

**Ashok Kumar and ors. Vs. State of Rajasthan and ors.**

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**Court :** Rajasthan

**Decided On :** Dec-22-2006

**Reported in :** RLW2007(2)Raj1019

**Judge :** Mohammad Rafiq, J.

**Appellant :** Ashok Kumar and ors.

**Respondent :** State of Rajasthan and ors.

**Disposition :** Petition dismissed

**Judgement :**

**Mohammad Rafiq, J.**

1. All the aforesaid 32 writ petitions have been filed with a similar prayer that the notification dated 14th July, 2003 issued by the respondents thereby amending Rule 226 of the Rajasthan Panchayat Raj Rules, 1996 and the advertisement dated 27th July, 2003 inviting applications for appointment on the post of Teacher Gr. III be declared illegal and unconstitutional and quashed and further prayer that the respondents be directed to operate and give effect to the notification/order dated 01st July, 2003 whereby the government decided to give appointment to all those who had appeared in the select panel prepared pursuant to the recruitment process initiated in the year 1998.

2. The impugned notification and the advertisement are in fact off-shoot of the judgment of Hon'ble Supreme Court in *Kailash Chandra Sharma v. State of Rajasthan and Ors.*, reported in : [2002]SUPP1SCR317 wherein their Lordships while upholding the judgment of this Court held that the provision made by the State Government in its circular dated 10th June, 1998 providing for ten bonus marks on the ground of domicile in the State of Rajasthan, ten bonus marks for residents of the district concerned and five bonus marks to the residents of rural area of that district was illegal, discriminatory and unconstitutional. Full Bench of this Court in *Deepak Kumar Suthar and Anr. v. State of Rajasthan and Ors.* vide its judgment dated 21st October, 1999 reported in (1999) 2 RLR 692 while dealing with the cases of appointment of Teachers Gr.II and Gr.III held that any kind of weightage/advantage in public employment is not permissible on the ground of place of birth or residence and the provision contained in the relevant Government Circular providing for bonus marks was declared to be illegal and void ab initio. Another Full Bench of this Court in *D.B. Civil Writ Petition NO.3928/1998* vide its judgment dated 18th November, 1999 reiterated the same view regarding process of selection for appointment of Primary School Teachers with various Zila Parishads of the State. A Co-ordinate Bench of this Court by judgment dated 26th February, 2001 in a bunch of writ petitions directed preparation of fresh merit list in respect of candidates who were not appointed on or before 21 st October, 1999 without awarding any bonus marks. The Division Bench upheld the said judgment by its decision rendered on 13th April, 2001. The State of Rajasthan and certain affected employees filed SLPs against the said decision. The Hon'ble Supreme Court although upheld the judgment of the Division Bench as also of the Full Bench. While taking note of the fact that in almost all the writ petitions that the candidates appointed pursuant to the aforesaid selection were not impleaded parties to the litigation before the Hon'ble High Court, Hon'ble Supreme Court however confined the relief to only such candidates who had moved the High Court as petitioners and by invoking the doctrine of prospective overruling held that aforesaid judgment would apply to only such appointment which were made on or after 18th November, 1999. In other words, the appointments made up to 17th November, 1999 were saved and directed not to be reopened. In the special circumstances of the case however the Hon'ble Supreme Court while invoking the

Article 142 of the Constitution moulded the relief accordingly. What is however relevant to be noted for the present purpose is that relief granted by the Hon'ble Supreme Court was confined to only those petitioners who had moved the High Court and the appointments made on or after 18th November, 1999 were liable to be undone. Those writ petitioners and those who were in the select list were not appointed if are found to be superior in merit by exclusion of the bonus marks were required to be considered for appointment by replacing the candidates appointment on or after 18th November, 1999.

3. First 16 writ petitions out of the aforesaid 32 petitions, the candidates are claiming appointment with the Zila Parishad, Banswara and in the remaining, appointments are being claimed with Zila Parishads of various other districts. Although the issues raised in all the writ petitions are substantially covered by judgment of a Co-ordinate Bench of this Court dated 10th September, 2003 in *Madhu Soni v. State of Rajasthan and Ors.* S.B. Civil Writ Petition No. 3512/2003 and connected matters vide which a batch of 843 writ petitions were dismissed. Learned Counsel for the petitioners however in the present case has insisted on making fresh arguments because according to him these petitions raise certain additional grounds not urged before the learned Single Judge in *Madhu Soni (supra)*. Although instantly it may be noted that the very same learned Counsel who represent the petitioners in this batch of petitions was also appearing for some of the petitioners in those cases too. Even though the writ petitions could have been decided on the basis of judgment rendered in *Madhu Soni (supra)*, yet however I have heard the learned Counsel for the parties on those additional arguments which I shall deal with shortly hereafter.

