

Calcutta High Court
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Somak Das vs State Of West Bengal on 21 April, 2005
Equivalent citations: (2005) 2 CALLT 465 HC
Author: V Sirpurkar
Bench: V Sirpurkar, A K Ganguly
JUDGMENT

V.S. Sirpurkar, C.J.

1. Heard finally with consent of parties.

2. This matter pertains to the selection and appointment of petitioner for the post of West Bengal Civil Services (Judicial) 2003. The writ petitioner appeared for the necessary tests and admittedly cleared them. However, there was one more factor which he had reported while applying for the candidature. He had pointed out that he was suffering from physical disability and he was a physically challenged candidate. He was not selected and, therefore, he approached the Court by way of writ petition wherein he pointed out that there was no reservation provided in terms of Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The learned Judge took the view that the petitioner had appeared at the selection test, succeeded and thereafter was called for interview but he was not selected. It was clear that he had participated in the selection process as a general candidate and did not succeed and, therefore, he could not turn back and find fault with the selection process. The learned Judge dismissed a few other petition with which we are not concerned today. The learned Judge accordingly dismissed the writ petition.

3. The appellant now is before us by way of this appeal. The learned counsel for the appellant points out it was an admitted position that the concerned appellant was a physically challenged person and that there was in reality no reservation made for the physically challenged persons.

4. The learned counsel for the appellant drew our attention to Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and contended that it was imperative under that Act for every government to appoint in establishment such percentage of vacancies not less than 3% for persons or class of persons with disability, like (i) blindness or low vision; (ii) hearing impairment; (iii) locomotor disability or cerebral palsy, as provided in that provision. We are not concerned with the proviso in the circumstances of this case. Relying on that Section the counsel averred that there ought to have been reservation for the handicapped persons.

5. The learned counsel argues that such reservation for the physically challenged persons not being there in the present selection the whole selection process was rendered illegal on that score. The learned counsel has invited our attention to the advertisement and from that it seems that there was no reservation for the physically challenged persons. There are 141 vacancies shown, out of which 103 were for general category, 13 for scheduled caste, 10 for scheduled tribes and 7 for backward classes. Beyond these, there does not appear to be any reservation. Our attention was also invited by the learned counsel to the contents of the advertisement which suggest that for the physically handicapped candidates having disability 40% above, the age limit, shall be relaxed upto 45 years. We are taken through the application form wherein it is suggested that the petitioner/appellant Somak Das had claimed to be belonging to general category and had also tick-marked the entry under 'PH' (physically handicapped). Therefore, it was obvious that the petitioner/appellant had pointed out that he was a physically handicapped person but had not claimed for any relaxation of age on that account. It is, no doubt, true thereafter he appeared for the written test and cleared the same and as a result of that he was called for the personal interview also.

6. The learned counsel for the appellant/petitioner has thereafter taken the pains to point out that a select list of 135 persons was released, wherein the name of the appellant/petitioner did not figure.

7. The learned counsel also relied on a letter dated 14th October, 2004 (Annexure P/5 to the writ petition) which seems to suggest that the appellant/petitioner was required to bring a Certificate suggesting that he was a physically handicapped person. That is apparent from paragraph 3 of the said letter.

8. There can be no dispute with the proposition that once a person chooses to take part in the selection, he cannot turn back and call the names to the selection process. This principle is settled in *Madan Lal v. State of J&K*, . *Omprakash Shukla v.*

Akhilesh Shukla reported in 1986 SCC (supp.) 285, and *Union of India v. N. Chandrasekharan*, . However, where there

has been an error which would go to the very root of the selection the Constitutional Courts are not debarred from interfering. That is the ratio of the Supreme Court in '*Raj Kumar and Ors. v. Shakti Raj and Ors.*' .

9. In the aforementioned decision, the Supreme Court observes in paragraph 16 as follows:

"... It is true, as contended by Sri Madhava Reddy, that this Court in *Madan Lal v. State of J&K* and *Ors.* decisions referred therein held that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge either the constitution of the Selection Board or the method of selection as being illegal, he is estopped to question the correctness of the selection. But in this case, the Government have committed glaring illegalities in the procedure to get the candidates being examined under the 1955 Rules, so also in the method of selection and exercise of the power in taking out from the purview of the Board and also conduct of the selection in accordance with the rules. Therefore, the principle of estoppel by conduct or acquiescence has no application to the facts in this case...."

