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IN THE HIGH COURT OF SIKKIM AT GANGTOK
(CONSTITUTIONAL JURISDICTION)

Writ Petition (C) No. 34 of 2007

1. Shri Santosh Rai,
Son of Prithi Dhoj Rai,
Resident of Tadong Dara Gaon,
P.O. Tadong, P.S. Gangtok-Sadar,
East Sikkim presently working as
Graduate Teacher (Maths),
Deorali Senior Sec. School, (East)
2. Mr. Nirmal Kumar Subba,
Son of Shri B.B. Limbu,
Resident of Kartok Block, P.O. Pakyong,
East Sikkim,
Presently working as,
Graduate Teacher, Modern Secondary School,
Gangtok, East Sikkim.
3. Mr. Bhakti Prasad Sharmapa,
Son of C. Sharma,
Resident of Ganchung Busty,
P.O. Pakyong, East Sikkim.
Presently working as
Graduate Teacher (Arts), Mamring
Senior Secondary School, East Sikkim.
4. Krishna Kumar Sharma,
Son of Shri Manohari Sharma,
Rhenock – Khamdong,
P.O. & P.S. Rhenock,
East Sikkim, working as Headmaster at
Lower Bermiok Jr. High School,
West Sikkim.
5. Shri Dilliram Sharma,
S/o Hari Prasad Sharma,
Resident of RDD Complex, Pakyong,
Presently working as Graduate Teacher (Arts),
Pacheykhani Secondary School,
East Sikkim.



6. Shri Liladhar Dhakal,
Son of Late Loke Nath Dhakal,
Resident of Pakyong, East Sikkim
Presently working as Headmaster,
Parakha Jr. High School, East Sikkim
7. Shri Binod Kumar Sharma,
Son of Punya Prasad Sharma (Bhandari),
Resident of Tareythang Busty,
P.O. Biring, East Sikkim
Presently working as Graduate Teacher at
Dikiling, Senior Secondary School,
East Sikkim.
8. Shri Khush Narayan Pradhan,
Son of S.N. Pradhan,
Resident of Rongli,
P.O. and P.S. Rongli, East Sikkim,
Presently working as a Graduate Teacher (Arts)
At Aho Kissan Jr. High School, East Sikkim.
9. Shri Gangaram Kafley,
Son of Pashupati Kafley,
Resident of Thekabong,
P.O. Thekabong, P.S. Pakyong,
East Sikkim, working as Post Graduate
Teacher (Chemistry) at Samdong S.S.S., East
Sikkim.

...Petitioners

-Versus-

1. State of Sikkim,
Through the Secretary,
Human Resource Development Department,
Government of Sikkim,
Tashiling, East Sikkim.
2. Sikkim Public Service Commission,
Through the Secretary,
SPSC, Government of Sikkim,
Gangtok, East Sikkim.
3. Smt. Rasmika Rai,
Assistant Education Officer (East)
C/o Joint Director (E),
HRDD, Tashiling Secretariat,
Gangtok, East Sikkim.



4. Mrs. Sonam D. Bhutia,
Assistant Education Officer (East)
C/o Joint Director (E),
HRDD, Tashiling Secretariat,
Gangtok, East Sikkim.
5. Mr. Durga Pd. Sharma,
Assistant Education Officer (East)
C/o Joint Director (E),
HRDD, Tashiling Secretariat,
Gangtok, East Sikkim.
6. Mr. Chandra Singh Subba,
Assistant Education Officer (East)
C/o Joint Director (E),
HRDD, Tashiling Secretariat,
Gangtok, East Sikkim.
7. Ms. Geeta Sherpa,
Assistant Education Officer (East)
C/o Joint Director (E),
HRDD, Tashiling Secretariat,
Gangtok, East Sikkim.
8. Shri Sudesh Deokota,
Assistant Education Officer (HQ)
C/o Joint Director (E),
HRDD, Tashiling Secretariat,
Gangtok, East Sikkim.
9. Shri Pempa Lepcha,
Assistant Education Officer (North)
C/o Joint Director
District Administrative Centre,
Mangan, North Sikkim.
10. Shri Thinley Lepcha,
Assistant Education Officer (North)
C/o Joint Director
District Administrative Centre,
Mangan, North Sikkim.
11. Shri Dilip Sharma,
Assistant Education Officer (North)
C/o Joint Director
District Administrative Centre,
Mangan, North Sikkim.

