

**IN THE WEST BENGAL ADMINISTRATIVE TRIBUNAL
BIKASH BHAVAN, SALT LAKE CITY
K O L K A T A – 7 0 0 0 9 1**

Present :-

**HON'BLE JUSTICE SOUMITRA PAL, CHAIRMAN
-AND-**

HON'BLE SAYEED AHMED BABA, MEMBER (A)

J U D G M E N T

-of-

Case No O.A. 170 of 2021

NEWTON BISWAS AND 320 OTHERS APPLICANTS

-Versus-

THE STATE OF WEST BENGAL AND 583 OTHERS..... RESPONDENTS

For the Applicants :

Mr. Subir Sanyal, Mr. Dibyendu Chatterjee, Mrs. Reshmi Ghosh, Mr. P. Majumdar, Ms. P. Paul, Advocates

For the State Respondents :

Mrs. Sunita Agarwal, Advocate

For the Private Respondents :

Mr.Kamalesh Bhattacharya with Mr.Gourav Halder, Advocates

For the Public Service Commission, West Bengal :

Mr. Goutam Pathak Banerjee,
Advocate.

Judgment delivered on : 20th day of April, 2022.

1. In the original application being OA 170 of 2021, filed on 26th February, 2021, Newton Biswas and others have prayed for certain reliefs, the relevant portion of which is as follows :-

“ a) An order quashing the entire process of selection for recruitment to the post of Fire Operator in the Department of Fire and Emergency Services, Government of West Bengal of the declared vacancies and directing the respondents to commence the process of recruitment afresh maintaining the lack of transparency by publishing cut off marks of the Written Test and the result of the respective candidates with breakup of marks.

b) An order directing the respondents to publish the marks of the Written Test and marks of interview and also to publish and also to publish the OMR of the applicants”.

2. The applicants have also prayed for an interim order, which is as under:-

“....An order restraining the respondents from giving any effect or further effect to and/or making any appointment of any of the provisionally selected candidates of the Merit List published on 11th February 2021 for the post of Fire Operator in the Department of Fire and Emergency Services, Government of West Bengal, at least fortnight before publication of the result of all the selected candidates with the breakup of their marks for Written test and interview and also the OMR....”

3. The application came up for hearing before the Single Bench of the Tribunal, constituted pursuant to the notification dated 24th December, 2020 issued in exercise of the powers conferred under sub section (6) of section 5 of the Administrative Tribunals Act, 1985, on 17th March, 2021 when after hearing the learned advocates for the parties it was directed to appear under the heading “Admission Hearing” on 19th March, 2021.

4. Accordingly, the matter came up for hearing on 19th March, 2021 and after hearing the learned advocates for the parties it was admitted and it was further directed that “ *in view of the fair submission made by Mr. Banerjee, the Commission shall upload the marks obtained by all the candidates in the written test and interview and shall also publish OMR of the candidates on the website of*

the Commission within ten days from the date of communication of this order downloaded from the internet/website.

Let the matter appear under the heading “For Orders” on 12th April, 2021.

Let there be an interim order directing each of the respondents not to take any action on the basis of the recommendations made by the Commission till 19th April, 2021”. It be noted interim order passed was extended from time to time.

5. It appears that the Public Service Commission, West Bengal (‘Commission’ in short) had published an advertisement in its website on 13th June, 2018 inviting the applications from eligible candidates for recruitment to the post of Fire Operator in the West Bengal Fire and Emergency Services under the department of Fire and Emergency Services, Government of West Bengal. In the advertisement, it was mentioned that there are 1452 vacancies. Out of the total vacancies of 1452, 707 is for unreserved candidates, Scheduled Caste – 309, Scheduled Tribe – 93, OBC ‘A’ – 157, OBC ‘B’ – 74, Ex-servicemen – 80, meritorious sports personnel – 32. The applications were received on line on and from 13th June, 2018 till 3rd July, 2018. The written test for 80 marks was held on 15th September, 2018, admit cards were issued to the applicants and they had participated in the written test.

6. During first week of September, 2019, the Commission published a list of candidates provisionally qualified for physical measurement/endurance test in connection with recruitment to the post concerned. It has been stated in the original application that the Commission did not disclose the marks obtained by the individual candidates in the written examination. The list only contained the roll numbers along with the names of the candidates to be called for physical measurement test. The list did not disclose the marks obtained by the candidates in the written examination and thus the applicants were not aware of the marks secured by them in the written test.

