

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

Before:-

The Hon'ble Justice Lapita Banerji

W.P.A. 18906 of 2022

Liapubam Upendro Sharma

Vs.

Union of India & Ors.

With

W.P.A. 28493 of 2022

Shyama Prasad Chattopadhyay

Vs.

The Union of India & Ors.

For the petitioner in
W.P.A. 18906 of 2022:

Mr. Soumya Majumder, Adv.,
Mr. Victor Chatterjee, Adv.,
Mr. B. Basak, Adv.

For the petitioner (in person) in:
W.P.A. 28493 of 2022

Mr. Shyama Prasad Chattopadhyay, Adv.

For the respondent no. 2 in:
W.P.A. 18906 of 2022

Mr. Lakshmi Kumar Gupta, Sr. Adv.,
Mr. Sandipan Banerjee, Adv.,
Ms. Amrita Pandey, Adv.,
Ms. Sneha Singh, Adv.

For the respondent no. 5 in:
W.P.A. 18906 of 2022 and
W.P.A. 28493 of 2022

Mr. Joydip Kar, Sr. Adv.,
Mr. Pinaki Ranjan Chakraborty, Adv.

For the respondent no. 1/U.O.I.:

Mr. Dhiraj Trivedi, Ld. DSGI,
Mr. S.N. Dutta, Adv.

For the respondent no. 3 in:
W.P.A. 18906 of 2022 and
Respondent No. 2 in

Mr. Billwadal Bhattacharyya, Ld. DSGI,
Mr. Anish Kumar Mukherjee, Adv.

WPA 28493 of 2022

For the Respondent No. 4 in:
W.P.A. 28493 of 2022

Mr. Sandipan Banerjee, Adv.,
 Ms. Amrita Pandey, Adv.

For the Respondent No. 7 in:
W.P.A. 28493 of 2022

Mr. Surendar Kumar, Adv.
 Mr. Ghanshyam Pandey. Adv.

Heard on: 05.04.2023.

Judgment Delivered on: 04.05.2023.

LAPITA BANERJI, J.: Two writ petitions WPA 18906 of 2022 and WPA 28493 of 2022 were taken up for hearing together. In WPA 18906 of 2022, the writ petitioner challenged the recommendation of the Hon'ble Governor to interview 20 more candidates on May 20, 2022, apart from the 11 short listed candidates. Furthermore, he challenged the recommendation of the Hon'ble Governor dated May 26, 2022 to the Ministry of Culture for appointment of the Private Respondent No.5 as the Director, Eastern Zonal Cultural Centre (EZCC) and also the letter of appointment of the private respondent no. 5, dated July 5, 2022. The petitioner was the second empanelled candidate in the letter of recommendation dated May 26, 2022.

2. In WPA 28493 of 2022, the writ petitioner has, inter alia, prayed for revoking and or rescinding the decision to call the private respondent no. 5 for the interview and for a declaration that the appointment of the private respondent no. 5 is bad in law. He was one of the 20 candidates whose names were recommended by the Hon'ble Governor by a subsequent list.

3. WPA 18906 of 2022 is taken up for consideration first. Common questions of facts and law arise in both the writ petitions.

4. Pursuant to an advertisement dated July 17/23, 2021, the petitioner applied for recruitment to the post of Director, EZCC on short-term contractual basis for a tenure of 3 years which was extendable by another period of 2 years depending upon the performance of the incumbent. The candidates could either apply for appointment on short-term contractual basis or on deputation basis. The eligibility criteria for candidates applying on deputation basis were different from the candidates applying on short-term contractual basis. The eligibility criteria for appointment on short-term contractual basis is as follows:

- (i) *Eminent cultural personalities (practicing artistes, scholars or experts) in the field of Art & Culture of at least 10 years standing and experience;*
- (ii) *Possessing Bachelor Degree; and*
- (iii) *Minimum of 3 years' administrative experience in running cultural institution (s).*

The eligibility criteria for candidates applying on deputation basis are as follows:-

Officers working in the rank of Director/Deputy Secretary to the Government of India having experience of working in organizations related to Art & Culture:

- i. *Holding post of regular basis in the pay scale of Rs. 37,400-67,000+GP Rs. 8,700 (pre-revised as per 6th CPC) OR*
- ii. *Having 3 years of regular service in the pay scale of Rs. 15,600-39,100+GP Rs. 7,600 (pre-revised as per 6th CPC).*

5. Under the Clause 7.3 of Memorandum of Association and Rules & Regulations of EZCC, the Executive Board had the power to appoint a *Search Committee* and other committees which may be deemed necessary to assist the Board in furtherance of the objectives of the Society.

6. Under Clause 7.4 (xv) the *Executive Board* had the power to make appointment in respect of the posts including the post of Director of EZCC. The appointment of Director would have to be made with “*prior approval*” of the Government of India.

7. Under the bye-laws of EZCC (Recruitment and Service Rules – 2015), the “*Executive Board*” of EZCC was the “*Appointing Authority*” of the Director. The *Executive Board* was required to act in consonance with the Government of India in respect of appointment of the Director.

8. By an electronic mail dated May 12, 2022, the Under Secretary to the Government of India, Ministry of Culture intimated the Additional Chief Secretary to the Governor of West Bengal about the constitution of a *Scrutiny Committee* for filling up the post of Director, EZCC. As per the direction of the Ministry of Culture, a 4-member *Scrutiny Committee* was constituted for scrutiny of applications received in the Office of the Hon’ble Governor of West Bengal/Chairperson of EZCC against the advertisement published for filling up of the post of Director, EZCC. The work of the *Scrutiny Committee* was to “**examine** the applications” and “**short list** of the eligible candidates”. Thereafter, further process of filling up of the post of Director, EZCC was to be initiated.

9. Pursuant to the constitution of the *Scrutiny Committee*, a meeting was held on May 13, 2022. The said meeting was held under the Chairmanship of the Director (ZCC), MoC in New Delhi, for filling up of the post of Director, EZCC.

10. The said *Scrutiny Committee* noted that out of 41 applicants, 4 applicants applied on deputation, whereas, remaining 37 applicants applied for short-term contract. The suitability of the applicants were **evaluated** on the basis of the **eligibility criteria** as per the Recruitment Rules.

