

THE HIGH COURT OF SIKKIM : GANGTOK
(Civil Extra Ordinary Jurisdiction)

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

W.P. (C) No. 35 of 2021

Mrs. Kamala Tamang & 15 Ors.
..... Petitioners

Versus

State of Sikkim & 64 Ors.
..... Respondents

Application under Article 226 of the Constitution of India.

For issuance of a writ of or in the nature of mandamus/certiorari and/or any other appropriate writ, order or direction of like nature.

Appearance:

Mr. A. Moulik, Senior Advocate with Mr. Ranjit Prasad, Advocate for the Petitioners.

Dr. Doma T. Bhutia, Additional Advocate General with Mr. Thinlay Dorjee Bhutia, Government Advocate and Mr. Shakil Raj Karki, Assistant Government Advocate for the Respondent nos. 1 to 4.

Mr. Kazi Sangay Thupden, Ms. Prerana Rai and Ms. Som Maya Gurung, Advocates for Respondent nos. 5 to 27 & 29 to 35 & 37 to 49.

Mr. Udai Kunwar, Advocate for Respondent nos. 28 and 36.

Mr. Sajal Sharma, Ms. Puja Kumari Singh and Ms. Shreya Sharma, Advocates for Respondent nos. 50 to 64.

Date of hearing : 01.08.2023 & 09.08.2023

Date of judgment : 24.08.2023

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The present writ petition questions the selection and appointment of Pre-Primary Teachers, Teachers with D.El.Ed and Cluster Resource Coordinators for the post of

Assistant Education Officers by issuing addendums after the notice advertising the post for selection through the process of screening-cum-interview of eligible persons as per the *Sikkim Human Resource Development Department (Assistant Education Officer) Recruitment Rules, 2011*. Consequently, the petitioners seek a declaration that they were successful in the interview. It also challenges the method by which the petitioners were absorbed only as Assistant Education Officers in officiating capacity and thereafter, cancelling it. Consequently, the petitioners seek a declaration that they had been absorbed vide the same notification by which they had been absorbed officially.

2. The 15 writ petitioners had approached this court against the State-respondent nos. 1 to 4 and respondent nos. 5 to 49 who features in the merit list after their selection in the screening-cum-interview. Respondent nos.50 to 64 were later impleaded as they were in the panel list and therefore above the names of the petitioners in the result of the screening-cum-interview.

3. The petitioners were working in the regular establishment of the Government of Sikkim as Primary, Graduate and Head Masters of Primary Schools under the Education Department. The petitioners were brought on deputation as Assistant Education Officers during the

period 2017-2018 in officiating capacity. In the year 2018 an advertisement to select 34 posts of Assistant Education Officers was kept in abeyance.

4. The petitioners in the meanwhile had been approaching the Government through various representations to absorb them as Assistant Education Officers. Their plea was examined, recommended and the recommendation approved by the Hon'ble Chief Minister on 01.03.2019. The recommendation was that the 21 persons may be duly absorbed as a onetime relaxation utilising 21 vacancies out of 34 on need basis. It was further recommended that once the officiating promotion of Assistant Directors was confirmed, recruitment may be conducted for 48 posts instead of 34.

5. The recommendation was on the grounds that out of the sanctioned strength of 69 only 03 regular Assistant Education Officers were left, out of which promotion of 02 were under process; the petitioners had been submitting that they were performing their duties with devotion in remote Block Administrative Centres (BACs) and that many of them were denied permission to apply for Head Master etc. earlier since they were on deputation; the matter had been discussed in the coordination meeting held on 11.01.2019 wherein the

Hon'ble Minister, HRDD, had given direction to absorb them; On 11.05.2018 as per the direction of the Hon'ble Chief Minister deputation of teachers had been stopped and the concerned department had issued their no objection for their absorption.

6. In *Devdutta & Ors vs. State of M.P. & Ors.*¹ the Supreme Court held:-

“8.“absorbed” in Service Jurisprudence with reference to a post in the very nature of things implies that an employee who has not been holding a particular post in his own right by virtue of either recruitment or promotion to that post but is holding a different post in a different department is brought to that post either on deputation or by transfer and is subsequently absorbed in that post whereafter he becomes a holder of that post in his own right and loses his lien on his parent post.”

