

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Uday Kumar

MAT 2023 of 2022
with
I.A No. CAN 2 of 2022

Biplab Thakur & Ors.
Vs.

Parimal Mahato & Ors.

For the Appellant	: Mr. Ekramul Bari, Adv., Mr. Syed Mansur Ali, Adv., Mr. Imtiaj Uddin, Adv., Ms. Tanuja Basak, Adv.
For the Respondent/ Writ petitioner	: Mr. Sabyasachi Chatterjee, Adv., Mr. Badrul Karim, Adv., Mr. Imtiaz Akhter, Adv. Mr. Subhrajit Saha, Adv., Mr. Kiron Sk. Adv.
For the WBBPE	: Mr. Saikat Banerjee, Adv., Mr. Ratul Biswas, Adv., Mr. Kaushik Chowdhury, Adv.
For the NCTE	: Mr. Sauvik Nandy, Adv., Mr. A. Chakraborty, Adv.
For the State	: Mr. Tapan Kr. Mukherjee, AGP., Mr. Avishek Prasad, Adv., Mr. Tapas Kr. Dey, Adv.
Hearing concluded on	: 9 th August, 2023
Judgment on	: 16 th August, 2023

Soumen Sen, J.:- The appeal is arising out of an order dated 21st November, 2022 at the instance of the para teachers of primary schools.

2. They are aggrieved by the impugned order dated 21st November, 2022 in view of the direction upon the Education Department to take steps for filling up the vacancies of para teachers by reading down the Notification dated 23rd September, 2016 and in permitting the upper primary para teachers to participate in the selection process for the recruitment of para teachers of primary schools.

3. The appellants are aggrieved by the said order as it has affected their rights to participate in the selection process initiated pursuant to the Notification dated 23rd September, 2016. The said notification was issued in terms of Note 7 of Rule 6(3) of the West Bengal Primary School Teachers' Recruitment Rules 2016, (hereinafter referred to as "Primary Teachers' Recruitment Rules, 2016") in which a direction was given by the Hon'ble Governor that during the "forthcoming" recruitment of teacher for primary schools, 10% of the existing vacant posts shall be filled up by the para teachers serving at present in various primary schools across the State.

4. Mr. Ekramul Bari, learned counsel for the appellants has submitted that the Primary Teachers' Recruitment Rules, 2016 prescribe a selection process for appointment of teachers in primary schools whereas the recruitment for upper primary para teachers are governed by West Bengal School Service Commission (Selection for Appointment to the Post of Teachers for Upper Primary Level of Schools) Rules, 2016, (in short, "Upper

Primary Level Rules 2016"). In both the Rules there is a provision for earmarking 10% of the total vacant posts for the para teachers without disturbing the 100 points roster as notified by the State Government from time to time.

5. It is submitted that eligibility criteria and honorarium for the post of para teachers of primary and upper primary are different. The educational qualification of primary para teachers is Madhyamik pass or equivalent whereas for upper primary para teachers the qualification is graduate with 300 marks in relevant subject. In the Primary Teachers' Recruitment Rules, Rule 2(b) mentioned that 'appointment' means appointment of teachers of primary schools in accordance with the provision of the Act and Rules made thereafter. Similar provisions exist in the Upper Primary Level Rules 2016. In clause 2(p) it has been clearly stated that vacancy means a vacancy in the post of Teacher for classes of Upper Primary Level.

6. The grievance of the appellants are that if the upper primary teachers are allowed to participate in the 10% vacancies to be notified for primary teachers, it would be discriminatory as the para teachers duly qualified for upper primary level will be doubly benefitted. They are not eligible for participation in the 10% vacancies for para teachers for primary school. There are different qualifications and pay scale. Moreover, 10% reservation for upper primary teachers has been provided in terms of Rule 8(4) of the Upper Primary Level Rules, 2016. The writ petitioners had never challenged the vires, legality and validity of Rule 6, Note 7 of the

Primary Teachers' Recruitment Rules, 2016 issued by the State Government identifying 10% vacancies to be filled up for para-teachers in the primary schools. The writ petitioners being the para-teachers of upper primary school also enjoy similar advantage and they cannot take advantage of reservation in upper primary as well as primary when there is no ambiguity in the Rules and the Notification.

