

(2014) 09 CAL CK 0071

Calcutta High Court

Case No: Writ Petition No. 16421(W) of 2011

Nirvik Banerjee

APPELLANT

Vs

The University of Burdwan

RESPONDENT

Date of Decision: Sept. 1, 2014**Citation:** (2014) 4 CALLT 351 : (2014) 4 CALLT 135 : (2015) 1 ESC 504**Hon'ble Judges:** Aniruddha Bose, J**Bench:** Single Bench

Advocate: Kashi Kanta Moitra, Sr. Adv., Anup Kumar Lahiri, Lakshmi Kanta Pal, Asoke Nandy, Basir Layek, Bijoy Kumar Shaw, Sayani Roy Chowdhury and Mousmi Chakraborty, Advocate for the Appellant; L.K. Gupta, Sr. Adv., Achintya Banerjee, Ankita Mitra, Raghunath Chakraborty and Tanushree Das, Advocate for the Respondent

Judgement

Aniruddha Bose, J.

Complaint of the petitioners in this proceeding is that in spite of being empanelled by the University of Burdwan for appointment to the posts of Junior Assistants, their appointment is being withheld illegally. The University authorities had published an advertisement for appointment to different posts, including the posts of Junior Assistants under Advertisement No. 4/2008 dated 10 February 2009. In the said document, styled as "Information Sheet", the posts for which applications were being invited along with qualification criteria for such posts were disclosed. Vacancies in altogether fifteen posts were advertised and number of posts which were vacant also had been specified in respect of fourteen of them, excepting the posts of Junior Assistants, with which the dispute involved in this proceeding is concerned. The eight writ petitioners had responded to the advertisement and participated in the selection process for appointment to the said posts. The respondent Nos. 8, 9, 10 and 11, had also applied for these vacancies. All of them claim to have been placed in the panel. The respondent Nos. 8, 9, 10 and 11 had applied for being added as party respondents during pendency of this writ petition by taking out individual applications and these applications were allowed. I shall refer to the respondent Nos. 8, 9, 10 and 11 later in this judgment as the added

respondents. Their complaint is same as that of the petitioners, and they have supported the case of the petitioners.

2. Based on the performance of the respective candidates who had applied for selection, a panel was prepared comprising of 121 candidates for the said posts, out of which 83 candidates were from the general category. In this writ petition, the petitioners as well as the added respondents belong to the unreserved category. The panel was approved by the Executive Council of the University in their meeting held on 9 November 2010. The Council also resolved in that meeting to issue offers for appointment to 47 candidates from the unreserved category, 13 from the SC category 4 from the ST category and 3 from the category of Physically Handicapped (PH) persons from the said panel. The resolution of the Council on this point appears from the Minutes of the meeting of the Council held on 9 November 2010, a copy of which has been produced by Mr. Gupta, learned senior counsel. It is recorded in the said Minutes.

"(5) The Council considered the recommendation of the Standing Committee for appointment to the Non-teaching posts (Junior Assistant, Sorter, Peon) of the University in its meeting held on 06.11.2010. While approving the above recommendations, the Council approved the panels of candidates maintaining the reservation as per Government Rules as under:

The Council resolved that the offers of appointment be issued to 47 candidates from the General category, 13 candidates from SC category, 4 candidates from ST category and 3 candidates from PH category from the panel concerned serially for the substantive posts of Junior Assistant against the vacant posts of Junior Assistant taking into account also the vacant promotional posts of Senior Assistant and Senior Superintendent keeping the vacant posts of Senior Assistant and Senior Superintendent in abeyance."

3. In the 10th meeting of the Council held on 14 December 2010, it was resolved to keep the panel of candidates valid for one year from the date of meeting of the Executive Council in which the panel was approved. This meant that the life of the panel was to last till 8 November 2011. This writ petition was filed on 22 September 2011, during the lifetime of the panel. Main prayer of the petitioners in this proceeding for a direction on the University for giving them appointment in respect of vacancies which accrued subsequently. The petitioners have proceeded in this matter on the basis that there were altogether 121 vacancies only, matching the number of candidates placed in the select list. Alternatively, it was argued by Mr. Kashi Kanta Moitra, learned Senior Counsel appearing for the petitioners that all the vacancies which arose during the subsistence of the panel ought to be filled up from the list of candidates whose names appeared in that panel only. Learned Counsel appearing for the added respondents has also taken the same position. The petitioners as well as the added respondents have their positions in the merit list within the range of 83 candidates placed on the panel from the general or

unreserved category.

