

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

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

WPA 12448 OF 2013

Rajendra Rajak

vs.

The State of West Bengal & Ors.

For the Petitioner : Mr. Saktipada Janaadvocate

For the State : Sk. Md. Galibadvocate

Heard on : 12.09.2022 and 14.09.2022

Judgment on : 14.09.2022

Hiranmay Bhattacharyya, J.:-

1. In this writ petition the petitioner has challenged the decision of the District Inspector of Schools (SE), Kolkata (for short "DI") which was communicated vide memo no. 90/06/Law dated 8th April, 2013 by virtue of which the concerned school was directed to submit the relevant papers for filling up the vacancy of the post of clerk to the office of DI for the DI to report the vacancy to the Regional School Service Commission and has prayed for setting aside the said decision.
2. The facts relevant for the purpose of deciding this writ petition are summarised hereunder-

3. Petitioner claims that the post of clerk in Jawaharlal Nehru Vidyapith Boys' High School, Kolkata (for short "the school") fell vacant in the year 2006. Petitioner claims to have participated in the interview for the post of clerk which was held on May 10, 2009. Since the panel prepared by the Selection Committee was not approved by the Director of School Education, West Bengal, the petitioner filed a writ petition being WP No. 1249 (W) of 2011. A co-ordinate bench passed an order on November 16, 2011 in the said writ petition directing the school authority to reconstitute the Selection Committee as per the relevant Government Order read with the Recruitment Rules of 2005 and complete the selection process after giving further opportunity to the candidates who participated earlier in the selection process. Petitioner claims to have appeared before the reconstituted Selection Committee for fresh interview which was scheduled on February 19, 2012. The petitioner claims that his name appeared in the first position in the panel prepared by the Selection Committee and the same was pending for approval before the concerned authority. The petitioner filed a writ petition being WP No. 564 (W) of 2012 praying for approval of the said panel and a co-ordinate bench by an order dated July 20, 2012 in WP No. 564 (W) of 2012 directed the concerned DI to consider the panel and take the ultimate decision on the subject of approval by passing a reasoned order. Thereafter

the concerned DI passed the impugned order which was communicated vide memo dated April 8, 2013.

4. Mr. Jana learned advocate appearing for the petitioner contends that the concerned DI exceeded its jurisdiction by directing the school to send the papers for the purpose of reporting the vacancy to the Regional School Service Commission for filling up the vacancy. He contends that since the post of clerk fell vacant prior to the coming into force of the West Bengal School Service Commission (Selection of Persons for Appointment to the Post of Non-Teaching Staff) Rules, 2009 (for short “the 2009 Rules”), the process of selection in the instant case is to be governed by the West Bengal Schools (Recruitment of Non-Teaching Staff) Rules 2005 (for short “the 2005 Rules”). Mr. Jana submits that a panel may be prepared by excluding the marks awarded by the President of the Managing Committee of the School in terms of a judgment dated June 21, 2011 passed by a co-ordinate bench in WP No. 19279 (W) of 2009 (*Paban Kumar Dutta vs. The State of West Bengal and ors.*). By placing reliance upon a decision of the Full Bench of this court in the case of *Tulsi Roy vs. Krishanu Roy reported at 2011(2) CHN (Cal) 1021*, Mr. Jana submits that since the process of selection has already been initiated prior to the coming into force of the 2009 Rules, the process of selection which has already been initiated should be finished in accordance with the 2005 Rules.

5. Per contra, Md. Galib learned advocate for the State contended that the Selection Committee was reconstituted by the school but the same was not in accordance with the provisions of the 2005 Rules. He, thus, submits that since the Selection Committee was not constituted in accordance with the provisions of the 2005 Rules for selection of a clerk in a school, the entire selection process is thus, vitiated and the vacancy is to be filled up in terms of the 2009 Rules which has come into force with effect from July 9, 2009. He places reliance upon a decision of a Division Bench of this Court in the case of *Motin Saikh vs. State of West Bengal & ors.* reported at (2010) 3 CHN 849 (Cal) (DB) in support of his contention that if the original process of selection is found to be defective after the coming into operation of the 2009 Rules, a fresh process of selection is to be initiated in terms of the 2009 Rules. He further submitted that a candidate does not acquire any right to the post on their selection and the State is under no legal duty to fill up all or any of the vacancies. In support of such contention he relied upon the decisions of the Hon'ble Supreme Court in the case of *Shankarsan Dash vs. Union of India* reported at (1991) 3 SCC 47 and *Jai Singh Dalal and ors. vs. State of Haryana & ors.* reported at 1993 Supp (2) SCC 600. Mr. Galib referred to a decision of the Hon'ble Supreme Court in the case of *State of M.P. and ors. vs. Raghuveer Singh Yadav and ors.* reported at (1994) 6 SCC 151 in support of his contention that the State has the power to prescribe