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12. Shri Tek Bdr Rai
Assistant Education Officer (South)
C/o Joint Director
District Administrative Centre,
Namchi, South Sikkim.
13. Mrs. Radhika Rai,
Assistant Education Officer (South)
C/o Joint Director
District Administrative Centre,
Namchi, South Sikkim.
14. Shri Iching Subba,
Assistant Education Officer (West)
C/o Joint Director
District Administrative Centre,
Gyalshing, West Sikkim.
15. Shri Sudha Rai,
Assistant Education Officer (East)
C/o Joint Director (E)
HRDD, Tashiling Secretariat,
Gangtok, East Sikkim.
16. Shri Robin Dong,
Assistant Education Officer (West)
C/o Joint Director
District Administrative Centre,
Gyalshing, West Sikkim.
17. Shri Manoj Shankar,
Assistant Education Officer (West)
C/o Joint Director
District Administrative Centre,
Gyalshing, West Sikkim.
18. Shri Raju Bhandari,
Assistant Education Officer (West)
C/o Joint Director
District Administrative Centre,
Gyalshing, West Sikkim.
19. Shri Tsewang T. Sherpa,
Assistant Education Officer (West)
C/o Joint Director
District Administrative Centre,
Gyalshing, West Sikkim.



20. Shri Harendra Subba,
Assistant Education Officer (West)
C/o Joint Director
District Administrative Centre,
Gyalshing, West Sikkim.
21. Shri D.N. Sharma,
Assistant Education Officer (West)
C/o Joint Director
District Administrative Centre,
Gyalshing, West Sikkim.
22. Shri Tshering Sherpa,
Assistant Education Officer (East)
C/o Joint Director (E)
HRDD, Tashiling Secretariat,
Gangtok, East Sikkim.
23. Shri Chewang Gyatso,
Assistant Education Officer (East)
C/o Joint Director (E)
HRDD, Tashiling Secretariat,
Gangtok, East Sikkim.
24. Ms. Priscilla Rai,
Assistant Education Officer (East)
C/o Joint Director (E)
HRDD, Tashiling Secretariat,
Gangtok, East Sikkim.
25. Ms. Priscilla Rai,
Assistant Education Officer (East)
C/o Joint Director (E)
HRDD, Tashiling Secretariat,
Gangtok, East Sikkim.
26. Shri Maching Lepcha,
Assistant Education Officer (Rongli)
C/o BDO Rongli, East Sikkim.
27. Shri D.M. Subba,
Assistant Education Officer (Pakyong)
C/o Asst. Director Pakyong Sub Division
East Sikkim.

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28. Ms. Sunita Pradhan,
Assistant Education Officer (South)
C/o Joint Director
District Administrative Centre,
Namchi, South Sikkim.
29. Mrs. Indira Rai,
Assistant Education Officer (South)
C/o Joint Director
District Administrative Centre,
Namchi, South Sikkim.
30. Mrs. Reepa Lepcha,
Assistant Education Officer (SSA)
C/o Joint Director (E)
HRDD, Tashiling Secretariat,
Gangtok, East Sikkim.
31. Shri Chandra Kiran Dahal,
Assistant Education Officer (Pakyong)
C/o Assistant Director
Pakyong Subdivision,
Pakyong, East Sikkim.
32. Shri Karma Bhutia,
Assistant Education Officer (North)
C/o Joint Director
District Administrative Centre,
Mangan, North Sikkim.
33. Shri Chhochung Bhutia,
Assistant Education Officer (North)
C/o Joint Director
District Administrative Centre,
Mangan, North Sikkim.
34. Shri Deepak Rai,
Assistant Education Officer (Rongli)
C/o Assistant Director
Rongli Sub Division,
Rongli, East Sikkim.
35. Mr. Biren Rai,
Assistant Education Officer (West)
C/o Joint Director
District Administrative Centre,
Gyalshing, West Sikkim.



