

(2015) 4 CALLT 375 : (2015) 1 CHN 26 : (2015) 2 WBLR 1005

Calcutta High Court

Case No: F.M.A 412 of 2012

The West Bengal
College Service
Commission

APPELLANT

Vs

Barnali Sen (Sinha)

RESPONDENT

Date of Decision: Nov. 21, 2014

Acts Referred:

Constitution of India, 1950 – Article 15, 15(3)

Citation: (2015) 4 CALLT 375 : (2015) 1 CHN 26 : (2015) 2 WBLR 1005

Hon'ble Judges: Tapash Mookherjee, J; Jyotirmay Bhattacharya, J

Bench: Division Bench

Advocate: Pulak Ranjan Mandal, Bandana Das, Pingal Bhattacharya, Chandrachur Chatterjee, Bidyut Kumar Mukherjee and Ujjal Kumar Bhattacharya, Advocate for the Appellant; Bidyut Kumar Mukherjee, Ujjal Kumar Bhattacharya, Tapan Kumar Mukherjee and Nilotpal Chatterjee, Advocate for the Respondent

Judgement

1. This Mandamus Appeal is directed against the judgment and/or order passed by a learned Single Judge of this Court on 30th August, 2011 in

W.P. No. 10300(W) of 2010 at the instance of the West Bengal College Service Commission and another being the respondent No. 2 and 4 of

the writ petition.

2. By the impugned order, the learned Trial Judge, while allowing the writ petition of the respondent No. 1 herein, directed the

appellants/respondents to recommend the name of the writ petitioner to a college located at a reasonably commutable distance from the place

where she lives as indicated by her repeatedly, after considering the vacancy position in any such college or colleges. Such direction was passed by

the learned Trial Judge primarily on two grounds. The learned Trial Judge held that the Regulation 9(3) of the West Bengal College Service

Commission (manner of selection of persons for appointment to the post of teachers including principals) Regulations, 1980 (hereinafter referred to

as the said ""Regulation"")) had not been adhered to by the appellants while recommending the name of the writ petitioner for her appointment in the

post of lecturer in English in a college in Bankura within Burdwan University zone. The learned Trial Judge also held that the writ petitioner being a

lady candidate, the principles underlying Article 15(3) of the Constitution of India ought to have been adhered to by the concerned authority while

recommending her to a college for her appointment in the post of lecturer. Since the concerned authority while recommending her to a college in

Bankura did not adhere to the Constitutional mandate under Article 15(3) of the Constitution of India, recommendation which was given by the

appellants requires to be interfered with. The direction passed by the learned Trial Judge while disposing of the writ petition is primarily based on

the aforesaid findings of the learned Trial Judge.

3. Let us now consider the merit of the instant appeal in the facts of the instant case. The West Bengal College Service Commission (hereinafter

referred to as the ""Commission"")) published an advertisement on 5th December, 2008 in its Website inviting applications in the prescribed form

from the eligible candidates for preparation of a panel for appointment to the post of lecturers and librarians in the affiliated non-Government

colleges/teachers training colleges under different Universities in West Bengal. The Commission also published a list of tentative vacancies as on

15th September, 2008 in respect of the post of lecturers in different subjects and in the said list, total number of vacancies in the post of lecturers in

English for Burdwan University zone was shown as 78 and for physically handicapped candidates vacancies were shown as 3. The writ petitioner

applied in the prescribed form by offering her candidature for the post of lecturer in English under Burdwan University zone. Admittedly, she

fulfilled the eligibility criteria prescribed for the post of lecturer in English. She was allowed to participate in the selection process. The commission

called her for appearing in interview on 9th July, 2009 in the office of the said Commission. She appeared in the interview before the selection

authority. She was empanelled under general category and ultimately a panel consisting of 32 candidates belonging to general category was

published on 25th November, 2009 in the Commission's Website for the subject English under Burdwan University zone. The name of the

petitioner was placed at serial No. 31 in the said panel. She was called upon to appear for counselling before the concerned authority on 10th

March, 2010 for selecting the choice of her posting from the vacancies available under Burdwan University zone as on the date of counselling. 5

available vacancies which remained unfulfilled as on the date of her counselling was placed before her and she selected the college, namely,

