

THE HIGH COURT OF SIKKIM: GANGTOK

(Civil Extra Ordinary Jurisdiction)

SINGLE BENCH: HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

W.P. (C) No. 01 of 2022

- 1.** Tshering Samdup Bhutia,
S/o Mr. Karma Bhutia,
R/o Marchak, Ranipool,
East Sikkim - 737135.
- 2.** Man Kumari Subba,
D/o Birkha Bahadur Subba,
R/o Rangpo IBM,
East Sikkim - 737132.
- 3.** Krishna Prasad Sharma,
S/o Late Bhim Lall Sharma,
R/o Lungchok, Salangdang, Soreng,
West Sikkim, 737121.
- 4.** Usha Karki,
D/o Late Tek Bir Karki,
R/o Namthang, Nagi,
South Sikkim-737126.

..... Petitioners

Versus

- 1.** State of Sikkim, through
The Chief Secretary,
Government of Sikkim,
Gangtok
East Sikkim-737101.
- 2.** Department of Personnel, Administrative Reforms,
Training and Public Grievances,
Through the Secretary,
Government of Sikkim,
Gangtok- 737101
- 3.** Sikkim Public Service Commission (SPSC),
Through the Secretary,
Government of Sikkim,
Old Tourism Complex,
M.G. Marg, Gangtok-737101.

- 4.** Animal Husbandry & Veterinary Service Department
Through the Secretary,
Government of Sikkim,
NH-31A, Gangtok
Pin: 737102.

..... **Respondents**

Writ petition under Article 226 of the Constitution of India.

(Writ of mandamus and/or other appropriate writs, orders and /or directions against respondents for quashing of the Notification No.34/GEN/DOP dated 22.07.2019, consequent of which, subsequent employment advertisement for the post of Fisheries Block Officer under the provisions of the impugned Rules, 2019 to be declared as null and void.)

Appearance:

Mr. Yam Kumar Subba, Advocate for the Petitioners.

Dr. Doma T. Bhutia, Additional Advocate General, Mr. S.K. Chettri, Government Advocate for the Respondent Nos. 1, 2 and 4.

Mr. Bhusan Nepal, Advocate for Respondent No.3.

Date of hearing : 23.06.2022 & 27.06.2022.
Date of judgment : 05.07.2022

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The present writ petition has been filed by four petitioners. All of them were aspiring to join the Sikkim State Sub-ordinate Fisheries Service as Fisheries Block Officer.

2. On 01.05.2008 the Government of Sikkim framed and notified the Sikkim State Subordinate Fisheries Service Rules, 2008 (Fisheries Rules, 2008). It came into force on

03.05.2008 on which date the Fisheries Rules, 2008 was published in the official gazette.

3. The controversy in the present case relates to the eligibility condition for the Fisheries Block Officer. In the Fisheries Rules, 2008 the eligibility condition provided that, insofar as the age is concerned, the incumbent should have been of the age between 18 years to 30 years. However, for Scheduled Caste (SC) and Scheduled Tribe (ST) candidates their age was relaxable by five years. In case of most backward classes (MBC) and Other Backward Classes (OBC) candidates the age was relaxable by 3 years. The petitioner nos. 1 and 2 were ST candidates and petitioner nos. 3 and 4 were OBC candidates.

4. On 22.07.2019 the Sikkim State Subordinate Fisheries Service (Amendment) Rules, 2019 (the Amendment Rules, 2019) was notified for the post of Fisheries Block Officer. The amended schedule which substituted the previous schedule of the Fisheries Rules, 2008 specified that the candidates should have attained the age of 21 years and should not have exceeded 30 years for all communities. What in effect this amendment did was to do away with the age relaxation given to the ST, SC, MBC and OBC candidates by the Fisheries Rules, 2008.

5. On 26.08.2021 the Sikkim Public Service Commission (SPSC) issued an advertisement for filling up 11 posts of Fisheries Block Officer. In the advertisement it was specified that the candidate should have attained the age of 21 years but should not have exceeded 30 years as on 31.07.2021.