7. Mr. Tapan Kumar Mukherjee, the learned AGP on behalf of the State respondents have contended that the recruitment process was initiated by the West Bengal Board of Primary Education (in short WBBPE) constituted under the West Bengal Board of Primary Education Act, 1973 (in short, WBBPE Act, 1973). Section 106 of the WBBPE Act, 1973 empowers the State Government to frame a Rule and pursuant thereto Primary Teachers Recruitment Rules, 2016 was framed and duly notified on 2nd March, 2016. In Rule 2(a) 'Act' is defined to mean the West Bengal Primary Education Act, 1973, Rule 2(k) has defined the primary school which includes Junior Basic School. Teacher has been defined in Rule 2(o). Teacher means a person who holds a teaching post in primary school or in a junior basic school on a regular and whole time basis and is paid either wholly or in part from the funds under the control of the State Government in the Education department. Rule 2(p) has defined the Teachers Eligibility Test (in short TET) to be conducted by the Board. Trained candidates have been defined in Rule 2(q). It means a candidate who has obtained diploma in elementary education. The Board is the selecting authority.

8. The said Rule has been amended by the Notification dated 22nd December 2020. “Training” in terms of Rule 2(r) means the training referred to in the notification dated 23rd August 2010, issued by the National Council for Teacher Education (in short NCTE) as subsequently amended and in Rule 6 it has been provided that the candidate shall possess minimum educational and training qualification as prescribed by the NCTE. The Primary Education Department by a notification dated 24th September, 2016 required that during the “forthcoming” recruitment of teachers for primary schools, 10% of the existing vacant posts shall be filled up by the para-teachers serving at present in various primary schools in the State of West Bengal.

9. On 1st April 2010 the Right of Children to Free and Compulsory Education Act, 2009 came into force and Section 23 of the said Act provides inter alia that any person possessing such minimum qualifications as laid down by an academic authority, authorized by the Central Government, by notification shall be eligible for appointment as a teacher. Section 2(f) defines elementary education from first class to eighth class. This Act applies to primary schools i.e. upto Class IV and from Class V to Class VIII it is called as Upper-Primary that is Junior High School in West Bengal.

10. It is submitted that in terms of Notification dated 23rd August, 2010 issued by National Council For Teacher Education (in short, ‘NCTE’) issued under Section 23(1) of the Right of Children to Free and Compulsory Education Act, 2009 (in short, ‘RTE’) the eligibility criterion for appointment

as a teacher in Classes I to V and VI to VIII has been laid down. It prescribes different qualifications for the two sets of teachers.

11. According to the notification issued by the NCTE under the RTE Act, 2009 the candidates must be qualified in a TET Examination to be conducted by the State Government. In case of primary Schools TET is conducted by the WBBPE (Board) and for Secondary Schools it is conducted by the School Service Commission.

12. In so far as Teachers for appointment of Upper Primary, namely from Class V to Class VIII recruitment is done by the West Bengal School Service Commission (in short WBSSC) under the West Bengal School Service Commission Act, 1997 (in short WBSSC Act, 1997) which came into force on and from 1st November 1997. According to Section 2(a) of the WBSSC Act, 1997 the Board means the West Bengal Board of Secondary Education (in short WBBSE) established under the West Bengal Board of Secondary Education Act, 1963 (in short the WBBSE Act, 1963). Section 17 of the 1997 Act, empowered the State Government to frame a Rule for carrying out the purposes of the said Act and accordingly on 20th September 2016 a Rule has been framed for appointment of Teachers in Upper Primary level of Schools, that is, up to Class VIII. This Rule is called in short Upper Primary Level Rules, 2016. According to Rule 2(r) Teachers Eligibility Test to be conducted by the West Bengal School Service Commission (WBSSC). According to Rule 2(a) of the said Rule, 2016 the Act means the WBSSC Act, 1997.

13. The NCTE has amended its Notification dated 23rd August 2010 on 29th July, 2011. The said Notification prescribed that the candidate must

have 50% marks in Higher Secondary Level with 2 year Diploma in Elementary Education for primary schools and for upper primary the candidate must have 50% marks in graduation with 2 year Diploma in Elementary Education or 1 (one) year B.Ed. However, in both the cases he must be TET qualified candidate to be conducted by the two different authorities, one by the Board and other by the School Service Commission constituted under the WBSSC Act, 1997.

14. The learned AGP has referred to the aforesaid provisions to show that both the Rules have been framed under different statutes and the selection and recruitment process are completely different. The qualifications for the teachers under both the Rules are also different. It is submitted that by the memorandum dated 2nd July, 2018 the department has declared consolidated remuneration of the Para Teacher (Primary) and Para Teacher (Upper Primary). The remuneration for the Para Teachers Primary and Para Teachers Upper Primary are different.

