

**(2014) 06 CAL CK 0090**

**Calcutta High Court**

**Case No:** F.M.A. No. 36 of 2013 (CAN No. 9901 of 2012) and M.A.T. No. 1789 of 2012 (CAN No. 10442 of 2012)

Sukumar Kalsar

APPELLANT

Vs

Rajsekhar Mondal

RESPONDENT

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**Date of Decision:** June 19, 2014

**Citation:** (2014) 3 CALLT 78 : (2015) 5 CHN 605

**Hon'ble Judges:** J. Bhattacharya, J; Ishan Chandra Das, J

**Bench:** Division Bench

**Advocate:** Soumya Majumder, Dipayan Kundu and Sunny Nandy, Advocate for the Appellant; Partha Dutt, Asok Kumar Ganguly, Yamin Ali, Manas Kumar Sadhu, Saira Banu, Jahar Lal De, Shamim ul Bari, Milan Chandra Bhattacharya and Subhajit Panja, Advocate for the Respondent

**Final Decision:** Disposed Off

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### **Judgement**

Jyotirmay Bhattacharya, J.

Both the writ petitions being W.P. No. 15733(W) of 2010 and W.P. No. 11352(W) of 2009 which were filed by the writ petitioner/respondent No. 1 were disposed of by a Learned Single Judge of this Court by a common order dated 27th June, 2012. These two Mandamus appeals are directed against the said order of the Learned Trial Judge at the instance of the appellant who was the respondent No. 7 in both the writ petitions. The respondent No. 7 was the selected candidate for the post of clerk in Shyamsundarpur Patna High School (H.S.), Purba Medinipur. The writ petitioner who was an unsuccessful candidate filed a writ petition being W.P. No. 11352(W) of 2009 challenging the legality of selection of the said respondent No. 7. According to him, selection was not made properly. He complained that more marks were awarded to the respondent No. 7 in the viva voce test and also in the typewriting test than what he actually deserved. A definite allegation of favouritism was made out against the headmaster of the said school who was also a member of the Selection Committee.

2. It was alleged that though a panel was prepared after holding the selection test placing the respondent No. 7 at the top of the said panel, but such panel was neither accepted by the Managing Committee of the school nor submitted to the concerned District Inspector of Schools for his approval until a sum of Rs. 1,50,000/- was paid by the respondent No. 7 to the headmaster of the said school on account of bribe as a consideration for selecting the respondent No. 7 for the said post.

3. Incidentally it may be mentioned herein that in course of enquiry held by the Managing Committee of the said school relating to such complaint, it was revealed that a sum of Rs. 1,50,000/- was deposited in the bank account of the headmaster in two instalments; part of such payment was deposited in the bank account of the headmaster on 17th October, 2008 and the remaining part of such payment was deposited in the bank account of the headmaster on 24th October, 2008. Such deposits were all made immediately after the interview was held. The interview was held on 27th September, 2008.

4. Deposit of such money in the personal account of the headmaster was sought to be explained by the headmaster in the meeting of the Managing Committee by contending that he collected the said money from his brother and other relatives. However, he failed to disclose the names and other particulars of his brother and his other relatives from whom he collected the said money.

5. Thus, suspicion which arose out of such deposit of unaccounted money in the personal account of the headmaster at the crucial time, in our view, could not be properly explained by the headmaster, even though we find that the Managing Committee of the said school accepted the said explanation of the headmaster without holding any further enquiry.

6. In this context, the first writ petition was filed by the petitioner challenging the legality of selection of the said respondent No. 7 for the post of clerk in the said school. The legality of the panel which was so prepared and approved by the concerned District Inspector of Schools was also challenged. Writ of mandamus was also sought for commanding the respondent No. 3, viz., the District Inspector of Schools (SE) to enquire into the allegation of the writ petitioner against the headmaster viz., the respondent No. 5 therein. Some other incidental reliefs were also claimed in the said writ petition.

