

01.05.2023
Sl. No.43(ML)
srm

W.P.A. No. 22024 of 2016

Mithu Bauri

Vs.

The State of West Bengal & Ors.

Mr. Subhas Chandra Atha,
Ms. Payel Pramanik

....for the Petitioner.

Mr. Pantu Deb Roy,
Mr. Subrata Guha Biswas

...for the State-respondents.

The petitioner has challenged the order of the Joint Secretary (Family Welfare) & Additional Mission Director (National Health Mission) dated June 26, 2014. By the said order, approval to the selection of the petitioner as an Accredited Social Health Activist (ASHA) in Jamtora Gram Panchayat, Bankura, had been refused by the government.

The State Mission Director (National Rural Health Mission) & Ex Officio Special Secretary, Department of Health and Family Welfare, Government of West Bengal, circulated an office order being Memo No.HFW/NRHM/277/06 dated December 11, 2006 to all Sabhadhipatis, District Magistrates and Chief Medical Officers of Health regarding engagement of ASHAs in

different blocks of different districts in West Bengal. Along with the said notification, guidelines for the selection of ASHA had been enclosed. All the blocks followed the guidelines framed for implementation of the said selection process. The guidelines provided that the age group of the candidates applying for being selected as an ASHA should be between 30 to 40 years, which was relaxable to 25 years, in case of scheduled tribes only. The guidelines did not provide for age relaxation for scheduled caste candidates. The petitioner is a schedule caste candidate.

According to the petitioner, the Pradhan of Jamtora Gram Panchayat had issued a notification inviting applications from eligible candidates. In the said advertisement, the lower age limit of the candidates applying for the post was mentioned as 25 years. The petitioner accordingly applied for being considered in the recruitment process.

The petitioner was 29 years 6 months at the relevant point of time. When the selection of the petitioner was sent for approval by the department as per the guidelines, it was found that the petitioner had not met the eligibility criteria of being within the age group of 30 to 40 years. Hence the selection of the petitioner was not approved by the government.

Learned Advocate for the petitioner has prayed for cancellation of the said decision on the following grounds:

- (a) The Pradhan issued the advertisement by mentioning the lower age limit as 25 years for scheduled caste candidates.
- (b) The petitioner qualified in terms of the advertisement.
- (c) The vested right of the petitioner could not be taken away subsequently, by the government.
- (d) The petitioner cannot suffer for any mistake, if at all, committed by the Pradhan.

The two reports filed by the State-respondents clearly indicate that at the time of publication of the advertisement on the basis of which the petitioner applied for the post of ASHA, the guidelines annexed to the communication dated December 11, 2006 were to be followed. The Pradhan of the Jamtora Gram Panchayat unilaterally relaxed the lower age limit for scheduled caste candidates to 25 years, without any authority from the concerned department and in violation of the guidelines.

The contention of the petitioner that the guidelines was undated and did not bear any memo number, is not relevant for adjudication of the dispute in this case, as it is

the specific contention of the Department of Health and Family Welfare, Government of West Bengal, that the guidelines attached to the communication dated December 11, 2006 was the sole basis for deciding the eligibility criteria and the procedure to be followed for engagement of ASHA *vide* notification dated December 11, 2006.

Subsequently, on June 27, 2012, the revised guidelines were published. Clause B.3 of the same mentioned that the age limit of a candidate who applied for the post of an ASHA should be between 30 to 40 years, but relaxation up to the lower age limit to 22 years for scheduled caste and scheduled tribe candidates could be given by the authority. The petitioner relies on such guidelines and submits that the candidature of the petitioner ought to have been decided on the basis of the said 2012 guidelines, by relaxing the lower age limit.

There is no doubt that at the relevant point of time, the guidelines annexed to the communication dated December 11, 2006 were being followed. The petitioner has not been able to prove the contrary. Only age limit for scheduled tribe categories was relaxable to 25 years. In any event, the expression 'relaxable to 25 years' does not mandate that there must be relaxation in all cases. The discretion is left with the authority to relax the lower age

limit in an appropriate case by deciding as to whether the relaxation would be given or not. The petitioner has not been able to show that such situation exists. The writ court cannot also interpret the 'scheduled caste' to be synonymous with 'schedule tribe'.