7. It has been stated that no qualifying/cut off marks of the written test was declared by the Commission. Thereafter, the Commission published a list of a

total 5375 candidates for interview to be conducted on and from 28th December, 2020 to 1st February, 2021. However, it did not contain the marks obtained by the candidates in the physical measurement test. The applicants appeared in the interview/personality test for which 20 marks were allotted. On 11th February, 2021, the final merit list was published by the Commission in the official website and the applicants “..found that their names did not figure in the final merit list despite being meritorious” and inspite of putting in best efforts.

8. On 20th April, 2021 the applicants filed a supplementary affidavit praying for bringing on record subsequent facts in furtherance of the case made out in the original application and the reliefs prayed therein.

9. On 29th June, 2021 an application being MA 56 of 2021 in connection with the original application was filed wherein the applicants therein prayed to be added as party respondents to the original application being OA 170 of 2021. The original applicants contested the said application by filing an objection to the application for addition of parties. After hearing the parties the said application for addition of parties was disposed of by passing an order on 7th September, 2021, the relevant portion of which is as under :-

“...In the original application there are no allegations against the applicants in MA-56 of 2021. Since it appears from the reply to the Original Application that the names of the proposed respondents have been recommended by the Commission on 11th February, 2021, the applicants in MA-56 of 2021 are necessary parties. Hence, the application for addition of parties, being MA-56 of 2021, is allowed. The Registry of the Tribunal is directed to amend the cause title by incorporating the names of the applicants in MA-56 of 2021 as respondents in OA-170 of 2021 within a week from the date of sending down the records. Since there is no allegation against the applicants in the Original Application who have been directed to be added as respondents in the Original Application, the question of denial of facts in the Original Application does not arise and hence no reply is required to be filed by the added respondents in the Original Application.

Hence, in view of the above, the learned advocate on record in the Original Application, being OA – 170 of 2021 is directed to hand over copies of

the Original Application, reply, rejoinder/objection and affidavits exchanged between the parties in course of this week.”.

10. The original application along with the supplementary affidavit came up for hearing before the Tribunal on various dates. The State respondents and the Public Service Commission, West Bengal have filed their respective replies. On 31st August, 2021 an order was passed, the relevant portion of which is as under :-

“Since Mr. S.Sanyal, learned advocate for the original applicants submits as marks obtained by a candidate in Physical Efficiency Test and Desirable Qualification have been clubbed together as evident from annexure ‘B’ to the supplementary affidavit and since it is submitted that the marks in Physical Efficiency Test and Desirable Qualification need to be segregated for better understanding, the Public Service Commission, West Bengal and its Chairman are directed to publish the segregated marks in Physical Efficiency Test and Desirable Qualification which shall be put up in the website of the Commission by 3rd September, 2021”.

11. The Commission had complied with the said order, which is recorded in the order dated 7th September, 2021, the relevant portion of which is as under :-

“....On 31st August, 2021, direction was issued upon the Public Service Commission, West Bengal to publish the segregated marks in Physical Efficiency Test and Desirable Qualification by 3rd September, 2021. It is submitted by Mr.G.P. Banerjee, learned advocate for the Public Service Commission, West Bengal that the said direction has been complied with as it has been published and put up in the website of the Commission. Since Mr. Banerjee took leave to file the list of the segregated marks of the candidates and objected to by Mr. S. Sanyal, learned advocate for the applicants, in the event the Commission intends to file the segregated marks it shall be by an affidavit and in that event a copy be served on the learned advocate on record for the original applicants”.

12. Thereafter the original applicants had filed an application being MA 109 of 2021 on 12th November, 2021 praying for the following :-

“...Under the circumstances as aforesaid, your applicants most respectfully pray that Your Lordships may graciously be pleased to pass a direction upon the Public Service Commission to supply the answer keys of the written examination for the post of Fire Operator in the West Bengal Fire Services under the Department of Fire and Emergency Services of West Bengal, 2018..”.

13. The said application was disposed of on 10th February, 2022 by passing an order, the relevant portion of which is as under :-

“...Considering the prayer made in the miscellaneous application, the Deputy Secretary, Public Service Commission, West Bengal, the respondent no. 5 is directed to furnish the key answers of the written examination for the post of Fire Operator in the West Bengal Fire Services under the Department of Fire and Emergency Services of West Bengal, 2018 before the Tribunal on 23rd February, 2022. A copy of the key answer shall be furnished to the learned advocate-on-record of the applicant by 16th February, 2022.