7. However, on 07.03.2019 the petitioners were absorbed only in an officiating capacity. The notification dated 07.03.2019 was also cancelled on 26.03.2021 on the ground that absorption could have been done only in substantive capacity.

8. Thereafter, a selection process for Assistant Education Officers started on the issuance of notice dated 05.07.2021. This was followed by two addendums which the petitioners are now aggrieved by since they included other categories and made them eligible to participate in

¹ 1991 Supp (2) SCC 553

the selection process. At the relevant time a feeble anxiety was expressed by the petitioners vide letter dated 28.07.2021 to the State Government. However, the petitioners expressed that they were looking forward to sit for the screening-cum-interview being conducted. The petitioners participated in the screening-cum-interview but failed to qualify. Thereafter, they approached this court for the following substantive reliefs:-

- (i) Quashing of Notification No.7/ADM/Edn. dated 23.06.2021 (notification dated 23.06.2021) by which the earlier notification absorbing 21 Assistant Education Officer including the petitioners in an officiating capacity duly relaxing the mode of recruitment was cancelled.
- (ii) A declaration that they had been absorbed as Assistant Education Officer vide Notification No.2147/ADM/HRDD dated 07.03.2019 (notification dated 07.03.2019).
- (iii) That consequent upon the declaration as prayed in prayer (ii) a further declaration that the petitioners are entitled to all service benefits including seniority in the rank of Assistant Education Officer w.e.f. 17.03.2019 or from any other reasonable date.
- (iv) A declaration that the State-respondents have illegally selected/appointed Pre-Primary Teachers, Teachers with D.El.Ed and the Cluster Resource Coordinators and they be removed from service by cancelling the selection and appointment.
- (v) A declaration that the petitioners were successful in the interview held pursuant to the Notice No.57/SSTRB/ADM dated 05.07.2021 (notice dated 05.07.2021) and consequently to declare them as the Assistant Education Officer in substantive capacity.
- (vi) A declaration that Addendum No.60/SSTRB/Adm. dated 20.07.2021 (addendum dated 20.07.2021) and Addendum No. 61/SSTRB/Adm. dated 21.07.2021 (addendum dated 21.07.2021) be quashed and the selection of the newly appointed Assistant Education Officers based on the two addendums be set aside.

The Facts

9. On 07.03.2011, *the Sikkim Human Resource Development Department (Assistant Education Officer) Recruitment Rules, 2011* (Recruitment Rules, 2011) was brought into force in Sikkim.

10. The Recruitment Rules provided for 69 posts of Assistant Education Officers. The mode of recruitment was 100% by promotion through Limited Departmental Competitive Examination.

11. The Recruitment Rules, 2011 was amended by *Sikkim Human Resource Development Department (Assistant Education Officer) Recruitment (Amendment) Rules, 2016*. The eligibility conditions for Assistant Education Officers were as under:-

(a) 50% (i) by Graduate Teachers with B.Ed. recognised by NCTE and having 8 years of regular service as Graduate Teachers; (ii) by Primary Teachers with Graduate Degree and B.Ed recognised by NCTE and having 10 years of regular service as Primary Teacher;

(b) 30% by Head Master/Head Mistress of Primary School with Graduate Degree and B.Ed. recognised by NCTE and having 6 years of regular service as Head Master/Head Mistress of Primary School;

(c) 20% (i) by Graduate Language Teachers (all category) with B.Ed. recognised by NCTE and having 8 years of regular service and (ii) by Primary Language Teacher (by all category) with Graduate Degree and B.Ed. recognised by NCTE and having 10 years of regular service as Primary Language Teacher.