4. The University authorities have contested this writ petition filing two affidavits, both affirmed by one Kalyan Kumar Mukhopadhyay on 10 April 2013 and 9 September 2013, respectively. The second affidavit has been entitled supplementary affidavit-in-opposition. On behalf of the University this writ petition is being resisted primarily on the ground that mere empanelment does not give any right of appointment and the term of the panel having lapsed, petitioners' claims ought to be rejected. Mr. Gupta, learned Senior Counsel appearing for the University has primarily addressed me on these points. Mr. De, learned counsel appearing for the State has supported the stand of the University.

5. It is admitted position that there are altogether 160 sanctioned posts in the cadre of Junior Assistant. The sanctioned strength was approved by the Council in a meeting held on 4 July, 1986. This appears from the copies of a bunch of documents which were produced before this Court by Mr. Gupta, in course of hearing of this writ petition. As part of the same bunch, extract from the employment register has been produced, which reveals that on 10 February 2009, being the date of the advertisement, there were 106 individuals on employment of the University as Junior Assistants. Thus, on the date of advertisement, there were 54 vacancies in total. Case of the University is that all these vacancies have been filled up and the petitioners are not entitled to stake any claim on posts which fell vacant subsequent to the date on which the advertisement was issued. On their own admission, however, the University has engaged altogether 67 candidates from the panel, 47 from the General category, 13 from the SC category, 4 from the ST and 3 from the PH category. Contention of the University is that the 13 additional appointments over and above the 54 vacancies which had occurred on the date of publication of the advertisement were effected as vacancies from different cadres had been added to the post of Junior Assistants. I was apprised by Mr. Gupta that two of the selected candidates, however, had not joined. Thus vacancies are there for that reason as well.

6. Case of the petitioners on the other hand is that vacancies which have occurred subsequent to the publication of the advertisement should be taken into account for considering the cases of the empanelled candidates. It has been specifically pleaded by the University that after preparation of the panel, approximately 40 vacancies have arisen in the cadre of the Junior Assistants and the University ought to be permitted to initiate fresh selection process for filling up these vacancies. I shall first deal with the question of legal right of the petitioners to maintain this action. On behalf of the University reliance was placed on the judgments of the Supreme in the cases of [Sanjoy Bhattacharjee Vs. Union of India and others](#), , [Arup Das and Others Vs. State of Assam and Others](#), and [Rakhi Ray and Others Vs. The High Court of Delhi and Others](#), in support of their argument on this point. In the case of [Shankarsan Dash Vs. Union of India](#), , it was held that position in the merit list would not create

any vested legal right in favour of a candidate to get appointed in respect of vacancies for which such list was prepared. A Constitution Bench of the Supreme Court in that case examined the extent of right of a candidate in the merit list to claim appointment on the basis of his empanelment. It has been held:--

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana V. Subash Chander Marwaha*, *Neelima Shangla V. State of Haryana* or *Jatinder Kumar V. State of Punjab*."

7. Submission of Mr. Moitra on the other hand is that while empanelment by itself would not create any right of appointment, arbitrary exclusion from the process of selection can be remedied by the Court by issuing appropriate direction. Referring to the judgment of the Supreme Court in the case of [Karnataka State Forest Industries Corporation Vs. Indian Rocks,](#) he submitted any action by the authorities in breach of the Constitutional provisions or law would constitute arbitrary action. [Secretary, Cannanore District Muslim Educational Association, Kanpur Vs. State of Kerala and Others,](#) and [State of Jharkhand and Others Vs. Ashok Kumar Dangi and Others,](#) were also cited by Mr. Moitra for the same proposition of law. He argued that the scope of issuing a writ in the nature of mandamus is wide enough to close any breach of law. On this point, I accept the submission of the petitioners that while an empanelled candidate cannot seek mandatory direction on the employer to appoint him on the basis of being placed in the merit list, if such candidate can demonstrate that he has been arbitrarily excluded from the process of selection, then Court shall not deny him entry into the judicial arena for seeking relief. The Constitution Bench of the Supreme Court in the case of *Shankarshan Dash* (supra) has laid down the scope of jurisdiction of the Court in such matters, and I shall limit my scrutiny on the action of University authorities within the parameters outlined in that decision. It was also submitted by Mr. Moitra that in appropriate cases, it is permissible for the Court to mandate appointment of eligible candidates being illegally denied appointment. In the case of [Sri Soumen Ghosh and Another Vs. The State of West Bengal and Others,](#) a Division Bench of this Court had upheld the right of certain candidates to be considered for appointment after they had passed