11. The *Scrutiny Committee* found only 11 applicants suitable for appearing in the *interview* before the *Search-cum-Selection Committee*. Out of the 11 applicants, 10 applied for short-term contract while 1 applied on deputation.

12. Mr. Majumder, Learned Counsel appearing for the petitioner, submitted that the *Scrutiny Committee* short-listed the names of only 11 candidates and it was reasonably expected by the petitioner that only 11 candidates would be called for interview. However, 20 more ineligible candidates were later included in the list of candidates who were called for the interview. The interview for the selection was held as scheduled on May 20, 2022 on online mode.

13. At the time of participation in the interview, the petitioner was surprised to see that a total of 31 candidates were being interviewed. Since the interview was held on online mode, the petitioner could not enquire about the participation of 20 more candidates and the petitioner was unable to gather information about the said 20 more candidates even after visiting the office of EZCC after the interview. The petitioner made an application under “Right to

Information Act” on July 14, 2022. The response to such information was only received by the petitioner in August, 2022. Subsequent thereto, the petitioner filed the instant writ petition.

14. He submitted that by calling 20 more ineligible candidates for interview, the very purpose of setting up of the *Scrutiny Committee* was vitiated/frustrated.

15. The Majority members of the *Search-cum-Selection Committee* on May 20, 2022 recommended the names of the following candidates for the post of Director:

- a. Mr. Ashis Kumar Giri;
- b. Mr. LaipubamUpendro Sharma;
- c. Mr. Atul Dwivedi

16. Only one of the Members of the *Search-cum-Selection Committee*/Joint Secretary (ZCC) differed with the aforesaid panel. She recommended a panel of 3 candidates from the initial list of the 11 shortlisted candidates :

- a. Ms. Madhurima Barman Sen;
- b. Mr. LaipubamUpendro Sharma;
- c. Dr. Pushpita Mukherjee

17. (The Search-cum-Selection Committee comprised of the following people:

Chairperson of ZCC:	Chairman
Joint Secretary (ZCC), MoC:	Member
Dr. Sarup Prasad Ghosh:	Member
Dr. Sachchidanand Joshi:	Member
Culture Secretary, Govt. of Jharkhand	Member
Culture Secretary, Govt. of Manipur	Member)

18. The Governor of West Bengal/Chairman, *Search-cum-Selection Committee* accepted the recommendation of the majority.

19. Pursuant to the information received under the RTI, it transpired that the Senior Special Secretary, one Mr. Utpal Biswas wrote to the Chairman of the ***Scrutiny Committee/Director*** (ZCC), MoC on June 10, 2022 sending him a list of 20 candidates, other than 11 shortlisted candidates by the *Scrutiny Committee* described as the “Search Committee” who were called for interview on May 20, 2022. The list was sent to the Chairman of the *Scrutiny Committee* by a Member of the *Scrutiny Committee* on June 10, 2022 pursuant to the e-mail by the Chairman on June 10, 2022. The said communication was directed to be sent from the Governor’s Secretariat in Kolkata to the Chairman, Scrutiny Committee.

20. He contended that the Hon’ble Governor in his capacity as the Chairman, EZCC could not override the recommendations of the *Scrutiny Committee*. The Hon’ble Governor of his own accord directed that 31 applicants be called for interview which he had no authority to do.

21. The Hon’ble Governor by the Impugned Order dated July 5, 2022, appointed the respondent No.5 to the post of Director/EZCC which should be set aside and/or quashed due to the fact that a candidate considered to be *ineligible* by the *Scrutiny Committee* was subsequently called for the interview upon exercise of the discretion used by the Hon’ble Governor, which he had no right to exercise.

22. Mr. Gupta, Learned Senior Counsel, appeared on behalf of the respondent No.2/EZCC and submitted that no infirmity was committed in including the names of 20 more candidates to the initial list of 11 candidates prepared by the *Scrutiny Committee*. The *Scrutiny Committee* had overstepped their authority in **evaluating** the candidature of the applicants. The *Scrutiny Committee* could only reject such applications which were not made through proper channel in case of regular Government employees or it could reject the applications, whereby, the candidates have crossed the maximum age limit or did not specify the criteria of pay scale as mentioned in the Advertisement dated July 17/23, 2021.

23. The *Scrutiny Committee* could not assess the criteria of eminence in the field of art and culture. Neither could it assess whether a candidate possessed requisite experience in the field of art and culture, nor could assess whether a candidate possessed requisite administrative experience.

24. The job of the *Scrutiny Committee* was only technical/clerical in nature. Any **evaluation** was in the domain of the *Search-cum-Selection Committee*.

25. Since the *Scrutiny Committee* acted beyond its jurisdiction/without authority, it was necessary for the Members of the *Search-cum-Selection Committee* to advise the Governor accordingly, to protect the constitutional rights of the candidates who had a right to be considered for appointment having met the *eligibility* criteria.

26. He submitted that the Governor did not act on his own discretion but was advised by the *Search-cum-Selection Committee* to include the names of 20

more candidates, who met the eligibility criteria. Therefore, pursuant to telephonic conversation, the Governor orally directed 20 more candidates to be interviewed by the Members of the *Search-cum-Selection Committee*. After the interview was held on May 20, 2022, the said fact intimated to the Chairman of the *Scrutiny Committee* on June 10, 2022 pursuant to an enquiry made by the Chairman. There were various trail mails to that effect which are contemporaneous documents. He relied on a Judgment reported in 2012 (7) SCC 678 (**East Coast Railway & Anr. vs. Mahadev Appa Rao & Ors.**) to contend that contemporaneous records can be relied upon as the basis for an action/order to be brought forward.

27. He referred to a decision reported in AIR 1992 SC 1806 (**National Institute of Mental Health and Neuro Sciences vs. K. Kalyana Raman & Ors.**) and also a decision reported in 2012 (1) SCC 157 (**Sanchit Bansal & Anr. Vs. Joint Admission Board & Ors.**) in support of his contention that function of a *selection committee* is neither judicial nor adjudicatory. As the Selection Committee consists of men of high status, Courts should be slow to interfere in their action.