12. During the period 2017-2018 the petitioners were deputed as Assistant Education Officers. On

24.07.2017 vide Memorandum No.984/HRDD/ADM the HRDD clarified that Post Graduate Teachers who have already completed 10 years as Graduate Teacher or cumulative 10 years same as Graduate Teachers/Post Graduate Teachers are eligible under the existing Recruitment Rules to appear for the recruitment exam of Head Master-Secondary School. It was further clarified that these Teachers/Head Masters who are currently on deputation to other non-teaching post were not eligible and in case of those who were reverted to lien teaching posts, the period of non-teaching deputation shall not be counted as qualifying service for as the post of Principal/Head Master. The petitioner nos. 1, 3, 6, 7, 8, 9, 11, 12 and 14 claims that although they were eligible to apply, they were not allowed to do so due to this memorandum. They however, do not assert that they challenged the memorandum.

13. On 11.08.2018, advertisement was issued by HRDD for filling up 34 posts of Assistant Education Officers on promotion basis. The last date of submission was 13.09.2018. Eligibility criteria were also specified therein which was as provided in the Recruitment Rules, 2011.

14. On 11.09.2018, however, a notice was issued by Human Resource Development Department, (HRDD) keeping the advertisement notice in abeyance.

15. During 2019, the representations made by 21 Assistant Education Officers were considered by the Government. The proposal to absorb them as onetime relaxation utilising 21 vacancies out of 34 posts of Assistant Education Officers advertised and kept in abeyance was approved by the Hon'ble Chief Minister on 01.03.2019. While recommending the absorption of 21 Assistant Education Officers as onetime relaxation utilising the 21 vacancies out of 34 on need basis it was also recommended that once the officiating promotion of Assistant Directors was confirmed, recruitment may be conducted for 48 posts instead of 34. The file seems to have been put up for examination of both the recommendations as above. The Hon'ble Chief Minister on 01.03.2019 approved both the recommendations which included the absorption of the 21 Assistant Education Officers by conducting recruitment for 48 posts instead of 34.

16. Thereafter, notification dated 07.03.2019 was issued by the Human Resource Development Department (HRDD) in exercise of the powers conferred by Rule 9 of the *Sikkim Human Resource Development Department (Assistant*

Education Officer) Recruitment Rules, 2011 relaxing the method of recruitment to absorb the 21 Teachers holding the posts of Assistant Education Officers (on deputation) however, in an officiating capacity only, as a onetime relaxation. The notification dated 07.03.2019 was not challenged.

17. The notification dated 07.03.2019 by which the petitioners were 'absorbed' in 'officiating capacity' was cancelled by the impugned notification dated 26.03.2021. According to the impugned notification dated 26.03.2021, it was felt that absorption to a post could only be made in substantive capacity and not officiating capacity. The impugned notification dated 26.03.2021 was not challenged prior to the petitioners choosing to sit for the screening-cum-interview held pursuant to the notice dated 05.07.2021.

18. Thereafter, vide notice dated 05.07.2021 which was published in the newspapers on 08.07.2021, applications were invited from in-service eligible Graduate Teachers, Primary Teachers with Graduate Degree and Head Masters/Head Mistress of Primary Schools serving in Government Schools of Sikkim for filling up the 45 posts of Assistant Education Officers. The notice dated 05.07.2021 prescribed eligibility criteria, educational and professional

qualification for the posts of Assistant Education Officers. The notice dated 05.07.2021 permitted the petitioners to participate in the screening-cum-interview.

19. On 20.07.2021, the Education Department issued a notification which was published in the Sikkim Government Gazette on 02.09.2021 allowing certain further categories of candidates to appear for the screening-cum-interview for the post of Assistant Education Officer as a onetime measure to be conducted by the State Teachers Recruitment Board in exercise of the powers conferred by Rule 9 of the Recruitment Rules, 2011. They were:-

1. Primary Teachers with Graduate Degree in any subject from a recognised University having a B.Ed. or D.El.Ed. from any institute recognised by NCTE with 10 years of un-interrupted regular service as Primary Teachers as on 30.06.2021.
2. Head Master, Primary School with Graduate Degree in any subject from a recognised University having a B.Ed. or D.El.Ed. from any institute recognised by NCTE with 6 years of un-interrupted regular service as Head Master of Primary School as on 30.06.2021.
3. Pre-Primary Teachers with Graduate Degree in any subject from a recognised University having a B.Ed. from any institute recognised by NCTE with 16 years of un-interrupted regular service as Primary Teachers as on 30.06.2021.

