

(2007) 11 CAL CK 0005**Calcutta High Court****Case No:** FMA No. 628 of 2004

West Bengal School Service
Commission and Another

APPELLANT

Vs

Shelly Jaffri Latif and Others

RESPONDENT**Date of Decision:** Nov. 23, 2007**Acts Referred:**

- Constitution of India, 1950 - Article 15

Citation: (2008) 1 CHN 801 : 112 CWN 321**Hon'ble Judges:** Tapas Kumar Giri, J; Ashim Kumar Banerjee, J**Bench:** Division Bench**Advocate:** Saikat Banerjee, for the Appellant; Saktinath Mukherjee, Abu Jafar M.S. Alam, Tanmay Goswami and Aloke Chatterjee, for the Respondent

Judgement

Ashim Kumar Banerjee, J.

The respondent No. 1 sat for the School Service Commission Examination for the post of assistant teacher in English in 2001. She was successful and she was placed at serial No. 75 in respect of female vacancies. She was ultimately recommended in Raghunathpur Girls High School in Basirhat in the district of 24-Parganas North. She did not join there on the ground that the school was distant from her residence at Calcutta. She approached the Commission for change of placement. The Commission did not act upon such request. Being aggrieved she approached the learned Single Judge by filing a writ petition inter alia, praying for issue of writ of mandamus directing the Commission to recommend her in any school at Park Circus, Ballygunge, Taltala or Sealdah in Calcutta, so that she could join her new posting after such alteration. It was contended that she was having two minor children and ailing husband suffering from pancreatitis.

2. The learned Judge allowed the writ petition and directed the Commission to place her in a school near to her residence where vacancy occurred in 2003 whereas she

was considered for the vacancy declared in 2001.

3. Pertinent to note, respondent No. 1 was placed in Central Collegiate School at Calcutta for which the Commission could not get any opportunity to hold any selection test after declaring the said vacancy. The Commission had to accommodate the respondent No. 1 in terms of the order of the learned Single Judge.

4. Being aggrieved by, and dissatisfied with, the judgment and order of the learned Single Judge, the Commission preferred the instant appeal. At the time of admission of the appeal the Division Bench made it clear that her appointment to the new school would be subject to the result of the appeal.

5. On analysis of the judgment and order of the learned Single Judge we find that His Lordship discussed Article 15 of the Constitution and observed that the State should find out ways and means so that female candidates could be accommodated in nearby school and they could perform their duties more effectively. His Lordship made detailed discussion on "women empowerment". His Lordship perhaps overlooked that she was considered in female vacancy and she was placed at such.

6. On perusal of the affidavit-in-opposition filed before His Lordship we find that the successful candidates, who could secure similar position with the respondent No. 1, were placed in various girls" schools which were also distant from their respective places of residence. In this regard paragraph 12 of the said affidavit appearing at pages 45-46 of the paper book may be referred to.

7. Mr. Saikat Banerjee, learned Counsel appearing for the appellants contends that under the School Service Commission Act it was the primary duty of the Commission to recommend teachers from the panel of successful candidates strictly in accordance to merits. The writ petitioner/respondent No. 1 was in serial No. 75 and accordingly, she was placed. There was no nearby school available to accommodate the respondent No. 1 when her turn for recommendation came. Mr. Banerjee further contends that once a recommendation is made by the Commission, there is no scope for alteration of such recommendation by acceding to the request made by the candidate. Moreover, it would create an anomalous situation.

8. In support of his contention Mr. Banerjee has relied on a Division Bench decision of this Court in the case of Chairman, West Bengal Central School Service Commission and Ors. v. Saswati Pramanick and Ors. reported in 2007(2) CLJ 301, wherein on identical issue the Division Bench set aside the order of the learned Single Judge directing change of posting. The Division Bench held that such order was grossly illegal and irregular.

9. Opposing the appeal Mr. Saktinath Mukherjee, learned Senior Counsel has contended as follows:

I) The respondent No. 1 was a lady candidate. She narrated her immense difficulties in her petition. No mala fide was alleged by the Commission. Hence, the learned Judge was right in acceding to her request directing change of posting.

II) By the order impugned no other candidate was displaced as the vacancy in Central Collegiate School was filled in by the respondent No. 1 without displacing any other candidate. Hence, no prejudice was caused to anyone.

III) Assuming the order impugned cannot be sustained, since the respondent No. 1 is working in the post for last four years, the Division Bench should not upset such position which would ultimately amount to loss of livelihood.

