

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

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

WPA 23102 of 2018

With

I.A. No. CAN 1 of 2019 (Old No. CAN 11321 of 2019)

Md. Rabiul Sk. & Ors.

versus

State of West Bengal & ors.

With

WPA 5463 of 2019

Iswar Chandra Mahata & Ors.

versus

State of West Bengal & ors.

With

WPA 5470 of 2019

Abdus Salam Ansari & Ors.

versus

State of West Bengal & ors.

with

WPA 5479 of 2019

Murari Mohan Mandal & Ors.

versus

State of West Bengal & ors.

with

WPA 21720 of 2019

Niladri Jana & Ors.

versus

State of West Bengal & ors.

For the Petitioners

**: Mr. Bikash Ranjan Bhattacharyya,
..... learned Senior Advocate**

**Mr. Dibyendu Chatterjee,
Mrs. Jhuma Chakraborty,**

Mr. Pritam Majumdar,
Mr. S. Ghosh

.....advocates

For the Council : Mr. Bhaskar Prasad Vaisya,
Mr. Nilay Baran Mandal,
Mr. Sagnik Chatterjee ,
Mr. Pinaki Bhattacharya

.....advocates

For the Board : Mr. Subir Sanyal,
Mr. Ratul Biswas

.....advocates

For the State : Mr. Ranjan Saha

.....advocate

Reserved on : 18.01.2023

Judgment on : 23.03.2023

Hiranmay Bhattacharyya, J.:-

1. This batch of writ petitions were heard analogously as identical questions of law and fact are involved and have been taken up together for disposal.
2. WP No. 23102 (W) of 2018 was heard as the lead case and for the sake of convenience the pleadings of the respective parties of the said writ petition is narrated in a summarised form hereinafter.
3. The petitioners have challenged the selection process conducted by the West Bengal Board of Primary Education (for short “the Board”). Pursuant to the Notification issued by the Board on 26.09.2016, applications were invited for filling up the posts of Primary Teachers in schools under different District Primary Schools Councils (for short “DPSC”) in the State of West Bengal. The petitioners have prayed for issuance of a writ of mandamus to command the

authorities to set aside the entire selection process and to prepare the panel of successful candidates in accordance with the Reservation Policy.

4. The petitioners have alleged that the Board has not followed the Reservation Policy while conducting the selection process. It has been further alleged that Rule 8(5) of the West Bengal Primary School Teachers Recruitment Rules 2016 (for short “the 2016 Rules”) has been violated. It has been also alleged that the cut off marks for getting empanelled under the Reserved category was higher than the cut off marks for being empanelled in the unreserved category which could not have been possible unless there was irregularity or illegality in the selection process.
5. Board contested the writ petition by filing affidavit-in-opposition denying the material allegations contained in the writ petition. It has been specifically stated that the writ petition has been affirmed, filed and moved long after exhaustion of panels and appointments of the empanelled candidates being made. It was stated that the writ petition is liable to be dismissed for not impleading the appointed candidates who are necessary parties. It was specifically stated therein that Rule 8(5) of the 2016 Rules was strictly followed including preparation of alternative set of panel as required under Rule 8(5)(iv) of the said Rules. It was also stated therein that additional panel as required under Rule 8(6) of the 2016 Rules was also prepared.
6. Mr. Bhattacharya, learned Senior Counsel assisted by Mr. Chatterjee appearing for the petitioners contended that the Reservation Policy has not been followed by the Board. He further contended that those candidates who have obtained higher marks than the candidates under the general category ought to have been empanelled in the general category which has not been done by the concerned authorities. According to the learned Senior Counsel for the petitioners if such practice had been followed then the cut off

marks for getting empanelled under the reserved category ought to have been much lower. He further contended that Rule 8(5) of the 2016 Rules has been violated by the concerned authorities and in course of his argument he drew the attention of the Court to the documents annexed to the writ petition.