15. It is submitted that the eligibility criteria of the teacher under both the Rules are different and so also eligibility criteria for the Para Teachers Primary and Para Teachers Upper Primary schools. Para teachers appointed in primary level up to Class IV and also from Class V to Class VIII are having different pay scale and with different qualifications. It is submitted that both the Rules contemplate earmarking of 10% vacancies to fill up by the para teachers for the primary level and upper primary level.

16. In view thereof it cannot be said that the Para Teachers of all categories irrespective of their qualification shall be treated alike.

17. Mr. Sabyasachi Chatterjee, the learned Advocate appearing on behalf of the writ petitioner has submitted that all para teachers are to be treated at par and para teachers form one homogenous group. There cannot be any classification of para teachers for primary school and upper primary school. They cannot be treated differently.

18. It is submitted that the para teachers were functioning even before introduction of the Right to Education Act, 2009 and they were, in fact, aiding the schools in providing education to the children and to prevent drop out from the school. They also take care of the drop outs from the school and now that the Right to Education Act has come into force, it is the obligation of the State to ensure that up to Class VIII all the children receive free education. Para Teachers are essentially performing same kind of job from Class I to VIII irrespective of the gradation of the school where they were placed or would be placed in the event the vacancies are declared and accordingly there was no need to create a sub category of Para teachers and bifurcate into Primary and Upper Primary.

19. In view of the nature of the job and the object for which the rules have been framed there was no need for any artificial classification of Para teachers. It is submitted that the view taken by the learned Single Judge with regard to the Rules 6 Note 7 in the Primary Rules, 2016 was on correct appreciation of the facts and the object which both the Rules seek to achieve. It is submitted that it is not impermissible for the court to take external aid for the purpose of reading down the particular provision in the

event the court is of the view that the said interpretation is necessary for achieving the object of the Act, and securing the benefit of para teacher.

20. Mr. Chatterjee in this regard has relied upon the decision of the Hon'ble Supreme Court in ***Kanai Lal Sur Vs. Paramnidhi Sadhukhan reported in AIR 1957 SC 907*** paragraphs 6 and 7.

21. It is submitted that when it is clear from the object of both the Rules that the Para Teachers are necessary for primary and upper primary level and they are to be treated at par.

22. At the outset we must state that the Primary Rules 2016 and the Upper Primary Rules 2016 have not been challenged in the writ petition. The challenge was essentially with regard to notification issued by the Hon'ble Governor dated 23rd September, 2016 by which the State was directed that during 'forthcoming' recruitment of teachers 10% of the existing vacant posts shall be filled up by the Para Teachers serving at present in various primary school in the State. The said Notification was issued under the Primary Teacher Recruitment Rules, 2016. It was in the nature of clarification in the form of a direction after taking note of Rules 6 Sub Rule 3 Note 7 of the said Rule. Under the said notification the State was obliged to initiate immediately recruitment of teachers for primary schools and 10% of the existing vacant posts shall be filled up by the para teachers serving at the relevant time in various primary school in the State.

23. The qualification of the para teachers in primary school and upper primary level are admittedly different. The qualification published

under Sarba Siksha Mission has clearly stated that for a para teachers in the primary school a candidate should have the qualification of Madhyamik or equivalent and for upper primary he should be a graduate with 300 marks. The Government as a policy thought that the qualification for para teachers primary and para teachers upper primary are to be different having regard to the nature of the job and requirement. The para teachers of primary would require to take care of students from Class I to Class V. The Government was of the view that a Madhyamik pass candidate would be suitable for the said posts whereas for a student from Class V to Class VIII the candidate must have been a graduate with 300 marks in aggregate. Remuneration of the para teachers is also different. The processes of selection are also different.

24. Free and compulsory education for children was a duty cast upon the Government by the framers of the Constitution. Elementary education for children in the present context is a Fundamental Rights enshrined under Article 21A of Part III of the Constitution of India. Every child (up to 14 years of age) has a Fundamental Right to have 'free' and 'compulsory education'. It implies that it should be a 'meaningful education'. It is the duty of the State to provide good quality education to every child. A good teacher is the first assurance of quality education in a school. Elementary education in India is at two levels. A is the Primary' level i.e. class I to V, and B is the Senior or upper primary level i.e., classes VI to VIII.

