

12.01.2021
S/L No. 28
Court No.12
DNS/s.biswas

MAT 843 of 2020

Moumita Ghosh & Ors.
Vs.
Aktarul Islam Kayal & Ors.

(Through Video Conference)

Mr. Partha Sarathi Bhattacharya
Mr. Ashis Kumar Chowdhury
Mr. Rajib Ghosh
Ms. Debrupa Mukherjee
... .. for the appellants
Mr. Kishore Datta, learned Advocate General
Dr. Sutanu Kr. Patra
Mr. K. K. Bandyopadhyay
Ms. Supriya Dubey Chakraborty
... .. for the WBCSSC
Mr. A. Majumder, ld. AAG
Mr. Bhaskar Prasad Vaisya
Mr. Suman Dey
... .. for the State
Dr. Chapales Bandyopadhyay
Ms. Anandamayee Dutta
... .. for the respondent no.118/ Secy, WBCSSC
Mr. Subir Sanyal
Ms. Ruchira Chatterjee
Mr. Vishak Bhattacharya
... .. for the respondent no. 1 to 115
Ms. Koyeli Bhattacharya
... .. for the WBBSE

This appeal is at the instance of parties who were not parties in the writ proceeding. They filed an application for leave to prefer an appeal that was allowed on 7th February, 2021 on the sole consideration that the applicants claimed to be the merit listed candidates for the recruitment to the posts of Assistant Teachers in upper primary school in connection with State Level Selection Test 2016 (in short SLST) but by reason of the cancellation of merit list their chance of being appointed on the basis of the panel prepared as per merit list is in jeopardy. The application

for leave to appeal was thus allowed on such considerations by an order dated 7th January, 2021.

The contention of the petitioner Mr P. S. Bhattacharya, learned Senior Counsel appearing on behalf of the applicants/appellants is that the cancellation of the merit list suffers from total non-application of mind. By reason of the publication of the merit list by the School Service Commission third party's interest has been created and it was improper to quash the merit list without giving an opportunity of hearing to the successful merit listed candidates. It is submitted that the merit list was published by the School Service Commission after completion of the selection process by following recruitment rules i.e. SLST 2016 (upper primary) and the appellants as successful candidates are eligible to get appointment as teacher in the Upper Primary Section of Government aided and sponsored Schools which fact ought to have been taken into consideration by the learned Single Judge before quashing the merit list and directing the successful candidate to appear again in the interview process. It is submitted that in view of the fact that the appellants are merit listed candidates selected through recruitment process they cannot be directed at this stage to appear again in the interview process. Mr. Bhattacharyya in keeping with the tradition of the bar has candidly submitted that all the writ petitions except WPA No. 9597 of 2019 were filed when merit list was not

prepared. All other matters were filed subsequently only after preparation of the merit list which factor is relevant in considering the grievance of the present appellants as by that time valuable right has accrued in their favour by reason of inclusion of their names in the merit list prepared by the Commission.

The said list was prepared after verifying everything and the learned Single Judge without recasting the said merit list cancelled the selection process without following the recruitment rules. It is submitted that once a person is declared successful according to the merit list of selected candidates the appropriate authority has the responsibility to appoint that person as the rights of the successful candidates cannot be turned down on the basis of the claim of unsuccessful candidate. It is argued that the court in such a situation should not sit in judgment over the method of marking used by the interviewing body in the personality test. There is no fault on the part of the successful candidates whose names were included in the merit list as per the eligibility criteria and their merits and they cannot be made to suffer for any mistake committed by the Commission in giving preference to some candidates. It is argued that it is fundamental that he who alleges must prove it which the writ petitioner has failed to do. In other words it is argued that the allegations of malpractices or favouritism or any illegal procedure adopted in preparation of the merit list are

completely unsubstantiated and there is no proper pleading in the writ petition which, however, was ignored by the learned Single Judge.