7. Mr. Sanyal, learned counsel representing the Board seriously disputed the contentions raised by the learned Senior Counsel for the petitioners. He contended that the writ petitions should fail for non-joinder of the appointed candidates who, according to Mr. Sanyal, are necessary parties to this writ petition. He further contended that the Reservation Policy was duly followed and Rule 8(5) of the 2016 Rules was also strictly followed. Mr. Sanyal concluded by submitting that a co-ordinate Bench while dealing with a bunch of writ petitions being WP No. 6894 (w) of 2017 in the case of *Monika Das and ors. vs. The State of West Bengal & ors.* and other writ petitions delivered a judgment on 10.12.2019 deciding identical issues and the said decision having attained finality, a fresh challenge to the self same selection process on identical grounds should not be entertained.
8. Heard the learned advocates for the parties and perused the materials placed.
9. It is not in dispute that the selection process initiated vide Notification of the Board dated 26.09.2016 got culminated by giving appointment to a large number of candidates in the posts of primary school teachers under different DPSCs throughout the State. The writ petitioners have sought for setting aside the entire selection process and for preparation of a panel in accordance with the Reservation Policy. In a writ petition wherein the process of selection has been challenged and since a large number of candidates have been appointed pursuant to the said selection process, this Court is of the considered view that a right stood vested upon the candidates who have already been appointed and

such appointed candidates are necessary parties to this writ petition as there is every possibility that their rights may be adversely affected by any order that may be passed in this proceeding.

10. After going through the decision in the case of *Monika Das* (supra), this Court finds that the selfsame selection process was also under challenge in the writ petitions which were decided by the co-ordinate bench and more or less identical issues were raised therein.
11. The Co-ordinate Bench in the case of *Monika Das* (supra) after noticing several decisions of the Hon'ble Supreme Court as well as Rule 12 read with Rule 53 of the Rules governing applications under Article 226 of the Constitution held that the writ petitions must fail for non-joinder of the appointed candidates either in their individual capacities or in a representative capacity. The Co-ordinate bench held thus-

“15. Firstly, it is not in dispute that pursuant to the selection process that was initiated by issuance of Notification dated 26th September, 2016, a panel of successful candidates was prepared and appointments have been given to a huge number of candidates in posts of primary school teachers under different DPSCs. If the petitioners' prayer is allowed, the appointments of such candidates will have to be set aside. In other words, such candidates would be badly affected if an order is passed as prayed for by the petitioners. This makes such candidates necessary parties to the instant writ applications. Any person who may be adversely affected by an order which may be passed in a legal proceeding is a necessary party to such proceeding. Without hearing him no effective order can be passed. An order passed without hearing a necessary party is a nullity and has no binding effect.

*16. In this connection one may refer to the decision of the Apex Court in *Khetra Basi Biswal -Vs.- Ajaya Kumar Baral & Ors.*, 2004 (100) FLR 6 = (2004) 1 SCC 317. Although the order that was passed in*

that case by the Hon'ble Supreme Court was in exercise of power under Article 142 of the Constitution, there is clear pronouncement in the judgment and order that procedural law as well as substantive law both mandate that in the absence of a necessary party, the order passed is a nullity and does not have a binding effect.

17. In State of Orissa & Anr. -Vs.- Binode Kishore Mohapatra, AIR 1969 SC 1249, the Union Government had prepared a seniority list with which the writ petitioner was aggrieved and accordingly the writ petitioner challenged such list. The matter ultimately reached the Hon'ble Supreme Court. It was urged by Learned Attorney General that all the officers who were likely to be affected by the decision of the writ petition had not been impleaded as parties to the petition. The Hon'ble Supreme Court accepted the contention that in the absence of such officers, who were necessary parties, the writ petition could not succeed. The Hon'ble Supreme Court referred to its decision in Padam Singh Jhina -Vs.- Union of India, Civil Appeal No.405 of 1967 wherein speaking for the Court, Shah, J. had observed:

"But we are unable to investigate the question whether there has been infringement of the rules governing fixation of seniority, for a majority of those who were placed above the appellant in the seniority list are not impleaded in the petition before the Judicial Commissioner and are not before this Court. It is impossible to pass an order, assuming that the appellant is able to convince us that a breach of the rules was committed, altering the list of seniority, unless those who are likely to be affected thereby are before the Court and have an opportunity of replying to the case set up by the appellant."

The Hon'ble Supreme Court observed that this is a salutary rule and should be followed.

