

Calcutta High Court (Appellate Side)

Shibu Sarkar vs The State Of West Bengal & Ors on 5 July, 2017

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

PRESENT: The Hon'ble Mr. Justice Subrata Talukdar

W.P. 2351(W) of 2017

Shibu Sarkar

-Vs-

The State of West Bengal & Ors.

For the Petitioner : Mr. Bimal Chatterjee
Mr. Sukanta Chakrabarty
Mr. Anindya Halder

For the College Authority : Mr. Bikash Ranjan Bhattacharya
Mr. Soumen Dutta
Md. G.N. Imrohi

For the respondent No.6 : Ms. Debjani Sengupta

Ms. Shreya Bhattacharya For the respondent No.21 : Mr. Atarup Banerjee For the State : Ms. Chaitali Bhattacharya Heard on : 22/02/2017 & 13/04/2017 Judgement on : 05/07/2017 Subrata Talukdar, J.:

The short facts of this case relate to an Employment Notification dated 24th May, 2016, issued by and on behalf of the Principal, Belda College, District - Paschim Medinipur, (for short the College in issue). Vide the said Employment Notification candidates were called for a written examination for Group C and Group D posts at the College in issue.

The written examination was followed by an interview which was held on 30th October, 2016 and 31st October, 2016. The respondent No.21 was appointed to the post of Laboratory Assistant (for short LA) under the Persons with Disability (for short the PWD) quota.

The writ petitioner has now, by way of this writ petition, challenged the appointment of the respondent No.21.

Mr. Bimal Chatterjee, learned Senior Counsel, arguing on behalf of the writ petitioner, points out that the appointment of the respondent No.21 in the PWD category is violative of the 100 Point Roster of the Backward Classes Welfare Department (for short BCWD) dated 24th September, 2010, read with the relevant provisions of the West Bengal Regulation of Recruitment in State Government Establishments, Public Undertakings, Statutory Bodies, Government Companies and Local Authorities Act, 1999 (for short the 1999 Act) as well as the West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancies) Act 1976 (for short the 1976 Act) and the West Bengal Commission for Backward Classes Act, 1993 (for short the 1993 Act).

Mr. Chatterjee argues that under the 100 Point Roster each of the three vacancy points, viz. the 12th, the 42nd and the 72nd position are reserved for PWDs. Under the provisions of the PWD (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short the 1995 Act), the above noted vacancies must be reserved at one per cent each for the three categories of PWD. The categories in the following sequence of reservation, are:- (a) blindness and low vision, (b) hearing impairment; and (c) loco motor disability or cerebral palsy. Mr. Chatterjee further points out that the above noted provisions of the 1995 Act read with the Notification of the Labour Department, Government of West Bengal dated 1st of March, 2011 (for short the 2011 Notification) earmark the 12th vacancy specifically for candidates with blindness or low vision. In this connection, Mr. Chatterjee relies upon Sections 33 and 36 of the 1995 Act which read as follows:-

"33. Reservation of posts.--Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from--

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy, in the posts identified for each disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

36. Vacancies not filled up to be carried forward.--Where in any recruitment year any vacancy under section 33 cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government."

Learned Senior Counsel for the petitioner argues that therefore applying the provisions as above, in the event any of the three categories of vacancy points cannot be filled up due to non-availability of suitable candidates with the disability entitling his consideration to such vacancy point or, for any other sufficient reason, such vacancy shall be carried forward to the succeeding recruitment year.

Submitting that Section 36 of the 1995 Act also provides for the contingency which may arise in the event a person of the particular PWD category is not available or, not found to be suitable, the employer, in this case the College in issue, is entitled to interchange the vacancy from out of any of the vacancy categories with the 'prior' (emphasis supplied) approval of the appropriate Government.

Therefore, Mr. Chatterjee submits that since the 12th vacancy under the Employment Notification of 24th May, 2016 for the post of LA stood specifically reserved for a blind or low vision person under the PWD category, the respondent No.21, who is purportedly found to be suffering from hearing impairment, cannot be automatically appointed without first exhausting the blind or low vision probables who, if the position was advertised strictly in accordance with law, could stake their claim. The appointment of the respondent No.2 in total disregard of Sections 33 and 36 of the 1995 Act makes such appointment a nullity.

Learned Senior Counsel for the petitioner further submits that in the event no suitable candidate from the blind or low vision category was found for the 12th vacancy, the vacancies ought to have been carried forward under Section 36 of the 1995 Act and, in the event the vacancy still could not be filled up, it could be only interchanged with a person of hearing impairment or any other disability with the 'prior' approval of the appropriate Government.

Therefore, Mr. Chatterjee submits that there has been an unseemly haste on the part of the respondent/College in issue in taking the resolution for appointing the respondent No.21 to the 12th vacancy without compliance with the statutory procedure provided under Section 36 of the 1995 Act. Additionally, the lapse in the Employment Notification dated 24th May, 2016 to pinpoint the PWD category exactly eligible to apply for the 12th Vacancy point de hors the statutory provisions, warrants an interdiction by this Court.

On the question of locus of the petitioner to move the writ petition, although the writ petitioner was not a candidate qua the Employment Notification dated 24th May, 2016 (supra), Mr. Chatterjee relies upon the law as already discussed by this Court vide its interim order dated 22nd of February, 2017, to highlight the point that in the event the decision making process/appointment procedure lacks legal integrity and, is consequently a nullity, the petitioner, although not being a candidate, is not estopped from seeking the enforcement of his statutory rights. Learned Senior Counsel submits that the petitioner, being a blind person, would lose a vital opportunity of seeking employment in the event the 1995 Act read with its supporting enactments is not read and/or implemented in a purposive manner since the 12th Vacancy in the roster first belongs to a blind or low vision person.

