

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FMA 803 of 2019

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IA No. CAN 1 of 2019 [Old No. CAN 7589 of 2019]

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IA No. CAN 2 of 2020

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IA No. CAN 3 of 2021

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IA No. CAN 4 of 2022

Ajijul Islam & Anr.

-Versus-

The State of West Bengal & Ors.

For the Appellants : *Mr. Simanta Kabir,*
Mr. Satyam Mukherjee,
Mr. Avik Pramanick.

For the WBCSSC : *Dr. Sutanu Kumar Patra,*
Mr. Kanak Kiran Bandyopadhyay.

Hearing is concluded on : *11th September, 2024.*

Judgment On : **7th October, 2024.**

Tapabrata Chakraborty, J.

1. The present appeal has been preferred challenging the order dated 8th April, 2019 passed by the learned Single Judge in the writ petition being WP 28256 (W) of 2017.

2. Shorn of unnecessary details the facts are that the writ petitioners/appellants herein participated in the 12th Regional Level Selection Test (in short, RLST) for appointment to the post of Assistant Teacher. Upon emerging to be successful in the selection process the appellants were empanelled but they were not called for counseling and were not offered any letter of recommendation for appointment. Aggrieved thereby, the appellants preferred a writ petition being WP 34996 (W) of 2013 which was disposed of by an order dated 17th December, 2013 directing *inter alia* that ‘*if it is found that the writ petitioners have crossed all hurdles i.e. TET examination, subject and interview in that event the authorities are directed to call the writ petitioners in counselling and recommend them for giving appointment. It appears that the petitioners’ name are appearing in the combined merit list*’. Challenging the said order, the West Bengal Central School Service Commission (in short, the Commission) and others preferred a mandamus appeal being MAT 1257 of 2014 which was disposed of by an order dated 15th March, 2017, setting aside the order impugned in the said appeal. Aggrieved by the said order the appellants preferred a Special Leave Petition (in short, SLP) and the Hon’ble Supreme Court disposed of the same on 4th September, 2017 observing *inter alia* that ‘*the petitioners at liberty to move the High Court so as to ascertain whether any decision has been taken not to fill up the vacancies from the existing panel*’. Thereafter the appellants preferred a fresh writ petition being WP 28256 (W) of 2017 but the same was dismissed by an order dated 8th April, 2019. Aggrieved by the said order, the present appeal has been preferred.

3. Mr. Kabir, learned advocate appearing for the appellants submits that as the appellants, namely, Ajijul Islam (in short, Ajijul) and Bijoy Kumar Ruidas (in short, Bijoy) emerged to be successful in the 12th RLST, they were empanelled by the Commission after adding the marks they have obtained in the written examination, evaluation of academic qualification and personality test (hereinafter referred to as PT). They accordingly secured berth in the panel as defined under the Rule 2(f) of the West Bengal School Service Commission (Selection of Persons for Appointment to the Post of Teachers) Rules, 2007 (in short, the 2007 Rules). A perusal of such definition would reveal that the names of candidates empanelled should be equal to the number of vacancies declared. Thus, the Commission was under an obligation to call the appellants for counseling and to recommend their names for appointment.

4. According to him, under the 2007 Rules there is no provision towards preparation of any '*combined merit list*' (hereinafter referred to as CML). Rule 12(6) of the 2007 Rules *inter alia* provides that each Regional Commission is required to prepare a subjectwise, mediumwise, categorywise and genderwise list of candidates on the basis of the marks obtained by the individual candidates in the written examination and evaluation of academic qualification. From amongst them, the candidates coming within the zone of 1.5 times the number of actual vacancies shall be called for PT. Thereafter in terms of Rule 12(8) each Regional Commission upon adding the marks obtained in the written examination, evaluation of the academic qualification and PT would prepare a panel of candidates and each panel

shall include names equal to the number of vacancies on 1:1 basis together with a waiting list on 1:0.1 basis. The appellants on the basis of merit were included in a panel and accordingly earned a right to be called for counseling. They have been arbitrarily denied of such right by the Commission contending *inter alia* that the appellants found place in a CML and not in the panel though in paragraph 4 of the affidavit-in-opposition it has *inter alia* been averred that a CML was published after adding the marks obtained in written examination, evaluation of academic qualification and PT.