28. He further tried to negate the argument made on behalf of the petitioner that the Executive Board is the appointing authority of the Director and not the Chairman as per Rule 1.3(b)(a) of the 2015 Service Rules since the Rule starts with the phrase “*unless otherwise provided*”. The 2015 Service Rules do not apply to the recruitments on contractual basis. Attention is drawn to Rules 1.2 and 1.2.1 of the 2015 Service Rules.

29. He also submitted that the writ petitioner along with other candidates were aware on May 16, 2022 about the participation of 31 candidates in the interview that took place on May 20, 2022. No objection was raised by any of the candidates. The final decision regarding the selection was made known on July 5, 2022 by publication on Twitter from the Hon'ble Governor's Office. Immediately after the petitioner found that he was not selected for appointment, he made an application under the Right to Information Act, 2005 on July 14, 2022. The present writ petition was filed on August 18, 2022. Therefore, the petitioner should be now estopped from challenging the recruitment process as he took a calculated chance for getting selected. He relied on a Judgment reported in 2022 (2) SCC 173 (**Anupal Singh & Ors. Vs. State of Uttar Pradesh**) and also a Judgment reported in 2016(1) SCC 454 (**Madras Institute of Development Studies & Anr. Vs. K. Sivasubramanian & Ors.**) for contending that after participating in a selection process a candidate is estopped from challenging the same.

30. Mr. Billwadal Bhattacharya, Learned Deputy Solicitor General of India appearing on behalf of the respondent No.3/Search-cum-Selection Committee, EZCC submits that the 2015 Service Rules were silent with regard to the "appointing authority" in case of persons being recruited on ad-hoc basis, contractual basis or engaged on daily wage basis for specified jobs or for specified period by the EZCC. The said rules are not applicable for persons appointed on deputation from State Government/Central Government and Semi-Government as they are governed by Fundamental Rule – 9(25). A two-

fold selection process was to be followed pursuant to the advertisement; (a) preliminary step for scrutiny of applications by *Scrutiny Committee* (b) actual selection/final selection done by *Search-cum-Selection Committee*.

31. The *Scrutiny Committee* sent one list containing 11 names of the *eligible* candidates. The other list contained 30 names of the candidates who were *rejected*. Since it was pandemic times, the Governor being the Chairman of the *Search-cum-Selection Committee* decided to go through all the files containing their applications. Thereafter, there were meaningful discussions/deliberations with the other Members of the Search-cum-Selection Committee when it occurred to the Chairman/Governor that there are discrepancies in the matter of short listing of candidates and the names of 20 other **eligible** candidates were not included in the list of **eligible** candidates sent by the *Scrutiny Committee*. None of the Members of the *Search-cum-Selection Committee* found any infirmity with the reasoning of the Governor. Hence, 31 (11+20) candidates were interviewed.

32. The *Scrutiny Committee* was not vested with the power of selecting the candidates (picking up of some candidates and rejection of others). The selection exercise was specifically vested in the *Search-cum-Selection Committee* which alone could decide which of the candidates were to be interviewed, selected and recommended for appointment. The majority of the *Search-cum-Selection Committee* approved of one panel which was also approved by the Hon'ble Governor being the Chairman of the *Search-cum-Selection Committee*. The recommendation of the Hon'ble Governor to appoint the private respondent

No.5 as the Director of EZCC being the first empanelled candidate was approved by the Ministry of Culture, Government of India.

33. On May 26, 2022, the respondent No.3/*Search-cum-Selection Committee* forwarded the names of 3 empanelled candidates in the order of preference to the Ministry of Culture, Government of India. On July 1, 2022 the Ministry of Culture approved of the same and on July 5, 2022, the letter of appointment was issued by the Hon'ble Governor.

34. The petitioner participated in the recruitment process without any protest or demur. Only after being unsuccessful in the selection process, the petitioner made an RTI application on July 14, 2022. He referred to the decisions reported in 1995 (3) SCC 486 (**Madan Lal & Ors. Vs. State of J&K & Ors.**) and the one reported in 2015(11) SCC 493 (**Pradeep Kumar Rai & Ors. Vs. Dinesh Kumar Pandey**) in support of his contention that the candidate should not be allowed to approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after interview was conducted. He also relied on the decision of **Madras Institute** (Supra) and **Anupal Singh** (Supra) in support of his argument that a person, who consciously takes part in the process of selection, cannot turn around and question the method of selection.

35. Mr. Trivedi, Learned Deputy Solicitor General of India appearing on behalf of Union of India submitted that the petitioners were aware that 31 candidates were called for the interview. As per the averments made in the writ

petition he became aware of the position not later than May 20, 2022 (the scheduled date of the interview). Having participated in the selection process without any protest or demur, the petitioner cannot now challenge the same after being unsuccessful. A decision reported in 2019 (15) SCC 633 (**Union of India and others Vs. C. Girija and others**) was relied upon in support of the contention that after participating in a selection process the petitioner should not be allowed to challenge the same.

36. Mr. Kar, Learned Senior Counsel appearing on behalf of the private respondent No.5/present Director of EZCC, submitted that the appointment of his client was made with approval of the Central Government and without challenging the said approval, the other challenges in the writ petition were infructuous. The writ petitioner has challenged the recruitment process after becoming unsuccessful. He submitted that the *Scrutiny Committee* was wrong in coming to the finding that the deponent did not have minimum 3 years of administrative experience in running a cultural institution as the respondent No.5 was holding a post of Programme Executive with the All India Radio from 2016 and was continuing in the said capacity till the date of voluntary retirement. He submitted that the Programme Executive plays a pivotal role in administration. He is a convener, coordinator and conductor in respect of the functions and activities to which his unit is attached. He arranges discussions and consultations within the unit and coordinates the work of different members of the unit thereby translating ideas and plans into actual broadcasts. The Programme Executive also has to look into the work of

programme administration by providing relevant budget heads in terms of the allotment made to different programme units, working out fees and expenses to be paid to the artistes and submission of detailed proposals for sanction by the Station Directors, dealing with all the administrative work involved in the procedure of governing audition and classification of artistes. He had to perform the task of maintenance of libraries of gramophone records and other musical instruments and supervise the functioning and discipline of the working staff of the unit. Supervision and maintenance of transport was also under his domain. Therefore, the private respondent should not have been considered to be an *ineligible* candidate by the *Scrutiny Committee*.

