

**IN THE HIGH COURT OF HIMACHAL PRADESH  
SHIMLA**

**C.W.P. No. 11127/2011**

**Judgment reserved on 18.4.2012.**

**Date of decision: 08 .05. 2012**

---

***Jiwan Lal Tandiya son of late Sh. Purshottam Chand resident of VPO Busal, Tehsil Baroh, District Kangra, HP at present working as Assistant Master (Maths) Sainik School, Sujanpur Tihra, District Hamirpur, H.P.***

**.....Petitioner.**

**Versus**

- 1. Sainik Schools Society, (Registered under Societies Registration Act, 1860) Room No. 101 D-1 Sena Bhawan, New Delhi-11 through its Honorary Secretary.**
- 2. Principal Sainik School, Sujanpur Tihra, District Hamirpur, H.P.**

**.....Respondents.**

---

**CIVIL WRIT PETITION UNDER ARTICLE 226  
OF THE CONSTITUTION OF INDIA.**

---

**Coram:**

**The Hon'ble Mr. Justice Surinder Singh, J.**

***Whether approved for reporting?<sup>1</sup> Yes.***

**For the Petitioner: Mr. Shrawan Dogra, Advocate.**

**For the respondents: Mr. Sandeep Sharma, Assistant Solicitor General of India.**

---

**Surinder Singh, Judge**

By means of the present petition, the petitioner seeks to quash and set aside the communication dated 5.12.2011 (Annexure P7) with a further direction to consider the case of the petitioner for promotion/appointment to the post of Master

---

<sup>1</sup> *Whether the reporters of Local Papers may be allowed to see the judgment ?. yes*

(Maths), strictly as per the parameters laid down by clause 5.26 of service Rules of Sainik Schools and considering his case as per the norms followed in the past for the cases of promotions/appointments to the post of Masters in different subjects. ◇

3. The petitioner is M.A mathematics and B.Ed. He was appointed as Assistant Master (Maths) on 10.8.1992 in the respondents Sainik School to teach mathematics up to 10<sup>th</sup> standard. He also underwent in-service training in the month of June, 1993 (Annexure P9), June, 1995 (Annexure P10) and in June 2001 (Annexure P11) in the subject of Mathematics. On and w.e.f. 31.12.2011 the post of PGT (Maths) was likely to fall vacant on the retirement of Shri G.D. Kshirsagar. Thus, 2<sup>nd</sup> respondent sought permission from the 1<sup>st</sup> respondent to fill-up the vacancy.

4. The Sainik School Society Rules and Regulations were published in the month of January, 1997, in short referred as "**the Rules**". Chapter 5 of these Rules makes the provisions for the staff and the establishment. Rule 5.25 provides for the appointment of the staff. The method of recruitment is laid down in Rule 5.26 which precisely provides for filling up the vacant post by direct recruitment only

in case a suitable qualified and experienced persons already employed in the School is not available.

5. Thus after getting approval, the 2<sup>nd</sup> respondent sent communication to all the Sainik Schools notifying the vacancy in PGT (Maths) in the School of 2<sup>nd</sup> respondent. Thus invited applications/proposals for inter school transfers. In response whereof no eligible person(s) applied for such transfer rather petitioner was the only candidate who had already applied in advance to consider him for the post by promotion. The DPC was constituted comprising of the following:-

- |   |                  |
|---|------------------|
| (a) <b>Principal, Sainik School</b>               | <b>Chairman.</b> |
| (b) <b>Headmaster, Sainik School</b>              | <b>Member</b>    |
| (c) <b>Director of Higher Edn. or his nominee</b> | <b>Member</b>    |
| (d) <b>Subject Specialist</b>                     | <b>Member.</b>   |

6. Vide annexure P4 dated 4.11.2011 the Headmaster on behalf of the 2<sup>nd</sup> respondent informed the petitioner about the constitution of the DPC and apprised him that the written test will be held followed by interview on 8/9.11.2011 at 09.00 hrs.

7. On 8.11.2011, the petitioner was subjected to written test consisting of 20 questions of 5 marks each. All the questions were illustrative and required details calculations to be completed within one hour, though no syllabus was prescribed for such a test and he was also interviewed.

8. Shri Shrawan Dogra, learned counsel for the petitioner submitted that the petitioner was apprehending some foul play as no result was notified thus, on 12.11.2011 vide Annexure P5 sought information to know result of test/interview, inter alia, also applied for the certified copies of the proceedings of the DPC, whereas the case of the respondents has been that the petitioner was informed telephonically and in writing as well. But however, an advertisement appeared on 4.12.2011 in the news paper inviting applications for the post of Master (Maths) on regular basis. The last date of submission of such applications was 17.12.2011.

