UNION PUBLIC SERVICE COMMISSION

IN THE HIGH COURT OF DELHI AT NEW DELHI
C.M. WRIT PETITION NO.20916 OF 2002
D.D. 17.7.2002
Hon'ble Mr. Justice G.P.Mathur &
Hon'ble Mr. Justice N.K. Mehrotra

Jata Shankar Shukla ... Petitioner
Vs.
U.P.S.C. & Ors. ... Respondents

Examination:

Whether a candidate can change the information furnished in the application form at a subsequent stage? - No

Petitioner with M.A. in History while applying for Civil Services (Preliminary) Examination 2002 indicated in the application form Agriculture (Code 01) as optional subject in respect of History (Code 10) – Admit card issued showing Agriculture (Code 01) – Petitioner as per interim order appeared for Preliminary Examination in History as optional subject – High Court heard the case on merits – In the photocopy of the application petitioner indicated Agriculture (Code 01) as optional subject – In view of Instruction No.7 of Information Brochure–No addition/alteration in the entries made in the form is allowed at any subsequent stage, High Court dismissed the writ petition.

Held:

Instruction clearly shows that a candidate cannot change the entries made in the application form at any subsequent stage. The plea of the petitioner that he wants to appear in the subject of History cannot be accepted at the present stage.

Case referred:

1997 (3) JT 587 - L.Chandrakumar Vs. Union of India

ORDER

The petitioner applied for appearing in Civil Services (Preliminary) Examinations, 2002, and filled in the prescribed form for the said purpose. The case of the petitioner is that he has passed MA in History and had filled in History (Code-10) as his optional subject in the application form. However, the admit card received by him mentioned that his optional subject was Agriculture (Code-01). He then filed the writ petition on 17.5.2002 praying that a writ of mandamus be issued directing the respondents to permit him to appear in the Civil Services (Preliminary) Examinations, 2002, with History as an optional subject.

Sri. Satish Chaturvedi, learned counsel for the respondents, has raised a preliminary objection that the writ petition is not maintainable in view of Section 14(1)(a) of the Administrative Tribunals Act and the petitioner should have first approached the Central Administrative Tribunal as held by the Supreme Court in L.Chandra Kumar Vs. Union of India, 1997 (3) JT 587. In view of the fact that the writ petition has already been entertained by a Division Bench on 17.5.2002 and an interim order was passed in favour of the petitioner, permitting him to appear in the Preliminary examination and also to avoid unnecessary hardship to him, we have heard the learned counsel for the parties on the merits of the case.

Sri. Satish Chaturvedi has produced before us a photocopy of the application form which was submitted by the petitioner. Column 19 of the form requires that the candidate should indicate the optional subject in which he wants to take the examination. In this column the petitioner gave the code of his optional subject as 01. The advertisement shows that the code for Agriculture subject is – 01 while the code for Indian History is 10. This shows that the petitioner himself mentioned Agriculture as his optional subject. In these circumstances, there was no mistake in the admit card which was sent to the petitioner as the petitioner never indicated that he wanted to appear in History as an optional subject. Instruction no.7 of the information brochure reads as under:

> "7. No addition/alteration in the entries made in the form is allowed at any subsequent stage"

The aforesaid condition clearly shows that a candidate cannot change the entries made in the application form at any subsequent stage. The plea of the petitioner that he wants to appear in the subject of History, therefore, cannot be accepted at the present stage.

There is no merit in this writ petition, which is hereby dismissed at the admission stage.

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IN THE HIGH COURT OF DELHI AT NEW DELHI
C.M. WRIT PETITION NO.21129 OF 2002
D.D. 17.7.2002
Hon'ble Mr. Justice G.P.Mathur &
Hon'ble Mr. Justice N.K. Mehrotra

Ajeet Pratap Singh ... Petitioner
Vs.
Union of India & Ors. ... Respondents

Examination:

Whether UPSC is justified in rejecting candidature of a candidate on the ground that the application is incomplete? – Yes

Petitioner's candidature for Civil Services (Preliminary) Examination, 2002, was rejected as he had not indicated his educational qualification in the application form – High Court in view of the fact that the applicant had left the relevant column blank in violation of Instruction No.4 - Do not leave any relevant column blank and incomplete application will be rejected, dismissed the writ petition at the admission stage holding that the application was rightly rejected.

Case referred:

1997 (3) JT 587 - L.Chandrakumar Vs. Union of India

ORDER

The petitioner applied for Civil Service (Preliminary) Examinations, 2002, and filled in the prescribed form for the said purpose. His candidature was rejected on the ground that he had not indicated his educational qualifications in the application form. He then filed the writ petition on 16.5.2002 and a Division Bench passed an interim order whereby the petitioner was permitted to appear in the Preliminary examination, which was going to be held on 19.5.2002.

Sri. Satish Chaturvedi, learned counsel for the respondents, has raised a preliminary objection that the writ petition is not maintainable in view of Section 14(1)(a) of the Administrative Tribunals Act and the petitioner should have first approached the Central Administrative Tribunal as held by the Supreme Court in L.Chandrakumar Vs. Union of India, 1997 (3) JT 587. In view of the fact that the writ petition has already been entertained by a Division Bench on 17.5.2002 and an interim order was passed in favour of the petitioner, permitting him to appear in the Preliminary examination, we have heard the learned counsel for the parties on the merits of the case.

Sri. Satish Chatruvedi has produced before us a photocopy of the application form which was submitted by the petitioner. Column 15 of the form requires that the candidate should give his educational qualifications. In the application form filled in by the petitioner he has not written his educational qualifications and the said column was left blank. Instruction no.4 of the information brochure, which was supplied to the candidates, reads as follows:

> "4. Do not leave any relevant column blank. INCOMPLETE APPLCATION WILL BE REJECTED."

In these circumstances, the candidature of the application was rightly rejected. There is no merit in this writ petition, which is hereby dismissed at the admission stage.

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CENTRAL ADMINISTRTIVE TRIBUNAL
CHANDIGARH BENCH
O.A. NO.983-PB-2003
D.D. 22.10.2003
Hon'ble Shri Justice O.P. Garg, Vice Chairman &
Hon'ble Shri S.K.Naik, Member (A)

Aman Kumar Devesher ... Applicant
Vs.
Union of India & Anr. ... Respondents

Examination:

Applicant who was unsuccessful in Civil Services Examination (Preliminary) 2003 alleged that his answers have been wrongly evaluated – As per interim order the petitioner was permitted to appear for the main examination – Though there is dispute about correctness of model answers in respect of some questions High Court in view of the fact that the petitioner has secured 264 marks as against cutoff marks of 281 dismissed the petition at the preliminary stage itself.

ORDER

Justice O.P.Garg, Vice Chairman:

The applicant had appeared in Civil Services Examination (Preliminary), 2003 held on 10.5.2003, result of which was declared on 5.8.2003. The applicant was not successful in the examination. The applicant has thus, approached this Tribunal under Section 19 of the Administrative Tribunals Act, 1985 with a prayer that the respondents be directed to permit him to appear in the Civil Services (Main) Examination. The grouse of the applicant is that his answers have been wrongly evaluated with reference to the wrong model answers/key answers by the respondents. At the time of the preliminary hearing of this O.A. Shri K.K.Thakur appeared on behalf of the Union Public Service Commission (for short 'UPSC'). He was directed to produce the answer sheets of the applicant and the Model/ key answers with reference to which they were examined/evaluated Shri Hemant Bassi has now appeared before us on behalf of the UPSC along with relevant materials.

2. We have sifted the answer sheets of the applicant, both in the paper of Indian History and General Studies with reference to the model answers. Except for the answers for Question No.45, 49, 94 and 108 of Indian History Paper, and question No.14, 46, 64, 116 and 134 in respect of General Studies, there was no discrepancy in the evaluation of the answers. There is a dispute about correctness of the model answers in respect of the above questions in the two papers. The applicant

supports his version with reference to certain gazetted and Civil Services Chronicles and other publications brought out by the Ministry of Information & Broadcasting. The correctness of the answers given in the publications has been challenged by the learned counsel for the UPSC. He pointed out that the model answers have been prepared after a thorough exercise undertaken by experts in the field.

3. The last general candidate who was called for Civil Service (Main) Examination had secured 281 marks while the applicant had secured only 264 marks. There was leave way of 17 marks in the case of the applicant. Even if the contention of the applicant, as has been put up before us and thoroughly examined with the assistance of learned counsel for the parties, is accepted in that event the applicant perhaps may get fifteen more marks, thereby totalling to 279. He again falls short of the cut off mark of 281. It is indubitable fact that this Tribunal is not supposed to enter into a roving enquiry. Prima facie we find that the applicant has been rightly dropped from being called for Civil Services (Main) Examination. We accordingly dismiss this O.A. without issuance of any notice to the respondents.

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IN THE SUPREME COURT OF INDIA
APPEAL (CIVIL) NO.6332 OF 2005
[Arising out of S.L.P. (C) No. 18026 of 2005]
W I T H
CIVIL APPEAL NO.6333-6334 OF 2005
[Arising out of S.L.P.(C) No. 18760-18761 of 2005]
D.D. 7.10.2005
Hon'ble Mr. Justice S.B. Sinha &
Hon'ble Mr. Justice R.V. Raveendran

U.O.I. Thr. Govt. of Pondicherry & Anr. ... Petitioner
Vs.
V. Ramakrishnan & Ors. ... Respondents

Service Rules

Whether promotion can be given on the basis of Draft Rules? – No

The 1st respondent was appointed on deputation as Chief Engineer of P.W.D. Pondicherry on short term deputation/temporary basis by the UPSC w.e.f. 1.7.2004 – Appellant (R.Sundar Raju), Superintending Engineer, holding the current charge of the duties of the post of Chief Engineer, challenged the deputation of the 1st respondent - In view of the objection of Government of Pondicherry, the appellant was not eligible to hold the post of Chief Engineer as he did not fulfill the eligibility criteria his original application was dismissed – In the meanwhile draft rules were framed altering the eligibility criteria as regard experience – 5 years experience was reduced to 3 years – Appellant was promoted on 27.4.2004 purely on adhoc basis as recommended by D.P.C. – 1st respondent was repatriated to his present department on 14.2.2005 which he questioned in original application filed before CAT – 1st respondent also questioned the appointment of the appellant by filing amendment application – Original application filed by 1st respondent was allowed by CAT on 14.7.2005 - Appeals filed by the appellant against the said order was dismissed by Madras High Court – In this appeal before the Supreme Court, the Supreme Court found fault with the Government of Pondicherry and UPSC for promoting the appellant R.Sundar Raju, on the basis of draft rules which were approved as per order dated 28.9.2005 without considering the employees similarly situated as the appellant for promotion in terms of the new rules and upheld the decisions of both CAT and the High Court.

Held:

When the tenure of deputation is specified, despite a deputationist not having an indefeasible right to hold the said post, ordinarily the term of deputation should not be curtailed except on such ground as for example, unsuitability or unsatisfactory performance.

J U D G M E N T

S.B. SINHA, J :

Leave granted.

The First Respondent herein was appointed on deputation as Chief Engineer of the Public Works Department, Government of Pondicherry on short term deputation/ temporary basis pending selection of the regular incumbent by the Union Public Service Commission (UPSC) with effect from 1.7.2004. He was repatriated to his parent department on 14.2.2005 and relieved off from his duties on the same day. Questioning the same, an original application was filed before the Central Administrative Tribunal on 25.2.2005 praying interlia therein:

> "–it is humbly prayed that this Hon'ble Tribunal may be pleased to quash the order passed by the 2nd Respondent in No. A.22012/I/PW-1/A1/2002 (Part) dated 14-2-05 as illegal and unconstitutional and thus render justice."

R. Sundar Raju (Appellant in the connected appeal), Superintending Engineer, having three years experience, who was holding the current charge of the duties of the post of Chief Engineer at that time, in the meanwhile had filed an application questioning the deputation of the First Respondent herein. In the said original application, Government of Pondicherry inter alia raised a contention that he was not eligible to hold the post of Chief Engineer as he did not fulfill the eligibility criteria therefor. The said original application was dismissed on the ground of ineligibility to hold the said post and, a furthermore regular appointment in terms of the Rules was yet to take place. It was directed:

> "We have already given a limited direction to the Respondents when the O.A. was entertained, to follow the Recruitment Rules as and when the post of Chief Engineer, PWD is filled up on regular basis. The Respondents have also assured that the Recruitment Rules will be revised and adhered to strictly when the question of filling up of the post of Chief Engineer on regular basis is taken up. In these circumstances, we are of the view that nothing survives in the relief sought for by the Appellant in this O.A. The interim orders are made absolute. The O.A. is disposed of accordingly. No order as to costs."

In the meanwhile, draft rules were framed altering the eligibility criteria as regard experience for the post in terms whereof the eligibility clause of five years experience was reduced to three years. R. Sundar Raju was promoted on 27.04.2004 purely on adhoc basis.

The First Respondent, herein questioned the said appointment by filing an application for amendment

in the pending original application on 23.6.2005 before the Central Administrative Tribunal which was registered as M.A. No. 258 of 2005 wherein he prayed for:

> "It is prayed that this Hon'ble Tribunal may be pleased to amend the relief sought column in the main O.A. and it may be read as that this Hon'ble Court "may be pleased to set aside the promotion order of the Fourth Respondent passed by the Government of Pondicherry in No. 473/PW1/A1/2005 dated 27-4-2005 and direct the restoration of the applicant as Chief Engineer, Public Works Department, Pondicherry and thus render Justice."

On or about 08.04.2005, R. Sundar Raju was recommended for promotion by the Departmental Promotion Committee to be promoted to the post of Chief Engineer and by order dated 27.04.2005, he was promoted to the said post purely on ad hoc basis. On or about 21.4.2005, the First Respondent was posted by the CPWD, New Delhi as Director of Works (SR) Chennai.

The original application filed by the First Respondent was allowed by the Central Administrative Tribunal by an order dated 14.7.2005. Both the Appellants preferred appeals therefrom before the High Court of Judicature at Madras and by reason of impugned judgment the said appeals have been dismissed holding that as the First Respondent was sent on deputation pending selection of the regular incumbent by the UPSC; till such regular selection is made, he had a right to hold the said post. So long, the draft rules were not approved by the Competent Authority, viz., UPSC, it was opined, R. Sundar Raju was ineligible to be appointed as Chief Engineer, Pondicherry.

The Appellants, aggrieved by the said judgment, are in appeal before us.

The learned Solicitor General and Mr. V.A. Bobde, learned senior counsel appearing on behalf of the Appellants, at the outset would draw our attention to the fact that the said draft rules had since been approved wherefor an appropriate notification has been issued on 28.9.2005.

Our attention has further been drawn to the fact that Government of Pondicherry by a letter dated 28.9.2005 addressed to the Secretary, UPSC requested it to regularize the services of the Chief Engineer from the date of his adhoc promotion. It was contended that the Departmental Promotion Committee (DPC) constituted in terms of the said Rules would hold its meeting at an early date.

The learned Solicitor General would submit that the First Respondent herein had no legal right to hold the said post of the Chief Engineer of PWD in the Government of Pondicherry and that having regard to the fact that the Rules have now been approved and as the DPC is likely to hold its meeting at an early

date, the prayers made in the original application for all practical purposes have become infructuous.

It was submitted that the High Court committed a manifest error in not considering the effect of the draft rules as in terms thereof the candidature of R. Sundar Raju could have been considered. It was also contended that on repatriation, the First Respondent opted for posting at Chennai and having been so posted, he was no longer entitled to pursue his claim to continue as Chief Engineer.

Mr. Bobde would further submit that if the prayer for amendment of the original application was permitted without giving his client an opportunity of filing a reply to which he was entitled to in terms of Rule 12 of the Central Administrative Tribunal (Procedure) Rules, 1987 in terms whereof it was incumbent upon the Tribunal to give at least one month's time. It was submitted that a prayer was made on behalf of the Appellant for an adjournment on the ground that the senior counsel Mr. Vijayaraghvan was not well but the same was rejected and the Tribunal proceeded to pass the impugned judgment on 11.7.2005.

Mr. P.P. Rao and Ms. Nalini Chidambaram, learned senior counsel appearing on behalf of the First Respondent, on the other hand, would contend that in terms of the Recruitment Rules, 'deputation' is a mode of recruitment. Having regard to the fact that such appointment has not been made until now, the First Respondent had a legal right to continue as Chief Engineer, in view of the decision of this Court in Parshotam Lal Dhingra Vs. Union of India [(1958) SCR 828].

It was further submitted that as the original application filed by R. Sundar Raju was dismissed on the ground that he was wholly ineligible, the effect of the judgment could not be nullified by reason of the draft rules. Our attention was drawn to the fact that the Appellant Government repatriated and relieved the First Respondent on 14.2.2005 and the First Respondent approached the Tribunal on 25.2.2005 and in that view of the matter, he having been posted at Chennai, the order passed by the Tribunal cannot be said to have been made on a representation made by the First Respondent herein as was sought to be contended. The said order was passed during the pendency of the original application.

It was argued that it is not a case where the First Respondent wanted to be permanently absorbed but his right to hold the said post for the term he was appointed could not have been defeated. Deputation, it was submitted, being a tripartite arrangement, the same must meet the requirements of

law. In so far as the order of promotion of R. Sundar Raju dated 27.4.2005, Mr. Rao, would contend that it was only a consequential order and in that view of the matter it was not necessary to set out the grounds therefore separately.

It was argued that although the UPSC asked the Government of Pondicherry to amend the rules in view of the fact that the Post of Superintending Engineer and the Chief Engineer carry the same scale of pay upon revision thereof, the remedy therefore was to send the matter to anomaly removal committee and not to amend the rules. The UPSC, the learned counsel would contend, did not say that the eligibility criteria should be changed. The action of the Government of Pondicherry must be held to be illegal as by its letter dated 28.9.2005 a request was made to regularize the services of the Chief Engineer from the date of his ad hoc promotion.

Furthermore, new Rules cannot be given a retrospective operation.

The fact of the matter, as noticed hereinbefore, depicts as to how sometimes the public functionaries of the Government function. R. Sundar Raju, according to the Appellant, is said to have been appointed as Superintending Engineer on ad hoc basis. The Central Administrative Tribunal in its order dated 31.8.2004 passed in Original Application No. 581 of 2004 noticed:

> "The Respondents refuted the claim of the applicant that he is eligible to be considered for the post. They have averred that the Applicant was appointed only on ad-hoc basis as Superintending Engineer with effect from 26.11.2001. Further, the departmental candidates in the feeder category who are in the direct line of promotion shall not be eligible for consideration for appointment on deputation. Therefore, it is asserted that the Applicant does not have any cause of action to approach this Tribunal. Further, he cannot be a person aggrieved or concerned with the appointment in question. Therefore, there is no merit in the O.A. and is liable to be dismissed in limine."

It was further held:

> "–This is particularly relevant in the context of this case. If the above eligibility criteria are applied in the case of the Applicant in this O.A. it is obvious that he is not eligible to be considered for the post of one the following grounds, either by promotion or by transfer on deputation."

Taking note of the eligibility criteria as laid down in the Rules, it was observed:

> "The Applicant was only holding the current charge of the duties of the post of Chief Engineer which does not confer on him any right to be considered for the post. Therefore,

> the averments made by the Applicant that he is eligible and qualified for the post and that the Respondents have not given wide publicity for filling up the vacancy and statutory rules have not been followed have no basis."

The Tribunal, as noticed hereinbefore, directed the Respondents to follow the Recruitment Rules as and when the post of Chief Engineer, PWD is filled up on regular basis. As would be noticed hereinafter, the Appellant has failed even to keep it assurance before the Central Administrative Tribunal that the revised recruitment rules would be adhered to strictly when the question of filling up of the post of Chief Engineer on regular basis is taken up.

However, things began to take a different shape in a quick succession from February, 2005. The First Respondent was relieved by the Government of Pondicherry. No reason was assigned therefor. There is nothing to show that the lending department was consulted. The draft rules were made. A so-called DPC, composition whereof has not been disclosed, was constituted and R. Sundar Raju was sought to be promoted on adhoc basis by an order dated 27.4.2005 although he merely completed three years of service at that point of time.

As has been noticed by this Court in Abraham Jacob and Others Vs. Union of India [(1998) 4 SCC 65] and Vimal Kumari Vs. State of Haryana and Others [(1998) 4 SCC 114], such draft rules can be acted upon to meet urgent situations when no rule is operating.

In High Court of Gujarat and Another Vs. Gujarat Kishan Mazdoor Panchayat and Others [(2003) 4 SCC 712], it was observed:

> "27. It is now trite that draft rules which are made to lie in a nascent state for a long time cannot be the basis for making appointment or recommendation. Rules even in their draft stage can be acted upon provided there is a clear intention on the part of the Government to enforce those rules in the near future. (See Vimal Kumari v. State of Haryana)"

But, therein the question as to whether a draft rules can constitute a valid rules or not, did not arise for consideration either in Gujarat Kisan Mazdoor Panchayat (supra) or in Abraham Jacob (supra) and Vimal Kumari (supra).

The rules did not become inoperative only because the two scales of pay of the Superintending Engineer and the Chief Engineer became same in terms of revised pay scales. A rule does not become inoperative only because the UPSC says so. A rule validly made even if it has become unworkable

unless repealed or replaced by another rule or amended, continue to be in force. As regard, scale of pay, the matter should have been referred to the anomaly removal committee. In terms of the new rules, the criteria prescribed under the old rules were modified. Thus, till the new rules were given effect to, no promotion to the post of Chief Engineer could be effected in derogation to the criteria prescribed under the existing rules.

In Dr. Rajinder Singh Vs. State of Punjab and Others [(2001) 5 SCC 482], this Court held:

> "5. It has not been disputed before us that on the relevant date when Respondent 3 was recommended for promotion, he had not completed 10 years of service within the meaning of Rule 9-A read with Rule 2(2) of the PCMS Class I Rules. As Respondent 3 was not possessing the requisite qualifications on the relevant date, he could not be considered for promotion to the post of Deputy Director, Health Services."

It was further held :

> "7. The settled position of law is that no government order, notification or circular can be a substitute of the statutory rules framed with the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so far accepted service jurisprudence. We are of the firm view that the High Court was not justified in observing that even without the amendment of the Rules, Class II of the service can be treated as Class I only by way of notification. Following such a course in effect amounts to amending the rules by a government order and ignoring the mandate of Article 309 of the Constitution."

Valid rules made under proviso appended to Article 309 of the Constitution of India operates so long the said rules are not repealed and replaced. The draft rules, therefore, could not form the basis for grant of promotion, when Rules to the contrary is holding the field. It can safely be assumed that the principle in Abraham Jacob (supra), Vimal Kumari (supra) and Gujarat Kisan Mazdoor Panchayat (supra) that draft Rules can be acted upon, will apply where there are no rules governing the matter and where recruitment is governed by departmental instructions or executive orders under Article 162 of the Constitution of India.

Indisputably R. Sundar Raju was granted promotion on the basis of the draft rules which was given finality only during the pendency of the matter before this Court.

Furthermore, the new rules framed in terms of proviso appended to Article 309 of the Constitution of India as per notification dated 28.9.2005 has not been given a retrospective effect. By reason of

the said rules, the Superintending Engineer having a scale of pay of Rs. 12,000-16,500 can be promoted as Chief Engineer. The eligibility criteria for promotion is laid down in clause 12 of the Schedule to the Rules in the following terms:

> "Promotion: Superintending Engineer (Rs. 12,000-16,500) with five years regular service in the grade, failing which Superintending Engineer with ten years of combined regular service in the grade of Superintending Engineer and Executive Engineer out of which at least one year regular service should be in the grade of Superintending Engineer."

In terms of Article 16 of the Constitution, the employees similarly situated cannot be discriminated. Employees having the same qualification, thus, must be considered by a duly constituted DPC consisting of the Chairman/Member, UPSC, Chief Secretary and Secretary (Works). It is unfortunate that the Government of Pondicherry instead of asking the UPSC to constitute a DPC for consideration of the cases of all eligible candidates, passed the order (vide letter dated 28.9.2005) on the same day on which the new Rules came into effect, requesting UPSC to regularize the services of R. Sundar Raju as Chief Engineer from the date of his ad hoc promotion. Such an act betrays a lack of bona fides on the part of a State which is required to be performed in a fair and reasonable manner. It smacks of favouritism. Having regard to the unauthorized purpose for which the action has been taken, the same would attract the principle of malice in law. [See Punjab State Electricity Board Ltd. Vs. Zora Singh and Others, (2005) 6 SCC 776].

Ordinarily, a deputationist has no legal right to continue in the post. A deputationist indisputably has no right to be absorbed in the post to which he is deputed. However, there is no bar thereto as well. It may be true that when deputation does not result in absorption in the service to which an officer is deputed, no recruitment in its true import and significance takes place as he is continued to be a member of the parent service. When the tenure of deputation is specified, despite a deputationist not having an indefeasible right to hold the said post, ordinarily the term of deputation should not be curtailed except on such just grounds as, for example, unsuitability or unsatisfactory performance. But, even where the tenure is not specified, an order of reversion can be questioned when the same is mala fide. An action taken in a post haste manner also indicates malice. [See Bahadursinh Lakhubhai Gohil Vs. Jagdishbhai M. Kamalia and Others, (2004) 2 SCC 65, para 25]

Kunal Nanda Vs. Union of India and Another [(2000) 5 SCC 362], relied upon by the learned Solicitor General, was a case where the petitioner therein had asserted a claim for permanent absorption

in the department. The matter relating to appointment through the Government of Pondicherry Public Works Department Group "A" Post of Chief Engineer Recruitment Rules, 1996 was governed in terms of a notification dated 11th December, 1996. The said notification was issued by the Government of Pondicherry in exercise of its power under the proviso to Article 309 of the Constitution of India. Rule 3 thereof prescribes that the method of recruitment thereto shall be as specified in columns 5 to 14 of the Schedule appended thereto. In terms of the Schedule, the post of Chief Engineer was a selection post and one of the methods for recruitment as envisaged in Column 11 thereof is that the same post may be filled up by direct recruitment or by promotion or by deputation/ transfer. The said post could be filled up by transfer on deputation in terms of Column 12 of the Scheduled appended thereto. The appointment of the First Respondent in the said post was on short term deputation/ temporary basis till a regular appointment is made.

In Parshotam Lal Dhingra (supra), it is categorically stated that when an appointment is made for a specific period, unless any disciplinary proceeding is initiated, a person will be entitled to hold the said post.

The Tribunal and the High Court, therefore, cannot be said to have committed any error in passing the impugned judgments.

It is true that R. Sundar Raju was not given an opportunity of hearing in terms of Rule 12 of the Central Administrative Tribunal (Procedure) Rules, 1987 framed under the Administrative Tribunals Act, 1985. But, it does not appear from the judgment of the High Court that any such point had been taken before it. It was open to him to raise a specific question as regard violation of Rule 12 and denial of an opportunity of hearing but he chose not to do so.

Furthermore, the questions which were raised before the Central Administrative Tribunal and the High Court are pure questions of law. They have been gone into both by the Tribunal and the High Court.

For the reasons aforementioned, we do not find any infirmity in the judgment of the High Court. However, all the authorities concerned must see to it that the selection process in accordance with law may be completed as expeditiously as possible. These appeals are dismissed with the aforementioned observations. No costs.

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IN THE HIGH COURT OF DELHI AT NEW DELHI
W.P.C. NO.13674/2006
D.D. 5.10.2006
Hon'ble Mr. Justice Anil Kumar

Pankaj Kumar ... Petitioner
Vs.
U.P.S.C. & Ors. ... Respondents

Examination:
Jurisdiction:
Service matters include process of selection for service:
Competitive Examination is a part of process of recruitment:

Petitioner who was unsuccessful in Civil Services (Preliminary) Examination, 2006, sought direction for revaluation of his answer sheets – Respondents preliminary objection regarding maintainability under Sections 14 and 28 of the Administrative Tribunal's Act contending that the jurisdiction is with CAT and not with the High Court – Petitioner contending that in view of Article 323-A CAT can deal with service conditions of persons who have been already appointed – High Court holding that the competitive examination is a part of process of recruitment dismissed the writ petition as having no jurisdiction.

Held:

Competitive examination is a part of process of recruitment. The definition of service matter is very wide and it is not to be considered narrowly to limit its meaning strictly to the conditions of service. Service matters would include not only the conditions of service but also other incidental and ancillary matters and therefore, the process of selection for service would be governed by the word 'service matters'.

ORDER

1. The petitioner has sought a direction to Union Public Service Commission for re-evaluation of the answer sheet of the preliminary examination of the petitioner or to re-evaluate the answer sheet in the Court itself.

2. The petitioner appeared in the Civil Services (Preliminary) Examination, 2006 conducted by Union Public Service Commission, respondent No.1, and his Roll No. was 020091.

3. According to the petitioner, there were two papers in the preliminary examination out of which General Studies paper was compulsory and one paper was optional. The petitioner had opted Public Administration as optional subject.

4. The plea of the petitioner is that he appeared in the examination of Public Administration held on 14th May, 2006 but the examination was cancelled and re-examination was conducted on 18th June,

2006 in which the petitioner appeared. According to him, he did very well as per his assessment. The petitioner pleaded that he compared his answers with several other candidates who had not done well, however, the petitioner has not been declared successful in the preliminary examination and has not been called for main examination.

5. In the circumstances, the petitioner has challenged the examination setup which, according to the petitioner, requires transparency. For the preliminary examination, the candidates are kept totally in dark about their marks. According to the petitioner, he has a right to information about his marks.

6. The petitioner contended that to err is human and the probability of error and omission is very strong in the examination system and in case the petitioner's answer sheet is not re-evaluated, then one full year and one chance of petitioner shall be wasted causing irreparable loss, unbearable pain and frustration to him.

7. In the circumstances, petitioner seeks re-evaluation of his answer sheets and he is confident that he would qualify for the main examination in case his answer sheet is re-evaluated and in any case the answer sheet should be re-evaluated in the Court itself.

8. Learned counsel for respondent, Ms. Jyoti Singh, has raised a preliminary objection about the maintainability of the writ petition. She contends that the jurisdiction in the circumstance under Sections 14 and 28 of the Administrative Tribunal Act, 1985 is with the Central Administrative Tribunal and not with the High Court.

9. The learned counsel for the petitioner, however, contended that Article 323A of the Constitution of India contemplated formation of administrative tribunals with respect to recruitment and condition of service of persons appointed to the public service and post in connection with the affairs of the Union and consequently the Central Administrative Tribunal under the powers of said Article dealt only with the service conditions of the persons who have already been appointed to the public service and post and not to the matters of the persons who have not been appointed.

10. The learned counsel for the petitioner relied on the definition of "appointment" as given in Oxford English Reference Dictionary, Second Edition, Revised which is as under:

> "Appointment: 1. an arrangement to meet at a specific time and place; 2)a) a post or office available for applicants, or recently filled (took up the appointment on Monday); b) a person appointed; c) the act or an instance of appointing esp. to a post; 3)a) furniture fittings; b) equipment."

11. The reliance has also been placed on the definitions of words "recruit" and "select" in Oxford English Reference Dictionary, Second edition, revised which are as under:

> "Recruit:- 1) a serviceman or servicewoman newly enlisted and not yet fully trained; 2) a new member of a society or organization; 3) a beginner. 1) enlist a person as a recruit; 2) form (an army etc) by enlisting recruits; 3) get or seek recruits; 4) replenish or reinvigorate (numbers, strength etc.)"
>
> Select:- Choose, esp. as the best or most suitable. 1) chosen for excellence or suitability; choice; 2) (of a society etc) exclusive, cautious in admitting members, select committee."

12. The Division Bench of Allahabad High Court in 1988 (2) SLR 689, Sudhanshu Tripathi Vs. Union of India and another, however, had held that examination is a part of the process of recruitment and consequently the High Court has no jurisdiction to entertain writ petition in this regard and only Administrative Tribunals have jurisdiction to grant appropriate relief. Relying on the meaning of the word "recruitment" as specified in the shorter Oxford dictionary, Vol.II, "a recruitment; the act or process of recruiting", it was held that the Parliament deliberately used the words "recruitment" and "matters concerning recruitment" in Section 14 and 28 of the Act so as to indicate that the Tribunal shall have exclusive discretion to deal with these matters. The Division Bench was of the view that in clause (1) of Article 323-A, the relevant words used are "Recruitment and condition of service of persons appointed to Public Service and post" and, therefore, it is obvious that the words "recruitment" and "conditions of service of persons appointed" have been used to indicate different meaning and purposes.

13. A Division Bench of Orissa High Court also in the matter of Pratap Chandra Rout and others vs. State of Orissa and others, 1987 Labour Industrial Cases, 104 had held that the entire exercise for establishment of Administrative Tribunals by amending the Constitution was to take away the cases relating to service from the jurisdiction of the High Courts and put them within the ambit of a separate forum. The plea that Central Administrative Tribunal will have jurisdiction only if a person is appointed in the service and not before that was not accepted on the ground that the words "appointment" and "recruitment" are not synonymous. It was held that the word "recruitment" cannot suggest that it must be understood in relation to a complete appointment and not to a stage where the appointment is still under consideration. It was held that it is only after the culmination of process of recruitment that an appointment takes place and therefore, recruitment and appointment are two separate stages, quite distinct from each other and the word "appointment" would relate only to conditions of service and not to the word "recruitment" which is a stage prior to getting into service.

14. A single Judge of this Court in the matter of Pranay Kumar Sen Vs. the Chairman, UPSC and others in CWP No.5259 of 2002 relying on Sudhanshu Tripathi Vs. Union of India and Another, 1988 (2) SLR 688; Pratap Chander Rout and others Vs. State of Orissa and others, 1987 LIC 104 and K.Nagaraja and others Vs. Superintending Engineer, Irrigation Department and Others, AIR 1987 Andhra Pradesh 230 had held that the competitive examination is a condition precedent for appointment to an All India Service and such an examination, therefore, is a part of process of recruitment. Perusal of the definition of service matter, it is apparent that it is very wide and it is not to be considered narrowly to limit its meaning strictly to the condition of service. Consequently, service matters would include not only the conditions of service but also other incidental and ancillary matters and, therefore, the process of selection for service would be governed by the word 'service matters'.

15. The following extract of the above noted judgment Pranay Kumar Sen (supra) is relevant:

> "6. Taking pleas from the word used under Article 323 (a) of Constitution for trail, deliberately used the word recruitment and matters concerning in Section 14 and 28 of the Act so as to indicate that the Tribunal shall have exclusive jurisdiction to deal with these matters and that the High Court in view of the specific provisions contained in section 28, shall not have jurisdiction to entertain or adjudicate upon the petition in which questions relating to recruitment and matters concerning recruitment are raised."

16. No cogent grounds have been raised by the petitioner to differ with the ratio of above noted judgments. Therefore, there are no grounds to hold that the Central Administrative Tribunal does not have jurisdiction to try and adjudicate the disputes raised by the petitioner. Consequently the Central Administrative Tribunal have jurisdiction to decide the controversies raised by petitioners regarding re-evaluation. Therefore, in the facts and circumstances, there is no ground to interfere and exercise jurisdiction under Article 226 of the Constitution of India and the writ petition is dismissed.

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.2067 OF 2007
[Arising out of Special Leave Petition (Civil) No.11651/2005]
D.D.14.04.2007
Hon'ble Mr. Justice H.K.Sema &
Hon'ble Mr. Justice V.S.Sirpurkar
WITH
CIVIL APPEAL NOS.2071, 2072, 2068, 2070 & 2069 OF 2007
(Arising out of S.L.P (C) Nos.19594, 26333 of 2005, 8470, 10225 and 12656 of 2006 AND C.A.No.3628 of 2006)

Union of India & Anr.	**...**	**Appellants**
Vs.		
T.V.Patel	**...**	**Respondent**

Disciplinary Inquiry:

Whether consultation under Article 320(3)(c) of the Constitution with UPSC in disciplinary matter or furnishing copy of the advice tendered by UPSC is mandatory? – No

The Disciplinary Authority after disagreeing with the report of the Inquiry Officer holding that the charges were not proved issued notice to the respondent after giving reasons for disagreement and asking him to make representation if any and rejected the representation made by the respondent – After obtaining advice of UPSC and considering the advice of UPSC the Disciplinary Authority imposed penalty enclosing copy of the advice of UPSC with the final order of penalty – The respondent challenged the same before CAT – CAT after considering the various grounds urged set aside the order of Disciplinary Authority on grounds among others that copy of UPSC advice was not made available to the respondent – The applicant challenged the same before High Court which dismissed the Special Civil Application on the ground that copy of advice of UPSC was not supplied to the respondent – Hence there was violation of principles of natural justice – In the present appeal before the Supreme Court, the Supreme Court upheld the contention of the appellants that consultation with the UPSC under Article 320(3)(c) is not mandatory and the advice tendered by the UPSC is not binding on the Disciplinary Authority following its earlier decision in State of U.P. vs. Manbodhan Lal Srivastava – 1958 SCR 533 and disposed of the appeals.

Held:

Provisions of Article 320(3)(c) of the Constitution are not mandatory and they do not confer any rights on the public servant so that the absence of consultation or any irregularity in consultation process or furnishing a copy of the advice tendered by UPSC if any does not afford the delinquent Government servant a cause of action in a Court of law.

JUDGMENT

H.K.SEMA, J.

Leave granted.

These appeals preferred by the Union of India arise out of a common question of facts and law and they are being disposed of this common order. The facts are identical. For the sake of brevity we are taking facts from S.L.P (C) No.11651 of 2005.

The facts in compendium are as follows:

The respondent was functioning as SDO (Phone) at Navsari Telephone Exchange. He was found to have been involved in providing telephone connection in contravention of the P&T Manual thereby causing huge avoidable financial loss to the Department. A memorandum and the article of charge framed against the respondent are coined in identical in language. A memorandum dated 30.06.1997 along with the substance of imputation of conduct was served on the respondent.

The statement of article of charge framed against the respondent are as follows:-

> "That the said Shri T.V.Patel while functioning as SDOP, Navsari, during the period 1996-96, deliberately provided seven telephone connection from Navsari Telephone Exchange to subscribers of Munsad Village falling within the local area of Ugat Telephone Exchange, with ulterior motive and in contravention of Paras 11(A) & (B) of P&T Manual Vol.XII, Part-I; and the connections thus irregularly provided, had to be got closed by the Telecom District Manager, Valsad. The said Shri T.V.Patel thereby caused a huge avoidable loss to the Department by incurring unnecessary expenditure towards stores and labour. Thus by his above acts the said Shri. T.V.Patel committed grave misconduct, failed to maintain absolute integrity, exhibited lack of devotion to duty and acted in a manner unbecoming of a Government servant thereby contravening Rule 3(1)(i), (ii) and (iii) of the CCS (Conduct) Rules, 1964."

List of documents and prosecution witnesses sought to be relied during the inquiry were also supplied along with the article of charge.

During the inquiry the respondent was given an opportunity of fair hearing and the Inquiry Office submitted its report holding that the charges were not proved. The Disciplinary Authority disagreed with the report and issued a notice to the respondent providing the reasons for disagreement and calling upon the respondent to make representation, if any, by its order dated 1.4.1999. On 4.5.1999,

the respondent made a representation to the said notice. This was rejected.

The Disciplinary Authority, thereafter, sought for advice of the Union Public Service Commission (UPSC) and after considering the advice of the UPSC imposed a penalty of reduction of pay by one stage in the time scale of pay till 30.11.2001, without cumulative effect by an order dated 15.11.2000. A copy of the advice obtained from UPSC was also sent along with the final order of penalty.

Aggrieved thereby, the respondent filed O.A.No.96 of 2001 challenging the final order passed on 15.11.2000 before the Central Administrative Tribunal (CAT) Ahmedbad Bench on various grounds. The Tribunal after considering various grounds urged before it, set aside the order dated 15.11.2000 passed by the Disciplinary Authority imposing the penalty. One of the grounds, which persuaded the Tribunal to come to the aforesaid conclusion, is recorded in paragraph 12 of the judgment:

> "We also note that the copy of UPSC advice was not made available to the applicant. Under the circumstances we quash and set aside of the penalty imposed on the applicant and direct the respondents to take a decision after supplying a copy of the UPSC report and having regard to principles stated in para 10 & 11 above. The OA is allowed with these directions. No costs."

Aggrieved thereby, the appellant unsuccessfully filed Special Civil Application being No.17027 of 2004 before the High Court urging various grounds. The High Court dismissed the Special Civil Application on the sole ground that a copy of advice tendered by the UPSC was not supplied to the delinquent officer to enable him to represent. According to the High Court, the said advice tendered by the UPSC, a copy of which should be made available to the delinquent officer so as to enable him to afford an effective representation to the punishment proposed and such advice tendered by the UPSC a copy of which having not been supplied to the delinquent officer before the order of imposing a penalty was passed, there is violation of principles of natural justice and vitiates the inquiry.

Admittedly, in the present case, the UPSC tendered its advice and a copy of the advice tendered by the UPSC was sent along with the copy of the final order dated 15.11.2000 imposing the penalty, to the delinquent officer.

The question that calls for determination is as to whether a copy of the advice tendered by the UPSC is to be furnished along with the order of penalty or before the passing of an order imposing final penalty.

In Swamy's Compilation of CCS CCA Rules, Rule 15 deals with the action on the inquiry report.

Sub-rule (3) of Rule 15 reads as under:

> "(3) If the Disciplinary Authority having regard to its findings on all or any of the articles of charge is of the opinion that any of the penalties specified in Clauses (i) to (iv) of Rule 11 should be imposed on the Government servant, it shall, notwithstanding anything contained in Rule 16, make an order imposing such penalty:
>
> Provided that in every case where it is necessary to consult the Commission, the record of the inquiry shall be forwarded by the Disciplinary Authority to the Commission for its advice and such advice shall be taken into consideration before making any order imposing any penalty on the Government servant.

Part IX of the CCS Rules deals with Miscellaneous. Rule 32 deals with Supply of copy of Commission's advice. It reads:

> "Whenever the Commission is consulted as provided in these rules, a copy of the advice by the Commission and where such advice has not been accepted, also a brief statement of the reasons for such non-acceptance, shall be furnished to the Government servant concerned along with a copy of the order passed in the case, by the authority making the order."

In the aforesaid premises, Mr. B.Datta, learned ASG, contended that a consultation with the UPSC under Article 320(3)(c) is not mandatory and the advice tendered, if any, by the UPSC is not binding on the Disciplinary Authority. It is further contended that such advice would not confer any rights on a public servant so that the absence of consultation or any irregularity in consultation does not afford him a cause of action in a court of law. He further contended that even otherwise Rule 32 of the Rules is clear that a copy of such advice shall be furnished to the delinquent servant along with a copy of the order passed in the case, by the authority making the order.

There is substance in the contention of Mr. Datta, learned ASG.

As already noticed, Rule 32 of the Rules deals with the supply of a copy of Commission's advice. Rules as read as it is mandatory in character. Rule contemplates that whenever a Commission is consulted, as provided under the Rules, a copy of the advice of the Commission and where such advice has not been accepted, also a brief statement of the reasons for such non-acceptance shall be furnished to the Government servant along with a copy of the order passed in the case, by the authority making the order. Reading of the Rule would show that it contemplates two situations; if a copy of

advice is tendered by the Commission, the same shall be furnished to the government servant along with a copy of the order passed in the case by the authority making the order. The second situation is that if a copy of the advice tendered by the Commission has not been accepted, a copy of which along with a brief statement of the reasons for such non-acceptance shall also be furnished to the government servant along with a copy of the order passed in the case, by the authority making the order. In our view, the language employed in Rule 32, namely "along with a copy of the order passed in the case, by the authority making the order" would mean the final order passed by the authority imposing penalty on the delinquent government servant.

Article 320 of the Constitution deals with the functions of Public Service Commission and provides that it shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.

Article 320(3)(c) reads:-

(a) .....

(b) .....

(c) On all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;

.....

.....

Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case o in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

A Constitution Bench of this Court in the case of State of U.P. vs Manbodhan Lal Srivastava, 1958 SCR 533, considered the question as to whether the consultation of the Commission under Article 320(3)(c) is mandatory and binding on the appropriate authority.

The arguments that the non-compliance of Article 320(3)(c) vitiates the order passed by the appropriate authority have been repelled by the Court at SCR.pp 543-544:-

"Perhaps, because of the use of word "shall" in several parts of Art. 320, the High Court was led to assume that the provisions of Art. 320(3)(c) were mandatory, but in our opinion, there are several cogent reasons for holding to the contrary. In the first place, the proviso to Art. 320, itself, contemplates that the President or the Governor, as the case may be, "may make regulations specifying the matters in which either generally, or in any particular class of case or in particular circumstances, it shall not be necessary for a Public Service Commission to be consulted." The words quoted above give a clear indication of the intention of the Constitution makers that they did envisage certain case or classes of cases in which the Commission need not be consulted. If the provisions of Art. 320 were of a mandatory character, the Constitution would not have left it to the discretion of the Head of the Executive Government to undo those provisions by making regulations to the contrary. If it had been intended by the makers of the Constitution that consultation with the Commission should be mandatory, the proviso would not have been there, or, at any rate, in the terms in which it stands. That does not amount to saying that it is open to the Executive Government completely to ignore the existence of the Commission or to pick and choose cases in which it may or may not be consulted. Once, relevant regulations have been made, they are meant to be followed in letter and in spirit and it goes without saying that consultation with the Commission on all disciplinary matters affecting a public servant has been specifically provided for, in order, first, to give an assurance to the Services that a wholly independent body, not directly concerned with the making of orders adversely affecting public servants, has considered the action proposed to be taken against a particular public servant, with an open mind; and, secondly, to afford the Government unbiased advice and opinion on matters vitally affecting the morale of public services. It is, therefore, incumbent upon the Executive Government, where it proposes to take any disciplinary action against a public servant, to consult the Commission as to whether the action proposed to be taken was justified and was not in excess of the requirements of the situation.

Secondly, it is clear that the requirement of the consultation with the Commission does not extend to making the advice of the Commission on those matters, binding on the Government. Of course, the Government, when it consults the Commission on matters like these, does it, not by way of a mere formality, but, with a view to getting proper assistance in assessing the guilt or otherwise of the person proceeded against and of the suitability and adequacy of the penalty proposed to be imposed. If the opinion of the Commission were binding on the Government, it may have been argued with greater force that non-compliance with the rule for consultation would have been fatal to the validity of the order proposed to be passed against a public servant. In the absence of such a binding character, it is difficult to see how non-compliance with the provisions of Art. 320(3)(c) could have the effect of nullifying the final order passed by the Government.

Thirdly, Art. 320 or the other articles in Chapter II of Part XIV of the Constitution deal with the constitution of the Commission and appointment and removal of the Chairman or other members of the Commission and their terms of service as also their duties and functions. Chapter II deals with the relation between Government and the Commission but not between the Commission and a public servant. Chapter II containing Art. 320 does not, in terms, confer any rights or privileges on an individual public servant nor any constitutional guarantee of the nature contained in Chapter I of that Part, particularly Art.

311. Article 311, therefore, is not, in any way, controlled by the provisions of Chapter II of Part XIV, with particular reference to Art. 320."

Finally, at page SCR p.547 it was held as under:

"We have already indicated that Art. 320(3)(c) of the Constitution does not confer any rights on a public servant so that the absence of consultation or any irregularity in consultation, should not afford him a cause of action in a court of law, or entitle him to relief under the special powers of a High Court under Art.226 of the Constitution or of this Court under Art. 32. It is not a right which could be recognized and enforced by a writ. On the other hand, Art. 311 of the Constitution has been construed as conferring a right on a civil servant of the Union or a State, which he can enforce in a court of law. Hence, if the provisions of Art. 311, have been complied with in this case – and it has not been contended at any stage that they had not been complied with – he has no remedy against any irregularity that the State Government may have committed. Unless, it can be held, and we are not prepared to hold, that Art. 320(3)(c) is in the nature of a rider or proviso to Art. 311, it is not possible to construe Art. 320(3)(c) in the sense of affording a cause of action to a public servant against whom some action has been taken by his employer."

The decision of the Constitution Bench in Srivastava (supra) was reiterated by a three judge Bench of this Court in the case of Ram Gopal Chaturvedi vs. State of Madhya Pradesh, 1969 (2) SCC 240, it was held in paragraph 7 of the judgment as under:-

"It was argued that the impugned order was invalid as it was passed without consulting the State Public Service Commission under Article 320(3)(c) of the Constitution. There is no merit in this contention. The case of State of U.P. v. M.L.Srivastava 1958 SCR 533 decided that the provisions of Article 320(3)(c) were not mandatory and did not confer any rights on the public servant and that the absence of consultation with the State Public Service Commission did not afford him a cause of action."

Counsel for the respondent contended that non-supply of a copy of the advice tendered by the UPSC before the final order was passed deprived the delinquent officer of making an effective representation and therefore it vitiates the order. It support his contention he referred to the decision of this Court rendered in the case of State Bank of India v. D.C.Aggarwal, (1993) 1 SCC 13, where this Court held that the disciplinary authority, while imposing punishment, major or minor, cannot act on material which is neither supplied nor shown to the delinquent. Imposition of punishment on an employee, on material which is not only not supplied but not disclosed to him, cannot be countenanced. Procedural fairness is as much essence of right and liberty as the substantive law itself.

He also referred to the decision of this Court in the case of Managing Director, ECIL, Hyderabad vs. B.Karunakar, (1993) 4 SCC 727, where this Court dealt with the non-furnishing of the inquiry

report to the delinquent officer. The facts of the aforesaid decision are distinguishable from the facts of the case at hand. The aforesaid decisions are not relevant for the purpose of adjudication of the case at hand.

In view of the law settled by the Constitution Bench of this Court in the case of Srivastava (supra) we hold that the provisions of Article 320(3)(c) of the Constitution of India are not mandatory and they do not confer any rights on the public servant so that the absence of consultation or any irregularity in consultation process or furnishing a copy of the advice tendered by the UPSC, if any, does not afford the delinquent government servant a cause of action in a court of law.

In the view that we have taken we allow these appeals. The orders of the High Court and the Tribunal, to the extent indicated above, are set aside. This takes us to consider as to whether the matter be remitted back to the High Court or the Tribunal to deal with the other various grounds raised by the delinquent government officers.

CIVIL APPEAL ARISING OUT OF S.L.P. (C) NO.11651 OF 2005

(Union of India & Anr. V. T.V.Patel)

The Tribunal had elaborately dealt with the contentions of both sides on merits. The Writ Petition of the Union of India before the High Court also raised many grounds to be dealt with on merits. However, the High Court has only dealt with the question of non-supply of copy of advice tendered by the UPSC before the passing of the order of punishment which has already been dealt with by us. SCA No.17027 of 2004 is now restored to the file of the High Court. The matter is remitted back to the High Court for disposal on merit on other grounds urged before the Court.

CIVIL APPEAL ARISING OUT OF S.L.P. (C) NO.19594 OF 2005

(Union of India & Ors. V. Avinash Kumar Srivastava)

In this case also the High Court dismissed the SCA No.15316 of 2004 filed by the appellant challenging the order of CAT. The High Court dismissed the writ petition solely on the ground of non-supply of copy of advice tendered by the UPSC to the respondent before the final order was passed. The respondent did not prefer any writ petition before the High Court challenging the order of Tribunal. Many grounds were urged before the Tribunal. However, the Tribunal decided the issue only on ground of non-supply of copy of the advice tendered by the UPSC before the final order was passed.

O.A.No.206 of 2004 is restored to the file of the Tribunal and is remitted back to the Tribunal to consider the other grounds urged before the Tribunal.

CIVIL APPEAL ARISING OUT OF S.L.P. (C) NO.26333 OF 2005

(Union of India & Ors. S.K.Agrawal)

Both the High Court and the Tribunal disposed of the case only on the ground on non-supply of copy of the advice tendered by the UPSC to the delinquent officer before the passing of the final order impugned the principles of natural justice. The other grounds urged before the Tribunal in O.A.No.451 of 2003 have not been considered by the Tribunal. O.A.No.451 of 2003 is restored to the file of the Tribunal and the matter is remitted back, to consider on merits all other grounds urged before the Tribunal.

CIVIL APPEAL ARISING OUT OF S.L.P. (C) NO.8470 OF 2006

(Union of India & Ors. V. P.K.Saha & Anr.)

In this case also the Tribunal has decided solely on the ground that a copy of the advice tendered by the UPSC has not been furnished to the delinquent government servant before the final order was passed. In view of our order, O.A.No.627 of 2000, is now restored to the file of the Tribunal and the Tribunal shall now deal with the other grounds urged before the Tribunal on merits.

CIVIL APPEAL ARISING OUT OF S.L.P. (C) NO.10225 OF 2006

(Union of India & Ors. V. N.J. Paulose)

In this case, both the High Court and Tribunal disposed of the case solely on the ground of non-supply of a copy of the advice tendered by the UPSC before the final order was passed. In view of our order, O.A.No.490 of 2002 is now restored to the file of the Tribunal and the matter is remitted back to the Tribunal, to deal with the other grounds urged before it and pass appropriate orders in accordance with law.

CIVIL APPEAL ARISING OUT OF S.L.P. (C) NO.12656 OF 2006

(Union of India & Ors. V. V.K.Sajnani)

The respondent has challenged the main order before the Tribunal by filing O.A.No.208 of 2002. The Tribunal by an order dated 17.10.2003 considered the entire grounds on merits and dismissed the petition. Aggrieved thereby, he filed SCA No.1071 of 2004 urging many grounds. The Division bench of the High Court by the impugned order set aside the order of the Tribunal solely on the ground of non-supply of copy of the advice tendered by the UPSC before the final order was passed by the authority. The High Court has not decided other grounds urged before the High Court in SCA No.1071 of 2004. In view of our order, SCA No.1071 of 2004 is now restored to the file of the High Court. The High Court shall decide the other grounds urged before the High Court and dispose of the matter in accordance with law.

CIVIL APPEAL ARISING OUT OF S.L.P. (C) NO.3628 OF 2006

(Union of India & Ors. V. Ashok Kumar Tiwari)

In this case, both the High Court and the Tribunal, disposed of the matter only on the ground of non-supply of copy of advice tendered by the UPSC before the final order was passed. In view of our order, O.A.No.271 of 2003, is now restored to the file of the Tribunal and the matter is remitted back. The Tribunal shall consider other grounds urged before it and pass appropriate order in accordance with law.

The appeals are allowed in the above terms. No costs.

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CENTRAL INFORMATION COMMISSION
Block IV, 5th Floor, Old JNU Campus
New Delhi 110 067
Complaint No.CIC/WB/C2006/00223;
Appeal Nos.CIC/WB/A/2006/00469; & 00394;
Appeal Nos.CIC/OK/A/2006/00266/00058/00066/00315
D.D. 23.04.2007
Sri. Wajahat Habibullah, Chief Information Commissioner
Smt.Padma Balasubramaniam, Information Commissioner
Sri. M.M.Ansari, Information Commissioner
Sri. O.K.Kejariwal, Information Commissioner
Sri. A.N.Tiwari, Information Commissioner

Shri Rakesh Kumar Singh & Ors. ... Complainant/Appellants
Vs.
Shri Harish Chander, Asst.Director, Lok Sabha Secretariat,
Information Cell, Parliament House Annexe, New Delhi & Ors. ... Respondents
R.T.I. Act:

Whether answer scripts are exempt from disclosure under Section 8 of R.T.I. Act? – Yes

Application seeking copies of answer scripts from Institutions which conduct academic/competitive examinations like UPSC, Staff Selection Commission, CBSE have been considered by Central Information Commission (CIC) and held that institutions like UPSC, CBSE whose main function is to conduct examination are exempt from furnishing copies of answer scripts.

Held:

In regard to public examinations conducted by institutions established by the institutions like UPSC or institutions established by any enactment by the Parliament or Rules made thereunder like CBSE, Staff Selection Commission, Universities etc., the function of which is mainly to conduct examinations and which have an established system as fool-proof as that can be, and which, by their own rules or regulations prohibit disclosure of evaluated answer sheets or where the disclosure of evaluated answer sheets would result in rendering the system unworkable in practice and on the basis of the rationale followed by the Supreme Court in the above two cases (Maharashtra State Board of Secondary and Higher Education Vs. Paritosh Bhupeshkumar Sheth & Anr. (AIR 1984 SC 1543) & Fatehchand Himmatlal Vs. State of Maharshtra (AIR 1977 SC 1825), we would like to put at rest the matter of disclosure of answer sheets. We therefore decide that in such cases, a citizen cannot seek disclosure of the evaluated answer sheets under the RTI Act, 2005.

Further held:

That insofar as the departmental examinations are concerned exemptions provided for under Section 8(1) of the Act are not applicable.

Further Held:

A reading of the above two judgements of the Hon'ble Supreme Court (Maharashtra State Board of Secondary and Higher Education Vs. Paritosh Bhupeshkumar Sheth & Anr. (AIR 1984 SC 1543)

& Fatehchand Himmatlal Vs. State of Maharshtra (AIR 1977 SC 1825) will reveal that both judgments are based on larger public interest, which is also the foundation of RTI Act. However, in coming to the above conclusions, the Court has taken into consideration the facts that the rules of the Board do not provide for inspection of the evaluated answer sheets, that a large number of candidates are involved, that the examiners are appointed with care, that there is an inbuilt system of ensuring fair and correct evaluation with proper checks and balances.

Cases referred:

1. AIR 1977 SC 1825 - Fatehchand Himmatlal Vs. State of Maharshtra
2. AIR 1984 SC 1543 - Maharashtra State Board of Secondary and Higher Education Vs. Paritosh Bhupeshkumar Sheth & Anr.

FACTS:

By an application of 30.6.2006, Shri. Rakesh Kumar Singh of Shiv Mandhir Gali, Maujpur, Delhi, applied to Assistant Director, Lok Sabha Secretariat, Shri Harish Chandra for information regarding marks secured by him in the examination of (a) Junior Clerk (b) Personal Assistant and (c) Executive Assistant together with related questions. He received a response on 25.7.2006 to all questions raised except one in which he has asked for the true copy of his answer sheets. To this, he received the response that "this cannot be given as no public interest would be served by giving the same". Holding that there is no exemption clause in section 8(1) which supports the above argument and arguing that there would be no fiduciary relationship involved in disclosing this information, as has been held by this Commission in earlier cases, as in this matter answer sheets are evaluated only by computers, Shri Rakesh Kumar Singh vide his compliant on 29.8.06 has pleaded that this information be provided to him. The matter was heard on 27.11.2006. Appellant has cited decision of other State Government Commissions in this regard. Since the issue raised impinged on a number of decisions announced by this Commission in several cases and similar cases before State Information Commissions, the matter was referred to the full bench of the Commission for a final decision on the complaint of Shri Rakesh Kumar Singh vide Decision notice dated 13.12.2006 in Complaint Case No.CIC/WB/C2006/00223.

2. In Appeal No.CIC/WB/A/2006/00469 (Shri Krishna Kumar Dwivedi vs. Delhi Jal Board), the issue concerning disclosure of answer sheets came up at the time of hearing. In this case, the applicant wanted to see the answer sheet and accordingly moved an application under the Right to Information Act (RTI), 2005. In this case, the 1st appellate authority held that the request by the appellant, Shri Dwivedi to see the answer sheet is administratively inappropriate. Since the issue

raised was identical with the case mentioned in the preceding paragraph which was already listed to be heard by a Full Bench of the Commission, this case was also clubbed for hearing by the Full Bench.

3. It further came to the notice of the Commission that the issue concerning disclosure of evaluated answer sheet is also a subject matter of some other appeals pending before this Commission for decision. It was decided that the following cases be heard together and accordingly all these cases were listed for hearing on 6.2.2007 by the Full Bench. A brief description of these cases is given below.

4. In Rakesh Kumar Gupta Vs. CBSE (CIC/OK/A/2006/00266), the PIO informed the appellant that there was no provision in the examination Bye-Laws of he CBSE to show the answer sheet either to the candidate or to her representative. The First Appellate Authority upheld the decision of the PIO. On behalf of the public authority, it was submitted before the Commission that on verification of the marks obtained by the candidate, it was observed that there was no mistake in the marks awarded. However, the disclosure of information was claimed to be exempted under Section 8(1)(e) of the Right to Information Act.

5. Appeal Nos.CIC/OK/A/2006/00058 & 00066 were filed against Diesel Loco Workshop of the North West Railways where the two appellants wanted to have photo copies of their answer sheets as well as answer sheets of two of their colleagues who had appeared in the written/selection test for the post of Junior Engineer-II. In this case, the respondents have pleaded that the disclosure of the evaluated answer sheet would amount to violation of a fiduciary relationship because the examiners had an explicit understanding with the department that the results of the answer sheets, which they had evaluated would not be disclosed as also their identity. The respondents also pleaded that if the identity of the examiners is disclosed then all such examiners would hesitate to take up an assignment of this kind.

6. In the above case, one of the applicants, Shri Munna Lal also wanted to see the records pertaining to the selection for the post of Junior Engineer-II. The respondents in this case stated that service records of only those qualified in the written examination were examined and marks were awarded on the basis of their performance and experience and since the applicant did not qualify in the written examination, there was, therefore, no question of disclosure of marks awarded to him on the basis of service records. This issue was also referred to the Full Bench by the Information Commissioner, Dr. O.P.Kejariwal.

7. In Anurag Tomar Vs. CBSE (CIC/OK/A/2006/00315), the appellant sought certified photo copies of his answer sheets of the CBSE examination and he was informed that as per the Examination Bye-Laws of the Board, photo copies of the answer sheet of the candidates could not be supplied. The respondents also pleaded in this case that the authority conducting the examination and the examiner evaluating the answer sheets, stand in fiduciary relationship with each other and as such, the disclosure of the information is exempted under Section 8(1)(e) of the RTI Act.

8. Similarly, the applicant, Shri. B.L.Gupta was denied the photo copies of the papers and inspection of the answer sheet in a departmental examination held by the Delhi Development Authority (CIC/WB/A/2006/00394) in this case also, the respondents have argued that there exists a fiduciary relationship between the DDA and the examiner in respect of the answer sheet evaluated by them and as such, disclosure of the information is exempted under Section 8(1)(e) of the RTI Act.

9. As notified all the above cases were heard on 6.2.2007. The following attended:

Complainant/Appellants

(1) Shri Abdul Rafique
(2) Shri Munna Lal
(3) Shri B.L.Gupta
(4) Shri Rakesh Kumar Gupta
(5) Shri K.K.Dwivedi
(6) Shri Rakesh Kumar Singh

Respondents –

(1) Shri Kamal Kumar Jain, Chief Office Supdt., DSL Loco Workshop, N.W.Rly, Ajmer
(2) Shri Harish Chander, Asst. Director, Lok Sabha Secretariat.
(3) Shri S.C. Kaliraman, Under Secretary, Lok Sabha Sectt.
(4) Shri M.C.Singal, Director (Pers.) II, D.D.A.
(5) Shri G.C.Sharma, Asstt. Director (P) III, D.D.A.
(6) Shri G.Srivastava, Member (AD), Delhi Jal Board
(7) Shri S.N.Srivastava, Secretary, Delhi Jal Board
(8) Shri V.S.Rawat, Director (A&P), Delhi Jal Board
(9) Shri Mohan Piwani, A.O., Delhi Jal Board
(10) Shri Vineet Joshi, Secretary & Appellate Authority RTI, CBSE
(11) Shri M.C. Sharma, Controller with Examn., CSBE
(12) Mrs. Rama Sharma, PRO (PIO), CBSE.

10. Opening the argument, Mr. R.K.Singh submitted that the objective of the RTI Act is to bring in transparency in the working of every public authority and it is in public interest that all relevant information must be made available to a citizen seeking information under the RTI Act. He submitted that once the process of examination is over, every thing concerning the examination must come in public domain. Citing the decision of the Hon'ble Apex Court in The President, Board of Secondary Education, Orissa & another vs D. Suvankar & another, he submitted that the award of the marks by an examiner has to be fair and no element of chance or luck should be introduced. An examination is a stepping-stone in career advancement of a student. Absence of a provision for revaluation cannot be a shield for the Examiner to arbitrarily evaluate the answer script.

11. He also submitted that there can be no relationship between an owner and beneficiary and since the examiner is not a beneficiary, there can be no fiduciary relationship between the examiner and the University or the Board. In this context, he cited the decision of the Karnataka Information Commission in KIC/196/APPL/2586 wherein the Karnataka Information Commission (KIC) has observed as follows:

> "As may be seen, Section 8(1)(e) exempts disclosure of information available to a person in his fiduciary relationship. According to Oxford dictionary, the word "fiduciary" means "involving trust, especially with regard to relationship between a trustee and a beneficiary". The fiduciary relationship for the purposes of this section would imply that the person holding the information is not the owner of the information but holds it in trust for someone else who is the owner and the beneficiary. In this case, it therefore needs to be examined whether this type of relationship exists between the authority conducting the examination and the examiners as recognized by CIC and pleaded by the Respondent.
>
> The relationship between the authority conducting the examination and the examiners is governed by the terms and conditions of appointment of the examiners. It is wrong to say that confidentiality should be maintained by both, of the manner and method of evaluation. Firstly, this Commission finds it difficult to endorse the general statement that the manner and method of evaluation should be kept confidential. In this Commission's view, general instructions regarding the manner and method of evaluation must be consistent and should be made know in advance to the candidates, so that they are aware as to how their answers would be evaluated. As regards "key" or "model" answers, these should also be made public after the entire process of selection is over.
>
> Secondly, while examiners are bound by the secrecy clause in their order of appointment, there can be no such obligation on the part of the authority conducting the examination. There is no agreement between the examiners and the authority conducting the examination that the information regarding evaluation and award of marks is being held by the authority conducting the examination in trust and on behalf of the examiners. In fact, the examiner has been assigned a task and thereafter his responsibility censes.

> He has no authority thereafter to claim that the answer books evaluated by him and marks awarded by him should be treated as confidential and that copies of the same should not be made available. In fact such a provision, if it was made, would be a complete antithesis of the fairness in evaluation system. This Commissioner therefore is of the view that in the fiduciary relationship between the Authority conducting the examination and the examiners, while the Authority is the owner/beneficiary of the information, the examiner is the trustee and not the other way round. The examiners have to hold the answer scripts and the marks awarded by them as confidential, in trust for the authority conducting the examination, since they are not the owners of the information. But there is no such obligation on the authority, which in this case owns the information."

12. The complainant Shri R K Singh accordingly submitted that fiduciary relationship could be there only between an owner and a beneficiary and that since the examiner is not a beneficiary there can be no such fiduciary relationship.

13. Taking the arguments further, complainant Shri Singh submitted that the disclosure of answer sheets is not protected under Section 8(1)(j). Citing again the aforesaid decision of the KIC, the appellant submitted that opening up for the evaluation process including marking evaluated answer sheets available to any one who wishes to see them is necessary as a confidence building measure and reviving the faith of citizens in these august institutions. Once the evaluated answer sheets are made freely available, examines who are entrusted with the task of evaluation will be more careful and objective in their assessment.

14. In this connection, the appellant also cited the decision of the SIC Punjab in CC No.60/06 and he highlighted the following observations of the Punjab SIC:

> "Fiduciary relationship is a relationship of the nature of a trust and is based on confidence reposed by or on behalf of the beneficiary in the person holding a dominant position qua the beneficiary. It is often said that the term 'fiduciary relationship' is easier to illustrate than to define with precision. Some of the well known examples of a fiduciary relationship are the relationship between a lawyer and a client, medical practitioner and patient, guardian and ward, teacher and student, banker and customer, husband and wife. Like a trustee, a person having information in a fiduciary capacity holds it for the benefit of the cestui que trust. The holder of information, therefore, is required to treat it as confidential so as to protect the interest of the beneficiary. It is in this context that the exemption incorporated in clause (e) of Section 8(1) RTI Act is to be understood. Clause (e) has been enacted with a view to protect the interests of the beneficiary by statutorily exempting from disclosure the information relating to them in the hands of persons standing in a fiduciary relationship. Clause (e) does not debar the beneficiary of the trust from seeking information from the trustees that is the persons holding the information in fiduciary capacity. The plea of the respondent based on Clause (e) of Section 8(1) of RTI Act, 2005 is thus rejected."

15. The appellant also cited the decision of the Hon'ble Apex Court dated 30.6.2006 passed in 'President, Board of Secondary Education, Orissa & Anr. Vs. D.Suvankar & anr.' wherein the Hon'ble Apex Court had directed CBSE to provide answer sheet and has ordered production of answer sheet for showing it to the concerned candidate. Replying the arguments submitted by Mr. Singh, representatives from the Lok Sabha Secretariat submitted that the points raised by the appellant do not tally with the facts of the case as in the instant case the candidate has appeared for 3 examinations out of which only one has OMR sheets. He further submitted that the examiner who sets the OMR question papers also gives the answer sheet and as such he has his copyright thereon. It was also submitted that there is no public interest involved in disclosure of either the OMR questions papers or the evaluated answer sheet. The department also cited two decision of the Delhi High Court, one in the Writ Petition (C) No.5586 decided on 22.5.2006 (Amit Vs. UPSC) and the other in Writ Petition 17835 of 2005 (Dr.Ram Kumar Goyal vs. U.P.S.C.) where no disclosure was allowed. Similarly, Allahabad Bench of the Central Administrative Tribunal dismissed the OA filed by one Ram Kirpal Singh on the ground that the information asked for was merely personal. However, Mr. Tiwari appearing on behalf of the Lok Sabha Secretariat did not give any specific answer as to how disclosure of the evaluated answer sheet is going to be detrimental either to the system or to the public interest. In fact, when Information Commissioner Shri A.N.Tiwari asked as to whether such a disclosure would result in collapsing of the system, Mr. Tiwari assertively replied in the negative. Dr. O.P.Kejariwal expressed his apprehension that the disclosure of the evaluated answer sheet and disclosure of the identity of the examiners might pose a danger to the life and safety of the examiner and in such a situation no one would like to be an examiner in case he is apprehensive of the disclosure of his identity. Shri RK Gupta at this stage submitted that they did not want to know the identity of the examiner. In fact, they can disclose the evaluated answer sheet by withholding the name of the examiner. In this connection, he cited the example of a news item that reported an instance of children examining answer sheets. Disclosure, in his view, will prevent an abuse of this sort. The respondent representing the CBSE stated that the disclosure of the identity of the examiner will lead to increase in both fear and favour. He submitted that under CBSE, there are about 9000 schools and about 12 lakh examinees appearing each year in 5 subjects and as such, there are about 60 lakh answer sheets. With limited manpower at its command, it will be almost impossible to do this exercise of disclosure of evaluated answer sheet. CBSE also submitted that under the Rules, they have a system of re-evaluation and re-verification and as such, chances of any discrepancy are quite remote. The system, in fact, secured fair play. The CBSE while evaluating answer sheets also applies the moderation techniques which further ensures an evenly balanced evaluation and fairness.

17. Applicant Shri Munna Lal, presenting his case submitted that he wanted to see the report of the Selection Board regarding allocation of bonus marks to some of the candidates. It was submitted on behalf of the Railways that there is a system of selection both for the initial selection and for the promotion. They also submitted that the proceedings of the Departmental Promotion Committee, a copy of which was requested by the applicant herein, cannot be given as there exists fiduciary relationship between the Board and the public authority and as such any proceedings that have been submitted by the Board to the public authority in confidence is exempt from disclosure under Section 8(1)(e). It was further submitted that now the Railways only conduct a written examination and the system of holding a viva has been abolished. Since the applicant did not qualify in the written examination, his case was not placed before the Selection Board.

18. Shri Rafique also submitted that there was no fiduciary relationship between the Selection Board and the public authority and as such all such proceedings and the answer sheets of any written examination have to be disclosed under the Right to Information Act, 2005.

19. Shri B.L.Gupta presenting his case submitted that after the answer sheets have been evaluated and marks have been awarded, the process is over and as such an examinee is entitled to see and check as to whether the answer sheets have been evaluated or not and if evaluated whether they have been rightly evaluated. Unless the marks are made available, it is impossible to ascertain the same.

20. The D.D.A., on the other hand, submitted that the examination process can never satisfy everyone. If there is no confidentiality attached to the system, then there will be no end to the process. At this stage, the Chief Information Commissioner asked whether once the examination was completed, can answer sheets be not returned or given back to the examinees? The DDA submitted that this will result in disclosure of the identity of the examiner and will expose them to an unavoidable threat. The CIC suggested that probably the department can devise a system whereby the detachable sheets containing confidential particulars concerning the identity of the examiner can be kept and this detachable sheet can be retained and cannot be given to the examinees.

21. Shri K.K.Diwedi emphasized that the Right to Information Act, 2005 has been enacted with a view to bringing in transparency and after this enactment every student has a right to see the answer sheets after evaluation. There is no legal bar if an examinee is allowed to see his own answer scripts. He also submitted that there is no question of applying either Section 8(1)(e) or 8(1)(j) of the Right to Information Act.

22. Delhi Jal Board, who are the respondents in this case, submitted that there has to be some confidentiality in the whole process. While there is nothing wrong in having a system of re-valuation or re-checking, but in the name of transparency one cannot allow a system to collapse. The system of examination as adopted is a time tested one and it is working quite well. If the answer sheets are disclosed and if the identity of the examiners become known, serious consequences will follow. In this connection, he cited some cases where examiners were threatened.

23. ISSUES:

(i) Whether the disclosure of the evaluated answer sheets is exempted under Section 8(1)(e)?

(ii) Whether the disclosure of the evaluated answer sheets is exempted under Section 8(1)(g)?

(iii) What relief, if any, can be granted to the appellants in these cases?

DECISION NOTICE

24. The Right to Information Act was enacted with a view to conferring a right to access information under the control of public authorities on all citizens. The Act recognizes that an informed citizenry and transparency of information are pre-requisite to a democracy and these are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed. The Act was enacted in order to promote transparency and accountability in the working of the Government and their instrumentalities.

25. However, the definition of the "public authority" as incorporated in the Act widens its ambit and scope even beyond the preamble when it defines a public authority to mean and include any authority or body or institution of self-government established or constituted -

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government, and also includes

(i) any body owned, controlled or substantially financed

(ii) non-Government organizations substantially financed, directly or indirectly by the funds provided by the appropriate governments.

26. Thus, a University and educational institution under control and substantially financed directly or indirectly by the government is a "public authority" under the Right to Information Act, even though the functioning of an educational institution or University may not be directly related to governance as such, the transparency wherein is the key objective of the Right to Information Act.

27. The Act further recognizes that revelation of information in actual practice is likely to conflict with other public interests including efficiency operations of the Government, optimum use of fiscal resources and the preservation of the confidentiality and accordingly it aims at harmonizing these conflicting interests while preserving the paramountcy of the democratic ideals. To secure these objectives, the Act provides for specified categories of information which cannot be disclosed and as such these are exempted under various provisions of the Act, primarily Sec 8.

28. It is the contention of the appellants that disclosure of evaluated answer sheets is not exempt under any of the subsections of Section 8(1). The respondents including the Central Board of Secondary Education have taken the plea that the evaluated answer sheets are exempted from disclosure under Section 8(1)(e) as there is a fiduciary relationship between the University/Board and the examiner and as such disclosure of the evaluated answer sheets will result in breach of this relationship. The appellants do not agree with this contention of the respondents and in support of their views, they have cited the decision of the Karnataka Information Commission wherein it has been held that there is no fiduciary relationship between the examiner and the University or the Board conducting the examination.

29. This Commission in a number of cases has, however, held that the fiduciary relationship between the examiner and the authority conducting examination exists and therefore, the disclosure of the information is exempt under Section 8(1)(3). In Ms. Treesa Irish Vs. Kerala Postal Circle case (ICPB/A2/COC/2006), it has been observed that when the answer papers are evaluated, the authority conducting the examination and the examiners evaluating the answer sheets stand in a fiduciary relationship between each other. Such a relationship warrants maintenance of confidentiality by both of the manner and method of evaluation. That is the reason why while mark sheets are made available as a matter of course, copies of the evaluated answer papers are not made available to the candidates.