37. By rejecting the candidature of the Private Respondent No.5, the *Scrutiny Committee* committed a palpable error which was rectified by the Hon'ble Governor. Since the decision of the *Scrutiny Committee* was palpably wrong, no infirmity was committed in the decision making process by rectification of the decision of the *Scrutiny Committee* and inclusion of the name of the respondent No.5 in the second list of **eligible** candidates.

38. Therefore, the recommendation of the Governor/Search-cum-Selection Committee to include 20 more candidates for being interviewed cannot be interfered with in a writ petition.

39. In the event the recommendation of the *Search-cum-Selection Committee* and the order of appointment dated July 5, 2022 was interfered with, that would cause immense prejudice to the private respondent No.5 who would suffer prejudice by the reason of taking voluntary retirement from service.

40. Next he submitted that since the petitioner did not pray for a writ of *quo warranto*, it would go to show that the private respondent was **eligible** to hold the post.

41. As the recommendation of the *Search-cum-Selection Committee* as well as the approval of Government of India has not been challenged, the petitioner was now estopped from doing so and the appointment of the private respondent as the Director, EZCC cannot be interfered with at this stage. He contended that the *Scrutiny Committee* was not a statutory body and therefore, its decision is not binding on the *Search-cum-Selection Committee*. The Approving Authority/Chairperson of the EZCC had the power to **supervise** the decisions of the *Scrutiny Committee*. The *Search-cum-Selection Committee* had the right to **supervise** the decision of the *Scrutiny Committee*.

42. The dissenting member of the *Search-cum-Selection Committee* did not apply his mind and acted with material irregularity by not analyzing the legal nature and strength of the decision made by the *Scrutiny Committee*. The decision of the *Scrutiny Committee* cannot be binding upon the Chairperson, EZCC.

43. He submitted that there was no reason to interfere with the recommendation of the *Search-cum-Selection Committee*, approval of Central Government and the appointment of the private respondent no.5 by the Hon'ble Governor, Government of West Bengal.

44. He relied on a decision reported in 2013 (16) SCC 440 (**B. Amrutha Lakshmi Vs. State of Andhra Pradesh & Ors.**). He submitted that once a

candidate comes into the zone of consideration and satisfies all the requirements, he cannot be ousted. The rules for selection have to be applied uniformly and strictly and none from the **eligible** group can be eliminated from being considered on any criteria other than those provided in the rules. No additional criteria can be imposed other than the ones laid down. Denying equal opportunity to some, in the matter of public employment on the basis of a criteria which is not laid down, would result in violation of Article 14 and Article 16(1) of the Constitution of India.

45. Therefore, the *Scrutiny Committee* by not considering the application of the respondent No.5 being an **eligible** candidate acted in violation of Article 14 of the Constitution of India.

46. Mr. Chattopadhyay (appearing in person) in WPA 28493 of 2022 submitted that as per the regulations and office memorandum dated December 23, 2013 all Government servants were required to forward their applications for outside employment through proper channel. He submitted that despite being a Government servant and working with the All India Radio (AIR), the Private Respondent's application was not forwarded through proper channel. He also contended that the post held by the private respondent no. 5 in AIR was not an Administrative post. Therefore, the petitioner was **ineligible** to be considered for appointment. He further contended that the private respondent no. 5 was working as a programme executive with AIR at Pay Level-7, Grade Pay of Rs. 4600/- and not in Pay Level-13 in Grade Pay of Rs. 8700/-. Therefore, his application should have been summarily rejected. The Private

respondent no. 5 should have first resigned from his parent office in order to be eligible for direct recruitment on short term contractual basis. Without first resigning he was ineligible to apply for direct recruitment.

47. Considering the rival submissions of the parties and the materials placed on record, this Court finds that:

(a) Pursuant to an advertisement dated July 17/23, 2021 the petitioners in WPA 18906/2022 and WPA 28493/2022 and the Private respondent no. 5 in both the writ petitions, applied for appointment to the post of Director, EZCC. EZCC is an autonomous body under the Ministry of Culture, Government of India. The *eligibility criteria* for appointment on short term contractual basis was different from the *eligibility criteria* for appointment on deputation.

(b) By a written communication dated May 12, 2022 the Under Secretary to the Government of India, MoC, intimated to the Additional Chief Secretary to the Hon'ble Governor of West Bengal, that as per the decision of Ministry a four member *Scrutiny Committee* was constituted for scrutiny of applications received by the Office of the Hon'ble Governor of filling up the post of Director, EZCC.

(c) It appears from documents that two committees were constituted and the same was communicated vide electronic mail dated May 12, 2022 received by ZCC Section, Ministry of Culture, Government of India.

One was the *Scrutiny Committee* and the other one was the *Search cum Selection Committee*.

(d) The *Scrutiny Committee* would **examine** the applications and would **short list** the eligible applicants. Thereafter, further course for filling up of the post of Director, EZCC would be initiated.

(e) The four members of the Scrutiny Committee were as follows:-

- i. Director (ZCC), MoC
- ii. Shri Utpal Biswas, IAS, Senior Special Secretary, O/o Hon'ble Governor of West Bengal.
- iii. Under Secretary (ZCC), MoC
- iv. Under Secretary (IFD), MoC.

(f) The *Search cum Selection Committee* was constituted for filling up of/appointment to the post of Director, EZCC.

(g) The composition of the said committee are as follows:-

- | | |
|--|------------|
| i. Chairperson of ZCC | - Chairman |
| ii. Joint Secretary (ZCC), MoC | - Member |
| iii. Dr. Sarup Prasad Ghosh, | - Member |
| iv. Dr. Sachchidanand Joshi | - Member |
| v. Culture Secretary Government of Jharkhand | - Member |
| vi. Culture Secretary Government of Manipur | - Member |

(h) A meeting of the *Scrutiny Committee* was held on May 13, 2022 under the Chairmanship of the Director (ZCC) Ministry of Culture at Puratatya Bhawan, New Delhi. Out of total 41 applications 4 applied for being considered on deputation basis and remaining 37 applied for short term contractual basis. Out of 41 candidates only eleven candidates were found to be suitable for appearing in the interview to be held by the *Search cum Selection Committee*. 30 applications were rejected by the *Scrutiny Committee* and the reasons for such rejection were given in detail.