Panchmura Mahavidyalaya in the District of Bankura within Burdwan University zone. A declaration signed by her on 10th March, 2010 was

submitted before the West Bengal College Service Commission indicating therein the choice of her posting in the said college in her own

handwriting. Acting on such declaration submitted by the writ petitioner, the West Bengal College Service Commission recommended her for

appointment as a lecturer in English in the said college at Bankura under Burdwan University zone. 15 days" time was granted to her to intimate her

willingness to join the said post to the Commission. The petitioner declined to accept the said recommendation and submitted a representation

before the Commission on 14th March, 2010 inviting the Commission to change the recommendation so that she may be recommended to a

college nearer to her residence i.e., within a reasonably commutable distance from her residence.

4. It was stated therein that the college where she was recommended is situated in Bankura, which is about 250 Km. away from her residence.

Since the distance being a factor and there was no direct conveyance between her residence and the place of her posting, she prayed for change of

such recommendation. She also intimated the concerned authority that she is newly married having a child of two and half years and her mother-in-

law being an old and ailing lady, it was not possible for her to join the said post in the said college at Bankura. Since her prayer for change of her

posting was not considered by the concerned authority, she filed the said writ petition before this Hon"ble Court.

5. The College Service Commission contested the said writ petition by filing its affidavit controverting the material allegations made in the said writ

petition. It is stated therein that 78 vacancies were reported to the College Service Commission by different colleges under the said University zone

for the post of lecturer in English. Out of the said 78 vacancies, 32 vacancies were reported for the general category, 5 vacancies were reported

for OBC candidates, 30 vacancies were reported for the Scheduled Caste candidates and 11 vacancies were reported for the Scheduled Tribe

candidates; in addition thereto 3 vacancies were earmarked for physically handicapped candidates. It is stated in the said affidavit that after

receiving the vacancy report, the Commission took up the selection process and published an advertisement on 5th December, 2008 in their

Website inviting applications in the prescribed form from the eligible candidates for those reported vacancies . In pursuance of the said

advertisement the petitioner offered her candidature by submitting her application in the prescribed form. She was found eligible for the said post.

She was allowed to participate in the selection process. Ultimately she secured a berth in the panel. Her position was 31 in the panel of general

candidates. There were 32 vacancies for the general candidates for the said post. Thus, she occupied the last but one berth in the panel. Since she

was included in the panel, she was called upon to participate in the counselling. She participated in the counselling and selected on her own the

college where she was recommended. Thus, the College Service Commission contended that since she has been recommended to a college of her

own choice, her prayer for re-recommendation cannot be allowed.

6. It was further stated by the College Service Commission that the writ petitioner, after participating in the selection process and choosing a

college for her posting cannot subsequently challenge the selection process conducted by the College Service Commission. It was further stated

therein that while preparing the panel and/or holding counselling, the merit position of the empanelled candidates were considered without

superseding any candidate occupying higher position in the panel by any candidate occupying lower position in the panel. It was further stated

therein that the writ petitioner did not submit any area-wise choice for her selection in the course of counselling. It was also stated therein that on

the date of her counselling only 5 vacancies were left out and she selected one out of those vacancies on her own. As such the allegations made by

the writ petitioner about selection of the place of her posting in duress is absolutely unfounded. It was further stated therein that the entire selection

process was conducted by strictly adhering to the provisions contained in the said Regulation and the Regulation 9 which prescribes the procedure

for recommendation, has also been strictly adhered to by the Commission while recommending the candidates for their appointment. It was further

stated therein that though some allegations are made against the Commission for not making certain special provisions for the lady candidates for

their posting in colleges within a commutable distance from their residences in terms of Article 15(3) of the Constitution, but those allegations

cannot be sustained against the Commission as under the West Bengal College Service Act, 1978 and the Regulation framed thereunder, the

College Service Commission has not been vested with the power to make any special provision for the posting of the lady candidates in colleges

nearer to their residences and/or within a commutable distance from their residences. As such, the Commission cannot be accused and/or criticized

for not making any such special provision for the lady candidates in this regard.