7. Be it mentioned here that despite such definite allegation was made by the petitioner against one of the members of the Selection Committee for accepting bribe for selecting a nondeserving candidate, no affidavit was filed by any of the respondents in the said writ petition. Neither the headmaster of the said school nor the respondent No. 7 viz., the selected candidate filed any affidavit denying the allegation made out by the writ petitioner in the said writ petition.

8. Subsequently during pendency of the said writ petition, appointment which was given to the respondent No. 7 as a clerk of the said school was approved by the

concerned District Inspector of Schools. However, it was mentioned in the said approval letter that the said panel was approved, subject to result of the earlier writ petition. The approval of appointment of the respondent No. 7 was communicated to the school authority by the District Inspector of Schools (S.E.), Purba Medinipur vide its letter dated 22nd September, 2009.

9. The second writ petition was filed challenging the legality of approval of appointment of the respondent No. 7 given by the concerned District Inspector of Schools. The allegations which were made in the said writ petition against the selection process and/or for selection of the respondent No. 7 as a Clerk of the said school were almost identical with the allegations which were made out by the petitioner in his earlier writ petition. In addition thereto, the legality of approval of appointment of the respondent No. 7 as Clerk of the said school was challenged on several other grounds.

10. It was contended by the writ petitioner that the panel was not approved by the concerned District Inspector of Schools as per law. It was alleged that such panel was approved by the concerned District Inspector of Schools (S.E.) without considering the scoresheet of the individual members of the Selection Committee for the individual candidate either for the viva voce test or for the typewriting test.

11. The second writ petition was, however, contested by the school authority and the selected candidate by filing affidavit-in-opposition. Those respondents in their respective affidavits denied the material allegations made out by the writ petitioner in the said writ petition.

12. The allegation against the headmaster of the said school for receiving bribe for selecting the respondent No. 7 for the post of Clerk was also denied by the headmaster in the said affidavit.

13. The respondent No. 7 also in his affidavit denied that he gave any bribe to the headmaster of the said school for securing his appointment as Clerk in the said school. He also contended that even he had no fund at his disposal by which he could have paid the said amount to the headmaster of the said school on account of bribe.

14. Be that as it may, since an" allegation was made against the concerned District Inspector of Schools (S.E.) for approving the panel without considering the relevant papers including the scoresheets for the viva voce test and the typewriting test, direction was given by the Learned Trial Judge upon the concerned District Inspector of Schools (S.E.) for production of records to show that all those relevant documents were produced before the concerned District Inspector of Schools (S.E.) before he took the ultimate decision for approving appointment of the respondent No. 7 and he, in fact, applied his mind on those documents before approving appointment of the respondent No. 7 as a Clerk of the said school.

15. Despite such direction was given, the relevant records were not produced by the concerned District Inspector of Schools before the Learned Trial Judge to satisfy His Lordship that, in fact, those documents were all produced by the school authority to the concerned District Inspector of Schools for his consideration.

16. Under such circumstances, the Learned Trial Judge, while disposing of the writ petitions, recorded a positive finding in the impugned order that the District Inspector of Schools, despite direction was given upon him, did not produce the records to show that the relevant papers including the viva voce scoresheets and the typewriting test's scoresheets were produced before him by the school authority and he approved the appointment of the respondent No. 7 after considering those papers.

17. This is one of the primary reasons which led the Learned Trial Judge to conclude that selection of the said respondent No. 7 by the school authority was neither made by the school authority properly nor it was made in accordance with law nor the District Inspector of Schools approved the appointment of the said respondent No. 7 as per law.

18. Under such circumstances, both the aforesaid writ petitions were disposed of by the Learned Trial Judge not only by setting aside the impugned order passed by the concerned District Inspector of Schools (S.E.) but also by setting aside the approval of the panel accorded by the concerned District Inspector of Schools. As a result, the selection of the respondent No. 7 and his appointment as Clerk in the said school and the approval of his appointment as Clerk in the said school were set aside.