5. He contends that the Commission had illegally denied the fact that the appellants were empanelled. The sequence of facts would clearly reveal that the alleged CML was prepared on 25th September, 2013 after the PT of the appellants was held in between 20th August, 2013 and 1st September, 2013. The Commission had sought to alter the nomenclature of the list from a panel to a CML though the same was admittedly prepared by the Commission including names equal to the number of vacancies. Such fact would be explicit from the answer given to an application seeking information under the Right to Information Act, 2005, *vide* memo dated 16th April, 2015.

6. He argues that there is no provision towards preparation of any CML. The Commission in terms of 2007 Rules can only prepare a panel on 1:1 basis and a waiting on 1:0.1 basis. Admittedly, the appellants were included in the panel but the learned Single Judge glossed over the said

issue and arrived at a finding that the appellants were never empanelled and dismissed the writ petition.

7. He argues that while disposing of the SLP, the Hon'ble Supreme Court in the order dated 4th September, 2017 granted liberty to the appellants to move the High Court so as to ascertain whether any decision had been taken not to fill up the vacancies from the existing panel. The advertisement dated 28th December, 2011 contemplated filling up of 36140 vacancies but only about 22000 vacancies were filled up though a panel was prepared and candidates were available. The issues of empanelment and recommendation for appointment in the existing vacancies are inextricably bound. Once a person is empanelled, he earns a right to be called for counseling and to be recommended for appointment in a vacancy. In the affidavit-in-opposition filed to the writ petition there is no clear explanation as to how many vacancies in the respective categories could not be filled up due to non-availability of candidates. The Commission has thus frustrated the legitimate rights of the appellants and it is incumbent upon the Court to prevent perpetration of such illegality and to prevent evasion of law. In support of such argument reliance has been placed upon the judgment delivered in the case of *A.P. State Financial Corporation –vs– M/s Gar Rolling Mills and Another*, reported in (1994) 2 SCC 647.

8. Drawing our attention to the CML produced on behalf of the Commission at the time of hearing of the earlier appeal being MAT 1257 of 2014, Mr. Kabir submits that candidates below the appellants have been recommended. Even if it is assumed that the candidates referred to under

remarks column belong to untrained para-teacher category, the maximum number of candidates who can be recommended under the said category is 10%. If the total declared vacancy under the concerned category was 313 then only 31 candidates in terms of such reservation can be recommended. However, a perusal of the purported CML would reveal that more than 31 candidates under the said category were recommended. Such anomaly maligns the purported CML from which the Commission had whimsically called some candidates for counseling.

9. He argues that it is a well settled proposition of law that a natural person has the capacity to do all lawful things unless his capacity has been curtailed by some rule of law. It is equally a fundamental principle that in case of statutory authority, it is just the other way. The said authority can act only in terms of the rules prescribed and operative. In the present case, the Commission being a statutory authority had traversed beyond the statutory rules having prepared a CML which is alien to the Rules.

10. Mr. Kabir contends that there is no definition of '*combined merit list*' in the 2007 Rules. However, the term '*panel*' stands defined under Rule 2 (f) meaning '*a list published by the Commission for Schools and for Madrasahs separately containing the names of candidates equal to the number of vacancies declared for a Regional level Selection Test found fit for appointment strictly in order of merit*'. A composite reading of Rule 2 (f) and Rule 12 (8) would clearly reveal that the Commission was under an obligation to prepare a panel including the names equal to the number of vacancies together with a waiting list, as defined under Rule 2(o)(i). Admittedly the appellants were

called for PT and were included in the CML published by the Commission. Once a candidate secures a berth in the panel on the basis of the marks obtained in the written examination, academic qualification and PT, he earns a right to be called for counseling and to be recommended for appointment since the number of candidates empanelled is equal to the number of vacancies. After allotment of marks towards academic qualification, written examination and PT, Commission under the rules can only publish a panel in terms of Rule 12 (8). Prior to preparation of the panel the stage is of preparation of a list in terms of Rule 12 (6). The said list would contain the names of the candidates who would be qualified for the PT test on the basis of the marks obtained in the written examination and after evaluation of academic qualification and the number of candidates to be called for PT shall not exceed 1.5 times the number of actual vacancies.

