

(2008) 12 CAL CK 0076

Calcutta High Court

Case No: Writ Petition No. 219 of 2008

Elanjchelliyan and another

APPELLANT

Vs

District And Sessions Judge and
others

RESPONDENT

Date of Decision: Dec. 11, 2008

Citation: (2009) 121 FLR 59

Hon'ble Judges: Jayanta Kumar Biswas, J

Bench: Single Bench

Advocate: S. Ganguly and G. Binnu Kumar, for the Appellant; S.K. Mondal and Krishna Rao, for the Respondent

Final Decision: Dismissed

Judgement

Jayanta Kumar Biswas, J.

The two Petitioners in this writ petition dated September 1, 2008 are questioning the sixth Respondent's recruitment and appointment by promotion to the post of Lower Grade Clerk in the establishment of the District & Sessions Judge, A & N Islands.

2. The recruitment in question was governed by the Andaman and Nicobar Islands District and Sessions Judge and Subordinate Courts, Clerical (Group "B", & "C" (Non-Gazetted)) and Group-"D" Services Recruitment Rules, 2004. In column 12 of Schedule-VII to the rules it has been provided that recruitment by promotion to the post of Lower Grade Clerk shall be made from among the Group-"D" employees of the establishment of the District & Sessions Judge with regular service of 5 years in the grade and possessing the educational qualifications prescribed for direct recruits. The method of recruitment as mentioned in column 11 is 90% by direct recruitment and 10% by promotion on the basis of departmental test. The educational qualifications prescribed for direct recruits have been mentioned in column 8 of the schedule, and it is Senior Secondary School Certificate Examination (10+2) or its equivalent from a recognized Board/University. The other essential

qualifications for direct recruits are: (i) the candidate should be able to type 30 words p.m. in English or 25 words p.m. in Hindi; and (ii) he should qualify in the written examination to be conducted by the duly constituted selection committee/SSC. For the direct recruits, the desirable qualification is working knowledge in computer.

3. In the present case, the recruitment process for filling the sole vacancy was initiated by issuing an employment notice dated August 22/25, 2005. The cut off date for submitting applications was fixed for September 25, 2005. Though the notice was issued and the Petitioner and one R. Gurumurthy applied for the post, no further step was taken to proceed with the recruitment process. On July 24, 2008 a supplementary notice was issued inviting applications once again. The cut off date was fixed for August 4, 2008. All the educational and other qualifications prescribed for the direct recruits were mentioned in both the notices as the essential and desirable qualifications for the post. In response to the supplementary notice four candidates including the second Petitioner applied for the first time. Thus the total number of candidates who applied for the post became six. All the six candidates were invited to take the written test, typing test and viva, which all were conducted on August 23, 2008. While all the six candidates qualified in the written test, none of them, however, qualified in the typing test. After interviewing the candidates, the selection committee, constituted according to the rules, prepared the merit list on August 26/27, 2008 showing the respective merit positions of all the six candidates. The sixth Respondent occupied the first position. Accordingly, he was appointed to the post by promotion on August 29, 2008.

4. Ms. Ganguly, Counsel for the Petitioners, submits that the supplementary notice was issued only to accommodate this sixth Respondent who was not eligible to apply in response to the main notice. Her next submission is that even if it is accepted that the supplementary notice could be lawfully issued, the recruitment and appointment of the sixth Respondent cannot be sustained for the simple reason that admittedly none of the candidates taking the typing test qualified. According to her, when all the six candidates failed to qualify in the typing test, and the Petitioners, having working knowledge in computer, were senior to the sixth Respondent, the only course that ought to have been followed by the authorities was to give an opportunity to all the six candidates to take the typing test twice over. Her contention is that in terms of the employment notice it was mandatory for one to qualify in the typing test.