36. Mrs. Meena Chettri,
Assistant Education Officer (SSA)
C/o Joint Director (E)
HRDD, Tashiling Secretariat
Gangtok, East Sikkim.

37. Shri Theophillius W. Lepcha,
Assistant Education Officer (South)
C/o Joint Director
District Administrative Centre,
Namchi, South Sikkim.

...Respondents.

For the petitioners: Mr. A.K. Upadhyaya, Sr. Advocate
with Mr. D. Tewari, Advocate

For the respondents: Mr. J.B. Pradhan, Additional
Advocate General, Sikkim with Mr.
Karma Thinlay, Government
Advocate and Mr. S.K. Chettri,
Assistant Government Advocate for
the official Respondents No. 1
and 2

Mr. Tashi Rabden Barfungpa, Advocate
for private respondents No. 3 to 37

***Date of Hearing* : 09.09.2009**

***Date of Judgment* : 09.09.2009**

**PRESENT: HON'BLE THE CHIEF JUSTICE
MR. JUSTICE AFTAB H. SAIKIA
HON'BLE MR. JUSTICE A.P. SUBBA, JUDGE**

**JUDGMENT AND ORDER (ORAL)*****Saikia, CJ***

Heard Mr. A.K. Upadhyaya, learned Senior Counsel assisted by Mr. D. Tewari, learned Counsel for the petitioners. Also heard Mr. J.B. Pradhan, learned Additional Advocate General, Sikkim (for short, 'AAG') with Mr. Karma Thinlay and Mr. S.K. Chettri, learned State Counsel on behalf of official respondents No. 1 and 2 as well as Mr. Tashi Rabden Barfungpa, learned Counsel appearing for the private respondents No. 3 to 37.

2. The Office Order dated 13.03.2006 issued by the respondent No. 2, the Secretary to the Government of Sikkim, Human Resource Development Department (hereinafter referred to as 'HRDD') absorbing as many as 35 deputationists as Assistant Education Officers (for short, 'the AEOs') in HRDD without holding any selection process in accordance with Notification No. 1247/EST/EDN dated 24.06.1997, having relaxed the terms and conditions laid down in the said Notification, has been assailed in the instant writ proceeding being initiated by 9 (nine) aggrieved Graduate Teachers with the specific allegations of arbitrariness, nepotism and discrimination in issuing such absorption depriving them of being selected to such posts of AEOs.

3. Since the basic issue, being apparent on the face of the impugned Office Order itself, centres around the effect and

justiciability of the Notification dated 24.06.1997, the reproduction of the said Notification is necessary which reads as under:

**"GOVERNMENT OF SIKKIM
DEPARTMENT OF EDUCATION**

No. 1247/EST/EDN

Dated: 14th June, 1997

NOTIFICATION

In pursuance of the Notification No. 02/Gen/DOP dated 10.4.97, the Rules for limited Departmental Competitive Examination for the selection of Assistant Education Officers under the Department of Education, Government of Sikkim are published for general information.

1. The Selection Examination will be conducted by the Sikkim Public Service Commission.
2. All Graduate Teachers and Headmasters/Headmistresses of Junior High Schools having completed a minimum of five years of continuous service on regular basis as on 30.11.1996 shall be eligible for appearing at the Examination to be conducted by the S.P.S.C.
3. There will be a Physical Fitness Test to assess the suitability of the candidates for undertaking extensive tours. The venue and method of tests will be decided by the Commission. Only the candidates who qualify in the Physical Fitness Test shall be eligible to appear in the written examination.
4. The eligible candidates will have to apply to the Commission through the Heads of Schools if they are teacher and through the concerned Sub-Divisional Assistant Directors if they are Heads of Schools on payment of fees prescribed by the Commission in their NOTICE for the Examinations.
5. The decision of the Commission as to the eligibility or otherwise of a candidate for admission to the Examination shall be final.
6. The subject and syllabus for the written examination, time allowed and maximum marks allotted to each subject shall be as at Appendix-I.
7. The Commission will have the discretion to fix qualifying marks in the Examination.