(i) The reasons for non-selection/rejection of the candidates were as follows:-

- i. Applications not duly received through proper channel in case of regular government employees (such applications were summarily rejected).
- ii. Crossing the maximum age limit prescribed in Recruitment Rules (such applications were summarily rejected).
- iii. Not satisfying the criteria of eminence in the field of Art and Culture.
- iv. Not possessing the requisite experience in the field of Art and Culture as provided in the Recruitment Rules.
- v. Not possessing the requisite administrative experience as provided in the Recruitment Rules.
- vi. Do not satisfy the criteria of pay scale as mentioned in the Recruitment Rules.

(j) The name of the writ petitioner in WPA 18906 of 2022 appeared amongst the 11 short listed Candidates. The candidature of the writ

petitioner in WPA 28493 of 2022 was rejected by the *Scrutiny Committee* for being over aged at the first instance, summarily.

(k) At the time of interview the writ petitioner in WPA 18906 of 2022 found that not only 11 short listed candidates were interviewed but another 20 candidates who were initially considered to be *ineligible* were also interviewed. From a communication dated June 10, 2022 issued by one Utpal Biswas, Senior Special Secretary to the Governnor, to the Director (ZCC), Ministry of Culture, Government of India who was also a Member of the *Scrutiny Committee*, it appeared that a list of 20 candidates other than the 11 short listed candidates by the *Scrutiny Committee* were called for interview on May 20, 2022.

(l) The said communication dated June 10, 2022 was sent by the Senior Special Secretary in response to the electronic mail issued by the Chairman of the *Scrutiny Committee*/Director (ZCC) Ministry of Culture. It is unclear from the said communication that at whose instance names of 20 more candidates, who were initially considered to be *ineligible* by the *Scrutiny Committee*, were called for interview. The reason for sending 20 more names also does not appear from the said communication.

(m) From the proceedings/minutes of the meeting of the *Search cum Selection Committee* dated May 20, 2022 it appears that the Hon'ble Governor of West Bengal, in his capacity as the Chairman of EZCC stated that "after taking note of the situation that 31 candidates

including the 11 short listed by the *Scrutiny Committee* be called for the interview taking note of the prescriptions of the eligibility criterion.”

(n) This Court finds it perplexing to note that despite two committees being constituted for filling up the post of Director, EZCC the Hon’ble Governor chose to act in his sole discretion. No reasons are recorded as to why the Governor chose to override the decision of the *Scrutiny Committee* which was directly set up by the Ministry of Culture for examining the **eligibility** criteria of the candidates.

(o) There is no recording in the minutes dated May 20, 2022 that the Hon’ble Governor acted in accordance with the recommendations of the *Search cum Selection Committee*.

(p) It is only after the interviews of the 31 candidates were held on May 20, 2022 and an enquiry was made by the Chairman of the *Scrutiny Committee* regarding the names of additional 20 candidates, the same were forwarded on June 10, 2022 by the Governor’s Secretariat.

(q) This Court cannot accept the contention of Mr. Gupta that since the *Scrutiny Committee* overstepped its authority by **evaluating** the candidature of the applicants, the *Search cum Selection Committee* advised the Hon’ble Governor to include the names of 20 more candidates who met the eligibility criteria.

(r) The *Search cum Selection Committee* was constituted for a specific purpose of selecting the suitable candidates from a pool of eligible candidates after the **eligibility** of the candidates was examined and they

were **short-listed** by the *Scrutiny Committee*. The *Search cum Selection Committee* was not constituted for sitting in appeal or reviewing the decision of the *Scrutiny Committee*.

(s) Moreover, there is nothing on record to show that the *Search cum Selection Committee* advised the Governor to re-assess the eligibility criteria and send more names of **eligible** candidates since unfairly some names were left out.

(t) There are no reasons at all to show why the decision/recommendation of the *Scrutiny Committee* were considered to be faulty or beyond jurisdiction.

(u) Even assuming that the *Scrutiny Committee* acted beyond jurisdiction the same could not be rectified by the Hon'ble Governor or the *Search cum Selection Committee* by sitting in appeal or reviewing its decision.

(v) Reference has been made on behalf of the respondent no. 2/EZCC to an electronic mail dated June 10, 2022 issued by the Chairperson, *Scrutiny Committee*. The said mail dated June 10, 2022 refers to trailing mails and discrepancies pointed out over telephone. None of the trailing mails have been annexed to show the content thereof. Furthermore, it has been strenuously argued by Mr. Gupta, that on May 16, 2022 the petitioner was aware of the list of all 31 candidates who were sought to be called for interview. However, from the list of 31 candidates annexed to

the notes of argument it cannot be deciphered that it was sent on May 16, 2022 to the writ petitioner.

(w) The writ petitioner in WPA 28493 of 2022 who was one of the 20 candidates selected for the interview by way of a subsequent, list relied on an e-mail to show that he was informed about the said interview held on May 20, 2022 at around 3.22 P.M IST on May 18, 2022.

(x) Different reasons have been given in different pleadings for supporting the exercise of discretion by the Hon'ble Governor in supersession of the recommendation of the *Scrutiny Committee*. In an affidavit affirmed on December 13, 2022 it has been stated that the Hon'ble Governor in his capacity as Chairman of EZCC recommended that 31 applicants (including the 11 already recommended) ought to be interviewed to “**widen the scope of selection process**”. In an affidavit affirmed on February 28, 2023 on behalf of the EZCC it has been stated that there was no provision of any ‘*selection*’ Committee under the rule and therefore, the Hon'ble Governor as the Chairperson of the EZCC was not bound by its act/recommendation. Therefore, to widen the scope, 31 candidates were called for interview by the *Search and Selection Committee*. The statements made in paragraph 6g of the said affidavit are in contradiction with the statements made in paragraph 6h of the said affidavit. In paragraph 6h the minutes of the meeting of May 20, 2022 are referred to whereby the Governor in his capacity as Chairman, EZCC

after taking note of the situation recommended 31 applicants were to be called for interview.

