

(2013) 08 CAL CK 0078

Calcutta High Court

Case No: W.P. No. 22343 (W) of 2013

Raju Naskar

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** Aug. 22, 2013**Citation:** (2014) 1 CHN 654**Hon'ble Judges:** Debasish Kar Gupta, J**Bench:** Single Bench**Final Decision:** Disposed Off

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### Judgement

Debasish Kar Gupta, J.

Let the affidavit-of-service filed by the petitioner be kept on record. This writ application is directed against an order passed by the respondent No. 3 under Memo. No. L.C.-269/2(3) dated November 5, 2012. By virtue of the impugned order the respondent No. 3 rejected the prayer for approval of the panel prepared for appointment of a Non-teaching Staff (Clerk) of Chakkendua Vidyasagar Vidyayatan High School, District-South 24-Parganas. According to the petitioner, his name appears at the top of the panel under reference.

2. Having heard the Learned Counsel appearing for the respective parties as also after considering the facts and circumstances of this case I find that the panel under reference was rejected on the following grounds:

(i) The panel was submitted beyond the prescribed period of 30 days in violation of Clause (c) of sub-rule (7) of Rule 9 of the West Bengal Schools (Recruitment of Non-teaching Staff) Rules, 2005 (hereinafter referred to as the said Rules, 2005);

(ii) In violation of the provisions of Clause (b) of sub-rule (7) of Rule 9 of the said Rules, 2005, the candidates were not short-listed;

(iii) The interview letters were not sent to the short-listed candidates by registered post with acknowledgement due.

3. For proper adjudication of the above grounds, the provisions of Clause (c) of sub-rule 7 of Rule 9 and Clauses (b) and (c) of sub-rule (7) of the Rule 8 of the said Rules, 2005 are set out below:

9. ....

(7)(a) .....

(b) .....

(c) The District Inspector of Schools shall, within one month from the date of receipt of the panel, convey his decision thereon.

8 .....

(7)(a) .....

(b) In case of the applications received following the notice or advertisement, if the number of applications received by the selection committee is more than ten, a preliminary screening and a short list may be made by the selection committee on the basis of the marks obtained in the relevant examination or examinations and all the short-listed candidates shall be called for interview, (c) The candidates shall be called for interview by registered letters within acknowledgement due.

4. The provisions of Clause (c) of sub-rule (7) of Rule 9 of the said Rules, 2005 has already been interpreted by a judgment dated July 12, 2013 delivered in the matter of Shyamal Sen vs. The State of West Bengal & Ors. (In Re: W.P. No. 10501 (W) of 2012) and the relevant portions of the above decision are set out below:

After perusing the aforesaid provision, I find that in the event this provision is interpreted as mandatory under the provisions of the Recruitment Rules under reference, the intention of the framers of the above Rules may be frustrated at the instance of the Managing Committee by sending the panel prepared for recruitment of Non-teaching Staff to the State authority after expiry of the period mentioned in the aforesaid Rules. On the other hand if it is interpreted as directory, the ulterior motive of the school authority may be served in an appropriate case by not forwarding the panel to the State authority for uncertain period.

In such a situation SIR WILLIAM WADE observed in his "ADMINISTRATIVE LAW", 8th EDITION (at page 227) as follows: Acts of Parliament conferring power on public authorities very commonly impose conditions about procedure, for example by requiring that a notice shall be served or that action shall be taken within a specified time or that the decision shall state reasons. If the authority fails to observe such a condition, is held to be mandatory or directory. Non-observance of a mandatory condition is fatal to the validity of the action. But if the condition is held to be merely directory, its non-observance will not matter for this purpose. In other words, it is not every omission or defect which entails the drastic penalty of invalidity.

The distinction is not quite so clear-cut as this suggests, since the same condition may be both mandatory and directory: mandatory as to substantial compliance, but directory as to precise compliance.....

In view of the above, I find that the correct interpretation shall be that the above provision is mandatory for his substantial compliance and directory for its strict compliance. On the basis of the above interpretation of the provision under reference, I find that the submission of the panel beyond the period of one month was permissible.

5. So far as the second ground is concerned, it is the settled principles of law that unless a consequence is prescribed a provision with has to be interpreted as directory and not mandatory. Reference may be made to the decision of [Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur](#), and the relevant portions of the above decision are set out below:

29. This in fact was the exact question which had been decided by a Bench of five Judges in the case of Raza Buland Sugar Co. Ltd. vs. Municipal Board, Rampur. In that case municipal water tax was sought to be levied u/s 131 of the U.P. Municipalities Act, 1916. In terms of section 131(3), the Municipal Board was required to publish its proposal relating to the tax and the draft rules in connection therewith along with the notice in the specified format. Section 94(3) provided for the manner of publication of the resolution of the Municipal Board. The method of publication prescribed was "in a local paper published in Hindi and where there is no such local paper, in such manner as the State Government may, by general or special order, direct". The publication was made in a local paper published in Urdu. Wanchoo, J., speaking for the majority held that the provision for publication contained in section 131(3) was mandatory but the mode of publication provided in section 94(3) was not. Therefore, the publication in an Urdu newspaper was held to be sufficient and in substantial compliance with section 94(3). This conclusion was arrived at despite the use of the word "shall" in section 94(3). This is what the Court said: (AIR pp. 899 & 901, paras 7 & 10)

The question whether a particular provision of a statute which on the face of it appears mandatory--inasmuch as it uses the word "shall" as in the present case--or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining fact. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.