As nothing remains to be decided in the instant application, the miscellaneous application, being MA-109 of 2021, is disposed of.....”.

14. Thereafter on 22nd February, 2022 the applicants filed an application, being MA 22 of 2022, in connection with the original application pointing out that as there have been wrong key answers of some questions resulting in the selection process getting vitiated and merit of the candidates could not be judged, the entire OMR of the written test may be revaluated and the selection process be reinitiated.

15. Mr. S. Sanyal, learned advocate appearing on behalf of the applicants relying on the original application and the supplementary affidavit submitted as wrong key answers to question Nos. 50, 58 and 36 of ‘A’ Service of mention book with the condition of negative marking vitiates the entire basis of selection process and affects the merit of the candidates, the entire OMR of the written test should be revaluated and thereafter selection process be reinitiated.

16. Submission was as 2 OMR sheets were published by the Commission and as answers to question Nos. 24, 25, 50 and 74 in corrected OMR sheets were not considered there should have been an increase of two to four marks of the applicants and accordingly the recommended list may be directed to be reviewed.

17. It was also submitted that non publication of qualifying marks before holding written test and personality test makes the entire selection process vitiated.

18. Moreover, allotment of lesser marks in the personality test to the candidates, who secured higher marks in the written test, in a calculative and systematic manner to keep them out of the zone of appointment is arbitrary and illegal.

19. Submission was giving preference to the candidates, who had secured higher marks in personality test, in case of tie in total marks in written test and personality test, is illegal and arbitrary as there was no such condition either in the advertisement or in the rules of the Commission. According to him it was introduced by the Commission subsequent to the completion of written examination and interview and at the stage of recommendation which amounts to change of rules of game. Moreover, ultimate selection only on the basis of personality test in case of tie of marks is arbitrary, unjust, malafide and illegal as personality test is a breeding ground of favouritism and nepotism.

20. Mr. S. Sanyal has relied on the following judgements :-

(1) Richal Vs Rajsthan Public Service Commission (2018) 8 SCC 81, (2) Nirav Kumar Dilipbhai Makwana – Vs- Gujrat Public Service Commission (2019) 7 SCC 383, (3) K. Manjusree – versus- State of A. P. (2008) 3 SCC 512, (4) Krishan Yadav and another – versus- State of Haryana and another (1994) 4 SCC 165, (5) Ajay Hasia – versus- Khalid Mujib Sehravardi and others (1981) 1 SCC 722, (6) Bank of India – Versus- Vijay Transport (2000) 8 SCC 512, (7) Dalpat Abasaheb Solunke – vs- B. S. Mahajan (1990) 1 SCC 305, (8) State of Maharashtra – vs- Sarva Shramik Sangh, Sangli (2003) 5 SCC 321.

21. Mr. G.P. Banerjee, learned advocate appearing on behalf of the Commission, relying on the replies filed submitted that as the original applicants, belonging to different categories, have come together and have filed the original application, which is contrary to Section 19 of the 1985 Act, the application is not maintainable. Though the applicants have prayed for quashing the entire process of selection for recruitment to the post of Fire Operator in the department of Fire and Emergency Services, Government of West Bengal, however, as all along the applicants participated in the selection process without protest and as they cannot approbate and reprobate, the application be dismissed. The applicants having participated in the selection process having full knowledge of the stipulations in the advertisement cannot now go back and challenge the selection process itself.

22. With regard to the question of framing of key answers raised by the applicants, submission was as experts have prepared the key answers, the challenge to the same is without foundation.

23. With regard to the publication of two OMR sheets by the Commission, as raised in paragraph 13 of the supplementary affidavit, submission was it has been adequately dealt with in paragraph 15 of the reply to the supplementary affidavit. Submission was due to technical problem some OMR sheets were not displayed properly which were rectified after notice. It was submitted that Sourav Sen secured 47.67 marks in the written test and 7 marks in the interview and had obtained 54.67 marks in aggregate. Submission was some candidates had also secured 54.67 marks which was the cut off marks obtained in the aggregate by the last recommended candidate in General category. However, Sourav Sen was not recommended because he obtained lower marks in the personality test than the last recommended candidate.

