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Ct. No. 04

Akd

M.A.T. 179 of 2022

CAN 1 of 2022

Md. Anarul Islam

Vs.

The State of West Bengal & Ors.

Mr. Sarwar Jahan,

Mr. Shahan Shah.

... for the appellant.

Mr. Supriya Chattopadhyay,

Mr. Sagnik Chatterjee.

... for the State.

Mr. Dipankar Mandal,

Mr. Abdul Aziz Mondal.

... for the respondent

nos. 3 and 4.

Admittedly the writ petitioner/appellant is working in Group-C post in the college on temporary basis since 1999. Indubitably the petitioner is working continuously and such status has not been disrupted or disturbed by the college authority as yet. Subsequently the post of Library Clerk was sanctioned under Group 'C' category. Advertisement was made for filling of such post with upper age limit of 40 years and since the petitioner crossed the said upper age bar, he was not allowed to participate in the said recruitment process.

The aforesaid restraint led the petitioner to move the writ petition before this Court with the substantive reliefs in the form of Mandamus commanding or directing the respondents to permit the petitioner to participate in the selection process upon relaxation of age.

A plea was taken by the respondents that post was advertised for Library Clerk, which is different and distinct from the post, where the petitioner is working on a temporary basis; in other words, it is sought to be contended that the petitioner is ineligible to offer his candidature for the post of Library Clerk.

Our attention is drawn to the notification dated 18th April, 2013 issued by the Higher Education Department, Government of West Bengal, where the Governor has been pleased to raise the upper age limit for appointment to all posts of Group-C and Group-D in all Government aided Colleges and Universities in West Bengal to 40 years.

We do not find from the said notification that any power is reserved on the authorities to relax the upper age limit.

However, our attention is further drawn to the subsequent notification dated 25th August, 2017 issued by the Department of Higher Education, Science & Technology and Biotechnology, Government of West Bengal, wherefrom it appears that it was issued taking into account the needs of restructure and enriching the West Bengal College Service Commission for carrying out the huge responsibilities of conducting recruitment procedures for appointment of non-teaching employees in all Government aided Colleges in West Bengal; wherein the rigor of the provisions of Section 10(1) of the West Bengal Universities and Colleges (Administration and Regulations) Act, 2017 was relaxed to the extent that selection for non-teaching post, more particularly under the Group-C category, shall be conducted with written examination for 150 marks comprising of Mathematics, English and Mental aptitude, 50 marks for Computer application test, 20 marks for interview and the candidates engaged on contractual or temporary mode in the concerned college for a period more than two years were entitled to have an additional 5 marks for working experience in the interview.

However, the said notification is explicit to the extent that such additional marks shall only be

granted to the candidates, who are within the prescribed age limit. The question, which appears in the instant case, is in absence of any power reserved under the Rules or Guidelines issued by an appropriate Government, whether the authorities can relax the power suo motu.

Learned Advocate for the appellant has emphasized on a Special Bench Judgement of this Court in case of *Gobinda Chandra Mondal vs. The Principal, Rabindra Mahavidyalaya & Ors.* reported in 2013 (1) CHN 9; wherein the reference was made whether a temporary/casual employee can be allowed to participate in the selection process after condoning his age bar, as prescribed, in deviation of the recruitment Rules. The Special Bench took note of a Constitution Bench decision of the Supreme Court rendered in case of *The Secretary, State of Karnataka & Ors. vs. Uma Devi & Ors.* reported in (2006) 4 SCC 1 wherein it is held that if the appointment was made without undertaking the selection procedure provided under the Rule, on “temporary or ad hoc” basis by engaging the candidates having requisite qualifications, namely ‘age’ and ‘education’ at the time of appointment against the substantive post, then in such cases such candidates shall be allowed to participate in the examination upon condoning the age.

The Special Bench further took note of a subsequent decision of the Division Bench of the Supreme Court in case of *The State of Karnataka & Ors. vs. M. L. Kesari & Ors.* reported in AIR 2010 SC 2587, wherein the observations in the Constitution Bench decision in case of Uma Devi (supra) was taken note of and an exception was carved out that the State must take immediate steps for filling up through a regular process of selection and will allow the

candidates who worked on ad hoc and temporary basis in the substantive post, which cannot be termed as illegal appointment, to participate upon condonation of age.

It was thus held that even in absence of the Rules permitting the relaxation of age bar there is no fetter on the part of the Court to direct the authorities to permit such appointees working at the substantive post to participate in the recruitment/selection process upon condonation of age bar. The question, which further fell for consideration, is whether a candidate, who is otherwise ineligible to participate in the selection process having crossed the upper age limit can seek the condonation of age barrier as a matter of right.