Mr. Bhattacharyya has taken us through the judgment meticulously and submitted that the finding of the learned Single Judge that the TET marks wrongfully inflated of the selected candidates is neither urged nor pleaded and in absence of a clear case of mala fide made out by the writ petitioners the learned Single Judge could not have directed the process of recruitment denovo. It is submitted that the learned trial Judge has failed to appreciate that the criteria mentioned in the advertisement is the criteria to be followed and any infraction of Rule 12(4) which essentially is procedural and is directory in nature could not have affected the preparation of the merit list even if it is contended and held that the interview list exceed the ratio of 1:1.4 as required under Rule 12(4). It is submitted that the learned Single Judge has over emphasised the requirement of B.Ed. degree as required under the advertisement read with Rule 4(1) third proviso. It is submitted that the writ petitioners are unable to establish that even if there may be a relaxation by the commission by accepting B.Ed. degree certificates after submission of online application the writ petitioners are unable to establish any prejudice, in short, it is submitted that

acceptance of such certificates could not make any difference so far as the writ petitioners are concerned.

Mr. Bhattacharya, was critical of the observation made by the learned single Judge with regard to manipulation of the interview marks and it is submitted that the explanation of the Commission that there are 40 interview boards assessing the large number of candidates, the uniformity is not possible and it has been recognised by the Hon'ble Supreme Court in ***Lila Dhar vs. State of Rsjasthan & Ors.*** reported in **(1981) 4 SCC 159** (paragraph 8).

Mr. Bhattacharya has strenuously argued that the names of the petitioners having featured in the merit list ought to have been heard by the learned single Judge before directing the *de novo* selection as the learned single Judge has failed to appreciate that valuable right has been denied in respect of present appellants and no order could be passed without giving an opportunity of hearing to the petitioners. In this regard learned counsel has relied upon a judgment of the Hon'ble Supreme Court in the case of ***Arun Tewari & Ors. vs. Zila Mansavi Shikshak Sangh & Ors.*** reported in **(1998) 2 SCC 332** (paragraph 13).

We have heard Mr. Kishore Datta, learned Advocate General, ably assisted by Dr. Sutanu Patra. It is significant to mention that Commission has not preferred any appeal against the order. That the said order has adversely affected the Commission cannot be doubted.

The learned Advocate General appearing for the School Service Commission (in short SSC) has submitted that the first process as directed by the learned single Judge has already commenced and the verification is under process. The conduct of the Commission is an extreme relevant factor in deciding the locus of the present writ petitions as well as the issues raised by them as the challenges thrown by the Commission to the claim of the writ petitions were rejected by the learned single Judge with regard to recruitment of teachers in question after considering the relevant record and pleading.

Firstly, we deal with the argument made by Mr. Bhattacharya that the order ought not to have been passed in favour of the writ petitioners in absence of the present appellants. We are of the firm opinion that no vested rights had accrued in favour of the applicants merely because their names were included in the merit list. It is elementary that inclusion of the names in the merit list does not create any indefeasible rights to claim appointment. In the absence of any vested right in favour of the candidates whose claims are under consideration for appointment, we are of the view that the present appellants are not required to be heard, apart from the fact that the validity of the recruitment process can only be answered and defended by the Commission as they have prepared the list. The recruitment process was initiated under the West Bengal School Service

Commission (Selection and Appointment to the Posts of Teachers for Upper Primary Level of Schools) Rules 2016 and whether proper procedure has been followed can only be answered by the Commission. If there has been a clear infraction of the rules and illegalities committed in the process of recruitment, the Court has every right to interfere with such illegalities as and when they are brought to the notice of the Court. In any event we invite the applicants to make submission on merits and to demonstrate errors in the judgment. They were given the opportunity to argue on merits.

The impugned judgment records the following contentions raised by the writ petitioners challenging recruitment process :

a) Lesser qualified candidates with inferior academic qualifications and lower TET (Teacher Eligibility Test) weightage have been included in the Merit List.

b) The Interview list has been published without disclosing the specific marks obtained by the candidates

c) The Commission failed to prepare the Merit List in terms of the Rules. The Commission also failed to prepare the Interview List in the ratio of 1:1.4 of the final vacancies as mandated under the Rules.

d) Untrained candidates were brought into the zone of consideration in violation of the Rules.

e) Arbitrary awarding of marks in the Personality Tests/Interviews which would be evident from identical marks awarded to several candidates.

f) The Commission commenced the Personality Test of candidates in the Interview List without first publishing the final vacancy list.