19. While disposing of the writ petitions, the school authorities were however directed to hold fresh interview after having fresh prior permission from the concerned District Inspector of Schools.

20. The legality and/or propriety of the said order of the Learned Trial Judge is under challenge in these two appeals.

21. Let us now consider the merit of the present appeals in the context of the facts and circumstances as stated above.

22. Mr. Majumder, learned advocate appearing for the appellant/respondent No. 7 makes elaborate submission to impress upon us that there was no illegality in the process of selection of candidate for the concerned post. He pointed out that his client was academically sound than the other two empanelled candidates. As such, more marks were given to him while assessing his academic qualification.

23. He further contends that the typewriting test was held and marks was allotted to the respective candidates as per their performance in the said test. He further contends that the empanelled candidates appeared in the oral test and marks were allotted to them as per their performance in the viva voce test. He further submits that these allegations are baseless and are beyond the scope of scrutiny by the writ

court.

24. Mr. Majumder ultimately concludes by submitting that since his client scored the highest marks in the selection test, his client was placed at the top in the panel. He submits that the said panel was examined by the Managing Committee of the said school and after the said panel was approved by the concerned District Inspector of Schools, his client was given appointment to the post of Clerk in the said school and his appointment having been approved by the concerned District Inspector of Schools, his appointment should not be upset merely on the basis of some vague and evasive allegation made by an unsuccessful candidate against one of the members of the Selection Committee, particularly when it appears that in viva voce test more marks were given to the unsuccessful candidates by the Headmaster of the said school than the marks awarded by him to the successful candidate. He thus, invites us not to interfere with the appointment of the respondent No. 7/appellant.

25. Mr. Bhattacharya, learned senior counsel appearing for the school authority also supports the appellant by contending, inter alia, that no illegality and/or irregularity was committed either by the school authority in the process of selection of the respondent No. 7/appellant for his appointment in the post of Clerk in the said school or in according approval to such appointment by the District Inspector of Schools.

26. He further submits that the panel was prepared on the very same day when selection test was taken and after the said panel was approved by the Managing Committee of the said school, it was sent to the concerned District Inspector of Schools for his approval.

27. He further submits that after the said panel was approved by the concerned District Inspector of Schools, the school authority appointed the respondent No. 7/appellant as Clerk in the said school and the concerned District Inspector of Schools (S.E.) after considering all the relevant records including the typewriting test papers and the other scoresheets of the individual members of the Selection Committee, approved the appointment of the respondent No. 7. Copy of the panel including the other relevant papers and the typewriting test papers of the individual candidates were produced before us by Mr. Bhattacharya in course of hearing of this appeal to demonstrate that there was no illegality in the process of assessment of the merit of the participating candidates.

28. He also challenges the maintainability of the writ petition at the instance of the writ petitioner/respondent as he after being unsuccessful in the selection test, filed those writ petitions for challenging the selection of the successful candidate.

29. Relying upon a decision of the Hon"ble Supreme Court in the case of [Madan Lal and Others Vs. State of Jammu and Kashmir and Others](#), he submits that if a candidate takes a calculated chance and appears at the interview, then only because the result of the interview is not palatable to him, he cannot turn round and

subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted.

30. Relying upon the said decision of the Hon"ble Supreme Court, he contends that both the writ petitions should have been rejected by the Learned Trial Judge by following the principle as laid down by the Hon"ble Supreme Court in the aforesaid decision.

31. By relying upon another decision of the Hon"ble Supreme Court in the case of [City and Industrial Development Corporation Vs. Dosu Aardeshir Bhiwandiwalla and Others](#), he contended that though the State-respondents did not file any affidavit before the Learned Trial Court in connection with the writ petition but when the State-respondent was directed to produce the relevant records relating to the approval of the appointment of the respondent No. 7, it was the bounden duty of the State-respondents to produce the complete records relating to the recruitment process to dispel the doubts from the minds of the Learned Trial Judge as to the alleged illegality committed in the process of selection of the respondent No. 7 for the concerned post.