9. Now the grouse of the petitioner is that he could not have been subjected to the written test and, that too, by the said expert who was not a College Lecturer and was also not a teacher already working in Sainik School whereas two senior teachers were available in the School of the 2<sup>nd</sup> respondent. Secondly, the petitioner was the only candidate suitable for the said post in view of his work and experience. Further, the criteria of written test was contrary to Rules adopted for the first time qua the petitioner and cannot be regarded as an act done in pursuance to the Rules. Therefore, there

is no bar to challenge it by way of filing present petition, despite the fact that the petitioner had participated in the said process.

10. Shri Dogra learned counsel for the petitioner referred to Rule 5.26 *ibid* and submitted that in service jurisprudence the word "suitability" has got a particular meaning and connotation attached to it. Rule aforesaid also mandates that in-service candidate is required to be promoted, based upon the "suitability" for which qualification and experience is assessed and adjudged on the basis of available material viz ACRs etc. of the incumbent for the last few years, working skill, which in the instant case could be known from the result of the students taught by him for the last so many years and the satisfactory continuance in the job for the last so many years in the same institution yielding good results. Shri Dogra put his reliance on the judgments of the apex Court in **A.K. Roy and Another versus State of Punjab and others (1986) and SCC 326,** and **J.N. Ganatra vs. Morvi Municipality Morvi (1996) 9 SCC 495** whereby the Supreme Court observed that where statute confers a power to be exercised or performed in a specific manner, other modes of exercises or performance is impliedly barred. Thus,

submitted that the written test is not provided under the rules, therefore, it could not have been taken. He also ventilated that after holding the DPC, the result was not communicated to the petitioner rather the post was advertised to be filled in by a direct recruitment in a hush-hush manner which smacks volumes of malafidies on the part of the respondents. To buttress his arguments, he cited the judgment of the apex Court in **Valsala Kumari Devi M. v. Director, Higher Secondary Education and Ors. (2007) 8 SCC 533.**

11. Vide order dated 14.12.2011 notice was ordered to be issued by the Division Bench of Hon'ble the Chief Justice to the respondent and were also required to file short reply within two weeks as to how the petitioner was not suitable, qualified and experienced for the post of Master (Mathematics) and also to state as to what has been the past practice in the matter of promotion. Further proceedings pursuant to Annexure P6 were ordered to be stayed.

12. The contentions raised in the short reply-affidavit dated 28.12.2011 respondents submitted that PGT teacher is supposed to teach students of senior Secondary classes. The DPC which comprises

of three subject experts decided to hold a written test from the CBSE syllabus for classes XI and XII followed by an interview and conduct demonstration class to ascertain his subject knowledge of Math for subject classes but He secured 26 marks out of 100 in written test. His ACRs for the last five years were also perused. On the basis of the interview, written test and demo class, the DPC found his subject knowledge below average as he was not able to answer even the fundamental questions pertaining to various chapters of Math-syllabus of XI and XII classes pertaining to CBSE, hence he was not found fit for promotion. Respondents also annexed Annexure R3 (colly) the answer sheet duly evaluated by subject expert Dr. K.L. Verma, Associate Professor (Math) NSCBM PG College, Hamirpur, H.P. According to the respondents, the DPC was conducted in conformity with Rule 5.26 read with Rule 5.27 of the Rules aforesaid. It is also contended that Shri G.D. Kshirsagar was promoted in the year 1992 as a fresh candidate after due advertising the post prior to that three teachers, namely Shri S.S. Deswal, Sh. JP Vashishta and Shri S.P. Thakur were given fresh appointment of PGTs but at that time, the aforesaid

rules were not in vogue which only came into existence in January, 1997 thus there was no occasion to the respondents to make promotions by holding DPC in terms of the aforesaid Rules. The respondents also averred that they have no objection in case, the petitioner appears as a fresh candidate pursuant to Annexure P6 advertisement for the test/interview as a direct candidate and the respondents shall take up his case for age relaxation with higher authorities.

13. The petitioner also filed rejoinder to the short reply. In addition to whatever already mentioned in the petition, it is further averred that the case of Shri S.S. Deswal can also be referred to where the TGT (English) was promoted as PGT (English) without written test and even his marks in graduation was around 40% and he was further promoted as Senior Master. He also quoted the examples of Shri S.P. Thakur (English) and J.P. Vashishta (Maths) and G.D. Kshirsagar (Maths) who were not subjected to written test.

14. In detailed reply, the respondents contended further that there have been large scale failures in mid-term and final exams in all his classes. Even prior to that in the year 2002 alone, 12 students withdrew

due to failure in his subject for which the then principal issued a letter to him. In reply, the petitioner tried to defend himself by terming such students unwilling horses. Further that the number of failure in the subsequent years have also been pointed out and the claim of the petitioner having 100% result in annual examination for the last 5 years was disputed. They also averred that on professional front his performance has been commented upon on numerous occasions which show his casual attitude towards his primary and secondary duties. The respondents also alleged that the petitioner was not suitable for the post as per Rules, since his knowledge for the post of PGT (Math) was below average.