10. Similar is the situation here. In not reserving any posts for physically disabled candidates as per the mandate of Section 33 of the Persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, 1995 a glaring procedural irregularity has crept in. Not only this, but it has to be realised that the challenge is not to the constitution of the Selection Board or the method of selection. The challenge is regarding the very availability of the post for the disabled persons. Here was an advertisement where we do not find any reservation for the physically handicapped person and as such, reservation not being there, it was undoubtedly a basically defective advertisement. However, the fact cannot be ignored that the appellant/petitioner did not challenge the advertisement and instead choose to appear.

11. We do not find anything wrong in the view taken by the learned Judge under circumstances. However, we find that the learned Judge did not address on the issue as to whether the selection process suffered from inherent defects. We have gone through the Judgment very carefully. The only ground on which the learned Judge rejected the petition was that the appellant/petitioner had taken part in the selection process and having found himself unable to succeed in the same had turned to challenge the selection process. That undoubtedly is true. However, in our opinion, the learned Judge should have also addressed himself on the issue as to whether there was any inherent error in the selection process. We find that non-reservation for the category 'physically handicapped persons' would amount to an inherent error.

12. When we confronted this the learned Government Pleader very frankly admitted that the advertisement was erroneous. We appreciate the fairness on the part of the Government Pleader who makes no bones about the aforementioned inherent error which had crept in the said advertisement. We also confronted this to the learned counsel appearing for the Public Service Commission who, however, contended that the advertisement was issued on the basis of the requisition of the Government and that strictly in terms of the requirement of the Government and the Recruitment Rules. There can be no doubt that Public Service

Commission, which published the advertisement, would undoubtedly be guided by the communications of the Government. However, that would not absolve either the Government or the Public Service Commission if the advertisement is the inherently incorrect. The question is, therefore, as to what is the course to be taken under the circumstances.

13. It is reported before us that 135 candidates have already been selected though vacancies were for 141 candidates. It is also reported in terms of the selection such candidates have also joined in their posts. None of them was a party to this writ petition or to this appeal. It will not, therefore, be possible to upset the whole selection process if any via media can be found out to allay the grievances of the petitioner/appellant. In that view, we asked the Government Pleader as to whether any post was available for being filled up. The learned Government Pleader reports to us that 6 posts made for the S.T. have not so far been filled up. Besides that, he points out that some 2/3 persons who were initially selected have not chosen to join leaving those posts vacant. Specific question was put to the learned counsel for the Public Service Commission, as to whether there was any bench mark for the written test and also for oral interviews. The learned counsel very frankly admitted that the petitioner had scored above the bench mark so far as the written test and the oral interviews were concerned. The learned counsel pointed out that the candidate had to score 40% for being included in the merit list and we find that the present candidate has scored more than that and his score being 47%. The position of the candidate in the merit list is at 166. We also tried together from the learned counsel, for the respondent, as to how many physically handicapped persons had cleared the examination and the interview. We were told that there are only 2 candidates, they being (1) Shri Subhasis Bhattacharya who had scored 598 and his position is 114 in the general standard list and, the petitioner/appellant who scored 564 marks and was placed at 166 position in the general standard list. It is needless to mention that had there been any reservation provided, then the two persons namely, Subhasis Bhattacharya and Somak Das, would have found their names in the select list as of right on the basis of their score in the written test as well as in the oral interview. Under these unusual circumstances, we feel that complete justice would be done to the two physically handicapped persons if a direction is given to include their names in the select list and further to offer them an appointment in the post sought for.

14. Accordingly, we set aside the judgment of the learned Single Judge and allow this appeal with a direction, as we have already mentioned above. In this matter Subhasis Bhattacharya has not challenged the selection process nor is he before us. However, a direction will have to be given in his favour also as otherwise the petitioner/appellant cannot succeed and according to us, he is entitled to succeed in law. It is for this reason the appeal, treating the same as on day's list, must succeed and the respondents are directed to act according to the directions issued.

15. The application for injunction (CAN 1473/05) also stands disposed of.

16. No order as to costs.

17. If urgent xerox certified copy of this judgment and order is applied for, the same be supplied to the applicant upon compliance of all the formalities.