7. It was further stated by the Commission that though certain other allegations were made against the Commission for recommending some of the

reserved candidates to certain places of posting which were shown as vacancies reserved for the general candidates but those allegations,

according to the Commission, are also unfounded and unsustainable as recommending a reserved candidate to a post shown for the general

candidates is held to be permissible by the Hon"ble Apex Court when it is found that the candidates participating in the selection process for the

reserved post successfully competed with the general candidates securing higher marks than the last candidate occupying a berth amongst the

general candidates. The Commission thus, claimed that the writ petition deserved no merit for consideration and prayed for dismissal of the same.

8. Let us now consider as to how far the learned Trial Judge was justified in allowing the writ petition and by issuing those directions upon the

Commission in the facts of the instant case. Since violation of Regulation 9 is complained of by the writ petitioner in the process of recommending

her to a college in Bankura which is not within a commutable distance from her residence, we feel that the provision contained in Regulation 9 is

required to be considered. For the sake of convenience of understanding, Regulation 9 is set out hereunder :--

1. On receipt of a request made by the Principal of a college for recommending the name of a suitable candidate for appointment in a vacancy

against an approved post, the commission shall recommend only one name from the panel for appointment against the vacancy. A copy of the

letter recommending the name shall be endorsed to the candidate concerned.

2. The topmost name appearing in the panel at the material time shall be recommended every time.

3. The area-wise preference of the candidates as well as the special requirement of the college concerned shall also be taken into account.

4. If a candidate appointed on the recommendation of the Commission is thrown out of employment due to cessation of the vacancy for which he

was recommended by the Commission, the Commission may, on receipt of such information from the college concerned, recommend his/her name

for any other vacancy in the same college.

5. Recommendation shall be made for appointment in vacancies against approved posts only. For determining as to whether any vacancy is against

an approved post, the Commission may call for such information as may be necessary from the college and/or the Director of Public Instruction,

West Bengal.

9. Mr. Mukherjee, learned Senior Counsel appearing for the writ petitioner/respondent strenuously argued before us that the Regulation 9(3) has

not been adhered to by the Commission while recommending her to the college at Bankura for her appointment. He further submits that area-wise

preference from the candidates has also not been sought for from the writ petitioner. He further contended that even no column was provided in

the prescribed form seeking area-wise preference of the candidates. As a result such option could not be exercised by the writ petitioner. Relying

upon the following decisions, he supported the judgment of the learned Trial Judge and tried to convince us that the Regulation 9(3) has not been

adhered to in the process of recommendation of the writ petitioner and accordingly he submitted that the writ petitioner should be re-

recommended to a college within a commutable distance from her residence in terms of the provision contained in Regulation 9(3) of the said

Regulation:--

1. Jayashree Mahata Vs. State of West Bengal and Others

2. 2010(1) CHN Suchandra Mitra v. West Bengal College Service Commission & Ors.

3. 2010(1) CLJ (CAL) 866 West Bengal Regional School Service Commission, Western Region & Anr. v. Smt. Bidisha Chowdhury (D.B.)

4. In the case of Anuradha Majumdar v. State of West Bengal & Ors. in W.P. No. 13841 (w) of 2005 (unreported decision) of a learned Single

Judge of this Court.

5. In the case of Joseph, P.T. @ Thomas Jacob Vs. Union of India, .

10. We have considered the contention raised by Mr. Mukherjee with great anxiety in the light of the provisions contained in Regulation 9 of the

said Regulation. In Regulation 9(2) it was provided that the topmost name appearing in the panel at the material time shall be recommended every

time. Regulation 9(3) provides that area-wise preference of the candidates as well as the special requirement of the college shall also be taken into

consideration. According to him, both these provisions should be construed harmoniously. To give a meaningful meaning to those two provisions in

the said Regulation, we have read those two provisions very carefully. In our reading of those two provisions, we feel that recommendation of a

candidate shall be made every time by giving widest possible choice of selection to the candidates occupying higher position in the merit list than

the candidates occupying lower position in the merit list. In our considered view, in no circumstances a candidate occupying lower position in the

panel can be allowed to select a place of posting of his/her choice by superseding the choice of the place of posting made by any candidate

occupying higher position in the panel. If this procedure is not followed then Regulation 9(2) will be neglected and/or will become inoperative. This

was never the intention of the legislature. Then how to synchronize these two provisions which though apparently appears to be contradictory to

each other but really it is not so for the following reasons.