The aforesaid decision was cited with approval in another case decided by Mrs. Padma Balasubramanian in Shri J.Shahbudeen Vs. Director of Postal Services (ICPB/22/2006). The exemption under Section 8(1)(j) has also been applied by this Commission in case of disclosure of evaluated answer sheets in a complaint case decided on 22.9.2006 in Dr. (Mrs.) Archana S.Gawada Vs. Employees State Insurance Corporation and Others (Complaint No.PBA/06/103). However, a different view was taken in Smt. Bhudevi Vs. North Central Railway, Jhansi where the appellant had some doubt as to whether the paper examined was actually the paper which she had submitted, the Commission had ordered that the complainant be shown the answer sheets which she had written in the said examination. (CIC/OK/C/2006/00079 dated 13.12.2006).

30. Presently, the respondents have taken the plea that disclosure of the evaluated answer sheets is exempted under Section 8(1)(e) as disclosure of the identity of the examiner may endanger the life and physical safety of the examiner and as such the disclosure of the evaluated answer sheets is exempted under Section 8(1)(g) of the Right to Information Act. It is submitted on behalf of the appellants that they have requested for inspection/copies of the evaluated answer sheets and they are not interested in knowing the identity of the examiners. It is also contended that if the authority conducting the examination so desires, it can apply the severability cause enshrined in Section 10 of the Act and withhold the name of the examiner from being disclosed. In this context, the appellants also cited the following observation of the State Information Commission, West Bengal in Shri Utsab Dutta Vs. SPIO, University of Calcutta -

> "Here the Commission feels that the words 'Information', the disclosure of which would endanger the life or physical safety of any person...' is relevant, though such a possibility of identifying the examiners and scrutinizers by seeing the signature or handwriting on a mere inspection of the answer script is very remote. The Commission further feels that though such a possibility is remote, when the University takes care not to disclose the identity of the examinees, it can very well evolve and apply similar or more full proof method of not disclosing the identity of the examiners and scrutinizers."

31. The word "fiduciary" is derived from the Latin fiducia meaning "trust", a person (including a juristic person such as Government, University or bank) who has the power and obligation to act for another under circumstances which required total trust, good faith and honesty. The most common example of such a relationship is the trustee of a trust, but fiduciaries can include business advisers, attorneys, guardians, administrators, directors of a company, public servants in relation to a Government and senior managers of a firm/company etc. The fiduciary relationship can also be one of moral or

personal responsibility due to the superior knowledge and training of the fiduciary as compared to the one whose affairs the fiduciary is handling. In short, it is a relationship wherein one person places complete confidence in another in regard to a particular transaction or one's general affairs of business. The Black's Law Dictionary also describes a fiduciary relationship as "one founded on trust or confidence reposed by one person in the integrity and fidelity of another." The meaning of the fiduciary relationship may, therefore, include the relationship between the authority conducting the examination and the examiner who are acting as its appointees for the purpose of evaluating the answer sheets. We do not tend to agree with the decision of the Karnataka Information Commission wherein it has been held that in a fiduciary relationship such as between the examiner and the University, there are obligations only on the part of examiner and that the authority conducting the examination being not a trustee has no obligations. Any relationship including a fiduciary relationship is bound to have mutual rights and obligations. Thus, in the case before us where there is fiduciary relationship between the examiner and the authority conducting the examination, the obligations are mutual. This relationship does not end once the evaluation of the answer sheets is complete. The concerned authority has to take care that by disclosing identity of the examiner, there is no possibility of an eventual harm to the examiner. Thus, even while disclosing the evaluated answer sheets the authority conducting the examination is obliged to ensure that the name and identity of the examiner is not disclosed. The authorities conducting the examination can, therefore, take recourse to the exemptions provided for under Section 8(1)(j). But applicability of Section 8(1)(j) per-se will not exclude disclosure unless the disclosure is also justified under Section 8(1)(e). The fiduciary relationship between the examiner and the authority conducting the examination is personal and it can extend only insofar as the disclosure of the identity of the examiner is concerned, but it cannot be stretched beyond that point and as such neither Section 8(1)(e) nor Section 8(1)(j) exempts disclosure of the evaluated answer sheets if the authority concerned ensures that the name and identity of the examiners, invigilators, scrutinizers and any other person involved with the process is kept confidential.

32. In so far as application of Section 8(1)(j) to deny disclosure on the ground that personal information which has no public interest is concerned, it is necessary to explain the scope and ambit of this sub section. Section 8(1)(j) reads as under:

> "information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information."

This section has to be read as a whole. If that were done, it would be apparent that that "personal information" does not mean information relating to the information seeker, but about a third party. That is why, in the Section, it is stated "unwarranted invasion of the privacy of the individual". If one were to seek information about himself or his own case, the question of invasion of privacy of his own self does not arise. If one were to ask information about a third party and if it were to invade the privacy of the individual, the information seeker can be denied the information on the ground that disclosure would invade the privacy of a third party. Therefore, when a citizen seeks information about his own case and as long as the information sought is not exempt in terms of other provisions of Section 8 of RTI Act, this Section cannot be applied to deny the information. Thus, denial for inspection/ verification of his own answer sheets by a citizen applying the provisions of Section 8(1)(j) is not sustainable.

33. It has been submitted before us at the time of hearing by the CBSE that they have above 9000 schools and there are about 12 lakh examinees each of them appearing in 5 subjects. Thus, there are at least 6 million answer sheets. The examination being a process where no one may feel satisfied with the end result, there will be a general demand of disclosure of the answer sheets and it will give rise to a situation impossible to manage. He also submitted that if the disclosure is allowed, it will lead to a situation where no finality will ever come by. The points raised by the CBSE are not without merit and they need serious consideration. After all it is a matter of common knowledge that the parents and the students are never satisfied with their assessment. Every University and Board has a mechanism for re-evaluation which can be made use of by those who have genuine apprehensions about the fairness of the system. The disclosure, therefore, of the valuated answer sheets may be taken recourse in rare case but it cannot have an en-bono application, unless the University or the Board as the case may be introduces a system where the giving back of the evaluated answer sheets becomes or is made a regular practice, which this Commission hereby recommends.

33. Assuming, as contended by the appellants that Section 8(1)(e) cannot be applied in denying the disclosure of the evaluated answer sheets, we would like to examine the matter from another angle, keeping in mind the larger public interest purpose and ambit of RTI Act. The Act is founded on public interest and that is why, even where there are specific exemptions in certain matters, the CPIO has been given the discretion to disclose the same to different authorities if public interest so warrants.

34. The Supreme Court has examined the issue of public interest in the matter of allowing candidates to inspect their answer books or the revaluation of the answer papers in the presence of the candidates, in Maharashtra State Board of Secondary and Higher Education vs. Parithosh Bhupeshkumar Sheth & anr. (AIR 1984 SC 1543). In that case, the Rules framed by the said Board provided

> "No candidate shall claim or be entitled to revaluation of his answers or disclosure or inspection of the answer books or other documents as these are treated by the Divisional Board as most confidential."

The constitutional validity of the above rule was challenged as being in violation of the principles of natural justice. The Court held:

> "The principles of natural justice cannot be extended beyond reasonable and rational limits and cannot be carried to such absurd lengths as to make it necessary that candidates who have taken a public examination should be allowed to participate in the process of evaluation of their performances or to verify the correctness of the evaluation made by the examiners by themselves conducting an inspection of the answer books and determining whether there has been a proper and fair valuation of the answers by the examiners."

The Court, further observing that the constitutional validity of a rule, among other aspects has to be tested to see whether it infringes any of the fundamental rights or other restrictions or limitations imposed by the Constitution, held that the said rule did not infringe any of the fundamental rights. The Court further noting, that the procedure evolved by the Board for ensuring fairness and accuracy in evaluation of the answer sheets had made the system as fool-proof as can be possible, observed as follows:

> "The High Court has relied upon the fact that the University of Bombay and some other Universities have recently made provisions permitting candidates to demand revaluation. In our opinion, this has little relevance for the purpose of deciding about the legal validity of the impugned regulations framed by the Board. We do not know under what circumstances the University of Bombay has decided to recognize a right in the examinees to demand a revaluation. As far as the Board is concerned it has set out in the counter-affidavit the enormity of the task with which it is already faced, namely, of completing twice during each year the process of evaluation and release of results of some 3 lakhs of candidates appearing for the S.S.C. and H.S.C. examinations to be held in an interval of only a few months from one another. If the candidates are all to be given inspection of their answer books or the revaluation of the answer papers is to be done in the presence of the candidates, the process is bound to be extremely time consuming and if such a request is made by seven about ten percent of the candidates, who will be 30,000 in number, it would involve several thousand of man hours and is bound to throw the entire system out of gear. Further, it is in the public interest that the results of public examinations when published should have some finality attached to them. If inspection, verification in the presence of the candidates and revaluation are to be allowed as of right,

it may lead to gross and indefinite uncertainty, particularly in regard to the relative ranking etc. of the candidates, beside leading to utter confusion on account of the enormity of the labour and time involved in the process."

35. Pointing out the Constitution Bench decision in Fatechand Himmatlal Vs. State of Maharashtra (AIR 1977 SC 1825), that the test of reasonableness is not applied in a vacuum but in the context of life's realities, the Hon'ble Apex Court further observed:

"If the principle laid down by the High Court is to be regarded as correct, its applicability cannot be restricted to examinations conducted by School Educational Board alone but would extend even to all competitive examinations conducted by the Union and State Public Service Commissions. The resultant legal position emerging from the High Court Judgment is that every candidate who has appeared for any such examination and who is dissatisfied with his results would, as an inherent part of his right to the 'fair play' be entitled to demand a disclosure and personal inspection of his answer scripts and would have a further right to ask for revaluation of his answer papers. The inevitable consequence would be that there will be no certainty at all regarding the results of the competitive examination for an indefinite period of time until all such requests have been complied with and the results of the verification and revaluation have been brought into account".

"It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the court should also, as far as possible, avoid any decision or interpretation of a statutory provision, rule or bye-law which would bring about the result of rendering the system unworkable in practice. It is unfortunate that this principle has not been adequately kept in mind by the High Court while deciding the instant case."

36. However, it has been argued before us that the aforesaid decision of the Hon'ble Apex Court is prior to the enactment of the Right to Information Act under which every information under the control of a public authority is liable to be disclosed unless it is exempted from disclosure under of the provisions of this Act. As recently as in 2006, that is after the RTI Act came into effect, the Supreme Court has again affirmed the said decision in the President, Board of Secondary Education, Orissa V.D.Suvankar (Civil Appeal No.4926 of 2006 judgment dated 14.11.2006) stating -

"It is in the public interest that the results of Public Examinations, when published should have some finality attached to them. If inspection, verification in the presence of candidates and revaluation is to be allowed as a matter of right, it may lead to gross and indefinite uncertainty, particulars in regard to the relative ranking etc. of the candidates, besides leading to utter confusion on account of enormity of the labour and time involved in the process. The court should be extremely reluctant to substitute its own views as to

what is wise, prudent and proper in relation to academic matters in reference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and the departments controlling them."

37. A reading of the above two judgments of the Hon'ble Supreme Court will reveal that both judgments are based on larger public interest, which is also the foundation of RTI Act. However, in coming to the above conclusions, the Court has taken into consideration the fact that the rules of the Board do not provide for inspection of the evaluated answer sheets, that a large number of candidates are involved, that the examiners are appointed with care, that there is an inbuilt system of ensuring fair and correct evaluation with proper checks and balances.

38. There are various types of examinations conducted by public authorities which could be either public or limited examinations. Examinations are conducted for various purpose viz. (i) for admission to educational institutions, (ii) for selection and appointment to a public office (iii) for promotion to higher classes in educational institutions or in employment etc. There are institutions like UPSC, Staff Selection Commission, CBSE etc. the main function of which is only to conduct examinations. Many public authorities, as those in the present appeals like Jal Board, Railways, Lok Saba Secretariat, DDA, whose main function is not of conducting examinations, do so either to recruit fresh candidates for jobs or for promotion of existing staff. Thus these public authorities conduct both public as well as departmental examinations.

39. In regard to public examinations conducted by institutions established by the Constitution like UPSC or institutions established by any enactment by the Parliament or Rules made thereunder like CBSE, Staff Selection Commission, Universities etc., the function of which is mainly to conduct examinations and which have an established system as fool-proof as that can be, and which, by their own rules or regulations prohibit disclosure of evaluated answer sheets or where the disclosure of evaluated answer sheets would result in rendering the system unworkable in practice and on the basis of the rationale followed by the Supreme Court in the above two cases, we would like to put at rest the matter of disclosure of answer sheets. We therefore decide that in such cases, a citizen cannot seek disclosure of the evaluated answer sheets under the RTI Act, 2005.

40. Insofar as examinations conducted by other public authorities, the main function of which is not of conducting examinations, but only for filling up of posts either by promotion or by recruitment, be it limited or public, the rationale of the judgments of the Supreme Court may not be applicable in

their totality as in arriving at their conclusions, the above judgments took into consideration various facts like the large number of candidates, the method and criteria of selection of examiners, existence of a fool-proof system with proper checks and balances etc. Therefore, in respect of these examinations, the disclosure of the answer sheets shall be the general rule but each case may have to be examined individually to see as to whether disclosure of evaluated answer sheets would render the system unworkable in practice. If that be so, the disclosure of the valuated answer sheets could be denied but not otherwise. However, while doing so the concerned authority should ensure that the name and identity of the examiner, supervisor or any other person associated with the process of examination is in no way disclose so as to endanger the life or physical safety of such person. If it is not possible to do so in such cases, the authority concerned may decline the disclosure of the evaluated answer sheets u/s 8(1)(g).

41. In some of the cases before us, it was argued that there is no question of revealing the identity of an examiner when it is a computer based examination and OMR sheets are issued as in such cases, the assessment is done by the computer. Although the use of this technique is resorted to only where there are large numbers of examinees appearing, the disclosure of evaluated answer sheets in such cases is unlikely to render the system unworkable and as such the evaluated answer sheets in such cases will be disclosed and made available under the Right to Information Act unless the providing of such answer sheets would involve an infringement of copyright as provided for under Section 9 of the Right to Information Act. The same analogy which is applicable in most examinations will mutatis mutandis apply in case of an examination conducted with optical marking system.

42. However, insofar as the departmental examinees are concerned or the proceedings of Departmental Promotion Committees are concerned, the Commission tends to take a different view. In such cases, the numbers of examinees are limited and it is necessary that neutrality and fairness are maintained to the best possible extent. Disclosure of proceedings or disclosure of the answer sheets not only of the examinees but also of the other candidates may bring in fairness and neutrality and will make the system more transparent and accountable. The Commission moreover finds that the proceedings of the Departmental Promotion Committees or its Minutes are not covered by any of the exemptions provided for under Section 8(1) and, therefore, such proceedings and minutes are to be disclosed. If a written examination is held for the purpose of selection or promotion, the concerned candidate may ask for a copy of the evaluated answer sheet from the authority conducting such test/

examination. The right to get an evaluated answer sheet does not, however, extend to claiming inspection of or getting a copy of the valuated answer sheets concerning other persons in which case, if the concerned CPIO decides to disclose the information, he will have to follow the procedure laid down under Section 11 of the Right to Information Act.

43. Before us are appeals in relation to examinations conducted by CBSE, Lok Sabha Secretariat, Jal Board, DDA and North Western Railways. Insofar as CBSE is concerned, we have held that denial of disclosure has been correctly done. In respect of the other public authorities, we are of the view that each public authority conducting examinations shall disclose the evaluated answer sheets to the applicants subject to the guidelines set forth in the preceding paragraphs. The other cases are remanded back to the concerned Information Commissioner for issuing appropriate directions taking into consideration the broader principles laid down and indicated in the preceding paragraphs.

44. All the appeals are disposed of in the above terms. Copies of the decision will be sent to all concerned fee of cost.

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IN THE SUPREME COURT OF INDIA
CIVIL APPEAL NO.5274 OF 2007
[Arising out of Special Leave Petition (Civil) No.16909/2006]
D.D.16.11.2007
Hon'ble Mr. Justice A.K.Mathur &
Hon'ble Mr. Justice Markandey Katju

B.Ramakichenin @ Balagandhi ... Appellant
Vs.
Union of India and others ... Respondents

Qualification:

Experience:

Short listing of candidates for interview:

The appellant was a candidate for the post of Deputy Director (Agriculture) – Qualification prescribed was M.Sc. in Agriculture with 2 years experience in extension work/soil/input analysis – UPSC after short listing candidates did not call the appellant for interview as he did not have 2 years experience after obtaining M.Sc. Degree in Agriculture – Appellant was interviewed as per interim order of CAT and subsequently as per final order on the basis of merit he was selected and appointed – In the writ petition challenging the selection and appointment High Court allowed the writ petition quashing the appointment – Supreme Court in view of the procedure of short listing mentioned in the advertisement wherein it was not mentioned that 2 years experience must be after getting the M.Sc., Degree allowed the application and set aside the order of High Court.

Held:

Even if there is no rule providing for short listing nor any mention of it in the advertisement calling for applications, the Selection Body can resort to a short listing procedure if there are a large number of candidates and it is not possible for the authority to interview all of them. For valid short listing there have to be two requirements (1) It has to be on some rational and objective basis (2) If a prescribed method of short listing has been mentioned in the rule or advertisement then that method alone has to be followed.

Cases referred:

1. AIR 1979 SC 1628 - Ramana Dayaram Shetty vs. The International Airport Authority of India and others
2. 1993 (2) SCC 310Government of Andhra Pradesh vs. P.Dilip Kumar and another
3. 1994 (6) SCC 293 - Madhya Pradesh P.S.C.vs. Navnit Kumar Potdar and another
4. AIR 1996 SC 11 - Tata Cellular vs. Union of India

JUDGMENT

Markandey Katju, J.

1. Leave granted.

2. This appeal has been filed against the final judgment and order dated 19.9.2006 of the High Court of Madras in Writ Petition Nos.9521 and 18563 of 2000 and Writ Petition No.21870 of 2001.

3. Heard learned counsel for the parties and perused the record.

4. The appellant (respondent No.3 in the Writ Petition) applied for the post of Deputy Director (Agriculture) in the Agriculture Department, Government of Pondicherry. That post was to be filled up by direct recruitment in pursuance of the advertisement issued by the Union Public Service Commission (hereinafter in short 'UPSC') dated 23.5.1998 inviting applications from eligible candidates.

5. The appellant states that he was fully qualified for the post, but he was not called for the interview although similarly placed candidates had been so called.

6. In this connection it may be mentioned that in the advertisement for the post issued by the UPSC, essential qualifications mentioned therein were as follows:

"Essential:
A: Educational : M.Sc. Degree in Agriculture from a recognized University or institution.
B: Experience : Two years experience in extension work/soil/Input analysis."

There was no mention in the advertisement that the experience of two years must be after obtaining the M.Sc. degree.

7. It appears that the UPSC resorted to short listing and did not call the appellant for the interview because he did not have two years experience in extension work/soil/Input Analysis after obtaining the M.Sc. degree in agriculture. He no doubt had the requisite experience, but that was obtained before he got his M.Sc. degree. The UPSC called only those candidates for interview who had got the experience after getting the degree.

8. The appellant was of the view that there was no requirement that the two years experience should be after obtaining the Masters degree in agriculture. The appellant undoubtedly had such experience before obtaining his M.Sc. degree in agriculture.

9. Since the appellant was not called for the interview he filed OA.No.1045/97 before the Central Administrative Tribunal, Chennai. By an interim order the Tribunal allowed the appellant to appear in the interview. Subsequently the Tribunal in its final order dated 23.6.2000 observed that since the appellant had been interviewed in pursuance of the interim order of the Tribunal, no further direction is required to be given in this connection and the result of the interview should be published. Accordingly the result was published and since the appellant was found first in the merit list, he was appointed as Deputy Director (Agriculture) on 23.3.2001, and has been working as such since then.

10. Aggrieved, writ petition was filed by the respondents herein before the Madras High Court which allowed the writ petition and quashed the appointment of the appellant. Hence this appeal by way of Special Leave Petition.

11. One of the reasons given by the High Court for setting aside the appellant's appointment was that the Tribunal should have gone into the question of eligibility of the appellant herein. Instead of doing so, it disposed off the O.A. filed before it by directing the UPSC to publish the result. Accordingly, the appellant herein was appointed by the Government of Pondicherry vide order dated 23.3.2001 on the post of Deputy Director (Agriculture).

12. We need not go into the question whether the Tribunal should have decided the case on merits since we are deciding it on merits.

13. The High Court in the impugned judgment has also observed that it was open for the UPSC to restrict the number of candidates to be called for the interview by adopting a short-listing method. The High Court was of the view that there was no irrationality or illegality in the method of short listing adopted by the UPSC. With respect, we cannot agree.

14. In paragraph 3.1 of the advertisement of UPSC dated 23.5.1998, it is stated:

"Where the number of applications received in response to an advertisement is large and it will not be convenient of possible for the Commission to interview all the candidates, the Commission may restrict the number of candidates to a reasonable limit on the basis of either qualifications and experience higher than the minimum prescribed in the advertisement or on the basis of experience in the relevant field, or by holding a screening test. The candidate should, therefore, mention all the qualifications and experience in the relevant field over and above the minimum qualifications and should attach attested/ self certified copies of the certificates in support thereof."

15. It is well settled that the method of short-listing can be validly adopted by the Selection Body vide Madhya Pradesh Public Service Commission vs. Navnit Kumar Potdar and another – 1994 (6) SCC 293 (vide paras 6, 8, 9 and 13), Government of Andhra Pradesh vs. P.Dilip Kumar and another – 1993 (2) SCC 310, etc.

16. Even if there is no rule providing for short-listing nor any mention of it in the advertisement calling for applications for the post, the Selection Body can resort to a short-listing procedure if there are a large number of eligible candidates who apply and it is not possible for the authority to interview all of them. For example, if for one or two posts there are more than 1000 applications received from eligible candidates, it may not be possible to interview all of them. In this situation, the procedure of short-listing can be resorted to by the Selection Body, even though there is no mention of short-listing in the rules or in the advertisement.

17. However for valid short-listing there have to be two requirements – (i) It has to be on some rational and objective basis. For instance, if selection has to be done on some post for which the minimum essential requirement is a B.Sc. degree, and if there are a large number of eligible applicants, the Selection Body can resort to short-listing by prescribing certain minimum marks in B.Sc. and only those who have got such marks may be called for the interview. This can be done even if the rule or advertisement does not mention only those who have the aforementioned minimum marks, will be considered or appointed on the post. Thus the procedure of short-listing is only a practical via-media which has been followed by the courts in various decision since otherwise there may be great difficulties for the selecting and appointing authorities as they may not be able to interview hundreds and thousands of eligible candidates;

(ii) If a prescribed method of short listing has been mentioned in the rule or advertisement then that method alone has to be followed.

18. In the present case, no doubt, the UPSC had resorted to an objective and rational criteria that only those who have two years experience after getting the M.Sc. degree will be considered, while those who have got such experience but only before getting the M.Sc. degree will not be called for the interview. Ordinarily we would not have taken exception to this procedure since it is based on an objective decisions vide Tata Cellular vs. Union of India AIR 1996 SC 11. As observed in the said decision, the modern approach is for courts to observe restraint in administrative matters.

19. Hence, if the method of short-listing had not been prescribed by the UPSC or in a statutory rule, it is possible that the argument of learned counsel for the respondents may have been accepted and we may not have interfered with the method of short-listing adopted by the UPSC since it appears to be based on a rational and objective criteria.

20. However, in this case we have noticed that in paragraph 3.1 of the advertisement of the UPSC dated 23.5.1998, the method of short-listing has been given. Hence the UPSC cannot resort to any other method of short-listing other than that which has been prescribed in paragraph 3.1. In the said paragraph of the advertisement, it is mentioned that the Commission may restrict the number of candidates on the basis of either qualifications experience higher than the minimum prescribed in the advertisement or on the basis of the experience higher than the minimum prescribed in the advertisement or on the basis of experience in the relevant field. In other words, it was open to the UPSC to do short-listing by stating that it will call only those who have Ph.D. degree in Agriculture (although the essential degree was only M.Sc. degree in Agriculture). Similarly, the UPSC could have said that it would only call for interview those candidates who have, say, five years experience, although the essential requirement was only two years experience. However, experience after getting the M.Sc. degree cannot be said to be higher than the experience before getting the M.Sc. degree. Also, the advertisement dated 23.5.1998 does not mention that two years experience must be after getting the M.Sc. degree.

21. Learned counsel for the appellant has shown us several advertisements issued by the Union Public Service Commission in which it was specifically mentioned that experience must be after getting the post-graduate degree. However, in the present case, the advertisement does not mention that the two years experience must be after getting the M.Sc. degree in Agriculture. Hence, we cannot add words to the advertisement and we must read it as it is.

22. As observed by this Court in Ramana Dayaram Shetty vs. The International Airport Authority of India and others – AIR 1979 SC 1628 (vide para 10):

> "It is a well-settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in Vitarelli vs. Seaton (1959) 359 US 535; 31. Ed 2nd 1012 where the learned Judge said:

"An executive agency must be rigorously held to the standards by which it professes its actions to be judged.....Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that binds such agency, that procedure must be scrupulously observed..... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

This Court accepted the rule as valid and applicable in India in A.S.Ahluwalia vs. State of Punjab (1975) 3 SCR 82: (AIR 1975 SC 984) and in subsequent decisions given in Sukhdev vs. Bhagatram (1975) 3 SCR 619; (AIR 1975 SC 1331), Mathew, J. quoted the above referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanating from Article 14 does not rest merely on that Article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the Unite States Constitution but evolved it purely as a result of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-541 in Prof. Wade's Administrative Law 4th Edn. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law."

23. Had paragraph 3.1 not been in the advertisement of the UPSC it is possible that we may have taken a view in favour of the respondents since in that case it was open to the UPSC to resort to any rational method of short-listing of its choosing (Provided it was fair and objective). However, in the present case, a particular manner of short-listing has been prescribed in paragraph 3.1. Hence, it is not open to the UPSC to resort to any other method of short-listing even if such other method can be said to be fair and objective.

24. For the reasons given above, this appeal is allowed. The impugned judgment of the High Court is set aside. The appellant has been working as Deputy Director (Agriculture) since 2001 in pursuance of the judgment of the Tribunal and the interim order of this Court, and we uphold his appointment. No costs.

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.1488-91 OF 2008
(Arising out of SLP (Civil) Nos.1344-1347 of 2006)
D.D. 21.02.2008
CJI K. G. Balakrishnan & R. V. Raveendran & J. M. Panchal, J.J.

Union Public Service Commission ... Petitioner
Vs.
Dr. Pankaj Kumar & Ors etc. etc … Respondents

With

SLP (Civil) No.26430 of 2005

Dr. Pradeep Kumar Goswami … Petitioner
Vs.
The Govt. of NCT of Delhi & Ors. … Respondents

Age Relaxation:

Whether a contract employee is entitled to age relaxation? – No

The respondents who are working as Medical Officers (Ayurvedic/Unani) on contract basis challenged the advertisement for recruitment to the post of Medical Officers (Ayurvedic/Unani) issued by UPSC (Appellant) before CAT and sought regularization of their service – CAT dismissed their application as per order dated 10.12.2002 – The said order was challenged before High Court and High Court as per judgment dated 11.8.2005 affirmed the decision of CAT that the respondents were not entitled to regularization – However in view of the submission of Additional Solicitor General that the contract employees will be entitled to age relaxation against the vacancies notified the High Court directed that the respondents shall be granted age relaxation for the period they have worked as contract employees – The said decision was challenged by UPSC before the Supreme Court – The Supreme Court following its earlier decision in 2006 (02) SCC 482 – U.P.S.C. vs Girish Jayanti Lal Vaghela and 2006 (4) SCC 1 – Secretary, State of Karnataka vs. Umadevi wherein it has been held that contract employees are not Government servants and therefore, they are not entitled to age relaxation has up held the orders of the Tribunal and the High Court.

Held:

Contract employees are not Government servants and therefore, they are not entitled to age relaxation.

Cases referred:

1) 2006 (2) SCC 482 - Union Public Service Commission vs. Girish Jayanti Lal Vaghela
2) 2006 (4) SCC 1 - Secretary, State of Karnataka vs. Umadevi

ORDER

Leave granted. These appeals arise from a common judgment dated 11.8.2005 passed by the High Court of Delhi in CWP Nos.8218/2003, 619/2003, 620/2003 and 784/2003. UPSC is aggrieved by the said judgment to the extent it directs extension of benefit of age relaxation to the respondents.

2. The respondents were appointed as Medical Officers (Ayurvedic/Unani), on a fixed salary of Rs.6000/- per month on contract basis in the year 1998 by the Government of National Capital Territory of Delhi. Their services were extended from time to time with some breaks. The government of NCT of Delhi sent a proposal to UPSC in the year 2000 for filling up the posts of Medical Officers (Ayurvedic/Unani). In pursuance of it, UPSC scheduled a test on 10.2.2002. At that stage, the respondents approached the Central Administrative Tribunal seeking regularization. They sought a direction to Government of NCT of Delhi to send their service records to UPSC for assessing their suitability for recommending them for regular appointment to those posts. The Tribunal by its order dated 10.12.2002 rejected the application. That was challenged in various writ petitions before the High Court.

3. The High Court by common judgment 11.8.2005 affirmed the decision of the Tribunal that the respondents were not entitled to regularization. It however recorded the submission made by learned Addl. Solicitor General (Counsel for the National Capital Territory of Delhi) that the contract employees will be entitled to age relaxation and extension of time for submitting their applications against the vacancies notified vide UPSC Advertisement No.54 of 2005. Consequently, it directed that the writ petitioners who submitted their applications against the said advertisement shall be granted age relaxation for the period they have worked as contract employees. It was also declared that they will be entitled for one time age relaxation for the period they had worked whenever applications were next invited by the State Government for appointment of Medical Officers (Ayurvedic/Unani). The said decision is challenged by the UPSC in these appeals by special leave on the ground that the writ petitioners (respondents herein) not being government servants, the grant of age relaxation was contrary to rules and terms of the advertisement. They also submitted the concession made by the learned Solicitor General was not on behalf of UPSC.

4. The term relating to age in the UPSC advertisement No.54/2005 reads thus :

> "AGE : Not exceeding 35 years on normal closing date. Not exceeding 38 years for Other Backward Classes candidates and not exceeding 40 years for Scheduled Castes and Scheduled Tribes candidates in respect of vacancies reserved for them. Relaxable for central government servants as per the instructions issued by Government of India including NDMC/MCD from time to time upto five years. Age is also relaxable for employees of NDMC and MCD in respect of the posts in NDMC and MCD respectively upto five years."

The said clause makes it clear that age relaxation is available only to Central Government servants and employees of NDMC/MCD. The respondents were not employees of NDMC/MCD. Nor did they claim to be members of SC or ST or OBC. The respondents were contract employees of Government of NCT of Delhi. The limited question is whether they can claim to be 'Central Government servants' in which event they will be entitled to age relaxation.

5. The matter is squarely covered by the decision in Union Public Service Commission vs. Girish Jayanti Lal Vaghela - 2006 (2) SCC 482, wherein this Court has held that contract employees are not government servants and are not therefore entitled to age relaxation. Following the decision in Girish Jayanti Lal Vaghela (supra), these appeals are allowed and the order of the High Court in so far as it directs age relaxation to respondents, is set aside.

SLP (Civil) No. 26430/2005

6. This SLP is filed by a contract employee seeking regularization. The appointment was made by Government of NCT of Delhi on 9.2.2001 on a consolidated salary for a period of six months or till regular appointment was made whichever was earlier. The Central Administrative Tribunal had rejected his application for regularization on 8.1.2003 and the High Court affirmed that decision while disposing of his writ petition (CWP No.619/2003). Having regard to the decision in Secretary, State of Karnataka vs. Umadevi - 2006 (4) SCC 1, and several other decisions of this Court, the petitioner who was a contract employee for about two years when he approached the Tribunal was not entitled to regularization. There is no error in the orders of the Tribunal and the High Court. The SLP is, therefore, rejected.

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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH
RA NO.188/2008 IN OA NO.1823/2007
D.D. 06.01.2009
Hon'ble Mr. Justice V.K.Bali Chairman &
Hon'ble Mr. L.K.Joshi, Vice Chairman (A)

D.K.Saxena ... Applicant
Vs.
Central Electricity Authority & Ors. ... Respondents

Review of Order:

Power and scope of Review:

CAT as per order dated 17.10.2008 in O.A.No.1823/2007 in view of the fact that out of 5 years' ACRs which have been considered the 'Grading' of the Officer as 'Good' below benchmark 'Very Good' has been recorded in only the year 2003-04 and this has not been communicated to the applicant has disposed of the case – The applicant has filed Review Application that as per the findings of CAT the applicant meets the then existing criteria for promotion should have given direction to the respondents to grant promotion to the applicant as Chief Engineer – CAT in view of the decision of the Supreme Court in Ajith Kumar Rath vs. State of Orissa & Ors. (1999) 9 SCC 596 to the effect that review application has a limited scope has dismissed the review application.

Held:

The Review Application has a very narrow compass and is allowed only if there is an error apparent on the face of the record or if some new fact is discovered after due diligence which is not available at the time when the case was argued. The Tribunal cannot consider fresh grounds and fresh arguments in review.

Case referred:

(1999) 9 SCC 596 - Ajit Kumar Rath Vs. State of Orissa and others

ORDER (By Circulation)

Mr. L.K. Joshi, Vice Chairman (A):

This Review Application has been filed under Section 22(3)(f) of Administrative Tribunals Act, 1985 and Rule 17 of the Central Administrative Tribunal (Procedure) Rules, 1987. The Review applicant has sought review of the order dated 17.10.2008 in OA 1823/2007, D.K. Saxena Vs. UOI and others.

2. This Tribunal had made the following observation in its order dated 17.10.2008 in OA 1823/2007:

> "4. We have perused the ACRs of the applicant for the relevant period, the assessment sheet of the DPC as well as the minutes of DPC. While in the column 3 of Part IV of the form of ACR for the year 2002-03, which is regarding "General Assessment", the reporting officer has recorded that "the performance of the office during the year had been good", the Reviewing Officer has recorded "Very Good" in column 6 of Part V of the ACR, the heading of which is 'Grading'. However, the CR form has been changed from the year 2003-04. The column about 'Grading' has now become column 4 in Part IV of the form of ACR to be recorded by the reporting officer. Column 6 in Part V has been deleted and the reviewing officer is not recording 'Grading' of officer concerned. In the year 2003-04, the reporting officer has recorded the 'Grading' of the officer as 'Good'. Thus out of the five years' ACRs, which have been considered, the 'Grading' below bench mark has been recorded in only the year 2003-04. This has not been communicated to the applicant."

3. Paragraphs 6 and 7 of the Review Application are reproduced below:

> "6. That as per para 4 of the Judgment/order, Hon'ble Tribunal has, after perusing the ACR of the review applicant for the relevant period, the assessment sheet of the DPC as well as the minutes of DPC, has held:
>
> > "Thus out of the five years' ACRs, which have been considered, the 'Grading' below benchmark has been recorded in only the year 2003-04."
>
> 7. That since as per above paras, and as per the findings of this Hon'ble Tribunal, the review applicant meets the then existing criteria for the promotion, the Hon'ble Tribunal have directed that the un-communicated adverse remarks be communicated and a representation by applicant be made, etc. But the Hon'ble Tribunal, it is most respectfully submitted, inadvertently did not give a direction that the respondents grant promotion to the applicant as Chief Engg. as 4 out of 5 years ACR were found 'Very Good' and hence meeting the bench mark. Since the applicant was found by this Hon'ble Tribunal as meeting the Benchmark, the exercise of the communicating the adverse of the 5th year was actually not necessary as the applicant would have earned his promotion as Chief Engg on the basis of the 4 'Very Good' ACRs, as found by the Hon'ble Tribunal in para 4 of the judgment. This finding of 4 'Very Good' ACR has perhaps slipped into the background when Your Lordships were giving final directions to the respondents in the judgment. Thus there is an error on the face of the record which has materially effected the final outcome and the facts, as found by this Tribunal from the records of the ACRs, DPC minutes, would only result in a clear direction to the respondents to promote the applicant as Chief Engg. along with his batch mates in the year 2006."

The contention of the Review applicant is that in view of the remarks, the applicant has four 'Very Good' ACRs and, therefore, he should be promoted because he meets the benchmark.

4. The Review Application has a very narrow compass and is allowed only if there is an error apparent on the face of the record or if some new fact is discovered after due diligence, which is not available at the time when the case was argued. The Tribunal cannot consider fresh grounds and fresh arguments in review. It has been laid down by the Honourable Apex Court in Ajit Kumar Rath Vs. State of Orissa and others, (1999) 9 SCC 596 that:

> "A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it."

5. The Tribunal cannot review its order unless the error is plain and apparent. The Honourable Supreme Court has further held in the aforesaid case that "Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in Order 47, would amount to an abuse of the liberty given to the Tribunal under the Act to review its judgment."

6. Before parting with this order, it may also be stated that the Tribunal cannot direct the applicant to be promoted on the basis that four out of five ACRs are 'Very Good' and meet the prescribed benchmark. This decision has to be taken only by the DPC, as has been held in a catena of judgments of the Honourable Supreme Court. It may also be mentioned that the DPC is not bound by the grading given by the Reporting/Reviewing Officer.

7. With the above observations, the RA is dismissed in circulation under Rule 17 of the CAT (Procedure) Rules, 1987.

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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH
OA NO.2708/2008
D.D. 21.01.2009
Hon'ble Mr. Justice V.K.Bali, Chairman &
Hon'ble Mr. L.K.Joshi, Vice Chairman (A)

Brajesh Kumar Jha ... Applicant
Vs.
U.P.S.C. ... Respondent

Re-examination and Re-evaluation of answer scripts:

Held:

When there are no rules which permitted re-examination and re-evaluation of answer scripts a candidate cannot be permitted to peruse the answer sheets because it is the work for the experts.

ORDER

Hon'ble Shri. L.K.Joshi, Vice Chairman (A)

The applicant herein appeared for the Civil Services Examination 2007 and after clearing the Preliminary Examination, he appeared for the Main Examination for the Civil Services. The applicant has not been declared successful for the CSE 2007 in the Main Examination. The applicant's grievance is that he has scored marks below expectation in the papers of General Studies-II, Geography-II and Hindi Literature-II subjects. The applicant has sought the following reliefs:

"i) Direct the respondent to produce all the records relating to the case including the answer book of the applicant in all the subject and verify the irregularities committed by the respondent in the evaluation of the answer books; and

ii) permit the applicant to carry out the inspection of the answer books in the Court.

iii) direct the respondent to reexamine and re-evaluate the answer books of the applicant where the irregularities are found to be existing in the evaluation process of Civil Service (Main) Examination 2007; and

iv) direct the respondent to declare the applicant pass in the Civil Service (Main) Examination 2007 if after revaluation they get more marks than the mark achieved by the last candidate in the result who was called for interview and consider them for appointment by taking fresh interview of the applicant; and

v) to pass such other order/orders as this Hon'ble Tribunal may deem just and proper in the facts and circumstances of the case."

2. We have examined the issued involved in this OA already in OAs No.1389/2007 Dr. Bikram Singh Gill Vs. Chairman, U.P.S.C. and another, OA No.1747/2007 Neeraj Kansal and others Vs. U.P.S.C. (both decided by common order dated 18th July 2008), OA No.2570/2008 Sandeep Kumar Vs. U.P.S.C. and another dated 27.11.2008 and OA 133/2007, Ravi Jindal Vs. U.P.S.C. and another dated 21.02.2007. After considering the relevant judgments of the Hon'ble Supreme Court and Hon'ble Delhi High Court, this Tribunal had come to the conclusion that there were no rules which permitted re-examination and re-evaluation of answer book and that no purpose will be served by the Tribunal to peruse the answer sheets because it is the work for the experts. The aforesaid OAs were found to be without merit and dismissed.

3. For parity of reasons, the same order has to be passed in this OA also. OA is dismissed in limine.

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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH
OA NO.326/2009
D.D. 11.02.2009
Hon'ble Mr. Justice V.K.Bali, Chairman
Hon'ble Mr. N.D.Dayal, Member (A)

Dr.Manish Sharma ... Applicant
Vs.
U.P.S.C. & Ors. ... Respondents

Dr. Manish Sharma filed the application seeking to quash result dated 29.8.2009 notified by UPSC for the post of Ayurveda Physician and MO (Ayurveda). The main contention was regarding a question in which all the options seem to be correct. The question was only of one mark.

The Central Administrative Tribunal observed that the question referred in the application was common to all candidates and that the marks allocated to a candidate for whatever option they may have given, would have been the same in view of the fact that all the option were correct.

On the basis of the above, the CAT found OA to be totally devoid of merit and dismissed the same.

ORDER (ORAL)

Justice V.K.Bali, Chairman

Dr. Manish Sharma, the applicant herein, has filed this application under Section 19 of the Administrative Tribunals Act, 1985 seeking to quash result dated 29.08.2008 notified by U.P.S.C., the first respondent herein.

2. Brief facts of the case as projected in the application would reveal that the applicant passed the Degree in Bachelor in Ayurvedic Medicine & Surgery (B.A.M.S.) in 1998. The first respondent vide advertisement published in July 2005 invited applications for the post of Ayurveda Physician and M.O. (Ayurveda). The examination was conducted by the first respondent consisting of 120 questions of equal marks of maximum hundred marks in total. One question of the said written examination is as under:

"Which one of the following has not been mentioned by Caraka?
(a) Vataja
(b) Pittaja
(c) Kaphaja
(d) Amaja

3. It is the case of the applicant that since all four options of the said question were correct, therefore, the question itself was defective. The candidates sitting in the examination hall objected and upon such objections the Invigilator in the examination hall orally announced that if there was something wrong in the question then marks will be given to all the candidates for the said question. The averments made in the application go on to show the reasons for delay in declaring the result with which we are not concerned. However, the result was declared on 29.08.2008 and the applicant's name was not shown in the list of selected candidates. He moved an application under Right to Information Act to know as in what manner the respondents dealt with the above stated defective question. He got no satisfactory reply, rather it was stated that there was nothing wrong with the printed question No.120 in Booklet Series No.'C'. With a view, however, to make himself sure and in order to verify, he moved an application under Right to Information Act to various recognized institutions of Ayurvedic Medical Sciences such as Banaras Hindu University, Gujarat Ayurveda University, A & U Tibbia College and Hospital and all these Institutes have certified that all the options to the question mentioned above, do find mention in various Shlokas of Charka Samhita. The applicant thereafter referred to UPSC for making necessary corrections and not to proceed further till proper decision is taken upon the said question. When the efforts of the applicant brought to tangible result, present application has been filed.

4. We have heard the learned counsel for the applicant and with his assistance perused the material on record. All that is being urged before us is that it is not known in what manner question referred to above was treated and how the examiner had given marks for the said question and perhaps if the applicant would have got the marks against the said question he would have succeeded and may have been selected.

5. We find no merit whatsoever in the only contention raised by the learned counsel for applicant. The question referred to above was common to all the candidates. We are sanguine that the marks allocated to a candidate for whatever option they may have given would have been the same in view of the fact that all the options were correct. The question was only one mark. Original Application has no merits and is accordingly dismissed.

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HIGH COURT OF JAMMU AND KASHMIR AT JAMMU
S.W.P. NO.2201/2001
CMP NO.2283/2001
D.D. 01.05.2009
Hon'ble Mr. Justice J.P. Singh, J.

Ashok Kumar Raina ... Petitioner
Vs.
Union of India & Ors. ... Respondents

Selection:

Whether an unsuccessful candidate can challenge the marks awarded in interview contending that he has answered almost all questions correctly? – No

The petitioner was a candidate for the post of Junior Grade of Indian Information Service, Group "B" in the Ministry of Information and Broadcasting – The petitioner was not found fit for appointment by the Commission – Challenging the rejection of his candidature petitioner filed writ petition that he had answered 19 questions correctly out of 20 put to him during the course of interview – The Interview Board consisted of experts in the field apart from Members of the Commission holding that the experts and others on the Interview Board are the best persons to evaluate the merit of the candidates dismissed the application.

Held:

Petitioner's plea that he had answered 19 out of 20 questions put to him at the time of interview and was thus entitled to be selected, may not be tenable to upset petitioner's evaluation by the duly constituted Interview Board of the Union Public Service Commission, which was constituted inter alia, of the experts in the field. This is so because the experts and others on the Interview Board are the best persons to evaluate the merit of the candidates and candidate's own assessment of having answered the questions put to him correctly is absolutely irrelevant for determining his merit. The candidates, usually make their own appraisal about themselves little knowing about the parameters which may be necessary to adjudge their ability, suitability and merit which can be evaluated and assessed only by the Boards/authorities specifically constituted for the purpose by the employer who alone has the prerogative of nominating such persons or authorities, who according to its wisdom, are best suited for the job of selecting the employees needed by the employer for his work.

ORDER

On consideration of petitioner's candidature for the post of Junior Grade of Indian Information Service, Group-"B" in the Ministry of Information and Broadcasting, Government of India, pursuant to the directions issued in petitioner's earlier writ petition SWP No.1998/1999 directing consideration of petitioner's claim against the vacancies which were available with the Ministry of Information and Broadcasting, the Union Public Service Commission did not find the petitioner fit for appointment and,

accordingly, communicated his rejection vide their order no.F.1/325/95-R.IV dated September 3, 2001.

Seeking issuance of a writ of certiorari to quash the Union Public Service Commission's communication of September 3, 2001, the petitioner has additionally prayed for issuance of a direction to the respondents to reconsider his case for selection and appointment against the post of Junior Grade of Indian Information Service Group "B".

Raising the plea that the Commission had rejected his candidature, annoyed by the petitioner's approach to the Court against their refusal to consider his candidature on the earlier occasion, it is additionally projected by the petitioner that he had answered 19 questions correctly out of 20 put to him during the course of the interview, and in such view of the matter, he was entitled to be selected. The rejection of his candidature by the Commission, according to him, was thus unwarranted.

Controverting the case set up by the petitioner in the writ petition about the biased approach of the Commission towards him, it has been stated by the Commission on affidavit through its Under Secretary that the Commission had decided to implement the judgment delivered by the Court and in pursuance thereto, the petitioner had submitted application forms. On examination of the applications of the petitioner for all the three languages, he was found meeting the short-listing criteria fixed by the Commission for English and Urdu language only. He had, however, not been found fit for consideration for the post for Hindi language. The petitioner was, accordingly, interviewed by a duly constituted Board on August 23, 2001 for the post of Junior Grade Indian Information Service, English and Urdu, Group-B. The independent Interview Board constituted by the Commission for the purpose having two outside experts, examined the merit of the petitioner, keeping in view his already acquired qualifications; but did not find him suitable for the post.

The respondents have thus sought dismissal of the writ petition.

I have considered the submissions of learned counsel for the parties and seen the original records, which the respondents' counsel had produced at the time of consideration of the writ petition.

After going through the records of the Commission, it is found that the Commission had rejected the candidature of the petitioner on the basis of the evaluation of his merit by the duly constituted

Interview Board which included two outside experts. The Interview Board, after evaluating the petitioner's merit, has reflected the result of his evaluation in the records, on the basis whereof, he was not found suitable for the job.

Petitioner's plea that he had answered 19 out of 20 questions put to him at the time of interview and was thus entitled to be selected, may not be tenable to upset petitioner's evaluation by the duly constituted Interview Board of the Union Public Service Commission, which was constituted inter alia, of the experts in the field. This is so because the experts and others on the Interview Board are the best persons to evaluate the merit of the candidates and candidate's own assessment of having answered the questions put to him correctly is absolutely irrelevant for determining his merit. The candidates, usually make their own appraisal about themselves little knowing about the parameters which may be necessary to adjudge their ability, suitability and merit which can be evaluated and assessed only by the Boards/authorities specifically constituted for the purpose by the employer who alone has the prerogative of nominating such persons or authorities, who according to its wisdom, are best suited for the job of selecting the employees needed by the employer for his work.

In view of the evaluation of the petitioner made by the Interview Board, I do not find any merit in petitioner's writ petition entitling him to the reliefs prayed for in the writ petition.

There being no merit in the writ petition, it is, accordingly, dismissed. The original records be returned to the respondents' counsel.

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CENTRAL ADMINISTRATIVE TRIBUNAL
LUCKNOW BENCH, LUCKNOW
ORIGINAL APPLICATION NO.48/2009
D.D. 20.05.2009
Hon'ble Mr. M.Kanthaiah, Member (Judicial) &
Hon'ble Dr. A.K.Mishra, Member (Administrative)

Km. Divya Vishen ... Applicant
Vs.
UPSC & Ors. ... Respondents

Examination:

Whether claim of the applicant that his application sent through Courier was refused can be accepted in the absence of any documents? - No

The applicant has sent an application form for Civil Services (P) Examination, 2009 – The applicant has stated that dak counter of the Commission has refused to accept any of the applications received through any individual or any Courier agent – The applicant has not placed any material to show that there was any such returned endorsement of application form.

In the absence of any such document from Courier Service in respect of return/refusal of application of the applicant by the Commission, the CAT found there are no merits in the claim of the applicant and the same is liable to be dismissed.

ORDER

Mr. M.Kanthaiah, Member (J)

The applicant has filed the original application with a prayer to issue direction to the respondents to accept the application form of the applicant for Civil Services Examination (Pre.Exam) 2009 and also to consider the candidature of the applicant for such examination on the ground that they have refused to accept the application form arbitrarily and in negligent manner.

2. The respondents have filed counter affidavit denying the claim of the applicant stating that the dak counter of the respondent has not refused to accept any of the applications received through any individual or any Courier agent.

3. The applicant has filed reply denying the stand taken by the respondents and reiterated her pleas in the original application.

4. Heard both sides.

5. The point for consideration is whether the applicant is entitled for the relief as prayed for.

6. It is the case of the applicant that on 31.12.2008, she sent the application form to the Respondent No.2 through respondent No.3 Courier Service, for Civil Services (Pre.Exam) 2009 after completing

all the formalities. But all of sudden, Respondent No.3 delivered back the application form to the applicant intimating that Respondent No.2 has refused to accept the application form and the same was intimated to her in writing by the Courier Service. It is also the case of the applicant that as per notification 31.12.2008 is the last date for submission of application form and the candidates are entitled to send their application form through Courier Service, but respondent No.2 refused her application form in unfair and arbitrary manner and as such he filed this application to issue direction to the Respondent No.2 to receive his returned application form and consider her candidature for Civil Services (Pre.Exam) 2009.

7. The Respondent No.1 and 2 have categorically denied the contention of the applicant stating that dak counter has not refused to accept any of the applications received through any individual or any Courier agent and thus denied the claim of the applicant. Respondent No.3 remained ex parte.

8. Though the applicant contended that the Respondent No.2 returned his application form, he has not filed any such returned endorsement. Similarly, the applicant has not placed any material to show that there was any such returned endorsement of application form of the applicant from Courier Service (Respondent No.3) to substantiate that her application which she refused sent through Courier has been returned by the respondent No.2.

9. The applicant mainly relied on photocopy of information obtained from website of Respondent No.3 (Annexure A-10), but the same does not reveal return or refusal of the application of the applicant which she sent through the Respondent No.3 on 31.12.2008. Without any such document from Courier Service (Respondent No.3) in respect of return/refusal of the applicant by Respondent No.2, it is not open to the applicant to blame the respondent No.1 and 2 that they have not accepted his application which she sent through Courier Services (Respondent No.3). Without any such laches on the part of the respondents, the applicant is not justified to seek such relief against the Respondent No.2 to receive the application of the applicant for consideration of his candidature for Civil Services (Pre. Exam) 2009. Thus there are no merits in the claim of the applicant and as such, the same is liable for dismissal.

In the result, O.A. is dismissed. No costs.

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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH
MA NO.1073/2009
OA NO.1433/2007
D.D. 03.06.2009
Hon'ble Mr. Justice V.K.Bali, Chairman
Hon'ble Dr. Ramesh Chandra Panda, Member (A)

Prodip Kumar Mondal ... Applicant
Vs.
Union of India & Anr. ... Respondents

Examination:

Whether UPSC can claim privilege in respect of information disclosed to the Tribunal? – No

In O.A.No.1433/2007 as directed by the Tribunal UPSC furnished fact/information with regard to cutoff marks and the same was incorporated/reproduced in the Judgment of the Tribunal – UPSC filed this application (Miscellaneous A.No.1073/2009) for deletion of the portion of the judgment in respect of the information disclosed – Tribunal holding that the information disclosed is not injurious to public interest and UPSC cannot claim privilege has dismissed the Miscellaneous application.

Held:

Though information regarding cutoff marks is confidential for UPSC it cannot be considered by the Tribunal as confidential for the purpose of passing judgment in the main case. In the matters like cutoff marks the transparent processing will imbibe better confidence in the institutions like UPSC. Cutoff marks is not so confidential that functioning of the UPSC will be jeopardized.

ORDER

Dr. Ramesh Cahdra Panda, Member (A):

Respondent-Union Public Service Commission (UPSC) has filed Misc. Application No.1073/2009 seeking intervention of this Tribunal under Rule 24 of the Central Administrative Tribunal Rules for deletion of the Central Administrative Tribunal Rules for deletion of the portion of the Judgment in respect of the fact/information disclosed with regard to the cutoff mark, which was disclosed to the Tribunal. It is claimed that those cutoff marks are out of the purview of the public domain and being confidential should not have been disclosed even in the judgment of this Tribunal.

2. Shri. Naresh Kaushik, the learned counsel for the Respondent-UPSC contended that we had gone through the relevant UPSC records about the information of cutoff marks and the marks secured

by each candidate in written examination before passing of the judgment but his contention was that the records were produced before the Tribunal by claiming privilege in respect of the disclosed information not to be incorporated/ reproduced in the judgment. His main reasons were that (i) such information was not in the public domain, and (ii) the confidentiality of the cutoff mark, the standards so fixed by UPSC is disclosed, would adversely impact on the selection/examination process and functioning of the UPSC. He submitted that deletion of such portions from the judgment would not cause any adverse prejudice and harm to the applicant. Thus, Shri Kaushik prayed for the deletion of the relevant portion from the judgment containing information about the cut off marks in respect of each candidate figuring from Sl.No.211 to 223.

3. Shri A.K.Behera, the learned counsel for the applicant, having taken note of the MA at the admission stage, objected the contentions raised by the learned counsel for the UPSC.

4. Having heard the contentions of the learned counsel for the parties, the main issue which comes before us is whether by mentioning the cutoff marks in the judgment of the Tribunal has disclosed the privileged confidential information and if so should the same be deleted from the order dated 21.5.2009?

5. In para 8 and 9 of our order dated 21.5.2009 in the OA 1433/2007 we have indicated only the cutoff mark and have not given marks secured by each candidate in written, CRS and aggregates. We take extract of the said 2 paragraphs of our order which read as follows:

> "8. We perused the UPSC mark list of these 4 UR, 11 SC and 1 ST candidates to verify whether the standards were relaxed in the case of SC and ST candidates. We find from the UPSC records that standard set for the UR/General Category (200 marks in the written examination) was relaxed in case of all of them (11 SC and 1 ST candidates). However, since the SC and ST candidates have secured higher marks in the total compared to the last UR/General Candidate (Abhay Nandan Mishra), they were ranked as per their respective total marks.
>
> 9. Shri Behera's contention that those SC candidates who secured more marks than the UR category candidates, should have been moved as UR candidates vacating the SC slot for the applicant and others would be contrary to the Rule 8 of the Examination Rules. We find from the proviso of Rule 8 of the examination Rules submitted by the UPSC that the "candidates belonging to scheduled caste and scheduled tribes who have been recommended by Commission without resorting to any stage of examination" will be adjusted against UR vacancies and not in the vacancies reserved for the SC & ST. In this regard, on the direction of this Tribunal to clarify the position, the Respondent UPSC

submitted additional affidavit dated 2nd January 2009, and stated that no candidate was available from SC/ST category for being recommended against the repeat candidates who qualified at UR Standard. The LDCE examination for SO/Steno grade consists of two parts i.e. 500 marks for written exam and 100 marks CRS. The standard in the written examination for UR candidates was fixed at 200 marks. The said standard was relaxed for the SC/ST candidates, which means their marks in the written test was lower than 200 marks fixed for the UR category candidates. We note that the candidates belonging to SC/ST category ranking between 211 to 225 had qualified the written examination on the basis of the relaxed standards for SC/ST candidates and as such did not qualify the same against the standards for UR candidates and as such the UPSC did not recommend any of those SC candidates for appointment to UR vacancies on the basis of being equal/higher in merit on the basis of the total marks obtained than the last general category candidate. All SC/ST candidates between rank 210 to 223 have secured less than 200 marks and thus qualified the written test on the basis of the relaxed standard for SC/ST. The three candidates who secured 200 marks or more in the written examination were recommended against UR vacancies."

6. The cutoff mark being the essential information to prove that the SC candidates who secured below cutoff mark in the written examination and were granted relaxation in the standard as per Rule 8 of the Examination Rules of UPSC cannot be considered against the Un Reserved vacancies, such information (cutoff mark) though confidential for UPSC, cannot be considered by us as confidential for the purpose of our judgment passed by us in the said OA. In the matters like cutoff mark the transparent processing will imbibe better confidence in the institutions like UPSC. Cutoff mark is not so confidential that functioning of the UPSC will be jeopardized. This Tribunal is to decide whether the disclosure of the cutoff mark is necessary in the public interest and we find such disclosure is not injurious to pubic interest. Thus, the claim of privilege raised by the counsel for the respondent – UPSC does not have any merit and we do not find any ground to pass further order or to give any direction for deletion of cutoff mark under Rule 24 of the Central Administrative Tribunals (Procedure) Rules, 1987 on the order passed by us in OA No.1433/2007.

7. Taking into account the above facts and circumstances of the case and our discussion, we do not find any merit in the Misc. Application and accordingly the same is dismissed. No costs.

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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
O.A.NO.679/2009
D.D. 25.08.2009
Hon'ble Mrs. Meera Chhibber, Member (J) &
Hon'ble Dr. Ramesh Chandra Panda, Member (A)

Shri R.P.Kohli ... Applicant
Vs.
Municipal Corporation of Delhi & Ors. ... Respondents

Promotion:

Whether an official who was considered for promotion by DPC and the decision kept in sealed cover in view of the fact that the official was facing police case and against whom charge sheet was filed can ask for grant of promotion after opening the sealed cover on the ground that he was considered for promotion against the vacancy of the year 1998-1999 before police case/charge sheet filed? – No

The applicant sought direction to the Respondents to open his sealed cover, declare the result and in case he is found fit, to place him at the appropriate place in the order dated 8.9.2008. He also challenged order dated 8.9.2008 whereby 20 person have been promoted as Executive Engineers with immediate effect.

Hon'ble Tribunal held that the contention of the counsel for the applicant that he should be promoted w.e.f. 1998-99 by ignoring the police/charge sheet which was pending against him cannot be accepted because it is on the day when DPC is held that the relevant factors have to be kept in mind by the DPC.

Hon'ble Tribunal found no merits in the claim of the applicant and O.A. was dismissed.

Held:

The contention of the applicant that he should be promoted w.e.f. 1998-1999 by ignoring the police case/charge sheet which was pending against him cannot be accepted because it is on the day when DPC is held the relevant factors have to be kept in mind by DPC.

ORDER

Hon'ble Mrs. Meera Chhibber, Member (J)

Applicant has sought direction to the respondents to open his sealed cover, declare the result and in case he is found fit, to place him at appropriate place in the order dated 8.9.2008. He has also challenged order dated 8.9.2008 whereby 20 persons have been promoted as Executive Engineers with immediate effect [page 17].

2. It is stated by the applicant that he was appointed as Assistant Engineer (hereinafter referred to as AE) against direct recruitment quota in the year 1990. He was eligible to be promoted to the next post of Executive Engineer as per the Recruitment Rules after completing 5 years of regular service as Assistant Engineer in the year 1995 when there was nothing adverse pending against the applicant. But for reasons best known to the respondents, after the year 1996, no regular DPC was held and all the AEs including the applicant were promoted as Executive Engineers (hereinafter referred to as EE) on 13.11.1997 on ad hoc basis. It was only when the Hon'ble High Court of Delhi gave a direction that a DPC was held but applicant has not been given the promotion on the ground that a police case was pending against him.

3. It is submitted by the counsel for the applicant that since applicant was eligible in the year 1995 and at that time no case was pending against him, he should be given the promotion with effect from the said date by considering him for those years. If the sealed cover is not opened, it would delay his further promotion and affect his seniority as well. The respondents are already taking steps to convene DPC for the next post of Superintending Engineer (hereinafter referred to as SE) pursuant to the orders passed by the Hon'ble High Court of Delhi because even the DPC for the post of SE was last convened in the year 1997. Applicant has thus stated that he cannot be made to suffer for the delay on the part of the respondents.

4. The OA is opposed by the official respondents as well as UPSC. They have admitted that as per the guidelines, DPC is to be convened every year, but they have explained that the DPC for the post of EE(C) could not be held due to some administrative and technical reasons. They have referred to the instructions issued by the Government of India wherein it is clarified that when DPC could not be held for number of years, the authorities should determine the regular vacancies of the previous years and only such of the officers should be considered who fall within the zone of consideration for that particular year and the select lists have to be made year wise. In any case promotions have to be made prospectively, therefore, the contention of the applicant is contrary to the instructions as referred to above. They have further stated that in compliance with the directions given by the Hon'ble High Court of Delhi, DPC was held in July August, 2008 for the post of Executive Engineer against the vacancy year of 1998-99. Applicant was duly considered but at the time of consideration by the DPC, petitioner was facing some RDA/Police cases coupled with issuance of charge sheet, therefore, as per the instructions, his name was kept in the sealed cover. In case applicant is fully exonerated in

the pending case, recommendations of the UPSC would be acted upon and in case he is found fit, he would be granted promotion w.e.f. the same date when his immediate junior was promoted. They have thus prayed that the OA may be dismissed with costs.

5. We have heard both the counsel and perused the pleadings as well as the original record.

6. It was strenuously argued by the counsel for the applicant that MCD is not following any rules as a result of which people are being harassed unnecessarily, being denied their due promotions which they would have earned had the DPC been in time, therefore, some directions need to be given to the respondents to streamline their department and not to deny promotions to the eligible candidates in view of the delay which is totally attributable to the department. Counsel for the applicant also submitted that in the Minutes of the DPC for promotion to the post of Executive Engineer, names of Shri R.K.Allahawadi and Shri B.R.Bansal are kept in the sealed cover yet they have been given promotions subsequently, which shows that respondents are resorting to pick and choose method and denying the same benefit to the applicant such arbitrary action need to be stopped at any cost.

7. Since perusal of the minutes of the DPC produced by the counsel for the respondents showed that the names of Shri Allahawadi and Shri B.R.Bansal were indeed kept in the sealed cover, yet by the subsequent order they were promoted, we had directed the respondents to produce the records to show how these two persons were given promotions in spite of their names having been kept in the sealed cover while denying the same benefit to the applicant. Respondents have since produced the records. Perusal of the records show that on the date when the DPC was convened, names of both these officers were kept in the sealed cover because they were either under the currency of punishment or were facing departmental cases but subsequently the currency of punishment was over, therefore, their sealed covers were opened and since they were found fit by the DPC, they were give promotions. As far as applicant is concerned, he was also duly considered by the DPC convened by the respondents but as there was a police case pending against him in which charge sheet was already filed in the court of law on 9.12.2005 which case was still pending, therefore, his name was rightly kept in the sealed cover. Since it is an admitted position that charge sheet has already been filed in the court of law against the applicant, no direction can be given to open the sealed cover. Instructions on the point are clear that if on the day when DPC meets there is a charge sheet pending against an officer, his name has to be kept in the sealed cover and it can be opened only if he is ultimately fully exonerated in the police case or disciplinary case. In the instant case, it has not been stated by the applicant that his case has been decided finally, therefore, no direction can be given to the respondents to open the applicant's sealed cover.

8. It is correct that the applicant did not have any adverse case pending against him in the year 1998-1999 for the vacancies of which year applicant had been considered by the DPC but the fact remains that at the time when DPC was finally convened, a charge sheet was pending against him therefore, the said charge sheet could not have been ignored.

9. In the instant case, admittedly, DPC was held in July-August, 2008 when they were directed to do so by the Hon'ble High Court of Delhi. In such circumstances, the respondents were required to determine the actual number of regular vacancies that arose in each of the previous years immediately preceding and the actual number of regular vacancies proposed to be filled in the current year separately and consider in each of the years only such of the officers who would be within the zone of consideration with reference to the vacancies of each year. It has been clarified by the instructions that the promotions in such cases should be given only prospectively. Therefore, the contention of the counsel for the applicant that he should be promoted with effect from 1998-1999 by ignoring the police case/charge sheet which was pending against him cannot be accepted because it is on the day when DPC is held that the relevant factors have to be kept in mind by the DPC.

10. We would hasten to add here that we are not approving the delay on the part of the respondents in holding the DPC because it does cause inconvenience to the persons e.g. due to the delay they may lose out a promotion, which they might have got had the DPC been held in time but nonetheless since all the situations have been dealt with in the OM dated 14.9.1992 read with OM dated 9.1.1996, therefore, in the present circumstances, the relief, as claimed, cannot be granted. We would like to note here that respondents have themselves stated that in case applicant is fully exonerated in the police case, he would be given promotion from the same date when his juniors were promoted provided he is found fit by the DPC. We are sure respondents would adhere to their statement.

11. Counsel for the applicant strenuously agued that police case would go for year and years together, therefore, he should not be made to suffer in the matter of promotion. This aspect cannot be dealt with by us because if applicant feels the case is being delayed unnecessarily, he should take necessary steps in that regard in accordance with law.

12. With the above observations, OA stands disposed off. No order as to costs.

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CENTRAL INFORMATION COMMISSION

2nd Floor, August Kranti Bhawan,
Bhikaji Cama Place, New Delhi – 110 066
(Adjunct to Decision No.318/IC(A)/2006 dated 3/10/2006)

Decision No.4156/IC(A)/2009
F. No.CIC/MA/A/2006/00711
Dated, the 10th July, 2009

Name of the Appellant: Shri. Ravinder Kumar

Name of the Public Authority: Union Public Service Commission

R.T.I. Act:

Whether file notings containing the views and opinions of various officials who have contributed to the process of the conduct of disciplinary proceedings can be denied under Section 8(1)(j) of the Act? - Yes

Facts:

1. In our Decision No.318/IC(A)/2006 dated 3rd October 2006, the following Decision notice was issued:

> "The information sought relate to note sheets of the files dealing with disciplinary proceedings and imposition of penalty. Under the law, there are established procedures that are followed to ensure justice to the alleged offenders. The relevant details form the basis for formulating advice given by the UPSC to the concerned administrative Ministry, a copy of which is also supplied to the affected officer. The revealing of the note sheets containing the remarks and opinion of various officials on the matter of imposition of penalty, would identify their names, which might endanger their lives. The disclosure of such information is therefore barred u/s 8(1)(e) & (h) of the Act. In view of this, the decision of the appellate authority is upheld.
>
> As such, there is no denial of information to the appellant as the CPIO and the appellate authority have given a detailed response to the appellant. Moreover, there is no overriding public interest in disclosure of information relating to the prosecution of alleged offenders under the Civil Services conduct Rules."

2. Being not satisfied with the above decision, the appellant submitted a review petition before the Commission, which was examined and rejected. The appellant was accordingly communicated vide the Commission's letter dated April 19, 2007.

3. Subsequently, the appellant challenged the Commission's decision before the High Court of Delhi, which has passed the following order:

> "The prayer made by the petitioner for copies of the note sheets was rejected by the UPSC. The appeal filed before the appellate authority was also dismissed on 19.09.2006.

The petitioner has thereafter, stated to have filed an appeal before the CIC which was also dismissed on 03.10.2006. The petitioner who appears in person submits that the CIC has now given a decision in January, 2007, Shri. Pyare Lal Verma Vs. Ministry of Railways by virtue of which the CIC has held that the note sheets form part of the file and public authorities should give copies of the same. The petitioner in person prays that this matter may be remanded back to CIC to enable the CIC to hear the parties afresh in the light of the aforestated Full Bench judgment. Counsel for the respondents have no objection. Consequently, taking into consideration the stand of the parties, the present petition is disposed of with a direction to the CIC to issue notice to the parties and thereafter pass an order in the matter. Needles to say that in case the petitioner is aggrieved by the order passed by the CIC, it would be open to the petitioner to take recourse to such remedy as may be available to him in accordance with the law.

With these directions the present writ petition stands disposed of. (WP(C)No.4374/ 2007)

4. In compliance with the Court's order, notices were issued to both the parties for the hearing held on 9/7/2009. The following were present:

Appellant: Sh. Ravinder Kumar

Respondents: Sh. Y.P. Gupta, CPIO & Dy. Secretary

Sh. Kamal Bhagat, Jt. Secretary

Sh. R.K. Sinha, J.S.

Ms. Aditi Gupta, Advocate

5. The appellant reiterated his earlier plea for providing access to the note sheets containing the details of remarks and observations made by various officials of the respondent, in the matter of disciplinary action taken against the appellant. In particular, he stated that the Commission has allowed disclosure of the file notings in different cases. Therefore, he should also be provided the copies of note sheets as asked for by him.

6. The CPIO reiterated its earlier stand and maintained that the note sheets asked for pertain to the information of different departments and offices in the matter of disciplinary action against the appellant, the disclosure of which is not in public interest. Hence, the requested information mainly, the note sheets containing the opinion and advices rendered by various officials cannot be disclosed, as per Section 8(1)(j) of the Act.

Decision:

7. The information asked for relate to the file notings containing the views and opinions of various officials, who have contributed to the process of the conduct of disciplinary proceedings initiated against the charged officer. While such an action is taken by a public authority against its employee is largely in the public interest, the request for disclosure of the details by the charged official is mainly for promotion of personal interest. It is accepted that the note sheets of a file are covered under the definition of "information" and, therefore, a CPIO is free to invoke section 8(1) of the Act for denial of information for which valid justification has to be provided.

8. In the context of the disciplinary proceeding, which is initiated in the public interest as per the Civil Services (Conduct) Rules, the CPIO has justly invoked Section 8(1)(j) of the Act for denial of access to the file notings containing opinion and advices rendered by the officials of the respondent.

9. In view of this, the review petition is dismissed.

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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
O.A. 1293/2009
D.D. 24.11.2009
Hon'ble Mr. Justice M.Ramachandran, Vice Chairman (J)
Hon'ble Mr. S.P.Singh, Member (A)

Gambheer Singh ... Applicant
Vs.
The Secretary, UPSC ... Respondent

Examination:

Whether a candidate who has been debarred for attempting to appear for Civil Services Examination for the fifth time by suppressing that he had already appeared four times allowed under the rules take shelter on the basis of subsequent amendment of the rules relaxing the number attempts? – No

Shri Gambhir Singh filed an O.A. against the Commission's decision regarding his debarment and cancellation of his candidature for Civil Services (Main) Examination, 2005 for availing chances in excess of the permissible number of chances.

The applicant had applied for partaking the 2005 Civil Services Examination – In the relevant column, he had declared that he had made only three attempts in respect of Civil Services Examination – On verification, it was revealed that he had suppressed the details in respect of his candidature in the year 1996-97 and 2001 - When rules allowed only four attempts, it was found that he was attempting a fifth time by suppressing factual details – Accordingly, he was debarred by the Commission for 10 years after duly issuing him a show cause notice – Later on a relaxation in the number of attempts was introduced by the rules of 2008.

Held:

When we advert to the provisions of the rules, we find that on the date on which the applicant made a declaration, it was evidently wrong. He practically had admitted the above. The subsequent change in the rules was not sufficient enough to rectify or overreach the position that had come to be settled. Therefore, we find that the application is misconceived. We also notice that the limitation which had set in could not have been possible to be counted for the reasons stated in the application.

Case referred:

1995 (6) SCC 749 - B.C.Chaturvedi Vs. Union of India & Ors.

ORDER

M.Ramachandran, Vice Chairman (J)

The applicant had appeared in person and had urged that the order dated 31.03.2006 issued by the Union Public Service Commission (UPSC) whereby he has been debarred from appearing in the

examinations to be conducted by the Commission for a period of 10 years effective from 10.03.2006, is not valid. We find that the order also cancelled his candidature for the Civil Service Examinations held in the year 2005. It is his case that being a physically disabled person, from the lower rungs of the society, the order violates his basic rights for being appointed to a public office.

2. The contention highlighted is that in view of the Notification of UPSC issued in 2008, the order debarring him has no legs to stand and the bar that had been imposed on him could not have put into operation and requires to be revoked. He had cited the judgment of the Supreme Court in B.C.Chaturvedi Vs. Union of India & Ors. (1995 (6) SCC 749) which, according to him, had emphasized the duty of the High Court/Tribunal to do 'complete justice' between the parties, in line with the powers of the Supreme Court under Article 142 of the Constitution of India.

3. Before issuing the impugned order, a show cause notice had been issued to the applicant where under he was to explain as to why proceedings were not to be initiated against him under Rules 4 and 14 of the Rules for the Civil Services (Main) Examination, 2005. The applicant had applied for partaking the 2005 Civil Service Examination. In the relevant column, he had declared that he had made only three attempts, in respect of the Civil Service Examination. On verification, it was revealed that he had suppressed the details in respect of his candidature in the year 1996-97 and 2001. When rules allowed only four attempts, it had been found that he was attempting a fifth time by suppressing factual details. After hearing his version and finding no merit in the stand, the impugned order had been issued.

4. The counsel for the respondents has submitted that in any case the application is not maintainable since the huge delay has not been appropriately explained. He suggested that it could not be possible to be explained also. After acquiescing to the order, later on when it was found that there was a relaxation in the number of attempts introduced by the rules of 2008, the applicant was trying to steal benefits from that order. But 2008 rules had no retrospective effect and as far as the applicant's case was concerned, it was a closed chapter and no relaxation, therefore, was possible.

5. When we advert to the provisions of the rules, we find that on the date on which the applicant made a declaration, it was evidently wrong. He practically had admitted the above. The subsequent change in the rules was not sufficient enough to rectify or overreach the position that had come to be settled. Therefore, we find that the application is misconceived. We also notice that the limitation which had set in could not have been possible to be counted for the reasons stated in the application.

6. In the result, we dismiss the O.A. However, there will be no order as to costs.

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ANDHRA PRADESH PUBLIC SERVICE COMMISSION

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH AT HYDERABAD
(Special Original Jurisdiction)
W.P.Nos.20106 of 2004, 20350 of 2004, 20539 of 2004 and 21554 of 2004
D.D. 27.12.2004
Hon'ble Mr. Justice G.Bikshapathy &
Hon'ble Mr. Justice P.S.Narayana

P.Muralidhar & Ors. ... Petitioners
Vs.
The Andhra Pradesh P.S.C. & Ors. ... Respondents

Recruitment:

Effect of amendment to procedural law to on going selection process whether retrospective or prospective? – Retrospective unless specifically made prospective.

Recruitment was initiated to Group-II Services to 27 categories of posts both executive and non-executive in various Departments pursuant to notification dated 28.12.98 – Written test + viva voce for executive post – Only written test for non executive post – Selection was made and appointment orders were issued in respect of 3 categories of executive posts in 2001 and in respect of post of Asst. Section Officers appointment orders were issued in 2002 pursuant to order of the Administrative Tribunal – Aggrieved by the order of Tribunal in so far as it relates to non-filling up of posts under remaining executive category, Writ Petitions were filed – P.S.C. as per amended procedure as per G.O. 2004 revised the earlier selection so as to make the entire selection process on the basis of one merit list which had the benefit of distributing the position of already appointed candidates in 2001-2002 lists the same affected already appointed candidates challenged the same before Administrative Tribunal – Applications were also filed questioning the selection on the ground that they should not have been selected for the posts for which they had not given options – Applications were filed on the ground that no reservation was made for PH persons – Tribunal disposed of the case holding among others that the selections made in 2001 without following the amendments cannot be sustained and consequently, directed the Commission to review the selection list by following the Presidential Order No.124 dated 7.3.2002 – Against the said order writ petitions were filed – High Court while upholding the finding of the Tribunal that the selection process has to be in accordance with G.O.No.124 dated 8.8.2002 has held that the direction of the Tribunal that the select list has to be reviewed clubbing the appointments under first round is not sustainable and the procedure contemplated under G.O. No.124 has to be followed only in respect of candidates excluding the appointments already made in 2001-2002.