20. This notification dated 20.07.2021 remains unchallenged.

21. Thereafter, on the same day, i.e., 20.07.2021, the Sikkim State Teachers Recruitment Board issued the impugned addendum to the notice dated 05.07.2021 which was also published in the newspaper on 21.07.2021 inviting applications for the posts of Assistant Education Officer modifying the eligibility criteria, educational and professional qualification. For Assistant Education Officers from Primary Teachers besides the B.Ed. Degree from an institute recognised by NCTE Primary Teachers having Graduate Degree in any subject from a recognised University and 10 years of uninterrupted regular service as Primary Teachers as on March 31st 2021, Primary Teachers having the same academic background and teaching experience but having D.El.Ed. from any institute recognised by NCTE was also made eligible.

22. On 21.07.2021, the second impugned addendum to the notice dated 05.07.2021 was issued. Now the Sikkim State Teachers Recruitment Board added another category of Pre-Primary Teachers as being eligible, subject to the eligible criteria mentioned therein, for appointment as Assistant Education Officers. The Pre-Primary Teachers were required to be Graduates from any recognised University having a B.Ed. Degree from an Institute recognised by NCTE and possessing 16 years of

uninterrupted regular service as Pre-Primary Teachers as on June 30th, 2021.

23. On 28.07.2021, the 21 officiating Assistant Education Officers which included the present 15 petitioners, made a representation to the Education Department. They put up a case that they had made several failed representations for consideration of their absorption in substantive capacity. They also pointed out that on 21.06.2021 in the meeting chaired by the Hon'ble Chief Minister in the presence of the concerned Minister and other officers of the Education Department, the Hon'ble Chief Minister had assured that 21 Assistant Education Officers would be selected by a walk-in interview. They thanked the Hon'ble Chief Minister for the positive declaration and for the advertisement of the 45 post of Assistant Education Officers notified on 05.07.2021. They voiced their apprehension on the two impugned addendums issued by the Government and their depleting enthusiasm regarding the screening-cum-interview. However, they expressed their positivity to sit for the screening-cum-interview anyway.

24. Thereafter, an interview was held between 28th and 30th of September, 2021 for the posts of Assistant

Education Officers. The petitioners as well as the respondents participated in the screening-cum-interview.

25. On 02.10.2021, the result of screening-cum-interview of Assistant Education Officer was announced. Respondent nos. 5 to 49 were successful at the screening-cum-interview. However, the petitioners did not succeed. Along with the result, a list of persons named in the panel list was also announced. Respondent nos. 50 to 64 are the ones who were in the panel list and performed better than the petitioners.

26. During the pendency of the present writ petition, I.A. No. 03 of 2022 was filed by the respondent nos. 50 to 64. It was noticed that the writ petition was preferred during the validity of the panel list made by the State-respondents in which the respondent nos. 50 to 64 featured and if the prayers in favour of the petitioners were granted they would be affected. Respondent nos. 50 to 64 were accordingly impleaded.

27. On 06.10.2021, the Education Department issued the impugned Office Order No. 1481/ADM/EDN promoting 45 in-service candidates (respondent nos. 5 to 49) to the post of Assistant Education Officers.

28. On 30.10.2021, an ex-parte stay was granted by this Court restraining the State-respondents from taking further steps in terms of the impugned Office Order dated 06.10.2021 and impugned notification dated 23.06.2021.

29. On 31.05.2022, during the pendency of the writ petition respondent no.36 retired from service.

The submissions and the Court's opinion on each submission

30. Heard Mr. A. Moulik, learned Senior Counsel for the petitioners; Dr. Doma T. Bhutia, learned Additional Advocate General for the respondent nos. 1 to 4; Mr. Kazi Sangay Thupden, learned counsel for the respondent nos. 5 to 27 and 29 to 35 and 37 to 49; Mr. Udai Kunwar, learned counsel for the respondent nos. 28 and 36 and Mr. Sajal Sharma, learned counsel for the respondent nos. 50 to 64.