Subsequent to the Special Bench judgement of this Court, such point was also fell for consideration before the Supreme Court and in a recent judgement of three Judges Bench in case of *Rachna & Ors. vs. Union of India & Anr.* reported in (2021) 5 SCC 638, the Apex Court held that seeking condonation of age bar, when the Rule does not prescribe or loath the authorities with such power, is not a right created in favour of such candidate in view of the observations made in the earlier decision. The said case was concerning the Civil Service Examination for the year 2020 permitting the number of attempts as well as the age. However, the Civil Services Examination Rules, 2020 provides for age concession only to the ex-service man of Navy and Airforce in the Indian Union, but not extended to other category of the candidates. A plea was taken that once the power is reserved to permit age concession, which should not be reserved to a particular category but must be extended to all categories of candidates, who stand on the same footing that of the said category.

The Apex Court held that when there is no discretion left to the authorities to grant relaxation in the age bracket, the candidate, who is otherwise eligible, is not entitled to claim such condonation as a matter of right. The enlightening observations made in paragraph 38 of the said judgement are as under:

“38. * * * * At the same time, this reasoning would equally apply to those who have crossed the upper age barrier. More so, when no discretion is left with the 1st respondent to grant relaxation in the age baracknet to the candidates other than provided under Rule 6 of the scheme of the 2020 Rules which indeed the present petitioners are not entitled to claim as matter of right and that apart, those who have withdrawn their forms either because of lack of preparation or because of some personal reasons but have crossed the upper age-limit to appear in CSE 2021, they would also be equally entitled to claim and no distinction could be made whether the candidate has appeared in the Examination 2020 and availed the last attempt or attempts is still available at his disposal or has crossed the upper age limit.”

The Three Judges Bench further held that if the Rule does not provide any discretion to the authorities to grant relaxation either in number of attempts so fixed or age bar, it denuded such authority of any power or discretion not so vested to act in contravention to the statutory Rules. It is thus held:

“36. So far as the instant case is concerned, there are limited attempts for the candidates who appeared in the general category and the scheme of the 2020 Rules does not provide any discretion to the 1st respondent to grant relaxation either in attempt or in age and any exercise of discretion

which does not vest with the 1st respondent, if exercised, may go in contravention to the scheme of the 2020 Rules.”

Fixing the eligibility criteria including the upper age limit is within the realm of the policy decision of the State. The Court should not readily interfere with the policy decision unless it is arbitrary, whimsical, unreasonable, irrational or tainted with lack of intelligible differentia or in contravention to the statutory Rules or the provisions. The Court is not supposed to legislate the policy of the Government, which is within its exclusive domain, but the interference with such policy is within the limited contour and the Court should be cautious in interfering therewith. The Apex Court in the said judgement further held that if the policy maker has conferred the power to relax the age barrier to a particular category of the candidates, such policy decision should not ordinarily be interfered with, as before making the policy, various factors are considered and it would be apposite to quote the relevant excerpts of the said judgement in the following:

“45. Judicial review of a policy decision and to issue mandamus to frame policy in a particular manner are absolutely different. It is within the realm of the executive to take a policy decision based on the prevailing circumstances for better administration and in meeting out the exigencies but at the same time, it is not within the domain of the courts to legislate. The courts do interpret the laws and in such an interpretation, certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court is called upon to

consider the validity of a policy decision only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution or any other statutory right. Merely because as a matter of policy, if the 1st respondent has granted relaxation in the past for the reason that there was a change in the examination pattern/syllabus and in the given situation, had considered to be an impediment for the participant in the Civil Services Examination, no assistance can be claimed by the petitioners in seeking mandamus to the 1st respondent to come out with a policy granting relaxation to the participants who had availed a final and last attempt or have crossed the upper age by appearing in the Examination 2020 as a matter of right.”

What is discerned from the law as expounded in the above noted decision that the candidate/applicant is not entitled to claim relaxation of age bar as a matter of right. The right emanated from the statutory documents, in absence thereof the authorities cannot usurp such power and act in derogation therewith. Unless the power to relax is provided in the Rules or Act applicable in this regard, the authorities cannot usurp the power, not so conferred, in the guise of exercising discretion and in mitigating the situation. The authorities being the creature of the statute cannot travel beyond the circumference of the statute being the source of its existence nor the Court can issue Mandamus commanding the authorities to act contrary to such statutory provision.

We thus do not find any infirmity or illegality in the impugned order, where the relief for condonation of age bar has been denied.

The appeal is thus dismissed. Connected

application is also dismissed.

(Harish Tandon, J.)

(Rabindranath Samanta, J.)