11. Let us now give an example as to how such synchronization of the provisions contained in Regulation 9(2) and 9(3) is possible. Suppose there

are 5 vacancies in different colleges within a particular University zone. The panel which is prepared shows that candidate ""A"" occupies the 1st

position in the panel, candidate ""B"" occupies the 2nd position in the panel, candidate ""C"" occupies the 3rd position in the panel, candidate ""D

occupies the 4th position in the panel and the candidate ""E"" occupies the 5th position in the panel. In order of the position of the candidates in the

merit list, candidate ""A"" should be called upon to select anyone of the 5 notified vacancies, so that he may select any one of those 5 vacancies after

considering his convenience. Then candidate ""B"", in course of counselling will be called upon to select the place of his posting out of the remaining

4 notified vacancies so that he may select any one out of those 4 notified vacancies according to his convenience after considering the locations of

those 4 colleges where vacancies remain unfulfilled. In this way the remaining candidates should be given an opportunity to select their respective

place of posting by making a choice of place of posting after considering the area-wise preference of the candidates in respect of the vacancies

available as on the date and time of his counselling. If this procedure is followed then provision of Regulation 9(2) will not be violated rather it will

be complied with in the true spirit of the said Regulation.

12. Then a question comes up as to how Regulation 9(3) will be implemented. Let us now examine this problem. In our view, a duty is cast upon

the recommending authority by Regulation 9(3) to verify the candidate's choice of place of posting with reference to Regulation 9(3). Before

recommending the names of the candidates according to their choice, the recommending authority will have to consider as to whether the special

requirement of the colleges will be fulfilled in case the area of choice of the candidates is respected. If it is found that the special requirement of the

colleges will not be fulfilled by posting a candidate who selected the said college in counselling, the recommending authority may refuse to

recommend him in the said college. In such case he may be called upon to select a different college out of the colleges where notified vacancies are

available at the time of his counselling. Regulation 9(3) is a discretion left to the recommending authority to recommend a candidate according to

the special need of the colleges in the light of his area-wise preference. Regulation 9(3) in our view cannot get precedence over Regulation 9(2). If

we accept the submission of Mr. Mukherjee and give preference to Regulation 9(3) ignoring Regulation 9(2) of the said Regulation then giving

preference to the topmost candidate every time will practically be unworkable and meaningless, leading to a creation of a chaotic situation.

13. The decisions which were cited by Mr. Mukherjee as mentioned above, in our reading do not help Mr. Mukherjee in establishing his

contention made before us.

14. Let us now deal with the decisions cited by Mr. Mukherjee one by one. In the case of Jayashree Mahata (supra), the learned Single Judge

while deciding the said case held as follows:--

Paragraph 40: ""Under Regulation 9 of the 1998 Regulations, the Regional School Service Commission might recommend only one candidate for a

vacancy. The Regional School Service Commission is obliged to recommend the topmost candidate in the panel in order of merit.

Paragraph 41: ""Moreover, in making recommendations, the area-wise preference of the candidates is to be taken into account, to the extent

possible, depending on his/her position in the panel in order of merit"".

15. In our view the said decision does not support the contention of Mr. Mukherjee that Regulation 9(3) gives a right to his client to be

recommended to a place of posting of her choice which is nearer to her residence by ignoring Regulation 9(2).

16. Let us now consider the other decision cited by Mr. Mukherjee in the case of Suchandra Mitra (supra) where the learned Single Judge found

that the choice of area-wise preference as per Regulation 9(3) was given to the candidates occupying lower position in the panel by ignoring and/or

superseding the candidates occupying higher position in the panel. It was found that the writ petitioner therein obtained 4th position in the panel

prepared in order of merit out of 11 selected candidates obtaining 54.27 marks. Undisputedly the respondent No. 5 and 6 therein obtained 7th

and 9th position respectively in the said merit list obtaining 53.18 and 51.31 marks respectively. It was further found therein that while

recommending the names of the candidates in two different places of posting, respondent No. 5 and 6 whose positions were lower than the writ

petitioner in the merit list were allowed to select their respective places of posting nearer to their residences by superseding choice of posting of the

writ petitioner therein. This was done by the authority concerned for giving preference to Regulation 9(3) over Regulation 9(2) of the said

Regulation. In this context, a learned Single Judge of this Court after quashing the recommendations given in favour of the respondent Nos. 6 and 7

directed the Commission to recommend the name of the petitioner in respect of a college nearer to his residence after holding that -

Paragraph 18: There was procedural impropriety in recommending the names of the candidates from the above merit list of selected candidates.