.....As we have said already the essence of section 131(3) is that there should be publication of the proposals and draft rules so that the taxpayers have an opportunity of objecting to them, and that is provided in what we have called the first part of section 131(3); that is mandatory. But the manner of publication provided by section 94(3) which we have called the second part of section 131(3), appears to be directory and so long as it is substantially complied with that would be enough for the purpose of providing the taxpayers a reasonable opportunity of making their objections. We are therefore of opinion that the manner of publication provided in section 131(3) is directory.

6. With regard to third ground for rejecting the proposal for approval of the panel under reference is concerned, the above issue has also been settled by a Division Bench of this Court in the matter of [Asok Kumar Malik Vs. The State of West Bengal and Others](#), and the relevant portions of the above decision are set out below:

17. Rule 8(7)(c) is not a provision conferring power, but prescribes a procedure. This distinction is of great importance in finding out whether the word "shall" mentioned in the Rule is mandatory or not. A power given by a statute is to be used in the manner directed and other modes of performance is impliedly forbidden as has been clearly held in [Ramchandra Keshav Adke \(Dead\) by Lrs. and Others Vs. Govind Joti Chavare and Others](#), referring to Taylor vs. Taylor. But a procedural provision, as in Rule 8(7)(c), does not contain any implied prohibition so as to bar other modes of performance. Rule 8(7)(c) does not confer a power so as to attract the doctrine of implied prohibition. A statutory duty of doing something within a time-frame, as opposed to an exercise of statutory power, has been held to be directory. The decision of the Supreme Court in the case of P.T. Rajan vs. T.P.M. Sahir & Ors. (supra) is very much relevant in this regard.

18. The matter can be looked at from another angle. A candidate who has not received the interview letter may lawfully raise a grievance. His grievance in such a case will be for non-compliance of Rule 8(7)(a) or (b), but definitely not for non-compliance of clause (c), since a candidate is concerned with the receipt of interview letter and not with the mode in which it was sent. From this point of view, having regard to the aim of the Rule, Clause (c) of Rule 8(7) though uses the word "shall", is to be held as a directory and not a mandatory provision.

19. In the present case, there is no dispute that altogether 134 candidates were called for interview held on 13th June, 2009 under Certificate of Posting. Out of the aforesaid 134 candidates, 114 candidates applied in response to the advertisement issued by the School Authority and rest 20 candidates were sponsored by the employment exchange. It has been specifically admitted in course of hearing by the learned advocate of the respective parties that more than 100 candidates appeared at the interview held on 13th January, 2009.

20. It has also been admitted by the learned advocate of the respective parties that no complaint was made by any candidate that the interview letter was not received by him/her. So in absence of any complaint regarding non-receipt of interview letter it can be said without any fear contradiction that the interview letters were not only dispatched but the same were duly received by the candidates concerned and thus the requirements of Sub-Rule 7(c) of Rule 8 have been substantially complied with which is required to be done in respect of a directory provision.

21. Observations of the Supreme Court in the case of *The State of Punjab & Anr. vs. Shamlal Murari & Anr.* (supra) are very much relevant.

22. The relevant extracts from the aforesaid decision of the Supreme Court are set out hereunder:-

7.....The use of "shall" - a word of slippery semantics - in a rule is not decisive and the context of the statute, the purpose of the prescription, the public injury in the event of neglect of the rule and the conspectus of circumstances bearing on the importance of the condition have all to be considered before condemning a violation as fatal.

8.....We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, the procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, Courts are to do justice, not to wreck this end product on technicalities.....

23. For the aforementioned reasons, we overrule the objections raised on behalf of the State Respondents and hold that in the facts of the present case, provisions of Sub-Rule 7(c) of Rule 8 of West Bengal Schools (Recruitment of Non-Teaching Staff) Rules, 2005 have been substantially complied with.

7. In view of the discussions and observations made hereinabove, the impugned order cannot be sustained in law and the same is quashed and set aside.

8. The respondent No. 3 is directed to take a decision in respect of the panel under reference in the light of the discussions and observations made hereinabove within a period of six weeks from the date of communication of this order and shall communicate the same to all concerned including the respondent No. 4 within one week thereafter.

9. This writ application is, thus, disposed of.

10. There will be, however, no order as to costs. Urgent photostat certified copy of this order be supplied to the parties, if applied for, subject to compliance with all necessary formalities.