(y) From the remarks of the Joint Secretary, Ministry of Culture, who was a member of the *Search Committee*, it appears that the Hon'ble Governor in his capacity as Chairman, EZCC recommended 31 candidates to be *eligible* to be interviewed. The list so prepared by the Governor's Secretariat at Raj Bhawan was shared with all the committee members of the *Search and Selection Committee*. From the said document being a part of the Minutes dated May 20, 2022 it becomes categorically clear that the list was shared by Raj Bhawan to the committee members and the list was not prepared at the behest or advice or recommendation of the *Search cum Selection Committee*.

(z) In the notes of argument filed by the EZCC it has been stated that since it was pandemic time the Hon'ble Governor being the Chairman of the Search cum Selection Committee went through the files containing the applications and connected documents and after the ***meaningful deliberation*** with the members of the *Search cum Selection Committee* noted certain discrepancies in the matter of rejection of the *eligible* candidates. After discussing the matter with the other members and explaining his views 20 other candidates were found to be *eligible*. None of the members of the *Search cum Selection Committee* found any fault with the reasoning of the Chairman/Hon'ble Governor. The said stand is contrary to the remarks of the Joint Secretary.

(aa) This Court cannot accept such an argument since on the face of the records it appears that the list was prepared by Hon'ble Governor's Secretariat, Raj Bhawan and shared with the *Search and Selection* Committee Members without any **discussion** or **deliberation** with the said Committee Members.

(bb) In the affidavit in opposition filed on behalf of the respondent no. 5 affirmed on January 10, 2023 it appears that the respondent no. 5 contended that in rejecting the candidature of the private respondent the *Scrutiny Committee* made a palpable error which was sought to be rectified and corrected. The *Scrutiny Committee's* decision would have caused immense prejudice to the Private Respondent and he was rightly included in the list of candidates called for interview. No judicial review could lie from the decision of the Hon'ble Governor. The *Search cum Selection Committee* acted within their jurisdiction in including the private respondent's name in the subsequent list and no judicial review could lie in respect of the said decision.

(cc) This Court cannot accept such a submission made by Mr. Kar that whether or not a jurisdictional error has been committed by the *Search cum Selection Committee* and/or the Hon'ble Governor in exercising his discretion, the same cannot be a subject matter of Judicial Review.

(dd) The *Scrutiny Committee* scrutinised/closely examined the documents and came to the finding that only 11 candidates were **eligible** for the post of the Director, EZCC in all respects. The *Scrutiny Committee*

took a decision that the private respondent no. 5 did not possess the requisite administrative experience in running the cultural institution. Assuming that the Hon'ble Governor acted on the recommendation of the *Search cum Selection Committee* even then it is beyond the comprehension of this court how the *Search cum Selection Committee* could sit in appeal or review the decision of the *Scrutiny Committee*.

(ee) The *Scrutiny Committee* is constituted of individuals in high position/authority including the Director of ZCC by the Ministry of Culture. The applications which were made at the Raj Bhawan, Kolkata were considered at Parataya Bhawan, New Delhi. Therefore, the contention that the *Scrutiny Committee* was only constituted for carrying out a clerical job cannot be accepted. In the notes of argument filed on behalf of the Respondent no.3/Search cum Selection Committee it has been categorically stated that the Hon'ble Governor being the Chairman of the Search cum Selection Committee and the Chairman of the EZCC and the Chairman of the Governing body of the EZCC/highest authority in the organization forwarded the names of the selected candidates in the panel to the Government of India for approval and such approval was granted. It has been submitted by the learned Counsel appearing for respondent no.3/ *Search cum Selection Committee*, for the candidates applying on short term contractual basis no selection process was required to be adhered to in accordance with 1.3 (b)(a) of the 2015 service rules. The Governor in his sole discretion could appoint the

Director in accordance with 1.2.1 of the 2015 rules. Therefore, the Governor was empowered to give a go-by to the selection procedure laid down by the Ministry of Culture and to act without any recommendation of the committees. However, from the appointment order dated July 5, 2022 issued by the Governor/Chairman, EZCC it clearly appears that the appointment was made in terms of rule 1.3 (b)(a) of the 2015 rules. The Appointing Authority under 1.3 (b)(a) was the Executive Board of the EZCC in consultation with the Government of India. Therefore, the Governor was not the Appointing Authority. The recommendation of the Search cum Selection Committee had to be vetted by the Executive Board of the EZCC and then the same would have to be approved by the Government of India in respect of appointment of the Director. Moreover, this Court finds that under Clause 7.4(xv) of Memorandum of Association of the EZCC only the Executive Board had the power to make appointments to the post of Director. The entire selection procedure is vitiated by procedural impropriety.

(ff) Mr. Majumder, cited a decision reported in (2001)10 SCC 51 (**Maharashtra State Road Transport Corporation and others vs. Rajendra Bhimrao Mandve and others**) for the proposition the rules of a game meaning thereby the criteria for selection cannot be altered by the authorities concerned in the middle or after the process of selection has commenced. In the present case the *eligibility criteria* or the criteria for selection was not changed but the *procedure for selection* has been

altered by one committee/Hon'ble Governor by taking upon themselves the duties and functions of another committee by giving a go bye to its decision. Such procedure for *Selection* could not have certainly be changed during the course of selection process.

(gg) Mr. Gupta, cited a judgment reported in (1990) 2 SCC 669 (**A.P Public Service Commission, Hyderabad and another vs. B. Sarat Chandra and others**) for the appreciation/elucidation of the word 'selection'. The Apex Court held that the process of selection begins with the issuance of advertisement and ends with preparation of select list of candidates for appointment. The final stage of selection is quite often delayed for various reasons and the candidates who are eligible on the date of application may find that they are eliminated at the final stage for no fault of their own if the "age limit" is taken to be applicable on the date of the preparation of the final list and not on the date of application. The day to assess minimum or maximum age must be specific and determinate as on a particular date for candidates to apply and for recruiting agency to scrutinise the same. In such a context the Apex Court held that it could be unreasonable to construe the word "**selection**" only as the factum of preparation of the select list. The said case is completely distinguishable on facts and therefore not applicable.

(hh) With regard to the definition of the word '*Scrutiny*' as per the 'Webster's dictionary' meaning 'close' or 'minute' investigation whereas

the word '*selection*' in Webster's meaning 'to take in preference to another or others, pick out, choose there can be no controversy. To be selected would mean to be chosen in preference to the others being the most fit or desirable'. There is no dispute with regard to such explanations or meanings of the word '*Scrutiny*' and '*Selection*'.