Held:

Amendment to procedural law has retrospective effect unless it is specifically made prospective. Amendment to substantive law has only prospective effect unless it is specifically made retrospective. 2004(1) ALD 288 (FB) – Motichand Jain v. M.Jaikumar

Further held:

Selected candidates cannot contend that authorities ought not to have appointed them to the posts to which they had not given preference. If such an appointment was made, it is open for the candidate concerned to refuse the appointment. But, it cannot be contended that they should be posted only in

the post they had given preference.

Further held:

Right to employment is not a fundamental right enshrined under Article 16 of the Constitution of India. A candidate on making an application acquires a right to be considered for appointment if he is otherwise qualified. A candidate on making an application for the post pursuant to the advertisement, does not acquire any vested right of selection. But, if he is eligible and otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire vested right to be considered for selection in accordance with the Rules as existed on the date of the advertisement. Even if the candidate is selected, he cannot have any fundamental rights to claim the appointment and it is always open for the appointing authority to appoint or not depending on the exigencies of the requirement.

Further held:

If any provision of the rules is repugnant to the special rules applicable to any particular service in regard to any specific matter, the latter in respect of such service on such a specific rule prevail over the provisions of the General Rules.

Further held:

The inter se seniority between the 1st round appointees and later inducted persons under second round selection in the same cadre if any shall be decided by the appropriate authority in accordance with rules, depending on the merit ranking obtained by them.

Cases referred:

1905 A.C. 369 – Colonial Sugar Refining company Ltd. V. Irving
1992 (2) SLR 378 – N.T.Devin Katti v. Karnataka Public Service Commission
(2003) 6 SCC 659 – Shiva Shakti Cooperative Housing Society, Nagpur vs. Swaraj Developers
2004(1) ALD 288 (FB) – Motichand Jain v. M.Jaikumar

COMMON JUDGMENT

(per G.Bikshapathy, J.)

1. The Recruitment Notification (Advertisement No.10 of 1999) issued by the Andhra Pradesh Public Service Commission to Group-II Services is yet to attain the finality, even though legal battle by the unemployed continued to be unabated for over a quinquenial period. Though the procedural deficiencies and legal tangles were cleared by this Court on the earlier occasion. Yet, spate of cases continued to flow from the 2nd round of litigation. This is an apt example as to how the recruitment to various categories of posts is being delayed for years together.

2. These batch of Writ Petitions arise out of the common order passed by the Andhra Pradesh

Administrative Tribunal (for brevity the "Tribunal") in O.A.No.3840 of 2004 and Batch, dated 15.10.2004.

3. Following brief recitals are necessary to appreciate the matter in a proper perspective:

Andhra Pradesh Public Service Commission (for short "A.P.P.S.C.") issued notification on 28.12.1999 vide Advertisement No.10 of 1999 calling for the applications for the recruitment to 27 category of posts in various Departments consisting of executive and non-executive posts. Out of 27 categories, 10 fall in executive posts and 17 in non-executive posts. While written test and viva voci are the requirement for selection to the executive posts, only written test is the criteria for non-executive posts. In the notification, number of vacancies in each category were not notified, but only in respect of three categories, the number of vacancies were notified viz. 15 posts of Asst. Municipal Commissioner, Grade-III, 8 posts of Asst. Commercial Taxes, 6 posts of Asst. Labour Officer. In respect of other executive cadre posts, the number of vacancies left blank awaiting clearance from the Government, while non-executive cadre only 111 posts were notified in the category of Asst. Section Officers. In respect of other non-executive cadre, number of vacancies were stated as awaited. Notification further stated that the vacancies which arose up to 31.8.2000 were to be filled up. However, during the course of time, the vacancies notified in respect of Asst. Section Officers were withdrawn by the Government in their letter dated 7.8.2000 and hence the selections were only confined to three categories of executive posts. The A.P.P.S.C. held the written test and held viva voce and published the list. Accordingly appointment orders were issued to the selected candidates in the year 2001 in respect of the three categories of executive posts referred to above. However, aggrieved by the action of the authorities in withdrawing the Asst. Section Officers posts challenge was made before the tribunal in O.A.No.7443 of 2004. the Tribunal by an Order dated 21.12.2002 directed the A.P.P.S.C. to make selection of the candidates to 141 Asst. Section Officers posts for consequential appointment by the Government. In pursuance of the said directions, the candidates, who were in order of merit in the written test were selected and they were appointed in 2002. Up to this stage we describe as first round selection. However, aggrieved by the order of the Tribunal, in so far as it relates to non-filling up of posts under remaining executive category, Writ Petitions were filed in W.P.No.2868 of 2002 and 2904 of 2002. This Court by an order dated 8.7.2003 disposed of the Writ Petitions with the following directions:

"(a) The Government shall assess the vacancy position in respect of the posts covered

by Notification NO.10/1999 as on 30.8.2002 and fill up the same by candidates who were selected by A.P.P.S.C. duly observing the rule of reservation.

(b) The personnel who are to be deployed and adjusted from Surplus Main Power Cell have already been reflected in the Annexure and the total vacancy position was arrived at after giving credit to the number of persons deployed in the direct recruitment quota, however, if there is any surplus man power still unadjusted as on 30.8.2000, the Government shall work out the same and deploy those personnel and the appointment shall be made to the remaining vacancies.

(c) The persons who were promoted and posted on temporary basis or ad hoc basis in the vacancies earmarked for direct recruitment shall be reverted back to their original posts.

(d) The Government shall strictly observe the rule relating the ratio to be maintained between the direct recruits and promotees in accordance with the quota prescribed in the relevant Service Rules and neither excess intake shall be allowed to be crept in or the deficiency is allowed to persist except in exceptional or unavoidable circumstances.

(e) The entire exercise shall be done within a period of six months from the date of receipt of a copy of this Order."

In pursuance of the directions of this Court, the authorities assessed 973 vacancies in executive category and 193 vacancies in non-executive category. By this process, this became imperative for the A.P.P.S.C. to interview some more candidates in view of the additional recruitment to the posts as referred to above. However, A.P.P.S.C. entertained a doubt with regard to the preparation of the merit list as to whether one merit list has to be prepared. However, this Court while stating that no clarification was necessary, observed that only one merit list is required to be prepared in respect of the notification No.10 of 1999. Against the said clarificatory order, the matter was again carried before the Supreme Court in S.L.P. No.7772 of 2004 and the Supreme Court deleted the said portion.

4. A.P.P.S.C. started preparations for making selections, which we described second round selections to the posts referred to above and in that process, it revised the earlier selections so as to make the entire selections on the basis of one merit list. The said revision has the effect of distributing the position of the already appointed candidates in 2001 and 2002 in the posts of Asst. Municipal Commissioners, Asst. Commercial Tax Officers and Asst. Section Officers. Therefore, they filed O.A.No.3246 of 2004 and Batch challenging the action of the A.P.P.S.C. in recruiting them to above posts dislocating selections made earlier. Some of the O.As. were also filed questioning the selections

on the ground that they should not have been selected for the posts for which they have not given the options. While admitting the batch of O.As., the tribunal granted the following order:

> "Having regard to the facts and circumstances, the respondents are directed to maintain status quo as it obtains today with respect to the applicants shall be maintained pending disposal of the O.As."

5. Another batch of O.As. came to be filed in O.A.No.3427 of 2004 and Bach contending that while selecting the candidates, the procedure prescribed in G.O.Ms.No.124 GAD dated 7.3.2003 amending G.O.Ms. No.763 should have been followed and the same having not been followed, the selections are liable to be set aside. Yet, another set of O.As. were filed questioning the action of A.P.P.S.C. for considering their cases for the posts of which nil option/no options were given. In one of the O.A. No.3768 of 2004, challenge was made to the selections on the ground that no reservation was made for Physically Handicapped (hereinafter called "PHC"). It is in contravention of rule 22 of A.P. State and Subordinate Rules.

6. After hearing the learned counsel for the petitioners and also the counsel for A.P.P.S.C. and the learned Advocate General, the tribunal framed the following issues for consideration:

> "(i) Whether the impugned selections made by the A.P.P.S.C. call for any interference on the ground that the selections were made by following a single merit list resulting in upsetting the earlier selections and appointments made in 2001/2002?
>
> (ii) Even if the selections made based on single merit list do not call for any interference, are the applicants in (1) O.A.No.3426/2004, (2) O.A.No.3328/2004, (3) O.A.No.3329/2004 and (4) O.A.No.3351/2004 entitled to claim that their earlier selections cannot be unsettled on the ground that the A.P.P.S.C. has awarded interview marks indiscriminately in the interviews held in 2004?
>
> (iii) Whether the impugned selections made by the A.P.P.S.C. call for any interference as it had not followed the procedure prescribed in G.O.Ms.No.124, GAD, dated 7.3.2002 while making selections and also on the ground that rule of reservation in favour of local candidates and reservation as required under Rule 22 of the General Rules was not followed.
>
> (iv) Whether the impugned selections call for interference on the ground that rule of reservation in favour of P.H.C. persons was not followed while making selections?
>
> (v) Whether the impugned selections made by A.P.P.S.C. call for any interference on the ground that it had selected certain candidates to posts for which they have not given their preference or indicated 'Nil' in the proforma supplied to the candidates.

(vi) Whether the applicants in O.A.No.3979 and O.A.No.3765 of 2004 are entitled for any direction to the A.P.P.S.C. to consider their cases for selection against B.C. (C) vacancies in Zone-VI notified in Advertisement No.10/1999?"

7. In respect of the first issue, the tribunal held that there was nothing irregular or illegal in A.P.P.S.C. making the selections based on single merit list even if results in upsetting the selections and appointment made in 2001/2002. With regard to the 2nd issue, the tribunal found that the A.P.P.S.C. had not awarded interview marks indiscriminately in the 2nd round of selections and thus answered the 2nd issue in the negative. With regard to the issue No. (iii), the tribunal followed its earlier judgment in O.A.No.562 of 2002 and Batch, dated 27.7.2002 and also for the other reasons recorded in the Order held that the selections made by the A.P.P.S.C. in 2001 without following the amendments issued to G.O.Ms.No.763, GAD, dated 15.11.1975 in G.O.Ms.No.124, dated 7.3.2002 cannot be sustained and consequently directed the A.P.P.S.C. to review the selection list by following the Presidential Order keeping in view G.O.Ms.No.124, dated 7.3.2002 and consequently it found it is not necessary to examine the issue as to whether 70 per cent in favour of local candidates and rule of reservation has to be correctly followed or not which could be examined by the A.P.P.S.C. at the time of review of the selection list as directed. With regard to issue No.(iv), the tribunal held that the selections without giving reservations to PHC persons cannot be said to be illegal and accordingly selections are not liable to be set aside. With regard to the issue No.(v), the tribunal held that there is no merit in the contention of the applicants and therefore, it was held against the applicants. With regard to issue No.(vi), it was held against the applicants. Accordingly, the tribunal disposed of the O.As. in accordance with the findings referred to above. Aggrieved by the Orders passed by the tribunal, the present batch of Writ Petitions have been filed.

8. Principally two important issues were argued by the learned counsel for the petitioners. Firstly, it is contended that the notification was issued in 1999 and the Rules relating to the recruitment as existed at the time of relevant time have to be followed. When once the selection process had commenced, even though the procedure rules are amended during the pendency of final selection, yet, amended rule cannot be implemented as it would tend to unsettle the settled situation. It is further contended that G.O.Ms.No.124 GAD dated 7.3.2002 has to be given prospective effect and it cannot be applied to on going selections. It is further urged that G.O.Ms.No.124 is contrary to the provisions contained in the Presidential Order and hence the appointments have to be only made on the basis of the rule position that existed prior to G.O.Ms.No.124. The learned counsel have greatly relied on the

judgment of the Supreme Court in N.T.Devin Katti V. Karnataka Public Service Commission. Even otherwise, it is contended that since some of the appointments were already made even prior to the issue of G.O.Ms.No.124, such of the appointments which have made prior to issuance of the said G.O. namely three category of posts i.e. Asst. Municipal Commissioners Grade-III (15 posts), Asst. Commercial Tax Officers (83) and Asst. Labour Officers (6) which were filled in 2001 and posts of Asst. Section Officers (141 posts) which were filled consequent on the direction of the tribunal in 2001 cannot be made applicable to them as by the date of issue of G.O.Ms.No.124, who were selected for the posts were started functioning in the said post. Therefore, if the process is reversed, it would certainly create administrative dislocation apart from causing prejudice to the service interest of the respective appointed candidates.

9. On the other hand, the learned Advocate General as also the learned Standing Counsel for the A.P.P.S.C. and submit that any amendment brought out is presumed to be prospective in effect unless it is specifically stipulated in the respective provisions, but, however, this rule will apply only in respect of the substantive right. In the case of amendment to the procedural law, it is always considered to be retrospective unless it is specifically stated contra. It is also submitted that the principles of interpretation of statutes will equally apply to the interpretation of the administrative Orders issued by the Government from time to time where the issue is not covered by any statutory provisions. Such executive Orders have been issued in exercise of the powers conferred under Article 165 of the Constitution of India and therefore, they yield the same force on par with the statute law. It is also submitted by virtue of the revision of the entire merit list to keep in conformity with the procedure as laid down in G.O.Ms.No.124 the candidates who were already appointed to the posts in 2001 and 2002 in first round selection have to be rescheduled and they will be relocated in the other eligible posts and in some cases they may not find place selected list also. Thus, the entire review of the appointments made in the first round was wholly unwarranted. At the most, review could be confined to the posts other than the posts for which the appointment was made in the first round.

10. Elaborate arguments were advanced by the learned counsel for the petitioners and also the learned counsel for the respondent with reference to the principle laid down by the Supreme Court, and the tribunal has meticulously considered these contentions.

11. The issue that calls for consideration is whether the procedural rules as issued in G.O.Ms.No.124 are retrospective in nature. If so, effect of rules on the process of selection undertaken by the A.P.P.S.C.

12. We need not dilate much on this subject with regard to the retrospective operation of the procedural laws. Right from Colonial Sugar Refining Company Ltd. Vs. Irving upto Shiva Shakti Cooperative Housing Society, Nagpur vs. Swaraj Developers, it is well settled that the statue relating to substantive right is presumed to be prospective, unless it is expressly or by necessary implication made to have retrospective effect. However, while statute concerning with the matters on procedure or evidence which is declaratory in nature is construed to be retrospective unless there is a clear indication that such is not the intention of the Legislature. The Supreme Court was categoric in laying down the principle that no person has a vested right in course of procedure. He has only the right of proceeding in the matter prescribed. If by a statute change, the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation. The Full bench of this Court in Motichand Jain v. M.Jaikumar after considering the copious case law on the subject observed as follows:

> "From the above, it is obvious that when a repeal of an enactment is followed by a fresh legislation, such legislation does not affect the substantive rights of the parties unless such legislation is retrospective. However, the position of law would be different when it relates to procedural law which is presumed to be retrospective unless it is otherwise provided for in the Act."

13. In the instant case, the recruitment is required to be confined to the procedure laid down in G.O.P.No.763 GAD dated 15.11.1975. The said G.O. was issued by the Government to meet the requirement under the A.P. Public Employment Organisation of Local Cadre and Regulation of Direct Recruitment Order, 1975 (hereinafter called the "Presidential Order") issued in G.O.Ms.No.674 dated 20.10.1975. The said G.O. contemplates recruitment of candidates under two type namely single unit i.e. single cadre recruitment and multi unit i.e. multi cadre recruitment. In these batches of cases, we are only concerned with the multiple cadre recruitment. The procedure for recruitment to multi cadre posts to be in tune with the Presidential Order. Para 4 is relevant which is extracted below:

> "4. Multiple cadre recruitment may take different forms especially in the implementation of the proposed Presidential Order on the organisation of local cadres. It may take the form of –
>
> (a) Recruitment to fill up the vacancies in a single category for different local cadres or different parts of the State (local areas) in one department e.g. recruitment of Clerks in the Judicial Department for Courts in the Districts undertaken by the Andhra Pradesh Public Service Commission.
>
> (b) Recruitment to fill up the vacancies in identical or different categories in different local cadres in different departments in one part of the State (a local area) e.g. recruitment to Group-IV services undertaken by the Collectors now.

(c) Recruitment to fill up the vacancies in different categories in different local cadres in different departments for different parts of the State (local areas) e.g. recruitment to Group-II Services undertaken by the Andhra Pradesh Public Service Commission."

14. With regard to the procedure to be followed in respect of the recruitment to the posts falling in multi cadre is set out in Annexure-III (clauses 3 to 9) to the Order, which is extracted below:

"3. The number of posts reserved in favour of local candidates in relation to the local are in respect of each category of posts in each of the local cadres shall be determined, this number in each case being the prescribed percentage, applicable to the relevant category of the vacant posts to be filled by direct recruitment in respect of that category any fraction of a post being counted as one; provided that there shall be at least be one post left unreserved in each such cadre.

4. Similarly, the number of posts reserved, if any, in favour of the members of the Scheduled Castes, Scheduled Tribes, Backward Classes, Physically Handicapped persons, etc. to be appointed in each of such local cadres shall also be separately ascertained.

5. From amongst all eligible applicants, whether such applicants are local candidates or not, a combined list to fill up all the available vacant post in all the local cadres put together shall be drawn up. This list shall be prepared on the basis of the relative merits of all eligible applicants.

6. The candidates in the combined merit list may in the order of merit be successively allotted to the cadre of their preference so long a such allotment does not violate the rule of special representation in General Rule 22 in Part II of the Andhra Pradesh State and Subordinate Service Rules providing for reservation in favour of the Scheduled Castes, Scheduled Tribes, Backward Classes and the, Andhra Pradesh Public Employment (Organisation of Local Cadres, and Regulation of Direct Recruitment) Order, 1975.

7. If such allotment violates the rule of special representation or the extent of preference to local candidates such candidate may be allotted to the cadre of his second or subsequent preference consistent with the rules of special representation and the extent of preference to local candidates in respect of each such cadre.

8. This process may be repeated until all the cadres are filled.

9. If in the process of such allotment a candidate in the combined merit list cannot be allotted to any cadre without violating the condition regarding preference to local candidates or communal reservation such candidate may be passed over."

However, as on the date of the notification and also on the date of the selection and appointment to the posts of three categories under first round selections referred to above and also Asst. Section Officer posts, it continued to be in vogue. But, however, a procedural change has been brought about initially vide G.O.Ms.No.8, dated 8.1.2002 covering the post under direct recruitment without reference to the procedure prescribed under Annexure-I to G.O.Ms.No.763, dated 15.11.1975. The said amendment reads as follows:

"3. Accordingly the following amendment is issued to the procedure prescribed in paras 3 and 4 of the Annexure I to the G.O.(P)No.763, General Administration (SPF.A) Department, dated 15th November, 1975.

4. In respect of the Annexures-II and III to the G.O. 3rd read above Order will be issued separately."

15. It is further stated that in respect of Annexures II and III, the procedural changes could be issued separately. Therefore, in pursuance of the said provision, G.O.Ms.No.124, dated 7.3.2002 was issued. The amended provision reads as follows:

"In the Annexure-II –

(i) for paragraphs 3 and 4, the following shall be substituted namely,

(3): xxxxx

(2)In the Annexure-III, for paragraph 3, the following shall be substituted, namely:

"3: The provisional list shall be divided into two parts. The first part shall comprise 40% of the posts consisting of combined merit lists of locals as well as non-locals and the remaining second part shall comprise the balance 60% of the posts consisting of locals only and the posts shall be filled duly following the rule of reservation."

Therefore, by virtue of the aforesaid provision, the provisional list shall be divided into two parts. The first part shall contain 40% of the posts of combined merit list, local and non-local and remaining 60% shall consist of only locals. Therefore, keeping in view the principle laid down by the Supreme Court in catena of decisions referred to above, it is beyond pale of controversy that G.O.Ms.No.124, dated 7.2.2003 has to be made applicable even to the ongoing process of recruitment as it is only an amendment to procedural aspect and it did not affect any substantive rights of any individual. It is sought to be contended that the amendment runs counter to the provisions of the Presidential Order in as much as, no provisional list is contemplated. Further, in respect of the multi cadre posts, 70% of posts shall be filled by direct recruitment comprised of only locals and 30% shall comprise of locals and non-locals and in case of specified Gazetted category 60% of posts shall be filled by direct recruitment from the locals and 40 percent by locals and non locals. This was given a go bye in the amendment and therefore, the amendment is illegal and hence the G.O. unenforceable as hit by the Presidential Order. It is true that the amendment as brought in G.O.Ms.No.124, substituting paragraph 3 in the Annexure-III of G.O.Ms.No.763, dated 15.11.1975 is not happily worded as rightly contended by the learned counsel for the respondents and some times lack of drafting skill also leads to confusion and chaotic state of affairs, but that does not mean that the entire provision has to be struck down.

It is well settled rule of construction that when two provisions do not go together, efforts must be made by the Courts to resort to harmonious interpretation so as to achieve the object sought to be reached by such amendment. Even if the literal interpretation is likely to lead absurdity, it is the more essential to ensure that the intendment of clause (8) of the Presidential Order has to be given appropriate interpretative meaning and the primary of the Presidential Order has to be kept upright. The difficulty arose because of the multiple cadre recruitment. In respect of the non-gazetted categories multi cadre, separate reservation is provided while in respect of the specified gazetted local cadre, separate reservations are provided and the reservations shall be in accordance with the clause (8) of the Presidential Order. Therefore, the procedure as contemplated under the amendment, is to first prepare the select list consisting of locals and non-locals and thereafter to prepare the 2nd list consisting of only locals. However these lists have to be carved out from the single merit list. But, the percentage has to be in tune with the para (8) which cannot be modified under any circumstances except by the Presidential Order itself. In fact, the A.P.P.S.C. have also while not stating openly that the amendment is incapable of being implemented in the wake of clause (8) of Presidential Order have stated that the mention of 60% has to be related to the relevant cadres in whose case, the local reservation is 60% as per para 8 of the Presidential order.

16. The Government in the counter in para 21 stated as follows:

> "That one of the grounds raised by the petitioners is that while THE Presidential Order mandates 70% reservation for local candidates, G.O.Ms.No.124, dated 7.3.2002 provides for 60% reservation for locals, meaning thereby there is violation of Presidential Order. A consolidated reading of G.O.(P) No.763, dated 15.11.1975 shows that Annexure-III deals with multiple cadre recruitment, meaning thereby that in one recruitment there can be seven cadres clubbed together for recruitment. Therefore, there can be cadres where local reservation is for 80% or 70% even 60% as contemplated under Para 8 of Presidential Order. Such mention of 60% has to be related to the relevant cadres in whose case the local reservation is 60% as per para 8 of the Presidential Order. Further, merely because there is a mention of 60% for locals, that cannot over-ride the Presidential Order and when there is conflict between the present G.O.Ms.No.124, dated 7.3.2002 and the Presidential Order, no doubt Presidential Order shall prevail and local candidates are entitled for such percentage as mentioned in Presidential Order and by such mention in G.O.Ms.No.124, dated 7.3.2002, the G.O. does not become illegal per se, as long as the Presidential Order takes care of the situation. What is important is that the Government has prescribed particular procedure and the same was only to protect the interests of local candidates which is the object of the Presidential Order. The said procedure is splitting the merit list into two parts was held legal and valid by the Tribunal while dealing with

> G.O.Ms.No.8, as affirmed by the High Court. As a matter of fact, the validity of G.O.Ms.No.124, dated 7.3.2002 did not fall for consideration before the Tribunal, it is not open for the petitioners to challenge the validity of G.O.Ms.No.124. What all that falls for consideration in the present Writ Petitions is whether G.O.Ms.No.124 can be made applicable for the present selection process or not, that is undertaken/to be undertaken by the Public Service Commission pursuant to Notification No.10/99. Once it is held that it has to be implemented for the reasons stated above, minor lapses/aberrations if any can be taken care by following the Presidential Order."

Under those circumstances, merely because there is reference of 60% reservation, the entire G.O. need not be struck down. But, in such circumstances, the situation has to be salvaged by giving meaningful and workable interpretation. Therefore, it has to be construed that as far as the procedural aspect is concerned, the amendment brought about a change. But, however, in respect of the reservations, it has to be read in conjunction with para 8 and the reservations as amended in para 8, only will govern the respective cadres. It is also to be noted in this regard that when G.O.Ms.No.8 bringing an amendment to Annexure-I of G.O.Ms.No.763, was brought making the reservation, 20% and 80% comprise of locals and non locals in the former percentage and only locals in the later percentage, it came to be challenged before the tribunal on the ground that when the ongoing selection process of D.S.C. 2001 for the Secondary Grade Teachers, School Teachers, Language Pandits, G.O.Ms. No.8 was brought into effect and that should not be applied to the ongoing process as it has prospective effect. The Tribunal in batch of O.As. O.A.No.562 of 2002 and Batch, dismissed the O.As. against which the batch of Writ Petitions were filed before the High Court. The Division Bench of this Court in W.P.No.15935 of 2002 upheld the Order of the tribunal and dismissed the writ petitions. Against the said Order, the matter was carried before the Supreme Court and the Supreme Court also dismissed the same. G.O.Ms.No.124 is accomplishment of balance portion in respect of Annexure-II and III. But, in the instant case, on going recruitment process related to Group-II posts, but the principle is one and the same. As regards reliance placed by the learned counsel for the petitioner on Devin Katti's case (1st cited supra), the tribunal has referred to the facts of this case and rightly held that the decision has no application to the facts of the case. The tribunal observed thus:

> "In the above cases, except in the case of N.T.Devinkatti v. Karnataka Public Service Commission, the Hon'ble Supreme Court/A.P. High Court/Punjab and Haryana High Court/Central Administrative Tribunal have considered the aspects relating to the rule of reservation/rule relating to qualification/rule relating to direct recruitment against temporary vacancies/rule relating to change in the ratio between direct recruits and promotees/ guidelines issued regarding teaching experience for recruitment to the post of Professor/ prescription of minimum marks for the written test/waiving of minimum marks in the P.G.

entrance which were prescribed in the prospectus/relation of qualifications notified in the advertisement/change in the marks allocated for pre-assessment and written test for admission to MCH course and held that the rules/guidelines as obtained on the date of notification/date of occurrence of vacancies should be the criterion. In the present case we are not concerned with the above aspects but with the aspect of the procedure to be followed for fulfilling the requirement of reservation in favour of local candidates. The facts of those cases have no application to the facts of the present case. However, in the case of Devinkatti, the Supreme Court considered the aspect relating to the change in the reservation policy and also the procedure to be followed for the purpose of implementing the rule of reservation. In that case, the Karnataka Public Service Commission notified the vacancies for recruitment to the post of Tahsildars. The Karnataka Public Service Commission issued a notification on 29.5.1975 inviting applications from in service candidates for recruitment to 50 posts of Tahsildars. In the notification the details relating to reservation in favour of S.Cs./S.Ts./and B.Cs. was notified. According to Rule 5 of the Rules governing the posts of Tahsildars. Rules 7 to 14 of Karnataka Recruitment of Gazetted Probationers Rules, 1966 shall apply in regard to the reservations in the matter of direct recruitment. According to Rule 10 of the 1966 rules, reservation for S.Cs./ S.Ts./and other B.Cs. would be as per the notification issue by the Government. Under the above Rule, the Government issued a notification on 9.6.1969 for reservation of 3% in favour of S.Cs./15% in favour of S.Ts. and 30% in favour of B.Cs. the notification also prescribed the procedure to be followed in the matter of reservation. The above notification was in force at the time of notification of vacancies. However, during the pendency of selection, the government have issued Orders dated 9.7.1975 revising the extent of reservation and also prescribing a different mode of selection. The Supreme Court held that as G.O. dated 9.7.1975 has been issued in exercise of statutory power, the Order acquires the statutory force and as para 11 of the G.O. dated 9.7.1975 saved the pending selections, where selections were already advertised and made, the selection has to be made based on the Government Orders issued on 6.9.1969 and not based on the Government Orders issued on 9.7.1975. Though, in the above case, the procedure to be followed for the purpose of making reservation feel for consideration, the Supreme Court took a view that the Orders issued by the Government on 9.7.1975 cannot be applied for that particular selection, as the G.O. issued revising the procedure to be followed clearly states that it is not applicable to cases where reservation has already been made and advertisements have been issued. In the present case, G.O.Ms.No.14, GAD, dated 7.3.2002 does not stipulate any condition that the above G.O. is not applicable to cases where vacancies have already been notified or where the process of selection is not completed. Therefore, the above judgment also has no applicable to the facts of the present case. As already pointed out above, the law relating to the retrospective effect procedural matters is well settled and the change in procedure brought out during the pendency of selections has to be applied to the selections which have not been finalised"

17. It is also brought to our notice, that the Government issued Memo No.42005/Ser.D/2002-1, dated 28.8.2002 clearly spelling out the procedure to be adopted. Paras 2 and 3 of the said Memo reads thus:

"2. Orders have been issued in G.O.Ms.No.8, General Administration (SPF-A)

Department, dated 8.1.2002, directing while filling up of the posts which are organized as District cadre posts, 20% of the posts shall be filled up first from the combined merit list of both local and non-local candidates and thereafter remaining 80% of the posts shall be filled up by local candidates only. It has also been directed. In the G.O. that while filling up of the posts, special representation provided in the A.P. State and Subordinate Service Rules, under Rule-22 shall be followed suitably. Where reservation in direct recruitment in favour of local candidates and open category is 70:30, the first 30% of the posts have to be filled up from the combined merit list of both local and open category (both local and non-local) candidates based on their overall merit and the communal roster. The remaining 70% of the posts have to be filled up only by local candidates based on their merit and communal roster point. The same principle has to be followed for specified gazetted category posts for which reservation in favour of local and open categories is provided in the ratio 60:40. Necessary Orders to this effect have been issued by General Administration (SPF-A) Department, in G.O. in the reference 2nd cited above.

3. Now, there is a reservation on two counts – one, communal reservation and another, in local candidate reservation. Both have to be integrated. In order to avoid mistakes by various Recruiting Authorities in filling up the posts by providing for reservation in favour of local and O.C. category candidates and for ensuring that reservation provided in Rule 22 of A.P. State and Subordinate Services Rules, a detailed example case of filling up of (39) posts of School Assistants is enclosed, as Annexure-Y. All the recruiting authorities are directed to follow the procedure while filling up the posts for which communal reservation and to all cadre reservation apply."

18. In view of the aforesaid discussions, we are of the considered view that the Order of the tribunal cannot be found fault with.

19. However, we required to answer one more issue in this regard. As we have already noticed that the notification was issued in 1999 and initially appointments were made only to three categories of posts as referred to above. When the posts of Asst. Section Officers in non-executive cadre were withdrawn and the Orders were challenged before the tribunal, the tribunal issued directions for filling up the above posts. Accordingly, Asst. Section Officer posts were also filled up. But, subsequently when the Orders of the tribunal were challenged, this Court in W.P.No.2868 of 2002 disposed of the writ petitions with the directions (extracted supra). In the meanwhile, the G.O.Ms.No.124 was issued bringing a change in the procedure. It is the case of the official respondents that the entire merit list has to be redrawn taking into account the performance of the candidates who were already appointed under first round selections and working in the respective posts and therefore, it became necessary to shift the candidates who were already appointed to some other posts depending on their merit ranking and performance and also the reservation rosters. The tribunal holding that G.O.Ms.No.124 has to

be implemented in toto, held that the entire list has to be redrawn and the candidates of first round selection must be reallotted and realigned. It is observed that by virtue of the realignment some of the person who were already appointed to the posts of Asst. Municipal Commissioner Grade-III, Asst. Commercial Tax Officers and Asst. Labour Officers are required to be reallotted to some other posts. Even though, one merit list is contemplated and preparation of such merit list cannot be held to be contrary to the provisions of the Presidential Order, but, yet, the situation cannot be unsettled when the matter became crystallised and the candidates were appointed and working for the two or three years. It is also brought to our notice that probation of some of the candidates were also declared and some of them were in the zone of consideration for further promotion.

20. Under these circumstances, the issue that falls for consideration is whether G.O.Ms.No.124 can also be applied to the appointments already made so as to ensure one merit list. It is also contended that some of the candidates who were appointed earlier had obtained higher merit ranking and on account of the filling up of those vacancies early, they were appointed in those vacancies, but had there been a common merit list, they would have got appointment to the posts carrying higher pay scales and brighter prospect. It is also further contended that some of the candidates were appointed to the posts to which they had not given any preference. The candidates, who were appointed, in pursuance of the first round selections cannot be allowed to raise the contention that they should be placed in higher merit list and allotted the posts carrying higher scales of pay. Having accepted the post, it is not permissible for them to resile simply because of the changed circumstances by virtue of the orders of this Court, they cannot be allowed to take advantage. It may be true that if the recruitment had taken place at one stretch, these difficulties would not have been arisen. But, on account of the inaction on the part of the Government, the tribunals and Courts have to pass orders intermittently.

21. Of course, the delays dislocate and tend to defeat the avowed purposes, but the law cannot be said to be without arms to stretch its hands to set right such deviational dislocations.

22. Under those circumstances, we find that disturbing the appointments already made in 2001 and 2002 under first round selection would entirely dislocate the selection process and more over, by the date of issue of G.O.Ms.No.124, the appointments were already made. Even though the process came to be again recommenced at the instance of the Orders of this Court. Therefore, we find that the appointments already made in the first round cannot be disturbed by redrawing the list, which were admittedly completed prior to G.O.Ms.No.124. We also do not agree with the contention that when

no preference was given to particular post, authorities ought not to have appointed to such posts. If such an appointment was made, it is open for the candidate concerned to refuse the appointment. But, it cannot be contended that they should be posted only in the post they gave preference.

23. Right to employment is not a fundamental right enshrined under Article 16 of the Constitution of India. A candidate on making an application acquires a right to be considered for appointment if he is otherwise qualified. A candidate on making an application for the post pursuant to the advertisement, does not acquire any vested right of selection. But, if he is eligible and otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire vested right to be considered for selection in accordance with the Rules as existed on the date of the advertisement. Even if the candidate is selected, he cannot have any fundamental rights to claim the appointment and it is always open for the appointing authority to appoint or not depending on the exigencies of the requirement. Merely because, a candidate is required to give preference, it does not mean that he should be appointed in the post for which he preferred. It is the prerogative of the Government to appoint him in any of the categories advertised. The expression of preference would only enable the Government to accommodate his choice of preference as far as possible. But, he does not carry any vested right merely because he has expressed his choice. Under those circumstances, while upholding the finding of the tribunal that the preparation of one merit list is not contrary to the Presidential Order, but we do not approve the direction of the tribunal to review the entire select list including the cases of the persons, who were appointed in the first round selections. However, if any fresh intake is made in the aforesaid three categories or the other cadre of Asst. Section Officers, it is open for the Government to fix inter se seniority among the first round appointees and 2nd round appointees keeping in view the merit ranking obtained in merit list.

24. It is also contended that the persons who were appointed in the first round selection would become seniors to the appointees under 2nd round of selections even though appointees under 2nd round are more meritorious. This Court is not inclined to adjudicate this matter. It is for the Government to take appropriate steps in this regard.

25. Another important contention sought to be raised by the learned counsel for the petitioner is that the physically handicapped persons are entitled for reservation as provided under rule 22 of A.P. State and Subordinate Service Rules. It is contended that in the Special Rules in respect of the certain category of posts, the rules did not provide reservation for PH persons. But, however, in 1996

amended A.P. State and Subordinate Services Rules came into force and therefore, the later rules will prevail over the special rules as the State and Subordinate Service Rules are later in point of time. The tribunal had considered this aspect and observed that the said Special Rules having noticed the provision contained in rule 1(d) of General Rules, wherein it has provided that if any provision of the rules are repugnant to the special rules applicable to any particular service in regard to any specific matter, the latter in respect of such service on such a specific rule prevail over the provisions of the General Rules. The tribunal observed as follows:

> "In the present case, General Rule 22(2) does not contain any words to show that this provision would apply to the provisions contained in special rules or it applies irrespective of what is provided in the special rules. There is also no material placed before us to show that the intention of the rule making authority is that reservation in favour of PHC candidates should be followed irrespective of the provision contained in special rules. Thus, the judgment of the Apex Court in the case of S.Prakash and another Vs. K.M.Kurean and Others reported in 1999(2) SLR 595 is not applicable to the facts of the present case. Apart from this it is also to be noted that the A.P.P.S.C. while issuing advertisement had notified that the rule of reservation in favour of PHC persons is subject to the provisions in the respective special rules. If the applicant is aggrieved by the notification, which stipulates that reservation in favour of physically handicapped candidates is subject to the provision of special rules and not according to Rule 22 of General Rules, he should have questioned the notification itself at the appropriate time. On the other hand, the applicant had subjected himself to process of selection and on the results being announced in which he did not come out successfully the applicant is questioning the selections made by the A.P.P.S.C. the applicant having appeared for the examination without protest, it is not open to the applicant to challenge the process of selection at this stage as held by the Apex Court in the case of Om Prakash Shukla vs. Akhilesh Kumar Shukla, reported in AIR 1986 S.C. 1043 and also as held by the Apex Court in the case of Madanlal and Others Vs. State of Jammu & Kashmir, reported in AIR 1995 S.C. 1088. Therefore, the contention on behalf of the applicant in O.A.No.3768 of 2004, that the impugned selections are liable to be set aside as the A.P.P.S.C. has not followed the rule of reservation in favour of PHC persons cannot be upheld. Issue No.(iv) is answered accordingly."

In as much as, the special rule does not provide any reservation, the same cannot be claimed as of right. We do not see any ground to hold that the finding of the tribunal is erroneous or contrary to law.

26. In view of our foregoing discussions, we record the following conclusions:

(a) The finding of the tribunal that the selection process has to be in accordance with the G.O.Ms.No.124, dated 8.8.2002 cannot be said to be erroneous or contrary to law.

(b) But, however, the direction that the entire select list has to be reviewed clubbing the appointments under 1st round selection is not sustainable and accordingly the procedure as contemplated under G.O.Ms.No,.124 has to be followed only in respect of the candidates excluding the appointments already made in 2001 and 2002 namely, Asst. Municipal Commissioners Grade-III, Asst. Commercial Tax Officers, Asst. Labour Offices and Asst. Section Officers in non-executive cadre in view of the peculiar facts and circumstances of this case.

(c) The inter se seniority between the 1st round appointees and later inducted persons under second round selection in the same cadre if any shall be decided by the appropriate authority in accordance with rules, depending on the merit ranking obtained by them.

(d) The reservation of PHC category wherever it is not provided under the Special Rules cannot be claimed and hence the findings of the tribunal do not call for any interference.

27. We do hope that the process of selection would be completed expeditiously without further hurdles. Subject to the above conclusions, the writ petitions stand dismissed.

28. There shall be no order as to cost.

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IN THE ANDHRA PRADESH ADMINISTRATIVE TRIBUNAL AT HYDERABAD
O.A.NO.3067/2004 with MA.No.867/2005 and OA.776/2005
D.D. 21.10.2005
The Hon'ble Mr. Sudhender Kulkarni, Member (Judl.)

S.Siva Narayana Reddy & Ors. ... Applicant
Vs.
The State of A.P. & Ors. ... Respondents

Recruitment:

The Commission initiated recruitment to various categories under Group-II services pursuant to advertisement No.10/99 – When the recruitment process was going on certain candidates filed application before Tribunal seeking a direction to the respondents to compute the substantive vacancies in various categories under Group-II and fill up the posts by direct recruitment – Tribunal did not give any specific direction to fill up the vacancies while disposing of the applications – Aggrieved by the same writ petitioners were filed - Before the High Court statement was filed furnishing the information regarding vacancies – High Court has disposed of the cases giving various directions – The respondent did not notify the vacancies in compliance with High Court order – Therefore, these applications were filed – Tribunal has disposed of the applications with a direction to fill up the vacancies under Group-II pursuant to advertisement No.10/1999.

Held:

When the authorities are filling up the vacancies, to be filled in by promotees, they are bound to fill up the vacancies, meant for direct recruitment also.

ORDER

As the issue involved in these two O.As., is pertaining to appointment, in pursuance to the Andhra Pradesh Public Service Commission Notification No.10/99, for recruitment to various categories under Group-II Services, the matters were heard together and are being disposed of by a common order.

The applicants are unemployees. The A.P. Public Service Commission issued Advt.No.10/99, for recruitment to various categories, under Group-II Services. The applicants have responded to the notification and appeared for the examination. When the selection process was going on, certain candidates filed O.A.7443/2000 and batch, before this Tribunal, seeking a direction to the respondents, to compute the substantive vacancies, in various cadres, under Group-II services, in pursuance of the Notification NO.10/99 and to fill up the vacancies, by direct recruitment, by considering the claims of the applicants therein, as per the recruitment Rules. This Tribunal did come to a conclusion that, the

authorities are bound to fill up the vacancies, meant for direct recruitment, however, refused to grant specific direction and left it to the discretion of the respondent-authorities. Aggrieved by the same, W.P.Nos.2868 and 2904/02 were filed before the Hon'ble High Court. The Hon'ble High Court directed the authorities, to furnish the information, regarding the number of vacancies, to be filled in, by direct recruitment. When the Principal Secretaries were summoned, by the Hon'ble High Court, the respondents filed a statement therein, giving particulars regarding vacancies. The Hon'ble High Court, allowed the writ petitions giving various directions.

After the disposal of the Writ Petitions, the respondents willfully, did not notify all the vacancies. On receipt of the vacancy position, from the Government, A.P. Public Service Commission, furnished the information to the candidates, stating that, there are no vacancies of Deputy Tahsildars in Zones-II, III and IV, and, hence, only 16 vacancies were notified. In other zones also, the total number of vacancies notified are 35. In this regard, the applicants contend that, the earlier notification was issued, on 1.8.1990. This Tribunal in O.A.180/93 and batch, directed the authorities to take into account the vacancies, which arose, upto 23.9.1992, on the ground that, new Rules were issued on 24.9.1992, challenging the quota between direct recruitment and recruitment by transfer. Thus, the vacancies, which arose from 24.9.1992, are to be filled up, from the present Notification i.e., 10/99. After 1992, several vacancies arose. On account of promotion/ retirement and creation of new posts. In the year 1995, 540 new posts were created, in the category of Deputy Tahsildars, on 16.3.1996, about 1100 Deputy Tahsildas were promoted as Tahsildars. On these two occasions, there are more than 1600 vacancies arose in the cadre of Deputy Tahsildars. In addition to these, several promotions were made, every year from the category of Deputy Tahsildars to Tahsildars. All those vacancies have to be filled in, only by promotion, at least. If 1600 vacancies are taken into account, direct recruits are entitled for 480 vacancies as 30% is earmarked for direct recruitment.

The applicants further submit that, in the cadre of Excise Sub-Inspectors, the respondent-authorities informed the Hon'ble High Court that, there are 237 vacancies. However, only 138 vacancies were notified. In Zone-IV, only 25 posts were notified, whereas the Commissioner of Prohibition and Excise, in his letter CR.No.15640/2000/CPE/H1, dated 17.1.2001, informed the 1st respondent that, there are 57 vacancies in Zone-IV. The same were not notified. Further, pending direct recruitment, the Commissioner of Prohibition and Excise, issued proceedings dated 23.9.2000, permitting the Deputy Commissioners of Prohibition and Excise to fill up the vacancies of Prohibition and Excise

Inspectors, meant for direct recruits, by way of promotion, on incharge basis. The Deputy Commissioner of Prohibition and Excise, Kurnool issued proceedings dated 27.9.2000, for filling up the vacancies of Prohibition and Excise Inspectors, on incharge basis. In Anantapur District, 33 Excise Head Constables/Junior Assistants, were made incharge Prohibition and Excise Sub-Inspectors, in the vacancies, meant for direct recruitment. Thus, there are large number of vacancies in the cadre of Prohibition and Excise Sub-Inspectors, not only in Zone-IV, but in all zones in the entire State. The respondents are not filling up all the vacancies for the reasons best known to them.

In regard to the applicants, contention that, there are vacancies in the cadre of Executive Officers (Panchayat Raj) in Zones-III, IV, V and VI and only 21 vacancies were notified, earlier recruitment took place, in pursuant to the notification, issued in the year 1990, several posts are existing, the Division Bench of the Hon'ble High Court, has rejected the contention of the respondents that, they have right not to fill the vacancies. When the authorities are filling up the vacancies, to be filled in by promotees, they are bound to fill up the vacancies, meant for direct recruitment also. Further, the applicants contend that, it is not the case of the respondents that, the posts were abolished or vacancies were kept vacant by not filling them. Therefore, they are seeking a direction to the respondents to fill up all the vacancies in pursuance to the Advt.No.10/99.

In response to the notices, the 5th respondent i.e., the Chief Commissioner of Land Administration has filed a common counter affidavit in both the cases. In the counter, it is contended as follows:

> "the Government in G.O. Ms. No.440, Revenue Dept., dated 15.9.1995 upgraded (550) posts of Head Assistants to those of DTs and 30% of (550) comes to (165) posts only. The substantive vacancies were included when Collectors have given information in the prescribed proforma. Further on account of up-gradation of Mandal, as many as (805) Mandals were upgraded. Consequently the Tahsildars were acting as Mandal Revenue Officers instead of Deputy Tahsildars. In 1995 those who are appointed through APPSC as PDT, out of (386) only (104) DTs are promoted as Tahsildars as on 30.12.2000 i.e., after the cut off date 31.8.2000 issued by the APPSC. Further it is submitted that every year whenever promotions, retirements is effected the substantive vacancies are taken into account i.e., which are in existence for more than 5 years. After the recruitment of 8/90 in the year 1995 no further recruitment was made by the APPSC except this notification 10/99 notified on 15.1.2000 and called for the vacancy position. Accordingly the reports were called for from all Collectors in the State. In view of certain "in consistencies" in the figures furnished by some of the Collectors, the information available in this office has been taken into consideration. Based on the information furnished by the Collectors the information in prescribed proforma regarding the No. of substantive posts as per explanation 1 to Rule 4 of APS&SS Rules, 1996 has been posted in Col.No.4, 30% of

substantive vacancies i.e., quota meant for direct recruitment is posted in Col.No.5. Hence, the vacancy to be notified has to be restricted to 30% quota from total No. of substantive posts as shown in Col.No.10. the figures reported in last column are the vacancies meant for direct recruitment No. of PDTs working against those posts and balance to be recruited is arrived at 215 vacancies as on 30.4.2002. That is the position as on the date also there are no promotions to the cadre of Tahsildas. The last panel of Pro. Dy. Tahsildars promoted as Tahsildars on 30.12.2000 after the cut date 30.8.2000 as called for by the APPSC. A detailed statement is furnished herewith for kind perusal.

In view of all the above factors the total substantive posts is worked out and from this figure, already recruited figure is deducted and the balance figure is reported as the existing vacancies for the purpose of Notification. This is the procedure following and being followed.

The Information received from all Collectors regarding No. of substantive vacancies arose from 01.09.1995 to 30.4.2002 is worked out to as follows:

1.	No. of substantive posts including upgrading of Head Clerks DTs in 1995 and promotion of DTs to Tahsildar during 1995 to 30.4.2002	1555
2.	30% of the substantive posts	460
3.	Out of substantive posts PDTs working up to 30.4.02	245
4.	Balance of vacancies of DTS as on 30.4.02	215
5.	Last panel of PDTs promoted as Tahsildars as 30.12.2000.	104
6.	The vacancy position as on 31.8.2000 informed to the APPSC. It is respectfully submitted that the above said information was submitted to the Government vide this office Ref.No.X4/411/2002 dated 01.09.2003.It is respectfully submitted that the district wise vacancy position as ascertained from the Collectors is as follows. But due to inconsistency in the figure furnished by some of the Collectors, the information available in this office has been taken into consideration as above.	
	30% substantive vacancies	326
	Vacancies filled up by direct recruitment It is respectfully submitted that no further recruitment has been made by the APPSC between the period from 1995 to 1999. Hence year wise vacancy position is not readily available in this office for submitting to the Hon'ble Tribunal as called for in the order of OA.No.3067/2004 and 776/2005 dated 16.3.2005. But Zone wise and district wise information is furnished herewith in a statement. Further information regarding the details of year wise particulars will be submitted to the Hon'ble Tribunal within 25 days as we have already addressed to all the Collectors vide CCLA's ref No.X4/411/2002 dated 28.3.2005".	93

Heard both sides and perused the material papers, placed on record.

The Hon'ble High Court, while allowing the Writ Petitions had issued the following directions in W.P.Nos.2868 to 2904/2002, dated 8.7.2003:

"a. That the Government shall assess the vacancy position in respect of the posts covered by the Notification No.10 of 1999 as on 30.6.2002 and fill up the same by the candidates, who are selected by the Andhra Pradesh Public Service Commission duly observing the rules of reservation.

b. The personnel, who are to be deployed and adjusted from the surplus manpower Cell have already been reflected in the Annexure and the total vacancy position was arrived at after giving credit to the number of personnel deployed in the direct recruitment quota. However, if there is any surplus manpower still unadjusted as on 30.8.2000, the Government shall work out the same and deploy those persons and the appointments shall be made to the remaining vacancies.

c. The persons, who were promoted and posted on temporary basis or adhoc basis in the vacancies earmarked for direct recruitees shall be reverted back to their original posts.

d. The Government shall strictly observe the rule relating to the ratio to be maintained between the direct recruitees and the promotees in accordance with the quota prescribed in the relevant Service Rules and neither excess intake shall be allowed to be crept in nor the deficiency is allowed to persist except in exceptional or unavoidable circumstances.

e. The entire exercise shall be done within a period of six months from the date of receipt of a copy of this order.

f. It is also desirable that the Government takes appropriate and expeditious action to fill up the balance direct recruitment posts other than those which are notified under Notification No.10 of 1999 which arose after 30.8.2000 in the posts covered by Notification NO.10 of 1999 and other posts not covered by the notification which continued to be unfilled for several years at the earliest possible time.

g. The Government shall undertake review of vacancies every year and fill up the posts meant for direct recruitment in accordance with the rules so as to maintain the ratio under the relevant Service Rules."

In accordance with the aforesaid decisions, the respondent-Government was duty bound to assess the vacancy position, in respect of posts covered by Notification No.10/99 as on 30.8.2000 issued by the A.P. Public Service Commission. There is a further direction that the Government shall strictly observe Rule relating to the ratio to be maintained between direct recruits and promotees, in accordance with the quota prescribed in the relevant Service Rules. The directions were to be carried out within a time bound period 6 months. The respondents ought to have taken steps to calculate the substantive vacancies to be filled in pursuance of the Notification No.10/99. the complaint is that, the respondents have not notified all the existing substantive vacancies in the Group-II Services.

When the matter is taken up for hearing, the learned Government Pleader has placed before this Tribunal, the information relating to the vacancy position as given by the Commissioner of Prohibition and Excise, vide CR.No.12305/2004/CPE/III, dated 3.3.2005, which indicate that, there are vacancies of Sub-Inspectors of Excise as on the cut off date indicated in the Notification No.10/99 in Zone-IV. Further, as per the data furnished in the counter affidavit, there are certain vacancies of Deputy Tahsildars in the various Zones. As the information furnished by the respondents was hazy, this Tribunal, by their orders, directed the respondents to be present before this Tribunal. The order passed by the Tribunal is to the following effect:

> "In regard to the calculation of number of vacancies, year-wise number of vacancies should be arrived at under different modes such as, retired, dismissed, died, promoted to the next higher category. Total number arrived under the above different modes, temporary posts existing at the commencement of the year, number of temporary posts converted to substantive vacancies, total substantive vacancies available, temporary vacancies created during the year, temporary posts discontinued, temporary vacancies in existence at the end of the year. The respondents are directed to furnish the above information also in a tabular form as mentioned above in respect of all the Zones by 28.3.2005. In case, the information as indicated above in the prescribed form is not furnished by the respondents, the respondents shall appear in persons before this Court on 6.4.2005."

In spite of the aforesaid orders, the respondents did not furnish the correct information. They filed an application for dispensing with from the presence of the respondents in the Court. In the said Petition, the respondents have stated that, year wise vacancy position is not readily available, in the office, but the zone wise and district wise information furnished along with the counter affidavit and sought 25 days time to furnish the same. As he has addressed a letter on 28.3.2005, the matter was adjourned from time to time till date. No information is forthcoming from the respondents.

It is seen that, as per the information and letter dated 3.3.2005 it is stated that, there are 57 vacancies available for recruitment, in so far as Zone-IV is concerned. It is further stated that, only 25 posts were notified, vide Notification No.10/99. The balance vacancies were subsequently notified in the Notification No.10/40, the 31 vacancies have to be filled up only, pursuant to the Notification No.10/99. Thus, as per the information, the 31 vacancies notified in Advt. No.10/04 are to be deleted and to be added to the Notification No.10/99.

The Hon'ble High Court, while allowing the Writ Petition Nos.2868 to 2904/02 had given ample time to the respondents, to calculate the vacancies and to fill up. More than 2 years have elapsed, the

respondents have not taken any steps to fill up the vacancies, which, per se, appears to be arbitrary. Further, in spite of series of directions from this Tribunal, in these O.As., the respondents have not taken any steps to calculate the vacancies. In fact, to arrive at specific decision, this Tribunal by orders dated 9.2.2005 has sought information. In spite of this, the respondents have not furnished the information.

As far as the posts of Deputy Tahsildars are concerned, according to the calculation made by the applicants, they are entitled for 480 vacancies i.e. 30% and they submit that, there are quite a good number of vacancies in various other categories also. In the absence of any positive information from the respondents, there is no other course open for this Tribunal, except, to draw adverse inference against the respondents.

The applicants in O.A.3067/2004 have filed M.A.867/05 seeking a direction to the respondents to delete 31 vacancies of Prohibition and Excise Sub-Inspectors from Notification No.10/04 and as the said vacancies in the Notification No.10/99.

Having regard to the facts and circumstances obtained in this case, the O.As., are disposed of, with a direction to the respondents to fill up all the vacancies in Group-II Services, pursuant to the Advt. No.10/99, in the cadre of Deputy Tahsildars, Prohibition and Excise Sub-Inspectors, Executive Officer (PR), Extension Officers, Rural Development and consider the claim of the applicants, if they come within the zone of consideration, as per their merit. With these directions, the O.As., are disposed of. In view of disposal of the main O.As., M.A., also stands disposed of.

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IN THE HIGH COURT OF JUDICATURE OF ANDHRA PRADESH AT HYDERABAD
(Special Original Jurisdiction)
Taken up Writ Petition No.6223 of 2006
D.D. 27.4.2006
Hon'ble Mr. Justice J.Chelameswar &
Hon'ble Mr. Justice M.Venkateswara Reddy

Magapu Ravi Kiran & Ors. ... Petitioners
And:
The A.P.P.S.C. & Ors. ... Respondents

Reservation under PH category:

Implementation of the Persons with Disabilities (Equal opportunities, protection of rights and full participation) Act, 1995

Recruitment (Direct) – Group-I Services Advertisement No.21/2003 – Writ petition was taken up by the Hon'ble High Court on the basis of representation made to Hon'ble Chief Justice by certain disable persons on 27.3.2006 - Hon'ble High Court, while appreciating, the difficulty in employing either orthopedic or visually disabled in Police & Fire services, expressed the views that they do not perceive any difficulty in extending the benefit to Hearing Impaired - In the circumstances declared that the State is bound to provide reservation in accordance with the terms of Disabilities Act - Even while recruiting personnel to Fire & Police Services for the eligible candidates from hearing handicapped – The writ petition was disposed accordingly.

Held:

While appreciating the difficulty in employing either orthopedic or visually disabled in Police and Fire Services, the Court does not perceive any difficulty in extending the benefit to hearing impaired.

ORDER

(Per Hon'ble Sri. Justice J.Chelameswar)

This writ petition is taken up by this Court on the basis of the representation received by the Hon'ble the Chief Justice on 27-03-2006.

The complaint in the representation is that in the ongoing recruitment process to Group-I Services undertaken by the State, no provision is made for reserving posts in favour the "persons with disabilities", which is mandatory requirement under an Act of Parliament titled "Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995" (for short 'the Act').

The last direct recruitment to Group-I posts in the State of Andhra Pradesh took place sometime in the year 1998 i.e., approximately two years after coming into force of the above mentioned Act. The complaint is, even at that time of time the letter of the law was not given effect to by the State.

The present recruitment process commenced in the year 2003 and remained incomplete in view of the pendency of litigation either before this Court or the Andhra Pradesh Administrative Tribunal. No clear steps are taken by the State for giving effect to the provisions of the above mentioned Act.

In the circumstances, when the matter was taken up earlier on 28.3.2006 and subsequently on 21.4.2006, this Court passed orders calling upon the State to examine the issue and take a clear stand.

It is brought to the notice of this Court that various rules framed by the State in exercise of power under Article 309 of the Constitution of Indian constituting various services and prescribing their service conditions etc., excluded such opportunity in some of the departments and, therefore, when the recruitment process commenced way back in the year 2003, the notification did not contain a specific mention as to the availability of reservation in favour of the physically challenged persons though Rule 22 of the A.P. State and Subordinate Service Rules prescribes that there should be reservation in favour of physically handicapped persons in the matter of employment under the State.

In view of the fact that the Act is an enactment of the Parliament referable to the power under Article 253 of the Constitution of India, pursuant to a treaty obligation incurred by the country at Beijing in 1992, the decision taken by the State Government in exercise of power under Article 309 of the Constitution of India to exclude the opportunity to the physically challenged persons in certain categories of employment prior to the date of the commencement of the above mentioned Act stood overruled by the mandate of the Parliament. Under Section 33 of the Act, not less than 3% of available opportunities in employment in every "establishment" (a defined expression under the Act under Section 2(k)) be made available to the "persons with disabilities" of various categories enumerated in the sub section. However, the above mentioned enactment under Section 33 proviso recognizes the need to exclude the operation of the Act in some of the areas of the employment under the State and enables the State take a positive decision to make an exclusion, on an appropriate examination of the issue. Further, Section 13 of the Act contemplates the constitution of a coordination Committee, the composition of which is detailed thereunder providing for representation of the various interested groups including the persons with disabilities. Section 13 of the Act reads as follows:

> State Co-ordination Committee:- (1) Every State Government shall, by notification, constitute a body to be known as the State Co-ordination Committee to exercise the powers conferred on, and to perform the function assigned to it, under this Act.

(2) The State Co-ordination Committee shall consist of,-

(a) The Minister-in-charge of the Department of Social Welfare in the State Government, Chairperson, ex-officio;

(b) The Minister of State in charge of the Department of Social Welfare if any, Vice-Chairperson, ex.officio;

(c) Secretaries to the State Government in charge of the Departments of Welfare, Education, Woman and Child Development, Expenditure, Personnel Training and Public Grievances, Health, Rural Development, Industrial Development, Urban Affairs and Employment, Science and Technology, Public Enterprises, by whatever name called, Members, ex officio;

(d) Secretary of any other Department which the State Government considers necessary, Member, ex officio;

(e) Chairman Bureau of Public Enterprises (by whatever name called) Member, ex officio;

(f) Five persons, as far as practicable, being persons with disabilities, to represent non-Governmental organizations or associations which are concerned with disabilities, to be nominated by the State Government, one from each area of disability, Members;

Provided that while nominating persons under this clause, the State Government shall nominate at least one woman and one person belonging to Scheduled Castes or Scheduled Tribes;

(g) three Members of State Legislature, of whom two shall be elected by the Legislative Assembly and one by the Legislative Council, if any;

(h) three persons to be nominated by that State Government to present agriculture, industry or trade or any other interest, which in the opinion of State Government ought to be represented, Members, ex officio;

(i) the Commissioner, Member, ex officio;

(j) Secretary to the State Government dealing with the welfare of the handicapped, Member-Secretary, ex officio;

(3) Notwithstanding anything contained in this section, no State Coordination Committee shall be constituted for a Union territory and in relation to a Union Territory, the Central

Co-ordination Committee shall exercise the functions and perform the functions of a State Co-ordination Committee for the Union territory:

Provided that in relation to a Union territory, the Central Co-ordination may delegate all or any of its powers and functions under this sub-section to such person or body of persons as the Central Government may specify.

Under Section 18 of the Act such Coordination Committee shall serve as "the state focal point on disability matters and facilitate the continuous evolution of a comprehensive policy towards solving the problems faced by persons with disabilities". One of the duties of such Committee is to advise the State Government on the formulation of policies, programmes, legislation and projects with respect to disability.

It appears from the record as placed by the State that though a Committee contemplated under Section 13 was constituted by G.O. Rt.No.434, Women Development, Child Welfare & Disabled Welfare (DW) Department, dated 27.10.2001, the various other groups contemplated under Section 13 more particularly persons with disabilities were not made members of the said Committee. Therefore, the utility of the Committee stood considerably reduced.

It is in this background we though it fit when the matter was heard on 21.4.2006 to direct the Government to examine the issue and take an appropriate decision as to whether the benefits conferred under the above mentioned Act would be made available in the context of the ongoing recruitment process to Group-I Services to the State of Andhra Pradesh and if so, to what extent they would be made available.

Pursuant to the said direction, the State of Andhra Pradesh once again constituted a committee consisting of 10 Secretaries of various departments of the State of Andhra Pradesh to examine the issue in G.O.Ms.No12, Women Development, Child Welfare & Disabled Welfare (DW) Department, dated 20.4.2006.

When the matter is taken up today, the learned Advocate General placed before the Court the minutes of the meeting of the said Committee. It is stated by the learned Advocate General that of the 17 departments where Group-I Services are available and recruitment process is going on, 8 departments have already provided for reservation in favour of the physically challenged persons, as

contemplated under the Act and insofar as the remaining 9 departments are concerned, the various rules framed under Article 309 of the Constitution of India prior to the Act, positively excluded reservation for physically challenged persons. He further submitted that in view of the directions of this Court dated 21.4.2006, the Committee constituted under G.O.Ms.No.12 examined the issue and came to the conclusion that except in the departments indicated in the minutes of the meeting, in the matter of employment under the State of Andhra Pradesh in the various departments the benefit of the Act would be extended.

According to the minutes, the Transport department, Home, Revenue, Commercial Taxes are sought to be excluded from the purview of the operation of the above mentioned Act.

With reference to the other 5 departments of the 9 departments referred to earlier to which recruitment to Group-I Services is being conducted and the existing rules are either silent or exclude the benefit of reservation in favour of physically challenged persons. The learned Advocate General submitted that the State has taken a decision, though not expressed in a formal document as on today, to extend the benefit of the Act, except to the Group-I posts connected with the departments of Transport, Home (Police and Prisons), Revenue (Prohibition and Excise) and Commercial Taxes.

Considerable debate took place on the rationale behind the exclusion of the above-mentioned departments, the details of which may not be possible to be given at this juncture due to paucity of time. We are prima facie of the opinion that the decision of the Committee in seeking to totally exclude the benefit conferred under the Act to the Group-I posts under Transport and Commercial Taxes Department is irrational. Such exclusion insofar as such benefit pertains to the persons with hearing impairment is not justified. The question whether the exclusion of these benefits in these departments insofar as the other categories of impairment is a matter that is required to be examined and we defer the consideration in that regard.

We, therefore, for the time being direct the State to constitute a State Coordination Committee contemplated under Section 13 of the Act, strictly in accordance with the mandate of Section 13 of the Act, giving due representation to the persons with disabilities as contemplated under Section 13(2)(f) of the Act and also giving representation for either of the head of the department or a nominee of the head of the department who has field experience and who would be in a better position to appreciate the disadvantages if any in recruiting the physically challenged persons of any one of the categories,

and take a final decision regarding the exclusion of the benefits of the Act with reference to any one of the services under the State in consultation with the Committee to be constituted as indicated above.

We are also of the opinion having regard to the nature of the decision making process involved and the importance of the Committee to be constituted under Section 13 of the Act Sri. K.Balagopal and Smt. N.Sumalini Reddy, the learned counsel, who are assisting the Court in this matter be nominated in the Committee to be constituted under Section 13 of the Act,

In view of the fact that the recruitment process to Group-I Services is pending for the last 3 years, we deem it appropriate to direct the State:

(1) to implement the principle of reservation in favour of physically challenged persons in all the departments where the recruitment process is going on, except the Departments of Home (Police and Prisons) and Revenue (Prohibition & Excise);

(2) Insofar as the Transport and Commercial Taxes Departments are concerned, we direct the State to extend the benefit of 1% reservation in favour of candidates of hearing impairment; and

(3) Insofar as the Department of Cooperation is concerned, the Committee constituted under G.O.Ms.12 has already recommended for implementation of the Act in favour of the orthopedic impairment category candidates.

Insofar as the other categories of impairment are concerned, as already indicated, the consideration is deferred.

We are of the opinion having regard to the nature of the duties of the Group-I Officers of Cooperation Department, even the category of hearing impairment candidates cannot be excluded with any justification. We, therefore, direct that both the above mentioned categories must be provided reservation in the Cooperation Department.

The learned Advocate General made a categoric statement that after an appropriate consideration by the State after constituting the Coordination Committee, if a conclusion is reached by the State that the benefit given under the Act is to be extended in the Departments of Transport, Home (Police and Prisons) and Revenue (Prohibition and Excise) also, the State undertakes to create necessary posts for accommodating such candidates.

One more aspect of the matter is that even with regard to the last direct recruitment to Group-I posts, the provisions of the Act were not fully implemented. Section 36 of the Act reads as follows:

> **Vacancies not filled up to be carried forward**:- Where in any recruitment year any vacancy under Section 33, cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:
>
> Provided that if the nature of vacancies in an establishment is such that a given category of person can not be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government.

Under Section 36 of the Act, if the benefit of the Act is not given in any recruitment year, the same is required to be carried forward to the next recruitment year, the State is, therefore, directed to examine as to what should have been the number of posts filled up in the recruitment year that took place in the year 1998 (i.e., previous recruitment year) insofar as Group-I posts are concerned and provide that many posts as and when an appropriate recruitment process is taken up pursuant to this order.

It is also made clear the availability of the opportunity in favour of any one of the categories indicated above is subject to the availability of the roster point as indicated under Rule 22 of the State and Subordinate Service Rules earmarked for the physically challenged persons concerned in the on going recruitment process.

The direction insofar as the constitution of the Committee under Section 13 of the Act and a further direction to take up a decision as to the need to exclude the operation of the Act with reference to any one of the Group-I posts, is required to be taken by the State within a period of 14 weeks from today. Insofar as the on going recruitment process is concerned, the State and the Andhra Pradesh Public Service Commission shall take appropriate steps to provide the opportunity in favour of the physically challenged persons in the various departments in terms of the order passed today.

Post the matter for further orders on 12.9.2006.

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14.9.2006:

Pursuant to the order dated 13.9.2006, the matter is again listed today under the caption "for orders". When the matter is taken up, the learned Government Pleader Sri. J.Sudheer representing the learned Advocate General on instructions stated the Committee contemplated under Section 13 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is not yet constituted. However, according to the learned Government Pleader prompt action was taken on the order dated 27.4.2006. According to the learned Government Pleader, the said 'prompt' action is endless correspondence within the Government. In fact a note, basically meant for the information of the Advocate General, signed by the Secretary to the Government, WD, CW & DW Department, is placed before the Court. It reads as follows:

"ACTION TAKEN ON RECONSTITUTION OF STATE COORDINATE COMMITTEE AS PER PERSONS WITH DISABILITIES ACT, 1995

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Commissioner, Disabled Welfare has furnished proposal in his letter dt. 22.4.2006 to the Government to reconstitute the State Coordination Committee under Section 13(1) of the Persons with Disabilities Act, 1995. The file was circulated to C.S. (27.4.2006)/ Minister, School Education & WDCW&DW (29.4.2006). Again, the same day, file was resubmitted to the Minister with a request to nominate 2 MLAs to the State Coordination Committee as per the provisions of the Act. Accordingly, Hon'ble Minister indicated 3 names of MLAs on the same day and sent to C.M. for approval of constitution of the State Coordination Committee. While the file was with C.M. for consideration circulation was interrupted and file recalled on 1.7.2006 from C.M's office. This was done to take action on A.P. High Court orders regarding inclusion of 2 counsels Sri. K.Balagopal and Smt. N.Sumalini Reddy. The matter was examined within the department as to the exact provision of thirteen under which learned counsels could be appointed to the State Coordination Committee. While the issue was being deliberated, it was noticed that there is discrepancy in the procedure followed in regard to nomination of MLAs etc. The provisions of the Act u/s 13(2)(g) where 2 MLAs and 1 MLC are to be members of the State Coordination Committee mentions that "3 members of State Legislature of whom two shall be elected by the Legislative Assembly and one by the Legislative Council. It was felt that these 3 members should have to be elected by Legislative Assembly, and not nominated by Government.

The Law Department's advice was sought for on the following on 20.7.2006.

1) Whether this presumption is correct, if so, the process to be adopted by the department for obtaining the names from Legislative Assembly;

2) Also, since Legislative Council is not yet constituted, where 3 members could be elected by the Legislative Assembly (Instead of 2 from Legislative Assembly and 1 from Legislative Council)

The Law Dept. have observed that under section 13(2)(g) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, 3 members of State Legislature of whom, two shall be elected by the Legislative Assembly and one by the Legislative Council, if any, to the State Coordination Committee. Therefore, it is clear that selection of three members of state Legislature is only by election from among the members of the Legislative Assembly, but not by nomination by Government. As the Legislative Council is not yet constituted, three members can be elected by the Legislative Assembly. File was received back in this department on 29.7.2006. Accordingly, a decision was taken to address the Secretary, A.P. Legislative Assembly to furnish 3 names of MLAs elected by Legislative Assembly for appointment as members of State Coordination Committee on 5.8.2006 and accordingly Secretary, A.P. Legislative Assembly on 8.8.2006.

Secretary, State Legislature replied on 16.8.2006 to send a notice of motion (in duplicate) from M (SE, WDCW&DW) for furnishing names of the 3 MLAs, (date of receipt of that letter is not readily traceable, as it seems to have come along with the business papers from Assembly).

However, prompt action was taken and orders obtained from M(SE, WDCW&DW) on the draft motion on 26.8.2006 and Secretary, A.P. Legislative Assembly was addressed on 28.8.2006. The Assembly session was about to end on 31.8.2006 and the Secretariat of Legislature was not able to accommodate this department request in view of pendency of predecided agenda items.

Action for reconstitution of State Coordination Committee is pending at this stage at present names of 3 MLAs are expected from Assembly by early next session.

Sd/-
(Vasudha Mishra)
Secretary to Government,
WD, CW&DW Department."

Two aspects require notice from the said note. Section 13(g) requires three Members of State Legislature to be elected by the Legislature for the purpose of being the members of the Committee contemplated under Section 13. Initially, the respondents were of the opinion that the three members of the Assembly could be nominated by the concerned Minister "Again, the same day, file was resubmitted to the Minister with a request to nominate 2 MLAs...". The vague details of the movement of the said file up and down the corridors of the Secretariat are indicated in the note. Much later, somebody in the process noticed that the procedure that was followed was discrepant. As the law required such members of the Legislative Assembly to be elected for the purpose of Section 13 of the Act, such members could not be nominated. When such a realization dawned upon it was quickly followed by another doubt; Section 13(g) requires three members of the State Legislature to be

elected by the Legislature for the purpose of being members of the Committee, it further states, that of the three members of State Legislature, of whom two shall be elected by the Legislative Assembly and one by the Legislative Council. Though the language of 13(g) leaves no doubt or gives scope for any doubt regarding the one member to be elected by the Legislative Council as 13(g) specifies one member be elected by the Legislative Council, if any. The fact is that the State of Andhra Pradesh at present has no Legislative Council. Therefore, the question of one member to be elected by the Legislative Council to be a member of the Committee under Section 13 does not arise, for the obvious reason that the law does not expect impossible to be performed. None the less, the respondents entertained a doubt that what is to be done in the matter. The queries were once again sent to the Law Department. The Law Department pined in the absence of the Legislative Council, all the three legislators are to be elected by the Legislative Assembly. In the whole process, precious three months time was spent and on 5.8.2006, the Government decided to address the Secretary to the A.P. State Legislature to furnish the names of three MLAs elected by the Legislative Assembly for appointment as members of the Coordination Committee under Section 13. The actual communication is made on 8.8.2006. The Secretary to the Legislature, it appears, replied on 16.8.2006 raised further queries. The result is that neither the legislators could be elected as Members of the Committee under Section 13 nor the government took any steps to constitute a Committee contemplated under Section 13 of the Act notwithstanding the 10 year old mandate of the Parliament and a reminder by this Court by its order dated 27.4.2006.

Apart from that the whole exercise to constitute a Committee is of the purpose of facilitating the continuous evaluation and a comprehensive policy towards solving the problems faced by the persons with disabilities. The authority granted to the State Government in the present context to exclude from the purview of the operation of the Act in a department of establishment either subject to or without any condition is necessarily a policy decision to be taken on rational grounds and by virtue of the scheme of the Act and more particularly, the language of Section 18 such a decision could only be taken after appropriate deliberation by the Coordination Committee constituted under Section 13. In ignorance of the scheme of the Act, the respondents continue to make declarations that in certain departments the reservations cannot be implemented having regard to the nature of the work to be carried out by the department. The language of the Act does not permit any such exercise of the power by the State unilaterally. Such a decision is required to be taken only in accordance with law as indicated above.

In substance, notwithstanding the assertion of the State "prompt action was taken", this court is of the opinion that it was only pretension of action and no action was taken pursuant to the orders of this Court dated 27.4.2006.

The other aspect of the matter though this Court specifically directed on 27.4.2006 to identify the backlog vacancies i.e., the vacancies which ought to have been filled up by persons with disabilities in the earlier recruitment process to Group I Services held in the year 1998, no exercise in this regard was undertaken.

This Court indicated in the order dated 27.4.2006 that the matter be posted "for further orders" obviously with the hope that the directions issued on that day would be complied with within a reasonable time, the matter was directed to be listed after14 weeks for further orders. As noticed earlier, no concrete step has been taken in the last 14 weeks for the implementation of the order. In the normal course, it would be sufficient to ensure appropriate action under law for failure to comply with the orders of this Court. However, the learned Advocate General requested that the matter be taken on 19.9.2006 for the State to take appropriate steps to report compliance with the orders of this Court dated 27.4.2006. We are of the opinion that eventually the implementation of the law, which this Court should desire and the respondents seek some time to implement the law. We do not wish to decline the request. Registry is directed to list the matter for orders on 19.9.2006 for "further orders".

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26.4.2007:

In an order dated 25.11.2006, we noted the objection of the State to provide for the benefit of reservation envisaged under the Persons with Disabilities (Equal Opportunities, Protection of rights and full participation) Act, 1995 (for short 'the Act'), to the Group-I posts in the Home Department, and we also noted that whether such an objection is rational or not is a matter to be examined. By an earlier order dated 27.2.2006, we directed the State to constitute a Committee as envisaged under Section 13 of the Act, which under the scheme of the Act, is the appropriate body to guide the State and facilitate continuous evaluation of a comprehensive policy towards solving the problems faced by the persons with disabilities as mandated by the Parliament. The State took its own time for constituting the said Committee. In view of the heavy resistance by the Home Department in extending the benefit of the said Act to the personnel in the Police Department and Department of Fire Services, we opine that it would be appropriate for the above mentioned Committee to examine the full details and implications for extending or not extending the benefits under the above mentioned Act in the matter of recruitment of personnel in the abovementioned two departments.