4. In so far as first 16 of the above writ petitions pertaining to district Banswara are concerned, learned Counsel Shri P.R. Mehta raised two fold contentions, firstly it has been urged that even though the Hon'ble Supreme Court had directed the respondents to confine the consequential appointment to only those who had moved the High Court as writ petitioners by replacing the candidates appointed on or after 18th November, 1999 yet the respondents have given appointment to respondent No. 4 Shri Ishwar Bharti and respondent No. 5 Shri Bhura Lal who did not fall in that category. Contention of learned Counsel for the petitioner is that

neither Ishwar Bharti nor Bhura Lal had ever filed any writ petition. Yet, they have been appointed. The petitioners appeared at a much higher place than them in the merit having secured more marks. Such a contention has been pointedly raised in para 11 and ground I of the writ petition No. 4068/2003 filed by Ashok Kumar Pathak and 22 others candidates and also in other petitions relating to district Banswara.

5. The respondents in reply to para 11 although admitted that the respondents No. 4 and 5 were less meritorious than the petitioners but defended their appointment on the ground that while the petitioner did not approach the Court at the time of relevant selection process whereas the respondents No. 4 and 5 approached the Court. They have however not given any specific details of the writ petition which any of them filed either individually or jointly with some other petitioners.

6. The petitioners in rejoinder to the reply however asserted the same fact again and contended that no particulars or details of the writ petitions allegedly filled by the respondents No. 4 and 5 have been given and proof to this effect that they ever filed any writ petitions prior to the judgment of the Hon'ble Supreme Court in Kailash Chandra (supra) has not been furnished. He referred to the judgment of a Co-ordinate Bench of this Court in Deepak Vaishnav and Ors. v. The State of Rajasthan and Ors. in S.B. Civil Writ Petition No. 4586/2004 decided on 29th September, 2005 in which case respondents No. 4 and 5 were impleaded as party respondents and upon the respondents admitting the fact that the petitioners No. 1, 9, 10, 11 and 12 had secured more marks than the respondents No. 4 and 5, a direction was given to the respondents to offer appointment to them.

7. Another argument raised by the learned Counsel for the petitioners, which is common to all the writ petitions, is that the Government itself has issued a circular and order on 01st July, 2003 wherein it decided that such candidate who appeared in the revised panel prepared pursuant to the judgment of Hon'ble Supreme Court by exclusion of the bonus marks and have not yet been appointed are required to be appointed if the candidates lower in merit than them have secured appointment. Their appointments would be made against clear vacant post with the concerned Zila Parishad and if the posts are not available, sanction was

accorded for creating additional post up to the required extent. This has been contested by the respondents whose stand is that order dated 01st July, 2003 was withdrawn by order dated 25th July, 2003 and this withdrawal order has not been challenged by the petitioner. In fact the copy of a circular issued by the Education Department of the State dated 24th February, 2003 has been placed on record with the rejoinder whereby the respondents in order to carry out the mandate of the Hon'ble Supreme Court in Kailash Chandra (supra) directed review of all such appointments which were made pursuant to the judgments of the Courts in which decision was taken not to appeal against them, so as to find out whether the candidates in such cases have secured the appointment on the basis of bonus marks and if so, their merit should be revised by exclusion of the bonus marks as per the direction of the Hon'ble Supreme Court and consequential action taken.

8. Adverting at the out set to the first argument regarding appointment given to the respondents No. 4 and 5, it should be evident from pleadings of para 11 supra that their merit position is respectively 59.64% and 59.50% which fact has been asserted by the petitioners in para 11 of their petition with the additional fact that all the petitioners in first 16 writ petitions of the above 32 petitions have secured more marks than the respondents No. 4 and 5. Further more, the petitioners have asserted that when the respondents No. 4 and 5, inspite of the fact that they did not file any writ petition prior to judgment rendered by the Full Bench in Kailash Chandra (supra), have been appointed, their appointment give rise to a fresh cause of action in favour of the petitioners and on that basis they contend that the writ petitions deserve to be allowed on the ground of discrimination inasmuch as violation of Article 14 and 16 of the Constitution of India.

9. The averments of the State in reply to para 11 of the writ petition are quite vague, unspecific and ambiguous. Though it has been asserted that while the petitioners did not approach the Court at the relevant time, the respondents No. 4 and 5 did approach. Moreover, it has been submitted in additional submission filed in one of the writ petitions being S.B. Civil Writ Petition No. 4068/2003 that the names of respondents No. 4 and 5 appear in the select list at serial No. 65 and 69 but none of the petitioners figure in the select list. But then, this is again no direct answer to the arguments raised by the petitioners that excluding bonus marks of

the respondents No. 4 and 5 place them below the petitioners in the merit.

10. The petitioners in their rejoinder again asserted that the respondents No. 4 and 5 did not file any writ petition before this Court challenging validity of the bonus marks and not an iota of evidence or proof has been produced before this Court to substantiate the fact regarding their having, filed any such writ petition prior to the judgment rendered by the Full Bench in Kailash Chandra (supra). In spite of being specifically asked to give the particulars of any such writ petition filed by the respondents No. 4 and 5, the learned Counsel for the State as also the learned Counsel representing respondent No. 4 and 5 failed to give any such details. In fact, respondents No. 4 and 5 have been impleaded as party respondents to these writ petitions on the ground of discrimination and they are duly represented by their learned Counsel. Yet however the respondents No. 4 and 5 have chosen not to rebut the assertion made in the writ petition by filing reply thereto. In these circumstances, I have no option but to accept the contention of the petitioners that the respondents No. 4 and 5 did not file any writ petition prior to passing of the judgment by the Full Bench in Kailash Chandra (supra) and yet they were appointed in breach of the direction given by the Hon'ble Supreme Court.