Arguing on behalf of the respondent/College in issue, Mr. Soumen Dutta, learned Counsel led by Mr. Bikash Ranjan Bhattacharya, learned Senior Counsel, makes the usual point that the petitioner, not being a candidate to the selection process, is estopped at this stage from challenging the selection. Relying on the affidavit in opposition filed on behalf of the respondent/College in issue, Mr. Bhattacharya submits that the post of LA was authenticated by the BCWD for the PWD category. Accordingly, in the Employment Notification applications were invited from the PWD category. A total of 20 candidates were sponsored by the Employment Exchange from the PWD category and, no person with blindness or low vision, applied.

Therefore, the College in issue acting through its GB, adopted a resolution to the effect that since the subject of Zoology is in urgent requirement of a LA who, may be a person with PWD but may be unable to discharge such duties due to blindness or low vision. Therefore, the respondent No.21, who was also a PWD candidate suffering from hearing impairment stood selected.

It is therefore submitted that the selection was correctly done by following the 100 Point Roster and granting the 12th vacancy to a PWD candidate. In view of the authentication by the BCWD that the 12th vacancy belongs to the PWD category, the properly constituted Selection Committee of the College in issue decided to appoint the respondent No.21 upon fulfillment of the necessary norms. Such appointment was also referred to the Director of Public Instruction (for short DPI) for granting approval and, has been so approved.

The petitioner cannot, therefore, wake up in the month of February, 2017 challenging a concluded selection of May, 2016, since, in view of his conduct, the petitioner cannot be said to have been irreparably prejudiced.

On behalf of the respondent/University, Ms. Debjani Sengupta, learned Counsel appears. The State Respondent is represented by Ms. Chaitali Bhattacharya, learned Senior Government Advocate.

For the respondent No.21 Mr. Atarup Banerjee, learned Counsel reiterates the point that the selection of the respondent No.21 was bona fide conducted from the PWD category.

Having heard the parties and considering the materials placed, this Court arrives at the following findings:- (A) That admittedly the 1995 Act is an enabling legislation. The provisions of the 1995 Act must be read in harmony with the Constitutional guarantees covering the Right to Equal Employment Opportunities.

(B) It is trite law that when a law or a legally mandated procedure requires a thing to be done in a particular manner, such thing or action must be performed in that manner or, not at all. Inspiration for the above observed legal proposition can be culled from the principles laid down In Re:- Ramchandra Murarilal Bhattad and Others Vs. State of Maharashtra and Others (2007) 2 SCC 588 at Paragraph 47 and In Re: Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. and Others reported in (2003) 2 SCC 111 at Paragraph 40. Both the paragraphs may be usefully respectively reproduced for the sake of this discussion:-

(2007) 2 SCC 588:

"47. There is not dispute over the proposition that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. But in this case, the Authority has not exercised any power forbidden by law or in the manner which is not in accordance with law.

(2003) 2 SCC 111:

40. The statutory interdict of use and enjoyment of property must be strictly construed. It is well settled that when a statutory authority is required to do a thing in a particular manner, the same must be done in that manner or not at all. The State and other authorities while acting under the said Act are only creature of statute. They must act within the four corners thereof."

(C) Admittedly, the 12th vacancy was reserved for a person with blindness or low vision. It is, therefore, far from an accurate representation of the correct statutory procedure that the 12th vacancy is simply advertised to be filled up from the PWD category ignoring the clear intention of both the 1995 Act and the Labour Department Notification (supra) for reserving such vacancy in favour of a blind or low vision candidate. It stands to reason that in the event the 12th vacancy could not be filled up from the particular category of blind or low vision, the next vacancy which could arise for such category in the 100 Point Roster, stood miles away in the 42nd and 72nd positions respectively.

Accordingly, this Court is of view that in the event the petitioner or, any person with blindness or low vision, stands to lose the opportunity to even apply for the 12th vacancy, both the constitutional guarantee and the statutory protection of equal employment opportunity stand frustrated.

(D) This Court must further notice that under Section 36 of the 1995 Act the contingency of not having a suitable (emphasis supplied) candidate from a particular PWD category is taken notice of by permitting the employer/viz. the College in issue to approach the appropriate authority in the Government namely, in this case the DPI, to grant "prior" approval for interchange of categories. For the reasons best known to it, the respondent/College in issue proceeded with the appointment of the respondent No.21 on the assumption of a post facto approval by the DPI which, contrary to the statutory procedure, followed the initial appointment. In this connection it must be clarified that the approval of the appropriate authority in the Government must be "prior" and, not post facto, having regard to the clear language of Section 36 of the 1995 Act.

(E) To the mind of this Court the suitability of a person connected to discharge of duties as a LA in the Zoology Department of the College in issue may extend to consideration of the disability of a blind or low vision person being functionally deficient. However, such lack of suitability, which is now being presented at the stage of response by the College in issue to the legal challenge mounted by the petitioner, cannot justify a post facto plea for approval by the GB placed before the DPI.

In the backdrop of the above discussion, this Court finds merit in the maintainability of this writ petition as well as the ground taken that the appointment of the Respondent No.21 represents a colourable exercise of power.

Accordingly, the appointment of the respondent No.21 and, any consequential action taken in aid of such appointment, stands declared to be a nullity.

The respondent/College in issue shall be, however, free to readvertise the post in issue of LA (Zoology) strictly in accordance with law.

W.P. 2351(W) of 2017 stands accordingly allowed. Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.

(Subrata Talukdar, J.) Later Mr. Atarup Banerjee, Ld. Counsel for the petitioner prays for stay of operation of this judgment and order. Prayer for stay is considered and rejected.

(Subrata Talukdar, J.)