

07 28.11.22

Ct. No. 04

Akd

WP.ST. 109 of 2021

**The State of West Bengal & Ors.
Vs.
Chandra Kanta Ray & Ors.**

**Ms. Tapan Kumar Mukherjee,
Ms. Debdooti Dutta.
... for the petitioners.**

**Mr. D. N. Ray,
Mr. Biswarup Nandy,
Mr. Rajesh Kumar Shah.
... for the respondents.**

It is a common phenomenon, which we experienced in case of recruitment process that the person is permitted to appear and sit in the examinations subject to the outcome of the final decision taken in the legal proceeding. The instant case is the glaring example where such an order is passed perceiving to be innocuous without realizing the repercussion impacted on the system and ultimately resulted into a futile exercise.

By the interim order the Tribunal permitted the respondents to participate in the selection process with the condition that the mark-sheets and answer-scripts shall be kept in a sealed cover and shall not be published without the leave of the Tribunal.

The recruitment process prescribed the minimum age with the outer cap. Approach was made to the Tribunal as the respondents admittedly crossed the outer age limit and sought the blessings of the Tribunal to offer their candidature and permitted them to sit in the examination. The first and foremost question which involves in such type of litigation is whether the advertisement or notification confer such

power upon the competent authority to relax the age bar or the concerned Rules governing the field contained the identical provisions.

It is no doubt true that the recruitment process in the Government as well as the allied institutions / departments is conducted on the basis of the Rules having framed in this regard or in absence thereof the conditions and the powers incorporated into the advertisement inviting applications from various sections of the society who are eligible and fulfill the criteria incorporated therein. The statutory authority or the instrumentality of the Government cannot do something which is not provided either by way of circular, regulation, Rule, Act or in any form which has a statutory recognition. The authorities cannot travel beyond the circumference of the statutory documents nor can assume powers to its own unless it is provided therein.

Admittedly there is no power to relax the age bar either incorporated in the advertisement / notice or in the Rules applicable in this regard. The Tribunal appears to have been swayed by the observations made by the Special Bench of this Court in the case of *Gobinda Chandra Mondal vs. Principal Rabindra Mahavidyalaya & Ors.* reported in 2013 (1) CHN 9; where it is held that there is no fetter on the part of the authorities to relax the age bar even such power is conspicuously absent. The Special Bench arrived at such conclusion upon deriving an inspiration from the observations of the Constitution Bench in the case of *The Secretary, State of Karnataka & Ors vs. Uma Devi & Ors.* reported in (2006) 4 SCC 1. The Special Bench did not take into consideration the subsequent

decision of the Supreme Court in case of *State of Orissa & Anr. vs. Mamata Mohanty* reported in (2011) 3 SCC 436.

The Constitution Bench in *Uma Devi (III)* made such observations in the light of the core issue whether daily labourers, casual labourers and daily rated workers, who have been employed without following the process of selection, can be regarded to have a right to claim absorption against the permanent post.

In the backdrop above, the Constitution Bench noticed two distinctive features; firstly there were certain appointments without following the procedures required therefor and termed it as an illegal appointment; secondly certain appointments where selection procedure was followed but not to its fullest and was termed as irregular appointments. So far as the second category of appointments was concerned, the Constitution Bench held that if they have worked continuously for more than ten years preceding the said judgement without any intervention of the court's order, one time measure must be adopted by all the Government or its instrumentality for their absorption and in such perspective it was held that so far as those categories of appointees are concerned, they must be given an opportunity upon relaxation of age bar. Such observations cannot be construed to have laid down a uniform principle in every recruitment process to relax the age bar even there is no provision in this regard.

If the same is accepted to be a ratio laid down in the said judgement, it would render the outer cap

pertaining to age limit wholly redundant and of no consequences. The aforesaid observation was made in exercise of power enshrined under Article 142 of the Constitution of India and cannot be regarded as a declaration of law under Article 141 of the Constitution.