their selection examination, which was later cancelled by the authorities on the ground that many candidates could not appear in the examination for no fault on their part. The posts involved for selection in that case were that of lower division clerks under the Directorate of Agriculture. The State Administrative Tribunal quashed the order by which the examination was cancelled. This order of the Tribunal was sustained by the Division Bench of this Court with the following observation:--

"39. The private respondents have sought the revocation or quashing of the order cancelling the examination. They have not in their way sought their appointment. We have already observed that having one's name on the merit list does not create an indefeasible right in a person to be appointed. The fact that Lower Division Clerks are recruited on the basis of a written examination and without any other interview is not disputed. The State in its affidavits has categorically stated that the list published on its web-site was the merit list or result list and not a select list. Be that as it may, the fact that the petitioners has passed the examination and were entitled to be considered for appointment as Lower Division Clerks cannot be disputed. Thus they certainly had the locus to file the original application before the Tribunal."

8. Next comes the question as to whether the vacancies arising subsequent to the issue of advertisement or preparation of the panel can be filled up from the same panel. There are authorities for the proposition that no appointment or selection can be made beyond the number of posts advertised or notified, from a panel prepared in continuation of the process initiated by the advertisement. It has been held so by the Supreme Court in the cases of Sanjoy Bhattacharjee (supra), Arup Das (supra) and Rakhi Ray (supra). Further case of respondents on this point has been that the life of the panel cannot be extended unless there is any notification extending the validity of the same. This principle of law been laid down in the case of [Man Singh Vs. Commissioner, Garhwal Mandal, Pauri and Others,](#) .

9. In the cases of Sanjoy Bhattacharjee, Arup Das and Rakhi Ray, the proposition of law which has been laid down is that authorities cannot make any appointment from a panel beyond the number of posts which were advertised or notified. In the advertisement involved in this proceeding, though number of vacancies had been disclosed in respect of the fourteen other posts which were sought to be filled up, there was no indication about the number of vacancies so far as Junior Assistants are concerned. No separate notification was also disclosed by the University specifying the number of vacancies. The ratio of the decisions of the Supreme Court in the cases of Sanjoy Bhattacharjee (supra), Arup Das (supra) and Rakhi Ray (supra) on this point is not directly applicable in the facts of the present case for this reason. In these authorities, posts involved were advertised or notified. There has been no proper explanation for this omission on the part of the University. In the absence of such specific declaration of vacancies, the University has invited this Court to hold that the number of posts which were vacant on the date of the advertisement would

constitute the vacancies which could be filled up from the panel in question. The authorities themselves, however, did not adhere to this stand and admittedly have made 13 appointments beyond the 54 vacancies which were subsisting on the date of publication of the advertisement. It was submitted on behalf of the University that if an error was committed on their part, other candidates could not seek perpetuation of such a mistake. The prohibition on perpetuation of an error has been explained by the Supreme Court in the case of [State of U.P. and Others Vs. Rajkumar Sharma and Others](#), . But could this principle be applied in the instant case?

10. In the cases of Arup Das (supra) and Rakhi Ray (supra), the number of vacancies were specified. In this case, there is no stipulation as regards the number of posts which were to be filled up. If only 54 vacancies were to be filled up, then the panel comprised of an unusually high number of candidates, being 121. Of course, it is within the domain of the employer or the appointing authority to decide how many persons they ought to keep in a panel but if the intention was to appoint only in 54 posts, it does not appear to be a rational decision to have such a long list. Further, the University authorities themselves have engaged 13 persons during the lifetime of the panel from subsequent vacancies. Such appointments were made before the Executive Council took decision to extend the term of the panel. The cumulative effect of all these factors, in my opinion, lead to the inference that the authorities all along intended that vacancies which would arise subsequent to preparation of the panel could be filled up from the said panel. On the question of life or duration of a panel, no specific Rule of the University was cited. Thus, the decision of the Council that the panel would be kept alive for a year would hold the field on this issue. If the principle of prohibition on appointment beyond vacant posts is applied in the given case, then the only reason for keeping the panel alive for a year would have been to fill in the gap created by selected candidates by dropping out. But the University authorities themselves appointed 13 candidates from the panel in post-advertisement vacancies.