qualification for recruitment and the government is entitled to conduct selection in accordance with the changed rules and make final recruitment. He also relied upon a decision of a coordinate bench of this court in the case of *Dr. Asit Kumar Maji vs. The West Bengal University of Animal & Fishery Sciences & Ors.* reported at 2001(1) CLJ 546.

6. Heard the learned advocates for the parties and perused the materials placed.
7. Record reveals that the prior permission for the post of clerk of the concerned school was accorded on May 20, 2008. The Managing Committee took a resolution dated April 26, 2009 for the formation of Selection Committee and in the said resolution the constitution of the Selection Committee comprised of the Secretary of the Managing Committee of the school as the President of the Selection Committee, the Headmaster of the school, the Headmaster of Lachpath Hindi High School as an expert and a guardian member of the Managing Committee as the other members of the said committee. The panel forwarded by the said committee for approval was not approved as it was not formed as per GO No. 904-AC(s) dated July 18, 2007. By issuing a memo no. 1064-GA dated June 15, 2010 the Director of School Education took a decision that no further permission be given to form the Selection Committee since the School Service Commission is already empowered for such purpose. Challenging the said

decision the petitioner filed WP No. 1249(W) of 2011 and a co-ordinate bench of this court by an order dated November 16, 2011 directed the school authority to reconstitute the Selection Committee as per the Government Order being GO No. 904-AC(s) dated July 18, 2007 read with the Recruitment Rules of 2005 and complete the selection process after giving further opportunity to the candidates who participated earlier in the selection process to appear in the selection test before the Selection Committee on the date to be fixed by such committee. Thereafter, the committee was reconstituted by the Managing Committee by a resolution dated December 18, 2011 thereby including the Secretary of the Managing Committee as the President of the Selection Committee, the Headmaster of the school, the President of the Managing Committee of the School, the Headmaster of Lachpath Hindi High School as an expert and the Councilor of the Municipal Corporation as the other members of the Committee.

8. The order of the DI contained in the memo dated April 8, 2013 consisted of two parts. The first part of the order deals with the constitution of the Selection Committee and the effect of the panel submitted by such committee. DI after holding that the selection committee was constituted in violation of the provisions of the 2005 Rules did not approve the panel. The DI in the concluding portion of the said order directed steps to be taken in terms of the 2009 Rules.

9. This Court shall first consider as to whether the decision of the DI with regard to non-approval of the panel calls for any interference by this Court.
10. Mr. Jana, learned advocate for the petitioner did not dispute that the President of the Managing Committee of the School could not have been included as the member of the Selection Committee in the case on hand in terms of the 2005 Rules as the Headmaster and the Secretary of the School are not one and the same person.
11. This Court is, therefore, of the considered view that the Selection Committee which was reconstituted by the resolution of the Managing Committee dated December 18, 2011 was not constituted according to the 2005 Rules and therefore the panel prepared by such reconstituted Selection Committee cannot be said to have been prepared in accordance with the provisions of the 2005 Rules and all steps and action taken by such Committee is invalid in the eye of law.
12. Now, this Court has to consider the argument of Mr. Jana that the panel submitted by the said selection committee is to be approved after recasting the marks of the candidates who participated in the selection test by excluding the marks awarded by the President of the Managing Committee.