24. With regard to allegation of non publication of qualifying marks before holding written test and personality test, it was submitted that as Commission has the discretion to fix the cut off marks or qualifying marks depending on the number of candidates and as in the instant case there were thousands of candidates, the submission is without any basis.

25. The allegation of granting lesser marks in the personality test to the candidates who had secured higher marks in the written test in a calculative manner to oust them from the zone of appointment is without basis as no concrete example has been given either in the original application or in the supplementary affidavit.

26. With regard to the allegation of preference given to the candidates securing higher marks in the personality test in case of tie in total marks, that is written test and personality test, submission was since large number of candidates had participated in the selection process and as the allegation is bald and no specific case has been made out, the submission be not accepted.

27. Referring to the original application, it was submitted though the instances of Biswajit Ghosh and Mintu Ghosh, the candidates who had participated in the selection process have been highlighted, they are not parties to the application. Moreover, the statements made in paragraphs 5(dd), 5(ee) and 5(ff) in the original application are contradictory to each other.

28. Mr. Banerjee has relied on the following judgements in support of his submission. They are :- Dalpat Abasaheb Solunke – vs- B. S. Mahajan AIR 1990 SCC 434, Sadananda Halo – vs- Mamotaz Ali Sheikh 2008(4) SCC 619 and Ashok Kumar – vs- State of Bihar 2017 (4) SCC 357.

29. Mr. K. Bhattacharjee, learned advocate for the private respondents, adopting the submission on behalf of the Commission submitted that the original application does not contain any material fact. Rather facts have been supplanted in the supplementary affidavit. So far as the supplementary affidavit is concerned, the scope of the original application is sought to be enlarged which is not permissible in law. Since the applicants have participated in the selection process being aware of the stipulations contained in the advertisement which does not speak of disclosure of cut off marks before written examination and as the Commission has the power to fix cut off marks and as the applicants had appeared in all stages of the selection process and had allowed the selection process to continue, they cannot now turn back and challenge the selection process. Moreover, the applicants have not highlighted any procedural irregularities in the

selection process either in the original application or in the supplementary affidavit. Further, before moving the original application, the applicants have not filed representation highlighting any defect either with regard to the selection process or with regard to grant of individual marks. Mr. Bhattacharjee has relied on the judgement in Union of India – vs- S. Vinod Kumar 2007 (8) SCC 100 in support of his submission.

30. Mrs. S. Agarwal, learned advocate appearing on behalf of the State respondents, adopting the submission of the Commission submitted that as the applicants had all along participated in the selection process, they cannot now turn back and challenge the said process. Though the original applicants belong to various caste groups, they have joined for a common cause of action, which is impermissible under section 19 of the Act.

31. There are several issues, which require consideration.

32. Before we proceed to deal with the issues, it is pertinent to mention that though the applicants in paragraph 5(u) have alleged that there has been a clear violation of the reservation policy in as much as candidates having applied for OBC-‘B’ category have been selected in the unreserved category, however, same has neither been pleaded in the original application nor in the supplementary affidavit. Therefore, the allegations made in the said paragraph regarding lack of maintenance of transparency in the process of public recruitment is not tenable. It is to be noted that neither in the application nor in the supplementary affidavit the applicants have given any instance regarding breach of the reservation policy. So the judgement in Nirab Kumar Dilipbhai Makwana (supra) has no application.

33. With regard to the allegation of wrong key answers in question No. 50, 58 and 36 of ‘A’ service of mention booklet with the condition of negative marking, it is to be noted that while the applicants strenuously on the basis of the certain texts submitted that the key answers are wrong and the learned advocates for the respondents, including the private respondents, also on the basis of some other texts had refuted it, as key answers were prepared by the experts, Court cannot interfere in the answers formulated by them and thus, the said argument cannot be accepted.

34. With regard to publication of two OMR sheets by the Commission, we accept the submission made in the reply in the form of an affidavit by the Commission that due to technical problem some OMR sheets could not be displayed properly which were rectified after notice. In our view, since thousands of candidates had participated in the selection process and as it was a technical error, the submission of the Commission regarding the publication of second OMR sheet is to be accepted.