15. Shri Sandeep Sharma, learned Assistant Solicitor General submitted that the DPC can device its own method to adjudge the suitability of a candidate for promotion. Thus the DPC decided to subject the petitioner to written test and apart from perusing his service record, primarily keeping in view, the higher level of subject knowledge required to teach class XI and XII. The syllabus whereof and the subject knowledge demands exact standard and high professional competence from a teacher which is

even different from the level of the subject knowledge required at secondary level. Qua other teachers who were not subjected to the written examination, the learned counsel also submitted that the respondents School was opened in the year 1978 and it was up-graded to Senior Secondary School in the year 1983-84. Till then teachers were Assistant Masters. These teachers continued to take classes XI and XII for several years. After years of observations the School Authorities at that time in their best opinion found them suitable and issued them fresh appointment letters. Their suitability was ascertained before promoting them. Even Shri Kshirsagar was considered as a fresh candidate and the promotion was not automatic, as claimed by the petitioner. It is also ventilated that the petitioner has participated in the process of selection thus he cannot assail the said selection process. To buttress his points he cited the judgment of the apex Court in **Hardev Singh versus Union of India and another (2011) 10 SCC 121**, **Vijendera Kumar Verma vs. Public Service Commission Utrakhand and others (2011)SCC 150** and **Union of India and Another Vs. Bhaskarendu Dutta Majumdar JT 2010 (9) SC 122.**

16. During the proceedings of this case, the record was called for and perused. I have also surveyed

the case law cited above. On the perusal of the record of DPC produced by the respondents, I was shocked to note the way it was maintained. All the communications in the said record were not found paged and not supported by official notings which fact was also noted in the zimini order dated 18.4.2012. Shri Sandeep Sharma, learned Assistant Solicitor General admits this position and also pointed out that after perusing the record their appears to be some factual error in the short reply-affidavit dated 22.12.2011 at page 32 para 5 wherein it has been stated that before resorting to the procedure of DPC, they first wrote to all Sainik Schools intimating the arising of vacancy (PGT) Maths after 31.12.2011 and invited applications/proposal for inter School transfers. Actually, intimation was given after holding DPC and this factual erroneous averment made in the short reply was inadvertent. However, the arguments were heard and I have meticulously perused and examined the record and the contentions made.

17. It cannot be disputed that no employee has a right to get promotion but he has a right to be considered for promotion, if as per the prevailing policy, is eligible to be promoted to the higher post,

he is required to be considered by the DPC for such a promotion. The Supreme Court in **Hardev Singh's case** supra also opined that it is always open to an employer to change its policy in relation to giving promotion to the employees and no interference is required in such policy decisions. But however, when a policy has been declared by the employer as to the manner of filling up the post and that policy is decided in terms of rules and instructions from time to time and so long these instructions are not contrary to the rules, the same are required to be followed.

18. In the instant case, the rules make a provision the manner in which the post was required to be filled in. Rule 5.27 says about the constitution of the interview Board, which consists of Principal, the Head Master, Director of School Education or his nominee and a technical expert on the subject. Rule 5.26 provides a method of recruitment. It reads as under:-

**"METHOD OF RECRUITMENT**

***5.26. The posts in each grade/category will be advertised in the local press as well as in one national daily after considering the suitability of persons already employed in the lower grade or post. In addition, copies of the advertisement will be sent to the local/nearest employment exchange, other Sainik Schools, the Honorary Secretary, and the concerned record offices of the***

**Army, Navy and Air Force. There will be reservation of 15% and 7-1/2 % of the posts in all categories of employees, for SC and ST candidates respectively. However, if qualified SC and ST candidates are not available for the posts reserved for them, the Principal will be authorized to fill the posts from amongst the general category candidates. Direct recruitment for filling up the vacant posts shall be resorted to only in case suitable qualified and experienced persons already employed in the school are not available.**

**The following guidelines will be followed when effecting promotions or making direct recruitment:-**

**(a) The post against which the promotion is being effected or direct recruitment is being made should be an existing one. In another words, the vacancy should have arisen on account of retirement, dismissal, resignation, absorption in other organizations or promotion.**

**(b) New posts cannot be created without the concurrence of Board of Governors.”**

**[Emphasis supplied]**

20. Further Chapter 7 of the said Rule deals with the terms and conditions of service. Significantly Rule 7.02 says that the promotion shall be made on merit subject to suitability. It can be usefully quoted as under:-

**“ 7.2 Promotion shall be made on merit, subject to suitability of the candidates and fulfillment of prescribed qualifications.”**