Though the Committee is constituted, the Committee so far has not taken any decision in this regard and we are informed by the State and also by the Advocate-members of the said Committee that the issue is deferred by the Committee in its last meeting held on 26.2.2006. In the circumstances, the only inference we can draw is that the respondents have no interest in extending the benefits under the abovementioned Act, to the disabled insofar as the posts in the abovementioned two departments. Obviously, the respondents ignored the urgency of the matter and also the fact that it is a taken up writ petition specifically in the context of recruitment to the Group-I posts. The recruitment process, though commenced quite a few years back, the respondents could not give any valid reason before the Court for excluding the operation of the Act insofar as the recruitment to the abovementioned two departments are concerned.

We do understand the difficulty in employing persons with disability either orthopedic or visual either in the Police Services or in the Fire Services. However, we are not able to perceive any difficulty in extending the said benefit insofar as hearing impaired category is concerned, nor does the state place any material on record to dispel our opinion with reference to the hearing impaired category.

In these circumstances, we declare that the respondents are bound to provide reservation in accordance with the terms of the abovementioned Act even while recruiting personnel to the Fire and

Police Services for the eligible candidates of hearing impaired category.

With the above directions, we deem it appropriate to dispose of the writ petition.

The writ petition is, therefore, disposed of accordingly.

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IN THE ANDHRA PRADESH ADMINSITRATIVE TRIBUNAL AT HYDERABAD
O.A.NOS.60, 1330 OF 2006 AND 7273 AND 7480 OF 2005
D.D. 11.9.2006
Hon'ble Shri Y.V.Rama Krishna, Vice Chairman (Judicial) &
Hon'ble Mr. N.K.Narasimha Rao (Administrative Member)

Ch. Sashidhar Reddy & Others ... Applicants
Vs.
The Govt. of A.P. & Others ... Respondents

Recruitment:

Whether mandamus can be issued to notify all vacant posts intended for direct recruitment? - No

Recruitment of Group-II Services Advertisement No.10/2004 – OA is filed praying the Tribunal to direct the respondents to compute the substantive vacancies under direct recruitment quota meant for Group-II Services, Advt. No.10/2004.

Tribunal held that under Rule 10 of A.P. State and Subordinate Service Rules, the appointing authority is empowered if it is necessary in the public interest to emergently fill up a vacancy if a post borne on the cadre of service, class, temporarily either by direct recruitment or promotion or appointment by transfer - That is only a temporary measure - The appointing authorities cannot be prevented to exercise that option - When the applicants have no fundamental right for appointment, they have no locus standi to question the power of appointing authorities to take temporary measures as envisaged under Rule 10 of A.P. State and Subordinate Service Rules.

Hon'ble Court viewed that no mandamus can be given to the respondents to notify all the vacant posts intended for direct recruitment as on the date of notification and fill the same.

Held:

No mandamus can be issued to the Appointing Authority (Government) to notify all vacant posts intended for direct recruitment as on the date of the notification and fill the same.

ORDER

In all these applications common questions of fact and law are involved. So, they are grouped and heard together. A brief account of the pleadings are the following:

2. OA No.60 of 2006

All these applicants are aspiring appointment by direct recruitment for Group-II Services of the State which is notified in Advertisement No.10 of 2004 by the Andhra Pradesh Public Service Commission. All the vacancies up to the date of Notification No.10 of 2004 for Group-II services were not notified in spite of the directions by this Tribunal in OA No.7443 of 2000 and batch and the

Hon'ble High Court in WP No.2868 of 2000 and batch. Though the Courts have been holding that the direct recruitment should be periodically conducted in accordance with the rules, the respondents are floating the law and avoiding direct recruitment. Whenever a Notification is issued for direct recruitment all the vacancies available up to the date of Notification are not being notified. Therefore, the applicants are deprived of their rightful opportunity for consideration of their cases for direct recruitment. The respondents have restricted and notified the number of vacancies available up to 2004 only. The State cannot deprive the fundamental right guaranteed under Article 16(1) of the Constitution of India to the citizens. The respondents are filling up the posts meant for direct recruitment by promotions which were meant for direct recruitment. It is reliably learnt that there are 131 Deputy Tahsildar vacancies; 12 Municipal Commissioner, Grade-III; 108 Assistant Commercial Tax Officer and more than 20 vacancies in the Endowment, Hand-loom and Textile Departments are available for direct recruitment up to 10.8.2004. all these things are suppressed by the respondents contra to the directions of the Hon'ble High Court and this Tribunal.

3. O.A. No.1330 of 2006:

This OA is also filed by the unemployees for the same relief. They state, inter alia, that 200 more vacancies of Deputy Tahsildars are available which are to be included though only 3 vacancies were notified and 250 vacancies of Sub-Registrars are there and only 24 vacancies are notified. 20 vacancies were withdrawn and that the respondents are not notifying all the vacancies meant for direct recruitment.

4. O.A.Nos.7273 and 7480 of 2005:

This OA was also filled by unemployees who are competing for Group-II posts notified by the Andhra Pradesh Public Service Commission under advertisement No.10 of 2004. They also raised similar pleas.

5. The contentions of the State in al these O.As. are practically common and they run as follows:

The Government notified 663 vacancies under Group-II services; executive and non-executive in August, 2004. Subsequently, the Government notified 318 more vacancies on 17.5.2006 keeping in view the requirement and financial position of the State and the details of the posts notified are stated in the Counter affidavit. The Hon'ble Supreme Court in SLP (C) No.23566-67 of 2003 dated 24.3.2006 considered the judgment of the Hon'ble High Court regarding review of vacancies every year by the Government and direction to fill up the posts meant for direct recruitment. The Hon'ble Supreme Court has held that it is for the State Government to notify the vacancies keeping in view the

work load and the financial implication for filling up the posts. The Government examined the proposals furnished by the Departments as per the procedure laid down under GO.Ms.No.275, Finance, dated 14.12.2005 and keeping in view the critical nature of the vacancies of various categories and also the financial position of the State. In accordance with it, the Government notified 981 vacancies under Group-II services and accordingly the Andhra Pradesh Public Service Commission notified the vacancies in Notification No.10 of 2004. The Government notified 1183 posts under Group-II services based on the directions of the Hon'ble High Court and the vacancies furnished by the Departments. Subsequently the Government reviewed the vacancy position in respect of direct recruitment in all the categories in all the Departments by June, 2004 and issued Notification No.10 of 2004 keeping in view the financial position. The applicants cannot challenge the same.

6. The Andhra Pradesh Public Service Commission filed counter affidavit stating that they have no role to play in Notification of the number of vacancies and they only follow the number of vacancies furnished by the State. So, the Andhra Pradesh Public Service Commission is not a necessary party to the O.As.

7. Now the points for consideration are as follows:

1. Whether the State is bound to notify all the vacancies meant for direct recruitment in Group-II services by the date of Notification?

2. Whether the applicants are entitled for the reliefs prayed for?

Now I consider the above points.

Point No.1:

The Andhra Pradesh Public Service Commission issued a Notification No.10 of 2004 in the month of August, 2004 to fill up 663 vacancies in respect of Group-II services; both executive and non-executive. Subsequently, the Government have notified 318 vacancies under Group-II services under the head of Non-executive on 17.5.2006, the final break up of the notified posts is as follows:

Sl.No.	Name of the Post	No.of posts Notified
	Group-II	
	Executive Posts	
1.	Municipal Commissioner Grade-III	3
2.	Deputy Tahsildars	3
3.	Cooperative Sub-Registrars in A.P. Co-op.	4
4.	Excise Sub-Inspector	208
	Total (Executive)	218
	Non-Executive	
5	Auditor in A.P.P.A.O. Sub service	40
6.	Senior Accountant in A.P. Treasuries	328
7.	Senior Auditor in A.P. Local Fund & Audit	20
8.	Assistant Section Officer (Fin.) Dept.	7
9.	Assistant Section Officer (GAD)	78
10.	Assistant Auditor in AP PAO	10
11.	Junior Accountant in DTA Sub.Ser	140
12.	Junior Assistants	140
	Total (Non-Executive)	763
	Grand Total	981

9. The Government was facing a major problem of management of surplus man power. Besides that, the Heads of the Departments and Officers were sending requisitions to the Andhra Pradesh Public Service Commission for recruiting bye-passing the Government. So, the Government issued instructions to overcome the situation. As the trend was not arrested, the Government issued GO.Ms.No.275, Finance & Planning, dated 14.12.1995 prescribing the procedure to be followed for sending requisition either to the Andhra Pradesh Public Service Commission or to the District Employment Officers. It is appropriate to extract the said GO as it is not lengthy.

> "It has come to the notice of the Government that some of the Heads of Departments and Offices are sending requisitions to Andhra Pradesh Public Service Commission even though there are no clear vacancies or there are surplus manpower available in the Government. This perfunctory requisitions sent by the Departments and Offices is resulting in over-manning and accentuating the problem of surplus manpower in the Government. In spite of the instructions from time to time that any vacancy to be filled up through Andhra Pradesh Public Service Commission or through any other recruitment agency or from Employment Exchange must be made only after taking the clearance from the Surplus Manpower Cell in the Finance and Planning (Finance Wing) Department for twin cities and the District Collector in the Districts, the non-observance of the instruction is still continuing in good many cases.
>
> 2. It is, therefore, no felt necessary that all departments and offices for every kind of post whether full time of part-time, contingent or any other category must necessarily send the requisition to the Government in the Finance and Planning (Finance Wing)

Department. The Government in the Finance and Planning (Finance Wing) Department will verify whether the vacancies in the reported category could be filled up from the available surplus manpower and in the event of non-availability or suitable candidate it will be the responsibility of the Government in the Finance and Planning (Finance Wing) Department to issue required requisitions to the Andhra Pradesh Public Service Commission or to relevant Recruitment Agency/Special Selection Board or to the District Employment Exchange for sponsoring candidates to be appointed. In the case of Offices and Officers located in the Districts such requisitions must be sent to the Finance and Planning (Finance Wing) Department only after getting the clearance from the concerned District Collector that no suitable candidates are available in the Surplus Manpower Cell of the District in the concerned category.

3. The Secretary, Andhra Pradesh Public Service Commission, Chairman, Police Service Recruitment Board, District Selection Committees, A.P. College Service Commission and all other Recruiting Bodies/Committees of all Departments of the Government are requested not to accept any requisitions for any vacancies unless it is received from the Government in the Finance and Planning (Finance Wing) Department.

4. These orders do not apply to High Court, Subordinate Courts and Andhra Praesh Administrative Tribunal.

5. This order will come into force with immediate effect."

10. As per the said procedure after receipt of the requisitions from the various Departments, the Finance Department scrutinizes the proposals taking into account the necessity to fill up the surplus manpower available and the finances of the State and sends a Notification to the Andhra Pradesh Public Service Commission to notify the vacancies and to take recruitment process. The requisition will be sent for direct recruitment as per the General Rules (AP State & Subordinate Service Rules) and special rules applicable to respective services and subject to the reservation regarding communal categories.

11. When the Andhra Pradesh Public Service Commission issued Notification No.10 of 1999 on 28.12.1999 for recruitment of various posts under Group-II services for direct recruitment, both for executive and non executive posts, the aspiring candidates filed Oa.No.7446 of 2000 and batch questioning the inaction of the State for not notifying all the vacancies meant for direct recruitment. The said OA.No.7448 of 2000 and batch was disposed of by a common order dated 21.11.2001. This Tribunal directed the government to take up recruitment process at the earliest after the surplus man power was adjusted and notify the balance of vacancies due to be filled up by direct recruitment by not making any promotions to the posts of earmarked for direct recruitment. The Tribunal refused to give directions to the Government regarding the vacancies that ought to have been filled up through

direct recruitment in major categories of posts. Aggrieved by the said order some of the applicants filed W.P.Nos.2868 of 2002 and 2904 of 2002 before the Hon'ble High Court of Judicature of Andhra Pradesh. The Division bench of the Hon'ble High Court by common order dated 8.7.2003 disposed of the Writ Petitions by issuing the following directions.

"a. That the Government shall assess the vacancy position in respect of the posts covered by the Notification No.10 of 1999 as on 30.6.2002 and fill up the same by the candidates, who are selected by the Andhra Pradesh Public Service Commission duly observing the rules of reservation.

b. The personnel, who are to be deployed and adjusted from the surplus manpower Cell have already been reflected in the Annexure and the total vacancy position was arrived at after giving credit to the number of personnel deployed in the direct recruitment quota. However, if there is any surplus manpower still unadjusted as on 30.8.2000, the Government shall work out the same and deploy those persons and the appointments shall be made to the remaining vacancies.

c. The persons, who were promoted and posted on temporary basis or adhoc basis in the vacancies earmarked for direct recruitees shall be reverted back to their original posts.

d. The Government shall strictly observe the rule relating to the ratio to be maintained between the direct recruitees and the promotees in accordance with the quota prescribed in the relevant Service Rules and neither excess intake shall be allowed to be crept in nor the deficiency is allowed to persist except in exceptional or unavoidable circumstances.

e. The entire exercise shall be done within a period of six months from the date of receipt of a copy of this order.

f. It is also desirable that the Government take appropriate and expeditious action to fill up the balance direct recruitment posts other than those which are notified under Notification No.10 of 1999 which arose after 30.8.2000 in the posts covered by Notification NO.10 of 1999 and other posts not covered by the notification which continued to be unfilled for several years at the earliest possible time.

g. The Government shall undertake review of vacancies every year and fill up the posts meant for direct recruitment in accordance with the rules so as to maintain the ratio under the relevant Service Rules."

12. As against the said order the State preferred the Civil Appeal No.1781 of 2006 before the Hon'ble Supreme Court of India. The said Civil Appeal was disposed of by the Hon'ble Supreme Court by order dated 24.3.2006 order of the Hon'ble Supreme Court reads as follows:

"Leave granted.

The appellants herein are aggrieved by and dissatisfied with the two directions issued by the High Court which are as under:

"f. It is also desirable that the Government take appropriate and expeditious action to fill up the balance direct recruitment posts other than those which are notified under Notification No.10 of 1999 which arose after 30.8.2000 in the posts covered by Notification NO.10 of 1999 and other posts not covered by the notification which continued to be unfilled for several years at the earliest possible time.

g. The Government shall undertake review of vacancies every year and fill up the posts meant for direct recruitment in accordance with the rules so as to maintain the ratio under the relevant Service Rules."

Learned counsel appearing on behalf of the appellants brings to our notice that so far as relief (f) is concerned, the same has been complied wherefor our attention has been drawn to an additional affidavit filed on behalf of the appellants wherein it has been stated that pursuant to the policy of the State several notifications have been issued, the details whereof have been stated in para 8 thereto. In view of the said notification issued by the State, the relief (f) granted by the High Court stood substantially complied with and as such to that extent the impugned judgment need not be interfered with by us.

However, so far as relief (g) granted by the High Court is concerned, we are of the opinion that the same is wholly unsustainable. It is now well settled that it is for the State to fill up the posts. No writ in the nature of Mandamus can be issued directing the State to fill up the posts. As and when, however, posts are filled up, the same must be done in accordance with the Rules. We are, therefore, of the opinion that the impugned direction as contained in para (g) aforementioned cannot be sustained and the same is set aside accordingly. The appeal is disposed of on the above terms."

13. In the light of the above order of the Hon'ble Supreme Court, the direction under relief (g) stood set aside. It is also clear that the State cannot be compelled by way of mandamus to fill up the posts. Therefore, it is clear that when vacancies are there, how many vacancies have to be filled up is a matter of policy of the State. State takes a policy decision depending upon various considerations like management of surplus manpower and especially economy measures in the light of the financial position of the State and priorities in the allotment of finances etc. This Tribunal cannot sit in judgment over the policy decision of the State. In the counter affidavit filed on behalf of the State it is clearly stated that taking into account the financial implications, the Government has taken a decision to fill up the posts which are notified only. In the light of the judgment of the Hon'ble Supreme Court stated supra which is directly on the point, it is not necessary to dwell further deep into the matter by citing authorities.

14. Therefore, it is not necessary to further probe into the matter so as to find out how many vacancies are available by the relevant date which are meant for direct recruitment in various departments.

15. Therefore, the contention of the applicants that if all the vacant posts meant for direct recruitment are notified, they will have better chances of selection, does not carry any weight as no fundamental right is violated.

16. The another contention of the applicants is that the State cannot adopt double standards and the conduct of the State in not filling up the posts meant for direct recruitment by taking shelter under financial constrains and at the same time filling these posts by promotions amounts to fraud on quota rule system and to dilute it. This contention is seemingly attractive. But, on a deeper consideration of the matter it loses its face value. Under Rule 10 of AP State & Subordinate Service Rules the appointing authority is empowered if it is necessary in the public interest to emergently fill up a vacancy in a post borne on the cadre of a service, class or category, temporarily either by direct recruitment or by promotion or by appointment by transfer. So, that is only a temporary measure. The appointing authorities cannot be prevented to exercise that option. When the applicants have no fundamental right for appointment they have no locus standi to question the power of appointing authority to take temporary measures as envisaged under Rule 10 of AP State & Subordinate Service Rules.

Point No.2:

Therefore, viewed from any angle and in the light of the decision of the Hon'ble Supreme Court cited supra, no mandamus can be given to the respondents to notify all the vacant posts intended for direct recruitment as on the date of Notification and fill the same. Therefore, we do not find any merits in these applications and the applications are dismissed.

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.4121/2006
(Arising out of SLP (C) No.6789/2006)
D.D. 14.9.2006
Hon'ble Mr. Justice S.B. Sinha &
Hon'ble Mr. Justice Dalveer Bhandari

Pitta Naveen Kumar & Ors. ... Appellants
Vs.
Raja Narasaiah Zangiti & Ors. ... Respondents

WITH
Civil Appeal Nos.4131, 4130, 4132 of 2006
[Arising out of SLP (Civil) Nos.6516, 7016 & 8275 of 2006]

Recruitment:

Whether eligibility criteria can be reduced contrary to the Rules? - No

Group-I Services, Advertisement No.21/2003 & 6/2004 – The recruitment process comprises the Preliminary Examination followed by Main Examination and Oral Test – The ratio for admission to Main Exam is 50 times the vacancies as per G.O.570, dated: 31.12.1997 – The dispute was that there are more number of vacancies than notified and the Tribunal, in anticipation of vacancies, set the cut of marks as 61 marks without assessing the probable number of candidates who may be admitted to the Main Exam – By this method the number of candidates admitted to Main Exam exceeded the ratio 1:50 – The Hon'ble Supreme Court of India held that any person who falls beyond the ratio of 1:50 is not qualified for the Main Exam – The validity of other G.O. 164 relaxing the age and G.O. 133 fixing the date of reckoning the Education qualification issued during the process of recruitment were upheld.

Held:

Government Order dated 30.4.2005 reducing the qualifying marks from 66 to 61 to allow more candidates for the main examination which violated the norm of 1:5 for admitting the candidates for main examination under the rules is invalid. Relaxation can be given only if there exists any provision therefor in the Rules.

Cases referred:

1. (1985) 3 SCC 721 – Umesh Chandra Shukla v. Union of India and Others
2. (1990) 3 SCC 157 – N.T.Devin Katti v. Karnataka Public Service Commission & Ors.
3. 1993 Supp (2) SCC 611 – Ashok Kumar Sharma & Anr. v. Chander Shekar & Anr.
4. 1993 Supp (4) SCC 377 - Mr. P.P. Rao on Hoshiar Singh v. State of Haryana & Ors.
5. (1999) 5 SCC 180 - Union Public Service Commission v. Gaurav Dwivedi and Others
6. (2000) 7 SCC 561 - Suraj Parkash Gupta and Others v. State of J&K and Others
7. (2001) 10 SCC 51 - Maharashtra State Road Transport Corpn. And Others v. Rajendra Bhimrao Mandve and Others

8. (2004) 5 SCC 618 - Saurabh Chaudri (Dr.) v. Union of India
9. 2006 (6) SCALE 588 - Kuldeep Singh v. Govt. of NCT of Delhi

JUDGMENT

S.B.Sinha, J.

Leave granted in the S.L.Ps.

The State of Andhra Pradesh notified 301 vacancies by a notification bearing No.21 of 2003 dated 21.11.2003 in respect of the following six categories of Group 1 services:

(i) Deputy Collectors in A.P. Civil Service (Executive Branch)

(ii) Commercial Tax Officers in A.P. Commercial Tax Service

(iii) Deputy Superintendent of Police (Category-2) in A.P. Police Service

(iv) Regional Transport Officers in the A.P. Transport Service

(v) Assistant Prohibition and Excise Superintendents in A.P. Excise Service

(vi) Mandal Parishad Development Officer in A.P. Panchayat Raj Rural Development Service.

For filling up of the vacancies so notified, the Andhra Pradesh Public Service Commission (for short "the Commission") issued a notification on or about 21.11.2003 inviting applications from candidates eligible therefor. The salient features of the recruitment process are as under:

(i) Recruitment was to be made to vacancies notified only.

(ii) Recruitment was to be processed as per the notification and GOMs No.570 dated 31.12.1997 and instructions issued by the State from time to time.

(iii) The candidates were to possess the essential qualifications specified therefor as on the date of notification.

(iv) The minimum and maximum age specified for the post were to be reckoned as on 1.7.2003.

(v) The applicants were to be subjected to a Screening Test (Objective Type) for admission in the Main (Written) Exam. The candidates who obtained the minimum qualifying marks in the written examination were to be called for interview in the ratio 1:2 with reference to the number of vacancies.

Procedure for filling up of the vacancies was laid down in GOMs No.570 dated 31.12.1997 in terms whereof the number of candidates to be admitted to the written examination was to be 50 times the total number of vacancies available at the material time. On or about 10.12.2003, 18 more vacancies were notified, totalling 319 vacancies. 1,52,000 candidates including the Appellants herein submitted their applications in response to the said notification. Yet again, 31 posts were declared vacant on or about 1.1.2004.

A Preliminary Examination was conducted by the Commission on 28.3.2004.

Thereafter an Original Application was filed before the Andhra Pradesh Administrative Tribunal by some candidates being OA No.1708 of 2004 inter alia for a declaration that notification of vacancies in nine categories of posts only instead and place of twenty categories in Group I services was illegal. By an interim order dated 16.4.2004, it was directed:

> "Having regard to these facts and circumstances of the case, there shall be a direction to the respondents to compute and calculate the vacancies pertaining to various categories of posts under Group-I services and notifying the same to the APPSC pending disposal of the OA."

A notification was issued being GOMs No.164 on 6.7.2004 fixing 1.7.1999, instead of 1.7.2003 as originally stipulated, as the relevant date for fixing the upper age limit for candidates eligible to appear at the examination.

The Commission there after issued a supplemental notification being No.6 of 2004 on 7.8.2004 inviting applications for filling up of 170 additional vacancies stipulating:

(i) The candidates who were eligible but failed to appear in response to notification No.21 dated 13.11.2003 may apply in response to supplementary notification.

(ii) The candidates who had appeared in screening test held on 28.3.2004 in response to notification No.21 of 2003 should not apply again.

A second preliminary test thereafter was held on 10.10.2004 for about 51,768 candidates who had applied in response to the said supplemental examination. The Commission upon holding the said preliminary test released a list of 28,865 candidates stating that the marks obtained by the last candidate admitted into the main examination was 66% which was arrived at in terms of the ratio of 1:2 stipulated in the rules of selection. The said list was prepared with reference to 524 notified vacancies as on 7.8.2004 which included 223 vacancies notified after the issue of the initial notification for 301 vacancies

on 21.11.2003 and upon taking into account the results of both the preliminary tests held on 28.3.2004 and 10.10.2004. Questioning inter alia the said action on the part of the Commission, some candidates who had not been admitted into the Main Examination filed an original application before the Tribunal which was numbered as OA No.26 of 2005 praying for the following directions to the Respondents:

(i) to compute the correct number of vacancies and notify the same before the main examination;

(ii) to declare that the petitioners therein are entitled to be called for the main examination after correctly computing the number of vacancies in the ratio of 1:50 (i.e. as on GOMs No.520).

An interim order was passed therein by the Tribunal on 6.1.2005 reducing the cut-off marks for appearing in the main examination from 66% to 61% on the premise "so that some opportunity is given to some more candidates to appear for main examination as some more posts are there not notified have to be considered."

An application for vacating the said interim order was filed by the candidates aggrieved thereby whereupon by an order dated 9.4.2005 it was directed:

> "..... it would be just and proper to direct the APPSC not to declare the result of the candidates who have been permitted to appear for group I main examination in terms of the interim orders of this Tribunal, pending further orders in the OAs."

The State of Andhra Pradesh, however, issued a Government Order bearing GOMs No.200 dated 30th April, 2005 purported to be terms of the directions of the Andhra Pradesh Administrative Tribunal, the relevant portion whereof reads as under:

> "In the circumstances, after careful consideration Government direct the Andhra Pradesh Public Service Commission to reduce the qualifying marks from 66 to 61 to allow more candidates for the main examination for recruitment to Group-I Services with reference to the Notification No.21/2003 and Supplemental Notification No.6/2004 in relaxation of the orders issued in the G.O. first read above."

The legality of the said Government Order came to be questioned by some of the parties herein in OA Nos. 3960 of 2005 and 5548 of 2005. During pendency of the said original applications before the Tribunal, the Main Written Examination was conducted by the Commission in the month of May/ June, 2005. Original Applications were dismissed by the Tribunal and consequently interim order dated 6.1.2005 stood vacated having regard to the decision of this Court in Union Public Service Commission v. Gaurav Dwivedi and Others [(1999) 5 SCC 180] stating:

(i) The Tribunal had no jurisdiction to interfere with the percentage of marks fixed by the Commission as cut off marks for enabling the candidates to appear for the main examination. Interim order dated 6.1.2005 and consequential GOMs No.200 issued by the Government has the effect of interfering with the cut off marks prescribed by the Commission which the Tribunal cannot do.

(ii) The interim order dated 6.1.2005 and GOMs has the effect of allowing 23,000 candidates who were otherwise ineligible to appear in the examination thereby causing prejudice to the candidates who were initially selected.

The Tribunal by reason of its order dated 30.1.2006 directed the Respondents to finalise the process of selection in accordance with GOMs No.570 dated 30.12.1997 for 543 posts instead of 524 posts and complete the entire process of selection within three months.

The State of Andhra Pradesh or the Commission did not question the correctness or otherwise of the said judgment. Respondent Nos.1 to 3, however, filed a writ petition before the High Court. Some other writ petitions were also filed inter alia questioning GOMs No.164 dated 6.7.2004 and GOMs No.133 of 23.3.2005.

The High Court by reason of its impugned judgment reversed the judgment and order of the Tribunal opining:

(i) There is nothing sacrosanct in GOMs No.570 dated 30.12.1997 which stipulated the ratio of 1:50 between the number of vacancies and the number of candidates to be admitted to the main written examination;

(ii) Interim order dated 6.1.2005 of the Tribunal directing a cut off mark lower than the one arrived at in accordance with the ratio prescribed under GOMs No.570 was fixed for the reason that if eventually more number of posts in Group I are to be filled up, fixing lower cut off mark would satisfy the requirement of the ratio prescribed under GOMs No.570.

(iii) GOMs No.200 was a result of decision of the government independent of the interim order. The tenor of language of the said GOMs is not conclusive.

(iv) GOMs No.200 is merely a logical extension to the decision to issue second notification to fill up 223 posts.

(v) The contesting candidates cannot oppose issuance of GOMs No.200 which enable more number of candidates to appear in the main examination as the number of candidates to be finally called depended on the accident/chance of how many candidates could secure the cut off mark.

(vi) The judgment of this Court in Gopal Krushna Rath v. M.A.A. Baig (Dead) By LRs. And Others [(1999) 1 SCC 544] holding that calling more number of candidates for the interview than permitted under the rules may result in prejudice to those who are entitled to be called in accordance with rules must be read in the context of and in consonance with the judgment in Shankarsan Dash v. Union of India [(1991) 3 SCC 47] wherein it was laid down that no candidate participating in the selection process has any indefeasible and legally enforceable right to be appointed.

These appeals question the said judgment.

Mr. P.P.Rao, learned senior counsel appearing on behalf of the Appellants in Civil Appeal arising out of S.L.P. (C) No.6789 of 2006 submitted:

(i) GOMs No.200 dated 30.4.2005 having been issued pursuant to the interim order passed by the Tribunal on 6.1.2005; having regard to the fact that the same stood vacated and in any event the original application having been dismissed by the Tribunal, no effect could have been given thereto.

(ii) The High Court committed a serious error in opining that the said GOMs No.200 was issued pursuant to a conscious decision of the State independent of the said interim order.

(iii) The Tribunal having no jurisdiction to reduce the qualifying marks from 66% to 61% as a result whereof more candidates had appeared in the Main Examination for recruitment to Group I service in relaxation of GOMs No.570 dated 31.12.1997, the entire selection process was vitiated in law.

(iv) Although, the Appellants did not have any right to be selected, they had acquired a legal right to be considered in terms of the extant rules.

(v) The impugned judgment of the High Court cannot be sustained as the Commission acted in violation thereof.

Mr. L.Nageswara Rao, learned senior counsel appearing on behalf of Appellants in Civil Appeals arising out of S.L.P. (C) Nos.6516, 7016 and 8275 of 2006 supplemented the submissions of Mr.P.P. Rao urging that those candidates who were over aged on the date of the initial notification could not have been made eligible by reason of a subsequent notification. The candidates, it was urged, who appeared at the preliminary examination and the main written examination had a legitimate expectation that the vacancies which existed on the date of the notification would be filled up in terms of the extant rules and in relation thereto no vacancy arising in future could have been taken into consideration.

Mr. A.K. Ganguli, learned senior counsel appearing on behalf of the Commission, on the other hand, would draw our attention to the fact that some of the Appellants did not pass the preliminary examination. Although two preliminary examinations one, pursuant to the main notification and other pursuant to the supplementary notification, in view of the fact that the same provided for only one opportunity to all the candidates, viz., to appear at the main written examination and, thus, the same cannot be said to be arbitrary or unreasonable. The decision of the State to fill up all the vacancies cannot be faulted with as the said steps were taken as one time measure. As the impugned GOMs were issued in terms of the proviso to Article 309 of the Constitution of India, the validity of the impugned notifications cannot be questioned as thereby merely the age bar has been relaxed.

It is not in dispute that, at the material time, examination was to be conducted in terms of the instructions issued by the State of Andhra Pradesh as contained in GOMs No.570 dated 31.12.1997. The advertisement was also issued by the Commission pursuant to or in furtherance of the said notification, as would appear from Clause 2(a) of the notification No.21. It was categorically stated:

> "The recruitment will be made to the vacancies notified only. There shall be no waiting list as per G.O. Ms.No.81 and Rule 6 of APPSC Rules. The available break up of vacancies is given in Annexure-I. However, the breakup is subject to variation and confirmation by the Unit Officer, till such time as decided by the Commission and in any case, no cognizance will be taken by the Commission of any vacancies arising or reported after the completion of the selection and recruitment process, or, the last date as decided by the Commission, as far as this Notification is concerned; and any such subsequently arising vacancies will be further dealt with as per G.O. & Rule cited above."

Recruitment to the notified vacancies although was to be considered but the same was not sacrosanct as the Commission was given liberty to take into consideration the vacancies arising at a later date also. The jurisdiction of the Commission, however, was only restricted to the extent that it could not

have taken cognizance of any vacancy arising or reported after the completion of the selection and recruitment process. What was to be considered as a subsequent vacancy, in terms of the said rules, thus, would be such vacancies which arose after completion of the selection and recruitment process or the last date as decided by the Commission.

It is not in dispute that all the candidates who had applied for the said post were having the requisite educational qualifications. In terms of the said advertisement, the selection process was to comprise in three parts, viz.,

(i) a screening test for the purpose of admitting the candidates to the main written examination.

(ii) Holding of main examination for those who would become entitled to be admitted to main written examination and, thus were to be subjected to the process of selection.

(iii) The candidates who obtained minimum qualifying marks in the written examination, as may be fixed by the Commission at their discretion, were to be summoned for oral test in the ratio of 1:2 with reference to the number of vacancies duly following the special representation as laid down in General Rule 22 of Andhra Pradesh State and Subordinate Service Rules.

GOMs No.200 dated 30th April, 2005 was issued by the State. Although the High Court has opined that the said GOMs was issued upon an independent decision taken by the State of Andhra Pradesh in that behalf, the recitals contained therein does not say so. The notification specifically referred to the interim direction issued by the Tribunal which was treated to be a general direction to admit all the candidates who had appeared in the preliminary examination. It was in the aforementioned situation only the qualifying marks were reduced from 66% to 61% to allow more candidates for the main examination for recruitment to Group I service with reference to the notification No.21 of 2003 and the supplementary notification No.6 of 2004. The State of Andhra Pradesh, however, did not stop there. As has been noticed hereinbefore, subsequent vacancies were also notified.

The State thereafter issued GOMs No.164 dated 6.7.2004, having regard to the representations purported to have been received by it from the unemployed candidates to allow age concessions, considering that there had been long gap in issuing the notification, on taking a purported sympathetic view in the matter, stating:

"a) A supplementary notification will be issued for some more vacancies in addition to the vacancies already notified in various categories of pots under Group I Services, under Notification No.21/2003 issued on 21-11-2003 by the A.P. Public Service Commission.

b) For the candidates who could not appear for recruitment to Group I Services with reference to Advt. No.21/2003 issued on 21.11.2003 by the A.P. Public Service Commission, as they were over and above the 33 years of age, age concession will be allowed duly reckoning the age limits prescribed in the rules, with effect from 1.7.1999 for the Notification No.21/2003, and also for supplementary Notification to be issued. This age concession is only a one time measure and will not apply for further recruitments.

The candidates who were within the age limits, according to rules before the present concession raising the upper age limit and who could not apply for the notification issued on 21.11.2003 are also eligible to apply for the posts to be notified in the supplementary notification.

c) The candidates for the main examination will be finalized by the Commission from the common list of candidates qualified both in the preliminary examination already held and the preliminary exam to be held as per the supplementary notification to be issued."

Ad hoc rule was made by the Governor of Andhra Pradesh in exercise of the powers conferred by the proviso appended to Article 309 of the Constitution of India which reads as under:

"Notwithstanding anything contained in the Andhra Pradesh State and Subordinate Rules or in the Special Rules for any State Services or the Ad hoc Rules, the maximum age limit prescribed in the relevant special Rules for appointment by direct recruitment shall be reckoned as on 1-7-1999 instead of 1-7-2003 in respect of direct recruitment to Group I Services Recruitment 2003 notified by the Andhra Pradesh Public Service Commission vide their advertisement No.21/2003/Suppelementary notification.

This adhoc rule will apply only for the notification No.21/2003/Supplementary notification of A.P. Public Service Commission."

Yet again, GOMs No.133 was issued on 3.3.2005, in terms whereof the State allowed the candidates who had fulfilled the educational and age qualification, as per enhanced age limits eligible for recruitment to Group I service stating:

"Notwithstanding anything contained in the A.P. State and Subordinate Service Rules or in the Special Rules for any State Services or in the adhoc rules, all the eligible candidates who are within the age limits in terms of the Orders issued in G.O. 164, G.A. (Ser.A) Department, dated 6-7-2004 and also those candidates who fulfill the Educational qualification as on the date of Supplemental Notification (Notification No.6/2004 to the Main Notification No.21/2003) and who did not apply earlier are eligible to apply."

One of the contentions raised before us is as to whether the aforementioned three notifications are retrospective in nature. Submission of Mr. P.P. Rao is that they are only prospective. We, however,

do not agree. GOMs No.570 dated 31.12.1997 did not have any statutory favour. The notification in question were issued by the State in exercise of its jurisdiction under proviso to Article 309 of the Constitution of India. In terms of the said provision, the State indisputably is entitled to issue a notification with retrospective effect. GOMs No.200 indisputably affected those who had appeared at the examination as by reason thereof qualifying marks were reduced from 66% to 61%. Similarly, by reason of GOMs No.164, the maximum age limit prescribed in the relevant special rules for appointment by direct recruitment was to be reckoned as on 1.7.1999 instead of 1.7.2003. Expressly, the adhoc rule made thereby was made applicable only in respect of the notification No.21 of 2003 and the supplementary notification of the Commission. Similarly, in terms of GOMs No.133 dated 23.3.2005 those candidates who were not eligible on the date of issuance of the first notification became entitled to avail the beneficent provision as by reason thereof all those who had not applied earlier became eligible therefor.

The advertisement issued by the Commission was subject to GOMs NO.570. Administrative instructions contained in GOMs No.570 did not contain any statutory rules. Any rule made subsequently by the State will override the administrative instructions to the extent it was repugnant thereto. It is, however, one thing to say that, a retrospective effect was given to the said rules but it is another thing to say that by reason thereof accrued or vested right of a candidate has been taken away.

We begin our discussions by taking into consideration what would be a vested right vis-à-vis an accrued right.

In Kuldeep Singh v. Govt. of NCT of Delhi [2006 (6) SCALE 588], this Court observed:

> "What would be an acquired or accrued right in the present situation is the question.
>
> In Director of Public Works and Another v. HO PO Sang and Others [(1961) AC 901], the Privy Council considered the said question having regard to the repealing provisions of Landlord and Tenant Ordinance, 1947 as amended on 9th April, 1957. It was held that having regard to the repeal of Sections 3A to 3E, when applications remained pending, no accrued or vested right was derive stating:
>
> "In summary, the application of the second appellant for a rebuilding certificate conferred no right on him which was preserved after the repeal of sections 3A-E, but merely conferred hope or expectation that the Governor in Council would exercise his executive or ministerial discretion in his favour and the first appellant would thereafter issue a certificate. Similarly, the issue by the first appellant of notice of intention to grant a rebuilding certificate conferred no right on the second appellant which was preserved after the repeal, but merely instituted

> a procedure whereby the matter could be referred to the Governor in Council. The repeal disentitled the first appellant from thereafter issuing any rebuilding certificate where the matter had been referred by petition to the Governor in Council but had not been determined by the Governor."

In Saurabh Chaudri (Dr.) v. Union of India [(2004) 5 SCC 618], it is stated:

> "A statute is applied prospectively only when thereby a vested or accrued right is taken away and not otherwise. (See S.S.Bola v. B.D. Sardana) A judgment rendered by a superior court declaring the law may even affect the right of the parties retrospectively."

The legal position obtaining in this behalf is not in dispute. A candidate does not have any legal right to be appointed. He in terms of Article 16 of the Constitution of India has only a right to be considered therefor. Consideration of the case of an individual candidate although ordinarily is required to be made in terms of the extant rules but strict adherence thereto would be necessary in a case where the rules operate only to the disadvantage of the candidates concerned and not otherwise. By reason of the amended notifications, no change in the qualification has been directed to be made. Only the area of consideration has been increased. Those who were not eligible due to age bar in 2003 became eligible if they were within the prescribed age limit as on 01.07.1999. By reason thereof only the field of choice was enlarged. We would briefly consider the purport and effect thereof.

Initially, there had been 301 vacancies. 223 vacancies were later on added. 1,52,000 applications were received pursuant to the first advertisement. About 51,768 applications were filed after issuance of the impugned GOs. By reason of the subsequent GOs, however, those who had appeared in the first preliminary examination were debarred from appearing in the second examination. The reason therefor is not far to seek. The result of the first preliminary examination had not been announced. A combined result was announced both in respect of the first preliminary examination as also the second preliminary examination. Both the examinations were held to be a part of the same recruitment process. It may be that in relation thereto different question papers were set or different examiners examined them but it must be borne in mind that the said examinations were held only for the purpose of elimination of candidates. The result of the said examination was not to affect the ultimate selection process.

We may at this juncture examine some of the decision whereupon reliance has been placed by the learned counsel.

In Umesh Chandra Shukla v. Union of India and Others [(1985) 3 SCC 721], the candidates were

admitted to the viva-voce test by the Selection Committee. It is at that stage names of certain candidates, whose names had not been included in the Select List, were included in the final list of the Selection Committee and the names of certain candidates who had been interviewed by the Selection Committee had been omitted therefrom. This Court in the aforementioned fact situation opined:

> "..... The area of competition which the 27 candidates who had been declared as candidates eligible to appear at the Viva Voce examination before such moderation had to face became enlarged as they had to compete also against those who had not been so qualified according to the Rules. The candidates who appear at the examination under the Delhi Judicial Service Rules acquire a right immediately after their names are included in the list prepared under Rule 16 of the Rules which limits the scope of competition and that right cannot be defeated by enlarging the said list by inclusion of certain other candidates who were otherwise ineligible, by adding extra marks by way of moderation. In a competitive examination of this nature the aggregate of the marks obtained in the written papers and at the Viva Voce test should be the basis for selection..."

This Court found a blatant violation of Rule 16 of the Delhi Judicial Service Rules, 1970 which had limited the scope of competition. In the instant case, the scope of the competition has not been limited by enlarging the field of consideration.

In N.T.Devin Katti and Others v. Karnataka Public Service Commission and Others [(1990) 3 SCC 157], this Court was concerned with a situation where the advertisement expressly stated that selection would be made in accordance with the existing rules or government orders. In that case, it had categorically been stated that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right of selection. Once, however, he is found to be eligible and he is otherwise qualified in accordance with the relevant rules, he acquires a vested right of being considered for selection in accordance with the rules as they existed.

With a view to understand the implication of the ratio laid down in the said case, we may notice the factual matrix obtaining therein. The appellant therein were in service of the State Government. They had applied for selection pursuant to the said advertisement. Written examination and viva-voce test had been held. The list of successful candidates was finalized. It was also notified in Karnataka Gazette. An additional list of successful candidates had also been finalized. However, the said list was not approved by the State on the ground that its reservation policy had not been made in accordance with the directions and procedures issued subsequently, i.e., 9th July 1975 whereas the advertisement was issued on 23rd May, 1975. The matter relating to reservation was provided under the statutory rules.

The direction of the State to issue a fresh list on the Commission, therefore, came to be questioned. It was in the aforementioned situation, the law was laid down to the effect that the appellants therein acquired some right for being considered for selection in view of the rules as they existed on the date of advertisement. However, we my notice that no law in absolute terms was laid down therefor. This Court categorically held:

> "..... If the recruitment Rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules. Whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication; if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the rules and orders which were in force on the date of advertisement. Determination of this question largely depends on the facts of each case having regard to the terms and conditions set out in the advertisement and the relevant rules and orders ....."

In that case it was held that the Government Order dated 9th July, 1975 made the Government's intention clear that the revised directions which were contained therein would not apply to the selections in respect of which advertisement had already been issued and, therefore, the mode of selection as contained in Annexure 2 of the said Order was not applicable to the selection for filling 50 posts of Tahsildars pending before the Commission. A list, thus, validly prepared, could not have been directed to be changed because of a policy adopted by the State which was not applicable.

In Shankarsan Dash (supra), this Court stated the law in the following terms:

> "It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decision in State of Haryana v. Subhash Chander Marwaha, Neelima Shangla v. State of Haryana, or Jatendra Kumar v. State of Punjab."

[See also Food Corpn. Of India and Others v. Bhanu Lodh and Others (2005) 3 SCC 618 and

Punjab State Electricity Board and Others v. Malkiat Singh (2005) 9 SCC 22].

What is, therefore, required to be seen is as to whether the action of the State is arbitrary.

Strong reliance has been placed by Mr. P.P. Rao on Hoshiar Singh v. State of Haryana and Others [1993 Supp (4) SCC 377] wherein it was observed:

> "..... The appointment on the additional posts on the basis of such selection and recommendation would deprive candidates who were not eligible for appointment to the posts on the last date for admission of applications mentioned in the advertisement and who became eligible for appointment thereafter, of the opportunity of being considered for appointment on the additional posts because if the said additional posts are advertised subsequently those who become eligible for appointment would be entitled to apply for the same ....."

Selection in that case was for police service. Selection had been made in excess of requisition in violation of Rule 12.6 of the Punjab Police Rules, 1934. Standard of Physical fitness was relaxed by the Selection Committee which power in terms of the advertisement it did not possess. There was nothing on record to show that the Director General of Police had sent any further requisition apart from the 8 posts for which the notification was issued and it was in that situation this Court opined that the Board on its own could not recommend names of 19 persons for the selection and recommendation of larger number of persons than the posts for which requisition was sent.

In Gopal Krushna Rath (supra), the question which arose for consideration was in regard to the qualification of the Appellant for being appointed to the post of Professor at the relevant time. On fact it was held that the Appellant did possess the requisite qualification which was in accordance with the rules/guidelines then in force. He had also obtained higher marks than the original Respondent at the selection. It was in the aforementioned situation, this Court held that the subsequent change in the requirements regarding qualification by the University Grant Commission would not affect the process of selection which had already commenced.

In this case, however, the private Respondents concerned cannot be said to have no qualification on the date of advertisement.

Strong reliance has also been placed by Mr. P.P. Rao on Maharashtra State Road Transport Corpn. And Others v. Rajendra Bhimrao Mandve and Others [(2001) 10 SCC 51]. In that case, the

rule of game said to be involved was in terms of circular issued by the State. No statutory rule or requisition was governing the field. A question arose as to which circular would apply. The contention of the Respondent was that the circular dated 4.4.1995 would apply providing for assignment of 87½% marks for written/trade test and 12½% for the oral test (personal interview) which was accepted having regard to the fact that the driving test had been conducted on 27.11.1995 and, therefore, the circular letter which was issued on 24.6.1996 providing for a different standards was held to be not applicable, as on fact it was found that the other circulars issued have no application in respect of the driving tests held for appointment of the drivers. In the aforementioned fact situation, it was opined:

> "..... Therefore, the High Court cannot be said to be correct in holding that the circular order dated 24.6.1996 is illegal or arbitrary or against the orders of the State Government or the resolution of the Board of the Transport Corporation. Instead, it would have been well open to the High Court to have declared that the criteria sought to be fixed by the circular dated 24.6.1996 as the sole determinative of the merit or grade of a candidate for selection long after the last date fixed for receipt of application and in the middle of the course of selection process (since in this case the driving test was stated to have been conducted on 27.11.1995) cannot be applied to the selections under consideration and challenged before the High Court ....."

The said decision is, thus, also not an authority for the proposition that a subsequent circular would not per se be illegal or invalid. The Court in all situations of this nature is required to consider only the applicability thereof.

In Union Public Service Commission v. Gaurav Dwivedi and Others [(1995) 5 SCC 180], this Court held:

> "We are unable to agree with this contention. Once it is considered, and in our opinion rightly so, that the number of vacancies to be filled could be reduced then the rules do not stipulate that the entire selection of examination must be completed, including the conduct of the interview/viva-voce, on the basis of the original number of vacancies which were notified. When before the declaration of the result of the main examination, the number of vacancies have been determined then it was only proper that candidates who are twice the number of revised vacancies are called for interview and not more. It is to be borne in mind that this is a competitive examination with the number of vacancies being 470 only, 940 candidates were required to be called for interview. By calling more than this number may result in prejudice to one or more of the candidates who were in the position of 940 or above. For example, it is possible that a candidate at Serial No.941, who is not entitled to be called for interview, if he is permitted to be called for interview, may secure higher marks in the viva voce and oust those candidates who were higher in rank to him in the merit list. The High Court, in our opinion, was not right in permitting more than 940 candidates being called for interview/viva voce."

We may, however, notice that in Ashok Kumar Sharma and Another v. Chander Shekhar and Another [1993 Supp (2) SCC 611], advertisement was issued on 9.6.1982. The last date of submission of applications was 15th July, 1982. The Appellants and the Respondents by that date had submitted applications. The Appellants, however, had appeared for B.E. Civil Examination. Its results, however, was not published. Rule 37 of the J&K Public Service Commission Business Rules reads, thus:

> "Applications of candidates who have appeared in the examination, the passing of which may make them eligible to appear in an interview for recruitment to a post to be made otherwise than by a competitive examination, but results whereof have not been declared up to the date of making of the application, may be entertained provisionally, but no such candidate shall be permitted to take the interview if he is declared as having failed in the examination or if the results are not available on the date of the viva-voce test is held."

In terms of the said Rules, therefore, the Appellants were found to be eligible although he did not pass the examination on the date thereof. It was in that situation, the Appellants were held to be eligible.

In this case, we are dealing with a peculiar situation. The Government took a sympathetic view about the fate of those candidates who could not be accommodated earlier. Such consideration was made to broad-base the field of selection in view of the fact that since 1997 there had been no further recruitment. It is also not in dispute that the vacancies were notified from time to time as they were brought to the notice of the concerned department by the other departments.

The authority of the State to frame rules is not in question. The purport and object for which the said notifications were issued also cannot be said to be wholly arbitrary so as to attract the wrath of Article 14 of the Constitution of India. The Appellants herein no doubt had a right to be considered but their right to be considered along with other candidates had not been taken away. Both the groups appeared in the preliminary examination. Those who had succeeded in the preliminary examination were, however, allowed to sit in the main examination and the candidature of those had been taken into consideration for the purpose of viva-voce test who had passed the written examination.

The question, however, remains as to whether the State could reduce the cut-off marks. If the cut-off mark specified by the State is arbitrary, Article 14 would be attracted. The Tribunal did not have any jurisdiction to pass an interim order directing reduction in the cut-off mark. The cut-off mark at 66% was fixed having regard to the ratio of the candidates eligible for sitting at the written examination

at 1:50. An interim order as is well known is issued for a limited purpose. By reason thereof, the Tribunal had no jurisdiction to grant a final relief.

Moreover, the Tribunal could not have directed the Commission to do something which was contrary to rules. An interim order is subject to variation or modification. An interim order would ordinarily not survive when the main matter is dismissed. The Commission also did not intend to abide by the said directions. It wanted the State to pass an appropriate order. It was, pursuant to or in furtherance of the said desire of the Commission as also the direction of the Tribunal a contained in its interim order dated 6.1.2005, GOMs 200 was issued. The said Government Order was, thus, not issued by the State of its own. There was no independent application of mind. The statutory requirements for passing a government order independent of the interim directions issued by the Tribunal were wholly absent.

In Gaurav Dwivedi (supra), this Court categorically held the possibility that a person who was otherwise entitled to be called for an interview may lose his chance if the others who were not eligible are called for interview.

The standard was fixed as 1:50. The Commission came to the conclusion, having regard to the results published on written examination, that 66% should be the cut-off mark. It need not have been 66%. If the candidature of more candidates was to be taken into consideration, the same would mean that the State shall give a go by to principle of selection fixed by it, viz., 1:50. If the submission of the Commission and consequently; the State is to be accepted that the ratio should be 1:50, the same could not have been reduced to 10:90. A violation of that rule would, in our opinion, be arbitrary.

In total 558 vacancies were notified. Thus, only 27,900 candidates could have been called for main written examination on the basis of the norms fixed by the State itself. However, the actual number of candidates who passed the examination are said to have been 50,726. Although, actually it is stated that 32,056 candidates appeared. Thus, indisputably, a large number of candidates who had been allowed to appear at the examination were evidently permitted to do so in violation of norm of 1:50, as was specified by the State. The aforementioned rule could not have been relaxed. It did not have any rational basis. 66% cut-off mark was not fixed by the Commission. It was arrived at by the Commission in view of the marks secured by the respective candidates on applying the ratio of 1:50. Once a person falls beyond the said ratio, he was not qualified. He was not to be considered

any further. The State and the Commission had themselves fixed three different stages of selection process which were required to be adhered to.

We may notice at this stage Suraj Parkash Gupta and Others v. State of J&K and Others [(2000) 7 SCC 561], wherein it was held:

> "The result of the discussion, therefore, is that the wholesale regulation by order dated 2.1.1998 (for the Electrical Wing), by way of implied relaxation of the Recruitment Rule to be gazetted category is invalid. It is also bad as it has been done without following the quota rule and without consulting the Service Commission. Further, the power under Rule 5 of the J&K (CCA) Rules, 1956 to relax the Rules cannot, in our opinion, be treated as wide enough to include a power to relax rules of recruitment."

Relaxation can be given only if there exists any provision therefor in the Rules. GOMs No.200 dated 30th April, 2005, in our opinion, must fall having regard to the vacation of interim order by the Tribunal and consequent dismissal of the original application. It will bear repetition to state that, while issuing the same, the Government did not apply its own mind. Only those candidates who came within the purview of the rule existing thereto before could have been subjected to further selection process.

For the foregoing reasons, we are of the opinion that while GOMs No.164 and 133 are not invalid, GOMs No.200 is. The Commission was, thus, statutorily enjoined to interview only such candidates who had passed the written examination in 1:50 ratio. Only upon short listing the said candidates, the interview can be held at the ratio of 1:2.

To the aforementioned extent, the Commission must undertake selection process afresh. We, however, make it clear that those who have not passed the written examination would not be entitled to be considered in terms of the aforementioned directions. The Appeals are allowed to the aforementioned extent. No costs.

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.4129/2006
(Arising out of SLP (C) No.14845/2006)
D.D. 14.9.2006
Hon'ble Mr. Justice S.B. Sinha &
Hon'ble Mr. Justice Dalveer Bhandari

Andhra Pradesh Public Service Commission ... Appellant
Vs.
P.Chandra Mouleeshware Reddy & Co. ... Respondents

Recruitment:

Group-I Services Recruitment – Advt. No:5/98

The Commission notified 19 posts of D.S.P., but confined selection to 10 posts as directed by the Government. A.P.A.T. directed to fill the remaining 9 posts also long after completion of the recruitment. Commission filed W.P. pleading difficulty in implementing the orders without disturbing the selections and appointments. The W.P. was dismissed – This was challenged in the above appeal – The Hon'ble Supreme Court held that although it is the policy of the State to fill up all the Nineteen posts, it had mistakenly directed to fill up only ten posts which was realized by it when the Original application was filed before the Tribunal and the mistake cannot be directed to be perpetuated nearly because the Commission has to take up the selection process again – S.L.P. was accordingly dismissed.

Held:

The law cannot be permitted to act unfairly. It cannot be arbitrary. The country is governed by Rule of Law and not by men. Thus, although a mistake had been committed by the State, the same cannot be directed to be perpetuated only because the Commission will have to undertake the selection process again.

Cases Referred:

1. (1986) 4 SCC 268 - Ms. Neelima Shangla vs. State of Haryana & Ors.
2. (1989) Supp.1 SC 147 - S.L. Kaul & Ors. vs. Secretary to Government of India, Ministry of Information and Broadcasting, New Delhi & Ors.
3. (1999) 3 SCC 693 - Virender S.Hooda & Ors. vs. State of Haryana & Anr.

JUDGMENT

S.B.Sinha, J.

Leave granted.

Andhra Pradesh Public Service Commission (for short, 'the Commission') is in appeal before us aggrieved by and dissatisfied with the judgment and order of a Division Bench of the High Court of

Judicature of Andhra Pradesh dismissing a writ petition filed by it from an order of the Andhra Pradesh State Administrative Tribunal dated 15.10.2004 directing it to make recruitment from the selection list to the nine posts of Deputy Superintendent of Police as only ten out of nineteen posts advertised therefor had been filled up.

The Commission advertised nineteen posts for recruitment to the post of Deputy Superintendent of Police. Pursuant thereto and in furtherance thereof, applications were filed, inter alia, by the Respondent Nos.1 to 3 herein. The State, however, asked the Commission to fill up only ten posts. An exercise was carried out accordingly by the Commission purported to be in terms of Rule 6 of the Public Service Commission Rules.

Aggrieved by and dissatisfied therewith, the Respondent Nos.1 to 3 filed an Original Application before the Andhra Pradesh Administrative Tribunal (Tribunal). The Tribunal noticed that the Respondent Nos.1 to 3 pursuant to the advertisement of the Commission appeared at the written examination. They had also appeared at the interview. At that stage only, the State of Andhra Pradesh directed the Commission to fill up only ten posts, which was complied with.

It is not disputed that nineteen posts were vacant. The vacancies were notified in terms of Rule 3 of the Andhra Pradesh Public Service Rules. It is also not denied or disputed that the said posts were to be filled up both by way of direct recruitment as also by promotion in the ratio of 1:2. In not filling up the said posts, according to the respondents, the provisions of the said Rules have been violated.

In its counter affidavit, the State contended:

> "According to the programme of selections to be made by the Andhra Pradesh Public Service Commission among other things being equal that Government in the case of State Services should send to Andhra Pradesh Public Service Commission estimates of the number of candidates to be selected for each service. The estimate of the number of candidates required should cover a period of 12 months following the dates on which the lists of selected candidates are due to be communicated to the appointing authorities according to the programme. As the appointing authorities are not adhering to the time schedule and not notifying the vacancies to the A.P. Public Service Commission in time, which results in delay in making recruitment in the State Government Offices the following instructions were issued:
>
> "The matter has been reviewed and it is hereby ordered that 1/3 of the vacancies in respect of retirements in the particular year of recruitment in respect of the posts which are within the purview of the A.P. Public Service Commission for making direct recruitment

shall be notified in advance to the Andhra Pradesh Public Service Commission in order to hasten up the recruitment and to enable the Commission to programme its selection suitably."

In Rc.No.564/G3/97, dt. 8.7.97, the Director General and Inspector General of Police, Andhra Pradesh, Hyderabad has addressed the General Administration (ser) Department with a request to notify 19 backlog vacancies of Deputy Superintendent of Police Category-2 for direct recruitment but not the vacancies that would arise in future and he has also extended the same letter to the Andhra Pradesh Public Service Commission which in turn notified the vacancies for the purpose of inviting applications from the open market.

However on the presumption that they were to be filled up for future recruitment, Government in Home Department have given directions to the Andhra Pradesh Public Service Commission that only 10 vacancies for the post of Deputy Superintendent of Police instead of 19 vacancies be notified as per Govt. Memo No.1946/Ser-A/90-1, dt. 18.12.90, which is a mistake of fact i.e., vide impugned Government Letter No.21701/ Pol.E/A1/99-1 dt. 2.6.99."

The Tribunal, therefore, opined that mistake on the part of the State being admitted, the applicants were entitled to the reliefs prayed for. It was furthermore observed that the State before issuing the direction to the Commission should have consulted the Director General of Police and, thus, its decision was arbitrary. In regard to the stand of the Appellant, the Tribunal observed:

"Though the APPSC was acting at the specific instance of the first respondent i.e. Government, and it is not its own fault that not filling up the 19 vacancies occurred, still the action itself has to be declared as arbitrary and illegal on account of the basis of the action.

In the facts and circumstances of the case, it is declared that the APPSC ought to have selected 19 candidates strictly following the rule of reservation instead of 10 candidates. It is also further declared that the first and second respondents ought to have selected 19 candidates as against 10 candidates actually by following the rule of reservation."

The writ petition filed by Appellant was dismissed by a Division Bench of the High Court stating:

"The only submission made by the learned counsel for the writ petitioner is that at this stage, after a lapse of 7 years, if the direction of the Tribunal is to be implemented it would involve a great deal of exercise on the part of the Service Commission as the examination was conducted not only for the posts of Deputy Superintendent of Police but to 18 other categories of posts belonging to the same group. This argument, in our considered opinion, is only to be stated as rejected, as there is a constitutional obligation of the Service Commission to conduct the examination to enable the State to fill up the various posts to be filled up by the State. Such an obligation necessarily involves a onerous exercise, but that cannot be an excuse to decline the discharge of an obligation mandated by the Constitution of India."

Submission of Mr. G.Prabhakar, learned counsel appearing on behalf of the Commission before us is that as the selection process having been completed on 20.8.2000 the Tribunal should not have directed filling up of nine vacancies in September, 2003 as in terms of Rule 6 of the Public Service Commission Rules, the remaining vacancies were to be filled up only in the next year. It was submitted that if the direction is to be carried out, the same will have a cascading effect.

Mr. P.P. Rao, learned Senior Counsel appearing on behalf of the Respondents, on the other hand, would submit that the candidate should not suffer owing to a mistake on the part of the State.

Indisputably, by reason of Advertisement No.5 of 1998, nineteen posts of Deputy Superintendent of Police Category-2 in Police Service in the pay scale of Rs.3880-8140 were notified. Selection process ensued in furtherance thereof. The State of Andhra Pradesh by a letter dated 2.6.1999, however, asked the Commission to send recommendation for only ten vacancies in the said category for the purpose of direct recruitment, stating:

> "According to the orders issued in Govt. Memo No.1946/Ser.A/90-1, Dt.18.12.90, 1/3 of the vacancies in respect of retirements in a particular year of recruitment in respect of the posts which are within the purview of A.P.P.S.C. for making direct recruitment, shall be notified A.P.P.S.C.; and not on the basis of the total No. of substantive vacancies in the Dept. from its inception. Accordingly the D.G. & I.G.P. has been requested to send revised proposals and his proposals were awaited. As the matter stood thus, it is not clear as to how the estimate of 19 posts of D.Ss.P. were cleared by Fin. & Plg. Dept. and advertised by A.P.P.S.C. later, as stated in the letter third cited, without the conformation by this Dept.
>
> Subsequently, A.P.P.S.C. has also called for estimate of vacancies upto 31.8.1998 in the letter second cited. Govt. have furnished the estimate i.e. 10 vacancies, keeping in view the instructions issued in Govt. Memo 1946/Ser.A/90-1, Dt. 18.12.90 are also taking into consideration the vacancies arose upto 31.8.1998."

The finding of the Tribunal and consequently that of the High Court, in that, it was a mistake on the part of the State to issue the aforementioned direction. The same is not in dispute.

The State of Andhra Pradesh, we may notice, did not question the order of the Tribunal. The Commission was required to carry out fresh exercise in compliance of the directions of the Tribunal. For the said purpose, no fresh selection process was to be undertaken. If the State did not have any objection to fill up the said posts realizing the mistake committed by it; we fail to see any reason as to why the Commission should have felt aggrieved by the order of the Tribunal.

In Ms. Neelima Shangla vs. State of Haryana & Ors. [(1986) 4 SCC 268], this Court opined:

> "..... That was wrong. The names of all the qualified candidates had to be sent to the government. The reason given by the Public Service Commission for not communicating the entire list of qualified candidates to the government is that they were originally informed that there were only 28 vacancies. That is not a sound reason at all. Under the "Rules relating to the appointment of Subordinate Judges in Haryana", the Public Service Commission is not concerned with the number of vacancies at all. Nor is it expected to withhold the full list of successful candidates on the ground that only a limited number of vacancies are available. The Government of Haryana has taken the stand that they were unable to select and appoint more candidates as the names of only a few candidates were sent to them by the Public Service Commission. It now transpires that even before the Public Service Commission sent its truncated list to the Government, the High Court had already informed the government that there were more vacancies which required to be filled. The government not knowing that the names of several candidates who were qualified had been withheld from the government by the Service Commission, wrote to the Service Commission to hold a fresh competitive examination. If the government had been aware that there were qualified candidates available, they would have surely applied Rule 8 of Part D and made the necessary selection to be communicated to the High Court. The net result is that qualified candidates, though available, were not selected and were not appointed. Miss Neelima Shangla is one of them. In the view that we have taken of the rules, Miss Neelima Shangla is entitled to be selected for appointment as Subordinate Judge in the Haryana Civil Service (Judicial Branch)."

The candidates, therefore, in our opinion, should not suffer owing to a mistake on the part of the State. The Tribunal, we have noticed herein before, directed the Commission to notify the remaining nine candidates in the merit order following the 'Rule of Reservation'. It was categorically stated that those who would be appointed in terms thereof would be able to claim any right only with prospective effect, i.e., from the date of their actual joining of service. It, therefore, cannot be said that the order of the Tribunal was in any manner unjustified, arbitrary or unreasonable. The High Court, thus, in our opinion, rightly refused to exercise its jurisdiction under Article 226 of the Constitution of India.

We may notice that in S.L. Kaul & Ors. vs. Secretary to Government of India, Ministry of Information and Broadcasting, New Delhi & Ors. [(1989) Supp.1 SC 147], this Court held that to take a technical view so as to deprive the candidate of his right of seniority, would be unjust.

The question was considered at some length by a Division Bench of this Court in Virender S.Hooda & Ors. vs. State of Haryana & Anr. [(1999) 3 SCC 693], wherein it was held that the Commission should follow the instructions of the state provided the same is in accordance with rules.

The policy of the State was to fill up all the nineteen posts. The Respondents were, thus, entitled to have their case considered by the Commission in accordance with merits only. Mistakenly, the State directed to fill up only ten posts which was realised by it when the Original Application was filed before the Tribunal. It accepted its mistake in no uncertain terms.

Rule 6 of the Public Service Commission Rules reads as follows:

> "The list of candidates approved/selected shall be equal to the number of vacancies only including those for reserve communications/categories notified by the unit officers/ Government. The layout vacancies if any due to relinquishment/and non-falling selected candidates shall be notified in the next recruitment."

Rule 6 of the Public Service Commission Rules, whereupon Mr. Prabhakar place reliance, is not of much significance. It operates in a different field. It will have no application in a case of this nature. The law cannot be permitted to act unfairly. It cannot be arbitrary. The country is governed by a Rule of Law and not by men. Thus, although a mistake had been committed by the State, the same cannot be directed to be perpetrated only because the Commission will have to undertake the selection process again and particularly, in view of the fact that the State of Andhra Pradesh did not question the order passed by the Tribunal.

For the reasons aforementioned, we find no merit in this appeal, which is, accordingly, dismissed with costs quantified at Rs.25,000/- payable by Appellant in favour of Respondent Nos.1 to 3.

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IN THE ANDHRA PRADESH ADMINISTRATIVE TRIBUNAL AT HYDERABAD
OA.NO.7034 OF 2006
D.D. 29.11.2006
Hon'ble Mr.Sudhender Kulkarni, Member (Judl.)

S.Yugeswari Devi ... Applicant
Vs.
The A.P.P.S.C. & Another ... Respondents

Recruitment to Group-I Services, Adver tisement No.21/2003

The recruitment comprises preliminary exam, followed by Main & Oral test – The ratio for admission to Main examination is 50 times the vacancies or 1:50 – The Supreme Court held that once a person falls beyond the said ratio, he is not qualified for further process of selection – As per the revision made in accordance with the above judgment the applicant falls beyond the ratio, hence she was disqualified for the Main examination – She challenged her disqualification in this O.A. – A.P.A.T. held that there is no illegality in her disqualification – O.A. dismissed.

ORDER

The applicant has filed this OA with the following prayer:

> "To declare the action of the respondents in not including the Roll No.11206181 of the applicant in the list prepared and published by the 1st respondent on 4.11.2006 even though the applicant was already interviewed along with other candidates on 4.4.2006 as illegal, arbitrary and consequently direct the respondents to include Roll No.11206181 of the applicant and consider her case for regular appointment along with other candidates."

2. The case of the applicant is that she belongs to S.C. community and has responded to Notification No.21/2003 issued by the 1st respondent and offered her candidature. She appeared for the examination and out of 150 marks she secured 66 marks in preliminary examination. She fared well in the main examination and was called for interview vide call letter dated 20.3.2006. The applicant attended the interview and answered all questions. While the matter stood thus, a litigation ensued before this Tribunal wherein the cut off marks from 66 were reduced to 61. Eventually, the matter went up to Apex Court and the Hon'ble Supreme Court held that the reduction of cut off marks from 66 to 61 is not warranted and finally declared that the cut off mark is 66.

3. It is further submitted that in the first instance i.e., in April, 2006, the respondents called 1130 candidates for interview. After orders were passed by the Hon'ble Supreme Court, the 1st respondent prepared a revised list on 4.11.2006 and called 1106 candidates only for interview excluding the candidates who were interviewed earlier and fixed the schedule for interview from 18.11.2006 to

21.11.2006. But the interviews were not conducted. The applicant who was fully qualified and eligible in the first instance was surprised to note that her name was not found in the revised list. In fact, she appeared for the interview earlier. The applicant approached the 1st respondent on 21.11.2006 and enquired about the non-appearance of her number in the list. As the respondents did not respond to her request, she has filed this OA.

4. Learned counsel appearing on behalf of the Public Service Commission submits that the revised list has been prepared strictly in accordance with the directions of the Hon'ble Supreme Court of India ordered in Civil Appeal No.4121/2006 with CA.Nos.4131, 4130 and 4132/2006 dt: 14.9.2006. As the respondent Commission had to call candidates in the ratio of 1:50 for the written examination and 1:2 for the oral interview, the applicant could not come within the zone of consideration as per the ratio. Therefore, her name has not been included in the revised list and as such, there is no illegality in preparing the revised list. Learned counsel for APPSC has also brought to the notice of this Tribunal, the order of the Apex Court.

5. Heard the learned counsel for the applicant and the learned Standing Counsel for APPSC. Perused the material on record.

6. It is seen that Notification No.21/2003 in respect of Group.I services has underwent a chequerred litigation before this Tribunal, Hon'ble High Court and the Hon'ble Supreme Court. In between, the process of selection had moved to some extent, subsequently interdicted by the Courts, eventually after the orders of the Hon'ble Supreme Court dated 14.9.2006, the respondents have prepared the revised list. I have perused the judgment of the Hon'ble Supreme Court. Para-59 of the said judgment is as follows:

> "In total 558 vacancies were notified. Thus, only 27,900 candidates could have been called for main written examination on the basis of the norms fixed by the State itself. However, the actual number of candidates who passed the examination are said to have been 50,726. Although, actually it is stated that 32,056 candidates appeared. Thus, indisputably, a large number of candidates who had been allowed to appear at the examination were evidently permitted to do so in violation of norm of 1:50 as was specified by the State. The aforementioned rule could not have been relaxed. It did not have any rational basis. 66% cut of mark was not fixed by the Commission. It was arrived at by the Commission in view of the marks secured by the respective candidates on applying the ratio of 1:50. Once a person falls beyond the said ratio, he was not qualified. He was not to be considered any further. The State and the Commission had themselves fixed three different stages of selection process which were required to be adhered to."

7. In view of the implementation of the aforesaid orders of the Hon'ble Supreme Court, the applicant's name is not figuring in the revised list. In my opinion, the respondent Commission has not committed any illegality. The applicant's case could not be considered having regard to ratio of 1:50 for the written examination and 1:2 for the interview. Hence there is no illegality.

OA is, therefore, dismissed.

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IN THE ANDHRA PRADESH ADMINISTRATIVE TRIBUNAL AT HYDERABAD
O.A.No.161/2007 with VMA No.197/2007, O.A.No.238/2007 with VMA No.198/2007, O.A.No.239/2007 with VMA No.199/2007, O.A.No.453/2007, O.A.No.509/2007, O.A.No.3145/2006, O.A.No.5393/2006, O.A.No.94/2007
D.D. 22.6.2007
The Hon'ble Mr. S.Anwar, Vice Chairman &
The Hon'ble Mr. Koka Satyanarayana Rao, Member (judl.)

Y.Ramakrishna & Ors. ... Applicant
Vs.
The A.P.P.S.C. & Ors. ... Respondents

Recruitment of Group-I Services, Advertisement No.21/2003

Two unfilled BC-D vacancies of the earlier recruitment were carried forward to the next recruitment and filled in by the meritorious candidates since they are placed above the candidates selected in the current recruitment – The A.P.A.T. held that these candidates being meritorious they should be treated and selected as O.C. candidates and two other BC-D candidates lower in merit should be selected in those vacancies.

Held:

The reserved category candidate who gets selected on the basis of his own merit in the open competition will not be counted against the quota reserved for that category and he will be treated as open competition candidate. [Indra Sawhney Vs. Union of India, 1992 – AIR 1993 SC 477].

Cases referred:

(1996) 3 SCC 253 - Ritesh R.Shah Vs. Dr. Y.L.Yamul and Others

(1999) 3 SC 696 – Virender S.Hooda and Others vs. State of Haryana and another

(2003) 5 SCC 604 - Bimlesh Tanswar vs. State of Haryana and Others

ORDER

Koka Satyanarayana Rao (Judl.Member)

In OA No.161/2007 the applicant prayed for the following relief:

"..... to call for the records relating to and connected with the selections made by the Andhra Pradesh Public Service Commission in pursuant to Notification No.21/2003 and Supplementary Notification No.6/2004 to make recruitment to Group-I Services of the State of Andhra Pradesh and to declare the decision of APPSC not filling up all vacancies of Mandal Parishad Development Officer reserved to BC(D) (General) category as illegal, arbitrary, discriminatory and unconstitutional and consequently direct the 1st respondent to consider the applicant for appointment to the post of Mandal Parishad

Development Officer against one of the vacancies reserved to be filled by BC'D' (General) candidates as per his merit and rank with all consequential benefits."

2. In OA No.453/2007 the applicant prayed for the following relief:

"…. to call for the records relating to and connected with the selections made by the Andhra Pradesh Public Service Commission in pursuant to Notification No.21/2003 and Supplementary Notification No.6/2004 to make recruitment to Group-I Services of the State of Andhra Pradesh and to declare the decision of APPSC to finalize the selection without calling for revised options from all the candidates is illegal, arbitrary, unjust, violative of Articles 14, 16 and 21 of the Constitution besides being opposed to all canons of equity, justice and fair play and consequently direct the 1st respondent to call for the revised options from the applicant before finalizing the selections for recruitment to Group-I Services and consider the case of the applicant for selection and appointment to the post of Deputy Superintendent of Police in the existing vacancies according to his merit with all consequential benefits."

3. In OA.No.94/2007 the applicant prayed for the following relief:

"…. to call for the records relating to and connected with the selections made by the Andhra Pradesh Public Service Commission in pursuant to Notification No.21/2003 and Supplementary Notification No.6/2004 to make recruitment to Group-I Services of the State of Andhra Pradesh and to declare that the decision of APPSC to finalize the selection without calling for revised options from all the candidates is illegal, arbitrary, unconstitutional and consequently direct the 1st respondent to call for the revised options before finalizing the selections for recruitment to Group-I Services of State of Andhra Pradesh with all consequential benefits."

4. In OA.No.509/2007 the applicants prayed for the following relief:

"…. to call for the records relating to and connected with the selections made by the Andhra Pradesh Public Service Commission in pursuant to Notification No.21/2003 and Supplementary Notification No.6/2004 to make recruitment to Group-I Services of the State of Andhra Pradesh and to declare the decision of APPSC to finalize the selection without calling for revised options from all the candidates and redrawing the select list as per merit and rule of reservation to various social groups as illegal, arbitrary and discriminatory and unconstitutional and consequently direct the 1st respondent to call for the revised options and redraw the select according to merit and by following the rule of reservation to various social groups for appointment to Group-I Services with all consequential benefits."

5. In OA.No.5393/2006 the applicant prayed for the following relief:

"…… to call for the records relating to selection process of Senior Marketing

Assistant in Multi Zone-II meant for reservation of quota of SCs with respect to the relinquishment by the 4th respondent to her selection to the said post and not taking further steps in compliance of Rule 7 of Public Service Commission Rules of procedure r/w GO.Ms.No.396, dated 1.6.77, declare the impugned action of the respondents in not taking steps as required under Rule 7 as illegal, arbitrary and contrary to the Statutory provisions and consequently direct the respondents to select and appoint the applicant as Senior Marketing Assistant under Multi Zone-II meant for quota earmarked for SC reservation."

6. In OA.No.3145/2006 the applicant prayed for the following relief:

"..... to call for the records relating to selection of the applicant as well as the lay SC candidate with Roll No.13122974 for selection as Senior Marketing Assistant under Multi Zone-II, declare the selection/appointment of the lady SC candidate as Senior Marketing Assistant as irregular, illegal further being violated of Statutory provisions governing the selection process and consequently direct the 1st respondent to declare the applicant as selected candidate to the post of Senior Marketing Assistant against a vacancy meant for an SC candidate under Multi Zone-II."