11. Coming now to the judgment in Deepak Vaishnav relied upon by the learned Counsel for the petitioner, a bare perusal of the said judgment would reveal that though the Court taking note of the assertion made by the petitioner that the respondents No. 4 and 5 herein, who were also respondents in the said writ petitions, were having lesser marks in merit than the petitioners No. 1, 9, 10, 11 and 12 in the said writ petition directed the respondents to offer appointment to those the five petitioners. Reading of the judgment however does not show whether the Court was made aware of the fact that either the aforesaid petitioners or the respondents No. 4 and 5 did not file any writ petition prior to the judgment of the Full Bench in Kailash Chandra (supra). This judgment, with great respect, cannot be taken as a precedent on the facts of the present case where it has come to be specifically asserted by the respondents that neither of the petitioners filed writ petitions. A question would therefore arise whether a mandamus can be issued requiring the respondents to consider the case of the petitioners for appointment contrary to the specific directions issued by the Hon'ble Supreme

Court in Kailash Chandra (supra) which requires the respondents not to consider any such candidate for appointment who did not file writ petition questioning the award of bonus marks prior to the delivery of the judgment by the Full Bench. In my considered view, the relief as has been prayed for cannot be granted to the petitioners as that would tantamount to overreaching the specific directives contained in the judgment of the Hon'ble Supreme Court.

12. Coming now to the argument that if the respondents have wrongly appointed the respondents No. 4 and 5 even though they, like the petitioner, also did not file any writ petition prior to the judgment in Kailash Chandra (supra) and that this has violated the petitioners' right to equality enshrined in Article 14 and 16 of the Constitution resulting into discrimination against them, it should be noted that equality is a positive concept which cannot be enforced in negativity. If any functionary of the Government has passed any wrong order contrary to any provision of law or against any binding judgment of the Supreme Court, that can hardly afford any basis for an argument of discrimination and praying for a writ of mandamus seeking perpetuation of such illegality. An arguments based on such factual foundation would be absolutely fallacious.

13. It is indeed of matter of great concern that the respondents have shown such a scant regard for compliance of the judgment of the highest court of the land. Entire approach to the issue has been callous and lackadaisical inasmuch as their such action has given rise to several such unfounded claims like the petitioners in the present case and others as well. In the case of Deepak Vaishnav (supra) also although it is not appearing from the text of the judgment cited whether all the petitioners with respect to whom the direction was given for offering them appointment also had filed writ petitions prior to the judgment in Kailash Chandra (supra). If the respondents No. 4 and 5 and those others have ended up securing appointment even though on strict implementation of the judgment of Hon'ble Supreme Court in Kailash Chandra Sharma (supra), they were not entitled to such appointment, it is really a said commentary on the working of the respondent department. In fact the circular issued by the respondents on 24th February, 2006 clearly indicates that the government was cognizant of such cases where the appointments made in the past if are found to be contrary to the directions issued

by the Hon'ble Supreme Court in Kailash Chandra (supra) on the basis of revised merit list, such appointments are liable to be reviewed. It would be now for the respondents to hold an inquiry to find out if the respondents No. 4 and 5 and like them any other candidates have secured appointments even though on correct interpretation of the judgment of the Hon'ble Supreme Court in Kailash Chandra (supra) they having not filed writ petition prior to delivery of the said judgment were not entitled to such appointment and take steps to dispense with their services. And here, I must take note of the statement made by Mr. N.M. Lodha, learned Additional Advocate General appearing for the respondent State that while respondent No. 4 Shri Ishwar Bharti has expired and the government shall take steps to make amends in the case of respondent No. 5 Bhura Lal and take appropriate steps.

14. Coming now to the circular dated 01st July, 2003 on which much reliance has been placed by the petitioners', besides the fact that the respondents have withdrawn this circular by their subsequent order dated 25th July, 2003, an independent and careful reading of this circular dated 01st July, 2003 would clearly shows that this circular has been issued by way of guidelines for implementation of the said judgment. What was said in Clause-1 thereof was that if upon revision of the merit list after exclusion of the bonus marks certain candidates are found to have secured more marks than those who were already appointed, steps should be taken to appoint such more meritorious candidates and if no vacant post was available, sanction was accorded to create requisite number of post to the extent required. In the drafting of the order however a deviation appears to have been made in so far as reference of the appointees with whom comparison of those not appointed was to be made, by referring to them as the once appointed 'after' 18th November, 1999 whereas it should have been for those appointed 'before' 18th November, 1999. Soon upon realizing this mistake, the respondents by their order dated 25th July, 2003 withdraw a circular dated 01st July, 2003.

15. Upshot of the above discussion is that there is no merit in these writ petitions. The writ petitions are therefore dismissed with no order as to costs.