13. In the case of *Paban Kumar Dutta* (supra) the Selection Committee was constituted in accordance with the provisions of the relevant rules but the panel was prepared without taking into consideration the marks awarded by the Panchayat Nominee as the same was not submitted by such member. The co-ordinate bench after arriving at a factual finding that the Panchayat Nominee and the unsuccessful candidate acted hands in glove with each other and also taking note of the fact that the intention of the Panchayat Nominee was to promote the unsuccessful candidate, the co-ordinate bench did not interfere with the panel prepared by the selection committee which did not contain the signature of such Panchayat Nominee and also did not take into consideration the marks awarded by such member.
14. The facts in the case of *Paban Kumar Dutta* (supra) is distinguishable with the facts of the case on hand as the selection committee which conducted the selection test and awarded marks to the candidates and also prepared the panel in the case on hand was not constituted in accordance with the provisions of the relevant recruitment rules.
15. Therefore, this Court holds that all action taken by the Selection Committee, which was not constituted as per 2005 Rules, are invalid in the eye of law. Therefore, the finding of the DI which was communicated vide memo dated April 8, 2013 by holding that the panel prepared by the Selection

Committee constituted in violation of the specific provisions of the 2005 Recruitment Rules cannot be approved, do not suffer from any infirmity and the same cannot be interfered with by this court.

16. The 2009 Rules having come into force with effect from July 9, 2009 and a fresh process of selection is to be initiated, in the instant case as the panel prepared by the Selection Committee has not been approved, the question that arises in this case is whether such selection should be held in accordance with the provisions of the 2009 Rules as held by the DI in the concluding portion of the order of the DI contained in the memo dated April 8, 2013.
17. Vacancy arises if a person holding a post ceases to hold such post either due to retirement, death or for any other reason. If the authorities decide to fill up the vacancy, a process of selection as per the relevant rules is initiated and the selection process comes to an end upon an appointment being made to such post. The vacancy is filled up by making an appointment to such post. In the event such appointment is set aside for any reason whatsoever, a fresh vacancy is to be declared and thereafter steps to be taken for filling up such vacancy.
18. In the case on hand, the post of clerk of the school fell vacant upon retirement of the person holding such post. Selection process in terms of the then prevailing rules i.e., the 2005

Rules was initiated and upon obtaining prior permission from the concerned authority, a selection of candidates was made by the Selection Committee and a panel was prepared and thereafter forwarded to the authority for approval of the panel. However, as recorded hereinbefore the panel was not approved.

19. It is not the case of the respondents that an appointment to such post was made in terms of the selection process initiated as per the 2005 Rules. Non-approval of the panel, therefore, does not give rise to a fresh vacancy as the said post was not filled up in terms of the said selection process by making an appointment.
20. It is also not in dispute that the post fell vacant prior to the coming into force of the 2009 Rules and the process of selection had already been initiated at a point of time when the 2005 Rules was in force. However, since the committee was not formed in accordance with the 2005 Recruitment Rules, the panel forwarded by the Selection Committee could not be approved.
21. The Full Bench of this Court in the case of *Tulsi Roy* (supra) held that there is no dispute with the broad proposition of law that if the process of selection has already been initiated it should be finished in accordance with the law that it stood at the time of initiation of process even if a new law has come

into force in the meantime. The Full Bench of this Hon'ble Court held as follows-

“21. We do not for a moment dispute with the Broad proposition of law that if the process of selection has already been initiated, it should be finished in accordance with law that it stood at the time of initiation of process even if a new law has come into force in the meantime. However, such principle cannot have any application to a case where the process of selection was complete, an appointment was given, the appointed candidate joined service but subsequently, such appointment was found to be vitiated and the appointment given based on such selection has been set aside by an order of the Court. In such a case, on setting aside the appointment given to the appointed candidate, a new vacancy will arise in view of the order setting aside the appointment with effect from the date of such order. In such a situation, in our opinion, a fresh vacancy should be declared in accordance with the Rules of 2009 as if such vacancy has occurred on the date, the earlier appointment has been set aside and the post concerned should not be treated to have been lying vacant during the period when the person found to be illegally appointed by the Court worked.”

22. After taking note of the provisions contained in Rules 7 and 8 of the 2009 Rules it was further held that if the selected candidates have not yet joined, the process of selection should be completed in accordance with the rules which stood effective at the time of initiating the process of selection.