6. It is the petitioner's case that the petitioners made representations to the State Government against this advertisement. The petitioners have not filed their representations. The petitioners however, annexed certain departmental note sheets in the writ petition which does reflect that such representations had been made by the petitioners. The note sheet dated 01.09.2021 annexed as annexure P-12 to the writ petition indicate that their representation were made prior to 01.09.2021. It transpires that on 03.09.2021 pursuant to the representation made the SPSC kept the process of recruitment in abeyance on instruction from the State Government. However, on 14.12.2021 the SPSC issued a notice stating that the recruitment process shall be resumed with immediate effect.

7. On 25.12.2021 the petitioner no.2, on 27.12.2021 the petitioner no.4, on 30.12.2021 the petitioner no.3 and on 31.12.2021 the petitioner no.1, all applied online for the

post of Fisheries Block Officer, as 31.12.2021 was the last date of submissions of the applications. On the same date the petitioners preferred the present writ petition before this court. Admittedly, they did not mention the fact that they had also applied for the post of Fisheries Block Officer in the writ petition. This fact was however, subsequently placed by the petitioner through I.A. No.2 of 2022 filed on 28.01.2022.

8. On 12.01.2022 the SPSC published the rejected list of 96 candidates in which the petitioners featured at serial numbers 5, 10, 74 and 94. According to the rejection list the petitioners were rejected as they were overage. Besides the petitioners there were also other candidates who were also rejected being overage. As the notice dated 14.12.2021 had specified that the rejected candidates could submit their grievances with justifications to the office of the Controller of Examination, SPSC with effect from 17.01.2022 to 21.01.2022, the petitioners on 20.01.2022, 19.01.2022, 19.01.2022 and 21.01.2022 sent representations against the rejection of their candidature. In all their representations the petitioners candidly admitted that they were all over aged. The petitioners however, also informed that they had the necessarily educational qualification which is not in issue. On

consideration of the representations the SPSC re-published the rejection list on 28.01.2022 which reflects that the representations of the petitioners were not favorably considered.

9. The learned counsel for the petitioners submitted that the impugned Amendment Rules, 2019 insofar as it sought to do away with the age relaxation to ST, SC and OBC are concerned is in violation of Article 14, 16 and 335 of the Constitution of India. To buttress the argument, the learned counsel referred to the judgment of the Supreme Court in **State of M.P. vs. Mahalaxmi Fabric Mills Ltd.**¹ in which it referred to its earlier decision in **Indian Express Newspapers (Bombay) Pvt. Ltd. vs. Union of India**² in which a Bench of three Judges Bench held:

“A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable but in the sense that it is manifestly arbitrary.”

¹ AIR 1995 SC 2213

² AIR 1986 SC 515

10. The learned counsel submitted that although Article 335 of the Constitution of India is not enforceable however, it is the paramount duty of the welfare state to ensure that it achieves its purpose.

11. The learned counsel also referred to the decision of the High Court of Jharkhand in ***Bholanath Rajak vs. The State of Jharkhand***³. The petitioner's in that case had sought for a direction upon the respondents to fix the cut off upper age limit to be 31.01.2009 by substituting the same in the advertisement dated 10.12.2013, inviting applications for the post of Civil Judge (Junior Division) and to extend the time for submission of their applications and that backward category candidates be given relaxation of three years in the maximum age limit. The High Court on perusal of the rules opined that there is no provision for fixing the cut off date for determining the age prescribed for the post of Civil Judge (Junior Division). The High Court also noted that it was conscious of the fact that normally decision fixing cut off date is not interfered with by the courts. It noted that however, huge backlog of undecided cases, large number of vacancies which have accumulated since 2008 which has also affected the ratio of judges compared to the population of State, are also

³ MANU/JH/0202/2014/ 2014 SCC OnLine Jhar 73.

considerations which had to be kept in mind. It also noted that no examination for filling up of posts of Civil Judge (Junior Division) was held after 2008 and in the absence of regular examination for recruitment of judicial officers in the cadre of Civil Judge (Junior Division) the petitioners could not appear for the examination and in the meanwhile the writ petition as well as the other similarly placed candidates had completed the maximum age of 35 years. The High Court was of the view that by the reason of delay in holding the examination, the writ petitioners should not be disqualified from appearing in the examination.