11. He argues that after conclusion of the PT, the Commission had published a list with the nomenclature '*combined merit list*' though there is no provision of towards preparation of any such CML. Whichever list is published after Rule 12 (6) stage, whatever may be its nomenclature, the same has to be construed as a list prepared under Rule 12 (8) and such a list would be a panel of candidates found fit for appointment strictly in order of merit and such list/panel shall include the names equal to the number of vacancies. The Commission having included the appellants in the said list cannot deny recommendation to the appellants for appointment.

12. *Per contra*, Dr. Patra, learned advocate appearing for the Commission submits that the preparation of the CML was an internal

arrangement. Without preparing such list, no panel could have been prepared categorywise, languagewise, mediumwise. In the said panels the appellants were not included and as such they did not earn any right towards recommendation and appointment. Furthermore, it is well-settled that mere empanelment does not confer any indefeasible right upon the concerned candidates to be appointed.

13. He submits that the issue of discrimination as urged on behalf of the appellants cannot be re-agitated in the present appeal since the said issue was finally decided in the earlier appeal being MAT 1257 of 2014 and in the SLP preferred against the same. The only issue that was left open for the appellants was to ascertain whether any decision had been taken by the Commission not to fill up the vacancies from the existing panel. By filing an affidavit-in-opposition to the writ petition the Commission had explained in details that as in different categories there were no suitable candidates, all the vacancies could not be filled up and in terms of Rule 20 of the 2007 Rules the said vacancies were carried forward and included with the vacancies of the next year.

14. He submits that the total number of candidates who find a position in the panel and in the waiting list is equal to 1.1 times the actual vacancies. Hence, candidates equal to 0.4 times the actual vacancies, who were included in the CML, do not find any position either in the panel or waiting list. The appellants are amongst those 0.4 times candidates, who were neither empanelled nor waitlisted.

15. He argues that identical issues came up for consideration in a writ petition being WPA no. 1330 of 2014 [*Ruma Das – vs.- State of West Bengal & Ors.*] wherein it was observed *inter alia* that by no stretch of imagination can the CML be deemed as a panel given the definition of panel under Rule 2(f) read with Rule 2(n), Rule 8 and Rule 12. Such finding stood affirmed by the Hon'ble Division Bench and the Hon'ble Supreme Court.

16. Indisputably, Ajijul applied for the post of Assistant Teacher under OBC-A category in the subject of Bengali (Pass), medium Bengali in the South Eastern Region whereas Bijoy applied for the post of Assistant Teacher under SC category in the subject of Bengali (Pass), medium Bengali in the Northern Region. The last selected candidate in Ajijul's category was at merit position no. 403 having secured 58.08 marks whereas Ajijul was at merit position 408 upon securing 57.33 marks. The last selected candidate in Bijoy's category was at merit position no. 708 upon securing 59.17 marks whereas Bijoy secured 56.33 marks and was at merit position 854. A co-ordinate Bench of this Court in the earlier appeal being MAT 1257 of 2014 scrutinized the CML and extracting the portion of the same, which contained the status of the appellants, arrived at a categoric finding that '*it is crystal clear to us that none of the writ petitioners/respondents was superseded by any candidate belonging to the same category in which the respective respondents belong*'. The appellants have failed to dislodge the rigors of such finding in the present proceedings.