Admittedly, the name of respondent No. 6 was recommended in respect of the aforesaid Ranaghat College though she obtained lesser marks i.e.

51.31% in comparison to that of 54.27% marks obtained by the petitioner.

17. We thus, find that the said decision which was cited by Mr. Mukherjee cannot help his client in the facts of the instant case as it is not a case

where she was not given opportunity to select the place of her posting in exercise of area-wise preference under Regulation 9(3) of the said

Regulation by ignoring her position in the merit list.

18. While deciding the other case cited by Mr. Mukherjee in the case of West Bengal Regional School Service Commission, Western Region and

Ors. (supra), we find that the Division Bench of this Hon"ble Court, after considering an identical provision in the School Service Commission Act

held as follows:--

Thus, sub-Rule 2 clearly enjoins that area-wise preference of candidate for the post of assistant teacher shall be taken into account as far as

possible, depending on his/her position in the panel and availability of requisite vacancy.

19. We thus, find that the principle laid down by the other Division Bench of this Hon^{ble} Court in the said decision cannot help Mr. Mukherjee in

establishing the aforesaid contention of Mr. Mukherjee. We thus, do not find that any illegality was committed by the Commission in the process of

recommending the writ petitioner herein to a college of her choice. In our view, in the instant case such recommendation was done by observing

the relevant provisions contained in Regulation 9 of the said Regulation.

20. Let us now consider the other contentions of Mr. Mukherjee. He contended that though there were 54 vacancies for the general candidates

under Burdwan University zone but the Commission acted illegally by notifying that selection would be taken up for filling up of 32 notified

vacancies for the general candidates. Mr. Mukherjee pointed out from the vacancy list that 54 vacancies were there in the post of lecturers in

English under Burdwan University zone in different affiliated colleges. He thus, contended that instead of restricting selection process to 32

vacancies, the Commission ought to have taken up the process for filling up all those 54 vacancies and had that been done by the Commission, the

writ petitioner could have selected a college for her appointment which is nearer to her residence. He also pointed out that a vacancy in college

under Burdwan University zone was available where she could have been recommended but the Commission did not do so.

21. In this regard we find much substance in the contention of Mr. Mandal, learned Advocate appearing for the College Service Commission who

contended that in terms of Regulation 3 of the said Regulation, the Commission is required to ascertain from colleges the number of vacancies in

the approved post as on 1st April of each year or as soon as may be thereafter, ascertain from colleges the number of vacancies in approved posts

that are then available or are expected to be available for appointment between 1st May of the current year and 30th April of the following year

and may, for this purpose, instruct the college to furnish such information as may be considered necessary.

22. According to Mr. Mandal, the Regulation does not authorize the Commission to fill up any vacancies which are not notified by the colleges. He

thus, contended as per the information given by different colleges under Burdwan University zone, 32 vacancies for the general candidates were

found to be notified and accordingly, selection process was taken up by the Commission for filling up those 32 vacancies for the general

candidates. In support of his contention that Commission cannot take up the process for filling up any non-notified vacancy, he relied upon the

following decisions of the Hon"ble Supreme Court:--

(i) in the case of Rakhi Ray and Others Vs. The High Court of Delhi and Others, , (ii) in the case of Secretary, A.P. Public Service Commission

Vs. B. Swapna and Others, and (iii) in the case of Arup Das and Others Vs. State of Assam and Others, .

23. We have considered all these decisions of the Hon"ble Supreme Court wherein the Hon"ble Supreme Court uniformly held that appointment

cannot be made beyond the number of vacancies that have been advertised. In the present case we have found that altogether 78 vacancies were

notified on the basis of the actual vacancies including expected vacancy. Expected vacancies mean the vacancies which were expected between

1st May of the current year and 30th April of the following year. Out of those 78 notified vacancies, 32 vacancies were earmarked for the general

candidates and the remaining vacancies were reserved for the different category of candidates. Selection process was taken up for filling up those

posts. The writ petitioner participated for such a post as a general candidate. Her position was 31 in the merit list out of 32 candidates selected

and included in the panel.