31. (i) The learned counsel for the petitioners submitted that the two addendums issued by the State-respondents after the notice inviting applications for the 45 posts of Assistant Education Officer were illegal as they included persons who were not eligible under the Recruitment Rules, 2011 to compete in the screening-cum-interview. The learned Additional Advocate General and Mr. Kazi Sangay Thupden, learned counsel contended that the addendums

were issued after the issuance of notification in exercise of the power under Rule 9 of the Recruitment Rules, 2011 and as such they were well within the parameters of the law. The learned counsel further submitted that the notification dated 20.07.2021 published in the gazette on 02.09.2021 duly exercising the power under Rule 9 of the Recruitment Rules, 2011 has not been challenged by the petitioners and consequently the addendums cannot be held to be illegal.

31 (ii). The learned counsel for the petitioners contended that normally a candidate cannot challenge the selection process after participating in it but it is settled law that candidates by agreeing to participate in the selection process only accepts prescribed procedure and not the illegality in it by relying upon the judgment of the Supreme Court in ***Dr. (Major) Meeta Sahai vs. State of Bihar***². Per contra the learned Additional Advocate General cited ***Mr. Choda Bhutia vs. State of Sikkim***³ in which this court had examined several judgments of the Supreme Court on the point. Mr. Kazi Sangay Thupden relied on ***Dhananjay Malik & Ors. vs. State of Uttaranchal & Ors.***⁴ to submit that the petitioners are precluded from

² (2019) 20 SCC 17

³ SLR (2020) Sikkim 284

⁴ (2008) 4 SCC 171

challenging the selection on the ground that it was not based in accordance with the rule once they participated in the selection process.

31 (iii). In *Meeta Sahai* (supra) the Supreme Court held that it is well settled that the principle of estoppel prevents a candidate from challenging the selection process after having failed in it. However, a candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it.

31 (iv). In *Dhananjay Malik* (supra) the Supreme Court examined a case in which an advertisement was issued for selection and appointment of Physical Education Teachers the requisite qualification indicated in the advertisement was BPE or Graduate with Diploma in physical education. The unsuccessful candidates in the interview challenged the selected candidates on various grounds. One of the ground was that the advertisement and selection were not based in accordance with the rules. The Supreme Court held as under:-

“7. It is not disputed that the respondent-writ petitioners herein participated in the process of selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as BPE or graduate with diploma in Physical Education. Having unsuccessfully participated in the process of selection without any demur they are estopped from challenging the selection criterion inter alia that the advertisement and selection with regard to requisite educational qualifications were contrary to the Rules.”

31 (v). In the present case the sequence of events reflects that the two addendums dated 20.07.2021 and 21.07.2021 impugned by the petitioner were preceded by notification dated 20.07.2021 issued by the Education Department exercising its power under Rule 9 of the Recruitment Rules, 2011 and thereby permitting further category of Primary Teachers, Head Master, Primary Schools and Pre-Primary Teachers to participate in the selection process. Rule 9 of the Recruitment Rules, 2011 is widely worded. It provides that where the Government is of the opinion that it is necessary or expedient to do so, it may on the recommendation of the committee consisting of the Chief Secretary and four other officers named therein, by order, for reasons to be recorded in writing, relax any of the provision of these rules with respect to any class or category of persons or posts. The notification dated 20.07.2021 which preceded the two addendums and was published in the gazette on 02.09.2021 clearly records that they have exercised the powers conferred by Rule 9 of the Recruitment Rules, 2011 to allow the eligible candidates to appear for the screening-cum-interview for the post of Assistant Education Officer as a onetime measure. This notification is neither adverted to nor challenged by the petitioners. Thus there is nothing illegal seen in the

prescribed procedure that has been followed before allowing other Primary Teachers, Head Master, Primary Schools and Pre-Primary Teachers to participate in the selection process. Consequently the judgment of the Supreme Court in **Dr. (Major) Meeta Sahai** (supra) is distinguishable from the facts of the present case.