**[Emphasis mine]**

21. Thus, both the rules referred above cannot be read in isolation. The harmonious reading of the

aforesaid rules make it abundantly clear that both, i.e., the suitability well as the merit are the criteria for the promotion to the post of Master (Maths). ◇

22. Therefore, the words "suitability" and "merit" are to be interpreted in the context used in the rules aforesaid. A person may be "suitable" but lacks merit cannot be promoted and it is not the spirit of the Rules aforesaid for promotion that merits of the candidate cannot be looked into if he is suitable for the post. On his promotion, the incumbent shall have to teach senior CBSE classes of Xi and XII which is the base of the students to seek further admissions on merits to other vocational courses and their future is dependent on their merits/ performance in XII<sup>th</sup> standard. Therefore, solely on the basis of "suitability" the "merit" of the person being considered for promotion cannot be ignored.

23. The expression "suitability" in Rule 5.26 of the Rules aforesaid would mean "suitability" in relation to the qualifications and requisite experience. But would not mean the comparative assessment of suitability. There may be more than one person suitable for promotion but out of them a meritorious shall have to be preferred. Therefore, suitability means the suitability for a particular post as held by the apex Court in

**Vasala Kumari Devi's case (supra)**. In other words, the expression "suitability" means that the person to be appointed shall be legally eligible and eligible should be taken to mean "fit to be chosen". The person who is fit to be chosen for promotion is to be made on merit of course, subject to suitability of the candidate and fulfillment of the prescribed qualifications.

24. As already stated above, the petitioner may be suitably qualified fulfilling all the prescribed qualifications but to adjudge his merit, a formula to assess his merit could be devised by the Interview Board/DPC. But, significantly, the Chairman of the Interview Board in this case is the 2<sup>nd</sup> respondent, who is the Principal of the School and Head master is one of the members. Surprisingly, It is the Headmaster who issued the letter Annexure P4 dated 4.11.2011 without any authority and decision of DPC to the petitioner the only candidate for the interview informing him that he will also be subjected to written test without mentioning the syllabus for the written test and the bench mark to which the petitioner was required to qualify. The record produced before this Court did not spell out that before issuance of this communication to the petitioner, interview Board had ever met and taken such a decision to assess the merit of the candidate. It

is also not understood under what authority the Headmaster acted on behalf of the principal. Although the petitioner did not object to his taking the written test, yet on the scrutiny of the record, I find that the Rule of the game was not framed by the Interview Board/DPC itself but it was only done by the Headmaster without any power or authority on which the DPC/Interview Board irrationally acted upon without specifying the bench mark and the syllabus.

25. Further from the record I failed to find out that the result of the interview/written test was notified on the notice Board of the School with a copy to the petitioner. The contention of the respondent that he was informed telephonically is a procedure not known to law. There is no communication sent to the petitioner informing him about his result. Though the respondent has relied upon the letter dated 5.12.2011, whereby the petitioner is alleged to have been informed, but it was received by the petitioner on 9.12.2011 when he had already applied for seeking information under the RTI vide Annexure P5. There is no record available by which it could be known as to what method was adopted for sending the communication. By that time, the petitioner had received letter, the 2<sup>nd</sup> respondent had proceeded to

resort to the alternative mode of inviting applications by issuing advertisement in Dainik Bhaskar on 4.12.2011 followed by a subsequent advertisement in The Tribune on 13.12.2011 and 15.12.2011. The proceedings of the DPC are also not supported by the office notings on the file which was haphazardly maintained, as stated above. Virtually there are no minutes of DPC/Interview Board.

26. Therefore, in view of the aforesaid facts, the participation of the petitioner in the said selection process cannot debar him to challenge the selection process. In fact in the matter of public appointment, the employer is required to keep complete transparency and frame the rules of game clearly and unambiguously before it is played. Since the selection process of the DPC is wrong and not in conformity with the principle of law and natural justice, as stated above, therefore, set aside and communication dated 5.12.2011 Annexure P7 inviting the applications from the direct recruits also stand quashed.

27. Consequently, the respondents are directed to consider the case of the petitioner for promotion subject to his "suitability" and on "merit". The DPC shall be at liberty to adopt the course of a written test with prior notice to the petitioner notifying the syllabus for

such a test and fixing a bench mark to qualify in written test or any other mode known to law to assess the merit of the petitioner for the post of Master (Maths). ◇

28. The above process shall be completed by the respondents within a period of one month from today. Till then the interim arrangement as per order dated 11.1.2012 by the Principal Division Bench shall continue. With these directions the petition stands disposed of, so also the pending applications, if any.

**May 7, 2012**  
**(cm)**

**(Surinder Singh),**  
**Judge.**

High Court