18. The petitioners contended that a very large number of candidates were given appointments and it was practically impossible to implead all of them as respondents in the writ petition. This is not an acceptable explanation. The petitioners could have and should have

impleaded a few of the candidates who were appointed, in representative capacity. Rule 12 of the Rules governing applications under Article 226 of the Constitution framed by this Court contemplates institution of a writ petition in a representative capacity. A petitioner may institute a writ petition seeking to represent other persons also who according to him would be similarly interested in the subject matter and result of the writ petition. Similarly, a petitioner may implead a person as a respondent in a representative capacity to represent the interest of others who may be similarly situate as the impleaded respondent and may be adversely affected by the order that may be passed in the proceeding. Further, Rule 53 of the said Rules provide that the provisions of the Code of Civil Procedure, 1908 will apply to applications under Article 226 of the Constitution in so far as the same can be made applicable. Order 1 Rule VIII of the Code of Civil Procedure provides for institution of suits in representative capacity. By reason of Rule 53 of the said Rules, the provisions of Order 1 Rule VIII are attracted to a writ application. For instituting a writ application in a representative capacity, the petitioner needs to obtain leave of the Court. No such prayer was made by the petitioners in the present case nor such leave was obtained otherwise. A few of the appointed candidates have been impleaded as respondents, not in a representative capacity, but in their individual capacities. Hence, the writ petitions must fail for non-joinder of necessary parties.”

12. Upon perusal of the writ petition this Court finds that the appointed candidates were neither impleaded in their individual capacities nor in representative capacities. Leave to institute the writ petition in representative capacity was also not sought for. Therefore, the aforesaid finding of the Co-ordinate Bench is squarely applicable to the case on hand. This Court accordingly holds that the writ petitions must fail for non-joinder of necessary parties.
13. The writ petitioners have made bald allegations that the Reservation Policy was not followed. However, the learned counsel for the writ

petitioners has failed to demonstrate as to how the Reservation Policy was violated. Therefore, this Court is not inclined to accept such contention of the writ petitioners.

14. The principal ground for challenging the selection process is that Rule 8(5) of the 2016 Rules has not been followed. Rule 8(5) of the 2016 Rules reads as follows-

"(5) The Selection Committee shall prepare separate Council-wise panels as per procedure below:-

(a) Firstly, the Selection Committee shall segregate all eligible candidates applying for earmarked vacancies as mentioned in Note 7 to rule 6, from other successful candidates;

(b) Secondly, the Selection Committee shall prepare the following panels for the successful candidates who have applied for non-earmarked vacancies

(i) a panel of all selected candidates in a district, namely, unreserved Category comprising of the names of the candidates belonging to General Category and reserved candidates of Scheduled Caste Category, Scheduled Tribe Category, OBC Category-A, OBC Category-B and PH Category serially according to descending order of merit as per existing vacancies medium wise;

(ii) a panel of selected reserved category candidates in a Council, namely, Scheduled Castes, Scheduled Tribes, OBC Category-A, OBC Category-B and Physically Handicapped (PH) candidates in the respective category as per statutory reservation rules, from amongst the remaining candidates of such categories, serially according to descending order of merit as per existing vacancies medium wise;

(iii) a panel of selected candidates belonging to Exempted Category, Ex-servicemen and Physically Handicapped

(PH) in a Council, separate panels category wise, for vacancies reserved for the respective categories;

(iv) an alternative set of panel of selected candidates for each category in a Council serially according to descending order of merit as per existing vacancy medium wise;

Note 1.- Such an alternative set of panel of selected candidates for each category in a Council shall be prepared for the purpose of providing option to the reserved category candidates during counselling to opt for posting as per position in unreserved category or as per position in the reserved category.

Note 2.- Separate sets of panels for all selected candidates applying for earmarked posts as mentioned in Note 7 to rule 6 shall be prepared in accordance with the procedures mentioned in clauses (i) to (iv) of sub-rule (b)."

15. In the affidavit of the Board it has been stated in details how Rule 8(5) was followed by the concerned authority. It was specifically stated therein that the eligible candidates were divided into two sections namely trained and untrained and also that the candidates were segregated into earmarked and non earmarked vacancies. The affidavit further states that two sets of panels one on merit basis and the other on the basis of merit amongst the caste/category wise candidates in terms of Rule 8(5) of the 2016 Rules were also prepared. The said affidavit also speaks about preparation of an alternative set of panel as required under Rule 8(5)(iv) of the 2016 Rules and an additional panel in terms of Rule 8(6) of the 2016 Rules. The said affidavit further disclosed as to how counseling was conducted.
16. The said affidavit further stated that a reserved category candidate whose name figured in the General category as well as reserved category might exercise his/her option for the panel where his/her

name might be in a higher position for exercising his/her right to obtain the benefit of being posted in a nearby school of his choice as prescribed under Note 1 to Rule 8(5)(iv) of the 2016 Rules.