In the subsequent judgement delivered after the Constitution Bench decision in *Mamota Mohanty* (supra) the Division Bench was considering the powers of the authorities to relax the age bar and held that the moment it is found that there is no power to relax the essential qualification, the entire process of selection of the candidates would be in contravention to the established norms prescribed in the advertisement.

The Apex Court was conscious of the situation that such power may be found in the advertisement or the Rules applicable in this regard and held that such power shall not be exercised arbitrarily as the uniformity in its application is the hallmark of Constitutional ethos. The Apex Court succinctly held that in absence of enabling provision concerning the power to relax the age bar, such power cannot be assumed to have inhered and inbuilt in dispensation of the administrative duties in the following:

“50. In the absence of an enabling provision for grant of relaxation, no relaxation can be made. Even if such a power is provided under the statute, it cannot be exercised arbitrarily. (See Union of India v. Dharam Pal). Such a power cannot be exercised treating it to be an implied, incidental or necessary power for execution of the statutory provisions. Even an implied power is to

be exercised with care and caution with reasonable means to remove the obstructions or overcome the resistance in enforcing the statutory provisions or executing its command. Incidental and ancillary powers cannot be used in utter disregard of the object of the statute. Such power can be exercised only to make such legislation effective so that the ultimate power will not become illusory, which otherwise would be contrary to the intent of the legislature. (Vide Matajog Dobey v. H. S. Bhari and State of Karnataka v. Vishwabharathi House Building Coop. Society.)

51. *More so, relaxation in this manner is tantamount to changing the selection criteria after initiation of selection process, which is not permissible at all. Rules of the game cannot be changed after the game is over. (Vide K. Manjusree v. State of A.P. and Ramesh Kumar v. High Court of Delhi)”.*

In a recent decision rendered in case of *Delhi Subordinate Services Selection Board & Anr. vs. Seema Kapoor* (Civil Appeal No. 4461 of 2021 decided on July 22, 2021), the Apex Court was considering a case where the benefit of age relaxation was permissible to the Government servants and the departmental candidates and not to any other persons employed in autonomous body under a specific statute; such benefit can only be extended to a class of persons and shall not be extended to an excluded class and held in the following:

“8. We have heard learned counsel for the parties and find that the order passed by the Central

Administrative Tribunal and that of the High Court are not sustainable. Firstly, the High Court has quoted a wrong provision in the order passed relating to subsequent advertisement. Secondly, the benefit of age relaxation is permissible for government servants and departmental candidates. It is not even the stand of the respondent that she is a government servant and, rightly so, as she is employed in an autonomous body i.e. Municipal Corporation established under a specific statute. The expression 'Departmental Candidates' is in respect of the candidates who are working in the concerned Department i.e. Education. The Circular of the Government of India dated 27.3.2012 has made it explicitly clear that the benefit of age relaxation is only meant for civil employees of the Central Government and not to the employees of the autonomous bodies, public sector undertakings etc. Therefore, the respondent, as an employee of the autonomous body, i.e. the Corporation, is not entitled to age relaxation either as a departmental candidate or as a government servant.

9. The argument that the respondent is in the feeder cadre and should be treated as a departmental candidate is again not sustainable. The Recruitment Rules mentioned by the respondent provides a promotion channel to the teachers working in the Municipal Corporation. Such channel of promotion is in no way comparable for appointment to the post as direct recruit. The respondent would be entitled to be considered for promotion in terms of the statutory rules on the basis of her seniority. Therefore, the respondent is not entitled to age relaxation as she

cannot be considered as a departmental candidate for appointment by way of direct recruit.”

In view of the above, since the power to relax the age bar is conspicuously absent in the present case, the Tribunal ought not to have permitted the respondents to appear in the examination as interim measures without venturing to find out whether such power is provided in the advertisement or the concerned Rules applicable in this regard.

The order impugned is thus set aside.

The Tribunal is directed to dispose of the proceeding as expeditiously as possible.

The writ petition succeeds.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)