32. According to Mr. Bhattacharya had those documents been produced by the State respondents before the Learned Trial Judge then it would have been apparent from the records that the concerned District Inspector of Schools duly considered the relevant records including the typewriting test papers before approving the panel and/or approving the appointment of the respondent No. 7.

33. To demonstrate before this Court that all those papers were submitted by the school authority before the concerned District Inspector of Schools, he produced the Photostat copies of the entire records which were sent by the school authority to the concerned District Inspector of Schools in connection with the selection of the respondent No. 7 to the said post and for approval of his appointment.

34. However, nothing has been produced before us to show that those papers including the typewritten test papers were in fact, submitted by the school authority to the concerned District Inspector of Schools. No acknowledgement regarding receipt of those documents by the concerned District Inspector of Schools has been produced before us.

35. The learned advocate appearing for the State-respondents, however, produces photostate copies of a bunch of papers to show that those documents were all produced before the concerned District Inspector of Schools. However, we are still at a loss to understand as to why those papers were not submitted before the Learned Trial Judge. It is interesting to note here that even the original documents have not been produced before us.

36. Be that as it may, even without going into the details of such enquiry, we find that the selection process cannot be held to be legal and valid as we find that the

very initiation of the selection process was illegal as the prior permission for initiation of the selection process was granted by the concerned District Inspector of Schools within the ban period. While considering this aspect of the matter, we have considered the prior permissions granted by the concerned District Inspector of schools (S.E.) which were produced by Mr. Bhattacharya before us.

37. On examination of those papers, we find that prior permissions were granted by the concerned District Inspector of schools twice. Firstly, one prior permission was granted by the concerned District Inspector of Schools on 2nd November, 2007 for filling up the vacancy in the post of a Clerk which fell vacant due to retirement of Sri Nitai Chandra Dinda, a clerk of the said school.

38. From the said prior permission, we find that the post of clerk for which such prior permission was granted, was reserved for E.C. candidate. Subsequently, another prior permission was granted by the concerned District Inspector of schools (S.E.) on 28th July, 2008. The concerned District Inspector of schools (S.E.) by granting prior permission on 28th July, 2008 permitted the school authority to initiate a selection process for filling up the vacancy in the post of a clerk which fell vacant due to the retirement of Sri Netai Chandra Dindia, a clerk of the said school. However, this time it was mentioned in the prior permission that the said post is reserved for the scheduled caste candidate. In the said prior permission it was specifically mentioned that previous sanction issued in the office of the concerned District Inspector of schools under Memo No. 1174-S dated 2nd November, 2007 was cancelled.

39. As a matter of fact, the present selection process was initiated on the basis of the subsequent prior permission which was issued by the concerned District Inspector of schools on 28th July, 2008 after cancellation of the previous prior permission granted by the said District Inspector of schools on 2nd November, 2007. The said selection process was concluded on the basis of the prior permission issued on 28th July, 2008. In this regard, our attention is drawn to the Government Circular being No. 1333 - SE(LAW)/08 dated 22nd July, 2008 which runs as follows:

"In response to the above reference this is to state that a revised policy decision for recruitment of Group "C" & Group "D" staff of the non-Govt. aided educational institutions is under process.

Hence the District Inspector of schools (S.E.) of all the districts may be directed to refrain from issuing fresh prior permission to schools for the recruitment of non-teaching staff until the finalisation of the policy. In such cases where prior permission have already been issued, recruitment process may continue in accordance with existing procedure and in terms of orders passed by the Hon"ble Court of law if any. No fresh prior permission should be issued except under directions of the Hon"ble Court."