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8. The successful candidates will be called for a Personality Test carrying 20 marks.
9. The successful candidates will be arranged by the Commission in order of merit as disclosed by aggregate marks awarded to each candidate in written and personality tests. The number and names to be included in the panel shall be decided by the Commission and the panel shall ordinarily be valid for one year.
10. The candidate who is or had been declared by the Commission to be guilty of any offence shall be liable to be disqualified for admission to the Examination.
11. Success in the Examination confers no right to appointment unless the competent authority is satisfied after enquiry as may be considered necessary that the candidate having regard to his conduct, is fit for appointment to the post of Assistant Education Officer.

T.T. Dorji, IAS
Commissioner-cum-Secretary
Department of Education
Date: 24th June, 97 "

4. Leading the arguments on behalf of the petitioners, Mr. Upadhyaya, learned senior counsel has eloquently stated that while the petitioners were working as Graduate Teachers along with private respondents i.e. respondents No. 3 to 37, all those private respondents went on deputation to the post of AEOs in HRDD in the years between 2001 to 2004. Since they were on deputation without affecting the petitioners' service conditions, such deputation of those private respondents was not being challenged by the petitioners. However, to their utter dismay and surprise, the authority by impugned Office Order dated 13.03.2006 has absorbed all those 35 deputationists as regular AEOs in the department concerned without any selection test/interview



whatsoever to the exclusion of the petitioners who have also possessed all requisite qualifications for such selection. No opportunity for such selection whatsoever was ever afforded to them and thereby depriving the petitioners, the respondents No. 3 to 37 were absorbed/appointed in the administrative job of AEOs. It is, therefore, strongly submitted that in the process of absorbing the private respondents, the authority has not only violated the terms and conditions stipulated in the Notification dated 24.06.1997 but also have gone beyond to contravene the fundamental rights guaranteed to the petitioners in the public employment by the Constitution of India under Articles 14 and 16.

5. The specific case of the petitioners is that the private respondents have not been put to any selection test/examination by the authorities, being essential in terms of Notification dated 24.06.1997 and they are straightaway absorbed as AEOs denying the petitioners, being qualified and eligible, the equal opportunity of appearing in the selection procedure for appointment as AEOs.

6. It is further submitted by the learned Senior Counsel that in issuing the impugned Office Order, the Government has clearly and specifically mentioned that they have relaxed the terms and conditions laid down in the Notification dated 24.06.1997 although the Notification does not contain any provision for such relaxation.



7. Mr. Upadhyaya has further contended that till date no statutory Rules are being framed by the State respondents governing the selection/appointment of AEOs and in absence of such statutory Rules, the Government has no other alternative but to follow the Notification dated 24.06.1997 in letter and spirit which has got the statutory force as it was being published in the Official Gazette of Government of Sikkim on 25.07.1997 and as such the violation of any terms and conditions laid down in the Notification itself is justiciable and shall vitiate the entire absorption process.

8. Refuting all the allegations and contentions made in the instant writ petition as well as arguments and submissions advanced by the learned senior counsel for the petitioners, Mr. Pradhan, the learned AAG, strongly relying on the affidavits filed on behalf of the State and raising a preliminary objection, has submitted that this writ petition basically suffers from delay and negligence inasmuch as although the impugned Office Order was passed on 13.03.2006, this writ petition has been filed only on 11.10.2007 after a lapse of about one year and seven months. Such inordinate delay has not been satisfactorily explained in the instant petition.