23. In the case on hand the process of selection was initiated when the 2005 Rules was in force and none of the candidates whose names find place in the panel prepared by the Selection Committee have joined. Therefore, by applying the ratio of the decision of the Full Bench in *Tulsi Roy* (supra) this court holds

that the process of selection should be completed in accordance with the 2005 Rules and the concerned authorities are to be directed to proceed with the selection process from the stage it got vitiated. 2009 Rules can have no manner of application to the facts of the instant case.

24. There is however, no quarrel to the proposition of law laid down in *Jai Singh Dalal and Ors.* (supra) and *Shankarsan Dash* (supra) that candidates selected for appointment have no right to appointment and it is open to the state government at a subsequent date not to fill up the posts or to resort to fresh selection and appointment on revised criteria. However, the said decisions have no manner of application to the facts of this case.
25. In *Raghuveer Singh Yadav* (supra) the Hon'ble Supreme Court reiterated the settled principle of law that the State has got power to prescribe qualifications for recruitment and the candidates who had appeared for the examination and pass the written examination had only legitimate expectation to be consider that their claims according to the rules then in vogue. The said decision also does not have any manner of application to the facts of this case.
26. In *Dr. Asit Kumar Maji* (supra) the appointment of lecturers by the University authorities was set aside and quashed as the selection committee had been constituted without complying

with the provisions of the relevant statute and the process of appointment was vitiated for non-compliance with the relevant rules and regulations of the university. The said decision however, supports the contention of the learned advocate for the State that all steps taken by the selection committee which was not constituted in terms of the relevant rules is to be considered to be invalid. However, since no appointment was made in terms of the panel prepared by the selection committee in the case on hand, the decision in the case of *Dr. Asit Kumar Maji* (supra) is of no assistance to the State in so far as the decision of the DI to proceed with the selection process as per the 2009 Rules is concerned.

27. In *Motin Saikh* (supra) the panel forwarded by the school was approved by the concerned DI and the school issued the offer of appointment to the writ petitioner and he also joined the service which was also approved by the DI. On a challenge to the process of selection at the instance of the candidate securing the third position in the panel the court held that there was tampering of marks in respect of the candidates particularly the candidate who got appointment and the court also found illegality in including the expert in the panel. On such facts the appointment made to the post in question was set aside. The Hon'ble Division Bench held that a fresh process of selection after the appointment of the selected candidate had been set aside is to be initiated in terms of the

2009 Rules. However, the Hon'ble Division Bench clarified that if the process of selection had already been initiated, it should be finished in accordance with law that it stood at the time of initiation of process even if a new law has come into force in the meantime. The said decision is distinguishable on facts and as such the same cannot be of any assistance to the State as in the case on hand as appointment was not made.

28. This Court therefore, holds that the portion of the impugned order passed by the DI as contained in the memo dated April 8, 2013 in so far as a direction was passed by the DI to the school authority to submit all relevant papers in regard to filling up the vacancy of clerk in question to the DI for the DI to report the vacancy to the Regional School Service Commission concerned for filling up the vacancy in accordance with law suffers from infirmity and the same is liable to be set aside and quashed. Accordingly, the aforesaid concluding portion of the impugned order is set aside and quashed.

29. It is further evident from the records that a co-ordinate bench by an order dated 09.07.2013 passed an interim order restraining the respondent authority from referring the vacancy under reference to the Regional School Service Commission for its recommendation. Though the respondent authorities decided to proceed in accordance with the 2009 Rules by passing direction to the school for submitting the

papers were restrained by the said interim order from taking steps in terms of the impugned order.

30. For the reasons as aforesaid the writ petition being WPA 12448 of 2013 is disposed of by directing the school authority to reconstitute the Selection Committee as per the relevant Government Order read with the 2005 Rules and complete the selection process after giving further opportunity to the candidates who participated earlier in the selection process, to appear in the selection test before the Selection Committee on the date fixed by the Selection Committee. Since the process of selection for filling up the post in question was initiated sometimes in the month of May, 2008, the entire process should be completed within a period of eight weeks from the date of communication of this order.
31. There shall, however, be no order as to costs.
32. Urgent photostat certified copy of this judgment be given to the parties upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)