17. Mr. Kabir has strenuously urged that on 17th July, 2018 by filing a supplementary affidavit wrong information was given by the Commission. In

paragraph no. 16 of the supplementary affidavit, the Commission declared vacancies as 313. Even, if that be true, then there were 4 declared vacancies available which were not filled up. According to CML total 324 SC candidates have been called for counseling. According to R.T.I. reply of Regional School Service Commission, among those 324 SC candidates only 15 candidates obtained general/unreserved vacancies school at the time of counseling as per their merit. Then definitely $(324 - 15) = 309$ SC candidates have been filled up by 309 candidates and 4 declared vacancies have not been filled and have been carried forwarded for next selection process. Out of those 4 vacancies one vacancy definitely could have been offered for recommending Bijoy as a SC category to the post of Assistant Teacher in Secondary or Senior Secondary School. In reply, placing reliance upon the CML of candidates, the Commission had shown that that there were 75 candidates who belonged to the same category as that of Bijoy and whose names featured above Bijoy in the CML and 72 of them obtained higher marks than Bijoy. Last three candidates out of those 75 candidates obtained same marks as that of Bijoy i.e. 56.33 but their names featured above Bijoy in the CML. In view thereof, we are unable to accept the argument of Mr. Kabir that the Commission had acted arbitrarily.

18. In the affidavit affirmed by the Commission before the writ Court on 25.05.2018 it was *inter alia* stated that CML prepared and published by the Commission was not a panel. Regionwise, subjectwise, categorywise, genderwise and mediumwise panels were prepared from the CML strictly in order of merit. The CML was not the panel. The appellants were placed in the

CML and the vacancies were filled up by the successful candidates, who were placed in higher ranks than the appellants in the CML. In the advertisement published on 29.12.2011 the number of vacancies declared was tentative and the total number of vacancies finally declared was 46,401. A total of 36,140 candidates were included in the CML and ultimately 30006 candidates were recommended. In some categories, less candidates were available and in some categories excess candidates were available and as such all of them could not be recommended. Though the appellants were placed in the CML, the respective vacancies in which the appellants applied for were all filled up and no occasion arose to empanel the appellants. The vacancies in the concerned region of the appellants in their respective categories were exhausted but in the selection process in other regions, subjects, categories etc. some vacancies could not be filled up for shortage of qualified candidates for the same. Such unfilled vacancies as per the Rules were duly carried forward in the subsequent selection process. As per leave granted by the Appeal Court on 03.11.2016, the Commission affirmed an affidavit on 11.11.2016 stating *inter alia* that the appellants could not be recommended as their ranks were lower than the last recommended candidate in the same category. Fact remains that prior to disposal of the SLP the panel which was prepared by the Commission expired on 24.03.2015 and all existing vacancies were carried forward to the next selection process in terms of the 2007 Rules.

19. From the above discussion it is clear that the Commission published a CML consisting of the candidates who appeared in the PT test and in the

said list the respective merit position was also indicated. Nomenclature is not relevant, it is the effect the entry has. Rigors of the entry is relevant and not the phraseology. Whatever be the nomenclature of the said list it was a list consisting of candidates who participated in the PT and secured the merit position as indicated in the said list. Subsequent thereto, the Commission had recommended candidates strictly on the basis of the merit position of the respective candidates.

20. Ordinarily the advertisement/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 provide/so indicate the employer is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the employer has the license of acting in an arbitrary manner. The decision 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 employer is bound to respect the comparative merit of the candidates and no discrimination can be permitted.

21. In the present case, the Commission had recommended candidates strictly on the basis of the merit position of the respective candidates. Shrinkage of the CML following the parameter of merit cannot be questioned as arbitrary. The appellants have not been superseded by any candidate belonging to the same category and from the same region in which they appeared. The status as examined at the time of disposal of the earlier

appeal has not changed. The appellants admittedly did not secure the marks to come within the zone of consideration.

22. For the reasons discussed above, the appeal, the application for stay being IA No. CAN 1 of 2019 [Old No. CAN 7589 of 2019] and the application for addition of party being IA No. CAN 3 of 2021 are dismissed. The applications for early hearing being IA No. CAN 2 of 2020 and IA No. CAN 4 of 2022 are disposed of.

23. There shall, however, be no order as to costs.

24. Urgent Photostat certified copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)