12. The writ petition challenges the Amendment Rules, 2019, the advertisement dated 26.08.2021 and seeks their quashing.

13. The respondent no.1, 2 and 4 have filed their common counter affidavits contesting the grounds in the writ petition. The facts stated hereinabove are not in dispute. It is the case of the learned Additional Advocate General that standardization the age of all categories of candidates was a policy decision of the government which cannot be challenged by the writ petitioner more so when they themselves have participated in the selection process by making their online applications which were rejected. It is argued that the petitioners have failed to display how their

rights under Article 14 or 16 have been violated and in fact there is no such violation. It is argued that out of 106 applicants for 11 posts 96 including the petitioners were rejected. Nine candidates including the four petitioners had been rejected on the ground that they were over aged. They have not been made parties in the writ petition even though they were necessary parties. It is submitted that at this juncture if the writ petition was to be allowed and a direction issued to give age relaxation as done by the Fisheries Rules, 2008 then all those ST, SC and OBC candidates above the age of 30 and below 35 inspiring for the post would also be eligible for the post which would open a flood gate. The learned Additional Advocate General also submits that in the same department other posts were also advertised which had the same standardized age limit for all communities and therefore it is quite clear that it is not only the Fisheries Block Officer post which had such provision. Importantly, it is pointed out that the policy decision of the State Government which is reflected in the Notification dated 03.07.2017 issued by the Department of Personnel, Administrative Reforms, Training and Public Grievances has not been challenged by the petitioners. The notification reads as under:

“ NOTIFICATION

The State Government is hereby pleased to prescribe a uniform upper age limit of 40 (forty) years for all communities of the State in the services /posts to be filled up by direct recruitment under the Government of Sikkim and in the State Public Sector Undertakings of Sikkim with immediate effect.

However, the posts and services for recruitment in Sikkim Police, Indian Reserve Battalion, Sikkim Armed Forces, Forest Services, Fire Services and any other posts and services which have specifically prescribed upper age limit lower than 30 (thirty) years in their recruitment rules are kept outside the purview of this notification.

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Sd/-

(Surekha Pradhan) Mrs.

ADDITIONAL SECRETARY TO THE
GOVERNMENT DEPARTMENT OF
PERSONNEL, ADMINISTRATIVE
REFORMS, TRAINING AND PUBLIC
GRIEVANCES”

14. To buttress the argument she cited the judgment of the Supreme Court in ***Union of India & Ors. Vs. Shivbchan Rai⁴***. The Supreme Court held that it is open for the government while framing rules under the proviso to Article 309 of the Constitution to prescribe such age limits or to prescribe the extent to which any relaxation can be given. Prescription of such limit or the extent of relaxation to be given cannot be termed as arbitrary or unreasonable.

⁴ (2001) 9 SCC 356.

15. It is pointed out by the learned Additional Advocate General that the petitioners have failed to challenge the rejection list as well. It is argued that although the Amendment Rules came into force on 22.07.2019 the petitioners failed to challenge the same until 31.12.2021 and therefore, the writ petition also suffers from delay and latches.

16. The learned counsel also argued that Article 335 of the Constitution of India must be read in consonance with Article 16 (4) of the Constitution of India.