11. No authority has been cited in support of the case of the respondent University that in the absence of publishing the number of vacancies in the advertisement inviting applications for the post, or elsewhere, the vacancies existing on the date the advertisement is published would be the number beyond which no appointment could be made from a panel prepared in consequence of such advertisement. There is no legal bar if a panel is prepared to last a year, and vacancies accruing during the one year period are filled up from that panel. It would be within the domain of the appointing authorities to adopt such a course, provided there is no contrary legal provision or a public declaration projecting a different stand. The University authorities in connection with the selection process appear to have proceeded on that basis, as is evident from their action at various stages of the selection process. First, they had not specified the vacancies in the advertisement for the posts of Junior Assistant. Second, the Council decided to fill up 13 posts beyond the vacancies

which were subsisting on the date the advertisement was published. Decision to offer for appointment to these 13 posts was taken on the very date the panel was approved. Third, in their subsequent meeting the Council chose to extend the term of the panel. Now they are taking a stand that the 13 appointments were made by mistake, and for all vacancies occurring after the date of advertisement, there ought to have been fresh recruitment process. Such a stand is irrational and unreasonable in the factual context of this case, and is inconsistent with the action of the University themselves. Mistake cannot be the justification of such action, which otherwise appears to have been taken in a calculated and conscious manner, reflected in the manner in which the University has proceeded in this matter.

12. In my opinion, in such a situation, the vacancies arising during the lifetime of the panel would be capable of being filled up from the same panel. Otherwise, the act of extension of the life of panel would be a meaningless Act. The claim of the petitioners and the four added respondents cannot be rejected only on the ground that merely on the basis of being empanelled, they have acquired no vested legal right to seek appointment from that panel. In the case of Shankarsan Dash (*supra*) the legal principle that the State is under no legal obligation to fill up all or any of the vacancies has been qualified with the observation that even in that context, the State would not have the license to act in an arbitrary manner. Duty of the public authorities to act fairly in making appointments from a select list has also been highlighted by the Supreme Court in the case of [Asha Kaul \(Mrs\) and Another Vs. State of Jammu and Kashmir and Others](#), . In this case, the stand of the University in denying the petitioners and the added respondents the right of being considered for appointment is both unreasonable and arbitrary.

13. There are several authorities on the point that if Rule does not provide, life of a panel would ordinarily be one year. Mr. De, learned counsel for the State had relied on the decision of the Supreme Court in the case of [State of Rajasthan and Others Vs. Jagdish Chopra](#), on this point. This is the established legal position guiding the field. But would application of this principle imply that because of lapse of more than a year after approval of the panel, the petitioners could not derive any benefit from the panel? This appears to be the argument of the University. Such argument in my opinion is fallacious. In this writ petition on 29 September 2011, an interim order was passed keeping in abeyance the resolution taken by the Executive Council on 14 December 2010 to the effect that the panel in question shall be valid for one year from the date of the meeting. This interim order was allowed to continue. The issue relating to term of the panel thus was kept alive. This writ petition was filed within the one year period and the petitioners sought to assert their right during subsistence of the panel. It has been held by the Supreme Court in the case of [State of U.P. Vs. Ram Sawrup Saroj](#), :--

"10. Similarly, the plea that a list of selected candidates for appointment to the State service remains valid for a period of one year is primarily a question depending on

facts and yet the plea was not raised before the High Court. Secondly, we find that the select list was finalized in the month of November 1996 and the writ petition was filed by the respondent in the month of October 1997, i.e., before the expiry of one year from the date of the list. Merely because a period of one year has elapsed during the pendency of litigation, we cannot decline to grant the relief to which the respondent has been found entitled by the High Court."

14. This view was adopted by a Division Bench of this Court in the case of Nirupama (Roy) Barman & Ors. v. State of West Bengal & Ors. [(2013) 2 CLJ (Cal) 462]. There is no reason as to why a different course shall be followed in this proceeding by me. In the given case, I am of the view that while the petitioners' claim would not go beyond the vacancies which accrued during the subsistence of the panel, they shall be entitled to be considered for appointment in the posts of Junior Assistants in vacancies which arose between the date on which the advertisement was published and the date on which the panel lapsed, on conclusion of the one year period.