(ii) Mr. Gupta relied on (2006) 6 SCC 698 (**Union of India and others vs. Lt. Gen Rajendra Singh Kadyan and another**) for elucidating the term '*selection*'. In the said case the issue whether the post of the Army Commander was a selection post as opposed to a post based on only seniority was in issue. In such a case the expression "**fit**" was analysed by the Apex Court and it was held that it has different meanings. A person appointed has to be legally eligible. The word '**select**' means chosen or picked up. The Apex Court held that the post of the Army Commander was a selection post and not merely a promotional post even though in the usual course the senior most officers would be selected as the Army Commander. This Court fails to see how the said case aids the contention of the EZCC, when the post of the Director is clearly a *selection* based post, and not a *Promotional* post based on seniority. The primary question that has fallen for determination in the present writ petition is whether the Hon'ble Governor in his sole discretion or at the behest of the *Search and Selection Committee* could give a go-by to the recommendation of the *Scrutiny Committee* that was constituted for

scrutinising/examining the **eligibility** of the candidates/applicants in terms of the advertisement.

(jj) The decision reported in Air 1992 SC 1806 (**National Institute of Mental Health and Neurosciences vs. Dr. K. Kalyanaraman and others**) was cited by Mr. Gupta for the proposition that the courts should be slow to interfere with the opinion of the *selection* committee consisting of experts, persons of high status and unquestionable impartiality. In that case the *selection* committee after interview and assessment of relative merits of the candidates recommended a panel whereby one Gouri Devi was placed first and the respondent no. 1 was placed second in the panel. There was no question of usurpation of the powers of one committee by a singular authority or by another committee or the candidate being chosen being an ineligible one. The subjective assessment of the *selection committee* was not interfered with by the Hon'ble Supreme Court. Interference by the Courts when administrative decisions are taken by men of high status is usually limited. The Hon'ble Governor in his own discretion or at the behest of the *Search and Selection Committee* interfered with or sat in appeal over the decision of the *Scrutiny Committee* formed undoubtedly by men of high status holding senior posts in the administrative service even when the Hon'ble Supreme Court held that Courts should be slow to interfere with such a decisions. The issue here is whether one set of highly placed individuals or one individual could interfere with the decision of another set of highly

placed individuals. The facts of **Kalyanaraman** (Supra) are no way similar to the present case.

(kk) From the Minutes of the Meeting dated May 20, 2022 it would appear that the Joint Secretary, 5th member recommended a panel where the petitioner was again the second selected candidate. Since the said panel was recommended out of the list of the 11 eligible candidates recommended by *Scrutiny Committee* the said panel has not been challenged by the writ petitioner. The subjective assessment of the 5th member being a part of the *Search cum Selection Committee* has not been challenged even though the petitioner is the second selected candidate in the said panel. Had the said panel been put under challenge the issue with regard to the courts being slow to interfere with the decision of highly placed individuals could have been agitated.

(ll) The case of **Sanchit Bansal** (supra), in fact aids the writ petitioner. The first appellant appeared in IITJEE 2006 as a general category candidate. Even though the candidate secured higher than the cut off marks in aggregate, he secured less than the cut of marks in one of the subjects (chemistry). The Apex Court held that the ranking and selection of candidates to suit specialised courses were within the exclusive domain of professional experts in charge, being technical matters in academic field. The courts will only interfere in the following cases: (i) violation of any enactment, statutory rules or regulations; (ii) mala fides or ulterior motive to assist or enable private gain to someone

or cause prejudice to anyone or (iii) where the procedure adopted is arbitrary and capricious. An action is arbitrary or capricious where a person in authority does any **action** based on '*individual discretion*' by ignoring prescribed rules, procedure or law and the action is founded on prejudice or preference rather than reason or fact. To be arbitrary and capricious, the action has been illogical and whimsical, without any reasonable explanation. The fact that the writ petitioner in WPA 28493 of 2022 was also included in the list of 20 candidates being an over aged candidate only goes to show that without any basis or reason or application of mind, the recommendation/short listing of 11 candidates by the *Scrutiny Committee* was given a go-by.

(mm) In the present case this Court finds that the discretion used by authorities is beyond jurisdiction and without any reasonable or logical explanation. There is no iota of reason available on the records as to the need to override the decision of the *Scrutiny Committee* by ignoring the prescribed rules or procedure as laid down in the e-mail dated May 12, 2022 by MoC and without referring the matter to MoC. Various attempts have been made after the filing of the writ petition to improve the case of EZCC, but they are uncorroborated by documentary evidence.

(nn) Next he relied on the decision of **Anupal Singh** (supra) to support his contention that after participating in the *selection* process the same could not be challenged by the petitioner after the result of a selection process is announced and the petitioner found that he is not selected.

The same contention is reiterated in the case of **Siva Subramaniyan** (supra).

(oo) An exception has been carved out by the Hon'ble Supreme Court in judgment reported in 2019 (20) SCC 17 **Dr. (Major) Meeta Sahai Vs. State of Bihar**. In that case it was held that by participating in a selection process a candidate accepts the prescribed procedure but not the illegality of it. In that case, the candidate alleged misconstruction of the statutory rules and the discriminatory consequences arising therefrom. The Apex Court held such misconstruction and discrimination cannot be condoned because the candidate has partaken in the 'selection process'. In fact, a candidate may not have any locus to assail the incurable illegality unless he or she participates in the selection process.

(pp) This Court also relies on a Judgment of the Apex Court reported in 1997(9) SCC 527 (**Raj Kumar and Others vs. Shakti Raj and Others**) for holding that the principle of *estoppel* by conduct or *acquiescence* will have no application a case where the entire selection process is illegal. In the case of **Raj Kumar** (supra), the case of **Madan Lal** (supra) was discussed/considered before holding that the Government having committed glaring illegalities in the selection procedure could not rely on the principle of *estoppel* by conduct/*acquiescence* on the part of the writ petitioner, for contending that a candidate having taken a chance to appear in interview and after being held to be unsuccessful could not

turn around and challenge either the constitution of the selection board or the method of selection as being illegal.