17. Mr. Bhusan Nepal, learned counsel for the SPSC in support of the various arguments made by the learned Additional Advocate General cites a judgment of the Supreme Court in **A.P. Public Service Commission, Hyderabad and Anr. vs. B. Sarat Chandra & Ors.**⁵. It was held by the Supreme Court that the process of selection consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva voce and preparations of list of successful candidates for appointment. It was held that when such are the different

⁵ (1990) 2 SCC 669

steps in the process of selection, the minimum or maximum age for suitability of a candidate for appointment cannot be allowed to depend upon any fluctuating or uncertain date. If the final stage of selection is delayed and more often it happens for various reasons, the candidates who are eligible on the date of application may find themselves eliminated at the final stage for no fault of theirs. The date to attain the minimum or maximum age must, therefore, be specific and determinate as on a particular date for candidates to apply and for recruiting agency to scrutinise applications. It would be, therefore, unreasonable to construe the word selection only as the factum of preparation of the select list. Nothing so bad would have been intended by the rule making authority.

18. The issue whether the State has the power to frame rules under the proviso to Article 309 of the Constitution of India to prescribe age limits or the extent of relaxation to be given has been lucidly explained by the Supreme Court holding *inter alia* that it is open for the government while framing rules under the proviso to Article 309 of the Constitution of India to prescribe such age limits or to prescribe the extent to which any relaxation can be given. The Supreme Court further held that prescription of such limit or the extent of relaxation to be given cannot be

termed as arbitrary or unreasonable. Thus, the challenge to the Amendment Rules, 2019 is rejected.

19. The writ petition avers that the petitioner no.1 obtained Degree of Bachelors of Fisheries Science (BFSc.) in the year 2017; the petitioner no.2 in the year 2014 and Masters in Fisheries Science in the year 2016 and further that she was working as a Block Officer (Fisheries) on Muster Roll since 23.02.2018; the petitioner no.3 in the year 2014 and he was working as a Range Officer (fisheries) on ad-hoc basis since 30.06.2017; and the petitioner no.4 in the year 2013 and has been appointed as Multi Task Office Staff under the Agriculture Department since 31.12.2018. Thus, it is clear that the petitioners all had desired minimum educational qualification of Degree of BSc by the year 2017. The petitioner no.2 and petitioner no.3 had also been working in the Fisheries Department. The petitioners however, did not challenge the Amendment Rules, 2019 when it was notified on 22.07.2019. The facts revealed that they challenged it after they made their online applications. Their representations were not favorably considered. It is seen that the Amendment Rules, 2019 was pursuant to a policy decision reflected in the notification dated 03.07.2017 quoted above. This notification has not been challenged by the petitioners. There is a presumption

that the notification was validly made by the government unless proved that it was not. The burden laid down by Section 101 and 102 of the Indian Evidence Act, 1872 has not substituted by the petitioners. Neither in the pleadings in the writ petition nor during arguments by the learned counsel for the petitioners it was shown that the Amendment Rules, 2019 was ultra vires the Constitution of India or any other law. The notification dated 03.07.2017 does reflect that the State Government had taken a policy decision to prescribe a uniform upper age limit of 40 years for all communities of the State in the services/post to be filled up by direct recruitment. It was further decided that the posts and services for recruitment in specific departments including any other posts and services which have specifically prescribed upper age limit lower than 30 years in their recruitment rules are kept outside the purview of the notification. Although this notification dated 03.07.2017 is silent on age relaxation for SC, ST, MBC and OBC candidates evidently the State Government had considered prescribing age limit for all communities of the State in the services/posts to be filled by direct recruitment. Thus the Amendment Rules, 2019 which amended the schedule seems to be in line with the policy decision of the Government when it prescribed that the

incumbent should have attained the age of 21 years and should not have exceeded 30 years for all communities. The prayer of the petitioners for a direction upon the State respondents to relax the age prescribed in the Amendment Rules, 2019 with the strength of the judgment passed by the Jharkhand High Court cannot also be accepted as the circumstances prevailing in the State of Jharkhand when the judgment was passed cannot be equated with what has been pleaded in the present proceedings. The scope of judicial review of policy decision of the government is very narrow and the present writ petition does not qualify as the exceptional one calling for interference.

20. In the circumstances, the writ petition fails and accordingly dismissed. The pending application is disposed off as well.

**(Bhaskar Raj Pradhan)
Judge**

Approved for reporting : **Yes**
Internet : **Yes**
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