25. The National Council for Teacher Education is the 'Academic Authority' authorized by the Central Government under Section 23 of the Right of Children to Free and Compulsory Education Act, 2009 to prescribe the minimum qualifications for the teachers who may be appointed to impart the elementary education from first class to eighth class. Section 23 of the Act is extremely important as it not only provides as to who shall determine the qualifications of teachers in a primary school, but as to who can relax these qualifications, and for how long. Under the Primary School Teachers Recruitment Rules, 2016 for being appointed as a Primary Teacher the candidate shall possess the minimum educational qualification specified by the NCTE and the notification relating to eligibility of candidates issued by the Ministry of Human Resources Development, Department of School Education and Literacy, Government of India from time to time.

26. The School within the meaning of Section 2(ii)(Ka) as amended by the Gazette Notification dated 12th October, 2011 means any recognized school imparting pre-Primary, Primary, Upper Primary, Secondary or senior Secondary Education or a college imparting senior Secondary Education. The said notification introduced by way of amendment a new Section after Section 12, namely, Section 12A which authorized the Council to make regulations prescribing qualifications of persons for being recruited, *inter alia*, to primary and upper primary established, run, aided or recognized by the Central Government or a State Government or a local or other authority for the purpose of maintaining standards of education in Schools.

27. Primary school teachers who impart lessons from Class I to Class IV and are guided under West Bengal Board of Primary Education Act, 1973 and the Rules framed thereunder. The Para Teachers working in Primary Schools are selected as Primary School Teachers in terms of provisions of the West Bengal Primary School Teachers Recruitment Rules, 2016 as amended from time to time, (hereinafter referred to as “Recruitment Rules, 2016”) issued in exercise of the power conferred by sub-section (1) and clause (k) of the sub-section (2) of section 106 read with clause (k) of Section 60 of the West Bengal Primary Education Act, 1973.

28. On 1st April, 2010 the Right of Children to Free and Compulsory Education Act, 2009 (herein after referred as “RTE Act, 2009”) came into force and section 23 of the said Act provides, inter alia, that any person possessing such minimum qualifications as laid down by an academic authority, authorized by the Central Government, by notification shall be eligible for appointment as a teacher and Section 2(f) of the said Act defines elementary education from Class I to VIII Class.

29. NCTE by a notification dated 29th July, 2011 has amended the minimum qualifications of teachers for classes I to V and classes VI to VIII. The principal notifications with regard to the minimum qualification have been amended by the said notification.

30. The minimum qualifications for the teachers from Class I to V are:

- a) *Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Elementary Education (by whatever name known)*

Or

Senior Secondary (or its equivalent) with at least 45% marks and 2-year Diploma in Elementary Education (by whatever name known), in accordance with the NCTE (Recognition Norms and Procedure), Regulations, 2002.

Or

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor of Elementary Education (B.El.Ed.)

Or

Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Education (Special Education)

Or

Graduation and two year Diploma in Elementary Education (by whatever name known)

And

b) Pass in the Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose.

31. The minimum qualification for the teachers from Class VI to VIII are:

a) Graduation and 2-year Diploma in Elementary Education (by whatever name known)

Or

Graduation with at least 50% marks and 1-year Bachelor in Education (B.Ed.)

Or

Graduation with at least 45% marks and 1-year Bachelor in Education (B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard.

Or

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor in Elementary Education (B.El.Ed.)

Or

Senior Secondary (or its equivalent) with at least 50% marks and 4-year B.A./B.Sc..Ed. or B.A. Ed/B.Sc.Ed.

Or

Graduation with at least 50% marks and 1-year B.Ed. (Special Education)

And

b) Pass in Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose.

32. It is pertinent to note that the structure and content of TET for Classes I-V is as follows:

- i. Child Development and Pedagogy-30 Marks
- ii. Language I – 30 Marks
- iii. Language II-30 Marks
- iv. Mathematics – 30 Marks
- v. Environment Studies – 30 Marks

The Selection Test of Teachers for Classes I-V is conducted by the West Bengal Board of Primary Education as per Act, 1973.

33. The Structure and content of TET for Classes VI-VIII is as follows:

- i. Child Development and Pedagogy- 30 Marks
- ii. Language I-30 Marks
- iii. Language II-30 Marks
 - a. For Mathematics and Science Teacher: 60 MCQs of 1 mark each.

- b. For Social Studies Teacher: for Social Studies – 60 MCQ of 1 mark each.
- c. For any other teacher either (a) or (b)

The Selection Test of Teachers for Classes VI-VIII is conducted by the West Bengal School Service Commission as per provisions of the West Bengal School Service Commission Act, 1997.