(qq) In the present case, the petitioner accepted the selection procedure but has challenged the illegality of it. The petitioner has challenged the non compliance of the selection procedure as laid down by the electronic mail dated May 12, 2022 issued by the MoC and the procedure for appointment. The illegality/arbitrariness in conducting the selection process cannot be condoned simply because the petitioner participated in it.

(rr) Here, on the date of the interview the petitioner found out that 20 more candidates were also being interviewed whose names did not feature in the first select list of candidates. It is not lost to the mind of this Court, that an application under Right to Information Act, 2005 was made on July 14, 2022, after the name of the selected candidate was published on twitter on July 5, 2022. However, the illegality/arbitrariness/capriciousness with which the selection process was conducted cannot be lost sight of.

(ss) Mr. Trivedi cited a judgment reported in 2019 (15) SCC 633 (**Union of India and another vs. C. Girija and others**). The facts of that case are completely distinguishable from the present lis. In that case, 30% vacancies were, reserved for promotion from Group-C to Group-B Posts in LDCE quota, out of which 4 vacancies were in unreserved category

and one vacancy was in reserved category. The petitioners were not allowed to challenge the bifurcation of the vacancies after taking a chance to get selected in the promotional process. Here, there was only one post of Director and the selection process or the method of recruitment has been given a go by, by an authority in its sole discretion, without recording the reasons for differing with the recommendation of the *Scrutiny Committee*.

(tt) Mr. Kar cited **B. Amruthalakshmi** (supra) on the issue that once a candidate comes into the zone of consideration and satisfies all the requirements including that of outstanding merit or ability, his name could not be precluded from being considered for recruitment and none from the eligible group can be eliminated from being considered on any other criteria than those provided in the rules. The similarly situated candidates cannot be treated dis-similarly. Therefore, the appellant was held to be eligible for consideration. It was held that the non-consideration of the appellant was totally unjust.

(uu) The issue of the present case is that whether or not a candidate can be considered to be **eligible** in the present selection process once the *Scrutiny Committee* held the person to be ineligible. Whether the issue of **eligibility** could be considered overriding the decision of the *Scrutiny Committee* by the Hon'ble Governor or the *Search cum Selection Committee*. This Court finds that the recommendation of the *Scrutiny*

Committee has been rendered otiose by another authority acting beyond its jurisdiction.

(vv) Admittedly, the respondent no. 5, used to work as a programme executive with the AIR in Pay Band-2, Pay Scale Rs. 9300-34800 in Grade pay – Rs. 4800 (revised as per the recommendation of the 7th CPC). Therefore, the private respondent no. 5 was not eligible to apply on deputation even though he was in regular service or holder of a post on regular basis. Candidates who could apply on deputation basis needed to hold a post on regular basis in Pay Scale of Rs. 37,400-67,000 + GP Rs. 8700 (pre-revised as per 6th CPC) or be required in 3 years regular service in Pay Scale of Rs. 15,600-39,100 + GP Rs. 7600 (pre-revised as per 6th CPC).

(ww) Therefore, the private respondent no. 5 chose to apply on short term contractual basis. Since he applied for appointment on short term contractual basis he subjected himself to the *evaluation/examination* by the *Scrutiny Committee*. The *Scrutiny Committee* **examined** the candidature of the private respondent no. 5 and came to the finding that he did not possess the requisite administrative experience as provided in the Advertisement. Even if, there was a subjective assessment involved in **examination** of the applications of the candidate/private respondent no.5, neither this Court can go into the correctness of the same as long as there was no infirmity in the decision making process nor could the

any other authority/committee could go into the correctness of the decision of/rejection by the *Scrutiny Committee*, when not vested with the authority to do so.

(xx) It may not be out of place to mention here that despite being a party respondent, no one represented the AIR/respondent no. 4 when it could have been easily clarified by the said respondent whether or not the petitioner working as a programme executive in Pay Band- 2, Pay Scale Rs. 9300-34,800, GP- Rs. 4800 held an administrative post in the said institution. In the RTI application made by Mr. Chattopadhyay the said question was not answered as being not applicable.

(yy) Since a challenge has been thrown to the procedural impropriety of a selection process this Court is not inclined to hold that as the petitioner did not pray for a writ of *Quo Warranto*, the appointment of the private respondent no. 5 cannot interfered with. It is not for the petitioner to comment on the eligibility of the Private Respondent No. 5 when the authority vested with the jurisdiction to do so has determined it.

(zz) A beneficial reference may be made on a Judgment reported in 2018 SCC OnLine Cal 16646 (**Mriganka Mondal vs. Dr. Asitabha Das & others**) on the issue that personal interest must yield to public interest. Since compassion, grace or charity cannot colour the minds of the Court, the argument with regard to saving the appointment of the private

respondent no. 5, because he left his permanent job at the AIR on the basis of the letter of appointment dated July 5, 2022, to join the post of Director bearing in mind the harsh consequences that are likely to follow if the writ petition is allowed, cannot be accepted.

48. In the light of discussion made hereinabove **WPA 18906 of 2022** is **allowed** by quashing the subsequent list of 20 candidates, letter of recommendation dated May 26, 2022 and the letter of appointment of the private respondent dated July 5, 2022. Accordingly, this Court directs the suitable candidate from the panel recommended by the Joint Secretary, ZCC to be considered for appointment to the post of Director, EZCC by the Executive Board, in consonance with/approval of the Government of India within a period 2 weeks from date. The short term contract so executed in terms of the advertisement dated July 17/23, 2021 will be for an initial period of 3 years from the date of appointment, further extendable by a period of 2 years.

49. **WPA 28493 of 2022** is dismissed along with **CAN 1 of 2023** since the petitioner therein was an ineligible candidate, being over aged, as per the recommendation of the Scrutiny Committee dated May 13, 2022. The writ petitioner being an ineligible candidate himself has no locus standi to challenge the appointment of the private Respondent No.5.

50. All parties to act on server copy of this Order as downloaded from the official website of this Hon'ble Court.

51. Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon compliance of all the requisite formalities.

(Lapita Banerji, J.)

Later:-

A prayer for stay is made on behalf of the respondent no. 2.

Such prayer is considered and refused.

(Lapita Banerji, J.)