35. The learned advocate for the applicant had strenuously submitted that cut off marks should have been fixed prior to the written test and personally test. Since in the instant recruitment process, a large number of candidates had participated, in our view pre fixation of cut off marks would have resulted in anomalies. We accept the submission on behalf of the Commission that it would not have been feasible if cut off marks were fixed too high or too low, then the Commission might either have faced a problem of excess candidates or paucity of candidates and for that reason, fixation of cut off marks, after the results were available to the Commission, was a sound proposition and would not have caused prejudice to any of the applicants. The contention on behalf of the Commission that there cannot be any pre-fixed minimum marks to qualify in the examination to be eligible for interview is reasonable. Moreover, fixation of cut off marks, when the number of candidates appearing is very high, should be left to the discretion of the Commission.

36. In this regard it is to be noted that the Supreme Court in Union of India – vs- S. Vinod Kumar (supra) held “ *Once it is held that the appellants had the requisite jurisdiction to fix the cut-off marks, the necessary corollary thereof would be that it could not be directed to lower the same. It is trite that it is for the employer or the expert body to determine the cut-off marks. The court while exercising its power of judicial review would not ordinarily intermeddle therewith. The jurisdiction of the court, in this behalf, is limited. The cut-off marks fixed will depend upon the importance of the subject for the post in question. It is permissible to fix different cut-off marks for different categories of candidates*”. Since the power of the Commission to fix cut off marks is neither denied nor

disputed by the applicants, the submission regarding non publication of qualifying marks before holding written test and personality test cannot be accepted.

37. The allegation of allotment of lesser marks in the personality test/interview, who secured higher marks in the written test in a calculative and systematic manner to keep the deserving candidates out of zone of appointment is unacceptable as no specific example regarding the same has been demonstrated neither in the original application nor in the supplementary affidavit.

38. Regarding preference given to the candidates, who secured higher marks in the personality test in case of tie in total marks, that is written test and personality test, it is to be noted that as the applicants had participated in the selection process knowing fully well about the stipulations in the advertisement and as the Commission has the power, keeping in mind the number of candidates who are participating, the said submission on behalf of the applicants cannot be accepted.

39. It is an admitted position that the applicants had participated in the selection process without raising any objection. The Supreme Court in Ashok Kumar (supra) while reiterating the well settled principle had held that “*The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable*”. Therefore, the challenge of the applicants to the selection process is without any merit.

40. So far as the judgements cited on behalf of the applicants are concerned, as the principles of law laid down in Nirab Kumar Dilipbhai Makwana (supra) relates to violation of the reservation policy and no such instance has been pleaded with specific name and roll number in the application, the same is not applicable. The judgement in K. Manjusree (supra) is not applicable as it relates to appointment of judicial officers and whereas in the instant case, it relates to appointment of Fire Operators where the parameters of employment are different and thousands of candidates had applied for the job. The judgement in Ajay Hasia (supra) has been over-ruled by judgement in Lila Dhar – versus- State of Rajasthan reported in 1981 AIR SC 1777. Since in the application the applicants have not pleaded specifically about bias or nepotism in the selection process in

selecting the candidates, the judgement in Dalpat Abasaheb Solunke (supra) is not applicable.

41. In Richal (supra) the Supreme Court while considering the matter in the background of the School Lecturer Examination 2015 conducted by the Rajasthan Public Service Commission did not lay down any proposition of law about applicability of any methodology in the event the key answers are found to be wrong. As has been held by various courts answers on the basis of debate and deliberation cannot be accepted. The principles of law laid down in the judgements in Krishan Yadav (supra), Bank of India – Vs- Vijay Transport (supra), State of Maharashtra – vs- Sarva Shramik Sangh, Sangli (supra) are not applicable due to lack of pleadings.

In view of the aforesaid, the original application (OA-170 of 2021) is dismissed. Interim order is vacated.

As discussed hereinbefore, no direction is passed on the Commission as prayed for in MA-22 of 2022. Hence, the Miscellaneous Application (MA-22 of 2022) is also dismissed.

No order as to cost.

(SAYEED AHMED BABA)
MEMBER(A)

(SOUMITRA PAL)
CHAIRMAN

Later :

After judgement is pronounced, Mr. D. Chatterjee, learned advocate for the applicants, prays for stay of the operation of the judgement and order which is opposed by Mr. G. P. Banerjee, learned advocate for the Public Service Commission and Mrs. S. Agarwal, learned advocate the State respondents. Prayer is considered and refused.

(SAYEED AHMED BABA)
MEMBER(A)

(SOUMITRA PAL)
CHAIRMAN