15. There has been no specific statement made in the pleadings about the number of vacancies which accrued during this period. In the supplementary affidavit-in-opposition, it has been stated that there were 40 vacancies which were required to be filled up without categorizing the vacancies on the basis of their accrual before and after the term of the panel. Mr. Gupta, learned senior counsel appearing for the University on instruction apprised me that 15 vacancies in total had arisen during the lifetime of the panel in the cadre of Junior Assistants. The petitioners and the private respondents in my opinion, ought to be considered for appointment in these vacancies on the basis of their respective position in the merit list.

16. A further argument on equitable ground was raised by Mr. Gupta on behalf of the University against confining this direction to those candidates only who had approached this Court. He submitted that there were other candidates in the panel whose position may be higher than those of the petitioners and the added respondents in such list and giving appointment to the petitioners without considering the cases of such candidates would not be proper. It was also submitted that cases filed by some other candidates were pending before this Court but particulars of those candidates or the cases instituted by them was not made available before me at the time of hearing.

17. The selection process this matter was initiated in the month of February 2009 and more than five years have lapsed since then. If any empaneled candidate did not feel aggrieved enough by the act of the University in not considering their candidature for appointment all these five years, I do not think this Court ought to embark on a search process to identify them and elicit from them whether they were still interested in the subject posts. But for that reason, the candidates who have brought their cause to the Court should not be denied justice. In the given context of this case, I think it would be reasonable to differentiate between the

candidates who have come to the Court and those who have not, for the purpose of grant of relief, particularly since I am satisfied that on merit the petitioners have made out a case for relief. On the same reasoning, the respondent Nos. 8, 9, 10 and 11 should be considered for appointment in the same manner. Denying them relief on the ground that relief at this stage to some would discriminate against other empanelled candidates would be unfair. In this regard the decision of the Supreme Court in the case of [Ashok alias Somanna Gowda and Another Vs. State of Karnataka by its Chief Secretary and Others](#), is relevant. In this judgment, it was held and directed:--

"3. We, therefore, allow the appeal and direct the respondents to give appointment to the appellant Ashok alias Somanna Gowda on the post of Assistant Engineer (Civil) and appellant Rajendra on the post of Assistant Engineer (Mech.) in Public Works Department within a period of two months of the communication of this order in case the appellants are found suitable in all other respects according to the Rules. Learned counsel appearing on behalf of the State of Karnataka pointed out that there are many other candidates who had secured much higher marks than the appellants in case the above criteria is applied for selection. In view of the fact that appointments under the impugned Rules were made as back as in 1987 and only the present appellants had approached the Tribunal for relief, the case of other candidates cannot be considered as they never approached for redress within reasonable time. We are thus inclined to grant relief only to the present appellants who were vigilant in making grievance and approaching the Tribunal in time. Learned counsel for the State also submitted that the State Government has already framed new rules, and as such we do not find it necessary to quash the Rules under which the present selections were made as they are no longer in existence."

18. I accordingly direct the respondent University to consider for appointment the petitioners and the respondent Nos. 8, 9, 10 and 11 in the fifteen vacancies in the posts of Junior Assistants which have arisen between 10 February 2009 and 8 November 2011 on the basis of their position in the panel. In the event there is any other candidate from the panel who has approached the Court for the same or similar relief, the University shall ascertain from them if they want their cases to be considered in the manner directed in this judgment or not. If such individuals agree to be considered in the above terms, then their cases shall also be considered in the same manner. Otherwise it shall be open to the University and such candidates to prosecute their respective claims in such litigations, if there is any. This exercise shall be completed within a period of eight weeks from the date of communication of this order, and if the concerned candidates otherwise fulfill the eligibility criteria, and can be accommodated in the fifteen vacancies following their positions in the panel, appropriate steps shall be taken by the University to give them appointment. After giving appointment as per the direction of this Court in the said fifteen vacancies, it shall be open to the University to initiate fresh recruitment process for the rest of the vacant posts in the cadre of Junior Assistants.

19. The writ petition stands allowed in the above terms. There shall be no order as to costs.

Urgent certified photocopy of this order be made forthwith available to the parties if applied for, subject to compliance with all necessary requisite formalities.