31 (vi). The facts revealed that the petitioners were fully aware of the addendums prior to them sitting for the interview. Although they sounded the State-respondents about their displeasure on the addendums the petitioners nevertheless participated in the selection process. The judgment of the Supreme Court in **Dhananjay Malik** (supra) is squarely applicable to the facts of the present case. Consequently it is held that the petitioners having unsuccessfully participated in the process of selection without any demur they are estopped from challenging the selection criteria *inter alia* that the advertisement and the selection with regard to the requisite education qualifications were contrary to the Recruitment Rules, 2011. Even if the feeble apprehension voiced by the petitioners was to be taken as their demur against the two addendums it does not come to the rescue of the petitioners and bring it within the parameters laid down by the Supreme Court in **Dr. (Major) Meeta Sahai** (supra). The

failure of the petitioners to challenge the notification dated 20.07.2021 which permitted other categories of persons to appear for the screening-cum-interview takes the thrust out of the challenge to the two addendums.

31 (vii). Thus prayers (iv), (v) and (vi) of the petitioners cannot be granted. It is accordingly rejected.

32 (i). The next submission of the learned Senior Counsel for the petitioners was that notification dated 07.03.2019 by which the petitioners were absorbed as members of the service holding the post of Assistant Education Officer (on deputation) in an officiating capacity must be taken as notification absorbing them in substantive capacity.

32 (ii). According to the petitioners this notification dated 07.03.2019 had been issued pursuant to various representations made by them from time to time which ultimately culminated in an assurance given by the Hon'ble Chief Minister for their absorption and thereafter by his formal approval in the files accepting the recommendation to absorb them as a onetime relaxation utilising the 21 vacancies out of 34 on need basis in consideration of their performance and contribution.

32 (iii). As seen from the records, the petitioners had been persistently approaching the State-respondents for their absorption as Assistant Education Officer in substantive capacity.

32 (iv). As seen from the records the State-respondent had in fact mooted the proposal to absorb them as a onetime time measure considering their performance and contribution. In the same breadth the State-respondents had also suggested that after the officiating promotion of Assistant Directors were confirmed, “...recruitment may be conducted for 48 posts instead of 34.”

32 (v). It is also noticed that the Hon’ble Chief Minister had in fact approved the above proposal on 01.03.2019. The approval was to absorb the 21 Assistant Education Officers as well as conduct the recruitment for 48 posts instead of 34. This perhaps would mean that even the posts recommended for absorption was to be through the process of recruitment.

32 (vi). The notification dated 07.03.2019 was also not challenged by the petitioners. Instead they seek its interpretation which is contrary to the clear language of the notification dated 07.03.2019. Before the filing of the writ petition the State Government vide impugned notification

dated 23.06.2021 took the decision to cancel the notification dated 07.03.2019 on the ground that it could not have been given effect to since their absorption had been made in officiating capacity.

32 (vii). The notification dated 07.03.2019 is unambiguous. It clearly states that the 21 Assistant Education Officer on deputation is absorbed in officiating capacity only. Had the Government the intention to absorb them in substantive capacity the notification dated 07.03.2019 would have clearly stated so. It did not do that. In fact by the impugned notification dated 23.06.2021 the State Government cancelled the notification dated 07.03.2019 on the ground that absorption could have been made only in substantive capacity and not in officiating capacity. When an Officer who is not in the relevant service is absorbed into the service it is to be done in a substantive capacity.

32 (viii). In *Kunal Nanda vs. Union of India & Anr.*⁵, the Supreme Court held that it is well settled that unless the claim of the deputationist for a permanent absorption in the department where he works on deputation is based upon any statutory rule, regulation or order having the

⁵ (2000) 5 SCC 362

force of law, a deputationist cannot assert and succeed in any such claim for absorption. The basic principle underlying deputation itself is that the person concerned can always and at anytime be repatriated in his parent department to serve in his substantive position therein at the instance of either of the departments and there is no vested right in such a person to continue for long on deputation or get absorbed in the department to which he had gone on deputation.