These issues have been very meticulously discussed and answered in favour of the writ petitioners. We find two of the aforesaid issues namely no.(a) and (b) are important and enough to decide the entire gamut of controversy as we feel that answer in either way would be sufficient to dislodge either of the parties. In other words if the said issues are answered in favour of the writ petitioners there may not be any necessity to decide the other issues as they would go to the very root of the recruitment process culminating in a merit list. The entire complexion of the controversy between the parties and relative merits of their cases depend upon the steps taken by the SSC in terms of the order passed in W.P. No. 5189 (W) of 2018 (Nandini singha vs. State of West Bengal) dated 16th January, 2019 which had triggered and unsettled the merit list prepared by the commission of all candidates pursuant to the advertisement mentioned above. The writ petitioners alleged that 21 of 160 writ petitioners despite scoring higher marks in the aggregate of academic qualifications, professional qualifications and

TET weightage failed to find a place in the merit list as opposed to candidates with a lower aggregate who were selected for the merit list. This was in reference to six categories female general, female OBC-B, male general, male SC, male OBC-A and male OBC-B, the same pattern was repeated as well for the other categories. In some cases the writ petitioners were not even called for verification which is before the stage of interview/personality stage. The commission contended before the learned Single Judge that pursuant an order passed in aforesaid writ petition that is Nandini singha (supra) dated 16th January, 2019 the Commission decided to reassess the TET marks of the petitioners. The Commission thereafter found that the marks of all candidates were required to be reassessed and accordingly decided to reassess the OMR answers scripts for TET 2015 of all the candidates as a result of the reassessment the TET marks of a large number of candidates was altered. The question arises if there has been a reassessment of the answers scripts of the TET 2015 then the exercise of discretion left to the candidates to give preference in terms of Clause 6 of the first SLST (AT) for upper primary level is affected and if the answer to this is in the affirmative then the Commission is left with no choice but to start a process from the stage of Rule 12(3) as directed by the learned Single Judge. The learned Single Judge relied upon the affidavits filed by the Commission affirmed on

13th October, 2020 and the report of the Chairman of the Commission dated 29th November, 2019 wherein Nandini Singha was declared as TET qualified in compliance of the order dated 16th January, 2019. A burning match stick is good enough to rage down a building. This solitary case in extending justice to Nandini singha which she deserved, has pricked the conscience of the Commission otherwise in the report of the Chairman it would not have been stated that the Commission had reasons raising to believe that other candidates had been similarly prejudiced as the writ petitioners in W.P. No. 5189 (W) of 2018 and on an unanimous decision taken by the Commission a resolution was taken in the presence of all and with the consent of its members for revisiting the TET marks of 2,28,670 candidates. The Commission in its affidavit dated 23rd December, 2019 did not offer any explanation on the decision to reassess the TET marks of all the candidates and the first time that the commission indicated that such a steps was taken in January, 2019 was by way of submission in October, 2020 followed by an affidavit of 9th October, 2020. There is a saying “truth has the ugly habit of raising its head” and precisely that had happened in the instant case, courtesy to Nandini Singha who possibly came as rescuer for the writ petitioners, as it was because of her case the commission decided to reassess and revisit the TET marks of all 2,28,670 candidates.