5. According to Mr. Mondal, Counsel for the authorities, the Petitioners, having participated in the recruitment process without recording any protest, are not entitled to question the validity of the process after finding themselves unsuccessful. For this he has relied on the Supreme Court decision in [Chandra Prakash Tiwari and Others Vs. Shakuntala Shukla and Others](#), .His further submission is that by issuing the supplementary employment notice, or by

proceeding to conclude the recruitment process, though none of the candidates participating in it qualified in the typing test, the authorities did not commit any wrong. Mr. Rao, Counsel for the sixth Respondent, has fully adopted the submissions made by Mr. Mondal.

6. The questions for decision therefore are: whether the Petitioners are entitled to question the validity of the process; whether the candidates applying in response to the supplementary employment notice dated July 24, 2008 could be considered for the post; and whether the sixth Respondent could be recruited and appointed to the post by promotion, though he failed to qualify in the typing test.

7. As to the first question, I agree with Mr. Mondal that after unsuccessfully participating in the recruitment process without recording any protest, the Petitioners are not entitled to question the validity of the process. The decision in Chandra Prakash supports his contention. In that case it was held that though the doctrine of estoppel by conduct would not apply to such a situation, it can be legitimately contended that a person participating in a recruitment process without protest is not entitled to question the validity of the process. But then, if it is found that in terms of the recruitment rules, the candidates applying in response to the supplementary notice dated July 24, 2008 could not be considered for the post, I think it will be the duty of this Court to set right the wrong only to that extent, because the Court cannot permit perpetuation of an illegality. Therefore, it is to be examined whether by issuing the supplementary notice and then by considering the candidates who applied in response thereto, the authorities have violated any provision of the recruitment rules.

8. The rules do not put any prohibition against issuing a supplementary employment notice. As a matter of fact, they do not say anything about employment notice. Hence it is apparent that the notices were issued, in exercise of pure administrative power in aid of the steps to be taken according to the statutory recruitment rules. Hence the question arises whether such administrative action taken by the authorities prejudiced any right already accrued to the Petitioners in view of the main employment notice dated August 22/25, 2005. By applying in response to this notice the first Petitioner acquired a right to be considered for the post. He was not required to apply once again in response to the supplementary notice. Since the second Petitioner did not apply in response to the main notice, there was no question of her acquiring any right.

9. By applying in response to the supplementary notice, the four candidates did not prejudice the first Petitioner's accrued right to be considered for the post. Rather they also acquired the right to be considered for the post. It is quite possible that at the cut off date mentioned in the main notice, all or some of them were not eligible to apply. But the question is whether the first Petitioner, by responding to the main notice, acquired a right to claim that the field of competition could not be expanded by including candidates more than the two who only responded to the main notice.

In my opinion, in the absence of a provision in the rules conferring such a right on a candidate, by merely responding to an employment notice a candidate cannot claim and enforce such a right.

10. The employer has a right to recruit and appoint the best available candidate to a post; and for achieving this goal he can always make the field of competition wider, unless the recruitment rules put a bar, when, as in this case, the number of candidates responding to the notice is not reasonably sufficient. I therefore hold that by issuing the supplementary notice, and then by considering the candidates applying in response thereto, the authorities have not committed any wrong.

11. As to the question of typing test, I am unable to agree that it was a mandatory requirement for the post. True it is that in the notices it was mentioned as one of the essential qualifications. But it was the result of pure administrative decisions. The rules do not prescribe that one must qualify in a typing test. The qualification is an essential one only for the direct recruits. Here the process was initiated for recruitment by promotion.

12. Simply because the Petitioners were senior to the sixth Respondent, or they had working knowledge in computer, they were not entitled to say that since all the six candidates failed to qualify in the typing test, the authorities were under an obligation to invite them all to take the typing test twice over. They could claim such a right provided it was conferred on them by the recruitment rules. The obligation of the authorities was to act fairly and reasonably. Just because they decided to select the best among the six participating candidates, none of whom incidentally qualified in the typing test, it cannot be said that they concluded the recruitment process arbitrarily, unfairly or unreasonably. In my opinion, by recruiting and appointing the sixth Respondent by promotion to the post they have not committed any wrong.

13. For these reasons. I dismiss the writ petition. There shall be no order for costs.

14. Urgent certified xerox of this order, if applied for, shall be supplied to the parties on the usual undertakings.