7. In OA.No.239/2007 the applicant prayed for the following relief:

"..... to call for the records relating to and connected with the selections made by the Andhra Pradesh Public Service Commission in pursuant to Notification No.21/2003 and Supplementary Notification No.6/2004 to make recruitment to Group-I Services of the State of Andhra Pradesh and to declare the decision of APPSC not filling up all vacancies of Mandal Parishad Development Officer reserved to BC(D) (General) category as illegal, arbitrary, discriminatory and unconstitutional and consequently direct the 1st respondent to consider the applicant for appointment to the post of Mandal Parishad Development Officer against one of the vacancies reserved to be filled by BC'D' (General) candidates as per his merit and rank with all consequential benefits."

8. In OA.No.238/2007 the applicant prayed for the following relief:

"..... to call for the records relating to and connected with the selections made by the Andhra Pradesh Public Service Commission in pursuant to Notification No.21/2003 and Supplementary Notification No.6/2004 to make recruitment to Group-I Services of the State of Andhra Pradesh and to declare the decision of APPSC not filling up only 5 vacancies of Mandal Parishad Development Officer reserved to BC'A' (Women) candidates as against six vacancies reserved for them as illegal, arbitrary, discriminatory and unconstitutional and consequently direct the 1st respondent to fill the sixth vacancy of Mandal Parishad Development Officer reserved to be filled by BC'A' (Women) candidate by considering the claim of the applicant as per her merit with all consequential benefits."

9. These OAs have been heard together as common question of law is involved and they are being disposed of by a common order.

10. The facts narrated in OA.No.161/2007 are taken as the basis for consideration:

The Andhra Pradesh Public Service Commission (in short 'Commission') issued Notification No.21/2003 and supplementary Notification No.6.2004 for recruitment to the posts of Group-I Services. The applicant belongs to BC 'D' community. The applicant participated in the selection process and secured 599 marks. The total number of vacancies notified in the cadre of MPDO is 235 under General Recruitment and 7 under limited recruitment. Out of this, 14 vacancies are earmarked for BC'D' General. Only 11 BC'D' (General) are selected. Out of 11 BC 'D' (General) candidates selected, 8 of them got higher marks than the lower OC candidate in the cadre of MPDO. As per law, reserved candidates who secured higher marks than the OC candidates and got selected must be treated as General candidates and all reserved vacancies must be filled by the candidates next in the order of merit of that reserved category. The Commission has not adopted this procedure while making the selection. As such, it is contended that the selection list made by the Commission is illegal and selection is liable to be redrawn.

11. The Commission filed common counter contending that with regard to the contention of the applicant in OA.No.238/2007 that 1 vacancy reserved for BC 'A' was not filed in, is not correct. The post of MPDO is organized into Multi Zone-I and II although there is no reservation to locals, selections were made as per options obtained from the candidates. The vacancy position so far as BC 'A' (Women) in the cadre of MPDO is as follows:

MZ-I	MA-II
3+1 CF	2

The particulars of candidates in above vacancies is as follows:

	Reg.No.	Marks		Regn.No.	Marks
1	11009141 selected against CF vacancy	614	1	10213903	584.5
2	12228814	589	2	12214265	583
3	10707194	589			
4	10401289	586			

All the 6 vacancies meant for BC'A' (Women) for the post of MPDO were filled. The

applicant in OA.No.238/2007 could not come up for selection as the applicant secured only 581.3 marks. It if further contended that out of 235 vacancies of MPDOs notified in General Recruitment and 7 vacancies notified under Limited Recruitment, about 14 vacancies are reserved for BC'D' (General) are concerned there are 9 (2 carry forward + 7) vacancies for BC'D' General in Multi Zone-I and 5 vacancies in Multi Zone-II. All these vacancies were filled and details are hereunder:

	MZ-I			MZ-II	
	Reg.No.	Marks		Regn.No.	Marks
1	11902771 selected against CF vacancy	659	1	12229186	607
2	12231501 selected against CF vacancy	643	2	12228602	602
3	10204971	608.5	3	12204169	602
4	10700100	608	4	12241495	602
5	10204422	608	5	11300058	601
6	10201364	608			
7	10103816	608			
8	10100323	603			
9	12201225	603			

The 2 BC'D' carry forward vacancies pertains to earlier recruitment and they were filled first and the candidates so selected are placed above the candidates selected against the vacancies belonging to the current recruitment. It is further contended that naturally the candidates selected against carry forward vacancies are higher in merit than the candidates selected against open competition vacancies of current recruitment. Hence, the OAs are devoid of merit and liable to be dismissed.

12. The Commission filed additional affidavit contending that sub rule 2(g) of Rule 22 of General Rules contemplates a Limited Recruitment for unfilled vacancies. In the case where candidates belonging to reserved groups are not available even after conducting limited recruitment, it is open to the Government to relax reservation rules and fill such vacancies by open competition candidates. In such an event, equal number of vacancies had to be reserved in the next general recruitment and only candidates selected against such vacancies can be appointed first before appointing the candidates selected against the vacancies of the current recruitment as per sub rule h (iii) of Rule 22. the respondents

followed the selection/allotment as per the roster brochure issued on reservation and special provisions for SC, ST and BCs published by the Government of Andhra Pradesh. In the present case the carry forward vacancies of BCs arose due to non joining of the selected candidates of the earlier recruitment. The candidates selected against the carry forward vacancies are enblock placed below the point where the last selection ended and above the point where present recruitment commenced. This will protect over all number of vacancies reserved for the community.

13. The learned counsel for the applicants submitted that the Commission issued Notification No.21/2003 and Supplementary Notification No.6/2004 calling for applications for recruitment to the post of Group-I Service in the State of Andhra Pradesh. The applicants though secured high marks in the selection process in view of the method and manner of preparation of final list of selected candidates for sending it to the Government for appointment to various posts in Group-I Service and earmarking of vacancies to various Social Groups by the Commission is contrary to rules and, therefore, the final list sent to the Government is illegal. The names of candidates who opted out of selection for various reasons were not deleted from the final selection list and the resultant vacancies were not filled up. Further the learned counsel submitted that a procedure has to be evolved calling for counselling and provide opportunity to the candidates who secured next higher marks than the candidates who were selected and opted out of the selection. The learned counsel referred to Rule-7 of A.P.P.S.C. Rules of Procedure (in short 'Rules of Procedures') wherein an enquiry is contemplated on the relinquishment of appointment by the selected candidates and thereafter the Commission has to send the final selection list to the Government for appointment. Rule-6 of Rules of Procedures would come into operation only after the final selection list is prepared after the enquiry is contemplated under Rule-7 of Rules of Procedures. In this case, the Commission did not hold any enquiry as laid down in Rule-7 of Rules of Procedures. As such, the final selection list submitted to the Government is not in accordance with the rules and the same is liable to be set aside. Further it is contended that several irregularities were committed in filling up of posts of MPDO with reference to the vacancies meant for BC'A' (Women) and BC'D' (General). The method adopted by the Commission with reference to carry forward vacancies is contrary to the law laid down by the Hon'ble Supreme Court. In this regard, the learned counsel relied upon the following judgments:

The Hon'ble Supreme Court in Bimlesh Tanswar vs. State of Haryana and Others, (2003) 5 SCC 604, wherein it has been observed thus:

> "An affirmative action in terms of Article 16(4) of the Constitution is meant for providing a representation of a class of citizenry who are socially or economically backward. Article

16 of the Constitution of India is applicable in the case of an appointment. It does not speak of fixation of seniority. Seniority is, thus, not to be fixed in terms of the roster points. If that is done, the rule of affirmative action would be extended which would strictly not be in consonance of the constitutional schemes. We are of the opinion that the decision in P.S. Ghalaut does not lay down a good law."

The Hon'ble Supreme Court in Ritesh R.Shah Vs. Dr. Y.L.Yamul and Others, (1996) 3 SCC 253, it has been observed as under:

"There cannot be any dispute with the proposition that if a candidate is entitled to be admitted on the basis of his own merit then such admission should not be counted against the quota reserved for Scheduled Caste or Scheduled Tribe or any other reserved category since that will be against the constitutional mandate enshrined in Article 16(4)."

The Hon'ble Supreme Court in Virender S.Hood and others Vs. State of Haryana and another (1999) 3 SCC 696, it has been observed as under:

"... .... When a policy has been declared by the State as to the manner of filling up the post and that policy is declared in terms of rules of instructions issued to the Public Service Commission from time to time and so long as these instructions are not contrary to the rules, the respondents ought to follow the same."

Since the respondents did not hold the enquiry as contemplated under Rule-7 of Rules of Procedures, the selection list sent to the Government is liable to be redrawn, otherwise the applicants who are meritorious candidates would be denied of their right to be considered for public employment. The action of the respondents is violative of Articles 14 and 16 of the Constitution of India.

14. The learned Standing Counsel reiterating the contentions made in the counter submitted that the applicants are not entitled to seek for redrawal of the select list, as the selected candidates have not been impleaded as party respondents to the case. The principle of carry forward of unfilled reserved vacancies was introduced with effect from 18.3.96 and keeping in view of the guidelines issued by the Government in the brochure on reservation and special provisions for SCs, STs and BCs, the vacancies were brought forward to the present recruitment. As per the guidelines of the Government, the carry forward vacancies reserved were filled first by meritorious candidates of that reserved category before appointing the selected candidates as per merit against the current vacancies. In this view of the matter, it justifies in filling up of the reserved carry forward vacancies with meritorious candidates of the concerned reserved category than the higher rank holder in the OC category. The applicant in O.A.No.238/2007 could not come up for selection as she secured only 581.3 marks.

The last candidate selected under this category secured 583 marks. With reference to the contention of the applicants in OA.No.161/2007 and OA.No.239/2007 all the 14 vacancies meant for BC 'D'(General) were filled up. The applicant in OA.No.239/2007 secured 600 marks and the applicant in OA.No.161/2007 has secured 599 marks, whereas the last candidate selected against BC'D' general vacancy is 601. Therefore, there is no illegality in drawing up of the final selection list. It is further submitted that an enquiry as contemplated under Rule-7 of Rules of Procedures does not arise, in view of the amendment brought about to Rule-6 of Rules of Procedures, whereunder the Commission shall have to send list of candidates selected by the Commission equal to the number of vacancies and the fall out vacancies, if any, due to relinquishment and non joining etc., of selected candidates shall have to be notified in the next recruitment. Therefore, the enquiry as contemplated under Rule-7 of Rules of Procedure has become redundant and it is not practicable to hold any further enquiry under Rule-7 of Rules of Procedure for filling up of the fall out vacancies has to take place, is not tenable and legal. The OAs are devoid of merit and liable to be dismissed.

15. The learned counsel for the unofficial respondents submitted that the unofficial respondents have nothing to do with the grievance raised by the applicants. This Tribunal on 8.3.2007 passed orders directing the respondents not to fill up 10 vacancies. In view of this order, the cases of the unofficial respondents are not being considered for selection and appointment as MPDOs. Though some of the candidates who secured less marks than the unofficial respondents were considered and appointed. Therefore, the interim order passed on 8.3.2007, directing the respondents not to fill up 10 vacancies is liable to be vacated.

16. The issues that arise for consideration in these OAs are

i) Whether the procedure adopted by the Commission for filling up the carry forward vacancies is legal;

ii) Whether the Commission is liable to hold an enquiry under Rule 7 of APPSC Rules of Procedure before sending the final select list; and

iii) To what relief?

17. The Commission issued Notification No.21/2003 and Supplementary Notification No.16/2004 for recruitment to the post of Group I Services. The total number of vacancies notified for the post of MPDO is 235 under General Recruitment. Out of which, 14 vacancies are reserved for BC'D' (General). Though there is no reservation to locals, the respondents made selections as per the options obtained from the candidates. The 2 carry forward vacancies were filled by the Commission

by the candidates who secured 659 marks and 643 marks out of 9 vacancies and the balance of 7 candidates selected secured the following marks:

3	10204971	608.5
4	10700100	608
5	10204422	608
6	10201364	608
7	10103816	608
8	10100323	603
9	12201225	603

The last candidate selected under OC category for the post of MPDO secured 609 marks. It is the contention of the Standing Counsel that this procedure has been adopted as per the roster brochure issued on reservation and special provisions for SC, ST and BCs published by the Government of Andhra Pradesh. It is to be noted that the Government has not filed counter nor opposed the applications. It is necessary here to extract the relevant portion of the brochure:

> "The register will be maintained in the form of a running account year by year; for instance, if recruitment in a year stops at a point 6 of a cycle, recruitment in the following year will begin at a point 7 of the same cycle. It may be noted that the General Rule 23 provides for rotation in 4 cycles of 25 points each and unless a complete set of 4 cycles in successions are completed, the next set of 4 cycles of rotation should not be started.
>
> No gap should be left in the roster; for example if a reserved vacancy, at say point 22 has to be treated, for want of a suitable SC/ST candidate, as unreserved the candidate actually appointed will be shown against that point itself. This vacancy will have to be carried forward to the next recruitment year and it has to be filled first by a SC/ST candidate as the case may be in the succeeding recruitment year;
>
> At the beginning of each calendar year particulars of reservation brought forward from previous years should be noted in the register. Appointment to such reserved vacancies be made first before the cycle of rotation is continued from the last point of the previous recruitment year.
>
> An abstract should be given in the roster after the last entry in any recruitment year showing the number of reservations to be carried forward to the succeeding recruitment year separately for Scheduled Castes and Scheduled Tribes."

In the above brochure, it is nowhere stated that the persons who are selected for the carry forward vacancies have to be placed above the merit list candidates of the General/Limited recruitment. There is also no such condition stipulated in Rule 22 of the General Rules. The learned counsel for the applicants is right in contending that the reserved category candidate who gets selected on the basis of his own merit in the open competition will not be counted against the quota reserved of that category and he will be treated as open competition candidate. In Ritesh R. Sah supra cited by the learned

counsel for the applicants, the Hon'ble Supreme Court referred to Mandal case and R.K.Sabharwal case and quoted therefrom thus:

> "In a case Indra Sawhney Vs,. Union of India, 1992 Suppl (3) SCC 217, commonly known as Mandal case, this Court held thus: (SCC p.73, para 811)
>
> "In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Cates; they will be treated as open competition candidates."

In R.K.Sabharwal v. State of Punjab, the Constitution Bench of this Court considered the question of appointment and promotion and roster points vis-à-vis reservation and held thus: (SCC p.750, para 4)

> "When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve category candidates can compete for the non reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation."

Keeping in view of the above law laid down by the Hon'ble Supreme Court, the Commission is not justified in counting the two candidates who were selected for the post of MPDOs with 659 and 643 marks as candidates selected under BC'D' (general). The respondents are liable to treat them a Open Competition candidates and fill up those two vacancies with BC'D' (General) candidates next in the merit list.

18. Before considering the second issue, it is necessary here to extract Rule-6 of Rules of Procedure prior to amendment and after amendment as well as Rule-7 of Rules of Procedure:

> Rule-6: (Prior to amendment)
>
> "The ranking list prepared by the Commission for selection in a direct recruitment shall remain in force for a period of one year from the date on which the selection list is published on the Notice Board of the Commission or till the publication of the new selection list whichever is earlier. The Commission may select candidates from the ranking list in force in place of those who relinquish the selection or who do not join duty with in the time given and also new requisitions (sent by appointing authorities). However, the

Commission shall have the right to freeze any ranking list for reasons recorded.

Rule-6 (After Amendment):

"The list of the candidates approved/selected by the Commission shall be equal to the number of vacancies only including those for reserve Communities/Categories notified by the Unit Officers/Government. The fallout vacancies if any due to relinquishment and non-joining etc., of selected candidates shall be notified in the next Recruitment.

Rule-7:

Any candidate whose name has been included in a selection list in a direct recruitment prepared by the Commission, on enquiry by the Commission, may relinquish his claim for appointment in writing in the proforma prescribed by the Commission. The Commission shall thereupon remove the name of such candidate from the selection list and select another candidate according to rules. the candidate whose name has been so removed from the selection list shall be informed of such removal by the Commission and shall have no right for the said appointment in future with reference to the said selection."

As per the amended Rule-6 of Rules of Procedure, a list of candidates selected by the Commission shall be equivalent to number of vacancies notified and that the fall out vacancies, if any, due to relinquishment or non joining of the selected candidates shall be notified in the next recruitment. However, Rule-7 of Rules of Procedure lays down that if a candidate whose name has been included in the selection list by the Commission for direct recruitment intends to relinquish his claim for appointment in writing in the proforma prescribed, the Commission shall hold an enquiry and remove the name of such candidate from the selection list and select another candidate according to the rules. The candidate whose name has been removed from the selection list shall be informed of such removal by the Commission. In this case, no such enquiry as contemplated under Rule-7 of Rules of Procedure has taken place by the Commission. Though the Standing Counsel is right in contending that in view of the amendment of Rule-6 of Rules of Procedure, the question of keeping the selection list in force for one year and to select candidates from the ranking list in the place of those who relinquished selection or who does not join within the time given, does not arise. However, it is to be seen that Rule-7 of Rules of Procedure has not been amended even though the amended Rule-6 of Rules of Procedure does not contemplate keeping the select list for one year or to select candidates for the fall out vacancies. Though Rule 6 of Rules of Procedure is amended in the year 1997, no amendment has been brought about to Rule-7 of Rules of Procedure till date. The contention of the learned Standing Counsel that it is not practicable to hold any further enquiry after the preparation of the select list, cannot be a ground to interpret Rule-7 of Rules of Procedure than what it lays down in simple words. Therefore,

it has to be construed that Rule-7 of Rules of Procedure which is independent of Rule-6 of Rules of Procedure cannot be said to be subjected to Rule-6 of Rules of Procedure. The Commission is required to make an enquiry before the select list is finally sent to the Government with regard to the candidates who intends to relinquish or who do not opt to join service on selection. In the present case, the Commission has not made any enquiry before sending the selection list to the Government. As such, the select list sent to the Government cannot be said to be in accordance with law. However, as rightly pointed out by the learned Standing Counsel, since the selection list has already been sent by the Commission to the Government and as the applicants have not impleaded the selected candidates, the question of setting aside the selection list sent by the Commission, would not arise. The learned counsel for the applicants rightly submitted that under the given circumstances, the respondents should be called upon to fill up the unfilled vacancies from out of the leftover merit list of the present recruitment.

19. Under the facts and circumstances of the case, it is declared that the action of the Commission treating the two selected candidates with 659 and 643 marks as candidates selected under BC'D' (General) quota for the post of MPDO is contrary to law. The respondents are liable to treat the two selected candidates for the post of MPDO as open competition candidates and fill the two carry forward vacancies with BC'D'(General) candidates. Further as the respondents did not hold the enquiry as contemplated under Rule-7 of Rules of Procedure, the final selection list sent to the Government is not just and proper. In view of the peculiar facts and circumstances of the case, as the selected candidates are not parties to the case, the selection list sent to the Government does not call for any interference. However, the respondents are hereby directed to fill up the unfilled vacancies from out of the leftover merit list, in the interest of justice. The respondents shall complete the process within one month from today. Accordingly, the OAs are disposed of and VMAs are allowed. No costs.

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ARUNACHAL PRADESH PUBLIC SERVICE COMMISSION

IN THE GAUHATI HIGH COURT
(THE COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR: TRIPURA: MIZORAM AND ARNACHAL PRADESH)
ITANAGAR PERMANENT BENCH
WP (C) 596 (AP) 2005
D.D. 19.1.2006
Hon'ble Mr. Justice H.N.Sarma

Shri Dakme Abo ... Petitioner
Vs.
The State of Arunachal Pradesh & Ors. ... Respondents

Reservation:

Whether stammering is a physical disability? - No

Recruitment to the post of Inspector (Tax & Excise) – Petitioner a candidate suffering from the disability of stammering has challenged recruitment on the ground 3% reservation for physically handicapped has not been made – The State respondent has contended as the post is meant for carrying out physical duties including investigation, raid etc., reservation under P.H. has not been made - High Court in view of the fact that stammering does not fall within the category of physical disability defined under Section 2(i) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, has held that no reservation is required to be made as provided under Section 33 of the said Act and consequently dismissed the writ petition as without merit.

Held:

A discussion of the aforesaid provisions of law as well as the related facts discloses that disability of "stammering" does not fall within the category of physical disability entitling the petitioner to have reservation on the ground of physical disablement in the post so advertised by the Commission.

ORDER

In this writ petition, the petitioner has prayed for issuance of a writ in the nature of mandamus restraining the respondents from declaration of the result of the interview of Inspector (Tax & Excise) unless they specified the 3% reservation for physically handicapped quota. Further prayer for issuance of mandamus was also made to implement the Govt. memo dated 22.1.2002 in all the direct recruitment process.

2. The petitioner obtained the B.A. degree from Bharatiya Shiksha Parishad, Uttar Pradesh and also obtained Bachelor of Education degree from the Hindi Sahitya Sammelan University, Allahabad in the year 2003.

3. The petitioner is a handicapped person and to that effect a certificate has been issued by a Board of Doctors wherein it is stated that the petitioner of a physically disabled person having the disability of stammering and cannot be recovered in any manner. The petitioner, in pursuance to an advertisement made by the Arunachal Pradesh Public Service Commission (herein after called Commission in short) for recruitment to the post of Inspector (Tax & Excise) in the Department of Tax & Excise, Government of Arunachal Pradesh for filling up 22 Nos. of posts of Inspector (Tax & Excise), duly applied for the same complying with all necessary formalities. The Commission held necessary recruitment test on 24.9.2005 and 25.9.2005. When the petitioner came to know that no provision for 3% reservation of posts for physically handicapped persons has been made in terms of Govt. notification dated 22.1.2002, considered the said selection process as illegal. Before declaration of the result by the Commission, the petitioner approached this Court by filing this writ petition for keeping 3% of the advertised posts to be reserved for physically handicapped persons to which he is entitled.

4. The State respondent has contested the case by filing affidavit-in-opposition wherein at para-6, it is interalia stated that post of Inspector (Tax & Excise) is meant for carrying out field duties and responsibilities for implementation of the provisions of Arunachal Pradesh Excise Act/Rules and Arunachal Pradesh Goods Tax Act/Rules. Like civil police, they are provided with basic physical training in North East Police Academy, Shillong. The Inspectors perform field/mobile works, which includes investigation, raid, search, arrest etc., and for that purpose, such Inspectors are to be physically fit and mentally sound.

5. Mr. BL Singh, learned senior GA appearing on behalf of the State respondents, apart from taking aid of the statements made in the affidavit in opposition has also submitted that the petitioner admittedly being suffering from stammering disabilities, do not fall within the category of physical disability and accordingly he is not permitted to get any relief in this case.

6. Mr. T.Pertin, learned counsel appearing for respondent No.3 has submitted upon instruction that the disability of stammering do not fall within the category of physical disability justifying reservation of post for such persons in the matter of public employment.

7. I perused the contentions made in this writ petition as well as the documents annexed therewith. The certificate issued by Board of doctors disclosed that the petitioner is suffering from stammering for which he is considered to be a physically disabled person. The Office Memorandum No.OM-15/

97(Pt-I) dated 22.1.2002 speaks about reserving 3% of posts/services against direct recruitment quota for physically handicapped persons in Group 'A', 'B', 'C' and 'D' posts/services. Vide Office Memorandum No.OM-34/85 dated 10.1.2002 the Government has specified the category of disabled persons for which reservation in posts/services are to be made, as the persons having the disability (i) Blindness – 1% (ii) Deafness – 1% and (iii) Orthopedically handicapped – 1%. The said memorandum does not include "stammering" as one of the physically handicapped category.

8. The Central Government also enacted a legislation namely "The persons with disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, 1995. The said Act defines disability under Section 2(i), which is as follows:

i) Blindness
ii) Low vision
iii) Leprosy cured
iv) Hearing impairment
v) Locomotor disability
vi) Mental retardation
vii) Mental illness

9. Under Section 33 of the Act, the provision for reservation of posts is made. Section 33 of the Act is quoted herein below:-

> "33. Reservation of posts – Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three percent for persons of class of persons with disability of which one percent each shall be reserved for persons suffering from-
>
> i) Blindness or low vision
> ii) Hearing impairment
> iii) Locomotor disability or cerebral palsy
>
> In the posts identified for each disability.
>
> "Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

10. A discussion of the aforesaid provisions of law as well as the related facts discloses that disability of "stammering" does not fall within the category of physical disability entitling the petitioner to have reservation on the ground of physical disablement in the post so advertised by the Commission.

11. It is submitted by Mr. T.Pertin, learned counsel appearing for respondent no.3 that in terms of the aforesaid selection process the Commission has already published its result.

12. In view of the aforesaid discussions, I do not find any merit in this petition and accordingly dismissed.

13. No costs.

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IN THE GAUHATI HIGH COURT
(High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram and Arunachal Pradesh)
ITANAGAR BENCH
WP(C) NO.142 OF 2006
D.D. 3.8.2006
The Hon'ble Mr. Justice H.N.Sarma

Shri Kipa Taja & Anr. ... Petitioners
Vs.
The State of Arunachal Pradesh & Ors. ... Respondents

Recruitment:

Petitioners were unsuccessful candidates in the recruitment to the post of District Fishery Development Officer carried pursuant to advertisement dated 29.4.2005 in which respondents 5 and 6 were selected and respondent 7 was placed in the waiting list – The petitioners challenged the selection process conducted by the APPSC on the ground that A.P. P.S.C. was not constituted as per Rules and the Subject Expert of the Commission was not a person from outside the State etc. – Petitioners also challenged the appointment of respondents 8, 9 and 10 who were first appointed on contract basis without advertising the posts against 3 direct recruitment posts – High Court rejected the contention of petitioners regarding selection of respondents 5 to 7 following the decisions of the Supreme Court including (2000) 6 SCC 127 to the effect that the challenge made by the unsuccessful candidates who appeared in the selection process but were unsuccessful is not to be entertained – High Court quashed the appointment of respondents 8, 9 and 10 against 3 direct recruitment posts for not advertising the posts holding that the same is violative of Rules and Articles 14 and 16.

Held:

When challenge is made by unsuccessful candidates who appeared in the selection process but were unsuccessful is not to be entertained.

Further held:

It is one of the first principles of law that if a legislature enables to do something to be done in a particular manner it should be done same manner. By appointing the respondent Nos.8, 9 and 10 on contract basis without making any public advertisement, the respondent authorities have violated the principles contained in schedule of the recruitment rules and cherished principle under Article 14 of the Constitution of India as a result of which other intending candidates have been deprived of making such application for the posts.

JUDGMENT

The two writ petitioners in this writ petition are serving as Extension Officer, Fisheries, in the department of Fisheries, Government of Arunachal Pradesh. The next higher grade for promotion from the Extension Officer is the District Fishery Development Officer (DFDO)/Assistant Director of Fisheries (ADF)/Farm Manager (FM) under the Department. The promotion to the aforesaid higher

cadre of DFDO and others is regulated and guided by a set of statutory rules from under Article 309 of the Constitution of India and known as "the Recruitment Rules for the post of District Fishery Development Officer/Assistant Director of Fisheries/Farm Manager, 2002". The respondent authorities having published an advertisement on 29.4.2005 for filling up two posts of DFDO, the petitioners and others duly applied for the same. After undergoing the process of recruitment test as conducted by the APPSC, the petitioners were unsuccessful in the said recruitment test whereas the respondent Nos 5 and 6 were selected and the respondent No 7 was put in the waiting list as per results published by the APPSC on 31.1.2006. The petitioners have challenged the selection process conducted by the APPSC on the ground that the Commission was not constituted as per rules and the subject expert of the Commission was not a person from out side the State but the Director of Fisheries was invited as subject expert in the selection process. Further case of the petitioners is that as per the recruitment rules the ratio of post to be filled up in the cadre of DFDO between the departmental candidate and the direct recruits is 50:50. But the respondent Nos 8, 9 and 10 have been illegally allowed to hold the posts in the cadre of DFDO, which are reserved to be filled up by way of direct recruitment without making any advertisement and without holding any recruitment test. Though the petitioners are departmental candidates they are competent to apply even as direct candidates upon advertisement but the respondent authorities have adopted pick and choose policy and the respondent Nos 8, 9 and 10 were appointed on contract basis vide order No.Fish/E(G) 92/2000 dated 8.12.2000 and thereafter they were appointed in the said posts on regular basis vide order No Fish/E(G) 152/Vol-II dated 27.10.2003 without advertising the posts. It is alleged that the said appointment of the respondent Nos 8, 9 and 10 as illegal and arbitrary as they were appointed in total violation of the existing statutory recruitment rules. With these allegations, the present writ petition has been filed praying for cancellation of the appointments of the respondent Nos 5, 6, 7, 8, 9 and 10.

2. Heard Mr T.Son, learned counsel for the petitioner and Mr A Apang, learned senior GA, AP. In spite of service of notice, the private respondents chosen not to appear in this proceeding. Although Mr T Pertin, learned Standing Counsel for the APPSC, appeared before this court on 1.8.2006 and submitted that he has received certain instruction and would file affidavit-in-opposition and the matter was kept for hearing today the learned Standing counsel for APPSC neither filed any affidavit nor appeared before this Court today.

3. The State respondents by filing the counter affidavit refuted the allegations made by the learned counsel for the petitioners. Regarding allegations of illegal selection and appointment of the respondent Nos 6 and 7 it is submitted that the petitioners themselves also participated in the said selection process. As regards the contention of the petitioners regarding illegality in the appointment of the respondent Nos 8, 9 and 10 in the vacancies earmarked for direct recruitment without making any public advertisement and without resorting to any recruitment test, the State respondents in its counter has admitted that there are six clear vacancies in the cadre of Grade B (Technical), DFDO/ADF/FM posts in the Fishery Department. Out of the said six posts two are earmarked for promotional quota and three are being held by the respondent Nos 8, 9 and 10 and one is anticipated vacancy. It is strenuously submitted by Mr Apang that although the aforesaid three posts are being held by the respondent Nos 8, 9 and 10 which falls within the category of direct recruitment quota as per recruitment rules, the rules are not strictly followed and such test was conducted through APPSC only last year when the respondent Nos 5 and 6 were selected and the respondent Nos 8, 9 and 10 were initially appointed on contract basis for a period of six months vide order No Fish E(G)92/2000 dated 8.12.2000 and later on they were regularly appointed vide order No.Fish/E(G) 152/Vol-II dated 27.10.2003 and, as such, in view of the aforesaid practice followed by the department their appointment should not be disturbed.

4. Recruitment to a public post is regulated and guided by statutory rules, if such rules exist. In the instant case, there are statutory rules as referred to above regulating the procedure of appointment in a Grade B (Technical) post in the Fishery Department. As per the schedule appended to the recruitment rules, 50% of the posts in the cadre are required to be filled up by way of direct recruitment and 50% are to be filled up from the departmental candidates by way of promotion. As per admission of the State respondents in their counter, three posts which are presently held by the respondent Nos 8, 9 and 10 fall within the category of direct recruitment.

5. The respondent Nos 5 and 6 were appointed on the basis of selection held by the APPSC in which the respondent No7 has been shown in the waiting list. The petitioners have also duly participated in the said selection process. It is no longer res integra that challenge made by unsuccessful candidates who appeared in the selection test but was unsuccessful is not to be entertained. {Ref: (1979) 3 SCC 165, (1998) 6 SCC 619 and (2000) 6 SCC 127}. That apart, the ground on which the petitioners have challenged the validity of the Constitution of the Commission ie., participation of the Director of

Fisheries as a technical expert, on the ground that he is an officer not out side the State in view of the fact that the relevant recruitment rules and APPSC Regulations do not provide that such technical expert should be a person from outside the State, attack made by the petitioners in the selection of the respondent Nos 5, 6 and 7 selected/wait listed has no legs to stand and the same is rejected.

6. Relating to remaining submissions of Mr Son that the respondent authorities acted illegally and arbitrarily in filling up the three earmarked post for direct recruitment by way of contract basis and later on regularly without making any public advertisement and without holding any recruitment test, I find that it has got force. As indicated above, the recruitment to a public post is to be made as per the statutory recruitment rules if such rules exist. In the instant case such recruitment rules exists. Accordingly, it is incumbent upon the authorities to follow and abide by the said statutory rules in filling up the posts and the authority cannot be allowed to make any appointment by flouting such recruitment rules. It is an admitted fact that three post held by the respondent Nos 8, 9 and 10 are earmarked for direct recruitment but those were filled up as per provisions of the recruitment rules. Though the private respondents were appointed initially on contract basis later on they were appointed regularly vide order No Fish/E(G) 152/Vol-II dated 27.10.2003 in the post in which they are appointed on contract basis without holding any recruitment test. It is one of the first principles of law that if a legislature enables to do something to be done in a particular manner it should be done same manner. By appointing the respodnent Nos.8, 9 and 10 on contract basis without making any public advertisement, the respondent authorities have violated the principles contained in schedule of the recruitment rules and cherished principle under Article 14 of the Constitution of India as a result of which other intending candidates have been deprived of making such application for the posts. Even when they were appointed in the said posts prima facie on regular basis vide order No Fish/E(G) 152/ Vol-II dated 27.10.2003, they have not undergone the process of selection test as required under the rules. Thus the appointments of the private respondents in both either on contract basis vide order No Fish/E(G) 92/2000 dated 8.12.2000 or on regular basis vide order No Fish.E(G) 92/2000 dated 8.12.2000 or on regular basis vide order No Fish/E(G) 152/Vol-II dated 27.10.2003 is violative of the rules and is illegal, unjust, arbitrary and violative of Articles 14 and 16 of the Constitution of India and hence the same are set aside and quashed.

Since the aforesaid posts fall within the category of direct recruitment. The State respondents shall take necessary steps immediately for filling up those posts or any other such posts available in the

department which are earmarked to be filled up by way of direct recruitment and to be filled up by making public advertisement through APPSC. The aforesaid exercise shall be completed by the Secretary (Fisheries), Government of Arunachal Pradesh, the respondent No 2, by publishing the post available for direct recruitment in the cadre of Grade B Technical in the Fishery Department through APPSC forthwith and at any rate not later than one month from today. Thereafter the Commission shall hold necessary interview/recruitment test in accordance with the law as soon as possible and furnish the select list to the Department. It is needless to say that the petitioners who are stated to be qualified for direct recruitment may also apply for the posts on advertisement and take part in the test.

However, in order not to cause any inconvenience to the department, the respondent Nos 8, 9 and 10 may be allowed to continue in their posts for a period of three months or for such shorter period of time till recruitment process is completed as indicated above. It is further made clear that the appointment/promotion so far made in the Grade B Technical posts in the Fishery Department as indicated in the Annexure 11 of the State affidavit is not disturbed and they will continue to remain as it is. The APPSC is also directed to complete the whole exercise within three months from the date of receipt of requisition from the respondent No.2.

Subject to the aforesaid direction and observations, the writ petition stands allowed to the extent indicated above.

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IN THE GAUHATI HIGH COURT
(THE COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR: TRIPURA: MIZORAM AND ARNACHAL PRADESH)
ITANAGAR PERMANENT BENCH
WP (C) No.3438 of 2006
D.D. 12.4.2007
Hon'ble Mr. Justice B.K.Sharma

Dr. Tarik Doke & Ors. ... Petitioners
Vs.
The State of Arunachal Pradesh & Ors. ... Respondents

Selection:

As against 31 posts of Junior Specialist Doctors in different disciplines as per advertisement dated 24.1.2006 P.S.C. selected 25 candidates in different disciplines as per notification dated 3.7.2006 – Petitioners challenged the entire selection process on the ground that selected candidates have not fulfilled requirement of experience as per rules which is 3 years for P.G. Degree holders and 5 years for Diploma holders – P.S.C. in view of shortage of candidates disciplinewise invoked Note-2 of the Recruitment Rules which provides for relaxation of experience in the case of candidates belonging to SC & STs – High Court rejected the contention of petitioners that P.S.C. could not have relaxed the requirement of experience without mentioning the relevant provision in the advertisement following the decisions of the Supreme Court in (1996) 5 SCC 167 and (1997) 10 SCC 298 – High Court also rejected the contention of the petitioner on the ground that the petitioners having appeared before Selection Committee without any protect and having taken a chance for favourable consideration were estopped from challenging the selection process as held in (2000) 2 SCC 615. Writ petition was dismissed

Held:

That relaxation provided was general and the Commission was empowered to do so at any stage of selection without making it public. The relaxation was provided as per the express provision in the rule upon scrutiny of the applications and when it was found that sufficient number of candidates with requisite experience were not available.

Cases Referred:-

1. AIR 1985 SC 167 - Probodh Kumar Verma v. State of U.P.
2. 1986 (Supp) SCC 285 - Om Prakash Shukla v. Akhilesh Kumar Shukla and others
3. (1996) 5 SCC 167 - M.Venkateswarlu and others v. Govt. of A.P. and others
4. (1997) 2 SCC 554 - Sodagar Singth v. State of Punjab and others
5. (1997) 10 SCC 298 - Sandeep Kumar Sharma v. State of Punjab and others
5. (2006) 6 SCC 395 - K.H.Siraj v. High Court of Kerala and others
6. (2006) 9 SCC 507 - Malik Mazhar Sultan and another v. U.P. Public Service Commission and others
7. (2006) 9 SCC 670 - Indian Institute of Technology and another vs. Paras Nath Tiwari and others
8. AIR 2007 SC 254 - Sanjay Kumar Manjul v. Chairman, U.P.S.C. and others

ORDER

The challenge made in this writ petition is the Annxure-7 notification dated 3rd July, 2006 by which the Arunachal Pradesh Public Service Commission, under the signature of its Secretary, has notified the selection for appointment of the incumbents named therein as Junior Specialist Doctors in the disciplines mentioned against each candidate.

2. The petitioners as well as the private respondents are the MBBS degree holders with Post Graduate degree/diploma in different streams. In response to the advertisement dated 24th January, 2006 for 31 posts in different disciplines, the petitioners and the private respondents along with others offered their candidatures. It is submitted that for 31 posts, only 50 applications were received. In terms of the advertisement, in which it was notified that the selection would be made through viva voce test and interview only, the selection was conducted by the Public Service Commission and pursuant to such selection, the impugned notification dated 3rd July, 2006 has been issued notifying the selection for appointment of the 25 candidates named in the notification for various disciplines. While the private respondents have been selected for appointment, the petitioners have not been selected.

3. The primary ground on which the petitioners have challenged the entire selection process initiated by the aforesaid advertisement and the selection of the private respondents is that the private respondents having not fulfilled the requirement of experience as per the rules, which is 3 years for P.G. degree holders and 5 years for diploma holders, the Public Service Commission could not have selected the private respondents. It will be pertinent to mention here that out of 10 petitioners, 4 petitioners also do not conform to the requirement of the requisite experience. In para-12 of the writ petition, a statement has been made that all the petitioners are having requisite qualification prescribed under the advertisement and thus, they duly applied in response to the advertisement dated 24.1.2006. In Para-16 of the writ petition, the petitioners have admitted that out of the 10 petitioners, the petitioners No.6, 7 and 8 do not have the requisite experience as prescribed in the rules. However, according to the private respondents, the petitioner No.3 also does not have the requisite experience.

4. At this stage, it will be appropriate to refer to the relevant rules since the entire argument of the learned counsel for the parties is based on the prescribed experience in the rules and the relaxation extended in respect of such experience. The rule holding the field is the Arunachal Pradesh Health Services Rules, 2001. As per Schedule 5 to the Rules, for the post of Junior Specialist, with which we

are concerned, there is requirement of 3 years experience in the concerned speciality after obtaining the P.G. Degree and 5 years experience after obtaining P.G. Diploma. Thus, while 3 years experience is the requirement for P.G. Degree holders, it is 5 years experience, which is required for P.G. Diploma holders.

5. As per Note-2 appended to the aforesaid clause regarding the experience, the experience is relaxable at the discretion of the Commission in the case of the candidates belonging to the Scheduled Castes and Scheduled Tribes, if at any stage of the selections, the Commission is of the opinion that sufficient number of candidates from these communities possessing requisite experience, are not likely to be available to fill up the vacancies, reserved for them. In the instant case, it is an admitted position that altogether 50 candidates applied for this specified 31 posts and out of which only 20 Scheduled Tribes candidates and 2 general category candidates were found to be eligible for appointment as per the rules. Thus, the requirement of experience for filling up the 31 posts fell short generally. Disciplinewise was also, there was shortage of candidates.

6. In the above context, the private respondents in their counter affidavit have stated in para-19 that against the 4 posts of Ophthalmology, although there were 4 applicants but only 3 candidates turned up for interview and all of them were selected. Similarly, 4 posts of Pathology were advertised but only 3 candidates applied and all the 3 candidates have been selected. In Para-23 of the counter affidavit, the private respondents have questioned the very locus standi of the petitioners to make the challenge to the selection in respect of the branches mentioned therein, since the petitioners were not the candidates for appointment against the posts of the said disciplines.

7. According to the petitioners, the respondents could not have relaxed the requirement of 3/5 years experience and even if, any relaxation was extended, the same ought to have been made public. The basic facts towards making the challenge to the very selection of the private respondents and others could be found in para-15 of the writ petition in which the petitioners have stated that the selected candidates, more particularly, the private respondents did not have requisite experience as per the rules, but yet, they have been selected for appointment. As noticed above, out of 10 petitioners, at least, 4 petitioners also do not have requisite experience.

8. In the counter affidavit filed by the State of Arunachal Pradesh Public Service Commission and the private respondents, the stand of the petitioners in the writ petition has been controverted. It

has been stated that the action taken in the matter of selection of the candidates was strictly as per the rules. As regards the relaxation extended in respect of experience prescribed in the rules, it is the stand of the respondents that such relaxation was extended having regard to the fact that sufficient number of candidates, more particularly, the Scheduled Castes and Scheduled Tribe candidates belonging to the State with the requisite experience were not available. In the additional affidavit filed by the Public Service Commission on 22.1.2007, it has been stated that out of 50 candidates, 47 candidates belong to Scheduled Tribes category and the remaining 3 candidates are general category candidates. The break up of the candidates discipline wise has also been indicated.

9. The Selection Committee was comprised of the Chairman and 3 other Members. The interview was conducted at Gauhati Medical College, Guwahati during the period from 26.6.2006 to 28.6.2006, in which the petitioners as well as the private respondents and others duly participated. On the basis of the interview so conducted by the appointed Selection Committee, the merit list was prepared and published on 3.7.2006 and the same was forwarded to the Government. In para-9 of the additional affidavit filed on 22.1.2007, the Commission has indicated the number of candidates selected discipline-wise.

10. As regards the question of relaxation, on which much emphasis has been placed by the petitioners, it has been stated that the Commission acted in tune with the power of relaxation. As per Note-2 appended to the relevant rules the experience of 3/5 years can be relaxed. The minutes of the meeting held on 17.5.2006 towards relaxation of experience 3/5 years has been annexed as Annexure-R/7 to the additional affidavit. On perusal of the minutes, what has transpired is that the Commission scrutinized the applications submitted by the candidates in response to the aforesaid advertisement and upon such scrutiny, it was found that there was hardly any candidate having 3/5 years experience in the respective branches after obtaining P.G./Diploma, as required in terms of the aforesaid rules and accordingly.

11. In the above context, it will be appropriate to mention that some of the posts in question were earlier advertised in 2001, to be precise, on 2.6.2001. On that occasion, altogether 17 posts were advertised. By notification dated 27.1.2001, the relaxation was provided in respect of the experience. In the minutes of the Arunachal Pradesh Public Service Commission meeting held on 17.5.2007, the relaxation extended in 2001 has also been referred to. Once the relaxation in respect of the experience

was provided by the Commission, the candidates irrespective of possessing the experience or not, they became eligible to sit in the interview/selection. Relaxation was extended in view of dearth of sufficient numbers of candidates having the requisite experience and such relaxation was as per the rules.

12. After the aforesaid process of relaxation was initiated and completed, the candidates were called for interview by issuing call letters on 25.5.2006. Thereafter, as noted above, the interview was conducted at Gauhati Medical College premises during the period from 26.6.2006 to 28.6.2006, in which the petitioners and the private respondents along with others participated. Thereafter, the Select List was published on 3.7.2006.

13. Mr. S.S.Dey, learned counsel for the petitioners, placing reliance on 3 decisions of the Apex Court, reported in (1997) 2 SCC 554 (Sodagar Singh v. State of Punjab and others), (2006) 9 SCC 507 (Malik Mazhar Sultan and another v. U.P. Public Service Commission and others) and (2006) 9 SCC 670 (Indian Institute of Technology and another vs. Paras Nath Tiwari and others) submits that the power of relaxation could not have been extended to the extent of relaxating the recruitment rules itself. He further submits that in case of any conflict between the recruitment rules and the advertisement, it is the recruitment rules which will prevail over the advertisement. The submission has been made in view of the fact that in the advertisement, there was no mention regarding requirement of experience of 3/5 years.

14. Mr. B.Banerjee, learned Sr. Government Advocate, Arunachal Pradesh countering the above argument, submits that the writ petition is misconceived. According to him, the petitioners are estopped from making challenge to the selection process. They themselves having participated in the same with their eyes wide open relating to the grievance now raised in the Writ Petition. He has referred to the decision of the Apex Court as reported in AIR 2007 SC 254 (Sanjay Kumar Manjul v. Chairman, U.P.S.C. and others). In para-27 of the judgment, it has been observed that while making a direct recruitment to a higher post, the Commission must have jurisdiction to relax the rules and that the power of relaxation must also be expressly conferred.

15. Ms G.Deka, learned counsel representing the Public Service Commission, referring to the aforementioned additional affidavit filed on 22.1.2007, submits that the Commission has acted bona fide in the matter and petitioners having participated in the selection process, cannot now turn round the same so as to question the validity of the same.

16. Mr. D.K.Misra, learned senior counsel assisted by Ms. S.Jahan, learned counsel representing the private respondents, has referred to various dates relating to the selection. He submits that the petitioners having confined the challenge to the selection of only the private respondents (numbering 14) out of 25 selected candidates, in absence of the remaining selected candidates in this proceeding, no adverse order can be passed in respect of the selection. He further submits that when as per own admission of the petitioners, at least 4 of the 10 petitioners do not possess the qualification regarding experience, they are precluded from making the challenge to that very aspect of the matter and that too, after availing the benefit of relaxation extended by the Commission. He further submits that since the petitioners were not the candidates in respect of the disciplines mentioned in para-23 of the counter affidavit filed by the private respondents, the petitioners cannot make a challenge in respect of the selection of candidates against those disciplines.

17. Placing reliance on the decisions of the Apex Court as reported in 1986 (Supp) SCC 285 (Om Prakash Shukla v. Akhilesh Kumar Shukla and others) and (2006) 6 SCC 395 (K.H.Siraj v. High Court of Kerala and others), Mr. Misra submits that the petitioners having taken the calculated chance for favourable consideration with the parameters of relaxation provided, cannot now turn round and question the very legality and validity of the relaxation provided by the Public Service Commission.

18. Mr. S.S.Dey, learned counsel of the petitioner, in his reply, has submitted that since the process of relaxation was initiated and completed without following the due procedure and such relaxation is confined in the file only without there being any publication such relaxation is not valid in the eye of law. According to him, such relaxation ought to have made public as was done in the case of the earlier selection for which the advertisement was issued on 6.8.2001. It is his submission that on that occasion, the relaxation regarding experience having been provided by express notification dated 27.8.2001, in the present case also, such relaxation ought to have made public by issuing notification and could not have been confined in the file only.

19. I have given my anxious consideration to the submissions made by the learned counsel for the parties. There is no dispute that the petitioners never raised any grievance relating to relaxation extended to or in respect of any of the clauses in the advertisement. They participated in the selection process by offering their candidatures and took a chance for favourable consideration. However, when they did not find their names in the impugned select list dated 3.7.2006, made a challenge to the very selection process and the selection of the private respondents. The prayer made in the writ petition is to quash the entire selection process convened and contained vide the aforesaid advertisement

dated 24.1.2006 and so also, to set aside and quash the entire select list, more particularly, the selection of the respondents No.3 to 16. Further prayer made is not to make any appointment from the impugned select list.

20. From the above prayers made in the writ petition, it will be seen that the petitioners have questioned the very validity of the selection process in which they duly participated without raising any objection. Further, if the select list containing the name of 25 selected candidates, is to be quashed, the same will lead to affecting the rights of the remaining 9 candidates, who are not the party in this writ proceeding. In the case of Probodh Kumar Verma v. State of U.P., reported in AIR 1985 SC 167, the Apex Court has observed that High Court ought not to decide a writ petition under Article 226 of the Constitution without the person who would be vitally affected by its judgment.

21. In Om Prakash Shukla (supra), the Apex Court has observed that the appellants/ petitioners in that case having participated in the interview, it was not open to turn round thereafter when they failed in the interview and then to contend that the provision of minimum marks in the interview was not proper. In the instant case also, as noticed above, the petitioners participated in the selection process taking a chance for a favourable consideration without any reservation and now, they cannot turn round the same so as to question the very validity of the selection process. In the case of Suneeta Aggarwal v. State of Haryana and others as reported in (2000) 2 SCC 615, the Apex Court having found that the petitioners therein not only applied for the particular post but also appeared before the selection committee constituted it was held that the appellant therein having appeared before the selection committee without any protest and having taken a chance for favourable consideration, she was estopped by her own conduct from challenging the order of the authority.

22. Much emphasis has been put in the decision of the Apex Court in the case Sodagar Singh (supra). That was also a case relating to relaxation of recruitment rules. Rule 8 of the Punjab Roadways (Ministerial) State Service Class III Rules, 1977 provided that no persons shall be appointed to the service unless he has requisite qualifications and experience, as specified in the particular column. On a reading of Rule 8, The Apex Court found that was no clause for relaxation. It was under the circumstances that it was held that the Government could not have provided relaxation to the candidates.

23. In the instant case, the rule itself provides for relaxation of requirement of experience. Being empowered with such relaxation power, the Public Service Commission has relaxed the rules. The Apex Court in the case of M.Venkateswarlu and others v. Govt. of A.P. and others, reported in (1996) 5 SCC 167 dealing with the power and jurisdiction for relaxation of rules, upheld the decision to relax the rules prescribed for requisite length of service. A question was raised that by providing

such relaxation, the right of other persons was affected. It was held that in such circumstances, no notice to the affected person was to be given. It was held that where the object would be frustrated, it must be applied in its own force. It was observed that relaxation may be given to a class of person or even individual. The test of justice and equity and envisaged in the particular rule was emphasized in the background of the case.

24. In Sandeep Kumar Sharma v. State of Punjab and others, reported in (1997) 10 SCC 298, the Apex Court noticing the recruitment rules, providing relaxation held that such rules of relaxation must get a pragmatic construction so as to achieve effective implementation of the requirement. It was held that the power of relaxation, even if, generally included in the Service Rules either for the purpose of protecting hardship or to meet special and deserving situation and other, such rules must be construed liberally. In the instant case, it is on record that adequate number of experienced candidates were not available and this is precisely the reason as to why the Public Service Commission invoked its power under the particular rule providing relaxation in respect of experience. At least 4 of the 10 petitioners are also the beneficiaries of such relaxation, with which that they participated in the selection.

25. As regards the submission of Mr. Dey, learned counsel for the petitioner that the relaxation provided must have been made public, suffice is to say that the relaxation provided was general and the Commission was empowered to do so at any stage of the selection. The relaxation was provided as per the express provision in the rule upon scrutiny of the applications and when it was found that sufficient number of candidates with the requisite experience were not available. Four of the petitioners are also the beneficiaries of such relaxation who have now turned round the same. Had the petitioners been selected, they would not have made any grievance against such relaxation. In fact, Mr.Dey, learned counsel for the petitioners during the course of his submissions has made the same known.

26. For all the aforesaid reasons and discussions, I am of the considered opinion that there was nothing wrong in providing relaxation in respect of experience for the purpose of selection of candidates for the post of Junior Specialists. Consequently, the selection made on that basis cannot be interfered with. Thus, the prayer for interference with the entire selection process including the selection of all the candidates and the private respondents cannot be granted.

27. In view of the above, the writ petition is dismissed. Interim order passed on 21.7.2006, modified on 16.8.2006 in Misc Case No.2840/2006 stands vacated. The respondents shall now proceed with the matter in accordance with law.

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ASSAM PUBLIC SERVICE COMMISSION

IN THE GAUHATI HIGH COURT
(The High Court of Assam: Nagaland: Meghalaya: Manipur: Tripura: Mizoram and Arunachal Pradesh)
Writ Appeal No.400 of 1999
In Civil Rule No.5055 of 1995
D.D. 6.9.2001
The Hon'ble Mr. Justice J.N.Sarma
The Hon'ble Mr. Justice D.Biswas

Sri. Abani Kumar Goswami ... Appellants
Vs.
The Chairman, Assam PSC & Ors. ... Respondents

Recruitment:

Whether selection in excess of number of posts advertised is valid? – No

Assam Public Service Commission advertised 18 posts of Finance and Accounts Officer/Treasury Officer etc. in Class-I cadre – General 11 + Reserved 7 posts for direct recruitment by competitive examination – 89 candidates including the petitioners were called for interview as against 18 posts Commission sent select list of 19 candidates – Government taking into consideration the posts that fell vacant subsequently requested the Commission to select to fill up 45 vacant posts – Commission sent further selection list of 6 candidates who were appointed – Petitioners filed W.P.No.5055/95 for direction to prepare waiting of 20 candidates out of 89 candidates called for interview – Single Judge issued direction to publish a list of remaining 20 candidates and to consider the claim of 9 writ petitioners - The Commission filed Review Application – The High Court gave direction to select and recommend the candidates from the same select list subject to their performance in the interview – Against the said order the Commission filed W.A.No.523/99 – The High Court found that there was contravention of C&R Rules and also Assam Public Service Commission (Limitation of Functions) Regulations and Assam Public Service Commission (Procedure and Conduct of Business) Rules, 1986, in the matter of preparation of merit list and select list – However, in view of the fact that more than 4½ years have been elapsed after the selection and appointment disposed of the case with a direction that there is not need for the Commission to make recommendation as directed by the Single Judge in the Review Application and to consider the writ petitioners for promotion as provided under Rule 6(4) of Assam Finance Service Rules.

Held:

That Public Service Commission should be an autonomous body; so that it could carry on its functions independently, fairly and impartially and it should be constituted with men of high integrity and qualification.

Further Held:

That Articles 14 and 16 of the Constitution enshrine fundamental right to every citizen to claim consideration for appointment to a post under the State. Therefore, vacant posts arising or expected should be notified inviting applications from all eligible candidates to be considered for their selection in accordance with their merit. The recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the Constitutional rights appointing the persons from the waiting list to the

vacancies arisen subsequently without being notified for recruitment is unconstitutional.

The High Court has observed as under:

"Another aspect of the matter which must be borne in mind is that we are exercising the powers of judicial review and in exercising the powers of judicial review when we question the propriety/legality of a decision of another constitutional body we must adopt a cautious and prudent approach. We are not sitting in appeal over the decision of another constitutional body. But in exercise of judicial review we must find out whether there is transparency and adherence to the Rules or whether the decision making process is fair and transparent one. We are not concerned with the decision. The founding fathers of our Constitution have given that power or role to another body. But if it is found that the decision making process itself is not valid and proper by adhering to Rules or it does not inspire confidence of the people in the system, a Writ Court must step in to stop such a rot. If it is found that the Commission did not adhere to the Rules for its guidance and in arriving at the decision, the action of the Commission shall have to be termed as arbitrary. The Rules are made to be adhered to so that the public cannot question the honesty, fairness, transparency and the role of the Commission. Some Rules are mandatory and some may be directory."

Cases referred:

1. AIR 1981 SC 1777 - Lila Dhar Vs. State of Rajasthan & Ors.
2. 1994 (3) SC 308 - State of Bihar and Another Vs. Madan Mohan Singh & Ors.,
3. (1995) SCC 486 - Madan Lal and Ors. Vs. State of J&K & Ors.
4. (1996) 1 SCC 283 - Ashok Kumar Vs. Chairman, Banking Service Recruitment Board and Ors.
5. (1998) 8 SCC 726 - Pradip Gogoi & Ors. vs. State of Assam & Ors.

ORDER

The brief facts are as follows:

A writ application was filed by nine persons being Civil Rule No.5055 of 1995. Their case was that they are working in different posts in the Finance Department, Govt. of Assam and at that point of time the tenure of their service in the said Department was more than five years (see para 1 of the writ application). It was also claimed that all of them had the qualification to be appointed/promoted as Finance & Accounts Officer/ Treasury Officer/Deputy Director-Audit in Class-I Grade-III cadre of Assam Finance Service.

2. An advertisement was issued on 17.7.93, which amongst others was published in the Assam Tribune inviting applications for 18 posts of Finance & Accounts Officer/Treasury Officer/Deputy Director-Audit (LF) in Class-I, Grade-III cadre of Assam Finance Service in the scale of pay as

mentioned therein. The break up was General 11 + reserved 7. That copy of the advertisement was annexed to the writ application as Annexure I. In response to the aforesaid advertisement the petitioners and others submitted applications. The Assam Public Service Commission (hereinafter referred to as the "Commission") also conducted a written examination on 22nd and 23rd October, 1994. On the basis of the written examination the Commission called 89 successful candidates including the petitioners for oral interview. The oral interview was held on different dates i.e., on 6th, 7th, 10th, 11th and 12th July 1995.

3. The Commission did not publish the select list for more than one year. It is the case of the petitioners which is also admitted by the State of Assam that after the advertisement was made some more posts fell vacant and under the circumstances, the Secretary to the Govt. of Assam, Finance Department wrote a D.O. letter on 14.7.95 to the Commission requesting the Commission to select the candidates to fill up 45 vacant posts. But the select list was published by the Commission for 19 candidates only inspite of the fact that the Finance Department asked for requisite number of candidates to fill up 45 vacancies. The said select list is claimed to be published on 12.9.95. The select list was published against 18 posts mentioned in the advertisement. After publication of the select list, on 25.9.95 another letter was written by the Secretary requesting he Commission to send 20 more names of selected candidates for the said posts in view of the fact that many posts were lying vacant. Thereafter names of the another 6 persons were sent and it is the case of the petitioners that those 6 candidates are from the waiting list. In fact no waiting list was at all published by the Commission. On the basis of the select list the 19 persons whose names were forwarded by the Commission were appointed and subsequently another 6 persons whose names were sent also have been appointed against backlog of Scheduled Caste and Scheduled Tribe candidates which was not at all mentioned in the advertisement which was published. Petitioners' further case was that the petitioners are entitled to benefit under the Assam Finance Service Rules, 1963 specially the benefit of promotion under Rule 6(4) read with the proviso thereto.

On these backgrounds the writ application was filed with the following prayers:

> "In the premises aforesaid, your petitioners prayed that your Lordships may be pleased to call for the records of the case, issue a Rule calling upon the Respondents as to why a Writ of Mandamus or a Writ of like nature should not be issued directing the Respondents, more particularly, the Assam Public Service Commission to publish another Select List and/or a Waiting List containing names of the selected out of 89 candidates

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who appeared in oral examination to fill up the remaining 20 posts of Treasury Officer/ Deputy Director-Audit and Finance & Accounts Officer which are at present lying vacant in the Finance Department as would appear from the DO letters being No.FEB.228/92/ 250 dt. 14.7.95 and FEB.228/92/272 dt. 25.9.95 and further directing the Respondents to appoint the selected candidates in such waiting list against the remaining 20 vacancies in the Finance Deptt. As stated above for the interest of justice of public service and/or any other appropriate Writ or Direction should not be issued restraining the Respondents from taking any other alternative method or making fresh advertisement for filling up those 20 vacancies and on hearing the cause of causes may be pleased to pas any other order or orders as to your Lordships may deem fit and proper."

4. No affidavit-in-opposition was filed on behalf of the Assam Public Service Commission. An affidavit-in-opposition was filed and it is said to be on behalf of respondent Nos.2 and 3. This is a mistake committed by the learned Govt. Advocate as in fact it is an affidavit-in-opposition on behalf of respondent Nos.1 and 2 namely, the State of Assam and Commissioner & Secretary to the Govt. of Assam. This affidavit was sworn by the Deputy Secretary to the Govt. of Assam. In the affidavit-in-opposition in para 7 it has been stated as follows:

"7) that in reply to the statements made in paragraphs 6 and 7, it is submitted that although the Assam Public Service Commission (hereinafter referred to as A.P.S.C.) made advertisement for 36 candidates, 18 for Direct recruitment and 18 for promotion quota, yet the A.P.S.C. selected only 2 candidates viz. Smt. Bharati Bora and Shri Rajendra Kumar Das against promotion quota and sent the same to the Secretary, Finance to the Govt. of Assam vide letter No.PSC/E-31/Con/92-93 dated Guwahati the 30th April 94.

Hence, the total vacancy position remained as 18 +16 = 34. However, the said vacancy position in the mean while raised upto 45 due to retirement or otherwise. It may be stated here that the vacancy position hardly remains static in as much as this position may sometimes change due to degradation or reversion posts if and when situation arises. As per Rule 5(2) of the Assam Finance Service Rules, 1963 a amended since the remaining post of promotion quota can be filled up from the select list of Direct recruitment and vice versa, the A.P.S.C. were informed about the position of increased vacancy vide this Deptt. D.O. No.FEB.228/92/250 dated 14.7.95 and requested the A.P.S.C,. to send names to suitable candidates for appointment in the Assam Finance Service.

But inspite of the request the A.P.S.C. forwarded a select list of 19 candidates only vide letter No.16 PSC/E-32/Con/92-93 dated Guwahati, he 12th September, 1995.

A copy of the aforesaid letter dated 30.4.94recommending names of two candidates against Departmental (Promotion) quota by the A.P.S.C. for appointment in Class-I, Grade-III cadre of Assam Finance Service, a copy of the letter dated 14.7.95 informing the A.P.S.C. about vacancy position in the Finance Deptt. And requesting to send names of suitable candidates for appointing them in the said service, an except of the aforesaid Assam Finance Service Rules, 1963 for made of recruitment and a copy of the aforesaid

select list forwarded by A.P.S.C. on 12.9.95 are annexed hereto and marked as Annexure A, B, C and D respectively."

5. Before we proceed further we must state herein that it is a really strange situation and strange course of conduct adopted by the Assam Public Service Commission. 18 posts were advertised by way of direct recruit. Promotion quota is to be filled up according to Rule 6(4) of the Assam Finance Service Rules. So, as a matter of fact, The Assam Public Service Commission had not jurisdiction to make any recommendation for promotion of the departmental candidates. It was beyond their jurisdiction. But inspite of it the Commission made recommendation for 19 + 6 i.e., for 25 candidates out of the competitive examination held by it which appears to be illegal and without authority of law. Be that as it may there is power with the Government that if persons are not found to be fit for promotion by the Departmental Promotion Committee, the posts can be filled up by direct recruits and that is provided in Rule 5 of the Assam Finance Service Rules, 1963 which is quoted below:

"5. Method of recruitment. (1) Recruitment to the service shall be made –

(a) by promotion accordance with Rs 6 and 7, and

(b) through competitive examination in accordance with R.9.

(2) When sufficient number of candidates are not available for filling up vacancies reserved for promoted or direct recruits they may be filled up by candidates of the other category. The reservation of 50 percent quota for promoted or direct recruits shall not be carried forward.

But before going for direct recruits of promotional quota, the departmental promotion committee must make an exercise to find out whether such candidates are available or not. Only thereafter the exercise for direct recruit is to be made. There is nothing on record to show that this was done. In the absence of it the Commission should have kept itself confined to 18 posts which were available for direct recruits and which was advertised.

6. When this matter came up for hearing the learned Single Judge by judgment dated 30th July, 1997 found as follows:-

"Mr. Dutta further submitted that the petitioners legitimately expected that if a waiting list of 45 candidates had been published by the Commission their names would have been included in such a waiting list and in that case they would have been entitled to be appointed in the posts advertised for against 45 vacancies as disclosed by the finance Department in the said D.O. letter. According to petitioners' calculation, against 45 vacancies Department has already appointed total 25 (19=6) candidates as trainees for absorption in those posts and that there remained 20 posts more out of the 45 posts yet to be filled up in the Finance Department. Therefore, petitioners pray for a direction from this Court to fill up those 20 posts by preparing waiting list from amongst the 89 candidates who were successful in the interview held on 22nd and 23rd October, 94."

This submission itself is not tenable in law in as much as once the advertised vacancies are filled up, the Commission has no business to forward more names.

Mr.P.Prasad (since deceased) who was the counsel for the A.P.S.C. candidly submitted before the learned Single Judge by producing the records as follows:

> " ..... From the records it is revealed that as per the direct recruit 89 candidates were called for interview and 18 nos of candidates were selected, but no select list in order of merit has been made so far."

In page 92 the learned Single Judge came to the following finding:

> "..... I hold that the Commission has included in their selection those 45 posts apart from 18 advertised posts. The admitted position is that there is no select list of 89 candidates after the interview and, therefore, no waiting list was made, though attempt was made to show that appointed candidates apart from the selected 19 candidates were from waiting list. In the affidavit respondent is trying to show that those candidates are from reserved quota and they have been brought in and accommodated after revalidating the earlier select list exclusively meant for SC/ST reserved quota."

In page 9 it was found as follows:-

> " ..... I hold petitioners are not below average candidates. Further, the averments made in the affidavit regarding appointments by revalidating the earlier select list exclusively meant for the reserved candidates cannot be accepted as apparently a separate examination as held by the APSC for recruitment exclusively meant for SC/ST candidates and on the basis of that a select list was prepared."

In page 95 it was further held:-

> " ..... Mr. P.Prasad, counsel for the APSC submitted that no select list has been found in the record and this Court also after elaborate effort did not find out the same."

Accordingly in para 15 of the judgment following direction was given:

> "15..... In view of the above situation, the respondents Commission shall publish a list of remaining 20 candidates remained to be filled up during the relevant period to enable the Govt. to fill up those posts, as the work of the Finance Department is under acute shortage of officers which apparently affects the public interest. While the list will be prepared, Commission shall consider the case of the 9 writ petitioners keeping in view their experience and the required training they have already undergone."

7. It may be stated herein that another Civil Rule was filed being W.P. (C) No.3890 of 1997 by eleven persons in which the following order was passed:

> "5.12.97
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> The facts and the law in the Writ petitions is squarely covered by the decision of this Court in Civil Rule No.5055/95. Accordingly the petitioner would be entitled for the similar benefit of the judgment and order passed by this Court on 30.7.97 in Civil Rule NO.5055/95. The Respodnent – Commission shall accordingly consider the case of the petitioners also in the light of the direction given by this Court in its decision dated 30.7.97 passed in Civil rule No.5055 of 1997. This order is passed upon hearing Sri. N.Dutta, learned counsel for the petitioner assisted by Sri. S.K.Medhi, Advocate and K.H.Choudhury, the learned Addl. Senior Government Advocate and Sri. B.J.Talukdar, Advocate for the A.P.S.C."

8. Thereafter on 11.12.97 a review application was filed being Review Application No.7 of 1998 by the Chairman, Assam Public Service Commission and the affidavit in respect of this Review Application was sworn by one Sri. Balindra Huzarika, Assistant Controller of Examination, APSC. Para 2 to 5 of the Review Application are quoted below:-

> "2. That the said writ application had been preferred by one Shri Abani Kumar Goswami and twelve others jointly. The petitioners contended that they have been serving in different posts in the Finance Department of the govt of Assam since about 5 years following an advertisement dated 17.7.93 by the APSC for 18 posts of Finance and Accounts Officers/ Treasury Officer/Deputy Director-Audit and Class I Grade III cadre of Assam Finance Service they all applied A.P.S.C. held written examination on 22nd and 23rd October, 1994 in which 1188 candidates took part, out of which only 88 candidates qualified for interview. Five candidates absented themselves from interview and remaining 84 were interview with the help of expert deputed by government. On 6th, 7th, 10th, 11th, 12th and 13th July, 1995. For the 18 advertised posts the Commission selected and recommended the names of 19 candidates in order of preference vide letter dt. 12th September, 1995. Vice another letter dated 25th October 1995 the Commission recommended the names of six more candidates in order of preference. Meanwhile the Commission held provisional examination for a number of said posts in which 4 candidates appeared out of which only two were selected on merit and their names were forwarded vide letter dt. 30.4.94.
>
> 3. That before publication of the select list vide letter dt. 14.7.95 requesting the APSC to select candidates to fill up 45 vacancies. The Commission could not recommend 45 candidates because of their performance in the interview was not upto the mark. The A.P.S.C. selected and recommended names of only 19 candidates for the 18 advertised posts and opined that the rest of the candidates who had appeared in the interview are not up to the mark and after proper advertisement selection of letter candidates should be made. The writ petitioner contended that a waiting list should have been prepared and they should have been absorbed in the additional vacancies.

4. That the Hon'ble Court accepting the contention of the petitioner by judgment and order dt. 30.7.97 directed the APSC to publish a list of remaining candidates to enable the Government fill up all the vacancies.

5. That the humble petitioner most respectfully state that the aforesaid direction of the Hon'ble High Court to publish the list of candidates for remaining vacancies would tantamount to publish select list without advertising the vacancies would amount to denial of right to candidates who are eligible to apply after the earlier advertisement for 18 candidates and therefore would be violative of Article 14 of the Constitution and would be against the settled law laid down by the Apex Court."

9. An Additional affidavit was filed by the then Chairman of the Commission in respect of the Review Application. The stand taken in the additional affidavit by the Chairman is as follows:-

(a) ..... It is true that the Commission could not provide required assistance to this Hon'ble Court as it has failed to produce relevant records regarding the performance of the Writ Petitioners in the examination as there was a communication gap between the Learned Counsel of the Commission and the office of the Assam Public Service Commission. the Court in fact passed the impugned judgment on the basis of whatever records produced by the Learned Counsel, Assam Public Service Commission. The deponent believes that had the relevant records been produced before the Court at the time of hearing, the Court might not have passed the impugned judgment directing the Commission to publish the list for remaining 20 vacancies.

(b) ..... The Commission on 12.9.95 initially recommended the names of 19 candidates on the basis of their performance in the examination. On receipt of further request from Govt. on 25.10.98 the Commission recommended the names of all the candidates who secured atleast the cut off marks in their respective categories for appointment. It may be mentioned that even after this flexible approach the Commission could recommend the names of only 6 candidates as none of the remaining candidates had scored the minimum cut off as mentioned above.

(c) ..... This Court was pleased to hold that the petitioners are not below average as they have come out successfully in written examination and were allowed to appear in the interview/oral examination. However, the aforesaid contention of the petitioners were not true and the records will reveal that their performance in the entire interview was below average."

10. On the basis of this Review Application on 29th September, 1999, this Court gave the following direction:-

"7. In that view of the matter, the judgment and order dated 30.7.97 is modified to the extent, that as per Government requisition and request/proposal, the Assam Public Service Commission shall select and recommend the candidates from the same select list subject to their performance in the interview in the same selection process so that those vacant posts can be filled up immediately."

11. Being aggrieved by this order, Writ Appeal No.523/99 has been filed by the Commission and Writ Appeal No.400/99 has been filed by the writ petitioners.

12. We have heard Mr. KN Chowdhury, learned senior Counsel, assisted by Mr. TC Chutia, learned counsel for the Assam Public Service Commission and Mr. AKBhattacharya, learned senior counsel assisted by Nr BK Singh, learned counsel for the writ petitioners/appellants. We have also heard Mrs. A.Hazarika, learned counsel for the State of Assam.

13. Before we go to the other aspects of the mater, let us have a look at the provisions of law with regard to the competitive examination and how the posts are to be filled up by the Assam Public Service Commission. This matter is covered by the Assam Public Service Commission (Limitation of Functions) Regulations, 1051. Part II provides for recruitment by open competition and Rule 4(a) and (b) are quoted below:-

> "4. In the case of recruitment by competitive examination the Commission will send to the appointing authority a complete list of the marks obtained by each of the candidates, and –
>
> (a) If the appointing authority is the Government, the Secretary in the Department concerned shall submit without comment for the order of Government, the names of, or
>
> (b) If the appointing authority is not Government, that authority shall appoint the candidates who obtain the highest marks upto the number of vacancies to be filled, or, where recruitment is to be made from candidates belonging to Scheduled Castes, Scheduled Tribes and Backward Classes, the candidates of each category who obtained the highest marks upto the number of vacancies to be filled from that category provided that the Commission certifies that these candidates are fit for appointment."

There is a set of rules known as Assam Public Service Commission (Procedure and Conduct of Business) Rules, 1986. Rule 41, 42, 43 and 49 are quoted below:

> "41. When on each day after the interview is over and marks are awarded to each candidate the mark sheet prepared shall be placed in sealed covers and will be kept by the Chairman.
>
> 42. The mark sheets so obtained shall be opened on the last day of the interview or immediately thereafter and the marks of interview/personality test in a competitive examination shall be added to the marks obtained by the candidate in the written examination. Thereafter on the basis of totals so obtained the merit list shall be prepared and placed before the Commission for final declaration of the result:
>
> Provided that the Commission may with a view to eliminate variation in the marks awarded to candidate on any examination or interview adopt method, device or formula which they consider proper for the purpose.

43. After the results are declared by the Commission, a copy of the same shall be placed in the Notice Board. A copy of the result will also be sent to the Press/Newspapers with a request to publish the same.

48. Where multiple Boards are constituted by the envelopes containing the original mark sheets of interview held by different Boards shall be sent to the Chairman/Senior most member for preparation of results which shall be sent to all Members of the Boards for signature. The Private Secretary to the Chairman shall prepare the results."

14. No mark sheets were sent and even it was not produced before this Court, though sufficient opportunity was given for it. Another aspect of the matter which must be borne in mind is that we are exercising the powers of judicial review and in exercising the powers of judicial review when we question the propriety/legality of a decision of another constitutional body we must adopt a cautious and prudent approach. We are not sitting in appeal over the decision of another constitutional body. But in exercise of judicial review we must find out whether there is transparency and adherence to the Rules or whether the decision making process is fair and transparent one. We are not concerned with the decision. The founding fathers of our Constitution have given that power or role to another body. But if it is found that the decision making process itself is not valid and proper by adhering to Rules or it does not inspire confidence of the people in the system, a Writ Court must step in to stop such a rot. If it is found that the Commission did not adhere to the Rules for its guidance and in arriving at the decision, the action of the Commission shall have to be termed as arbitrary. The Rules are made to be adhered to so that the public cannot question the honesty, fairness, transparency and the role of the Commission. Some Rules are mandatory and some may be directory.

15. The founding fathers of the Indian Constitution rejected the 'spoils system' under which the administration is carried on by civil servants appointed in consideration of their political service to the party in power. They realized that the democratic stem could be maintained only if the civil servant were appointed solely on the basis of merit by open competition and only if they could carry on the administration independently, instead of blindly carrying out the orders of their political superiors. It is for this that Commission is constituted as a constitutional body. (See Constitution by Basu, 1999 Edition).

16. For the recruitment on the basis of merit, they provided for a Public Service Commission at the Union as well as the State level, which itself should be an autonomous body; so that it could carry on its functions independently, fairly and impartially, it should be constituted with men of high integrity and qualification.

17. If any authority is required, one can go through AIR 1981 SC 1777 (Lila Dhar, Petitioner Vs. State of Rajasthan & Ors., Respondents) where the Supreme Court in para 4 pointed out as follows:

> "4. The object of any process of selection for entry into a public service is to secure the best and the most suitable person for the job avoiding patronage and favouritism. Selection based on merit, tested impartially and objectively is the essential foundation of any useful and efficient public service. So, open competitive examination has come to be accepted almost universally as the gateway to public services. "The ideal in recruitment is to do away with unfairness". United Nations Hand book on Civil Service Law as and Practice: "Competitive examinations were the answer to the twin problems represented by democracy and the requirements of good administration. They were the means by which equality of opportunity was to be united with efficiency.....By this means favouritism was to be excluded and the goal of securing the best man for every job was to be achieved." Public Personnel Administration by O. Gler Sthal. "Open competitive examinations are a peculiarly democratic institution. Any qualified person may come forward. His relative competence for appointment is determined by a neutral disinterested body on the basis of objective evidence supplied by the candidate himself. No one has "pull" everyone stands on his own feet. The system is not only highly democratic, it is fair and equitable to every competitor. The same rules govern the same procedures apply, the same yardstick is used to test competence". Introduction to the study of Public Administration by Leonard White."