32(ix). Rule 5 read with the schedule of the Recruitment Rules, 2011 provides that the mode of recruitment relating to the posts of Assistant Education Officer shall be 100% by promotion through a limited Departmental Competitive Examination. Recruitment through the mode of absorption is not contemplated in the Recruitment Rules, 2011. Thus the petitioners who had been assured, as claimed by them, by the highest authority of the State could not have claimed their absorption as of right. Merely because in the past similar absorption has been done does not give a right to the petitioners for their absorption. Absorption is always a reasoned decision taken by the State in consideration of various factors including the relevant rules. Further, the power to relax under Rule 9 of the Recruitment Rules in the case of the petitioners was

not exercised to appoint them in substantive capacity. Thus there is no legally enforceable right in favour of the petitioners for this Court to issue a writ to the State authorities to do so. By no principle of interpretation can this Court hold that the notification dated 07.03.2019 absorbed the petitioners in substantive capacity when the language of the notification clearly reflects that it does not. It is also to be noted that the State respondents did not deprive the petitioners of the opportunity to participate in the selection process. As seen above the petitioners in fact participated in the selection process but failed to qualify. In fact the panellist i.e. respondent nos. 49 to 64 seemed to have fared better than the petitioners.

33 (i). The petitioners submit that the State-respondents wrongly selected teachers with D.El.Ed., and Pre-Primary Teacher and Cluster Resource Co-ordinator without sanction of the Recruitment Rules, 2011 and consequently their appointments are illegal. This argument ignores that they were inducted after a selection process before which the State-respondents had exercised their power under Rule 9 of the Recruitment Rules, 2011 which is not challenged. It is also contended that the petitioners were posted against clear vacancies of Assistant Education Officers and as such their absorption was in substantive

capacity. Absorption is a matter of fact. The facts revealed that the petitioners were deputed as Assistant Education Officers earlier and from 07.03.2019 in an officiating capacity till 23.06.2021. The petitioners were not absorbed in substantive capacity but only in an officiating capacity and that to for a short duration. That however, does not entitle the petitioners for issuance of a writ by this Court which can be issued only on violation of their fundamental or statutory right or if the acts of the State are arbitrary or illegal. No such case has been made out by the petitioners.

33 (ii). Consequently, the petitioners' prayer (i) for setting aside impugned notification dated 23.06.2021 and restoring notification dated 07.03.2019 cannot be granted. Prayer (ii) for declaring that the petitioners had been absorbed in the rank of Assistant Education Officer in substantive capacity vide notification dated 07.03.2019 cannot also be granted. Consequently, prayer (iii) for a declaration that the petitioners are entitled to service benefits including seniority cannot also be granted. All the prayers are accordingly rejected.

34. Mr. Sajal Sharma, learned counsel for the respondent nos. 50 to 64 contents that vide an ex-parte order dated 30.10.2021 against them the State-respondents were restrained from taking further steps in

the matter in terms of the prayers made by the petitioners in I.A. No.01 of 2021. It is submitted that although the State-respondents had also released panel lists which included respondent nos. 50 to 64 the petitioners concealed this fact, did not implead them in the writ proceedings and obtained an ex-parte order behind their back. I.A. No. 01 of 2021 had sought a stay of order bearing Office Order No.1481/ADM/EDN dated 06.10.2021 and Notification dated 23.06.2021 cancelling the notification dated 07.03.2019. Consequently the promotion of the respondent nos. 5 to 49 was stayed. On 31.05.2022 respondent no.36 retired. The panel list which was published on 02.10.2021 would be effective vide Notice dated 05.07.2021 for a period of 11 months i.e. 02.09.2023. Therefore, as on 31.05.2022, the respondent no. 50 - Sonam Tshering Bhutia, would have been promoted but for the ex-parte order of stay. The judgment of the Supreme Court in ***Kalbharati Advertising vs. Hemant Vimalnath Narichania & Ors.***⁶ is cited to press the principle of *actus curiae neminem gravabit* (which means that the act of the court shall prejudice no one). The learned counsel also refers to the same judgment to press that interim order always merges with the final order to be

⁶ (2010) 9 SCC 437

passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. It is submitted that the respondent no.50 cannot be made to suffer due to the act of the court. A direction is therefore, sought to promote the said respondent. There is substantial merit in the submission made by the learned counsel for the respondent nos. 50 to 64. Thus, the State-respondents are directed to examine the case of the respondent no.50 and if found entitled may be considered for promotion.

35. The writ petition stands dismissed. No orders as to costs.

(Bhaskar Raj Pradhan)
Judge

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

to/