9. To bolster up such submission, Mr. Pradhan has taken us through a catena of judicial authorities to establish that the writ court under Article 226 of the Constitution of India, basically being



an equity court, shall act judicially and reasonably because it is purely a discretionary power that has been vested upon the Court and accordingly the Court has to satisfy itself as to whether the petitioner has approached this Court seeking equitable relief within a reasonable time. If the Court is satisfied that the same is not within the permissible period, the High Court, being an equity court, should refuse to entertain such petition on the sole ground of laches and negligence.

10. The cases relied on behalf of the State are as follows:

- (a) **(1975) 1 SCC 152 (*P.S. Sadasivaswamy vs. State of Tamil Nadu*)** and
- (b) **(2007) 9 SCC 274 (*Shiv Dass v s. Union of India and others*)**

11. In order to augment his arguments on question of delay, Mr. Pradhan, the learned AAG has also drawn our attention to the two representations dated 29.04.2005 and 05.04.2006 (Annexures P/4 and P/5 appended hereto in this writ petition) submitted by the Sikkim United Teachers' Welfare Association (for short, 'the Association') to the Government, to show that the petitioners have all knowledge and informations about the present development and being fully aware of such position, they have intentionally and deliberately caused an inordinate delay in approaching this Court. He has referred to Annexure P-4 (p. 36 of the paper-book), as mentioned above which is a representation dated 29.04.2005 from the President of the Association including the petitioner No. 1,

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being an office bearer of the Association in the capacity of Secretary General addressed to the Chief Minister of Sikkim requesting to direct the Department concerned to conduct the recruitment test at the earliest to fill up the posts of AEOs in HRDD. After the issuance of the impugned Office Order, the petitioner No. 1, being one of the office bearers of the Association, has again written to the respondent No. 1 vide representation dated 05.04.2006 as already indicated, seeking some clarifications as regards the appointment of AEOs without interview with a request of response to such communication at the earliest. From those two communications/representations, the learned AAG has wanted to place on record that the petitioners, after making the last communication/representation on 05.04.2006, have waited for long one year and seven months to approach this Court and such delay, according to him, is not reasonable but surely intentional and wilful and under such premises, the instant petition is liable to be dismissed on the threshold on account of delay and laches itself.


12. Replying to this preliminary objection raised on question of delay, Mr. Upadhyaya, learned senior counsel has submitted that though the Association wherein petitioner No. 1 is also an office bearer in the capacity of Secretary General, had written through their representation to the authority concerned inviting the attention of those concerned towards such illegal action, no step has ever been taken at the end of the respondents. The authority



did pay no heed to that effect and ignoring such appeal made vide representation dated 29.04.2005, the Government has proceeded to absorb all the private respondents without holding or conducting any sort of selection and eventually the impugned Office Order has been notified. Thereafter, they have again approached to the respondent No. 1 by filing the second representation dated 05.04.2006 seeking clarification pertaining to such appointment of AEOs being done without any interview. However, till date they have not received any response whatsoever from the respondent No. 1. Eventually they have to fall back upon the Right to Information Act, 2005 (for short, 'the Act') and have applied to the authority under the Act for basic informations with regard to the absorption of the private respondents without holding any selection test and after getting those informations, ultimately they have approached this Court by filing this writ petition on 11.10.2007 and the delay, as alleged, occurred in this process in preferring this petition, cannot be said to be inordinate and this delay may be accepted as reasonable delay.

13. It is also clarified by Mr. Upadhyaya, that the Act has been implemented only in the year 2006 and the statutory officer has also been appointed only in the year 2007 and hence, there is no delay as such as claimed by the learned AAG.

14. Entire materials on record including the pleadings exchanged by and between the parties have been subjected to meticulous






scanning and analysis. Extensive arguments and strong submissions put forward on behalf of the parties have also given due consideration and care.