Next, the question as to whether the revised guidelines dated June 27, 2012, would be applicable in this case, is answered in the negative. The guidelines applicable in the impugned selection process would be the one which was prevailing on March 23, 2012, that is, the last date within which the applications had to be filed by the eligible candidates. As per the advertisement published by the Pradhan inviting applications from the eligible candidates to participate in the ASHA selection process, the last date was March 23, 2012. The notification/guidelines dated June 27, 2012 is an administrative order which cannot be applied retrospectively and must be applied prospectively.

In the decision of Bharat Sanchar Nigam Ltd. & ors. etc. vs. M/s Tata communications Ltd. Etc. decided in Civil Appeal No.1699-1723 of 2015 at paragraph 30, the Hon'ble Apex Court held as follows:-

“30. The power to make retrospective legislations enables the Legislature to obliterate an amending Act completely and restore the law as it existed before the amending Act, but at the same time, administrative/executive orders or circulars, as the

case may be, in the absence of any legislative competence cannot be made applicable with retrospective effect. Only law could be made retrospectively if it was expressly provided by the Legislature in the Statute. Keeping in mind the afore-stated principles of law on the subject, we are of the view that applicability of the circular dated 12th June, 2012 to be effective retrospectively from 1st April 2009, in revising the infrastructure charges, is not legally sustainable and to this extent, we are in agreement with the view expressed by the Tribunal under the impugned judgment.”

Secondly, the discretion left to the authority to relax the lower age limit up to 22 years cannot be considered to be a mandate upon the authorities to relax the lower age limit in all cases. It is left to the authority to decide in appropriate cases as to whether the relaxation would be given or not. In the decision of *Shri Amrik Singh and others vs. Union of India and others* reported in (1980) 3 SCC 393, the Hon’ble Apex Court held that the discretionary power has to be exercised judiciously and not in a routine manner. Right to a post accrues when the appointment letter is issued.

The other question of infringement of a vested right raised by the petitioner, does not arise, precisely for the reason that the selection of the petitioner had not been reached to its logical conclusion and had been disapproved by the appropriate authority at a stage before the appointment letter.

The guidelines which was applicable at the relevant point of time required that the final list of the selected candidates (gram panchayat wise and village wise), should be submitted to the State. In compliance with such provision, the selection list with the petitioner's name was sent to the State. The state authorities found that the petitioner was not eligible, as he was under age. Thus, the petitioner did not accrue any vested right even if his name was included in the list. The selection was subject to the approval of the State and the approval was not granted.

In the decision of *Punjab SEB vs. Malkiat Singh* reported in (2005) 9 SCC 22, the Hon'ble Apex Court held that the mere inclusion of the candidate in a selection list does not confer upon them a vested right to appointment.

The court held:-

“4. ...the High Court committed an error in proceeding on the basis that the respondent had got a vested right for (2005) 9 SCC 22 appointment and that could not have been taken away by the subsequent change in the policy. It is settled law that mere inclusion of name of a candidate in the select list does not confer on such candidate any vested right to get an order of appointment. This position is made clear in para 7 of the Constitution Bench judgment of this Court in *Shankarsan Dash v. Union of India* [(1991) 3 SCC 47.

7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the

notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subash Chander Marwaha* [(1974) 3 SCC 220].

The selection was not found to be in accordance with the procedure and guidelines and hence approval for the selection of the petitioner was not given by the competent authority. The fact that the Pradhan had unilaterally relaxed the lower age limit, cannot be a ground for allowing the writ petition as the Pradhan did not have any authority to do so.

Any appointment *de hors* the procedure and the guidelines and on the basis of a decision of an authority who did not have any power or jurisdiction to decide on such selection process, thereby, re-writing the eligibility criteria in contravention to the guidelines, cannot be a ground for allowing the writ petition.

Under such circumstances, the writ petition is disposed of without any orders.

There shall be no order as to costs.

Parties are to act on the basis of the server copy of
this order.

(Shampa Sarkar, J.)