34. In so far as the appointment of the teacher for Upper Primary Schools, namely for classes from Class VI to Class VIII is concerned the recruitment is done by the West Bengal School Service Commission (in short WBSSC) under the West Bengal School Service Commission Act, 1997 (in short WBSSC Act, 1997) which came into force on and from 01 November 1997. The Para Teachers working in Secondary Schools are selected as Secondary School Teachers in terms of provisions of Upper Primary Level of Schools Rules, 2016 issued in exercise of power conferred by sub- section (1) of section 17 read with section 8 and clause (d) of sub- section (2) section 17 of the WBSSC Act, 1997

35. The qualifications prescribed for recruitment of Primary Teachers are in line with and in consonance with the qualifications prescribed by the NCTE. Under both the Rules of 2016 the candidates who were working as Para Teachers may be considered for appointment as Primary Teachers and Upper Primary Teacher under the 10% vacancies to be declared in terms of the provisions of both the rules provided they have the requisite said minimum qualifications. The eligibility criteria for the Para Teachers of Primary and Upper Primary are different. The test conducted are by different

authorities. A higher qualification is not necessarily a suitable qualification for post. The qualification of the para teachers for the upper primary level may not be a suitable qualification for primary level of classes. There is an intelligible differentia between the para teachers of primary education and para teachers of upper primary education.

36. As observed earlier NCTE has prescribed different qualifications for Primary and Upper Primary Teachers they are having different pay scale. The method of recruitment is also different.

37. When a particular qualification is laid down in the rules relating to a distinct classes of candidates the candidates possessing a qualification higher than that under different rules cannot claim his candidature to be considered in terms of the other rules which prescribe lower qualification. To illustrate B.Ed. qualified teachers were kept out from the purview of the eligibility of the teachers in primary schools as B. Ed. was not considered a “qualification” for teachers at primary level. In **Devesh Sharma v. Union of India & Ors, 2023 INSC 704** the argument that B.Ed. qualification candidates are better suited for appointment as teachers in primary schools, as they have ‘higher qualification’, and as such they should be appointed as teachers in all Primary Schools was not accepted. The NCTE in prescribing the qualification for teachers in primary school and upper primary school have carefully selected essential qualifications that are required for the purpose of imparting education of children at primary level and upper primary level. As observed in **Devesh Sharma** (supra), “the pedagogy for a child who has just entered the school in an important consideration. A

child has come to face a ‘teacher’, so to speak, for the first time in a class room. It is the beginning of a journey for the child student and therefore world over great care is taken in laying down proper foundations in these formative years. Well qualified and trained teacher in elementary school is an extremely vital aspect. A teacher must be trained to teach students at ‘primary level’ and this is precisely what the training of Diploma in elementary education (D.El. Ed.) does; it trains a person to teach children at primary level.....”

38. In the instant case, we have two distinct rules prescribing different qualifications made under different statute for a different purpose. As noticed earlier the qualification and selection process is by different authorities.

39. The prescription of qualifications for a post is a matter of recruitment policy. The State as the employer is entitled to prescribe the qualifications as a condition of eligibility. As observed in **Zahoor Ahmad Rather and Ors. Vs. Sheikh Imtiyaz Ahmad and Ors.** reported in **2019(2) SCC 404** “.....It is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications. Similarly, equivalence of a qualification is not a matter which can be determined in exercise of the power of judicial review. Whether a particular qualification should or should not be regarded as equivalent is a matter for the state, as the recruiting authority, to determine.....”

40. While prescribing the qualifications for a post, the State, as employer, may legitimately bear in mind several features including the

nature of the job, the aptitudes requisite for the efficient discharge of duties, the functionality of a qualification and the content of the course of studies which leads up to the acquisition of a qualification. The state is entrusted with the authority to assess the needs of its public services. Exigencies of administration, it is trite law, fall within the domain of administrative decision making. The state as a public employer may well take into account social perspectives that require the creation of job opportunities across the societal structure. All these are essentially matters of policy. Judicial review must tread warily.”

41. In the impugned order we do not find any reflection of this distinction. The notification was issued in relation to Primary Schools. Similar provisions exist for the Upper Primary School with different qualifications. Both cannot be treated at par by reason of the distinguishing features mentioned above.

42. Under such circumstances, the impugned order is set aside.

43. The appeal and the Applications are allowed.

44. There shall be no order as to costs.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)