15. Apparently the impugned Office Order which clearly indicates that the impugned absorption was done by duly relaxing the terms and conditions laid down vide Notification dated 24.06.1997, appears to be in direct conflict with the Notification dated 24.06.1997. On a careful perusal of the Notification, as quoted hereinabove, it would candidly reflect that there is no whisper as regards any provision or clause for relaxation. The said Notification does not contain any such clause so as to allow the authority to relax the terms and conditions postulated therein.

16. Interestingly there is no explanation on the counter affidavit filed on behalf of the State in this regard as to whether under what circumstances they have issued the impugned Office Order relaxing the terms and conditions of the Notification in question which empathetically stipulates that there must be a selection examination for departmental competitive examination for the posts of AEOs and that too has to be conducted by the Sikkim Public Service Commission (for short, 'SPSC').

17. In the present case, it is an admitted position that the absorption under challenge has never been subjected to any such selection examination to be held by SPSC and the same is evident



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from the submission advanced on behalf of the Government as well as the responses filed by the State respondents.

18. Coming to the question of justiciability of the Executive Instructions i.e. Notification dated 24.06.1997, it can be held that in absence of any statutory Rules framed under Article 309 of the Constitution of India, the instructions issued by the Government are justiciable and the Government is required to act and rely on each and every terms and conditions provided in such Executive Instructions. It is also admitted that there is no Rules framed by the Government for such selection of AEOs and eventually the Government has to fall back upon such executive instructions for the purpose of selection of AEOs. In fact, the Government has acted upon such Notification and the same is indicative from the very fact that the absorption was made by relaxing the terms and conditions of the said Notification although no such provision has been incorporated thereon.

19. It can be said that the relaxation is permissible only if there exists any provision in the Notification. In ***Pitta Naveen Kumar and others vs. Raja Narasaiah Zangiti and others*** reported in (2006) 10 SCC 261 in paragraph 59, it was clearly ruled that "relaxation can be given only if there exists any provision therefor in the Rules".





20. In the instant case, in our considered opinion, since there is no statutory Rules framed for such recruitment, the Executive Instructions vide Notification dated 24.06.1997 holds the field and the Government is duty bound to follow the terms and conditions laid down therein. Since this Notification does not contain or prescribe any relaxation for such purposes, the action taken by the Government issuing the impugned Office Order is not in conformity with the Notification. Moreso, the entire absorption process without selection is vitiated inasmuch as no selection examination was conducted by SPSC as required under the Notification.

21. Under such circumstances, we have no hesitation to hold that the impugned Office Order absorbing the 35 private respondents de hors the Notification and the same deserves interference by this Court.

22. Insofar as the question of delay is concerned, having carefully gone through the steps taken by the petitioners by submitting two representations as mentioned above, in pre-litigation and post-litigation stage of the instant writ proceedings, it is seen that prior to issuance of such impugned Office Order, the petitioners through the Association of which one of the petitioners is an officer-bearer, have approached the authority concerned seeking justice but their case was never looked into. After issuing the impugned Office Order also, one of the petitioners has approached the authority concerned through the Association seeking some response

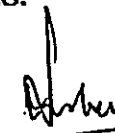


pertaining to such issuance of the impugned Office Order absorbing the private respondents without interview but such request has also not been duly responded by the Government till date. Failing to get any positive responses, they have approached the authority under the Act wherefrom they have got certain informations under the Act. Then only they have approached this Court and in the process, it is seen that there is a delay of about one year and seven months. In the interest of justice, we are of the firm view that there was no inordinate delay caused in filing this writ petition and we do accordingly hold that the petition has been filed within the reasonable period without causing any such delay to attract the question of maintainability on the count of laches and negligence.

23. In view of whatever has been stated, discussed and observed above, we are of the considered view that this writ petition deserves acceptance.

24. In the result the impugned Office Order dated 13.03.2006 stands set aside and quashed. This writ petition stands allowed.

25. There shall be no order as to costs.



Judge.



Chief Justice.

rsr/jks