to the commencement of the selection process. As such said decision of the Co-ordinate Bench has no manner of application to the facts of the instant case.

The learned Tribunal in our view, exceeded its jurisdiction by directing PSC to recommend the original applicants for appointment to the post of Principal of the GPTTI under the respective categories without requiring the Commission to decide whether any discretion could at all be exercised in favour of the original applicants having regard to the posts in which such selection were to be made.

For the reasons as aforesaid we are of the view that the impugned orders both dated 14.02.2020 passed by the Tribunal in O.A. 293 of 2017 and O.A. 292 of 2017 suffer from infirmity and the same are accordingly set aside and quashed.

The writ petitions stand allowed.

However, there shall be no order as to costs.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

(Hiranmay Bhattacharyya, J.)

(Soumen Sen, J.)