18. It is in this background that we must decide this case. Mr. Chowdhury, learned Advocate for the Assam Public Service Commission Writ Appeal No.523/99 makes the submission that as there is no wait listed candidate, the Commission cannot adhere to the directions given by this Court and further with regard to the request of the Government to recommend suitable candidates, there was no suitable candidate as their performance was below the cutoff mark. In support of his contention, Mr. Chowdhury placed reliance on the following decisions:

State of Bihar and Another Vs. Madan Mohan Singh & Ors., reported in1994 (3) SC 308. That was a case where an advertisement was made to fill up 32 vacancies. Recommendation was made and 32 vacancies were filled up and the Supreme Court pointed out that as the 32 vacancies were filled up, there cannot be any further appointment from that select list the list itself has been exhausted and the selection process has ended. It was further pointed out that if the same list has to be kept alive for the purpose of filling up of other vacancies, it would amount to deprivation of rights or other candidates who would have become eligible subsequent to the said advertisement and the selection process.

19. The next case relied upon by Mr. Chowdhury is Ashok Kumar Vs. Chairman, Banking Service Recruitment Board and Ors., reported in (1996) 1 SCC 283 wherein the Supreme Court pointed out that Article 14 read with Article 16(1) of the Constitution enshrines fundamental right to every citizen to claim consideration for appointment to a post under the State. Therefore, vacant posts arising or expected should be notified inviting applications from all eligible candidates to be considered for their selection in accordance with their merit. The recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the Constitutional right under Article 14 read with Article 16(1) of the Constitution. The procedure adopted, therefore, in appointing the persons from the waiting list prepared by the respective Boards, though the vacancies had arisen subsequently without being notified for recruitment, is unconstitutional. However, since the appointments have already been made and none was impleaded, the Supreme Court did not interfere with these matters adversely affecting their appointments.

20. The next case relied upon by Mr. Chowdhury is Pradip Gogoi & Ors. vs. State of Assam & Ors., reported in (1998) 8 SCC 726. This is a case of this Court and a Division Bench of this Court laid down the law that no candidate in the waiting list shall acquire a right to get appointment. As against that a SLP was filed before the Apex Court and that was dismissed by the Apex Court holding as follows:

> "2. Though Mr. Goswamy, learned counsel appearing for the petitioners is right in contending that opportunity should be given to such people and the petitioners too would have had also applied for appointment having considered their cases waiting for such an appointment since, their cases were tested by the Public Service Commission and kept in the waiting list, omission to appoint them affects their rights seriously under Article 16(1) of the Constitution. We cannot give a direction to consider their cases for appointment from the wait list. The sympathetic vibrations are also responsible for this sagging problem and moral degeneration. Under these circumstances, we are constrained not to accede to the persuasive request made by Mr. Goswamy. However, the authorities are directed to notify forthwith vacancies to the Public Service Commission and the Public Service Commission would take necessary expeditious action for recruitment and recommend the names to the authorities expeditiously, so that the existing vacancies would be filled up and the petitioners and all eligible candidates would also be eligible to apply."

21. Another case relied upon by Mr. Chowdhury is Madan Lal and Ors. Vs. State of J&K & Ors., reported in (1995) SCC 486. That decision is also on the same point that once notified vacancies are filled up, there can be no further appointment from the select list even if vacancies arise subsequently.

22. On the basis of these decisions of the Apex Court which are binding on us, we accept the propositions of law as put forward by Mr.Chowdhury. But the matter does not end there. There are certain other murky facts as revealed from the records and we want to have a bird's eye view on these matters not to condemn the conduct of the Commission but to strike a note of caution with hope and trust that the Commission may be more cautious and prudent in future. We are not touching the appointments already made, as they are not parties before us and further almost 4 years have elapsed from the date of appointment.

23. Mr. AK Bhattacharyya, learned Advocate for the appellants in Writ appeal No.400/99 strenuously contends that on earlier occasion record was produced before this Court and this Court on examination of the record found that there was no select list. Even that was the finding of the learned single Judge. Thereafter a Review Application was filed wherein it was stated that there is a select list. The record which now has been produced before this Court by the learned Counsel for the APSC does not show any selection proceeding. The selection proceeding and the mark sheets should be maintained by the APSC according to its own rules and not only that when the Commission sends recommendation to the government they must reflect the marks obtained by each candidate. That is a mandate of Rule which we have quoted above. The Commission cannot recommend and sent a list to the Government without mark sheets. That is what has been done here. A bare perusal of the records will show that the list was published on 12.9.95 for 19 candidates and the matter was closed thereafter as evident from the note sheet. How thereafter the matter was reopened with regard to that there is no note sheet. The next note sheet is dated 27.2.96 which shows the names of 25 candidates appointed. There is also no record to show that there was selection for these 25 candidates by adhering to Rules. Further there is another disturbing factor. The result was published on 12.9.95 by the Assistant Controller of Examination. In pursuance of the Rules it was never notified, it was not sent to the press or to news papers which is required under the law. On the same date the Chairman of the Assam Public Service Commission on his own wrote a letter to the government for appointment of 19 persons (though only 18 posts were advertised) and though the vacancy position was 18 the government appointed 19 candidates and thereafter names of another 6 persons were sent on 25th October, 1995. Selection cannot be made by installments. There must be one combined select list. Publication of result must be once for the advertised posts. No waiting list is available in the record produced before us and it is not known wherefrom these 6 persons have been picked up. Further in the result published by the Assistant Controller of Examination appearing at page 93 for 6 candidates

the date is cut both at the top as well as below signature and that was shown to the learned counsel for the parties. Earlier to this publication itself the then Chairman of the Commission sent a letter to the Government recommending 6 persons. The names were recommended by the Chairman on 21.10.95 but the result as seen from the record was published on 25.10.95 for these 6 persons. That is something unthinkable. Not only that we have shown the records to the learned counsel for both the parties and we have doubt regarding select list dated 12.9.95. Of course, there is no material before us to establish that these pages were inserted later on or after the decision of the learned Single Judge. There is doubt regarding the whole selection process, in the absence of selection proceeding or mark sheets. Further, the note sheets maintained are like a mirror to a file maintained. The note sheets are absolutely silent with regard to different stages.

24. We close the chapter here with the hope that things will improve and there will not be any complaint to the effect that "something is wrong in the State of Denmark". It may be stated herein that in the Regulation which we have quoted above there is no provision for wait list and that is why the provision for some few more names to be added and it is really unfortunate that candidates are wait listed and somebody takes advantage of it.

25. We dispose of the Writ Appeal as follows:

1) Writ Appeal No.523/99 shall stand disposed of with a direction that there is no need for the Commission to make recommendation as directed by the learned Single Judge in the Review Application.

2) Writ Appeal No.400/99 shall stand disposed of with a direction that if the petitioners are entitled to the benefits of Rule 6(4) and the proviso thereto of the Assam Finance Service Rules, 1963, that benefit shall be given to them as it will be really unjust and improper to deny the benefits to these persons if they really deserve promotion at the hands of the authority.

26. As we have found the whole selection process to be not fair and proper, we have all sympathy for these candidates. But in view of our circumscribed power we cannot give any direction for re-consideration of their cases. But they should receive justice in the hands of the authority. The authority should try to wipe out injustice if any caused to them. Even making a bold attempt to wipe out genuine tears of somebody is justice. We also hope that the authority shall look to the aspect that 50% of the

posts are available by way of promotion and that shall be strictly adhered to according to Rules.

27. Before we part with the record we make it explicitly clear that the exercise we have made about the affairs of the Commission is not to erode the confidence of the public in the august body but only to point out the loopholes so that it may be plugged in future. It is with anguish and pain that we have delved into it. We quote here a famous line of Churchill. "It is wrong not to lay the lessons of the past before the future." To keep something below the carpet is not beneficial for the institution, rather it should be the endeavour to remove the garbages. Though the selection made by the Commission is only recommendation and not binding on the Government, yet it must be an unbiased advice as it affects the moral of public service. Public Service Commission is independent constitutional body. So it is entrusted a valuable and far reaching important task of selecting personnel to whom shall be entrusted the duty of running the administration of the State. Destiny of the people very much depends on the fair and just decision of the Commissions. Way back in 1954 the Supreme Court pointed out that the Executive is to be manned by the cream of the society. The Commission must churn/separate this cream from the milk.

The records are returned to the learned counsel for the APSC.

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IN THE GAUHATI HIGH COURT
(The High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram and Arunachal Pradesh)
W.P. (C) No.1042/2002 and W.P.(C) No.1933/2002
D.D. 13.6.2002
The Hon'ble Mr. Justice J N Sarma

Sri (Dr) Muhi Kanta Hazarkika & Anr. ... Petitioners
Vs.
State of Assam & Ors. ... Respondents

Qualification & Experience:

Recruitment to the post of Director of Health Services - At the time of issuing advertisement no qualification was prescribed by the Government under the Rules with regard to academic qualification and experience – While issuing advertisement qualification experience as was done in the past were prescribed – P.S.C. prepared select list placing Dr. Bipul Goswami at Sl.No.1 and Dr. Paresh Battacharee at Sl.No.2 – After receipt of the list the authority came to a decision that Dr. Goswami was not qualified to hold the post as he did not have the requisite experience – The validity of the select list was challenged – The High Court scraped the selection and sent back to the Government to lay down the qualification and experience as required under the Rules and hold selection.

Held:

Following the decision in (1990) 3 SCC 655 (District Collector & Chairman, Vizianagaram Social Welfare Residential School Society Vs. M.Tripura Sundari Devi) that when an advertisement mentions a particular qualification and an appointment is made in disregard of the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement.

Cases referred:

1. (1990) 3 SCC 655 - District Collector & Chairman. Vizianagaram Social Welfare Residential School Society Vs. M.Tripura Sundari Devi

2. (1998) 3 SCC 381 - Upen Chandra Gogoi Vs. State of Assam and others

ORDER

Both these applications have been filed challenging the legality and validity of the select list dated 29.12.2001 prepared by the Assam Public Service Commission (hereinafter referred to 'APSC') and communicated by its Secretary by which Dr. Bipul Ch. Goswami and Dr. Paresh Ch. Bhattacharjee were selected to fill up the post of Director of Health Services, Assam in pursuance of the advertisement

dated 10.10.2001. It may be stated that Dr. Bipul Ch. Goswami was placed at Sl.No.1 in the select list and Dr. Paresh Ch.Bhattacharjee was placed at Sl.No.2 in the select list. The authority, however, after receiving the list came to a decision that Dr. Bipul Ch.Goswami is not qualified to hold the post as he did not have the requisite experience as per the advertisement and as such, the post is now being held by Dr. Kalyan Das as in-charge Director pursuant to an interim order of this Court.

2. The brief facts are as follows:-

On 10.10.2001 an advertisement was issued to fill up the post of Director of Health Services, Assam and the qualification mentioned were as follows:-

"Qualification: Atleast M.B.B.S. Degree or an equivalent Degree of a recognised University.

Experience (a) At least 4 (four) years practical and administrative experience in the post of either Chief Medical and Health Officer or Additional Chief Medical and Health Officer or combining both, the experience together or in an equivalent or in a higher post.

(b) Experience in Medical Public Health and Family Welfare works.

(c) Preference will be given to the candidates having experience in administering large Health Service programmes including Family Welfare programme and Hospital administration.

(d) A post graduate degree or diploma in Public Health will be treated as a preferential qualification.

(e) Candidates must be from Health (A) Deptt. Only."

3. There is a set of Rules framed under Article 309 of the Constitution of India t\and that Rules is known as Assam Health Services Rules, 1995 which came into effect from the date of its publication in the Official Gazette and it was published on 26th September, 1996. Rule 6 of that Rules provides for direct recruitment. Rule 6(1) is as follows:-

> 6.(1) Direct recruitment to the cadre of Director of Health Services and also in the cadre of M & HOI of the service shall be made by the Governor in accordance with the procedure. The other part of the Rules namely, 6(1) (a), (b), (c), (d) and (e) are with regard how to fill up the post by the Public Service Commission. Rule 7 provides for qualification for direct recruitment. Rule 8(i) vides for academic qualification. Rule 8(ii) provides as follows:-
>
> "8(ii) Academic qualification of a candidate for direct recruitment for the post of the Director of Health Services shall be as prescribed by the Governor from time to time. The qualification and experience prescribed as on the date of commencement of those rules are given in Schedule-IV."
>
> A bare look at Schedule-IV will show that it prescribes qualification only for Medical

& Health Officer and nothing has been prescribed with regard to Director. There is no notification also in the name of the Governor prescribing the academic qualification and experience. What the authority did in this case was that after the selection was made by the APSC on 4.2.2002 a note was put up by the Commissioner and Secretary, Health to the Chief Secretary, Minster of Health and Chief Minister seeking their approval. That note produced by Mr BP Bora, learned Sr Govt. Advocate was approved by the Chief Minister on 15.4.2002. That note is quoted below.

"Chief Secretary

Minister, Health

Chief Minister

The matter had been put up to seek approval of the Honorable CM for appointment of the Director of Health Services. In this connection, the Hon'ble CM has stated that he would like know the rule position.

As per Rule 5 of the Assam Health Services the recruitment to the post of DHS is to be done by direct recruitment through Commission (APSC). The procedure for direct recruitment has also been given in rule 6 of the Assam Health Service Rules. The academic qualification and experience are normally prescribed by the Government from time to time. Accordingly, this time the qualification and experience was prescribed by the State Government which was similar to the prescription given in the previous 2 occasions. The prescribed qualification and experience is as given below:-

Qualification: At least M.B.B.S. Degree or equivalent Degree of a recognised University.

Experience:

(a) At least 4 years administrative experience as Chief Medical and Health Officer or Additional Chief Medical and Health Officer or combining both experience or experience in an equivalent or in a higher post.

(b) Experience in Medical & Public Health and Family Welfare works.

(c) Preference will be given to the candidates having experience in administering Health Service programmes including Family Welfare programmes and Hospital administration.

(d) A post graduate degree or diploma in Public Health will be treated as a preferential qualification.

(e) Candidates must be from Health (A) only.

The Government has followed procedure as prescribed in the rules and the APSC has given the recommendations. As already indicated in the note at page 119-121, the first persons recommended by APSC does not fulfill the minimum criteria required for consideration. The officer does not have adequate experience at the appropriate level and hence his candidature cannot be accepted. The Government as per rule position has to make the appointment by direct recruitment through APSC. Since the APSC has given only two names in order of merit and the Government is unable to accept the

candidature of the number one nominee for very valid reasons there should be no bar in accepting the 2nd nomination.

It is further suggested that the whole matter regarding issue of experience certificate by Dr. P.K.Deka, PD IPP IX to Dr.B.C.Goswami fraudulently should be inquired into by the Vigilance through Anti-corruption Branch. CS may kindly obtain CM's approval for taking up a vigilance case.

Hon'ble Chief Minister, *Sd/- Commissioner & Secretary, Health*

This is regarding appointment of Director, Health Services, Assam as per APSC's Select list. Hon'ble C.M. vide his order at page 121/N wanted to know the 'Rules position'. Commissioner & Secretary, Health was furnished the Rules position at office note from prepage. C.M. may kindly peruse the same and pass necessary order to appoint Dr. Paresh Bhattacharjee, the 2nd nominee for the post of Director Health Services.

Regarding 'X' above, explanation may be called from Dr.P.K.Deka, P.D., Assam Area Project first for taking appropriate action.

Submitted for approval. Sd/- Minister, Health.

Approved
Sd/- C.M.

The note which has been quoted above will have bearing on the argument advanced by the learned Advocate for the petitioners. From this note it will be crystal clear that at the time of issuing advertisement as quoted above there was no qualification prescribed by the Government as required under the Rules with regard to academic qualification and experience. It appears that the authority while issuing advertisement adopted its own approach as yardstick and laid down the qualification and experience as was done in the past. It further appears that the APSC also adopted a mechanical approach instead of looking to the qualification as required to be prescribed it issued advertisement with the qualification as suggested by Government. The Commission adopted an approach which cannot be accepted. The experience prescribed in the advertisement was of Chief Medical and Health Officer or Additional Chief Medical and Health Officer or bearing both experience together or an equivalent or Higher post. Mr.Bipul Chandra Goswami is MBBS and subsequently he also passed MD in Gynecology. Dr. Goswami joined in the service as Assistant Surgeon on 18.10.73. He became Senior Medical & Health Officer on 9.1.73. He became Superintendent of Civil Hospital (rank of S.D.M. & H.O.) on 1.8.94. He was not promoted to the rank of Chief Medical and Health Officer or Additional Chief Medical and Health Officer. Thereafter he went on deputation to Assam Area Project under World Bank and there he was posted as Junior Consultant (HMD). That was a deputation

vacancy and not a cadre post as prescribed in the Rules. the post of Junior Consultant is not a cadre post under Rule 3(iii) of the Rules of 1995. The cadre posts are provided in the Rules. The learned Advocate for Mr.Goswami produces before me a set of Regulation framed by the Society for implementation of Assam Area Project and in that regulation framed by the society it is provided that the post of Junior Consultant (HMD) shall be equivalent to Joint Director of Health Services of the State of Assam. The qualification which is required to fill up the post of Junior Consultant is as follows:-

> "Any Officer from Assam Health Service not below the rank of Joint Director/ Associate Professor/Asstt. Professor with at least 8 yeas experience in HMD Back ground in organizing training/seminar atleast for 4 years or any officer holding an equivalent post under the State Government or a retired Government servant who has retired from services from a similar post."

So, even he was not qualified to be a Junior Consultant. Be that as it may, he was sent on deputation. Now the question is that as he holds the post of Junior Consultant whether that can be deemed to be equivalent to Joint Director of Health Services. An equivalence made/created by another body certainly shall not bind the Government to make it equivalent to a post provided in its own cadre. In the cadre the post of Joint Director is above the post of Chief Medical and Health Officer and Additional Medical and Health Officer. But that equivalence has been created by a society and it shall not give a person a right to claim that he is holding cadre posts. Before the APSC a certificate was produced by the Govt. Advocate issued by the Project Director, Assam Area Project which reads as follows:-

> "TO WHOM IT MAY CONCERN
>
> This is to certify that Dr. Bipul Chadra Goswami of Assam Health Service (A) is working as Assam Area Project, Indian Population Project-IX since 5th February, 1997. The Assam Area Project IPP-IX, lunching from 1994 is the World Bank funded project under department of Health and Family Welfare, Govt. of Assam and providing multi purpose health care and Family Welfare Services in the State of Assam including MCH Services. Dr. Goswami holding the post of Junior Consultant (HMD) which is equivalent to Jr. Director of Health Services, Assam. During tenure of his 4 years 9 months services, he look after training. IEC activities and logistic management field works. He is sincere, hard working and work satisfactory upto entire satisfaction of higher authorities.
>
> He bears good moral character.
>
> I wish him success in life.
>
> Sd/- Dr. P.K.Deka,
> Project Director,
> Assam Area Project IPP-IX"

It was on the basis of holding of this post and the certificate issued, this officer PC Goswami claims to have the experience and accordingly he applied and his application was considered. It may be stated herein that during the pendency of this writ application, this certificate has been withdrawn by the Project Director, Assam Area Project stating that it was issued by mistake. So, the question is that whether Dr.Goswami was qualified to apply and considered for the post in terms of the advertisement. As will be seen from the facts stated above, he did not satisfy the requirements of experience etc., as laid down in the advertisement and he was not eligible to be considered for the post.

4. I have heard Mr HN Sarma and Mr AM Mazumdar, learned Advocates for the writ petitioners. Sri CK Sarma Baruah, learned Advocate for the Respondent No.3, Dr. Bipul Ch. Goswami, Mr. TC Chutia, learned Advocate for APSC, Mr BP Bora, learned Sr Govt. Advocate for official respondents and Mr BK Sharma, learned Advocate for the Respondent No.4 Dr PC Bhattacharyya.

5. The learned counsel for the petitioners places reliance on two decisions to argue that Dr Goswami did not have the experience and his case was illegally considered by the APSC. It is submitted by Mr HN Sarma, learned Advocate for Dr Muhi Ram Hazarika that if it would be known to him that the person having lesser experience than that mentioned in the advertisement would have been considered he also would have been in a position to apply for the post. On the other hand, Mr BK Sarma points out that Dr Ananda Narzary appeared in the interview, but he failed to qualify and now he cannot turn back and question the selection. It is the further contention of Mr BK Sharma that his client is the only candidate who fulfills all the qualifications laid down in the advertisement and as such, he should be allowed to enjoy the benefit of selection as decided by the Government. It is further submitted by Mr BK Sharma that when Rules are silent with regard to qualification and experience, Government in its own wisdom by executive instructions or otherwise can prescribe necessary qualification and experience. But the records produced by the Govt. Advocate do not show that any such decision was taken by the Government before the requisition was sent to the APSC by the Govt. lying down qualification etc., No doubt, in the rule earlier to 1995 qualifications were laid down but in the present rule, it is to be prescribed in the schedule and as indicated above, in the schedule the qualifications have not been laid down. There was also no decision with regard to qualifications etc. before issuing the advertisement.

6. Mr. HN Sarma, learned Advocate for the writ petitioner relies on two decisions (i) (1990) 3 SCC 655 (District Collector & Chairman. Vizianagaram Social Welfare Residential School Society

Vs. M.Tripura Sundari Devi) where in paragraph 6 the law has been laid down as follows:-

> "It must further be realized by all concerned that when an advertisement mentions a particular qualification and an appointment is made in disregard of the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. It amounts to a fraud on public to appoint persons with inferior qualifications are circumstances unless it is clearly stated that the qualifications are relaxable. No Court should be a party to the perpetuation of the fraudulent practice. We are afraid that the Tribunal lost sight of this fact."

That is what has happened in the instant case. Dr. Goswami was selected disregarding the qualifications laid down in the advertisement and the Supreme Court further issued a caveat stating that no Court should be a party to the perpetuation of the fraudulent practice. The next case relied on by Mr Sarma is (1998) 3 SCC 381 (Upen Chandra Gogoi Vs. State of Assam and others). That was a case from Assam and there the situation was more interesting. The person concerned drafted the Rules to suit himself. There was a selection and that was challenged and a Division Bench of this Court quashed the selection and his appointment. In that particular case the Supreme Court observed that even if the Rules which provides the qualifications at a later point of time and validate the appointment of person, yet, that rule cannot be applied to a selection which was held at an earlier point of time and the Supreme Court pointed out as follows:-

> "Be that as it may, the subsequent rules cannot affect the qualifications prescribed for the post of OSD under the advertisement of 18-6-1985. The appellant was appointed pursuant to this advertisement. He had to meet the qualifications prescribed. The appellant has drawn our attention to Rule 38 of the Assam Legislative Assembly Secretariat Rules, 1986, under which all orders made or actions taken before these rules came into force shall be deemed to have been made or taken as if these were made or taken under these rules. Rule 38 can apply only to orders lawfully made or action lawfully taken before these Rules came into force. It cannot validate an action which was not lawful at inception."

The question which now shall arise is that whether the entire selection should be scrapped and the matter should be sent back to the Government to lay down the qualifications and experience as required under the Rules or we should uphold the selection of Dr.Bhattacharjee. I have applied my mind to the factual matrix as well as to the law. I find it will be just and proper to scrap the entire selection and to send back the matter to the Government to lay down the qualifications and experience as required under the Rules as indicated above and thereafter to hold the selection. In the meantime, the Government may allow the continuance of the person holding the post by virtue of the interim

order of this Court. If the Government thinks otherwise, the Government may deem fit and proper to give charge to another person who is senior and better qualified to the person now holding the post. A person junior to the person holding the post shall not be brought in during the interval as in charge of the post. It is needless to say that Dr. Ananda Narzary who earlier failed to qualify in the interview shall also be eligible to apply in terms of the fresh advertisement when issued. The contention that the case of Dr. Narzary was not considered is not correct inasmuch as the records produced by the learned Sr.Govt. Advocate show that the petitioner appeared in the interview conducted by the APSC, but he did not qualify in the interview nor he had the experience as pointed by the Commission. It may be stated herein that after Dr. Goswami now on expiry of deputation has been reverted back to his parent department. Dr. Goswami now has been appointed as SDMO and PHC in the office of the Joint Director of Dhubri which is a post below the rank of Chief Medical and Health Officer or Additional Medical and Health Officer. It is needless to say that whole process of selection shall be completed by the Government within a period of three months.

6. Both the writ applications are disposed of accordingly.

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IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA, MANIPUR, TRIPURA, MIZORAM AND ARUNACHAL PRADESH)
W.P. (C) No.1661 OF 2006 & Connected cases
D.D. 9.6.2006
The Hon'ble Mr. Justice B.K.Sharma

Dr. Arun Deka & Ors. ... Petitioners
Vs.
The State of Assam & Ors. ... Respondents

Recruitment:
Selection by conducting interviews:
Whether allegation with regard to conduct of interview tenable? - No
Meaning and effect of preferential qualification:

In this case pertaining to recruitment to the post of Demonstrator/Registrar/Resident Physician in all 23 posts in Medical Colleges – Unsuccessful candidates have challenged the selection alleging irregularities committed by the Selection Committee – High Court after perusal of the relevant records has upheld the selection process and dismissed all writ petitions except W.P.No.1916/2006 wherein the grievance of the petitioner is that he is entitled to get appointment against the said post – Said writ petition has been disposed of by leaving the matter to be decided by the Government as per the quota of reservation, operation of roster and backlog, if any.

Held:

Regarding the ground that Selection Committee did not put questions relating to the subject, asked few irrelevant and out of context questions, interview for each candidate was over for few minutes etc., the High Court in view of the fact that the petitioners appeared for interview and did not raise any grievance against the process of interview till publication of the results has held that the petitioners are estopped from making the kind of allegations in respect of conducting the selection following the decisions in Madan Lal Vs. State of J&K – AIR 1995 SC 1088 and Suneeta Aggarwal Vs. State of Haryana – (2000) 2 SCC 615 wherein it has been held that the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful..

Further held:

Regarding the allegation that the Commission ought to have held written examination which according to the petitioners would have removed arbitrariness and extraneous consideration, the High Court has held that the petitioners ought to have agitated the same before the selection by way of interview was conducted.

Further held:

Regarding the allegation that although some of the petitioners are better qualified and in view of the preference clause in the advertisement, preference ought to have been given to the candidates having PG degree in the concerned discipline, the High Court in view of the advertisement held that question

of preference will come only when merits are equal between two candidates and preference clause does not mean that irrespective of basic eligibility of the candidates a candidate having PG degree in the concerned discipline will have to be preferred over the candidate having MBBS Degree which is the minimum requisite qualification even if he scores a march over the PG degree holder.

Further held:

Regarding question of preference, the High Court has relied upon the decision in (2003) 5 SCC 341 – Secretary, A.P. P.S.C. vs. Y.V.V.R. Srinivasulu & Ors. wherein it has been held that preference in the context of all such competitive scheme of selection would only mean that other things being qualitatively and quantitatively equal, those with the additional qualification have to be preferred.

Further held:

Regarding the allegation that near relatives of some Ministers and politicians have been selected, although they are less meritorious than the petitioners, the High Court has held that there cannot be any bar for the relatives or even the close relatives of the Ministers and/or politicians and/or any high dignitaries to appear in any selection. Merely because some of the selected candidates are the relatives of the Ministers and politicians by itself cannot lead to the inference that selection is vitiated in view of their selection.

Further held:

Regarding the allegation that the select list has not been published in the newspaper as per Rule 43 of the Rules, the High Court has held that the list has been published in the Notice Board. If the select list has not been published in the newspapers, same cannot lead to violation of Rule 43. And at best, same can be considered as an irregularity and not illegality.

Cases referred:-

1. AIR 1995 SC 1088 - Madan Lal Vs. State of J & K
2. (1998) 2 GLR 242 - Pradyut Sarma Vs. APSC
3. (2000) 2 SCC 615 - Suneeta Aggarwal Vs. State of Haryana
4. 2001 (3) GLT - Debajani Choudhry Vs. State of Assam
5. (2002) 2 GLR 179 - Matiur Rahman Bhuyan Vs. State of Assam
6. (2003) 5 SCC 341 - Secretary, AP P.S.C Vs. Y.V.V.R. Srinivasulu & Ors.)

ORDER

All the writ petitions pertain to the challenge made to the select list for appointment to the post of Demonstrator/Registrar/Resident Physician etc. in the three Medical Colleges of the State under the Health & Family Welfare (B) Department. As agreed to by the learned counsel for the parties, they have been heard together and are being decided by this common judgment and order.

2. The basic thrust made in all the writ petitions is about the alleged illegality committed by the Assam Public Service Commission (APSC) in conducting the selection and the publication of the select list pursuant to the same. The writ petitions are based on more or less the same theme, except the writ petition being WP(C) No.1916/2006 in which the petitioner has made a claim that the quota earmarked for ST (H) candidates having not been utilized, inspite of the fact that the petitioner has been selected for appointment as ST (H) candidates is being deprived of the benefit of said quota.

3. It will be pertinent to mention here that in some of the writ petitions, interim orders have been passed not to make any appointment pursuant to the select list in question. On the returnable date so fixed in the orders, the official respondents and some of the private respondents being represented by their respective learned counsel opposed the admission of the writ petitions and it was on that basis the matter has been heard for which the learned Standing Counsel, APSC has also produced the records.

4. The select list in question pertains to the posts of 23 (twenty three) branches which are Demonstrator of Anatomy; Demonstrator of Physiology; Demonstrator of Pharmacology; Registrar of Medicine; Registrar of Nephrology; Demonstrator/Res. Pathologist/Clinical Pathologist; Demonstrator of SPM; Registrar of Neuro Surgery; Demonstrator of Bio Chemistry; Registrar of ENT; Registrar of Dermatology; Demonstrator of F&SM; Registrar of Anesthesiology; Anesthetist; Registrar of Radiology; Demonstrator of Microbiology; Registrar/Res. Physician Resident/Surgeon of Surgery; Registrar of Orthopedics; Registrar of Cardio Thoracic; Registrar of Neurology; Registrar of Gastroenterology; Registrar of Psychiatry; Registrar of Rebractionist or Ophthalmology and Registrar of Paediatric Surgery.

5. Although by the interim order, this Court provided for stay of the entire select list, but during the course of hearing, learned counsel of the petitioners submitted that the present batch of writ petitions are concerned with only 12 branches of posts and thus so far as the other posts pertaining to the rest 11 branches are concerned, there is no challenge to the same.

6. The petitioners, who also appeared in the selection either have not been selected or although have been selected, but their merit positions in the select list are not within the zone of consideration for appointment. Thus, here is a case in which, although the petitioners appeared in the selection, but

have questioned the same on grounds of wrong procedure and methodology of selection as well as on ground of ignoring merit and experience, being guided by extraneous considerations. Be it stated here that although the writ petitioners have stated that they were not satisfied with the manner in which the interview was conducted and have described the same to be so called interview, but none of the petitioners made any grievance against the same by submitting any representation pointing out the alleged illegalities and irregularities purportedly committed by the Selection Committee and for that matter the APSC. It is only after publication of the select list and when their positions in the select list are not advantageous to them, they have invoked the writ jurisdiction of this Court making a challenge to the same.

7. The basic grounds on which the challenge has been made as could be gathered on a total reading of the writ petitions are as follows:

(I) The Selection Committees did not put questions relating to the subject but they asked few irrelevant and out of context questions and the interview for each candidate was over within few minutes. The experts, who in fact were the best persons to judge caliber, competence and professional proficiency of the candidates were not even asked to put questions and they were simply given a plain sheet of paper and a pencil to award marks and/or to grade the candidates.

(II) Some of the candidates placed above the petitioners lack experience in the particular branch and they are also lesser qualified than the petitioners.

(III) No written examination having been held and the selection being based only oral interview, there was scope for arbitrariness and manipulation. Having regard to the number of candidates, the APSC ought to have held written examination, and confining the selection only oral interview, the APSC favoured the blue eyed candidates on the strength of political and monitory power and that there was maneuvering of the APSC members.

(IV) Some of the selected candidates are related to some Ministers of the State. For example, Dr. Lipee Nath is the daughter-in-law of the cabinet Minister Sri Rameswar Dhanowar; Dr.Dipu Bhuyan is the brother-in-law of the Chief Minister of the State, Dr.Putul Mahanta is a close relative of a Cabinet Minister, Dr. Zakira Ahmed is the

daughter of a district Congress President, Dr.Mrinal Bhuyan is a close relative of Sri Bhubaneswar Kalita, President of the Assam Pradesh Congress Committee etc. According to the petitioners the instances given are only illustrative and not exhaustive. According to the petitioners the entire selection was not on merit but on extraneous considerations.

(V) Although in the advertisement is was specifically stated that "preference will be given to the candidates having PG degree in the concerned discipline", same was not adhered to and was given a good bye in making the selection. Candidates with PG degree have been superceded by candidates only with simple MBBS degree.

(VI) As requirement of Rule 43 of the APSC (Procedure and Conduct of Business) Rules, 1986, after publication of the results, a copy of the same is to be placed in the Notice Board. A copy of the same shall also be sent to the press/newspapers with a request to publish the same. However, the APSC violated the said rule inasmuch as till filing of the writ petitions the results were not published in the newspapers. Even after the directions as contained in the interim order, the results have not been published in the newspapers. Thus the petitioners find fault in not publishing the results.

8. Apart from the above grounds, with the production of records by the learned Standing Counsel, APSC, learned counsel for the petitioners also argued on the modality and methodology adopted in conducting the interview. However, on being pointed out that contrary to the stand of the petitioners, the mark sheets have revealed that the experts also awarded marks/grades in the printed form and not on plain sheet of paper and not by pencil, learned counsel for the petitioners have abandoned that ground. However, they argued in reference to the provisions of the aforesaid Rules of 1986 that the procedure envisaged in the rules was not followed in conducting the interview. In this connection, they have referred to Rule 19, 23, 26, 43, 46 and 48 of the Rules of 1986.

9. Although, no counter affidavit has been filed by the respondents but the learned Standing Counsel, APSC, made his submissions on the basis of the records produced by him. Similarly, the learned Additional Advocate General, Assam also argued on the basis of the allegations made in the writ petitions by contending that on the face of such allegations, the petitioners have not been able to make out any case requiring interference of this Court under Article 226 of the Constitution of India.

Likewise the learned counsel appearing for the private respondents, some of whom have filed applications for vacating the interim order, made their submissions on the basis of the individual case and also taking the plea that there is no allegation against the selection of those private respondents.

10. I have heard the learned counsel for the petitioners led by Mr.N.Dutta, as well as Mr.AK Goswami, learned Sr. Counsel. I have also heard the learned counsel representing the private respondents led by Mr. AK Bhattacharya, learned Sr. Counsel. I have also heard Mr. KN Choudhury, learned Sr. Counsel and Additional Advocate General, Assam, Mr.T.Chutia, learned Standing Counsel, APSC has made submissions on behalf of the APSC.

11. All the petitioners appeared in the selection/interview and did not raise any grievance against the same till publication of the results by the APSC and when they found that their positions in the select list are less favourable for appointments they filed the writ petitions taking the aforesaid pleas. If the petitioners were aggrieved by the manner and method of conducting the selection, they would have atleast submitted representation making a grievance against the same, which they admittedly did not do. Only statement made in the writ petition is that then they spoke about the same to their superiors, the said superiors tried to provide them some solace that things would ultimately work out perfectly in their favour. The petitioners have not indicated as to who are the said superiors. If the statement is taken on its face value, then also one thing is certain that the petitioners were not really aggrieved against the manner and method of conducting the interview but they only expressed their apprehension before their superiors and had the assurance and/or solace provided to them been materialized, their names being within the zone of consideration in the select list, there would not have been any occasion for them to make the kind of allegation as has been made in the writ petitions.

12. In view of the above, the petitioners are estopped from making the kind of allegations in respect of conducting the selection. They cannot take recourse to such allegations and that too vague, indefinite and devoid of any material particulars. They having appeared in the interview, without raising any grievance and protest and thereafter also having not raised any objection to the same, are precluded from making the kind of allegation as has been made in the writ petitions. They appeared in the selection by way of taking a chance for favourable consideration and have now turned round the same so as to question the validity of the same. They are estopped in law from doing so. In the case of Madan lal Vs. State of J & K reported in AIR 1995 SC 1088, the Apex Court has observed thus:

> "9. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful....."

Same view has been expressed in the case of Suneeta Aggarwal Vs. State of Haryana as reported in (2000) 2 SCC 615.

13. Same is the case in respect of the allegations made that the APSC ought to have held written examination, which according to the petitioners would have removed arbitrariness and extraneous consideration. If the petitioners were keen to sit in written examination, they ought to have agitated the same before the selection by way of interview was conducted. Instead they appeared in the interview by way of taking a chance for favourable consideration and now after finding that their positions in the merit list are not within the zone of consideration for appointment such a plea has been raised, which otherwise could not have been there had their position, in the merit list been according to their choice.

14. As regards the allegation that the interview was not conducted in a proper manner and irrelevant questions were put and that the experts were not asked to put any question, same is to be mentioned, only to reject. A constitutional body like APSC is supposed to conduct selection/interview strictly following the principle underlying the same. Unless the contrary is proved, the normal presumption is that the interview has been conducted applying those principles. Apart from the member of the APSC, the expert also constituted the Selection Committee. Contrary to the plea of the petitioners, that the experts were not asked to put questions, the records have revealed that the experts gave their own marks/gradings to each of the candidates and the same was taken into consideration towards preparing the final mark sheets and eventual selection. The printed forms containing the marks of the experts have been signed by the experts. Thus, the allegation of the petitioners, too vague, indefinite and without any material particulars cannot be accepted, and that too in writ jurisdiction.

15. As regards the allegation that although some of the petitioners are better qualified and in view of the preference clause in the advertisement, preference ought to have been given to the candidates having PG degree in the concerned discipline, on a reference to the advertisement, it is seen that the educational qualification prescribed to be eligible for offering candidature was MBBS degree and registration under the Assam Medical Council. There is no dispute that the petitioners, the private respondents and all the selected candidates have the minimum requisite qualifications to apply for the posts. The preference clause does not mean that irrespective of basic eligibility of the candidates, a

candidate having PG degree in the concerned discipline will have to be preferred over the candidate having MBBS degree, even if he scores a march over the PG degree holder, by performing well in the selection/interview. The question of preference will come only when merits are equal between two candidates.

16. In the above context, dealing with the question of preference, I may refer to the decision of the Apex Court as reported in (2003) 5 SCC 341 (Secretary, AP Public Service Commission Vs. Y.V.V.R. Srinivasulu & Ors.), wherein it has been pointed that the suitability and all round merit cannot be overridden merely because a particular candidate is in possession of an additional qualification on the basis of which, a preference has also been envisaged. Interpreting the term "preference", the Apex Court has held that, the preference envisaged in the rules, under the scheme of things and contextually also cannot mean, an absolute enblock preference akin to reservation or separate and distinct method of selection for them alone. Preference, in the context of all such competitive scheme of selection would only mean that, other things being qualitatively and quantitatively equal, those with the additional qualification have to be preferred.

17. Now let us deal with the allegations that near relatives of some Ministers and politicians have been selected, although they are less meritorious than the petitioners. First of all, there cannot be any bar for the relatives or even the close relatives of the Ministers and/or politicians and/or any high dignitaries to appear in any selection. To brand them as a class in the matter of selection with the pre-supposition of undue preference to them in the matter of selection will lead to violation of Article 14 and 16 of the Constitution of India. Merely because some of the selected candidates are the relations of the Ministers and politicians, that by itself cannot lead to the inference and that too the kind of inference required to draw in the matter of selection exercising the power of judicial review under Article 226 of the Constitution of India so as to conclusively hold that the selection is vitiated in view of their selection. Except indicating that the said selected candidates (only a few) are the relations of the politicians, no nexus has been shown not to speak of establishing the same as to how their such relation worked preferably for them in the selection. Such vague allegations without anything more cannot move the writ Court to draw the inference as has been desired by the petitioners.

18. There is another aspect of the matter. The petitioners have leveled allegations against the members of the APSC even to the extent of favouring the blue eyed candidates on the strength of

political and monitory power. They have also leveled allegations against the experts who conducted the selection. Allegations have also been made against the Ministers and politicians. Apart from failure to establish the same, the said members, experts, Ministers and politicians are also not party to this proceeding. In view of the allegations made against them, it was incumbent on the part of the petitioners to make them party respondents. They have even failed to name the members and the experts, although serious allegations have been hurled against them. Thus, on this score also the writ petitions are not maintainable.

19. As regards the allegations that the select list having not been published as per the requirement of Rule, 43 of the Rules of 1986, suffice is to say that the requirement of the said Rule to place the select list in the Notice Board and to send the copy of the same to the press/newspaper with a request to publish the same, has been complied with. Apart from the fact that all the petitioners are in possession of the copies of the select list, but for which they could not have annexed the same to the writ petitions, it is also on record that the select list has been placed in the Notice Board of APSC and the copies thereof have also been sent to the press/newspapers for publication. If the select list has not been published in the newspapers, same cannot lead to violation of Rule 43. At best, same can be regarded as an irregularity and not illegality. However, there is even no irregularity on the part of the APSC inasmuch as the list has been sent to the newspapers for publication which is the requirement of Rule 43.

20. Let us now examine the provisions of the Rules violation of which has been alleged. Rule 19 provides for constitution of Board for interview/viva voce test. Rule 23 provides that the proceedings of the Board shall as early as possible be placed before the Commission for approval before the recommendations are issued. Such approval may be obtained by circulation by hand or in a meeting of the Commission. As per Rule 48, where multiple Boards are constituted, the envelopes containing the original mark sheets of interview held by different Boards shall be sent to the Chairman/Senior most members for preparation of results, which shall be sent to all members of the Board for signatures.

21. I have carefully verified the records produced by the learned Standing Counsel, APSC. It appears that multiple Boards were constituted for each branch of the posts. As per the requirement of Rule 23 the proceedings of the Board were placed before the Commission for approval and the necessary approval was also accorded. As regards the preparation of results combining the mark sheets of the different Boards and thereafter to obtain the signatures of all the members, the records

have revealed that all the members including the Chairman of APSC have put their signatures in the final result sheets. Thus, it cannot be said that there was violation of Rule 48 of the Rules. Rule 53 of the Rules empowers the Commission to deal in such manner as they deem fit with any matter not specifically provided for in the rules. Thus, the Commission is also empowered to deal with the particular situation not specifically envisaged in the rules.

22. During the course of hearing learned counsel for the petitioners pertaining to Anatomy, physiology, Medicine, Pathology, SPM, Anesthesiology and Radiology have furnished the particulars of their academic career, qualification, experience etc. bringing comparison with the candidates placed above them in the select list. First of all, the petitioners while making such comparison have not disclosed about the academic career of the candidates above them, although, some instances having given as to how beyond MBBS degree, some of the petitioners are better qualified. In this connection, the Secretary, APSC by his letter dated 11.4.2006 addressed to the learned Standing Counsel, APSC has furnished the following information.

"ASSAM PUBLIC SERVICE COMMISSION

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No.64 PSC/CC-6/26/2006-2007, Dated Guwahati, the 11th April/2006

To: Mr. T.Ch. Chutia,
Standing Counsel, APSC

Sub: Cases in connection with rectt. To the post of Demonstrator/ Registrar/Resident Physician etc. in Medical Colleges under H & V.W. (B).

Sir,

In inviting a reference to subject cited above, I am directed to inform you the following things for your help to deal with the cases.

1. The recruitment is called direct recruitment.
2. The recruitment process is as follows:-
   - i) Interview Board consists of a member of the Commission and an expert from concerned department;
   - ii) Experts, especially in this rectt. Were not below the rank of Asstt. Professor.
   - iii) Expert deputed by Govt. from different medical colleges of Assam.
   - iv) Experts are at liberty to give their opinion independently.
   - v) In this rectt. 100 marks were allocated, out of which 50 marks earmarked for

academic career from HSLC onwards with their percentage break up; the rest 50 marks were allocated for Board including experts;

vi) Marks of academic career from HSLC onwards are converted in the following manner-

A candidate who has 66% of marks in HSLC will get 6.6 marks, if he has 58% marks in HSSLC, he will get 5.8 marks and so on and so forth.

Yours faithfully,
Sd/- Illegible
Secretary,
Assam Public Service Commission
Jawaharnagar, Khanapara, Guwahati-22.

23. I have verified the above stand of the APSC with the records. I have also verified as to whether there was any deviation in the above procedure towards conducting the selection. To quell any doubt, I have also taken the pain to verify the mark sheets containing the marks under different heads which include the head of experience and knowledge of the subject apart from the other heads including the heads as indicated in the above quoted letter. Upon verification of the same, it appears that the select list has been prepared strictly on merit on the basis of the total marks obtained by the candidates under different heads. Needless to say that it is the total marks which count for selection and not the mark under a particular head. Even if one excels in a particular head, that by itself cannot make the selection for him but it is the total marks obtained by him, which eventually count for selection and merit position. Upon verification of the entire records, I do not find any infirmity in awarding marks. It is one thing to say that the marks were not given as per the desire of the candidates, but it is another thing as to what are the marks obtained by him under different heads. The writ Court exercising its power of judicial review under Article 226 of the Constitution of India does not have the expertise and/or the measuring rod to scrutinize and/or measure the respective merits of the candidates.

24. Mr. TC Chutia, learned Standing Counsel, APSC vehemently argued that having regard to the contradictory stand in writ petitions, they are liable to be dismissed without entering into the merit of the case. Specifically referring to the writ petition bearing Nos.WP(C) Nos.1690, 1163, 1871, 1875, 1667, 1849, 1874, 1873, 1661, 1664, 1872, 1916 and 1666 of 2006, he pointed out that although the petitioners applied for the particular post in the particular subject, but have made grievance in respect of the results of other posts in other subjects. He also pointed out as to how some of the petitioners are not even selected. His further argument was that when the petitioners are selected, but their positions in the select list may not permit their appointment, the said petitioners after getting the

selection cannot question the validity of the list, so far as the same relates to their positions in the merit list. The contention raised by Mr. Chutia, learned counsel representing the APSC merits consideration. However, since otherwise also, I do not find any merit in the writ petitions, this contention of Mr. Chutia need not be elaborated.

25. It need not be reiterated that the writ Court exercising its power of judicial review under Article 226 of the Constitution of India cannot make a roving enquiry into the kind of allegations made in the writ petitions. The allegations are also all vague, indefinite and without any materials. It will be too dangerous to draw any inference on the basis of such allegations. The decision on which Mr. KN Choudhry, learned Additional Advocate General placed reliance i.e. (1998) 2 GLR 242 (Pradyut Sarma Vs. APSC) 2001 (3) GLT (Debajani Choudhry Vs. State of Assam and Matiur Rahman Bhuyan Vs. State of Assam reported in (2002) 2 GLR 179 are all to remind this Court the limit, scope and jurisdiction of writ Court. In view of my aforesaid finding relating to the selection questioned in this writ petitions, I need not make any further discussions on those decisions. Suffice is to say that the decisions support the case of the respondents. In the aforesaid case of Madan Lal Vs. State of J&K as reported in AIR 1995 SC 1088, the Apex Court has observed thus:

> "9..... It is also to be kept in view that in this petition we cannot sit as a Court of appeal and try to re-assess the relative merit of the concerned candidates who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merit as made by such an expert committee cannot be brought in challenge only on the round that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a court of appeal over the assessment made by such an expert committee.
>
> 16..... The petitioners subjectively feel that as they had fared better in the written test and had got more marks therein as compared to concerned selected respondents, they should have been given more marks also at the oral interview. But that is in the realm of assessment of relative merits of concerned candidates by the expert committee before whom these candidate appeared for the via voce test. Merely on the basis of petitioners apprehension or suspicion that they were deliberately given less marks at the oral interview as compared to the rival candidates, it cannot be said that the process of assessment was vitiated. This contention is in the realm of mere suspicion having no factual basis. It has to be kept in view that there is not even a whisper in the petition about any personal bias of the members of the interview committee against the petitioners. They have also not alleged any malafides on the part of the interview committee in this connection.

> Consequently, the attack on assessment of the merit of the petitioners cannot be countenanced. It remains in the exclusive domain of the expert committee to decide whether more marks should be assigned to the petitioners or to the concerned respondents. It cannot be the subject matter of an attack before us as we are not sitting as a court of appeal over the assessment made by the committee so far as the candidates interviewed by them are concerned. In the light of the affidavit in reply filed by Dr. Girija Dhar to which we have made reference earlier, it cannot be said that the expert committee had given a deliberate unfavourable treatment to the petitioners. Consequently, this contention also is found to be devoid of any merit and is rejected."

26. The writ petitions having been answered in the above manner, I now proceed to look into the particular grievance raised by the petitioner in WP(C) No.1916/2006. I make it clear that dismissal of the writ petitions on the grounds aforementioned has got nothing to do with this writ petition since the grievance raised is altogether different. In this case, the petitioner applied for the post of Registrar of Medicine as ST(H) candidate. In the select list his name appears at serial No.25 as ST(H) candidate. In the advertisement also one post was indicated for ST(H) category as backlog. However, in the select list while indicating the total 8 posts of Registrar of Medicine, the category wise distribution of posts, has excluded the category of ST (H). As per the said distribution, SC, OBC and unreserved posts have been shown as 1, 1 and 3 respectively. Rest 3 posts have been shown one each against SC, OBC and ST (P) as the backlog. According to the petitioners, this is contrary to the advertisement in which one post was indicated as backlog against the category ST(H). Thus, according to the petitioner, he having been selected as the only ST(H)) category, he is entitled to get appointment against the said post.

27. Mr.Chutia, learned Standing Counsel APSC was requested to obtain instruction and as per his instruction after publication of the advertisement in April, 2005, subsequently, the Government by its letter dated 4.6.2005 issued a corrigendum notifying that the backlog vacancy is meant for ST(P) and not for ST(H). In tune with the said corrigendum of the Government, the APSC also issued corrigendum vide their letter dated 19.7.2005. Thus, according to the Government the post no longer remains for ST(H), same being meant for ST(P) as backlog. Although, as per the instruction furnished to Mr. Chutia, the APSC also issued the corrigendum by its letter dated 19.7.2005 and sent to the Director of Information & Public Relation, it is not discernible as to whether the same was published in the newspaper or not. If the same was not published, naturally, the petitioner was not aware of such development, unless he had received the information otherwise. However, that by itself will not entitle the petitioner to claim appointment against the post meant for ST(P), if it really meant for ST(P) as

backlog. This aspect of the matter is left open to be decided by the Government as per the quota of reservation, operation of the roster and the backlog, if any.

28. The writ petition being WP(C) No.1916/2006 is answered in the above manner and the other writ petitions are dismissed. However, there shall be no order as to costs.

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CHHATTISGARH PUBLIC SERVICE COMMISSION

HIGH COURT OF CHHATTISGARH AT BILASPUR
W.P.No.687/2006
D.D.5.4.2006
Hon'ble Shri S.R.Nayak, Chief Justice &
Hon'ble Shri Dilip Roosaheb Deshmukh, J.

Vivek Shukla & Anr. ... Petitioners
Vs.
State of Chattisgarh & Anr. ... Respondents

Examination:

Recruitment to 181 posts in various cadres was initiated under the State Services Examination Rules as per Notification dated 27.8.2005 – Result of Preliminary examination was published on 19.12.2005 – On 20.12.2005 Commission published model answers on the Internet – In view of the controversy that some model answers were wrong and that no answers were mentioned in front of some questions etc. – The Commission in its meeting held on 13.1.2006 cancelled the results of preliminary examination and decided to hold fresh preliminary examination – Petitioners challenged the said decision of the Commission in this petition – High Court upholding the contention that the mistakes in the model answers fed into Website could be rectified and answer scripts already available could be assessed in accordance with the model answers, has held that while the decision of the Commission canceling the result of the Examination was correct and its decision to cancel the preliminary examination and to hold fresh examination was arbitrary and unreasonable and consequently allowed the writ petition.

Held:

The decision of the Commission to cancel the preliminary examination and to conduct preliminary examination de novo for roughly 80,000 candidates at the cost of the exchequer and causing inconvenience to candidates cannot be sustained. The answer scripts of the candidates who appeared for the preliminary examination could be conveniently and correctly be re-assessed in accordance with correct model answers. Such action quite feasible and practicable and would avoid unnecessary expenditure by the State as well as the candidates.

ORDER

The following oral order of the Court was passed by S.R.Nayak, C.J.

In this writ petition, the action of the Chhattisgarh Public Service Commission, "the Commission" for short, in cancelling preliminary examination, 2005 as a whole conducted for filling about 181 posts in the services under the Chhattisgarh State, is assailed.

2. The Governor of Chhattisgarh State has framed Rules for the Combined Competitive Examination (CCE) called State Services Examination Rules (for short 'Rules') for recruiting personnel

to various posts/services under the State and has empowered the Commission to conduct examinations annually in that regard and to send the select list of the candidates for consideration of the State Government for their appointment in the respective services under the State. Accordingly and in terms of the Rules, the Chhattisgarh State Government on or about 27.8.2005 issued an employment notification and the same was published in Newspapers calling for applications from the eligible candidates for filling about 181 posts in various cadres. The examinations consisted of two stages: (i) Preliminary Examination (objective type), for selection of candidates for the main examination; and (ii) Main Examination (written and interview) for final selection of the candidates.

3. In response to employment notification, 79,953 candidates including the present petitioners applied for the posts. Of them 60,592 candidates appeared in the preliminary examination conducted on 6.11.2005 as per the schedule. Results of Preliminary Examination were declared on 19.12.2005 and the same were published in the Rojgar Aur Niyojan on 28.12.2005, 2716 candidates which include the petitioners passed the Preliminary Examination.

4. On 20.12.2005, the Commission floated model answer papers in the internet and that led to the controversy by complaining that some model answer papers show wrong answers and that no answers have been mentioned in front of some questions etc.

5. The Commission acting on the above complaints, in its meeting held on 13.1.2006 cancelled the results of the Preliminary Examination declared on 19.12.2005 and decided to hold fresh Preliminary Examination and that decision was reported in the Rojgar Aur Niyojan on 18.1.2006.

6. The petitioners being aggrieved by the above actions of the Commission have preferred this writ petition praying for the following reliefs:

> "7. RELIEF(S) SOUGHT:-
>
> The petitioners most respectfully prayed for the following reliefs:
>
> 7.1 That the Hon'ble High Court be pleased to call for the entire records of the case.
>
> 7.2 That, the impugned decision dated 13.1.2006 of respondent no.2 published on 14.1.06 vide Annexure P/10 may kindly be quashed."

7. The writ petition is contested by the Commission by filing return. In the return, it is stated that when it came to know that technical errors had crept in the preparation of model answer sheets by the then Examination Controller, it took the impugned action not only to cancel the results of the Preliminary

Examination but also to conduct fresh Preliminary Examination; that its decision is bona fide and is intended to maintain transparency in conduct of the Preliminary Examination.

8. We have heard Shri Prateek Sharma learned counsel for the petitioners, Shri Vinay Harit, learned Deputy Advocate General for the State of Chhattisgarh who appeared for the State of Chhattisgarh and Shri Ashish Shrivastava, learned counsel for the Commission. Learned counsel for the petitioners would contend that though there was justification for cancelling the results of the Preliminary Examination, there is absolutely no rhyme or reason for cancelling the Preliminary Examination itself and taking decision to hold fresh Preliminary Examination. It was highlighted by the learned counsel for the petitioners that if the assessment of answer scripts of the Preliminary Examination is erroneous because of the mistakes that crept in the preparation of model answers and feeding them in the Web-Site by the then Controller of Examinations, that mistake can be rectified and answer scripts already available could be assessed in accordance with the correct model answers.

9. Learned counsel for the respondents, however, would support the impugned decision of the Commission.

10. Having heard the learned counsel for the parties, the only question that arises for decision is whether the Commission is justified and legally acted in cancelling not only the results of Preliminary Examination, 2005 but also cancelling the said Examination and taking decision to conduct Preliminary Examination once again to fill posts in various services under the State?

11. We cannot take any exception to the action of the Commission in so far as it has cancelled the results of the Preliminary Examination, 2005 is concerned. We say this, because, the results of the Preliminary Examination are cancelled by the Commission on the ground that the model answers fed into Web-Site are erroneous and if they were allowed to stand, it would have resulted in prejudice to the candidates who appeared in the Preliminary Examination and wrote correct answers. However, we cannot sustain the decision of the Commission with regard to cancellation of the Preliminary Examination, 2005 itself and deciding to conduct Preliminary Examination de novo for roughly 80,000 candidates at the cost of the State Exchequer and at the peril and inconvenience of the candidates. It needs to be noticed that there was absolutely no good reason for the Commission to cancel the Preliminary Examination itself. The answer scripts of all those candidates who appeared in the Preliminary Examination are available with the Commission and they could conveniently and correctly be re-

assessed in accordance with the correct model answers that may be floated into Web-Site. Such a course of action on the part of the Commission, which is quite feasible and practicable, would avoid unnecessary expenditure by the State as well by the candidates for various posts and also the inconvenience and hardship that may be caused to the candidates in the event of the Commission holding Preliminary Examination once again. Therefore, we are of the considered opinion that the decision of the Commission to cancel the Preliminary Examination is totally arbitrary, unreasonable and it does not stand the scrutiny of Article 14 postulates. That decision of the Commission would not serve any public interest. If it is allowed to stand, it will be injurious to public interest as well as the interest of the candidates who have applied for various posts. Although this Court under Article 226 is very slow to interfere with the decision of the University and its academic bodies, a weighty ground is made out in this case warranting our interference. We are convinced that our refusal to interfere would result in public mischief.

12. In the result and for the foregoing reasons, we allow the writ petition and quash the impugned decision of the Commission in so far as it has decided to hold fresh Preliminary Examination (objective type) is concerned. We make it very clear that the action of the Commission in cancelling the results of Preliminary Examination, 2005 shall stand. However, in the facts and circumstances of case, the parties shall bear their respective costs.

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HIGH COURT JUDICATURE CHHATTISGARH: BILASPUR
DIVISION BENCH
W.P.NO.1380 OF 2006
D.D. 27.11.2006
Hon'ble Shri S.R.Nayak, CJ & Hon'ble Shri V.K.Shrivastava, J.

Prakash Chandra Gautam & Anr. ... Petitioners
Vs.
State of Chhattisgarh & Ors. ... Respondents

Reservation:

The Commission conducted written examination for the post of Principal, Higher Secondary School (+2), in all 46 posts – 25 posts under unreserved category, 7 posts under SC, 8 posts under ST and 6 posts under OBC – While preparing list of 85 candidates for the purpose of calling for interview only candidates who belong to general merit category have been included – In this writ petition challenging the same the High Court has held that a candidate belonging to reserved category like SC, ST, OBC can compete with general category candidates and on his own merit can secure a seat or a job meant for unreserved category has allowed the writ petition with a direction to the Commission to redo the lists in accordance with law.

Held:

The Commission shall in the first instance make the list of candidates to be called for interview to fill up 25 posts of unreserved category and thereafter to make lists for the purpose of interview to fill up the posts reserved for reserved categories like SC, ST and OBC excluding all those candidates belonging to these three categories who have on their own merit secured selection against the posts reserved for unreserved categories.

ORDER

The following oral order of the Court was passed by S.R.Nayak, CJ.

The petitioners are the applicants for the post of Principal, Higher Secondary School (+2) in the written examination conducted by the Chhattisgarh Public Service Commission, the 2nd respondent herein. The second respondent called for application for filling up 46 posts of Principal, Higher Secondary School (+2). Out of 46 posts, 25 posts are reserved for unreserved category, 7 posts to Scheduled Caste, 8 posts to Scheduled Tribe and 6 posts to OBC.

2. It appears that on the basis of the relative performance of the candidates in each of the aforementioned four categories, separate and exclusive lists for each category are made. Admittedly, a list of 85 candidates is made with regard to unreserved category and this list includes only those

candidates who belong to general merit category. In other words, in preparing the list of 85 candidates under unreserved category for the purpose of calling for eligible candidates under unreserved category for the purpose of calling for eligible candidates for interview, the 2nd respondent has not taken into account all the candidates who have applied for the post and appeared in the written examination nor the relative performance of those candidates.

3. The main grievance of the petitioners in this writ petition is that the above procedure adopted by the 2nd respondent in preparing the lists is ex facie illegal, unconstitutional and violative of Articles 14 and 16(1) of the Constitution of India.

4. I find force in the above submission of the learned Senior counsel appearing for the petitioners. It is needless to state that with regard to the posts meant for unreserved category, all the applicants who have applied for the posts are entitled to compete on the basis of their relative merits. It is also well settled that a candidate belonging to reserved category like Scheduled Casts, Scheduled Tribe and OBC can compete with the general category candidates and on his own merit could secure a seat or a job meant for unreserved category. The post or admission given to him on the basis of relative merit amongst all candidates cannot be set-off against the seats earmarked or reserved for reserved category like Scheduled Casts, Scheduled Tribe and OBC. In that view of the matter, the 2nd respondent while preparing the list of 85 persons for the purpose of calling for the interview to fill-up 25 posts meant for unreserved category, ought to have considered the relative merits of all those candidates who have appeared for the examination irrespective of the fact whether some of them belong to any reserved category like Scheduled Casts, Scheduled Tribe and OBC and in terms of the relative inter-se merit should have prepared the list. This cardinal principle which is required to be observed by the Commission is flouted in the preparation of the lists.

5. There is no difficulty for the Court to appreciate how the above procedure adopted by the 2nd respondent would operate to the prejudice of the reserved categories like Scheduled Casts, Scheduled Tribe and OBC. If the candidates belonging to Scheduled casts, Scheduled Tribe and OBC on their own relative merit could secure appointments to any of the 25 posts of Principal, Higher Secondary School (+2) reserved for unreserved category, such appointments are required to be excluded from the number of posts reserved for Scheduled Casts, Scheduled Tribe and OBC categories, so that the relatively less meritorious candidates in those three categories would be entitled to insist and secure

appointments against 7 posts, 8 posts and 6 posts reserved for the candidates belonging to Scheduled Casts, Scheduled Tribe and OBC respectively.

6. In the result and for the foregoing reasons, we allow the writ petition. A direction shall issue to the 2nd respondent to remake the list in accordance with the law and the observations made in this order. It is needless to state that the 2nd respondent shall in the first instance make the list of candidates to be called for interview to fill up 25 posts of Principal, Higher Secondary School (+2) and thereafterwards proceed to make lists for the purpose of interview to fill up the posts reserved for reserved categories like Scheduled Casts, Scheduled Tribe and OBC excluding all those candidates belonging to these three categories who have on their own relative merit secure appointment against the posts reserved for unreserved categories. No costs.

7. The parties are entitled for urgent certified copy of this order.

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GUJARAT PUBLIC SERVICE COMMISSION

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
Letters Patent Appeal No.1311 of 1997
in
Special Civil Application No.3678 of 1997
With
Letters Patent Appeal No.1488 of 1997
D.D. 18.06.98
Hon'ble Mr. Justice C.K.Thakkar &
Hon'ble Mr. Justice A.L.Dave

K.V.Garasiya ... Petitioners
Vs.
Babubhai N Gavit … Respondent

Qualification:

Respondent No.1 – original petitioner was a candidate for the post of Personal Assistant (non-technical) to the Chief Town Planner – The qualification prescribed for which was Bachelor's Degree in Arts, Science, Agriculture, Commerce, Law or Engineering of a recognized University or an equivalent qualification with about 5 years experience in any responsible administrative capacity – As respondent No.1 did not have requisite experience after acquiring the academic qualification his name was deleted from the select list – He challenged the decision before High Court – High Court allowed the petition – Against that order G.P.S.C. preferred Letters Patent Appeal – Though the recruitment rules are silent as to whether the experience has to be gained before or after acquiring the basic qualification in view of Gujarat Civil Services (General Recruitment) Rules which provides that practical experience should be computed from the date on which requisite qualifications are obtained till the last date fixed for receipt of application – Division Bench following the decision of Supreme Court in N.Suresh Nathan & Anr. Vs. Union of India – AIR 1992 SC 564 allowed the appeal and quashed the appointment of the 1st respondent made pursuant to the decision of single Judge.

Held:

When the Special Recruitment Rules are silent as to whether the experience has to be gained before or after acquiring the basic qualification General Recruitment Rules providing that the experience should be computed from the date on which requisite qualifications are obtained, will become effective.

Cases referred:

1. 1973(1) SLR 1039 - Shri Sahig Ram Kumar v. Secretary, Haryana State Public Service Commission
2. (1987) Supp. SCC 401 - State of U.P. v. Rafiquddin and Others
3. (1990) 1 SCC 361 - Bhagwati Prasad v. Delhi State Mineral Development Corporation
4. (1990) 4 SCC 205 - B.N.Saxena v. New Delhi Municipal Committee and Others,
5. AIR 1992 SC 564 and 1996(8) SCC 234 - N.Suresh Nathan & Anr. v. Union of India & Ors.
6. (1997) 7 SCC 494 - Council of Scientific & Industrial Research v. M.V. Shastry

ORDER

1. These appeals arise out of an order passed by the learned Single Judge in Special Civil application No.3678 of 1997, on 29th September, 1997.

2. Respondent No.1-original petitioner had applied for the post of Personal Assistant (Non-Technical) to the Chief Town Planner and was placed at the top of the select list by Gujarat Public Service Commission ("GPSC" for short). The application was given by him pursuant to an advertisement that was published by GPSC, a copy of which is produced at Annexure-A. There were certain other candidates also, who had applied and, after the select list was prepared, name of respondent No.1 was recommended by GPSC to the Government for appointment.

3. Upon verification of the documents, the Government Department found that respondent No.1 did not possess the requisite qualifications and, therefore, there was an exchange of correspondence and, ultimately, it was found that because he did not possess the requisite qualification of about 5 years experience as required, his name was checked off the select list.

4. Being aggrieved by that decision of GPSC, respondent No.1 preferred Special Civil Application 3678 of 1997 challenging that decision, wherein he joined the State of Gujarat and the GPSC as respondents. The learned Single Judge, after considering the case of both the sides, came to the conclusion that the crux of the case lied in deciding the question whether the qualification of experience of about five years in case of eligible candidates should have been gained before acquiring the requisite academic qualification or thereafter. Considering the facts and circumstances of the case and relying upon a decision of the Punjab and Haryana High Court in the case of Shri Sahig Ram Kumar v. Secretary, Haryana State Public Service Commission, 1973(1) SLR, 1039, the learned Single Judge came to the conclusion that the qualification of experience required of an eligible candidate could be even before acquiring academic qualification and, ultimately, while allowing the petition, directed that the State of Gujarat shall consider the original recommendation of GPSC for appointment of the petitioner to the post of Personal Assistant (Non-Technical) to the Chief Town Planner, GSS Class II on the basis of selection order made by the Commission and as conveyed under communication dated 30th November, 1996.

5. Now the present appellant, who had also appeared at the interviews and who was also selected and was placed on the top of the waiting list, having learnt about this order and having been aggrieved

thereby, with a special permission, has preferred Letters Patent Appeal No.1311 of 1997. Aggrieved by the order passed by the learned Single Judge, GPSC preferred Letters Patent Appeal No.1488 of 1997.

6. The contentions that are raised are that the original petitioner, who is respondent No.1 in these appeals, did not possess the requisite qualification of experience of about 5 years', as rightly concluded by GPSC. It is contended that the learned Single Judge's conclusion that the experience gained before acquiring academic qualification may be taken into consideration is erroneous in light of various decisions of the Apex Court. Respondent No.1-original petitioner graduated on 10th April, 1992. The application was supposed to reach before 1st April, 1996 and, therefore, respondent No.1 could not be said to have met with the requirement of 5 years' experience, as expected of him. The qualification of experience must necessarily succeed the acquisition of academic qualification. In this regard, reliance was placed on the decision of the Supreme Court in the case of N.Suresh Nathan and Another v. Union of India and Others AIR 1992 SC 564 and 1996(8) SCC 234. Reliance was also placed on the decision in the case of Bhagwati Prasad v. Delhi State Mineral Development Corporation, (1990) 1 SCC 361. All these decisions go to show that experience gained before acquiring academic qualification cannot be taken into consideration. Mr. Upadhyay, learned counsel appearing for the appellant in Letters Patent Appeal No.1311 of 1997 has reiterated these grounds. He also submitted that although the GPSC is a constitutional body, it only acts as an advisor to the Government for making recruitment or making selection. The advertisement carried a specific averment of these qualifications. Besides this, the rules that are framed for recruitment to this post, which are framed under proviso to Article 309 of the Constitution by the Panchayat and Health Department, Gandhinagar, also provided about the candidate requiring 5 years' experience. These rules are silent about the dates from which the qualifications will be computed and for that purpose reliance has to be placed on the provisions of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967. Rule 8, sub-rule (8) makes a specific provision in this regard and if that is taken into consideration, respondent No.1 cannot be said to have possessed the requisite qualification of experience of 5 years. Experience, even if it is taken from the date of respondent No.1's graduation, would not make him available an experience of even 4 complete years and, therefore, the learned Single Judge ought not to have taken into consideration the earlier experience.

7. Mr. Pujari, learned counsel appearing on behalf of GPSC in Letters Patent Appeal No.1488 of 1997, while adopting the arguments made by Mr. Upadhyay, submits further that respondent No.1

had only an experience of 3 years and 8 months behind him, which was not sufficient to fulfill the requirement. Rule 3 of the Recruitment Rules is specific about this requirement and, therefore, the decision of GPSC was correct and in accordance with the Rules.

8. Mr. Parmar, learned counsel appearing for respondent No.1 in both the matters, has submitted that the qualification of experience is only preferential as against educational or academic qualification being essential for the post in question. In this regard, he has placed reliance on the Gujarati version of the advertisement inviting applications that was published in the newspaper. He has also relied upon the details of the candidates who were selected by the GPSC, as produced on page 34 of the petition, to show that the Commission while preparing the list has given priority to the academic qualifications of the candidates as listed therein. He also submitted that the experience part has been only given second seat and the candidates without requisite experience of 5 years have also been enlisted therein and, therefore also, the qualification of 5 years' experiences cannot be said to be essential qualification for being posted to the said post. While drawing our attention, Mr. Parmar, submitted that the appellant in LPA No.1311/97 is the least qualified person from the select list and that is how he is placed at the bottom of the list (page 34-35). In this regard, he has placed reliance on the decision of the Supreme Court in the case of Council of Scientific & Industrial Research v. M.V. Shastry (1997) 7 SCC 494.

9. Mr. Parmar submitted further that when there are specific rules providing for the qualifications and recruitment, they would certainly override general provisions and general rules and, as such, Rule 8, sub-rule (8) of Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 cannot be made applicable to the present case. He submitted that when the necessary qualification "a Bachelor's degree either in Arts, Science, Agriculture, Commerce, Law or Engineering of a recognized University or an equivalent qualification with about 5 years' experience in any responsible in an administrative capacity" indicates that experience and academic qualifications cannot be acquired simultaneously, they cannot go together and, therefore, the qualification of experience has to be considered as secondary or at the most preferential.

10. The next contention that was raised by Mr. Parmar was that the selection of respondent No.1-original petitioner was made by GPSC, which is a constitutional body, specially constituted for the purpose and, as such, the Court should be slow in exercising writ jurisdiction.

11. For State of Gujarat, Gujarati is the official language. The rules that are produced before this Court are in English. It can necessarily be presumed that there must be Gujarati version of the rules and that should be considered as the original rules. In absence of Gujarati version of the rules, blind reliance cannot be placed on the English version of the rules. In support of this, he has placed reliance on the advertisement inviting applications, at Annexure-A, which indicates that the qualification of 5 years' experience was considered as preferential as it states that candidates with about 5 years' experience will be given priority. Mr. Parmar's contention was that earlier no such clarification was given either in the advertisement or otherwise that experience of 5 years must necessarily be after acquiring necessary academic qualification and this stand taken by the GPSC, subsequently, of insisting for 5 years' experience after acquiring academic qualifications would amount to amending the qualification clause of the rules, which cannot be permitted. In support of this argument, he has placed reliance upon a decision of the Supreme Court in State of U.P. v. Rafiquddin and Others, (1987) Supp. SCC 401.

12. Lastly, Mr. Parmar submitted that respondent No.1 is a man coming from a remote place of the State. He belongs to Scheduled Tribe and is coming from a strata of society where education is rarely to be found, where he has acquired graduation with First Class and this Court, therefore, may use its discretion for delivering complete justice once he is selected for the post. He has placed reliance on the decision of the Supreme Court in the case of B.N.Saxena v. New Delhi Municipal Committee and Others, (1990) 4 SCC 205 to indicate that even where such qualification was lacking, the Honourable Supreme Court came to the conclusion that because the incumbent had worked on the post for a long time, the experience gained for a considerable length of time is itself a qualification. Mr. Parmar submitted that GPSC has power to relax the qualifications and powers to have waived the requirement of experience by recommending the name of respondent No.1 for appointment and, therefore, the appeals need not be entertained and no interference in the order passed by the learned Single judge is called for.

13. Replying to the argument of Mr. Parmar, Mr. Upadhyay submitted that the affidavit filed on behalf of GPSC makes it clear that there was a clerical mistake in the Gujarati version of the advertisement inviting the applications. The advertisement was also published in English newspapers specifying the requirement of qualification in consonance with the recruitment rules. He submitted that, where there are special rules, general rules must give way. But when the special rules are silent about certain procedure, general rules would be applicable. He lastly, tried to distinguish the decision relied upon

by Mr. Parmar (1990) 4 SCC 205 by saying that the said decision deals with a case of promotion whereas, in the instant case, the Court is seized of the question relating to direct recruitment and, as such, the said decision cannot be applied to the facts of the present case.

14. Mr. Parmar has raised a contention that once GPSC has recommended the name of a candidate to the Government, its function is over and becomes functus officio. Thereafter whatever correspondence was entered into between the Government and the GPSC and the ultimate decision taken by GPSC on the basis of that correspondence and communicated to respondent No.1 vide communication dated 23rd April, 1997 (Annexure-G) was beyond the authority and jurisdiction of GPSC. In this regard, Mr. Pujari as well as Mr. Upadyay has submitted that, if paragraph 2 of Annexure-C communication dated 30th November, 1996, intimating respondent No.2 about the recommendation of his name to the Government for the post in question is read, it makes it amply clear that GPSC had acted on prima facie acceptance of the certificates, etc. produced by respondent No.1 and if, subsequently, respondent NO.2 is found to be lacking any qualification in consonance with the rules, he would not be entitled to be appointed to the post in question.

15. Now, for deciding the question whether the petitioner possessed requisite qualification of experience or not, certain material and undisputed dates may be mentioned:

1) 10th April, 1992 – Petitioner graduated.

2) 1st May, 1987 to 12th July, 1987 – He worked as Gruhpati in Dakshin Vibhag Adivasi Madhyamik Kelvani Mandal, At Post Khanpur.

3) 10th April, 1992 to 20th July, 1992 – He worked as Accountant with Shri Tan-Man Pradesh Mahila Audyogik Sahakar Mandali Ltd., Khanda.

4) 21st July, 1992 to 10th October 1994 – He worked at Gruhpati (Warden) with Shri Gujarat Vanvasi Kalyan Parishad Chhatralay, Sedumbar.

5) 21st October, 1994 till date – He is working as Gruhpati with Shramjivi Sanskar Mandal Valsad Sarvoday Kumar Chhatralay.

16. A perusal of the Recruitment Rules framed for the post in question under proviso to Article 309 of the Constitution on 22nd February, 1972 indicates that there is no provision specifying the dates from which qualification of experience will be considered or computed. The relevant rule is Rule 3 which can be reproduced as under:-

"3. To be eligible for appointment by direct select to the post mentioned in rule 2, a candidate must –

(a) be not more than 35 years of age; and

(b) Possess a Bachelor's Degree either in Arts, Science, Agriculture, Commerce, Law or Engineering of a recognized University or an equivalent qualification, with about 5 years' experience in any responsible post in an administrative capacity;

Provided that preference may be given to a candidate possessing experience in Land Acquisition matters, Town Planning and Municipal Laws.