17. The said affidavit also explained the reasons as to why the cut off marks for getting empanelled in the reserved category was much higher than the cut off marks for getting empanelled in the general category by stating specifically that the candidates who had obtained better marks than the candidates empanelled in the general category preferred their positions in the merit wise panel of the respective reserved categories which resulted in higher cut off marks in reserved category than General Category.
18. Such positive factual assertion in the affidavit of the Board has not been controverted by production of documents by the petitioners. The learned counsel representing the petitioners also could not demonstrate before this Court that the procedure followed by the Board as stated in their affidavit is contrary to the 2016 Rules.
19. The writ petitioners have failed to demonstrate as to how their legal right has been infringed while conducting the selection process by the concerned authorities. It has been alleged that there were irregularities in preparation of the panel which is the subject matter of these writ petitions. When the writ petitioners have alleged irregularities in the preparation of the panel in question, it is for them to prove such allegations by production of sufficient materials before this court to support their case as the relevant materials are available in public domain.
20. The writ petitioners have annexed some documents in the writ petition which, according to them, are the list of empanelled candidates. The petitioners have not disclosed the source wherefrom they have collected the said documents which have been annexed to this writ petition. That apart the said documents, in the considered view of this Court are not at all sufficient to arrive at a

conclusion that there are irregularities and/or illegality in the preparation of the panel.

21. The writ petitioners instead of producing sufficient materials which are available in the public domain to prove their allegations have sought for a direction upon Board to produce the records pertaining to the said selection process. The writ court is not expected to make a roving enquiry by directing the Board to produce the voluminous records pertaining to the selection process when the petitioners have failed to make out any case before this court for production of the records pertaining to the selection process.
22. The co-ordinate bench in the case of *Monika Das* (supra) also refused to direct the Board to produce the records. The co-ordinate bench on the prayer for production of the records pertaining to the selection process held thus-

“19. Secondly, the primary ground for challenging the selection process is that Rule 8 (5) of the 2016 Recruitment Rules has been violated in preparing the panel of successful candidates. Apart from such bald allegation, no material particulars have been furnished in support of such allegations nor any documentary evidence has been disclosed in support of such contention. Copies of the documents enclosed to the writ petition do not inspire credence and in any event do not advance the case run by the petitioners. In the affidavit-in- opposition filed on behalf of the West Bengal Board of Primary Education it has been explained as to how Rule 8(5) of the 2016 Rules has been scrupulously adhered to and Learned Senior Counsel appearing for the Board has also explained the same to me in course of his submission. The petitioners wanted the Court to direct the Board to produce the entire records pertaining to the selection process. I was not and am not inclined to do so. The records are voluminous. It would be practically an impossible task for the Writ Court to delve into such records and ascertain as to whether or not the panel under challenge

has been prepared violating the recruitment rules. This would entail adjudication of highly disputed questions of fact which the Writ Court is ill-equipped to do.

20. It is not in doubt that the High Court while exercising power of judicial review under Article 226 of the Constitution can issue a writ of certiorari calling for the records of a particular case and upon consideration of such records quash the order challenged in the writ application. However, such a writ would be issued ordinarily only when serious factual disputes are not involved and on a bare perusal of the records, the Court can come to a decision one way or the other.

However, if consideration of the records would involve the Writ Court in adjudicating disputed questions of fact, the Writ Court would ordinarily not issue such a writ of certiorari. A writ remedy is a discretionary remedy and this is a discretionary rule that the Writ Court generally follows. The present case, in my opinion, is not one where merely by looking at the records the Court would be able to come to a conclusion, this way or that way. Separate panels have been prepared for each of the districts. If the prayer of the petitioners for issuance of a writ of certiorari is allowed, the Writ Court would have to convert itself into a fact finding trial Court which cannot be countenanced.”

23. This Court finds no reason to take a different view on such issue with that of the co-ordinate bench. For such reason, this Court in course of hearing was not inclined to allow such prayer of the petitioner for production of records and is of the view that there was/is no necessity for a direction to produce the records in the facts of this case.

24. The petitioners have failed to demonstrate before this Court that they have a legal right to be appointed. Therefore, no legal right of

the petitioners can be said to have been infringed by the action of the respondent authorities.

25. For all the reasons as aforesaid all these writ petitions are liable to be dismissed and the same accordingly stand dismissed. Connected application also stands disposed of accordingly.
26. There shall be, however, no order as to costs.
27. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)