40. In view of the said Government Circular, we have no hesitation to hold that ban in issuing prior permission by the District Inspector of schools for recruitment of Group "C" and Group "D" staff of the non-Government aided educational institution was imposed with effect from 22nd July, 2008. The prior permission on the basis of which the present selection process was initiated, was issued on 28th July, 2008. The said prior permission was not granted under the order of any Court.

41. As such, we have no hesitation to hold that such prior permission was granted during the ban period, as there was nothing on record to show that the revised policy for recruitment of Group - C and Group - D staff in non-Government aided educational institution was finalised before issuance of such prior permission on 28th July, 2008.

42. Mr. Bhattacharya further contends that the subsequent prior permission which was issued on 28th July, 2008 was practically issued in continuation of the earlier prior permission which was issued on 22nd November, 2007 with certain modification as regards the nature of the post which was required to be filled up as per the roaster. He, thus, contends that since there was no material change in the subsequent prior permission issued by the concerned authority, the subsequent prior permission should be considered as a prior permission issued in continuation of the earlier prior permission. According to him, if the subsequent prior permission is treated as continuation of earlier prior permission, then of course we find no other way but to hold that the subsequent prior permission was not issued within the ban period.

43. Mr. Yamin Ali, learned advocate, appearing for the State submits that the subsequent prior permission was issued by his client in ignorance of the ban issued by the Government. He contends that the decision of the Government for imposition of ban for issuing fresh prior permission after 22nd July, 2008 was in fact came to the knowledge of the concerned District Inspector of schools (S.E.) on 29th July, 2008 and as a result, the subsequent prior permission was issued on 28th July, 2008.

44. Be that as it may, we cannot accept the contention of Mr. Bhattacharya that the second prior permission was issued in continuation of the first prior permission which was issued on 2nd November, 2007; as in the subsequent prior permission which was issued by the concerned District Inspector of schools (S.E.), it was specifically mentioned that "The previous sanction issued under this office memo No. 1174-S dated 2nd November, 2007 is hereby cancelled".

45. As such, we hold that the second prior permission was not issued in continuation of the earlier prior permission.

46. Before parting with; we like to mention here that when a ban is imposed, such ban becomes effective prospectively i.e. with effect from the date when such ban was imposed, notwithstanding the fact that imposition of such ban was communicated to the concerned District Inspector of schools, subsequently.



47. As such, even if we accept the submission of Mr. Yamin Ali that the second prior permission was issued by his client in ignorance of a ban, still then, we cannot hold that the second prior permission was legal and valid simply because of the fact that the said prior permission was issued by the concerned District Inspector of schools in ignorance of the ban imposed by the Government as mentioned above. Rather we hold that it was the duty of the said District Inspector of Schools (SE) to recall the said prior permission immediately after he came to know about the said ban.

48. These chain of events lead us to conclude that since the selection process was initiated on the basis of an illegal prior permission issued within a ban period, the entire process was vitiated. As such, we do not find any reason to interfere with the impugned order by which the entire selection process including the appointment of the respondent No. 7 and the approval of his appointment by the District Inspector of Schools (SE) were set aside by the Learned Trial Judge.

49. It may be mentioned here that Mr. Bhattacharya by drawing our attention to the recent decision of a Division Bench of this Hon"ble Court in the case of [Asoke Sawoo Vs. The State of West Bengal and Others](#), submits that since the vacancy which is now going to be filled up, arose long before the earlier Recruitment Rules were amended, the selection process for the said post of the clerk should be completed by following the recruitment rules which was prevalent as on the date when the vacancy occurred.

50. Since this is not the subject matter of challenge before us in this appeal, we refrain ourselves from making any observation with regard to such contention of Mr. Bhattacharya. We simply observe that the vacancy so occurred due to retirement of Nitai Chandra Dinda, a clerk of the said school, shall now be filled up by the school authority as per law. Both the appeals are, thus, disposed of with the observation and/or modification as mentioned above.

Urgent photostat certified copy of this order, if applied for, be given to the petitioner as early as possible.

Ishan Chandra Das, J.

I agree.