Provided, further that the age limit may be relaxed in favour of a candidate possessing exceptionally good qualification or experience or both; provided further that the upper age limit may be relaxed in case of Gujarat State Servants in accordance with the provisions of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 as amended from time to time."

Now, therefore, to consider the question whether the experience gained by the petitioner before graduation can be taken into consideration or not, reference may be made to Rule 8, sub-rule (8) of the Gujarat Civil Services Classification and Recruitment (General) Rules 1967, which reads as under:-

"(8) Where the qualifications prescribed for any service or post include a qualification as to practical experience for a given period and applications are invited for such service or post the period of practical experience shall be computed –

(a) Unless otherwise provided in recruitment rule from the date on which requisite qualifications are obtained.

(b) With reference to the last date fixed for receipt of such application."

In this regard, clause (b) of sub-rule (8) makes it very clear that the qualification as to practical experience shall be computed with reference to the last date fixed for receipt of such application, which is 1st April, 1996, in the instant case before us. In this regard, the proviso to Rule 3 of the Recruitment Rules in question, if read, also indicates the intention of the Government of deriving support from the provisions of Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 and, therefore, when there is no specific provision in these Rules, reference has to be made to the provisions of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967. Even otherwise it is settled proposition of law where there is no specific provision in special rules framed for recruitment to a post, the general rules shall prevail.

17. In the instant case, it is also to be noted that the special recruitment Rules for the posts in question do not specifically provide for computing the date from which the requisite qualification of

experience is to be computed, and therefore, clause (a) of sub-rule (8) of Rule 8 of Gujarat Civil Services Classification and Recruitment (General) Rules, 1967, will come into play which specifically provides that unless it is otherwise provided the period of practical experience shall be computed from the date on which the requisite qualifications are obtained which is 10th April, 1992 in the instant case.

18. The outcome therefore is that the practical experience that can be taken into consideration in the case of respondent no.1 would be from 10th April, 1992 to 1st April, 1996 which would be definitely less than five years qualifying experience. To be exact, it would be 3 years and 8 months. In this regard, it is also to be considered that the argument advance by Mr. Parmar that the G.P.S.C. has power to relax the experience requirements as conceded to by the other side. Such relaxation is given to the extent of one month for every year of experience, and therefore, also the relaxation can at the most be for 4 months and if that is added the total experience would be 4 years which would be again less than the requisite qualifying experience. This being so, no error seems to have been committed in deciding for considering respondent no.1 as lacking requisite experience, and therefore, even if the power to relax was exercised by the G.P.S.C. it would not have helped respondent no.1 in any manner. Against this, it would not be out of place to observe that when it comes to experience of discretion by such authority, Court is not supposed to sit in appeal while exercising its extraordinary jurisdiction under Article 226 of the Constitution of India and has to be slow in using its discretion. The period of experience has to be computed after graduation unless contrary is provided is also a proposition settled by the Supreme Court while deciding the case of N.Suresh Nathan and Another v. Union of India and Others, AIR 1992 SC 564. The contention of Mr.Parmar that the qualification of experience is not essential but is only preferential is difficult to be accepted. If the recruitment Rule for the post in question particularly Rule 3 is perused it makes it abundantly clear that the candidate to be eligible must possess a bachelors degree either in Arts, Science, Agriculture, Commerce, Law or Engineering with about 5 years experience in any responsible post in an administrative capacity. It is therefore very clear that the candidate must possess both the qualifications, namely, a bachelor's degree and about 5 years experience. To overcome this difficulty it was contended that the advertisement inviting applications in Gujarati newspaper averred that the candidates with about 5 years experience will be given preference/priority, and therefore, that must prevail in the instant case. In this regard, the affidavit-in-reply filed on behalf of the G.P.S.C. makes it clear that the advertisement published in English as in consonance with the recruitment Rules, and therefore was a mistake in the Gujarati advertisement. In our view, such a clerical error cannot create a situation of overriding the

rules framed under proviso to Article 309 of the Constitution of India. Such mistakes can definitely be corrected as and when noticed. Such advertisement inviting applications does not confer a right to the candidates applying for such posts.

19. It was contended further by learned Advocate Mr. Parmar on behalf of respondent no.1 that in the State of Gujarat, Gujarati is the official language and there must be Rules of recruitment in Gujarati which can be considered as original one and in absence of such Rules presumption may be drawn in favour of respondent that the Gujarati version of the advertisement is more authentic. There cannot be any dispute about Gujarati being official language in the State but no such presumption or adverse inference can be drawn when specific rules are provided and there is an affidavit on record to indicate that it was only a clerical error in the Gujarati advertisement while translating the qualifying requirements of experience. As such there is no question of any conflicting or contrary interpretation or views being possible because the English advertisement indicates the situation in consonance with recruitment Rules which factum is not controverted by respondents.

20. As regards the contention that the G.P.S.C. could not have written letter Annexure "G" dated 23-4-1997 to respondent no.1 for the reason that after recommending the name of respondent no.2 to the Government it had become functus officio, this contention does not find any support from the facts of the case. If Annexure "C" which is letter intimating respondent no.1 about his name having been placed at serial no.1 in the select list is perused, it specifically indicates in paragraph (2) that the recommendation is made prima facie accepting the certificates etc. produced by respondent no.1 and that he shall be eligible to be appointed only after due verification of the documents. It is also stated therein that if at any stage he is found to be lacking the qualifications stated in the advertisement or Rules his candidature shall be cancelled and he will not be entitled to be appointed. Thus, it cannot be said that Annexure "C" was the final letter or decision of the G.P.S.C. regarding selections/appointment of respondent no.1. In fact, Annexure "G" is the final decision taken by the G.P.S.C. after perusal of all the requisite papers and therefore Annexure "C" cannot be said to be final decision of G.P.S.C. Besides this, it was only a letter of recommendation which was also conditional and the ultimate decision was to be taken by the Government. The G.P.S.C. can be said to have worked as a communicating agent only and the contention therefore cannot be accepted.

21. Mr. Parmar contended that by taking the action in the instant case an attempt is made to amend the Rules by insisting on experience of five years after attaining academic qualification. It is not

possible to accept this argument either because, as discussed above, Rule 8 sub-rule (8) clause (b) of Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 specifically provides that the experience has to be computed from the date on which requisite qualifications are obtained. This rule will be effective because special recruitment rules are silent in this regard. The Hon. Supreme Court has also held the same in the case of N.Suresh Nathan and Another v. Union or India, AIR 1992 SC 564.

22. The last contention raised by Mr. Parmar is that respondent no.1 is a man belonging to Schedule Tribe coming from that strata of society where education is a rarity and as such his case needs to be considered with sympathy. True, it is that the applicant's social position may call for sympathy but it has to be borne in mind that rule of law must prevail.

23. Mr. Parmar placed reliance on the decision in the case of State of U.P. v. Rafiquddin and Others, (1987) Supp. SCC 401 to emphasize that frequent changes in Rules of recruitment and qualifying requirements was deprecated by the Supreme Court. We are afraid the said decision cannot be made applicable to the facts of the present case as in the instant case no attempt is made either by the Government or by the G.P.S.C. for changing Rules or qualifying requirements. The qualifying requirements and the rules existed as they were from the beginning and as such this decision cannot be applied to the present case.

24. Mr. Parmar has placed reliance on the decision of the Hon. Supreme Court in the case of Council of Scientific and Industrial Research, New Delhi v. M.V. Shastri (1997) 7 SCC 494. It was observed therein that the requirements of experience for the post of Sr. Technical Assistant to Council of Scientific and Industrial Research do not appear to be mandatory, and therefore, the same ratio may be applied in the instant case. In our view, we cannot apply the ratio of the said decision to the facts of the present case for the reason that in that case certain specialized qualifications were expected of a candidate applying for the post in question which was specifically mentioned in the advertisement inviting applications and looking to the text of the advertisement it was held by the Hon. Supreme court that particular experience of the candidate in question cannot be considered as a specialized experience and the decision was given. In the instant case, the qualifications of experience is specified in the Rules and advertisement and the slip in Gujarati advertisement is specifically averred to, in the affidavit and the same has been detected before respondent no.1 could be given appointment and as

such respondent no.1 cannot get the advantage of a bonafide clerical error which is sought to be corrected. After all before appointment is given no right is created in favour of respondent no.1

In view of the above discussion, we are of the view that both the appeals deserve to be allowed. The decision rendered in Spl. C.A.No.3678/97 needs to be quashed and set aside as it is found to be not in consonance with the Rules of recruitment and both these appeals are therefore allowed. The decision of learned Single Judge given in Spl.C.A.No.3678/97 on 29.9.1997 is hereby quashed and set aside. No order as to costs.

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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
Special Civil Application No.6708 of 1997
D.D. 22.03.2007
Hon'ble Mr. Justice M.R.Shah

Bhupendrakumar M.Kadia ... Petitioner
Vs.
State of Gujarat & Ors. ... Respondents

Promotion:

The petitioner along with respondent No.4 and other employees was considered by State Government and Gujarath P.S.C. for promotion in Class-II service in 1995 – As the proposal regarding petitioner was incomplete as his complete Confidential Report was not submitted to the Commission, respondent No.4 who was immediate junior of the petitioner and other officials were promoted as per notification dated 29.8.1996 – Again the petitioner was considered for promotion after obtaining the required documents like confidential reports etc., and as per letter dated 17.3.1997 the State Government requested the G.P.S.C. to consider the case of the petitioner for promotion on the basis of material available – Accordingly G.P.S.C. considered the same but not retrospectively from the date when the petitioner's junior 4th respondent was promoted – Therefore, High Court allowed the Special Civil Application and directed the G.P.S.C. to consider the case of the petitioner for the purpose of fixing deemed date of promotion which should be the date on which his immediate junior i.e. respondent No.4 was promoted with consequential benefits.

Held:

Promotion cannot be denied for non availability of Confidential Reports for which the petitioner was not responsible.

ORDER

In this petition under Article 226 of the Constitution of India the petitioner has prayed for an appropriate writ, direction or order quashing and setting aside the action of the respondent authorities in not granting promotion to the petitioner in Class-III service in Cooperative Department. The petitioner has further prayed for a declaration that he is entitled to promotion in Class-II service in Cooperative Department with retrospective effect from the date of promotion of respondent No.4, his immediate junior to Class-II service.

2. It appears from the record that during the pendency of the present Special Civil Application the petitioner was promoted to the post in Class-II service in Cooperative Department and therefore the only question which is required to be considered by this Court is with regard to deemed date of promotion of petitioner to Class-II service.

3. It is the case on behalf of the petitioner that the case of the petitioner was considered by the State Government and the GPSC along with respondent No.4 and other employees, however the respondent No.4 his immediate junior was promoted but the petitioner was not granted the promotion. On considering the affidavit-in-reply filed on behalf of GPSC it appears considering Para 5 that by letter dated 20th July, 1995 the State Government submitted a proposal for promotion to the post of Gujarat Cooperative Service Class-II and in the said proposal the name of the petitioner was at Serial No.60. On receiving the same vide letter dated 5.8.1995 the Commission wanted some further information and clarification from the Government. It is further submitted that on receiving such information and clarification vide Government letter dated 17.8.1995, 76 Officers out of the said list of 88 offices were approved by the Commission vide letter dated 1.1.1996 and from amongst other remaining officers the proposal regarding the petitioner was incomplete as his complete confidential report was not submitted to the Commission. It is submitted that the Government was informed accordingly as stated in para 4 of the letter and in the meantime 61 officers out of the said officers in the approved list of Sr.No.1 to 71 were promoted by the Government vide Notification dated 29.8.1996. In the said notification the respondent No.4 who was the immediate junior to the petitioner was included at Sr.No.40. Thereafter, the Government once again by submitting incomplete confidential report of the petitioner called for opinion of the Commission. Thereafter vide letter dated 31.12.1996 the Commission requested the Government to submit complete confidential report of the petitioner and it was informed to the Government that only after getting the complete file the Commission will submit its opinion. It is submitted that pursuant thereto vide letter dated 17th March 1997 the Government informed the Commission that since complete confidential report of the petitioner is not available on the basis of available report and also the recommendation made in the proceedings of the Departmental Promotion Committee considering the same as circumstantial evidence requested the Commission to give its opinion.

3.1 In the aforesaid facts and circumstances of the case, ultimately, the Commission vide its letter dated 20.9.1997 gave its approval for including the name of the petitioner in the provisional promotion list dated 4/11.1.1995 of Gujarat Co-operative Service Class-II. Thus, on perusal of the affidavit-in-reply filed on behalf of the Gujarat Public Service Commission it appears that though the case of the petitioner was recommended by the Departmental Promotion Committee and was sent to the GPSC as some documents like Confidential Reports were not available the case of the petitioner was not considered by the GPSC and it was not approved by the GPSC at the relevant time and the immediate

junior to the petitioner came to be promoted. It is not the case of the State Government that the petitioner was in any way responsible for non-availability of the Confidential Reports. Even subsequently the State Government while again recommending the case of the petitioner in the year 1997 vide letter dated 17th March 1997 the State Government itself requested the GPSC to consider the case of the petitioner on the basis of the material available and accordingly the GPSC considered the same. Therefore, when the same set of circumstances was there at the time when the case of the petitioner was considered and when his immediate junior was promoted and at the time when actual promotion was subsequently granted, the same exercise was required to be carried out by the GPSC, i.e., the case of the petitioner was required to be considered on the date on which his immediate junior i.e., respondent no.4 was promoted. In other words, GPSC was required to consider the case of the petitioner for promotion along with the case of respondent No.4 who was his immediate junior. By not considering the case of the petitioner retrospectively, there is gross injustice caused to the petitioner.

4. Under these circumstances, the Gujarat Public Service Commission is required to be directed to consider the case of the petitioner for the purpose of fixing deemed date of promotion which should be the date on which his immediate junior i.e., respondent No.4 was promoted, and if ultimately it is found that the petitioner was eligible for promotion, in that case the petitioner should be granted the said deemed date. The matter is, therefore, remanded to the Gujarat Public Service Commission for completing aforesaid exercise. The said exercise be completed by the GPSC within a period of 3 months from the date of receipt of this order and thereafter if ultimately the petitioner is entitled to certain consequential benefits the same should be granted by the State Government within the period of the period of three months thereafter.

5. With these, the present Special Civil Application is partly allowed. Rule is made absolute to the above extent with no order as to costs.

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HARYANA PUBLIC SERVICE COMMISSION

IN THE HIGH COURT FOR THE STATES OF PUNJAB & HARYANA AT CHANDIGARH
CIVIL WRIT SIDE
CIVIL WRIT PETITION NO.8904 OF 2004
D.D. 21.8.2004
Hon'ble Mr.Justice S.S.Nijjar, and Hon'ble Mr. Justice Nirmal Singh

Narender Singh Kundu ... Petitioner
Vs.
Haryana Vidyut Prasaran Nigam Ltd. & Ors. ... Respondents

Qualification:

Post of Assistant Engineer – Qualification prescribed is Bachelor Engineering Degree in Electrical/ Electrical & Electronics or equivalent qualifications – Petitioner possesses Degree in Electronics & Power Engineering – His application has been rejected on the ground that the qualification possessed by him not equivalent to the qualification prescribed – High Court has dismissed the writ petition holding that the qualifications possessed by the petitioner not being the prescribed qualifications writ petition has been rightly rejected.

Held:

It is settled proposition of law that once a particular qualification is prescribed, the appointment has to be made strictly in accordance therewith following the decision in C.W.P. No.6958/2003 wherein it is held as under:

" ..... There may be some common subject so far as the aforestated two courses are concerned but that would not make both the degrees falling within the ambit of rule of equivalence. The petitioners have not been able to spell out that all the subjects in both the degrees are paramateria. Had it been so there was no reason or requirement to give different labels to different degrees accordingly,"

Also followed the decision of the Supreme Court in 1990((4) SLR 237 wherein it has been held as under:

"It must further be realised by all concerned that when an advertisement mentions a particular qualification and appointment is made in disregard of the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. ....."

Cases referred:

1. 1983 (3) S.L.R., 141 - Som Dutt Vs. State of Haryana & Anr.
2. 1990 (4) S.L.R., 237 - The District Collector & Chairman Vizianagaram (Social Welfare Residential School Society), Vizianagaram & Anr. v. M.Tripura Sundari Devi
3. 1995(3)(Vol. 21) Recent Services Judgments - Anuj Yadav v. State of Haryana & Anr.

JUDGMENT

S.S.Nijjar, J.

We have heard the learned counsel for the parties at length and perused the record of the case.

The petitioner holds the degree of Bachelor of Engineering in Electronics & Power Engineering. On the basis of this qualification, he applied for a post of Assistant Engineer in response to an advertisement Annexure P-3. The essential qualifications were as follows:-

Essential qualifications:

1. Assistant Engineer (Electrical)

   (i) Bachelor of Engineering Degree in Electrical/Electrical and Electronics or equivalent qualifications from any Indian/Foreign University/Institution duly recognised by All India Council of Technical Education with minimum 60% marks (55% marks for SC of Haryana)

   (ii) Hindi upto Matric.

By letter dated 07.04.2004, the petitioner has been informed that his candidature has been rejected as he does not possess the requisite degree of Bachelor of Engineering (Electrical). The petitioner was given ten days time to file a representation. The petitioner relies on a certificate dated 06.11.1997 issued by the Principal of Shri Ramdeobaba Kamla Nehru Engineering College, Nagpur. In this certificate, it is stated that in the Nagpur University, the Electrical Engineering Branch is now given the name of Electronics & Power Engineering. Thus, the Branch of Electronics and Power Engineering is nothing but Electrical Engineering Branch. It is further stated in the certificate that this College is affiliated to Nagpur University, Nagpur, runs Electronics and Power Engineering Course, recognised by Government of Maharashtra and approved by All India Council of Technical Education.

The respondents have filed a written statement. It is pleaded that the degree of electronics and Power Engineering is in a different discipline of Engineering than the Electrical/Electrical and Electronics Engineering and, therefore, the same cannot be treated as equivalent to Electrical/Electrical and Electronics Engineering. Commenting on the certificate submitted by the petitioner, it is stated that

from a perusal of the said certificate it is evident that Electronics and Power Engineering is one of the branches of the Electrical Engineering and not equivalent to the Electrical Engineering. According to the written statement, another candidate Lalan Kumar, Roll No.573 had also submitted the same certificate for the same post. He had also attached a certificate dated 15.10.2001 issued by the Assistant Registrar (Prof.Exam.), Nagpur University, Nagpur, Annexure R-1. According to this certificate, Electronics and Power Engineering is one of the branches which comes under the Electrical Engineering group as per University Ordinance.

Mr.Godara has vehemently argued that the objection raised by the respondents is hyper technical. The petitioner is entitled to be appointed on the basis of the degree aforesaid. Learned counsel submits that merely because a different nomenclature is used in the degree by the Nagpur University, would not render the petitioner ineligible. In support of this submission, learned counsel relies on a Division Bench judgment of this Court in the case of Anuj Yadav Vs. State of Haryana and another, 1995 (3) (Vol. 21) Recent Services Judgments.

We have perused the aforesaid judgment and find that the same is not applicable to the facts and circumstances of the present case. The following observations of the Bench would be relevant:-

> "2. We had asked an Advocate of this Court. Mr. Ravi Sodhi, to find out from the Panjab University as to whether the subject "Business Administration and Business Management" are one and the same and are interchangeable. Shri Ravi Sodhi, after meeting the Vice-Chancellor, Punjab University, "Business Administration" and "Business Management" are used interchangeably by various Universities and there is one paper of "Business Management" offered in B.Com. by the Punjab University.
>
> 3. In view of what has been put on record by Shri Ravi Sodhi, Advocate, after consulting the Punjab University, we are of the view that "Business Administration and "Business Management" are interchangeable and synonymous. Some Universities call it "Business Management" and other institutions call it "Business Administration". Learned counsel for the respondent-Commission states that if that is so, the petitioner would be eligible for consideration for the post of Labour-cum-Conciliation Officer. Consequently, we allow this writ petition and hold that the petitioner is entitled to be considered as eligible for the post of Labour-cum-Conciliation Officer. The Commission may now consider his case for appointment as of Labour-cum-Conciliation Officer within two months from today. The writ petition stands disposed of accordingly."

A perusal of the aforesaid observations clearly indicates that the counsel for the Punjab University had stated that the terms "Business Administration and Business Management" are used interchangeably by various Universities. This position was accepted by the parties and the writ petition was allowed.

We are unable to discern any legal principle that may have been laid down by the Division Bench in the aforesaid judgment.

On the other hand, Mr.Mehtani learned counsel appearing for respondent No.5 has submitted that qualifications possessed by the petitioner have not been recognised as essential qualifications for the post of Assistant Engineer. It has also not been treated as equivalent to degree of Bachelor of Engineering. Learned counsel relies on a Division Bench judgment of this Court rendered in CWP No.6958 of 2003 (Deepak Garg and others Vs. State of Haryana and another), on 09.10.2003, wherein a similar degree issued by the Amravati University has been held to be not equivalent to Degree of Bachelor of Engineering in Electronics Engineering/Electronics and Communication Engineering. In the aforesaid judgment, it has been held that there must be strict compliance with the prescribed qualifications. After noticing the submissions of the learned counsel, it has been held as follows:-

> "After hearing learned counsel for the parties at length and perusal of the pleadings and the record placed on the Court file, we are of the opinion that the petition is not sustainable and the same deserves to be dismissed. The perusal of the advertisement shows that no scope for applying the rule of equivalence has been provided by the respondents. It has been clearly and categorically mentioned that the persons who hold/have acquired B.E. (Electronics/Electronics Communication Engineering or Technology) from a recognised University, shall be eligible to be considered for the post by way of calling them for the interview. The candid certification of equivalence issued by the respective Universities of the petitioners is of no consequence. The advertisement categorically provides that a person who holds degree in Electronics Engineering/ Electronics and Communication Engineering or Technology from a recognised University, shall be eligible for being considered for the post of Lecturer in Electronics. There may be some common subject so far as the aforestated two courses are concerned but that would not make both the degrees falling within the ambit of rule of equivalence. The petitioners have not been able to spell out that all the subjects in both the degrees are paramateria. Had it been so there was no reason or requirement to give different labels to different degrees accordingly,"

In our opinion, the aforesaid observations are fully applicable to the facts and circumstances of this case. It is settled proposition of law that once a particular qualification is prescribed, the appointment has to be made strictly in accordance therewith. This principle of law has been laid down by a Full Bench of this Court in the case of Som Dutt Vs. State of Haryana and another, 1983 (3) S.L.R., 141. S.S.Sandhawalia, Chief Justice observes:-

> "There appears to be wide variety of reasons for holding that the employer-State, should in law, be entitled to prescribe the qualifications which it may think necessary as tailored to the peculiar needs of the particular post or service. Generally, it seems somewhat

> elementary that the employer alone would know what are the specialties and conditions of service or post for which the incumbent is required. Therefore, it would follow that its discretion in seeking the right man for the right job should be left relatively unfettered. Consequently, no doctrinaire rule can be laid down that a technically higher educational qualification is necessarily better or more advantageous for the peculiar needs of a post for which the employer-State has prescribed lower qualifications.

Once qualifications have been laid down by binding statutory provisions, then the concept of strict compliance therewith would entitle the State to insists that these be meticulously satisfied and extraneous considerations like qualifications other than those prescribed being either the exact equivalents, or technically higher than those, would be irrelevant to the issue and indeed may well be contrary to the statutory prescription.

An enquiry by the Court for determining as to whether a particular qualification is an exact equivalent or is higher or superior to the prescribed one, would open a Pandora's Box on which the lid cannot be easily be replaced."

The Supreme Court in the case of The District Collector & Chairman Vizianagaram (Social Welfare Residential School Society), Vizianagaram and Anr. Vs. M.Tripura Sundari Devi, 1990 (4) S.L.R., 237, has held as under:-

> "It must further be realised by all concerned that when an advertisement mentions a particular qualification and appointment is made in disregard of the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. It amounts to a fraud on public to appoint person with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No Court should be a party to the perpetuation of the fraudulent practice. We are afraid that the Tribunal lost sight of this fact."

In view of the above, we are of the considered opinion that the qualifications possessed by the petitioner not being the prescribed qualifications, the respondents have rightly rejected the candidature of the petitioner. Consequently, we find no merit in the present petition. Dismissed.

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AIR 2005 SUPREME COURT 137
Writ Petition (C) No.215 of 2002
D.D. 27.10.2004
Hon'ble Y.K.Sabharwal and D.M.Dharmadhikari, JJ

Virender Singh Hooda and Others ... Petitioners
Vs.
State of Haryana & another ... Respondents

Recruitment – Validity of the Haryana Civil Service (Executive Branch) and Allied Services, Common/Combined Examination Act 2002.

(A) Haryana Civil Service (Executive Branch) and Allied Services and Other Services, Common/ Combined Examination Act (4 of 2002), S. 1 – Validity – Act repealing circulars, basis of Supreme Court decisions in AIR 1999 SC 1701 : 1999 AIR SCW 1327 : 1999 Lab IC 1838 (Virender S.Hooda's case) and C.A.No.7422 of 1999, D/- 9-11-2000 (reported in 2002 (10)SCC 549) (Sandeep Singh's case) – Not ultra vires, except to the extent it takes away appointments already made in implementation of Supreme Court decision much before enforcement of Act

Constitution of India, Arts. 245, 14.

It cannot be said that vested rights cannot be taken away by legislature by way of retrospective legislation. Taking away of such right would, however, be impermissible if violative of Arts. 14, 16 and any other constitutional provision. (paras 49, 59)

It cannot be said that the effect of the writs issued by the Courts cannot be nullified by legislature by enacting a law with retrospective effect. The question, in fact, is not of nullifying the effect of writ which may be issued by the High Court or Supreme Court. The question is of removing the basis which resulted in issue of such a writ. If the basis is nullified by enactment of a valid legislation which has the effect of depriving a person of the benefit accrued under a writ, the denial of such benefit is incidental to the power to enact a legislation with retrospective effect. Such an exercise of power cannot be held to be usurpation of judicial power. The repeal of the circulars was permissible. In the instant case, the circulars were validly repealed by the impugned Act and it made the law declared in 1999 AIR SCW 1327 : AIR 1999 SC 1701 : 1999 Lab IC 1838, Hooda's case ineffective. Therefore, it would not be the case of usurpation of judicial power by the legislature. The legislature has removed the basis of the Supreme Court decision in C.A.No.7422 of 1999 D/- 9-11-2000 (reported in 2002 (10 SCC 549). The Act is also not violative of Arts. 14 and 16 of the Constitution of India. The candidates have right to posts that are advertised and not the one which arise later for which a separate

advertisement is issued. A valid law, retrospective or prospective, enacted by legislature cannot be declared ultra vires on the ground that it would nullify the benefit which otherwise would have been available as a result of applicability and interpretation placed by a superior Court. A mandamus issued can be nullified by the legislature so long as the law enacted by it does not contravene constitutional provisions and usurp the judicial power and only removes the basis of the issue of the mandamus. Despite the aforesaid conclusion, the Act (proviso to S. 4(3) to the extent it takes away the appointments already made, some of the petitioners had been appointed much before enforcement of the Act (ten in number) in implementation of Supreme Court's decision, would be unreasonable, harsh, arbitrary and violative of Art. 14 of the Constitution. The law does not permit the legislature to take back what has been granted in implementation of the Court's decision. Such a course is impermissible.

(Paras 56, 64, 65, 70)

(B) Constitution of India, Arts. 16, 309 – State services – Appointments – State Govt directed to take timely steps by sending requisitions in issue of advertisement, holding of examination, completion of selection processes. (Para 70)

Para 70. Before parting with the case, it deserves to be noticed that to a large extent the State Government itself was responsible for the difficulties because of long gap of number of years between advertisement and appointments to the posts. Rule 9 postulates that the competitive examination shall be held each year but the same are held after 3/4 years. If timely steps are taken by sending the requisitions, in issue of the advertisement holding of examination, completion of selection processes and in making appointments, the difficulties in all likelihood, would not arise. On the other hand, as in these cases, if there are long gap of years in taking any of aforesaid steps, the difficulties are likely to arise. In the present case 3 to 4 years were taken in making appointments in respect of posts advertised on all the four occasions i.e. in the year 1989, 1992, 1996 and 1999. We hope that such a situation would not arise in future. When Rule requires examination to be held in the month of January, it is implicit that the entire process up to the appointment shall be completed as soon as possible thereafter and not later than the end of the year so that when the examination is held in the month of January of the next year, the entire selection process of the previous advertisement is over. Another aspect required to be noticed is about special recruitment under proviso to Rule 5 in the exigencies of the service. In such mode of appointments, the compromise with, in so far as merits of the candidates is concerned, cannot be ruled out. Mr. Rao appearing for State of Haryana has informed us that in the recent years resort to special recruitment was made only in the year 1997. That was challenged and quashed by the judgment of Punjab and Haryana High Court which has attained finality. Ordinarily if the steps under the Rules are taken in time as above indicated there would hardly be an occasion to

resort to special recruitment avoiding unnecessary litigation of aforesaid nature which led to the setting aside of the special recruitment of 1997. this is yet another aspect which is required to be borne in mind by the State Government. Be that as it may, in view of aforesaid discussion our conclusions are as under:

(1) The impugned Act, to the extent of its retrospectivity, except to the limited extent indicated above, does not amount to usurpation of judicial powers by the Legislature. It is not ultra vires. It has removed the basis of decisions in Hooda and Sandeep Singh's cases (AIR 1999 SC 1701 : 1999 AIR SCW 1327 : 1999 Lab IC 1838).

(2) The Act is not violative of Articles 14 and 16 of the Constitution of India except to a limited extent noticed below.

(3) The first proviso to Section 4(3), to the limited extent it provides for dispensing the services of candidates already appointed, is harsh, excessive, arbitrary and violative of Article 14 of the Constitution.

The benefits already granted to the petitioners in Writ Petition Nos.215 to 218 and 224 of 2002 could not be taken back. To this extent, retrospectivity is ultra vires. In all other respects, it is valid.

(4) The directions of the High Court in favour of respondents Ajay Malik and Arvind Malhan, subject matter of Civil Appeal Nos.3937-38 of 2001 are maintained. For the same reason, Jagadish Sharma and Mahavir Singh being higher in merit than Lalit Kumar and Virender Lather would also be entitled to similar treatment.

(5) The judgments of the High Court in Civil Appeal Nos.8385 to 8393 of 2000, in view of the provisions of the Act, are set aside.

(C) Constitution of India, Art.309 – Service Rules – Executive instructions if contrary to statutory Rules – Rules would prevail and not executive instructions.(Para 22)

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(Only Head Notes containing the principles laid down are set out and the full text of the judgment is not set out as the decision is reported in A.I.R.)

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
C.M. NO.5577-78 of 2005 IN
C.W.P. NO.1101 of 2005
D.D. 11.11.2005
Hon'ble Mr. Justice J.S.Khehar &
Hon'ble Mr. Justice Rajive Bhalla

Ajit Singh ... Petitioner
Vs.
Haryana Public Service Commission ... Respondent

Examination

Supply of details of marks to non selected candidates:

Rules do not provide for supply of details of marks to non selected candidates – Following earlier decision in Civil Appeal No.6265 of 1997 in similar matter the High Court has set aside exparte order dated 20.1.2005 directing the Public Service Commission to furnish the details.

Held:

When the Rules do not provide for supplying details of marks to non selected candidate he is not entitled to seek the said information.

ORDER

J.S.Khehar, J.

We have heard learned counsel for the parties.

By our order dated 20.1.2005, we had issued a direction to the Secretary, Haryana Public Service Commission, requiring him to supply the details of marks obtained by the petitioner while appearing in the process of selection for the post of S.D.O. (Panchayati Raj). So as to controvert the aforesaid direction issued by this Court ex-parte, learned counsel for the applicant – respondent has invited our attention to an order passed by the Apex Court in Punjab Public Service Commission Vs. Subhash Chander and others (Civil Appeal No.6265 of 1997, decided on 12.9.1997). Relevant extract of the aforesaid order is being reproduced hereunder:

> "The grievance of the learned counsel for the appellant is that there is no procedure prescribed under any rule which warrants information to be conveyed to non-selected candidates of the marks obtained by them. It is stated that there is no justification for the aforesaid direction particularly in view of the fact that the appellant conducts selection

process for thousands of candidates every year and those who are not selected from the majority. Learned counsel for the respondents has been unable to point out any provision in the rules or in any other instruction which would justify the issuance of the above direction. The aforesaid direction, therefore, is totally unsustainable. We accordingly allow this appeal and modify the judgement of the High Court by deleting the direction reproduced above, while maintaining the rest of the order of the High Court."

In view of the aforesaid order, it is apparent that the direction issued by this Court on 20.1.2005 could not have been issued unless there were any statutory provisions prescribed/authorising the right to the petitioner to enquire about the detail of marks obtained by him in the aforesaid examination. It is not the case of the learned counsel for the non-applicant – petitioner that there are any statutory rules under which he could have sought the aforesaid details.

In view of the above, we hereby recall our order dated 20.1.2005. Main writ petition stands disposed of accordingly.

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IN THE PUNJAB AND HARYANA HIGH COURT AT CHANDIGARH
C.W.P. NO.6255/2005
D.D. 30.4.2007
Hon'ble Mr. Justice Ashutosh Mohanta &
Hon'ble Mr. Justice R.S.Madan

Ramphal Vashisth ... Petitioner
Vs.
State of Haryana & Ors ... Respondents

Selection:

Personality Test:

Preference:

Recruitment to the post of Asst. Environmental Engineer (Group-B) – Petitioner after interview was not selected – Petitioner alleged interview was eye wash as each candidate was interviewed only for a few minutes only – As petitioner had secured less marks than the selected candidates petition was dismissed holding petitioner was not entitled to be given any preference following the decision of the Supreme Court in 1996 (4) SLR 661.

Held:

Supreme Court in the aforesaid decision has laid down that where two candidates are equal in merit then preference is to be given to a candidate who possesses any of the preferential qualifications.

Case referred:

1996 (4) SLR 661 - Prem Singh & Ors. Vs. Haryana State Electricity Board & Ors.

ORDER

Ashutosh Mohanta, J

The petitioner has challenged selection of respondents No.4 to 24 for the posts of Assistant Environmental Engineer (Group-B).

In pursuance of advertisement dated September 16, 2004, the petitioner along with other eligible candidates applied for the post of Assistant Environmental Engineer (Group-B). The petitioner along with other candidates were duly interviewed by the Haryana Public Service Commission and the petitioner was not selected for the post in question.

Counsel for the petitioner contends that the entire interview was an eye-wash as each candidate was interviewed for a few minutes only. He further submits that the petitioner had the experience also

to his credit but no preference was given to the petitioner for his experience.

Reply on behalf of the Haryana Public Service Commission has been filed, wherein, it has been averred that 30 candidates were interviewed by each Selection Committee of Haryana Public Service Commission and were interviewed for a sufficiently long time and in a proper manner. The allegation of the petitioner that the interview was a farce and an eye-wash has been denied.

Shri R.K.Malik, counsel for the private respondents No.4 to 24, who were selected as Assistant Environmental Engineer (Group-B) contends that only preference was to be given to the candidates who had experience to their credit. He submitted that the word "preference" has been interpreted by this Court as well as by the Hon'ble Supreme Court in 1996 (4) S.L.R. 661 Prem Singh and others Versus Haryana State Electricity Board and others wherein it has been held that where two candidates are equal in merit then preference is to be given to a candidate who possesses any of the preferential qualification. It is contended that in the present case the marks obtained by the petitioner were much less than respondent No.4, hence, no preference was given to the petitioner.

After hearing learned counsel for the parties, we are of the considered opinion that as the petitioner has secured less marks, hence, he was not entitled to be given any preference. We also found that there was no illegality in the interview and the selection process carried out by the Haryana Public Service Commission.

In view of the above, we find no merit in the writ petition and the same is dismissed.

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IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH
C.W.P. NO.12205 OF 2005
D.D. 31.5.2007
Hon'ble Mr. Justice M.M.Aggarwal

Bhanu Partap ... Petitioner
Vs.
State of Haryana & Ors. ... Respondents

Recruitment:

Whether rounding of marks permissible – No

Recruitment to the post of HCS (Judicial Branch) – Recruitment Rules prescribe that no candidate shall be considered to have qualified in the examination unless he obtains atleast 50% marks in the aggregate of all papers including viva-voce test – Petitioner secured 488 marks out of 900 in written examination and 20 marks out of 120 in viva-voce in all 508 as against the minimum of 510 – Hence writ petition dismissed holding that even though the petitioner secured 49.9% as against the minimum of 50% rounding off marks was not permissible.

Held:

It may be a case of extreme hardship but no relaxation against the rules is possible.

Cases referred:

1. 1990(1) RSJ 261 - Dalpat Abasaheb Solunke and others v. B.S.Mahajan and others
2. 1993 (3), SC 237 - Asha Mehta v. State of Punjab
3. 1995 (3) RSJ 344 - Madan Lal and Others v. State of J&K and Others
4. 1997(5) SLR 133 - Kuldip Singh v. State of Punjab and Others
5. (1997) 11 SCC 410 - State of Punjab and another v. Asha Mehat
6. 2000 (1) SLR 35 - Dr. Surinder Kumar v. Kurukshetra University
7. 2002 (2) RSJ 194 - Rameshwar Dass Mehta v. Om Prakash Saini and Others

ORDER

M.M.Aggarwal,J

Sixty posts of HCS (Judicial Branch) were advertised by Haryana Public Service Commission, Chandigarh to be filed by competition. As per the record, as many as 5289 candidates had applied. Out of them, 3471 appeared and only 3 persons obtained more than 50% marks in the written examination and were eligible for being called for interview/viva voce. Bhanu Partap present petitioner

had obtained 488 marks out of 900 in the written examination whereas Vivek Nasir obtained 452 marks and Anubhav Sharma obtained 520 marks. These three candidates were called for interview. It comes out that the Haryana Public Service Commission awarded 72 marks out of 120 to Vivek Nasir, 60 marks to Anubhav Sharma and 20 marks to Bhanu Pratap. Anubhav Sharma and Vivek Nasir were selected whereas present petitioner could not obtain 50% marks in aggregate of the written examination as well as interview and therefore was not selected.

This is petition for quashing the action of the respondent HPSC in not appointing the petitioner as Judicial Officer in result of HCS (Judicial Branch) examination held in 2003 and also for direction to the respondents to appoint him to the post.

> Rule 7(1)(2) & 8(1) for appointment to the Judicial Branch of the Haryana Civil Service provides as under:
>
> "7(1) No candidate shall be credited with any marks in any paper unless he obtains atleast thirty three per cent marks in it.
>
> (2) No candidate shall be called for the Viva-voce test unless he obtains at least fifty percent qualifying marks in the aggregate of all the written papers and thirty three percent marks in the language paper, Hindi (in Devnagri script).
>
> 8. (1) No candidate shall be considered to have qualified in the examination unless he obtains atleast 50% marks in the aggregate of all papers including viva voce test."

On behalf of the petitioner, it was argued that the petitioner had got 488 marks out of 900 in the written test. His percentage was 54.3 whereas the minimum requirement was 50%. The marks of viva voce test were 120 and then aggregate of all papers including viva voce test would have been 1020. Minimum 510 marks were required whereas petitioner got 20 marks in the interview and in that way, he had got 508 marks in aggregate and was short of 50%, by two marks only. Counsel for the petitioner argued from the judgment of this Court case in Asha Mehta v. State of Punjab, reported in 1993 (3), SC 237 that where 33% were the pass marks and if some candidate had obtained 32.5%, this could be taken to be 33% and one could be declared pass. It was argued that against this judgment, an SLP had been dismissed by the Hon'ble Supreme Court in case reported as State of Punjab and another v. Asha Mehta, (1997) 11 SCC 410. It was argued that percentage of half or more was to be rounded off to one above whereas less than half was to be rounded off to be lower figure and when the petitioner had obtained 49.8% in the whole aggregate after viva voce test, he should have been treated to have obtained 50% and deemed to have qualified. From the judgment of

Hon'ble Supreme Court reported in Rameshwar Dass Mehta v. Om Prakash Saini and Others, 2002 (2) RSJ, 194, it was argued that when a person had secured 54.85% marks then it should have been treated to be as good as 55%, which was required in a case for the post of a Librarian.

As per reply of the Haryana Public Service Commission, a Judge is associated at the time of viva voce test, who gives grading on the basis of performance of a candidate in the viva voce test and on the basis of that grading, the marks are awarded by the Selection Committee of the Haryana Public Service Commission.

Counsel for Haryana State and HPSC had relied on a judgment of Hon'ble Supreme Court reported in Dalpat Abasaheb Solunke and others v. B.S.Mahajan and others, 1990(1) RSJ,261 and argued that it is not function of the Court to hear appeals over decision of the Selection Committee and scrutinize marks of the candidates. From another judgment of Hon'ble Supreme Court reported in Madan Lal and Others v. State of J&K and Others, 1995(3) RSJ, 344, it was argued that if a candidate had been given less marks in oral interview as compared to the rival candidates, it could not be said that there was any ulterior motive for the selection committee. It was argued that a candidate shall be considered to have qualified in the examination only when he obtained at least 50% in aggregate in all papers including viva voce test and in this case petitioner obtained less than 50% and therefore he was not qualified to be appointed. From the Full Bench Judgment of this Court reported in Kuldip Singh v. State of Punjab and Others, 1997(5) SLR, 133, it was argued that there was no provision of rounding off fraction of marks obtained in the written examination for bringing a candidate into the field of choice for selection to a post, which was not warranted by law. From the another Division Bench Judgment of this Court reported in Dr. Surinder Kumar v. Kurukshetra University, 2000 (1) SLR, 35, it was argued that when the minimum qualification prescribed was 55% then the petitioner, who was securing 54.94% marks, could not be given benefit of rounding off to 55% and could not be brought to the zone of eligibility. From all this, it was argued by counsel for the respondent that the petitioner has no case.

Since only three candidates had qualified for interview when there were as many as 60 posts advertised and present petitioner had got 54.3% marks in the written examination against the requirement of 50%, the record of HPSC regarding the interview and marks given in the interview was called. From the perusal of that record, it will come out that Expert Advisor, Chairman and Members had no knowledge about marks obtained in written examination.

A judge in this case had been associated as Expert Advisor at the time of viva voce test. There were total 120 marks for the viva voce test. These had been divided under four heads evaluating the personal quality of the candidates as follows:

"a)	Awareness, outlook, Subject knowledge and general interest	30 marks
b)	Articulation and expression	30 marks
c)	Intelligence and alertness	30 marks
d)	Poise, bearing and other qualities	30 marks"

The Judge of this Court was to classify a candidate as Expert Advisor under the following categories:

"Class		Marks range
Excellent	(E)	26-30
V.Good	(G+)	21-25
Good	(G)	16-20
Above Average	(A+)	11-15
Average	(A)	06-10
Poor	(P)	01-05"

In this case, the Judge of this Court had graded Anubhav Sharma as 'G', Bhanu Partap as 'P' and Vivek Nasir as 'A+'. After grading given by the Judge, the Chairman and Members of the Commission had given 18 marks each under the four heads to Anubhav Sharma (in all 72), 15 marks each under these four heads to Vivek Nasir (in all 60) and five marks each to the present petitioner and that way, gave 20 marks to the present petitioner.

When the present petitioner was assessed as 'P' by the Judge, who was Expert Advisor, the maximum marks, which could be given to the petitioner in each of the head, were five only and in this case, the Chairman and Members of the Commission had given the maximum and could not do anything more.

After 20 marks were added for viva voce test to the total obtained in the written examination by the petitioner, the total marks were 508 and these were less than 50%. The petitioner could not be considered to have qualified in the examination since as per Rule 8.1, he had not obtained at least 50% in aggregate of all papers including via voce test. It may be a case of extreme hardship but no relaxation against the rules is possible.

Under these circumstances, there is no merit in the present petition and the same is dismissed.

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BEFORE STATE INFORMATION COMMISSION HARYANA, CHANDIGARH
APPEAL UNDER SECTON 19(3) OF THE RIGHT TO INFORMATION ACT, 2005
Case No.1371 of 2007
D.D. 17.8.2007
Sri. G.Madhavan, Chief Information Commissioner, Haryana, Chandigarh

Dr.Naresh Kumar ... Appellant
Vs.
First Appeallate Authority, ... Respondents
Haryana P.S.C. Chandigarh & Anr.

Information under R.T.I. Act:

Appellant a candidate under PH quota for the post of Principal (School Cadre) after the interview sought for information pertaining to selection of candidates against the said quota – Information was refused on the ground that writ petitions were filed both in the High Court and the Supreme Court – Though the cases before the High Court and the Supreme Court were filed under R.T.I. Act the Information Commission disposed of the case by keeping the request for information in abeyance till the decision of the competent Court.

Facts:

Dr.Naresh Kumar, appellant filed an application in August, 2006 requesting for information pertaining to the selections made for the post of Principal (School Cadre) in the year 2002. The appellant was a candidates who was interviewed against the quota for physically handicapped category and desired to have information pertaining to selection of candidates against this quota. Vide letter dated 17.10.2006 a reply was sent to him by the respondent department that against these selections writ petitions have been filed both in the Punjab & Haryana High Court as well as Supreme Court of India and it is not possible to give information till these writs are decided. He wrote vide letter dated 20.10.2006 to the Secretary, Haryana Public Service Commission pointing out that his interview was only with regard to posts reserved for physically handicapped persons and the information required by him only pertained to selection of physically handicapped category. He desired to know from the respondent department whether there is any writ pending about the selection made against this category in the Court. Vide letter dated 14.12.2006 he was informed that irrespective of the fact of the writ pending in any category of selection it is not possible to give information until the writs are decided by the competent courts. The appellant vide letter dated nil pointed out that the decision of CWP No.16913 of 2002 which is being quoted for denying information to the appellant in the letter dated 5.4.2007 was much before the promulgation of the RTI Act. He was informed that since the selections have been challenged before the Punjab & Haryana High Court as well as the Supreme Court and keeping in view the decision

dated 29.10.2002 of the High Court it is not possible to provide the information. As regards decision of the Central Information Commission in a case pertaining to the Union Public Service Commission it was informed that a stay has been granted by the Division Bench of the High Court against the decision of the single bench in favour of the Central Information Commission. This view was again reiterated vide letter dated 25.5.2007. Dissatisfied with the response of the respondent department the present second appeal has been filed before the Commission.

In response to the notice issued by the Commission a detailed reply has been submitted by the respondent department vide letter dated 10.7.2007 which has been taken on record. A rejoinder has also been received from the appellant vide letter dated 20.7.2007 which is available on record. In the written reply furnished as well as during the hearing the respondent department has laid stress on the following points:-

i) The selections which have been made by the Haryana Public Service Commission in this case have been challenged before the Hon'ble Punjab & Haryana High Court and a SLP is also pending before the Supreme Court of India. In view of the fact that the matter is subjudice it is not possible to give any information pertaining to selection of any category. Attention has been drawn to the decision of the High Court in the case of CWP No.16913 of 2002 titled as Dr.Rajvir Singh Yadav and others versus Sate of Haryana decided on 29.10.1992, a copy of which has been annexed to the written reply. Similarly decision in writ petition No.1996 of 2002 titled as Gulab Singh vs. State of Haryana decided on 4.11.2003 by the Punjab & Haryana High Court has also been annexed to the reply. In both the decisions it has been held that there is no justification for conveying information to the non-selected candidates of the marks obtained by them as well as disclosing the result of selected candidates, the criteria etc. Both these decisions are based on the decision of the Supreme Court in Civil Appeal No.6265 of 1997 decided on 12.9.1997,

ii) Attention has also been drawn to the stay granted by the Division Bench of the Delhi High Court in a case pertaining to the Union Public Service Commission and Central Information Commission where the decision of the Single Bench of the High Court in favour of the Central Information Commission has been stayed by the Division Bench.

iii) The basic argument of the respondent department is that in view of the three judgments quoted above and in one of the cases the decision pertains to this particular matter of selection on which information is being sought by the appellant, where matter is also pending before the Supreme Court by way of SLP, there is no case made out for disclosing the information at this juncture till the SLP is decided. The appellant on the contrary argued that these decisions of the High Court and the Supreme Court were given prior to the enactment of RTI Act, 2005 which has completely changed the situation. He has also argued that in the case involving union Public Service Commission the issues were somewhat different and the question was with regard to disclosing the cut off percentage for the Civil Service Examination. He has therefore argued that there is every justification for disclosing this information.

I have considered the matter carefully. Even if the issue in the case of Union Public Service Commission was different the fact remains that in the instant case whether the selection has been challenged there is a specific order of the High Court holding that there is no need to disclose this type of information to the non selected candidates. This is based on an earlier decision of the High Court as well as that of the Supreme Court as mentioned in the order. The appellant has a point in the sense that these judgments were prior to the promulgation of the RTI Act, 2005. It is now upto him to challenge the decision of the High Court and also seek a review of the judgment of the Supreme Court citing the enactment of RTI Act. Under these circumstances unless this decision is reversed in the SLP by the Supreme Court it will not be appropriate for this Commission to pass any order which is contrary to these orders. There is thus no option for the Commission except to keep this request for information made by way of appeal to the Commission vide letter dated 4.6.2007 in abeyance till the decision of the competent court. It is therefore ordered accordingly.

To be communicated.

Place: Chandigarh
Dated: 17.8.2007

Sd/-
[G.Madhavan]
Chief Information Commissioner,
Haryana, Chandigarh.

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HIMACHAL PRADESH PUBLIC SERVICE COMMISSION

STATE INFORMATION COMMISSION
HIMACHAL PRADESH
Appeal No.66 of 2008-09 &
Appeal No.87 of 2008-09
(File No. SIC (A) 66/2008-09) &
(File No. SIC (A) 87/2008-09)
D.D. 24.12.2008
Hon'ble Mr. S.S.Parmar, State Information Commissioner, Himachal Pradesh
Hon'ble Mr. P.S.Rana, State Chief Information Commissioner, Himachal Pradesh

1. Shri Ajit Singh ... Appellant
Vs.
PIO-cum-Under Secretary, HPPSC Shimla

2. Shri Bansi Lal ... Appellant
Vs.
PIO-cum-Asstt. Secretary, HP Board of School Education Dharamsala

Right to Information Act:

Whether copy of evaluated answer script can be refused on the ground that the same is exempt from disclosure under Section 8(1)(e) of R.T.I. Act? – Yes.

Following the decision of Central Information Commission dated 6.2.2007 in complaint No.CIC/WB/C2006/00223 and connected cases wherein it has been held that there is fiduciary relationship between the authority conducting the examination and the examiners and also following below mentioned observation of CIC the Information Commission has held that the evaluated answer sheets are exempt from disclosure under Section 8(1)(e) of the R.T.I. Act:

> "Ïn regard to pubic examinations conducted by institutions established by the Constitution like UPSC or institutions established by any enactment by the Parliament or Rules made there under like CBSE, Staff Selection Commission, Universities, etc. the function of which is mainly to conduct examinations and which have an established system as fool-proof as that can be, and which, by their own rules or regulations prohibit disclosure of evaluated answer sheets or where the disclosure of evaluated answer sheets would result in rendering the system unworkable in practice and on the basis of the rationale followed by the Supreme Court in the above two cases, we would like to put at rest the matter of disclosure of answer sheets. We therefore decide that in such cases, a citizen cannot seek disclosure of the evaluated answer sheets under the RTI Act., 2005."

ORDER

An appeal dated 3-9-2008 was received in the State Information Commission from Shri Ajit Singh stating that he had applied for the following information from the PIO-cum-Joint Secretary, HPPSC:-

> "(i) How many questions have been attempted and question wise marks given.

(ii) Pleäse issue me answer sheet."

2. It has been stated further in this appeal that the PIO refused to provide the above information and on his refusal, an appeal dated 3rd May, 2008 was filed with the Appellant Authority-cum-Secretary HPPSC Shimla. The appellant was called several times to the office of the Appellate Authority and finally on 8th August 2008, he was shown the answer sheet from a distance. But the requisite information along with the rules for attempting the questions, allotment of marks for final score in the paper and an attested photocopy of the answer sheet was not so far been provided to him till date. The appellant, therefore, requested for taking remedial action.

3. In the second case, the appellant Shri Bansi Lal filed an appeal dated 7-10-2008 stating that his son had appeared for the plus one examination held in March, 2008 by HP Board of School Education Dharamshala. He was declared as 'Pass' in the result shown on the internet as well as published in the Newspapers but after two months, he was informed by the Board that he had failed in the Physics paper. He, therefore, lost the opportunity to inspect the Physics paper as the Rules of the Board did not allow such an inspection. Hence he had sought a copy of the evaluated answer sheet of Physics paper of Roll No.920231 for the plus one examination held in March 2008 from the PIO of the Himachal Pradesh Board of School Education vide his RTI application dated 21.7.2008 but his request was rejected by the PIO on 20-8-2008. Aggrieved by this action of the PIO, he filed an appeal dated 27-8-2008 with the Appellate Authority-cum-Secretary of the Board which was also rejected by the latter on 8-9-2008. Consequently the present appeal has been filed seeking following relief:-

"a) that the respondent Board authorities may kindly be directed to honour and implement the provisions of the RTI Act and supply the copy of the evaluated answer sheet of Physics paper of my son Sh. Naresh Chauhan, Roll No.920231 Plus one examination held in March, 2008 free of cost as per provision of RTI Act.

b) that any other order which deemed fit in the facts and circumstances of the case may also kindly be passed."

4. The grounds given in the appeal are as under:-

"i) that the request of the applicant has been wrongly rejected by the PIO/1st appellate authority of the respondent Board as this document is not an exempted document under section 8 of the RTI Act.

ii) That the application submitted under RTI Act can not be rejected by quoting local

laws, rules and instructions as according to section 22 of the RTI Act, 2005 this Act is having overriding effect on any other law including official Secret Act, 1923.

iii) That the respondent PIO of the Board has wrongly stated that the board has fixed Rs.500/- as rechecking of the answer sheet for which application is required to be preferred within 21 days from the declaration of result. It is pertinent to submit here that the time limit of 21 days had already passed when the result card was received by the son of the appellant through the school concerned as the result card was received after about two months of the declaration of the result.

iv) That due to this blunder/mistake of the respondent Education Board my son was totally depressed and I had to face a tough time to console him. He could not even apply for rechecking well in time and he had now to face a more hard situation for preparing for compartment examination as well as for the next annual examination of the Plus two."

5. Both the above appeal pertained to the supply of evaluated answer sheets to the applicants under the RTI Act, 2005. Hence these were taken up together for consideration by the Full Bench of the State Information Commission. Replies were submitted by the PIOs concerned in the two appeals at earlier hearings of these appeals.

6. At the hearing today, Shri Prabhat Sharma appellate Authority-cum-Secretary Himachal Pradesh Board of School Education Dharamsala, Shri R.S.Verma PIO-cum-Under Secretary, HPPSC Shimla and Shri Bansi Lal appellant are present. However, Shri Ajit Singh appellant is not present. He has, however, present at the last hearing and had submitted that the information sought by him was not exempted from disclosure under the RTI Act, 2005 and therefore should be furnished to him at the earliest. The PIO-cum-US, HPPSC submitted his supplementary reply to the appeal stating that the evaluated answer sheet cannot be supplied to the appellant under section 8(1)(e) of the RTI Act, 2005. The Secretary, HP Board of School Education also submitted his reply stating that the answer sheet cannot be supplied to the appellant under Section 8(1)(d) and 8(1)(e) of the RTI Act, 2005. The parties present were heard in detail.

7. The appellant Shri Bansi Lal stated that furnishing of an evaluated answer sheet of a paper is not exempted under section 8(1) of the RTI Act, 2005 as stated earlier by the other appellant Shri Ajit Singh. The Board has denied copy of the requisite document quoting its own instructions which is contrary to the provisions of Section 22 of the Act. A document can be denied to an information seeker only when it is covered under any of the exemptions mentioned in the RTI Act, 2005 and not otherwise. In this case since furnishing of photocopy of an evaluated answer sheet is not exempted

under Section 8(1) of the Act, the same cannot be denied to him by the PIO of the Board. The Karnataka State Information Commission has also allowed supply of evaluated answer sheets on the ground that it will serve public interest as "Once evaluated answer scripts are made freely available, the examiners who are entrusted with the task of evaluation would be more careful and objective in their assessment". Further, the Ernakulam Bench of Kerala High Court has also ordered supply of copies of answer sheets of the Inspector Post Examination 2005. He also submitted that the Central Information Commission in its judgment/order in complaint No.CIC/WB/C/2007/00011 dated 11.1.2007 has wrongly relied upon the judgments of the Apex Court as these judgments were not with reference to the RTI Act, 2005. Hence he submitted that the Board should be directed to supply an attested copy of the evaluated answer sheet sought in the RTI application.

8. The Secretary, HP Board of School Education, on the other hand submitted that the Board and the Examiners have a fiduciary relationship and therefore the supply of the evaluated answer sheet is exempted under Section 8(1)(e) of the RTI Act, 2005. He also stated that the evaluated answer sheets are also covered under the exemption given in section 8(1)(d) of the Act. However, his written reply does not mention any ground or reason as to how an evaluated answer sheet is covered under these exemptions. The PIO of HPPSC submitted that this issue has been reconsidered by HPPSC on earlier directions of the State Information Commission and it has been decided that the evaluated answer sheets cannot be disclosed to the information seekers as per provisions of Section 8(1)(e) of the Act. However, he conceded that the evaluated answer sheets can be shown to the candidate. The Secretary of the Board of School Education also stated that the evaluated answer sheets are shown to the candidates in the presence of subject expert as per the existing instructions of the Board. He, however, stated that due to some technical fault in the software, some mistake had occurred in the result of plus one Examination but this was duly notified on the next day. Correct result was published in the gazette which as sent to the Schools. Thus the candidate should have found out the result from the School during the week of declaration of the result.

9. The issue pertaining to furnishing of evaluated answer sheets to he information seekers under the RTI Act, 2005 was considered by the Central Information Commission on 6.2.2007 in various appeals/complaints namely Complaint No. CIC/WB/C2006/00223; Appeal No CIC/WB/A/2006/00469; & 00394; Appeal No.CIC/OK/A/2006/00266/00058/00066/00315 and was decided on 23.4.2007. The Central Information Commission has held in these cases that the meaning of the

fiduciary relationship may include the relationship between the authority conducting the examination and the examiners who are acting as its appointees for the purpose of evaluating answer sheets. It had not agreed with the decision of the Karnataka State Information Commission in this regard and has held that the obligations between the examiners and the authority conducting the examination are mutual. After examining certain judgments of the Apex Court, the Central Information Commission has held as under:-

> "Ïn regard to pubic examinations conducted by institutions established by the Constitution like UPSC or institutions established by any enactment by the Parliament or Rules made there under like CBSE, Staff Selection Commission, Universities, etc. the function of which is mainly to conduct examinations and which have an established system as fool-proof as that can be, and which, by their own rules or regulations prohibit disclosure of evaluated answer sheets or where the disclosure of evaluated answer sheets would result in rendering the system unworkable in practice and on the basis of the rationale followed by the Supreme Court in the above two cases, we would like to put at rest the matter of disclosure of answer sheets. We therefore decide that in such cases, a citizen cannot seek disclosure of the evaluated answer sheets under the RTI Act., 2005."

10. The State Information Commission Punjab had also considered this issue in its order dated 23.5.2007 in CC NO.773 of 2006 titled Shri Pradeep Kumar complainant, Moga Vs PIO in the office of IG Police Punjab. It was held in this case that an individual interest cannot be permitted to override the larger public interest and the complainant was not entitled to the copies of the evaluated answer sheets whether these pertain to the complainant himself or other candidates.

11. The contention of Shri Bansi Lal that the judgments relied upon by the Central Information Commission while coming to the conclusion quoted in para 9 above have not discussed provisions of the RTI Act, 2005 is correct. However, this does not mean that the pronouncements of the Apex Court on the issue are no longer valid. We tend to agree with the above findings of the Central Information Commission. The judgments of the Kerala High Court quoted by Shri Bansi Lal appellant in his submission is based on an order passed by the Central Information Commission in a case having similar facts, whereas the cases before us differ from these cases. In these circumstances the ruling of the Kerala High Court is not relevant to the two cases before us. It is also noted that most of the Information Commissions have not permitted disclosure of evaluated answer sheets.

12. Keeping the above discussion in view as also the decision of the State Information Commission Punjab, it is decided that the evaluated answer sheets are exempted from disclosure under Section 8(1)(e) of the RTI Act, 2005 and thus cannot be furnished to the two appellants. However, the

evaluated answer sheet has already been shown to the appellant Shri Ajit Singh in the first appeal. In the second case, the Secretary Himachal Pradesh Board of School Education Dharamsala has agreed to allow inspection of the requisite answer sheet to the appellant Shri Bansi Lal on 11.1.2009 at 11.00 AM at Dharamsala in the presence of a subject matter specialist to be nominated by the Board. Consequently the PIO-cum-Assistant Secretary, HP Board of School Education Dharamsala is directed to facilitate the inspection of the requisite answer sheet by Shri Bansi Lal appellant on the appointed date under intimation to the State Information Commission.

13. The appeals of S/Shri Ajit Singh and Bansi Lal are decided accordingly.

14. Announced. Certified copies of this order may be communicated to the parties in both the appeals.

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JAMMU & KASHMIR PUBLIC SERVICE COMMISSION

AIR 2000 SUPREME COURT 2386
Civil Appeals Nos.3034 with 3035 to 3047 of 2000
[Arising out of S.L.P. (Civil) Nos.4744 with 5600-5601, 5010, 5602, 5144, 5329-5330 and 5345-5350 of 1999
D.D. 28.4.2000
M.Jagannadha Rao and A.P. Misra, JJ.

Suraj Parkash Gupta & Ors. Etc. … Appellants
Vs.
State of Jammu & Kashmir & Ors. … Respondents

Constitution of J. and K., Art. 133 – J.K. Engineering (Gazetted) Service Recruitment Rules (1978), R.5 – J. and K. Public Service Commission (Limitation of Functions) Regulations (1957), Regn. 4(d)(ii) – J. and K. Civil Services (Classification, Control and Appeal) Rules (1956) R.23 – Promotion – Ad hoc promotion – Promotion of officers on ad hoc basis for six months without consultation with Public Service Commission – Ad hoc promotion made against quota of promotees and also in respect of 10% out of 20% quota for direct recruits – Direct recruitment delayed and then made only against 10% of quota – Retrospective regularization of ad hoc promotions without recommendation of Public Service Commission on ground of delay due to pendency of litigation and consultation with Commission would cause further delay – Invalid.

Constitution of India, Arts. 76, 309, Proviso.

Recruitment:

Quota rule as between direct recruits and promotees:

Can the promotees for recruitment to the Gazetted Service avoid consultation with Service Commission? – No

Held:

The promotees have to go through the Service Commission for getting into Gazetted category of Assistant Executive Engineers.

Can the Government order that the entire ad hoc/stop gap service of Assistant Engineers and Assistant Executive Engineers is to be counted for seniority and the Government order of regularization dated 2.1.1998 can be treated as amounting to an implied relaxation of the rules of recruitment requiring consultation with Service Commission? – No. Relaxation of recruitment rules is not permissible.

Held:

The wholesale regularization by order dated 2.1.1998 (for the Electrical Wing), by way of implied relaxation of the recruitment rule to the gazetted category is invalid. It is also bad as it has been done without following the quota rule and without consulting the Service Commission. Power under Rule 5 of the J& K CCA Rules, 1956 to relax rules cannot be treated as wide enough to include a power to relax rules of recruitment.

Further held:

If it is to be held that direct recruitment can also be permitted without consulting the Service Commission (in case it is required to be consulted) there will, in our opinion, be total chaos in the recruitment process and it will lead to backdoor recruitment at the whims and fancy of Government such a blanket power of relaxation of recruitment rules cannot be implied in favour of the Government. (AIR 1996 SC 2775).

Whether quota rule has broken down? – No

Held:

Rule 5(4) of the Recruitment Rules 1978 provides that in case suitable candidates are not available for promotion, the posts shall be filled up by direct recruitment and vice-versa. Thus, there must be evidence that suitable candidates were "not available" for direct recruitment. Such non-availability cannot be inferred when, as a fact, not even a reference is made to the Commission to find out if upon advertisement, anybody will respond. Thus there is no breaking down of the quota rule.

Whether adhoc/stop gap promotion of Assistant Engineers and Assistant Executive Engineers could be made beyond six months and till regularization, by Government without consulting the Public Service Commission?

Held:

Summarising the position, we therefore hold that the ad hoc /stop gap service of the promotees cannot be treated as non-est merely because P.S.C was not consulted in respect of continuance of the ad hoc / stop gap service beyond six months. Such service is capable of being regularized under Rule 23 of the J & K (CCA) Rules, 1956 and rectified with retrospective effect from the date of occurrence of a clear vacancy in the promotion quota, subject to eligibility, fitness and other relevant factors. There is no 'rota' rule applicable. The 'quota' rule has not broken down. Excess promotees occupying direct recruitment posts have to be pushed down and adjusted in later vacancies within their quota after due regularization. Such service outside promotee quota cannot count for seniority. Service of promotees which is regularized with retrospective effect from date of vacancies within quota counts for seniority. However, any part of such ad hoc / or stop gap or even regular service rendered while occupying the direct recruitment quota cannot be counted. Seniority of promotees or transferees is to be fixed as per quota and from date of commencement of probation/or regular appointment as stated above. Seniority of direct recruit is from the date of substantive appointment. Seniority has to be worked out between direct recruits or promotees for each year.

Whether the direct recruits can claim retrospective date of recruitment from the date on which the direct recruitment was available, even though the direct recruit was not appointed by that date and was appointed long thereafter? – No

Held:

Direct recruits cannot claim appointment from date of vacancy in quota before their selection.

Cases referred:

1. S.L.Chandrakishore Singh v. State of Manipur – 1999 AIR SCW 3731 : AIR 1999 SC 3616 : 1999 Lab IC 3543 : (1999) 7 JT (SC) 576
2. Ashok Kumar Uppal v. State of J&K - 1998 AIR SCW 1417 : AIR 1998 SC 2812 : 1998 Lab IC 1394 : (1998) 4 SCC 179
3. C.K.Antony v. B.Muraleedharan – 1998 AIR SCW 3051 : AIR 1998 SC 3136 : 1998 Lab IC 3510 : (1998) 6 SCC 630
4. Keshav Deo v. State of U.P. – 1998 AIR SCW 3365 : AIR 1999 SC 44 : 1998 Lab IC 3554 : 1998 ALL LJ 2592 (1999) 1 SCC 280
5. D.Stephen Joseph v. Union of India – 1997 AIR SCW 2558 : AIR 1997 SC 2602 : (1997) 4 SCC 753
6. I.K.Sukhija v. Union of India – 1997 AIR SCW 2684 : AIR 1997 SC 2714 : (1997) 6 SCC 406
7. Dr. Surinder Singh Jamwal v. State of J&K – 1996 AIR SCW 3481 : AIR 1996 WSC 2775 : 1996 Lab IC 2444 : (1996) 9 SCC 619
8. E.Ramakrishnan v. State of Kerala – (1996) 10 SCC 565 : (1996) 9 JT (SC) 286.

ORDER

M.Jagannadha Rao, J:-

Leave granted in all the special leave petitions.

2. These Civil Appeals arise out of several writ petitions filed in the High Court of Jammu & Kashmir in which common judgment was delivered on 14.12.1998. The judgement of the High Court deals with power of Government to appoint officers on promotion temporarily for periods of more than six months without consulting the Public Service Commission, grant of seniority to such promotees in respect of service within their quota and also outside quota. Validity of the order passed by the State Government on 2.1.1998 regularising, at one stroke, several ad hoc promotions made between 25.5.1973 to 31.12.1996 was in issue, so far as the Electrical wing was concerned. We are concerned only with the regularization of ad hoc Assistant Engineers and Assistant Executive Engineers (see Point 2 in the High Court judgment). The High Court held that ad hoc/stop gap service of promotees could not be regularized. A contention was also raised before us by the direct recruits that stop gap or ad hoc service of promotees could never be regularized and only service rendered in a post where a person if appointed "according to rules" can be regularized and that there was rota coupled with quota. All the appeals before us have been filed by the promoted Assistant Engineers.

How the appeals have arisen:

3. SWP 522/80 was filed in the High Court by the direct recruit Assistant Engineers of the Mechanical Department to fix a seniority and to declare that they were entitled to the post of Assistant Executive Engineers w.e.f. the date of their appointment as Assistant Engineers and to treat direct recruits as senior to respondents 3 to 121 therein (promotees) and to quash the promotion of respondents 3 to 32 therein as0 Assistant Executive Engineers (Mechanical). Similarly SWP 227/97 and 47/98 were filed by direct recruit Assistant Engineers (Electrical) seeking the quashing of Government Order dated 12.12.1997 containing the seniority list and also to quash the Government Order dated 2.1.1998 whereby services of several ad hoc promotee Assistant Engineers of the Electrical wing were regularized. They sought a further direction for issuing a fresh seniority list and for promotion as per quota and a direction not to fill up the post of Assistant Executive Engineers from among promotees' quota till seniority as per quota was fixed. CWP 1869/97 and 824-B/94 were filed by the direct recruits civil engineers (Hydraulic) for fixing seniority as per the recommendations of the Committee constituted by the Government by its order dated 31.2.1997 and for a direction not to promote promotee Assistant Engineers as Assistant Executive Engineers till a final seniority list was prepared.

The Facts:

5. The following facts are relevant:

There are three wings of Engineers working in the various Departments of the Government of Jammu and Kashmir Mechanical, Electrical and Civil Engineering. These posts in these three wings at various levels are of Junior Engineers, Assistant Engineers and Executive Engineers. The recruitment of the posts of Assistant Engineers as per the J.K. Engineering (Gazetted) service Recruitment Rules 1978 (hereinafter called the 'Recruitment Rules, 1978') provided that 20% posts were to be filled by direct recruitment, 60% by promotion of Junior Engineers who had degrees or equivalent qualification with 3 years service and 20% by Diploma holders or those holding post carrying scale of Rs.340-700/450-700 etc. with 10 years service.

6. In 1987, with a view to remove stagnation, the Government issued two orders one on 29.6.87 and another on 29.10.87, the latter in suppression of the former and re-organised the service as follows: (a) the existing post of Assistant Engineer was upgraded and redesignated as Assistant Executive

Engineer, to be kept in charge of a sub-Division. The Assistant Engineer was to work as a Technical Officer to the Assistant Executive Engineer in the sub-division and also to the Executive Engineer in each division. All the Diploma holders (Section Officers) were to be redesignated as Junior Engineers. In November 1987, 1116 posts of Assistant Engineers were created (as held by the High Court) in all the three wings. The Government also issued SRO 209 of 1992 on 4-9-92, amending the schedule to the Recruitment Rules, 1978. The ratio was 20% by direct recruitment, 60% by promotion of graduate Junior Engineers with 3 years service and 20% by Diploma holder Junior Engineers with 10 years service etc.

7. Thereafter, Government issued a large number of orders and officers at various levels were promoted to the next higher post on an ad hoc basis for six months. Later Government issued orders continuing these ad hoc/stop gap appointments till regularization. This was done without consultation of the Public Service Commission as required by Regulation 4(d) (ii) of the Service Commission Regulations, 1957. These orders included some in which several Junior Engineers were promoted as ad hoc Assistant Engineers in the three wings of the Engineering Department (and also related to ad hoc promotions as Assistant Executive Engineers). This was done without following the rules for promotion of the Junior Engineers as Assistant Engineers which required consultation with the J & K Public Service Commission under S.133 of the J.K. Constitution (corresponding to Art. 320 of the Constitution of India) or other rules. (The promotion as Assistant Executive Engineers required consultation with DPC). It was the case of the direct recruits, that these ad hoc promotions were made not only against the 80% (60% + 20%) quota of the promotees but also in respect of 10% out of the 20% quota of direct recruit, in total breach of the quota rule. Direct recruitment was indefinitely delayed to benefit promotee officers and even when it was initiated, it was restricted to 10%.

8. It appears that the last direct recruitment in these wings was way back in 1984. It was only on 23-11-87 that the State Government referred to the State Public Service Commission the matter relating to direct recruitment. But instead of referring the matter of filling up the quota up to 20%, the reference was confined only for 10%. The advertisement was issued by the Commission on 3-12-87. The respondents before us (who were direct recruit writ petitioners in the writ petitions before the High Court) applied direct recruitment. But, for a period of 4 years, the Commission did not take any steps to make recommendations. The candidates were interviewed during 1992-93 and a list of selected candidates was sent to Government for the 10% quota of direct recruits. It was only after the

High Court gave directions on 22-2-94 in certain writ petitions and on other dates in other petitions, that the direct recruits were appointed on various dates in 1994 as Assistant Engineers. Some direct recruits were appointed much later.

9. The direct recruits filed the various SWPs 522/90, 227/97, 47/98, 1869/97, 824-B/94 challenging the ad hoc promotion of the Assistant Executive Engineers made by Government without consulting the Service Commission beyond six months and contended that continuance of ad hoc/stop gap promotion beyond six months (as per the order issued during 1987 to 1996) was non-est and void and could not be subject of regularization. The seniority list cannot show these ad hoc promotees as seniors to direct recruits. There is rota as well as quota. They sought the quashing of existing seniority lists and they asked for issuing fresh seniority lists. On the other hand, the promotee officers filed SMP. 98/93, 705/94 and 777/94 and in the two latter petitions, the seniority list dated 28-4-94 was questioned to the extent it was favourable to the direct recruits.

The High Level Committee :

10. Government appointed a High Level Committee on 21-5-97 to go into various issues arising between the direct recruits and promotees. On the three issues referred, the Committee gave a Report soon thereafter in 1997. It said that merely because the State Government could not make direct recruitment due to inaction, the quota rule could not be said to have broken down. Thereafter, it opined as follows : (1) as and when the direct recruitment was made, the direct recruits would be entitled to placement of their seniority to the vacancies reserved for them as per the ratio. Similarly, where the promotees came to be promoted in accordance with the rules "in excess of their quota", they could not be given seniority but should be given seniority only from the respective dates on which vacancies in their quota were available : (ii) seniority had to be determined only "from the respective dates on which their respective quota became available in a particular year"; (iii) ad hoc/stop gap appointment would not entitle an individual to the benefit of seniority from the date of such ad hoc/stop gap appointment", such service not being according to rules. The period of officiation could not be taken into account for seniority. The continuous length of ad hoc service could not be so counted.

The order dated 2-1-98 by Government regularizing promotees services without consulting P.S.C.:

11. Ignoring the above report of the above Committee, and without any recommendation of the Public Service Commission for retrospective regularization, the Government issued, during the pendency

of the writ petitions, an order on 2-1-98 so far as the Electrical Wing was concerned, stating that ad hoc service of officers in various categories (starting from Junior Engineers to Superintending Engineers) right from 25-5-73 to 18-4-98 would stand regularized at various levels of the service including Assistant Engineers and Assistant Executive Engineers levels, as a "one time exception". This order dated 2-1-98 covered several Assistant Engineers in Electrical Wing wherein ad hoc promotions were made. The regularization was ordered subject to :

(a) The seniority of the officers concerned which will be fixed according to the Rules :

(b) The outcome of writ petition, if any, pending in Courts.

The writ petitions :

12. The above order dated 2-1-98 was questioned by direct recruits in the High Court along with other seniority lists. It was contended for the direct recruits before the High Court that there was quota and rota, that the entire ad hoc service was to be treated as non est, whether it was rendered within the promotion quota or outside the said quotas and stop gap/ ad hoc service of promotees could not be regularized at all. But the promotees contended that there was no rota, that the quota rule had broken down and the entire ad hoc service as Assistant Engineers could be counted or regularized by the Government.