It cannot be denied that Rule 12(5) of the 2016 Rules gives weightage to a candidate's TET marks and makes it clear that TET weightage would have a bearing on a candidate being selected for the merit list as detailed further in Part A of Schedule III. The Brochure says that no request for rechecking, reassessment, reevaluation or scrutiny of OMR Answer Sheets will be entertained and no correspondence in this regard will be entertained. Moreover, Clause 6 of the first SLST (AT) for Upper Primary Level Brochure provides that a candidate may give information in relation to TET 2011 or TET 2015 Roll Number (applicant can use any one among both TET results). By reason of the aforesaid undertaking of the Commission, the reassessment of the TET marks of all the candidates has caused prejudice to the candidates as explained by the learned Single Judge in the following words :-

“hence, there is every possibility that a reassessment of TET 2015 may result in a candidate being deprived of the choice given to him/her under Clause 6 of the Information Brochure. For example, if a candidate who has opted to give his marks obtained in TET 2011 which are higher compared to TET 2015, the candidate may be irrevocably prejudiced if his TET 2015 marks are subsequently enhanced to a level higher than his TET 2011 marks. The converse may also apply where a candidate has opted to give his TET 2015 marks instead of 2011 and finds that upon reassessment, his 2015 marks have been reduced to a level lower than his TET 2011 marks. The net result of all these possibilities is that

a candidate is deprived of exercising an effective choice under Clause 6 of the Brochure. The question is can a candidate be unfairly prejudiced by an act of the Commission without the candidate being informed, in advance, of the nature of the act.”

The learned Advocate General, in his usual fairness and true to the tradition of the Bar has submitted that this reassessment by the Commission has a cascading effect on the initial list that had influenced the learned Single Judge. Moreover, we find that after the advertisement for the recruitment process was published clearly mentioning that after submission of online form no further rectification will be allowed, the commission allowed submission of certificates of B.Ed. by the candidates, who had obtained such certificates after the cut off date. This relaxation for some of the candidates to the exclusion of other is not permissible as the Rules of the game cannot be altered to the prejudice of others after initiation of the recruitment process. Accordingly we agree with the following finding of the learned Single Judge:

“Even if the contention of the Commission that certain candidates were allowed to add to their qualifications since the said qualification had already been obtained by the candidate before the last date of submission of the application form is accepted as correct, it is undeniable that the cut-off date was relaxed for several of the candidates to the exclusion of others. It is equally correct that apart from several

candidates being treated as B.Ed qualified, the marks under the other heads namely TET weightage was modified after the last date of submission of the application forms. The answer of the Commission that the third proviso to Rule 4(1) is directory and procedural in nature or that no candidate had suffered infraction of his right, is not acceptable. The Rules prescribed cannot be complied on a selective basis; either the compliance has to be uniform or alternatively selective relaxation of the Rules must be upon notice to the candidates who will be affected by such change to the Rules.”

Even if we accept the submission of Mr. Bhattacharya, learned advocate appearing on behalf of the appellants that awarding of marks in the interview cannot be a consideration of upsetting the entire list, but the other grounds on which the learned Single Judge had entertained the objection to the preparation of the merit list are serious and it establishes infraction of various rules including Rule 12(5) of the 2016 Rules. We feel that this reassessment of TET result is sufficient to call for initiation of fresh recruitment process. We appreciate the stand of the School Service Commission in accepting the mistake and/or lapses committed during the recruitment process and in all fairness had initiated the verification under Rule 12(3) of the 2016 Rules as directed by the

learned Single Judge. We hope and trust that the directions passed by the learned Single Judge will be carried out in its true spirit.

The applicants/appellants have failed to establish that the infraction of the rules as noticed by the learned Single Judge was erroneous. The Commission was in possession of the record relating to the recruitment process and the best evidence can be produced only by the Commission cannot be doubled and when on the basis of such record a finding is arrived at by the learned Single Judge in absence of any perversity being demonstrated by the appellants there is no scope to interfere with the impugned order. The Commission has not challenged the judgment nor supported the appellants.

Under such circumstances, we do not find any merit in this appeal. The appeal and the application for stay are, thus, dismissed.

However, dismissal of this appeal shall not prejudice the rights of the appellants to participate in the verification process in terms of the notification being No. 689/6723/CSSC/ESTT/2020 dated December 28, 2020.

There will be no order as to costs.

(Soumen Sen, J.)

(Saugata Bhattacharyya, J.)