24. In our view the writ petitioner cannot complain that though 49 vacancies were available for the general candidates, the Commission ought not

to have restricted the selection process for filling up 32 vacancies only. We do not find much substance in such contention of the writ petitioner as

we have already indicated above that the Commission has no authority to take up the selection process for filling up any post which was not

notified and/or advertised. In the present case notified vacancies were 32; as such the Commission was justified in taking up the selection process

for filling up those 32 vacant posts despite other vacancies were there which were not notified by the college authorities for their filling. Thus we do

not find any substance in the aforesaid contention of Mr. Mukherjee.

25. With regard to the other claim of the writ petitioner that the provisions contained in Article 15(3) of the Constitution of India has not been

adhered to by the College Service Commission in the instant case. We have examined the West Bengal College Service Commission Act and the

Regulation made thereunder. We have seen that neither the Act nor the Regulation authorizes the Commission to make any provision for

reservation of the female candidates in the light of the provisions contained in Article 15(3) of the Constitution of India. Reservation policy in the

light of the provision contained in Article 15(3) of the Constitution of India can be worked out by the State Government by making suitable

legislation and/or issuing suitable administrative direction in this regard. This has not been done by the State Government so far as the female

candidates are concerned, in the process of recommending them for their appointment to the places which are nearer to their residences as per

their choice. Unless suitable provision is made by the State Government, the College Service Commission which has only been authorized to select

suitable candidates for appointment in different vacancies and recommending them to the place of their posting as per the Regulation framed

thereunder, cannot make any provision on its own for giving preference to the female candidates in respect of their place of posting, nearer to their

residence.

26. Keeping in mind the principles laid down in Article 15 of the Constitution of India, the recommending authority in case of tie between a male

candidate and a female candidate, may at best call the female candidate first in the counselling for selecting the place of her posting out of the

vacant posts available at the time of her counselling. We think that if this procedure is followed, then the principles underlying Regulation 9(2),

Regulation 9(3) and Article 15(3) of the Constitution will be fulfilled. However, since this is not a case of a tie occurring between a male and

female candidate and a male candidate occupying same position in the panel with a female candidate, was preferred over the female candidate in

the counselling, we feel that no interference with the selection process is warranted on the ground of violation of Article 15(3) of the Constitution of

India. The decision which was cited by Mr. Mukherjee in this regard in the case of Govt. of Andhra Pradesh Vs. P.B. Vijaykumar and another, ,

in our view has no application in the facts of the instant case.

27. We have also considered the other limb of the submission of Mr. Mukherjee that the selection of college by the writ petitioner was done under

duress and as such selection is not binding upon her. In support of such contention he has also relied upon a decision of the Hon"ble Supreme

Court in the case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, . We do not find any

reason to apply the said principle laid down in the instant case as the writ petitioner has failed to establish that she exercised her option of selection

in respect of such college at Bankura under duress. As a matter of fact, at the time when counselling was held for the writ petitioner, the vacancy in

the college where she wanted to be recommended was neither notified nor available. Admittedly she selected one out of the 5 notified vacancies

which were available to her on the date of her counselling and she selected one of such vacancies for her being recommended and as such we do

not find any substance in the contention of the writ petitioner that she had to select the said college at Bankura for her appointment under duress

and thus her selection is vitiated.

28. In the aforesaid set of facts and circumstances we find merit in this appeal. Accordingly, we set aside the impugned order and permit the writ

petitioner to join the post of lecturer in the Panchmura Mahavidyalaya at Bankura which was selected by her during counselling and where she was

recommended as the said post is still kept vacant pursuant to the interim order passed by this Court in this appeal with this rider that in the event

the writ petitioner fails to report for joining in the said post in Panchmura Mahavidyalaya at Bankura within a month from date, the college authority

will be free to report the said vacancy to the College Service Commission and the College Service Commission will be free to take up the selection

process for filling up the said vacancy in accordance with law thereafter.

29. The appeal is, thus, allowed.

30. The order impugned is set aside.

31. Urgent photostat certified copy of this order, if applied for, be given to the parties as expeditiously as possible.

Tapash Mookherjee, J.

I agree.