10. In support of his contention to the extent that the respondent No. 1 should not be disturbed irrespective of the result of the appeal, Mr. Mukherjee has relied on the following decisions:

- 1) [Dr. \(Mrs.\) Meera Massey, Dr. Abha Malhotra and Dr. S.C. Bhadwal and Others Vs. Dr. S.R. Mehrotra and Others,](#)
- 2) [Karnataka State Private College Stop-Gap Lecturers Association Vs. State of Karnataka and Others, \)](#)
- 3) [H.C. Puttaswamy and others Vs. The Hon"ble Chief Justice of Karnataka High Court, Bangalore and others,](#)
- 4) [Miss Shainda Hasan Vs. State of Uttar Pradesh and others, .](#)

11. To sustain the judgment under appeal Mr. Mukherjee has relied on a decision of the Apex Court in the case of Brahmo Samaj Education Society and Ors. v. State of West Bengal and Ors. WP (Civil) Nos. 9683-84 of 1983. In the said decision the question of right of the petitioner to select their own teaching staff was considered by the Apex Court. The Apex Court relied upon the earlier decision in [T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others,](#) . While deciding the issue on the right of the college to choose their own teaching staff the Apex Court observed that the State cannot impose restriction on selection of teaching staff subject to the statutory guidelines.

12. We have considered the rival contentions of the parties. We have also considered the decisions cited at the bar. Emphasis has been put in the case of Brahmo Samaj Education Society (supra). In the said decision the Apex Court merely reiterated what was observed in TMA Pai (supra). In the Constitution Bench decision in TMA Pai (supra) the issue of State control over the private educational institutions was called in question. While dealing with the said question, the Apex Court made the remarks as recorded above. The college teachers are appointed under the West Bengal College Service Commission Act. The colleges are run being affiliated by respective Universities which are also in turn affiliated to the University Grant Commission being a statutory body set up under the Central statute. Under the

University Grant Commission guidelines a college teacher has to undergo National Educational Test (NET) or State Level Eligibility Test (SLET), where a particular State is permitted to hold such test by University Grant Commission. The provisions of West Bengal School Service Commission Act might be pari materia with West Bengal College Service Commission Act, 1978. However, there are certain dissimilarities on the working procedure. In the aided educational institutions at the secondary or higher secondary level no teaching staff can be appointed without being recommended by the School Service Commission. The entire salary is being funded by the State in respect of the aided institutions. The State is empowered under the said Act of 1978 to frame rules relating to college teachers and accordingly, rules were framed. As per rules of the School Service Commission successful candidates are placed in a combined panel and thereafter, recommendations are made as per the reserved category. In the instant case, the respondent No. 1 was in serial No. 75 in female category. It was stated in the affidavit filed by the Commission that no nearby school could be found when her turn came and she was placed at Raghunathpur Girls" High School in the vacancy available to the Commission. Such vacancies were filled up from amongst female candidates. Hence, the question of "women empowerment" so raised by His Lordship is not at all relevant. His Lordship proceeded on the basis as if she was not considered for any vacancy in a nearby school. Factually, it was not correct as it appears from paragraph 12 of the affidavit filed by the Commission appearing at pages 45-46 of the paper book.

13. To maintain transparency the State has now changed their rules. Now, the candidates are free to choose their own posting strictly in accordance with merits, meaning thereby the candidate being serial No. 1 would be free to choose his/her place of posting from amongst all declared vacancies for which he/she was empanelled. After his/her choice the next candidate would get the remaining vacancy for his/her own consideration. The candidate at the bottom of the list would have no choice but to accept the lone residuary vacancy available for him/her. Such system is now being followed which was however, not available at the time when the respondent No. 1 was selected.

14. We are constrained to hold that this Court was not competent to direct the Commission to recommend the respondent No. 1 in a vacancy which occurred in 2003 and was not considered for filing up either contemporaneously when the respondent No. 1 was selected or subsequently. The Commission was directed to accommodate the respondent No. 1 in an undeclared vacancy which was grossly irregular.

15. It is contended on behalf of respondent No. 1 that if the judgment and order impugned is set aside, it would create an anomalous situation as the original posting given to the respondent No. 1 by that time has already been filled up and she would ultimately lose her means of livelihood. This ground cannot be the sole justification for retaining her in her present place of work, which would amount to

retaining such irregularity and/or illegality.

16. The appeal thus succeeds. The judgment and order of the learned Single Judge is set aside.

17. The respondent No. 1 is working in the post for so long. An opportunity should be given to her by the Commission to sit for the next regional level selection test in 2008 and for that purpose she should be considered as in service candidate. In case, she is empanelled, she must be given opportunity to choose her posting in terms of the present rules.

18. In case the respondent No. 1 is not successful in such eligibility test in 2008, she would be placed at the bottom of the list of successful candidates and for that matter one unspecified vacancy should be kept for her and in such event, she would be recommended in the lone residuary vacancy after the successful candidates choose their own posting.

19. The respondent No. 1 must make appropriate application before the Commission to get benefit of this judgment within the stipulated period. In case respondent No. 1 does not apply within the stipulated period, it would be understood that she is not interested to retain her service. In case she applies, she would be entitled to be retained in service at her present place of posting till she joins her new place of posting in terms of this order. So long such process is not complete; she may not be disturbed at her present place of posting.

20. The appeal is disposed of accordingly without any order as to costs.

Urgent xerox certified copy of this order, if applied for, may be given to the parties on priority basis.

Tapas Kumar Giri, J.

21. I agree.