The findings of the High Court :

13. The High Court framed three points for consideration. It held on the first point that promotion to the post in the Gazetted cadre required consultation with the Commission on the question of promotion/transfer from one service to another and also on the suitability of the candidates for appointment, promotion and transfer; that under the J & K Service Commission, Regulation 4(d) (ii), officiating promotion or transfer to any service or post, should not be for more than six months, unless the Commission was consulted and that the orders for such ad hoc continuance beyond six months and till regularization, without consultation, were ineffective. It held that the quota rule had not broken down. The posts were advertised in 1987, but it was only in 1992, 1994 and in 1998 that the direct recruits were appointed in the three wings, and that in the Civil, Mechanical and Electrical Wings 7, 16 and 20 posts were excess occupation by the promotees and these posts were not filled by direct recruitment because the Government directed advertisement of only 10% and not 20% for direct recruits. It was held that in SWP 824-B/94 filed by direct recruits, Government filed a reply stating

that there was 'quota rota' rule and therefore the said Rule applied. The seniority list dated 28-4-94 in the Mechanical wing which was sought to be quashed in SWP 705/94 by the promotees showed that the quota rule had not broken down. The State had not placed before the Court any material to show why it could not make direct recruitment. The excess promotees had to be pushed down and had to be fitted in subsequent vacancies in their quota in later years. On the second point the High Court held that ad hoc promotions could be made for three months and not more than 9 months under R. 14(1) of the J & K Civil Service (Classification, Control and Appeal) Rules, 1956 (read with Regulation 4(d) (ii) of the J & K Public Service Commission (Limitation of Functions) Regulations 1997). Ad hoc service beyond 6 months could not have been continued. But, in view of Regulation 4(d) (ii), "if the exercise of selection of candidates has not been done by the Commission for regularization" the promotees were not entitled to seniority. Under Rule 8 of the Recruitment Regulations, 1978 probation was to be for 2 years. Hence, an ad hoc promotee could not be 'member' of the service. To claim seniority the promotion could not be dehors the Rules. Conditions of service could be relaxed but rules of recruitment could not be relaxed. The order of blanket regularization of the promoted Assistant Engineers dated 2-1-98 for the Electrical wing passed by the Government was in violation of Regulation 4(d) (ii) was bad. Such orders passed under executive powers were outside the Rules and were invalid. On the third point, the High Court held that seniority under Rule 11 of the 1978 Rules was to be determined in accordance with Rule 24 of the 1958 Rules on the basis of "date of first appointment" i.e. date of "substantive appointment or date of permanent appointment or date of first appointment on probation against a clear vacancy". In as much as regularization of ad hoc promotions by the Government on 2-1-98 was illegal, the promotees were not members of the service. The order dated 2-1-98 could not have the effect of regularizing the entire ad hoc service. The direct recruits could however count their seniority from the date of their substantive appointment within their quota. However, the claims of the promotees whose stop gap promotion exceeded six months without consultation of the Commission should be referred to the commission "for determining their suitability". The seniority was to be fixed for direct recruits and promotees in terms of the quota-rota rule, within their respective quota in a particular year.

Stay orders in this Court :

14. In this Court notice in SLPs was issued on 7-4-1999 and the order of the High Court was stayed. But then a further order was passed on 12-3-99 in IAs. 3 & 4 in SLPs. 5329-5330/99 that

the stay order dated 7-4-99 did not imply any right to effect promotions during the pendency of the SLPs. It was directed that status quo be maintained.

15. During the course of hearing of the case, at one stage counsel made some efforts to narrow down the disputes between the two groups by discussion but ultimately all the points arising between the parties were argued elaborately and thoroughly.

16. The written submissions by both parties covered as many as sixty rulings of the Court. Having regard to the vehement arguments before us and also in order to explain the various decisions, which may appear to be apparently conflicting we have thought it necessary to refer to most of the relevant rulings. This has no doubt added to the volume of this judgment but it could not be helped.

17. On the basis of the various submissions, the following points arise for consideration :

The Points :

(1) Can the promotees, for recruitment to the gazetted service, avoid the Service Commission? Can the Government order that the entire ad hoc/stop gap service of Assistant Engineers and Assistant Executive Engineers is to be counted for seniority and can the order of regularization dated 2-1-98 passed by Government (in respect of the Electrical wing) be treated as amounting to an implied relaxation of the rules of recruitment requiring consultation with the Service Commission? Whether relaxation of recruitment rule is permissible?

(2) Whether the quota rule had broken down? Whether excess promotees are to be pushed down? Whether there is a quota-rota rule?

(3) Whether the ad hoc/stop gap promotion of Assistant Engineers (and Assistant Executive Engineers) could be made beyond six months and till regularization, by Government without consulting the Public Service Commission? Whether Government could have regularized the ad hoc service by executive order dated 2-1-98? Whether, the point raised by para IX of written submissions by the direct recruits that retrospective regularization cannot be made in respect of the ad hoc stop gap service and could be made only if the initial appointment as Assistant Engineers or Assistant Executive Engineers was "in accordance with rules", is correct?

(4) Whether the direct recruits could claim a retrospective date of recruitment from the date on which the post in direct recruitment was available, even though the direct recruit was not appointed by that date and was appointed long thereafter?

(5) To what relief?

Point 1 :

18. This point deals with the question whether the promotees can avoid going through the service commission for recruitment to the gazetted cadre? This raises the question of the validity of the order dated 2-1-98 of retrospective regularization of entire ad hoc service of promotees as Assistant Engineers and Assistant Executive Engineers passed by the Government, (in relation to the Electrical Wing) without the approval of the Public Service Commission and whether relaxation can be implied. Question arises whether it is permissible to relax recruitment rules?

Implied relaxation of recruitment rule relating to promotion – plea as to

19. Learned senior counsel appearing for the promotee Assistant Engineers contended that the order dated 2-1-98 regularising the ad hoc/stop gap service passed by Government, even if it be without the concurrence of the Commission, could be treated as one passed by the Government by impliedly "relaxing" the Service Commission Regulation requiring consultation with the Commission. Provisions of Art. 320 requiring consultation with the Commission (here S. 133 of the J & K Constitution), were not mandatory. When promotees had put in long years of service, it was permissible for the State to relax the recruitment rule and regularize the service outside the PSC Regulations. It was to be deemed there was relaxation. This contention was contested by the learned senior counsel for the respondents.

The Rules :

20. For the purpose of the above argument, the promotees relied on the following rules :

Rule 13 of the 1978 Recruitment Rules states that in respect of residuary matters, (i.e. 'matters not specifically covered by the said Rules), the members of the service shall be governed by the rules, regulations and orders applicable to the State/Civil Services in general. Therefore, Rule 5 of the J&K Civil Services (CCA) Rules, 1956 is attracted. It permits relaxation of the Rules. It reads :

"Rule 5 : Any of these rules or rules made under them, may for reasons to be recorded in writing, be relaxed by the government in individual cases, if Government is satisfied that a strict application of the rule would cause hardship to the individual, concerned or confer undue benefit on him".

21. Further, Rule 5(4) of the Recruitment Rules, 1978 states that : in case suitable candidates are not available for promotion, the posts shall be filled up by direct recruitment and vice-versa. In view of the words "vice versa", the promotees contend that if suitable direct recruits are "not available", the direct recruit quota can be filled up by promotees. Direct recruitment was not made for several years and hence it was clear that as required by proviso to Rule 5(4) of the Recruitment Rules, 1978.

22. The quota between direct recruits and promotees is governed by Rule 5(2) pf the 1978 Rules which states that appointment to a service shall be made by (a) direct recruitment (b) by promotion/ selection and (c) partly by direct recruitment and partly by promotees, in the manner and ratio as indicated against each post in the Schedule. The quota of 20% for direct recruits Assistant Engineers and 60% for graduate Junior Engineers and 20% for non-graduate in the lower category is provided in the Schedule. Further, Rule 11(1) of the above said Rules of 1978 states that seniority will be regulated under the provisions of the J & K Civil Services (Classification, Control and Appeal), Rules 1956. The proviso to Rule 11(3) states that the seniority in a particular year is to be determined as per ratio. It says :

> "Provided further that the seniority of Assistant Engineers by direct recruitment and by promotion shall, in a particular year be determined, in the ratio fixed for direct recruitment and promotion".

23. The relaxation Rule, namely, Rule 5 of the 1956 J & K CCA Rules, 1956 referred to earlier, enables the power of relaxation to be exercised on the ground of 'hardship' in "individual cases". Reasons have to be recorded in writing.

Reasons for so called relaxation of recruitment rules – Cabinet decision of 19.12.97 :

24. As to the reasons for relaxation of recruitment rule of promotion requiring consultation with the Commission, counsel for promotees referred us to the Cabinet decision preceding the issuance of the blanket regularization order dated 2-1-98. It is dated 19-12-1997, we have to examine the reasons started in the Cabinet decision and find out if adequate reasons have been given, it was stated there that in view of Court litigation, there used to be delay in finalizing seniority lists and that this had resulted in officers retiring at lower levels and getting financial/promotional benefit only after retirement. The finalization of seniority lists and the reference of the promotees' cases to the P.S.C./D.P.C would take fairly long time to be completed. It was felt that it would definitely be preferable if the confusion,

was cleared once and for all. At the level of Assistant Engineers, 574 were on ad hoc promotion and at the level of Assistant Executive Engineers there were 401, requiring regularization. This view was supported by the Law Department and it said that undue delay had adversely affected the promotees and the only remedy was to regularize their promotion in relaxation of rules from the date they were promoted on ad hoc basis against substantive vacancies without prejudice to seniority to be fixed in accordance with the "rota and quota" rules. It opined that all these who had held the post uninterruptedly for 6 months (originally Law Department said 2 years) or more and had rendered "satisfactory service" could be regularized in relaxation of rules. But the General Administration Department was however of the view that this relaxation proposal should be placed before the PSC/DPC and clearance obtained. The matter was therefore referred to PSC which instead of considering the proposal, requested by its letter dated 25-11-97 for various documents (1) final seniority list ; (2) eligibility list on prescribed form, (3) APRs of all Engineers for the relevant period, (4) integrity certificate and (5) information regarding Court orders and (6) copy of Rules, for the purpose of considering regularization under the Rules. But rejecting the said letter of the PSC, the Cabinet straightway directed relaxation as a "one time exception", stating that :

"due to reasons that the finalization of seniority list, collecting APRs of all engineers for the relevant period, obtaining date of eligibility / date of vacancy, one is expected to take a very long time and may even be impossible in very old cases. When this Department places those engineers in charge of higher posts, there must have been clear vacancies :

Hence, information required by the PSC cannot be prepared and the matter would stand further delayed, defeating the very purpose of this proposal. Accordingly, it is proposed that regularization of all ad hoc/stop gap/incharge promotions, may be approved as a "one time, exception".

On the above reasoning, by a single stroke of pen, by the above order dated 2-1-98 such of pen, by the above order dated 2-1-98 such stop gap/ ad hoc promotions made in response of the Electrical Wing, from time to time were regularized including those at the level of Assistant Engineers and Assistant Executive Engineers. It was no doubt stated that this would be subject to :

"(a) The seniority of the officers concerned which will be fixed according to the rules".

(b) the outcome of writ petitions, if any, pending in the courts."

It may be noted that the order of Government dated 2-1-98 does not however use the word "relaxation" though the Cabinet proceedings use the said word. The above order was issued after the

writ petitions were filed by the direct recruits. This order too was questioned by them by amending the relief in their writ petitions.

Relaxation Rules – scope of : If recruitment rules can be relaxed. A previous view:

25. Some relaxation rules permit relaxation of conditions of service and some permit relaxation of rules. Some permit relaxation in any particular case and some permit relaxation in favour of a person of class of persons. In I.C Yadav Vs. state of Haryana, (1990) 2 SCC 189 : (AIR 1990 SC 857 : 1990 Lab IC 727), a three Judge Bench while dealing with Rule 22 of the relevant rules which permitted relaxation, in case of hardship, in "any particular case", held that the above words did not mean a particular person but meant "pertaining to an event, situation or circumstances". The power could therefore be exercised even in favour of a group.

Two earlier decisions :

26. Promotees relied upon the ruling in G.S Lamba v. Union of India (1985) 2 SCC 604 : (AIR 1985 SC 1019 : 1985 Lab IC 822) but the said decision cannot, in our view, apply. There the promotees were appointed regularly but were allowed to occupy the posts of direct recruits, for long periods. It was held that it must be deemed that the relevant recruitment rule was relaxed in their favour and their service in such direct recruit posts could be counted. This case in our view is distinguishable because there the promotees were regular promotees though appointed outside the promotee quota. The position before us is different because here the promotees are ad hoc promotees and further the issue relates to all posts, within and outside promotion quota. Narender Chadha v. Union of India (1986) 2 SCC 157 : (AIR 1986 SC 638 : 1986 Lab IC 590) no doubt supports the case of promotees. There the promotees occupied not only their own quota but also the direct recruitment quota to some but also the direct recruitment quota to some extent, after 15 to 20 years, the temporary service of those who had put in 4 years service in the feeder category was regularized. It was held that all the promotees were entitled to regular promotion and the seniority of all promotees (including some of those selected by DPC) was to be reckoned from date on continuous officiation. This was done on the theory of implied relaxation of recruitment rule to all posts within and outside the promotion quota. But this case, in our view, is to be treated as an exception because the promotees there were not regularized for 15 to 20 years (see p. 171) and it was held that the non-regularisation over such a long period violated Arts. 14 and 16 of the Constitution of India. It is no doubt true that the

Constitution bench in the Direct recruit Class II Engineering Officers Association v. State of Maharashtra (1990) 2 SCC 715: (AIR 1990 SC 1607 : 1990 Lab IC 1304) referred to Narender Chadda's case (see at p. 726) (of SCC) : (at p. 1614 of AIR) and it observed : There is considerable force in this view also" but as we shall presently show, the recent trend of cases in this Court is entirely different.

Recent trend of cases : Recruitment rules cannot be relaxed :

27. The decisions of this Court have recently been requiring strict conformity with the recruitment rules for both direct recruits and promotees. The view is that there can be no relaxation of the basic or fundamental rules of recruitment. In Keshav Chandra Joshi v Union of India, 1992 Suppl (1) SCC 272 : (AIR 1991 SC 284 : 1991 Lab IC 21(6) the Rule permitted relaxation of conditions of service and it was held by the three Judge Bench that the rule did not permit relaxation of recruitment rules. The words 'may consult the PSC' were, it was observed, to be treated mandatory. In Syed Kalid Rizvi v Union of India, 1993 Suppl (3) SCC 575 at 603, decided by a three Judge Bench a similar strict principle was laid down. The relevant Rule – Rule 3 of the Residuary Rules (see p. 603) (para 33) in that case did permit relaxation of "rules". Even so, this Court refused to imply relaxation of recruitment rule and observed :

> " the condition precedent, therefore, is that there should be appointment to the service in accordance with rules and by operation of the rule, undue hardship has been caused. ..... It is already held that conditions of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed".

28. Similarly, in State of Orissa v. Sukanti Mohapatra, (1993) 2 SCC 486 : (1993 AIR SCW 1891 : AIR 1993 SC 1650 : 1993 Lab IC 1513), it was held that though the power of relaxation stated in the rule was in regard to "any of the provisions of the rules", this did not permit relaxation of the rule of direct recruitment without consulting the Commission and the entire ad hoc service of direct recruit could not be treated as regular service. Similarly, in Dr. M.A Haque v. Union of India (1993) 2 SCC 213: (1993 AIR SCW 784 : 1993 Lab IC 996) it was held that for direct recruitment, the rules relating to recruitment through the Public Service Commission could not be relaxed. In Jammu and Kashmir, Public Service Commission v Dr. Narinder Mohan (1994) 2 SCC 630 : (1994 AIR SCW 1701 : AIR 1994 SC 1808 it was held that the provisions of the J & K Medical Recruitment Rules could not be relaxed for direct recruitment. Backdoor direct recruitments, could not be permitted.

See also Dr. Arundhati Ajit Pargaonkar v. State of Maharashtra, 1994 Suppl (3) SCC 380 L (AIR 1995 SC 962). In Dr. Surinder Singh Jamwal v. State of J & K (1996) 9 SCC 619 : (1996 AIR SCW 3481 : AIR 1996 SC 2775 : 1996 Lab IC 2444), this Court directed the direct recruit to go before the Public Service Commission.

Decisions cited for promotees distinguishable :

29. Two decisions which have been referred to by counsel for promotees have to be referred to but these can be distinguished. In V. Sreenivasa Reddy v. Govt. of A.P. 1995 Suppl (1) SCC 572 : (1979 AIR SCW 4868 : AIR 1995 SC 586 : 1993 Lab IC 319) there was an order of relaxation in favour of the promotees who were not regularized under Rule 23 of the A.P. State and Subordinate Service Rules. In that case this Court felt that the Government's order relaxing the requirement of consultation with the Commission need not be interfered with because the promotees were placed by the Government below the direct recruits this case is therefore clearly distinguishable (we shall be referring to this case again under point 3). Again in Ashok Kumar Uppal v State of J. & K (1998) 4 SCC 179 : (1998 AIR SCW 1417 : AIR 1998 SC 2812 : 1998 Lab IC 1394) while holding that the power of relaxation could not be arbitrarily exercised, this Court upheld the relaxation of the relevant standard prescribed for typing, in respect of five direct recruits. This was because the State Recruitment Board in that case had made a recommendation for relaxation of the requisite standard in their favour and this was accepted by the Govt. The relaxation was upheld because Government had retrospectively amended the promotion rules so that promotees could just go into promotion quota by sheer seniority rather than by selection as was the rule earlier. The five direct recruits were very close to the other selected direct recruits and were more meritorious than the promotees.

Summary:

30. The result of the discussion, therefore, is that the wholesale regularization by order dated 2-1-1998 (for the Electrical Wing), by way of implied relaxation of the recruitment rule to the gazetted category is invalid. It is also bad as it has been done without following the quota rule and without consulting the Service Commission. Further, power under Rule 5 of the J & K CCA Rules, 1956 to relax rules cannot, in our opinion, be treated as wide enough to include a power to relax rules of recruitment.

On facts, relaxation bad :

31. On facts, the reasons given in the Cabinet note for granting relaxation are hopelessly insufficient. In fact, the letter of the Commission dated 25-11-97, shows that the Commission was prepared to give its opinion in regard to regularization of each promotee but the Government backed out when the Commission called for the records relevant for considering suitability for regular promotion. In our view, there can be no hardship for a person seeking appointment or promotion to go by the procedure prescribed therefore. The relevant recruitment rule for promotion cannot iself be treated as one producing hardship. Narendar Chadda's case (AIR 1986 SC 638 : 1986 Lab IC 590) must be treated as an exception and not as a rule. In fact, if such relaxation is permitted in favour of promotees then the same yardstick may have to be applied for direct recruits. In fact, the J.K. Government has already started to do so and this has not been accepted by this Court in Narinder Mohan's case (1994 AIR SCW 1701 : AIR 1994 SC 1808) and Dr. Surinder Singh Jaswal's case (1996 AIR SCW 3481 : AIR 1996 SC 2775 : 1996 Lab IC 2444) referred to above, if it is to be held that direct recruitment can also be, permitted without consulting the Service Commission (in case it is required to be consulted) there will, in our opinion, be total chaos in the recruitment process and it will lead to backdoor recruitment at the whims and fancy of Government such a blanket power of relaxation of recruitment rules cannot be implied in favour of the Government.

32. In the present case, the Government was merely carried away by sympathy to the promotees. By not making direct recruitment after 1894, by restricting direct recruits to 10% rather than permitting 20% and by deliberately promoting the Junior engineers to the other 10% quota of the direct recruits. The State Government had definitely acted in a biased manner. There is any amount of justification of the grievance of the direct recruits that the State had passed an omnibus order on 2-1-98 regularsing all ad hoc promotees (Electrical Wing) without consulting the Commission, by way of deemed relaxation, in a wholly arbitrary manner, counting the entire ad hoc service of promotion. Their illegal occupation of direct recruitment quota was not even noticed. Their eligibility or suitability was not respected. The regularizations order dated 2-1-98 was therefore bad and was therefore rightly quashed by the High Court. (This declaration is confined to Assistant Engineers and Assistant Executive Engineers (Electrical Wing) – as stated under Point No. 2 of the High Court's Judgment) we confirm the view of the High Court on this point. The result is that the promotees have to go through the Service Commission for getting into the gazetted category of Assistant Executive Engineers. The Assistant Engineers have to go through DPC for promotion as Assistant Executive Engineers. Point 1 is decided accordingly.

Point 2 :

33. This point concerns the question as to whether the quota rule has broken down and whether there is a quota rota rule. The High Court held it did not.

34. Reliance is placed by the promotees on the decision of the Constitution Bench in Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra, (1990) 2 SCC 715 : (AIR 1990 SC 1607 : 1990 Lab IC 1304). It laid down in propositions D & E as follows:

" (D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it is impossible to do so, the inference is irresistible that the quota rule had broken down.

(E) When the quota rules has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

35. The above decision deals with a situation where the quota rule has broken down and regular promotees whose service are regularized are posted in the direct recruitment quota. In that event, it is permissible to count that service for purpose of seniority of the promotee. But, that is the position when the quota rule breaks down.

Quota rule has not broken down.

36. On the question of breakdown of quota rule, except the lethargy of the State Government and its inaction and its not asking the service commission to make direct recruitment, no other cause is visible. The Cabinet note only stated that because reference to PSC would take a long time, the ad hoc services of promotees were to be regularized. The delay on part of the government appears to us to be motivated for the purpose of blocking the quota of the direct recruits and giving a part of it to promotees. We have noticed that when a very belated decision was taken to make direct recruitment, the same was restricted to 10% rather than to the statutory quota of 20%. This attitude on the part of the State was not reasonable.

37. Further under Rule 5(4) of the Recruitment Rules, 1978 it is provided that in case suitable candidates are not available for promotion, the posts shall be filled up by direct recruitment and vice versa. Thus, there must be evidence that suitable candidates were "not available" for direct recruitment. Such non-availability cannot be inferred when, as a fact, not even a reference is made to the Commission to find out if upon advertisement, anybody will respond. Thus there is no breaking down of the quota rule.

38. That in such situations there can be no break down of the quota rule is clear from decided cases. In N.K. Chauhan v. State of Gujarat (1977) 1 SCC 308 : (AIR 1977 SC 251 : 1977 Lab IC 38), the rule said that 'as far as practicable', the quota must be followed. Krishna Iyer J. said that there must be evidence to show that effort was made to fill up the direct recruitment quota. It must be positively proved that it was not feasible, nor practicable to get direct recruits. The reason should not be 'procrastinary'. In Syed Khalid Rizvi v. Union of India, 1993 Suppl (3) SCC 575, it was held that mere non-preparation of select list does not amount to collapse of the quota rule. In M.S.L. Patil v. State of Maharashtra, (1996) 11 SCC 361 it was held that mere omission to prepare lists did not amount to break down to quota rule.

39. One other significant fact is that the cabinet note dated 19-12-1997 only states that cases of the ad hoc promotees if referred to PSC, will take a long time for getting the necessary recommendation. But nowhere it is said that direct recruitment was not possible nor that direct recruits were not available or such recruitment had became impracticable. For the aforesaid reasons, we hold that the quota rule has not broken down.

Rota : No express rota rule :

39 A. We shall next refer to the contention for the direct recruits that "rota – quota rule is to be applied. Before us, it is not disputed by the learned counsel for the direct recruits that in the Recruitment Rules, 1978, there is only a quota rule and that no rota rule has been expressly prescribed.

Question is whether 'rota' can be implied ?

40. The direct recruits contend that rota is to be implied or read into be implied or read into the 'quota' rule. It is also argued that there has been a previous practice of applying a rota and that this fact stands conceded in the counter-affidavit filed by the Government in SWP. 824-B/94. Reliance is also placed on Cabinet note of December, 1997 where the view of the Law Department that quota-rota rule is to be applied, is referred to.

41. In our-opinion, in view of the admission before us by all parties that there is no express rota rule, the decision of the High Court that 'rota' principle applied cannot be upheld. As held in N.K. Chauhan v. State of Gujarat, (1977) 1 SCC 308 : (AIR 1977 SC 251 : 1977 Lab IC 38), by Krishna Iyer, J. there is no question of a quota being necessarily 'inter-locked' with rota. It is not necessarily inscribed within every quota rule. Again in B.S. Yadav v State of Haryana, (1981) 1 SCR 1024 : (AIR 1981 SC 561 : 1981 Lab IC 104), Chandrachud, C.J. held that 'quota' does not imply a rota. The first part of the contention of the direct recruits is without any substance.

Rota cannot be brought in because only of past practice :

42. So far as second part of the contention that there has been previous practice, we may refer to S.L. Chandrakishore Singh v. State of Manipur, (1999) 7 JT (SC) 576 (p. 592) : (1999 AIR SCW 3631 at P. 3642 : AIR 1999 SC 3616 at P. 3625 : 1999 Lab IC 3543 at P. 3553). There it was held that a practice must be consistent with Rules and that a practice not consistent with rules is not acceptable. In that case, the practice of not considering for promotion probationers and considering only confirmed candidates was, held not consistent with the Rules and could not be permitted. Similarly, in D. Stephen Joseph v. Union of India, (1997) 4 SCC 753 : (1997 AIR SCW 2558 : AIR 1997 SC 2602) it was held that a past practice which was dehors a rule could be of no help. The question in that case was as to whether the requirement of particular years of service with graduation for promotion meant service after graduation of service during which a degree qualification was acquired. A practice of counting three years after obtaining qualification was not accepted. In that view of the matter, the second part of this contention also goes.

43. Hence, it must be held that there is no rota coupled with quota but that there is only a quota rule. Point 2, is decided accordingly.

Points 3 :

44. This point is crucial. The point here is whether the Government could have continued the ad hoc / stop gap service of promotees beyond six months and till regularization without consulting the Commission and whether Government could have regularized without such consultation. Point also is whether as contended in para IX of the written submissions of the direct recruits, the retrospective regularization of the service of the promotees is not permissible unless the original promotion is "in accordance with rules"?

Ad hoc / stop-gap service beyond six months require P.S.C consent, Government cannot regularize the period without consultation.

45. In our view, the High Court was right to the extent it held that the rules did not permit continuance of the ad hoc/ stop gap promotion beyond six months and the Government could not have continued the ad hoc/stop gap promotion till regularization without consulting the Commission. This is clear from regulation 4(d (ii) already referred to. The High Court was also right in holding that the Government could not have also passed any orders such as the one dated 2-1-98 of regularization of the entire ad hoc service without consulting the Commission.

Regularisation of ad hoc/stop gap service under Rule 23 : The contention of direct recruits and the High Court's view :

46. Here, two important findings given by the High Court have to be referred to. The High Court at one stage observed as follows : " if the exercise of selection of candidates has not been done by the Commission for regularisation of ad hoc promotees for substantive promotions, in that event, without consultation of the Commission, the regularization of ad hoc promotions is in violation of Regulation 4(d) (ii) framed under the constitutional provision contained in Section 133 of the Constitution of Jammu and Kashmir. This would mean that the High Court in a way accepted that services of such promotees could be regularized if the Service Commission was consulted.

47. But the High Court again stated at a later stage that the ad hoc/stop gap service rendered by promotees could not be regularized and for that proposition it relied upon several rulings of this Court. But those decisions, as we shall show a little later were cases where it was held that a direct recruit could not count his ad hoc service rendered prior to the date of selection. Those rulings cannot be applied, as shown below, to the cases of promotees for holding that ad hoc/stop gap service of the promotees could not be regularized. If the High Court meant that such service could not be regularized under Rule 23 – at least to the extent when vacancies arose in the promotee quota, subject to eligibility and suitability of the promotees based on ACRs etc. – we are of the opinion, for reasons to be given below, that the said view of the High Court is wrong and runs counter to overwhelming authority of this court that such service of promotees could be regularized in the posts relatable to the promotee quota provided the PSC/DPC was consulted and subject to eligibility etc.

48. Perhaps based on the above view of the High Court, the direct recruits have raised a point in their written submissions in para as ix as follows :

> "Even where rules permit ante-dating of probation, the service rendered in stop-gap arrangement cannot be counted towards seniority. Discretion to ante-date appointment can be exercised only where initial appointment is according to rules. Even a rule that permit regularization of service retrospectively, does not entitle counting of stop gap service towards seniority".
>
> Rules relating to retrospective regularization, permit regularisation of ad hoc/stop gap service of promotees:

49. For the purpose of deciding the point, it is necessary to refer to other rules relevant on the question of regularization ; Rule 2(e) of the Recruitment Rules, 1978 defines "Member of Service" as a person appointed to a post in the service under the said rules. Under Rule 5 of the said Rules which deals with "Qualification and method of recruitment", it is stated in sub-clause (1) that one must possess the qualifications stated in the schedule for appointment or promotion. Clause (2) refers to 'appointment' to a service to be made by (a) direct recruitment (b) by promotion/selection and (c) partly by direct recruitment and partly by promotion. Rule 3 of the 1978 Recruitment Rules deals with 'probation' and states that persons 'appointed' against substantive vacancies, whether directly or by promotion, to any class, or category in the service shall be on probation for two years and their confirmation shall be regulated by the provisions of the J & K (Civil Services (CCA) Rules, 1956. Rule 11(1) of the same Rules refers to seniority to be regulated by J & K Civil Services (CCA) Rules, 1956. The second proviso to Rule 11(3) of the 1978 Rules requires that "seniority of Assistant Engineers appointed by direct recruitment and by promotion shall, in a particular year, be determined, in the ratio fixed for direct recruitment and promotion". It is to be noticed that these Recruitment Rules, 1978 for Engineers do not speak separately of recruitment by transfer. They only speak of direct recruitment and promotion. Even the schedule when it deals with 60% quota for graduate Junior Engineers and 20% quota for non-graduate, the word used is ' promotion '.

50. But under the J & K Civil Service (CCA) Rules, 1956, Rule 2(e) defines 'member of service ' as a person holding or appointed to a whole time pensionable post. Rule 2(f) defines 'period of probation' of a member of the service as the period prescribed in the rules. Rule 2(g) defines 'probationer' as a person appointed to a Service who has not been declared to have satisfactorily completed his probation. Rule 2(h) defines ' promotion ' as the "appointment" of a member of a

service or class. Rule 2(i) defines a person 'recruited direct' as one recruited otherwise than by promotion or by transfer. Rule 2(j) defines Recruitment by transfer as one where at the time of his 'appointment' thereto, he is either a member / probationer in another service. Rule 9 refers to 'first appointment' as (a) one by promotion or by transfer and (b) by direct recruitment or (c) partly by (a) or partly by (b). Rule 14(1) deals with 'temporary appointment' not exceeding three months at a time and under Rule 14(3), the temporary appointee is to be replaced by a member of the service or a candidate qualified and considered fit to hold the post under the 1956 Rules. Rule 14(4) says that a temporary appointment will not be regularized as a probationer nor will he have any preferential claim for future appointment. Rule 15, which follows Rule 14 permits commencement of probation from an anterior date and it reads as follows:

"Rule 15 : If such person is subsequently appointed to such service, class or category in accordance with these rules, he shall commence his probation therein from the date of such subsequent appointment or from such earlier date as may be determined by the Minister – in – charge.".

Thus a person temporarily appointed under Rule 14 can be appointed to the service according to rules from an anterior date. Rule 20 states that no person shall be eligible for confirmation as a member of a service or class, until he has been on probation in such service or class continuously or in the aggregate for a period of two years. Rule 22 deals with declaration of completion of probation. Rule 23 is again important and deals with 'appointment of Members' with retrospective effect. It reads as follows :

Rule 23 : (1) A probationer shall, if a substantive vacancy in the permanent cadre of the category for which he was selected exists, be appointed to the service at the earliest possible opportunity in the order of seniority, and if such vacancy existed from a date previous to the issue of the order of appointment, he may be so appointed with retrospective effect from such date or, as the case may be, from such subsequent date from which he was continuously on duty as a member of the service."

51. Under Rule 23, whenever probation is commenced in respect of an officer, it is permissible to appoint him to the service with retrospective effect from such date from which the person was "continuously on duty as a member of the service". Read with Rule 2(e) which defines 'member of service' it means the time from which he was "continuously holding the pensionable post". Rule 23 does not make any distinction between different modes of recruitment. It is well settled that in the case

of a direct recruit, the probation can commence only from a date after his selection and he can hold a permanent vacancy only after such selection. According to service jurisprudence (see in fact, discussion under Point 4), a direct recruit cannot claim appointment from a date much before his selection. So far as a promotee and also one who is recruited by transfer, are concerned, before such persons are appointed as members of the service under Rule 23, first their probation must commence. Then such person becomes a probationer for purposes of Rule 23. Once he is on probation, and if a substantive vacancy in the permanent cadre existed in which the promotee or a recruitee by transfer can be accommodated, and if such a vacancy has arisen from a date previous to the issue of the order of appointment (i.e. appointment by promotion or transfer) then under Rule 23 he may be appointed to the service (i.e. regularly) with retrospective effect from such anterior date (or, as the case may be from such subsequent date) from which (he has been continuing on duty on a non-pensionable post (see 2(e) defining 'member of service'). This period can certainly be one that a person holds in a stop – gap or ad hoc manner. The order of 'promoting a person in the service regularly from an anterior date and the order of probation from an anterior date can be simultaneously passed. That is how under Rule 23, a person holding a temporary stop-gap or ad hoc appointment beyond three months can become a probationer and get appointed regularly to the service with retrospective effect.

52. Then comes the Rule of 'Seniority'. Seniority is to be determined by the 'date of first appointment to such service, class or category or grade. It reads as follows:

"Rule 24 : Seniority : (1) The seniority of a person who is subject to these rules has reference to the service, class, category and grade with reference to which the question has arisen. Such seniority shall be determined by the date of first appointment to such service, class, category or grade, as the case may be."

Note 1 : . . . . . .

Interpretation : The words "date of first appointment" occurring in the above rule will mean the date of first substantive appointment, meaning thereby the date of permanent appointment or the date of first appointment on probation on a clear vacancy, confirmation in the latter case being subject to good work and conduct and / or passing of any examination or examinations and / or tests.

Provided that the inter se seniority of two or more persons appointed to the same service, class, category or grade simultaneously, will, notwithstanding the fact that they may assume the duties of their

appointments on different dates by reason of being posted to different stations, be determined :

(a) in the case of those promoted by their relative seniority in the lower service, class, category or grade :

(b) in the case of those recruited direct (except those who do not join their duties when vacancies are offered to them) according to the positions attained by and assigned to them in order of merit at the time of competitive examinations or on the basis of merit and ability and physical fitness etc., in case no such examination is held for the purpose of making selections;

(c) as between those promoted and recruited direct, by the order in which appointment have to be allocated for promotion and direct recruitment as prescribed by the rules.

Note : . . . . . .

It has to be noticed that the interpretation clause below Rule 24 is very wide and under that provision, seniority of a promotee depends on the date on the commencement of probation on a clear vacancy. Probation can be commenced in the case of a person promoted or recruited by transfer from the date of existence of a clear vacany in the promotee/transfer quota and depending upon his eligibility, suitability based on ACRs.

53. Rule 25 deals with temporary and regular promotions. It reads as follows:

"(1) All promotions shall be made by the appointing authority.

(2) Promotions to a service or class or to a selection category or grade in such service or class shall be made on ground of merit and ability and shall be subject to the passing of any tests that Government may prescribe in this behalf, seniority being considered only where the merit and ability are approximately equal.

(3) . . . . . .

(4) Where it is necessary in the public interest owing to an emergency which has arisen and could not have been foreseen, to fill immediately a vacancy by promotion from a lower category, and where promotion in accordance with these rules would involve undue delay or expenditure or cause

administrative inconvenience, the appointing authority may promote a person otherwise than in accordance with these rules temporarily until a person is promoted in accordance with these rules, but such temporary promotion shall in no case exceed three months on each occasion.

(5) A person promoted under sub-rule (4) shall not be entitled by reason only of such promotion to any preferential claim to future promotion."

54. A point has been raised by the direct recruits that there is no Rule (corresponding to Rule 15) for commencing probation retrospectively in the case of a person promoted or recruited by transfer temporarily under Rule 25.

55. It is true that while Rule 15 permits probation to be commenced from an anterior date in the case of one 'appointed' temporarily there is no such clause in Rule 25 dealing with 'promotions'. That does not, in our opinion, mean that in respect of a person temporarily promoted or a person temporarily appointed by transfer, probation cannot be commenced from an anterior date. In our view, this power is implicit in Rule 23 itself when it speaks of a probationer being appointed as a member of a service with retrospective effect. Once a promotee or recruitee by transfer is appointed on probation, it is permissible to appoint him under Rule 23 as a member of the service from an anterior date when a substantive vacancy existed in his quota. It is then obvious that such power to make a retrospective appointment of a member implies a power to commence probation of such person from an anterior date when a clear vacancy existed in his quota. We cannot imagine that the Rule-making authority did not visualize delays in regularization of ad hoc or stop-gap or temporary service rendered by promotees or those recruited by transfer and kept in mind delay only in cases of appointments under Rule 14.

56. Thus, the stop-gap/ad hoc or temporary service of a person appointed by transfer as an Assistant Engineer or by promotion as an Assistant Executive Engineer can be regularized through PSC/DPC from an anterior date in a clear vacancy in his quota, if he is eligible and found suitable for such transfer or promotion, as the case may be, and his seniority will count from that date.

Should the services proposed to be regularized have been rendered according to rules?

57. We then come to the crucial point (point IX in written submissions) raised by the direct recruits that if the appointment of a promotee as Assistant Engineer is not according to rules but is a stop gap

or ad hoc appointment and if it lasts more than 6 months, it requires consultation with the Commission under Regulation 4(d)(ii) of the P.S.C Regulations and if there is no consultation such service is 'not according to rules' and cannot be regularized, i.e even by consulting the Service Commission at a later stage, and in spite of such service being rendered within promotion quota, subject to eligibility and suitability.

Plea is not correct on the face of it :

58. We are unable to hold the entire service of a promotee continued beyond 6 months without consulting the Commission must be treated as non-est and should stand wiped out altogether and that only service rendered in accordance with rules can be retrospectively regularized.

59. On the face of it, there is a contradiction in the plea for if service to start with is in accordance with Rules; it will not come under Rule 25 at all. It will be regular to start with and there is no need for regularization. The need arises for regularization only if the service of the promotees is not according to rules to start with.

Regulation 4(d) (ii) does not refer to any penal consequences :

60. Regulation 4(d) (ii) of the J.K. Public Service Commission (Limitation of Functions) Regulations, 1957 merely states that it shall not be necessary for the Commission to be consulted on the suitability of candidates for "officiating promotions or transfer to any service or post when at the time of making the promotion or transfer there is reason to suppose that the officiating promotion or transfer will be or not more than six months". This Regulation therefore fixes the period of service of such officiating promotee or transferee which need not go before the Commission. It does not however say that if the Commission is not consulted before six months, or where the Commission when consulted within six months does not pass an order of extension before the period of six months, the said service is to be treated as non-est. Further, in our view, as already stated, such service can be regularized under Rule 23 of the J.K. (CCA) Rules, 1956, by commencing the probation retrospectively and by appointment to the service from a date when a substantive vacancy was available within the quota. It is only in respect of the period of service rendered outside the quota that retrospective regular promotion/ recruitment by transfer cannot be made in respect of that part of the service. That would mean that only such service which is rendered by the promotee/transferee-recruitee within his quota, can be

regularized. Similarly if he is found not eligible nor fit nor suitable though posted in a post within quota that service cannot be counted. It is not the employees' fault if the State does not take steps to refer the question of continuance beyond six months to the P.S.C for years. It is one thing to say that the ad hoc service of promotee does not count for seniority till regularized after consulting the Service Commission and another thing to say that it cannot, under any circumstances be regularized in as much as the consequence of non-consultation with the Commission is not stated in the Regulation 4(d) (ii) of the P.S.C. Regulations, 1957, and no penal consequences are mentioned, such service within quota subject to eligibility and suitability cannot be ignored when power is exercised under Rule 23.

Overwhelming authority of this Court to say that ad hoc/stop gap service of promotees can be regularized :

61. This principle is supported by ample authority. Procedural inaction towards promotees, it has been held, can be "rectified". This is explained in the three Judge Bench case in State of West Bengal v. Aghore Nath Dey, (1993) 3 SCC 371. In that judgment propositions A and B laid down in Direct Recruit case, (1990) 2 SCC 715 : (AIR 1990 SC 1607 : 1990 Lab IC 1304) were explained by Verma J. (as he then was). It was pointed out that proposition A where it was held that the ad hoc service would not count was one where the same was stop gap (i.e. and remained as such). In proposition B it was said that ad hoc service could count in certain situations such as where there was only a 'procedural' irregularity in making appointments according to Rules. In such a situation, the irregularity can be subsequently 'rectified'. In such a case such ad hoc/stop-gap or temporary service could be counted. Again in Syed Khalid Rizvi's case (1993 Supp (3) SCC 575), it was held by Ramaswamy J. speaking for the three Judge Bench that propositions A and B in Direct Recruit case had to be read with para 13 therein. Similarly, in I.K. Sukhija v. Union of India, (1997) 6 SCC 406 : (1977 AIR SCW 2684 : AIR 1997 SC 2714), Nanavati J. explained propositions A and B by reference to Aghore Nath Dey's (1993) 3 SCC 371 referred to above.

The Andhra Pradesh cases are based on similar rule : Such service can be regularized with retrospective effect :

62. Apart from the general principle of law as stated above, there are rulings of this Court on almost identical rules which go against the contention raised by the direct recruits. Rules identical to Rules 15 and 23 of the J & K (CCA) Rules, 1956 have come up for consideration in this Court in

cases arising from Andhra Pradesh. These decisions are obviously binding on us. A case directly in point is the one in Desoola Rama Rao v. State of A.P., 1998 Suppl SCC 221: (AIR 1988 SC 957 : 1988 Lab IC 994). The relevant rule in that case (Rule 23(a)) is similar to Rule 15 and Rule 23 of the JK CCA Rules of 1956. Rule 23(a) of the AP State and Subordinate Service Rules read as follows:

> "Rule 23(a). If a person having been appointed temporarily under sub-rule (a) or sub-rule (c) of Rule 10 to a post borne on the cadre of any service, class or category or having been appointed to any service, class or category otherwise than in accordance with the rules governing appointment thereto is subsequently appointed to any service, class or category in accordance with the rules, he shall commence his probation from the date of such subsequent appointment or from such earlier date as the appointing authority may determine."

We shall examine the facts closely. The respondents 3 and 4 there were temporarily promoted as Assistant Engineers on 14-10-1959 and 19-5-60 respectively. The appellant was directly recruited on 18-7-66 as Assistant Engineer. Under Rule 23(a) the services of the respondents 3 and 4 were retrospectively regularized by commencing probation on from 19-5-61 in both cases by order of the Chief Engineer dated 3-7-67. This Court held that the respondent-promotee officers would be senior to the appellant even though the appellant was appointed substantive as a direct recruit on 18-7-66 and the respondents were on that date working only in a temporary capacity from 14-8-59 and 19-5-60 but once their services were regularized by order dated 3-7-67 (passed no doubt after 18-7-66) it could take effect from anterior dates. It will be noticed that even in the above case, the regularization was not of the entire temporary service of the promotees from 14-8-59 and 19-5-60 but only from 19-5-61 in both cases. In other words when the promotees Assistant Engineers were filled, based on their qualifying service and availability of vacancies in their quota, past of the temporary service before 19-5-61 was lost and was not counted.

63. Again, in respect of the same Rule 23(a) of the Andhra Pradesh Rules, this Court observed in State of A.P. v K.S Muralidhar, (1992) 2 SCC 241 L (AIR 1992 AIR SCW 734 : AIR 1992 SC 922 : 1992 Lab IC 855) that there can be no objection under the said rule for retrospective regularization.

64. Similar is the position in M. Janardhan v. State of A.P., 1994 Suppl (3) SCC 298 (2). There adverting to Rule 37(e) of the A.P Rules which also permitted regular promotion from an 'anterior date' (like Rule 23 here) it was held that the said retrospective promotions were rightly upheld by the Tribunal.

Cases from other States support promotee's regularization with retrospective effect :

65. Apart from cases arising from Andhra Pradesh the position appears to be the same as per the cases arising from other States, so far as promotee's ad hoc service is concerned. In Baleshwar Das v. State of U.P., (1981) 1 SCR 449 : (AIR 1981 SC 41 : 1980 Lab IC 1155), it was observed (at p. 464 (of SCR) : (at P.49 of AIR: at P. 1063 of Lab IC) that officiating promotees are to be given dates by the Service Commission for counting seniority. In B.S Yadav v. State of Haryana, (1981) 1 SCR 1024 : (AIR 1981 SC 561 : 1981 Lab IC 104), it was said that the promotees have to be confirmed in their quota if found fit and qualified and when vacancies arose in their quotas. In A. Janardhana v Union of India, (1983) 2 SCR 936 (at p. 961) : (AIR 1983 SC 769 at P. 781) : 1983 Lab IC 849) it was observed that the seniority of the promotees was to count from the date of occurrence of vacancy in their quota. In G.P. Doval v. Chief Secretary, Government of U.P., (1984) 4 SCC 329 : (AIR 1984 SC 1527 : 1984 Lab IC 1304), it was held that subsequent appointment by the Public Service Commission to the temporary appointments will relate back to the initial dates of appointment for purpose of seniority on basis of rule of continuous officiation and the seniority could not be reckoned only from the date of approval or selection by the Commission. In Narender Chadda v. Union of India, (1986) 2 SCC 157 L (AIR 1986 SC 638 : 1986 Lab IC 590), it was held that promotees were first to be regularized from dates of occurrence of vacancies/eligibility. The initial appointment though not according to rules, the said service could not be ignored. In A.N. Pathak v. secretary to the Government, 1987 Suppl SCC 763 : (AIR 1987 SC 716 : 1987 Lab IC 638), it was held that the promotees had to be inserted at places reserved for them as per quota. In Delhi Water Supply & Sewage Disposal Committee v R.K. Kashyap, 1989 Suppl (1) SCC 194 : (AIR 1989 SC 278), it was held that once regularization was made by the PSC/DPC, the said service could not be ignored.

As to when post of ad hoc/ stop gap service of promotees cannot be regularized: if outside quota or not eligible or suitable :

66. In some cases, a distinction is made between two parts or the ad hoc/stop gap service or promotees, one which can be regularized and the other which cannot be regularized. In Keshav Chandra Joshi v. Union of India, 1992 Suppl (1) SCC 272 : (AIR 1991 SC 284 : 1991 Lab IC 216), it was held that previous promotee would get regularization from date of occurrence of vacancy in promotion quota. Before that, it would be fortuitous. Of course, excess promotees could not claim

seniority if the quota rule had not broken down because they occupy the seats of direct recruits. In Rajbir Singh v. Union of India, Air 1991 Sc 518 : (1991 Lab IC 488), the ad hoc promotion was in 1975 and the subsequent regularization was in 1986 and it was held that the period of ad hoc service could be counted. In A.N Sehgal v. Raje Ram Sheoran, 1992 Suppl. (1) SCC 304 : (1991 AIR SCW 1119 : AIR 1991 SC 1406 1991 Lab IC 1227), it was held that the promotees whose services were regularized could count their earlier service from the date of availability of a post within their quota but the earlier period between the starting point of ad hoc promotion and the date of occurrence of the vacancy could not be counted. In S.L. Chopra v. State of Haryana, 1992 Suppl (1) SCC 391 : (1991 AIR SCW 1028 : AIR 1991 SC 1126 : 1991 Lab IC 1097) it was held that promotee service would count from date of availability of post within quota and service before that dates would, be fortuitous. In Syed Khalid Rizvi v. Union of India, 1993 Suppl (3) SCC 575, it was held that the service of promotee would count from date of allotment to select list but the period prior thereto would not count. In Keshav Deo v State of U.P., (1999) 1 SCC 280 : (1988 AIR SCW 3365 : AIR 1999 SC 44 : 1998 Lab IC 3554, Srinivasan J. held, on a review of case law that seniority of promotees would count from the dates fixed within the quota by DPC. (In this case, a good number of judgments which were relied upon before us by direct recruits were distinguished).

67. Thus, there is overwhelming authority of this Court to hold that ad hoc, stop gap service could be regularized from an anterior date after consulting the Service Commission from the date of vacancy in promotees quota, after considering fitness, eligibility suitability and ACRs. Therefore, the ad hoc/ stop gap service rendered by promotees beyond six months and without the consent of the Public Service Commission as per Regulation 4(d) (ii) cannot be treated as non-est. It can be regularized later after consulting the Commission in respect of posts in the promotion quota and subject to eligibility and suitability based on ACRs. etc. Only the period rendered outside quota or the period rendered within quota when the promotee was not eligible or found fit has to be excluded.

68. Unfortunately, the High Court as well as the direct recruits have applied wrong rulings to the case of promotees and ignored the overwhelming authority, referred to above, in favour of promotees. We shall now refer to these aspects in detail.

Cases relied upon by direct recruits – not applicable.

69. The direct recruits have strongly relied upon the decision in V. Sreenivasa Reddy v. Govt of A.P., 1995 Suppl (1) SCC 572 : (1994 AIR SCW 4868 : AIR 1995 SC 586 : 1995 Lab IC 319). But this decision cannot be of any help to them. In that case Rule 10 and 23 of the Andhra Pradesh State and Subordinate Service Rules were referred to. It was pointed that the promotee's temporary service under Rule 10 (i.e service rendered in a post to which the officer was not appointed to Rules), could not be counted on facts, because there was no order of retrospective regularization. In fact, this Court accepted that if regularized under Rule 23 of the A.P Rules, the temporary appointees could have been regularized from an anterior date. (This Court then referred to certain rulings which said that direct recruits could not count ad hoc service rendered by them before their-regular selection). On facts, this Court held that the Government had relaxed the rule regarding P.S.C consultation but had placed the promotees below the direct recruits and this need not be interfered with). This case far from supporting the direct recruits, supports the promotees.

70. Similarly, K. Siva Reddy v. State of A. P. (1988) 3 SCR 18 : 1988 Suppl SCC 225 L (AIR 1988 SC 860 : 1988 Lab IC 997) cannot also be of any help. It was there held that the retrospective regularization cannot be reported to under Rule 23(a) of the Andhra Pradesh Rules if the service is rendered by the promotee is in a post within direct recruit quota. The promotees were to be confined to their quota. This case is distinguishable.

71. Again, Ramendra Singh v. Jagdish Prasad, 1984 Suppl SCC 142 : (AIR 1984 SC 885 : 1984 Lab IC 614) is distinguishable in as much as it was there held that under executive power, retrospective regularization cannot be made. That it can be made after consulting the Commission is well settled by various decisions. This ruling too does not advance the case of the direct recruits.

Principle that only service "according to Rules" can be regularized applies to direct recruits and not to promotees :

72. Next, the direct recruits and the High Court have relied upon several rulings which say that direct recruits cannot seek benefit of ad hoc service rendered before their regular appointments.

73. These rulings cannot be applied to the case of promotees. In fact the principle laid down in these cases is consistent with principles in service jurisprudence so far as the ad hoc service rendered

by direct recruits before the date of their regular selection is concerned. Their service counts only from date of regular appointment according to rules and any ad hoc / stop gap service rendered before regular selection cannot count for seniority.

74. The direct recruits relied upon A.P.M. Mayan Kutty v. Secretary, (1977) 2 SCC 360 : (1977 Lab IC 551). In that case, the petitioner was appointed in the 1950 temporarily under Rule 10(a)(i) of the Rules (which is similar to the ad hoc appointment under Rule 14 and Rule 25 in J & K Rules and Rule 10(a)(i) of the A.P. Rules) but was directly recruited only in 1954. It was held that the pre 1954 service could not be counted. Likewise in State of T.N. v E. Paripoornam, 1992 Suppl(1) SCC 420 : (1992 AIR SCW 2057 : AIR 1992 SC 1823 L 1992 Lab IC 1803), the petitioner in the High Court was appointed temporarily under Rule 10(a)(i) but was recruited much later under the rules through PSC. The PSC gave him a rank. It was held that the pre 1954 service could not be counted. Likewise in State of T.N. v. E. Paripoornam, 1992 Suppl (1) SCC 420 : (1992 AIR SCW 2057 : AIR 1992 SC 1823 : 1992 Lab IC 1803), the petitioner in the High Court was appointed temporarily under Rule 10(a) (i) but was recruited much later under the rules through PSC. The PSC gave him a rank. It was held that his seniority would be as per the rank and not from date of temporary appointment. A.P. M. Mayan Kutty's case (1977 Lab IC 551) was followed. P.D. Aggarwal v. State of U.P., (1987) 3 SCC 622 : (AIR 1987 SC 1676 : 1987 Lab IC 1307) was one where it was held (see para 26-28) (of SCC) : (Paras 25-27 of AIR, Lab IC) that the ad hoc service of the officer who was later directly recruited in consultation with the PSC, could not count as it was not regularized service. Their seniority would count only from the date they become members of the services, even if they were qualified earlier on date of temporary appointment (see p. 646 (of SCC) : (at Pp. 1689-90 of AIR : at Pp. 1320-21 of Lab IC. Masood Akhtar Khan v. State of M.P., (1990) 4 SCC 24 is also a case of a direct recruit and it was held that his previous service before regular selection by PSC could not count. Vijay Kumar Jain v. State of M.P., 1992 Supp (2) SCC 95 is similar. In State of Orissa v. Sukanti Mohapatra, (1993) 2 SCC 486 : (1993 AIR SCW 1891 : AIR 1993 SC 1650 : 1993 Lab IC 1513), the exercise of power of relaxation by the Government to count the ad hoc service of direct recruit prior to PSC recruitment was held bad and the order, to that extent, was quashed. Dr. Arundhati Ajit Pargaonkar v. State of Mahrashtra, 1994 Suppl (3) SCC 380 : (AIR 1995 SC 962) is also a case where ad hoc service of employee before direct recruitment by PSC was held not liable to be counted. All these cases cited relate to ad hoc service of direct recruits before selection and are therefore distinguishable and could not have been relied upon to deprive the promotees of their ad hoc service.

Promotees cannot seek regularization of ad hoc service in certain situations :

75. We shall next refer to another set of cases relied upon by the direct recruits where, on facts, the promotees were not given benefit of ad hoc / stop gap service. Here the service rendered by the promotee was either outside quota or the candidates were not eligible by the date the order of regularization was passed or were not having the required experience. In C.K. Antony v B. Muraleedharan. (1998) 6 SCC 630 : (1998 AIR SCW 3051 : AIR 1998 SC 3136 : 1998 Lab IC 3519), arising from the Kerala State has some special features. There was a rule similar to Rule 23 of the J & K Rules and Rule 23(a) of the Andhra Pradesh Rules. The said rule permitted retrospective regularization of the promotees from anterior dates but this rule stated that the said regularization should be "without prejudice to seniority". It was not doubt interpreted that the rule meant that the seniority of direct recruits could not be affected. The question as to when it could be said that the seniority of a direct recruit would be prejudice, was not elaborated. Whether the case of direct recruits would be prejudice even if the promotees were given seniority from an anterior date upon a post within their quota, was not decided. Further, on facts, the earlier ad hoc promotion of the promotees was not against cadre posts but was on the excess quota. Obviously, it could not count for seniority in view of Direct Recruit's case. Any regularization of such service in a direct recruitment post would definitely prejudice the seniority of direct recruits. In view of the above peculiar features, the case is clearly distinguishable. Similarly, the decision in D.N. Agarwal v. State of M.P., (1990) 2 SCC 553 L (AIR 1990 SC 1311 : 1990 Lab IC1156), cannot help. There it was held that the benefit of retrospective regularization for promotees could not be granted but this was because the promotees lacked the requisite years of experience and were not eligible, B.N. Nagarajan v. State of Karnataka, (1979) 3 SCR 937 : (AIR 1979 SC 1676) : 1979 Lab IC 1206), the promotees service from 1-11-1956 was regularized and it was held that the order of regularization by Government w.e.f 1-11-1956 by an executive order was not tenable because the probation Rules came in from 1958 and in fact, the promotions were partly within quota of direct recruits. The case in State of Bihar v. Akhouri Sachindra Nath, AIR 1991 SC 1244 : (1991 AIR SCW 1196 : 1991 Lab IC 1296) is again distinguishable because there the promotees were not even officiating the post on 22-2-61 and were not even born in the cadre. These cases are all distinguishable.

76. Unfortunately these rulings have been wrongly relied upon by the direct recruits or by the High Court, to hold that promotees are not entitled to benefit of the ad hoc / stop gap service.

Summary :

77. Summarising the position, we therefore hold that the ad hoc /stop gap service of the promotees cannot be treated as non-est merely because P.S.C was not consulted in respect of continuance of the ad hoc / stop gap service beyond six months. Such service is capable of being regularized under Rule 23 of the J & K (CCA) Rules, 1956 and rectified with retrospective effect from the date of occurrence of a clear vacancy in the promotion quota, subject to eligibility, fitness and other relevant factors. There is no 'rota' rule applicable. The 'quota' rule has not broken down. Excess promotees occupying direct recruitment posts have to be pushed down and adjusted in later vacancies within their quota after due regularization. Such service outside promotee quota cannot count for seniority. Service of promotees which is regularized with retrospective effect from date of vacancies within quota counts for seniority. However, any part of such ad hoc / or stop gap or even regular service rendered while occupying the direct recruitment quota cannot be counted. Seniority of promotees or transferees is to be fixed as per quota and from date of commencement of probation/or regular appointment as stated above. Seniority of direct recruit is from the date of substantive appointment. Seniority has to be worked out between direct recruits or promotees for each year. We decide point 3 accordingly.

Point 4 :

Direct recruits cannot claim appointment from date of vacancy in quota before their selection :

78. We have next to refer to one other contention raised by the respondent-direct recruits. They claimed that the direct recruitment appointment can be ante-dated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. It was submitted that if the promotees occupied the quota belonging to direct recruits they had to be pushed down, whenever direct recruitment was made. Once they were so pushed down, even if the direct recruit came later, he should be put in the direct recruit slot from the date on which such a slot was available under direct recruitment quota.

79. This contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not born in the service. This principle is well settled. In N.K. Chauhan v. State of Gujarat, (1977) 1 SCC 308 (at p. 321): (AIR 1977 SC 251 at P. 259 : 1977 Lab IC 38 at P. 46) Krishna Iyer, J. stated :

> "later direct recruit cannot claim deemed dates of appointment for seniority with effect from the time when direct recruitment vacancy arose. Seniority will depend upon length of service."

Again, in A. Janardhana v. Union of India, (1983) 2 SCR 936 : (AIR 1983 SC 769 : 1983 Lab IC 849) it was held that a later direct recruit cannot claim seniority from a date before his birth in the service or when he was in school or college. Similarly it was pointed out in A.N. Pathak v. Secretary to the Government, 1987 Suppl SCC 763 (at p. 767) : (AIR 1987 SC 716 at P. 718 : 1987 Lab IC 638 at P. 651) that slots cannot be kept reserved for the direct recruits for retrospective appointments.

80. What we have started in points 1 to 4 in respect of ad hoc Assistant Executive Engineers applies to ad hoc Assistant Executive Engineers, to the extent of the principles laid down, are applicable. We say this in view of point 2 that was framed by the High Court covering both the cadres. We hold on Points 1 to 4 as stated above.

Point 5 :

81. The relief :

In view of our decision on Points 1 to 4, the appeals will be governed by our findings on points 1 to 4. We further direct as follows. The Public Service Commission and the Government will complete the exercise of regular appointment of the promotees – Assistant Engineers and Assistant Executive Engineers within four months from today. Till such time the stay of promotions granted by this Court will operate. After passing orders under Rule 15 or 23, as the case may be, and in conformity with quota and year – wise adjustment of quota, a fresh provisional seniority list will be prepared in the category of Assistant Engineers. Objections will be invited and the final seniority lists will be issued within two months of last date fixed for filing objections. The stay of promotions granted by us will stand vacated once the provisional seniority list of Assistant Engineers is prepared. Promotions can be made, subject to review. After receiving objections, the provisional list shall be finalized as stated above and a final seniority list will be issued. Pending issue of final seniority list of Assistant Engineers there will be no reservations of today. Once the list is finalized, there will be a review of all promotions to the category of Assistant Engineers in respect of all promotions made to that category. Thereafter, a provisional seniority list will be issued in the category of Assistant Executive Engineers within one month of the final list of the Assistant Engineers and objections will be called for. The stay granted by us of further shall then stand vacated. There will be no reservations of Assistant Executive Engineers shall then stand vacated. There will be no reservations of Assistant Executive Engineers already promoted till final seniority list (of) Assistant Executive Engineers is published. Their final list will be published

within two months after the last date for filing objection to the provisional list.

Certain general directions to the State of J & K for the future :

82. Apart from the above specific directions, we think this is an occasion to issue certain general directions to the State of Jammu & Kashmir. As pointed out earlier the State of Jammu and Kashmir has been flouting basic rules of recruitment by granting relaxation of the rules of direct recruitment as also the rules requiring consultation with PSC/DPC for promotions/recruitment by transfer. In order to ensure that this is not done in future, the following directions shall also issue.

(A) The State of Jammu and Kashmir shall appoint a high level Committee within a month from today to go into the question as to whether in any department in Government service, direct recruitment of existing vacancies has not been made and (sic) if there was unreasonable delay. The State will consider making direct recruitment expeditiously depending on the needs in the service and other relevant factors. But it will ensure that no promotees are put in the direct recruitment quota, temporarily or on stop gap or ad hoc basis unless simultaneously proceedings are initiated for direct recruitment through the Service Commission. The Committee will recommend in what manner the direct recruitment could keep pace with promotions as contemplated by rules.

(B) Similarly, the Committee will find out in which department the ad hoc/ stop-gap promotees are languishing without their cases being referred to the Service Commission /DPC for regularization within their quota.

(C) The State of Jammu and Kashmir will ensure that no relaxation of basic recruitment rules is made for direct recruitment through P.S.C., or for purposes of regular promotions/ recruitment by transfer. The recommendations /recruitment by transfer. The recommendations of the Committee referred to above may be considered by Government and implemented in accordance with the rules and in accordance with law without unreasonable delay.

83. The appeals are disposed of as stated above. There will be no order as to costs.

Order accordingly.

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SUPREME COURT OF INDIA
RECORD OF PROCEEDING
Civil Appeal No.3734 of 2002
With CA Nos.3735/2002, 3736/2002, 3737/2002, 3738/2002 and 3739/2002
D.D. 20.4.2004
Hon'ble the Chief Justice
Hon'ble Mr. Justice S.B. Sinha &
Hon'ble Mr. Justice S.H.Kapadia

Inder Parkash Gupta … Appellant
Vs.
State of Jammu & Kashmir & Ors. … Respondent

Qualification:

Whether Rule 8 of Statutory Rules called J&K Medical (Gazetted) Service Recruitment Rules 1979 which prescribes method of recruitment prevails over Rule 51 of J&K PSC (Business and Procedure) Rules 1980? – Yes

Whether 100 marks for interview out of total of 150 is excessive ? – Yes

(A) Jammu and Kashmir Constitution, S.124 – Jammu and Kashmir Medical (Gazetted) Service Recruitment Rules (1979), R.8 – Jammu and Kashmir Public Service Commission (Conduct of Business and Procedure) Rules (1980), R.51 – Selection – Teaching wing of Medical Education Dept. of State – Viva voce test – R.51 framed by Service Commission providing for 100 marks for viva voce test against 40 for other criteria – Ultra vires statutory Rules and Constitution – Rule directed to be re-framed.

(B) Jammu and Kashmir Constitution, S.124 - Jammu and Kashmir Public Service Commission (Conduct of Business and Procedure) Rules (1980), R.51 – Appointment – Teaching wing of Medical Education Dept. of State – Rule prescribing certain marks to be allotted for higher qualification than basic (minimum) prescribed for 'post' – Word 'post' therein – Would mean dept. of superspeciality for which appointment was made – And not any other superspeciality.

(C) Constitution of India, Art. 136 – Relief – Interest of justice – High Court directed appellant to be placed above respondents in select list – Decade passed since selections made – Respondents working in posts for last 10 years – In interest of justice State directed to give all benefits including monetary benefit to appellant by placing him above respondents.

Held:

Section 133 of the Jammu & Kashmir Medical (Gazetted) Service Recruitment Rules, 1979 admittedly were issued under Section 124 of the Jammu and Kashmir Constitution which is in pari materia with Article 309 of the Constitution of India. The said rules are statutory in nature. Public Service Commission is a body created under the Constitution. Each State constitutes its own Public Service Commission to meet the Constitutional requirement for the purpose of discharging its duties under the Constitution. Appointment to service in a State must be in consonance with the constitutional provisions and in conformity with the autonomy and freedom of executive action. Section 133 of the

Constitution imposes duty upon the State to conduct examination for appointment to the services of the State. The Public Service Commission is also required to be consulted on the matters enumerated under Section 133. While going through the selection process the Commission, however, must scrupulously follow the statutory rules operating in the field. It may be that for certain purposes, for example, for the purpose of short-listing, it can lay down its own procedure. The Commission, however, must lay down the procedure strictly in consonance with the statutory rules. It can not take any action which perse would be violative of the statutory rules or makes the same inoperative for all intent and purport. Even for the purpose of short-listing, the Commission cannot fix any kind of cut off marks. [See State of Punjab & Ors. vs. Manjit Singh and Ors. [2003 (11) SCC 559].

Further held:

Higher qualification other than basic qualification prescribed for the post would evidently mean the department of superspeciality for which the appointment was made and not any other superspeciality.

Cases referred:

1. 1993 (1) SCC 17 - Indian Airlines Corporation Vs. Capt. K.C.Shukla & Ors.
2. 1994 (1) SCC 150 - Anzar Ahmad Vs. State of Bihar and Ors.
3. 1994 (2) SCC 630 - Jammu and Kashmir Public Service Commission Vs. Dr.Narender Mohan & Ors.
4. 1995 Suppl. (1) SCC 206 - Satpal and Ors. Vs. State of Haryana and Ors.
5. AIR 1998 SCC 795 -Union of India and Anr. Vs. N.Chandrasekharan & Ors.
6. 2003 (2) SCC 132 - Jasvinder Singh & Ors. Vs. State of J & K and Ors.
7. 2003 (6) SCC 545 - Chandra Singh and Ors. Vs. State of Rajasthan and Anr.
8. 2003 (8) SCC 567 - Chairman & MD, BPL Ltd. Vs. S.P.Gururaja and Ors.
9. 2003 (9) SCC-401 - Vijay Syal and Anr. Vs. State of Punjab and Ors.
10. 2003 (11) SCC 559 - State of Punjab & Ors. vs. Manjit Singh and Ors.
11. JT 2004 (3) SC 423 - M.P.Vidyut Karamchari Sangh Vs. M.P. Electricity Board
12. JT 2004 (3) SC 470 - State of Punjab & Ors. Vs. Savinderjit Kaur

JUDGMENT

S.B. SINHA, J :

INTRODUCTION:

These six appeals involving common questions of law and fact were taken up for hearing and are being disposed of by this common judgment.

BACKGROUND FACTS:

Under the Health Ministry of the State of Jammu and Kashmir there are two different departments, medical health and medical education. The employees working in those departments are borne on separate cadres. The Respondents 3 to 10 before the High Court were appointed as ad hoc lecturers in medicine in the medical education department by the State of Jammu and Kashmir. No recommendation of the Jammu and Kashmir Public Service Commission was obtained therefor. The said ad hoc appointments were set aside by this court in Jammu and Kashmir Public Service Commission Vs. Dr.Narender Mohan & Ors. reported in 1994 (2) SCC 630 wherein the State was directed to refer the vacancies to the Commission and make appointments in terms of the recommendations made by it in that behalf. Pursuant thereto and in furtherance thereof, an advertisement was issued by the Commission for some posts of Lecturers on or about 8.3.1994 in the Health and Medical education department. The educational qualification prescribed therefor was "M.D.(Medical/general medical) MCRF, FRCP. Speciality Board of Internal Medical (USA) or an equivalent qualification in the subject with experience as Registrar/Tutor/Demonstrator/Tutor or Senior Resident for a period of two years in the discipline of Medicine, in a teaching medical institution recognised by the Medical Council of India. The notification issued by the Public Service Commission further stipulated that the candidates who possessed any experience in the line, any distinction in sports/games, NCC activities should furnish certificate, along with the application, to that effect.

It is not in dispute that the appointment in the posts of Lecturers was governed by a statutory rule called Jammu & Kashmir Medical (Gazetted) Service Recruitment Rules, 1979 (for short, 1979 Rules), Rule 8 whereof reads thus:-

"8. Method of recruitment: While making selections.-

(1) to the posts in the teaching wing of the service, the Commission/Department Promotion Committee shall have regard to the following, namely,-

(a) Academic qualifications of the candidates;

(b) Teaching experience;

(c) Research experience; and

(d) Previous record of work, if any."

The Public Service Commission, however, framed a rule in the year 1980, known as Jammu & Kashmir Public Service Commission (Business & Procedure) Rules, 1980 (for short, 1980 Rules)

although there did not exist any provision therefor. Rule 51 of 1980 Rules is as under:-

"Rule 51. The assessment at an interview shall be based on the following principles:-

A. Performance of the candidate in the viva voce test	100 Marks
B. Academic Merit -	
(i) Percentage of marks obtained in the basic (i.e., minimum qualification prescribed for the post)	25 Marks
(ii) Higher qualification than the basic (minimum) prescribed for the post such as Diploma or Degree in the concerned Speciality/Superspeciality/ Subject/Discipline-	
(a) Diploma - 2 Marks]subject to	
(b) Degree - 5 Marks]a maximum of	5 marks
C. Experience acquired by the candidate in the concerned Speciality/Superspeciality/Subject/Discipline	
(i) exceeding 1 year but not 2 years	2 marks
(ii) for excess 2 years- for every full year 1 mark subject to a total of 5 marks including those under (i)	
D. Sports/Game :	
Distinction in sports/games (i.e., representing a University, State or Region in any Sports/Games.	3 Marks
E Distinction in NCC activities (i.e., having held the rank of Junior Under Officer or Senior under officer or having passed the top grade certificate examination of NCC).	2 Marks
Total A to E	140 Marks

The Commission interviewed the candidates in terms of Rule 51 aforementioned.

Upon taking the vice voce test and considering the materials on records, the public Service Commission made recommendations pursuant to or in furtherance whereof, the Respondent Nos.3 to 10 were appointed by the State.

Writ Petitions before the High Court:

Questioning the validity of the Rule 51 of 1980 and consequently the selection and appointment of the Respondents No.3 to 10, a writ petition was filed by Shri Inder Parkash Gupta, inter alia, contending therein that the Respondents No.3, 6 & 9 were not eligible to be considered for appointment to the said posts as they did not possess requisite experience of two years as Registrar/Tutor. It was further alleged that the Respondent No.10 at that time was overage. Further contention of the writ petitioner was that his research work, experience and publications had not been taken into consideration by the Commission. In particular, his higher qualification of D.M. had not been given due weightage.

It was also urged that keeping in view the decision of this Court in J & K Public Service Commission V. Dr. Narender Mohan [1994 (2) SCC 630] wherein the appointments of Respondent Nos. 3 and 10 as ad hoc Lecturers have been quashed, the purported experience gained by them in the said capacity could not have been taken into consideration by the Commission. The selection made by the Commission was said to be arbitrary and illegal as the criteria laid down in Rule 51 of 1980 Rules had been applied to assess the merit and suitability of the candidates ignoring Rule 8 of 1979 Rules whereby and wherein eligibility criterion and method of recruitment were laid down.

A further contention was raised by the said writ petitioner to the effect that 100 marks earmarked for viva voce test in Rule 51 is unreasonable and excessive.

The State of Jammu & Kashmir did not file any counter affidavit but Public Service Commission did. The private respondents also filed their counter affidavits.

The writ petition having regard to the importance of the questions involved was referred to a Full Bench for its decision. The Full Bench by its judgment dated 30.7.1999 passed in SWP No.211 of 1994, for all intent and purport accepted the major contentions raised on behalf of the writ petitioner/ appellant holding:-

> "1. The Commission has the competence and jurisdiction to frame rules for conducting its business such as Rules 1980;
>
> 2. Rule 51 of Rules 1980 should be re-framed by the Commission in accordance with the observations made in the course of this judgment.
>
> 3. The selection of selected candidates made by the Commission is not disturbed subject to the relief granted to the petitioner;
>
> 4. The petitioner shall be treated to have been selected and placed in the select panel above respondents 3 and 9 who in turn shall be the selected candidates in the select panel after respondent no.4 and the petitioner. The petitioner shall further be entitled to all consequential service benefits."

The writ petitioner, Inder Parkash Gupta has filed an appeal thereagainst which has been marked as C.A.No.3734/2002 and the State has filed an appeal which has been marked as 3736/2002.

One Dr. Vinay Rampal who was not a party in the writ petition has filed an appeal which has been marked as C.A.No.3735 of 2002 against the judgment.

An order of Jammu & Kashmir High Court passed by a learned single Judge dated 5.5.1997 in a batch of writ petitions which were disposed of following the Full Bench decision of this Court is the subject matter of other three appeals. A further contention was raised in the said writ petitions to the effect that even assuming Rule 51 of 1980 Rules to be valid, as it prescribed certain marks to be allotted, the same should be allotted to the superspeciality post which the concerned person had been holding and not his experience in any other capacity. The said appeals are marked as Civil Appeal Nos.3737/2002, 3738/2002 and 3739/2002.

It is not in dispute that the Public Service Commission proposed a select list of 16 candidates for appointment. Dr.Inder Parkash Gupta's name appeared at Sl.No.13 therein. The private respondents whose names appeared at Sl.No.3 to 10 of the select list were appointed. Two posts were kept in abeyance as the matter regarding reservation was pending before the State Government.

It, however, stands admitted that during the pendency these appeals the proceedings the State of Jammu & Kashmir issued a notification dated 22.5.2002 whereby and whereunder the appellant herein Inder Parkash Gupta was given promotion in terms of the judgment of the High Court but the same had been applied prospectively and without giving any monetary and seniority benefits to Shri Gupta.

High Court Judgment:

The High Court having regard to the pleadings of the parties and submissions made before it formulated the following questions:-

> "1. Whether the Commission has the competence and jurisdiction to frame the Jammu and Kashmir Public Service Commission (Conduct of business and Procedure) Rules, 1980?
>
> 2. Whether the selection made applying criteria prescribed under Rule 51 of the Rules (supra), has the effect of ignoring Rule 8 of the Jammu & Kashmir Medical (Gazetted) Service Recruitment Rules, 1979, which prescribes the statutory method of recruitment to the posts in teaching wing?
>
> 3. Whether the experience as ad hoc lecturer can be counted as experience gained as Registrar/Tutor, Demonstrator/Tutor or Senior Resident/Tutor to meet the requirement of statutory eligibility condition to seek consideration for selection and appointment as lecturer?
>
> 4. Whether 100 marks earmarked for viva voce test and 40 marks for record as per the criteria contained in rule 51 (supra), are excessive and capable of turning the merit into demerit in view of the judgments of the Supreme Court and thus Rule 51 needs re-consideration?

5. Whether the selection of respondents 6 to 10 and particularly of respondents 3, 6, 9 & 10 is bad being not in accordance with the statutory method of selection and is also the result of arbitrary selection?"

As regard question No.1, it was answered in the negative stating that although no such power is expressly conferred upon the Commission but proceeded to hold that the Commission had the competence and jurisdiction to frame such regulatory procedural rules for conduct of its own business and this power is impliedly granted by the enactment. As regard question No.2, the High Court was of the opinion that Rule 8 of 1979 Rules prevailed over Rule 51 of 1980 Rules holding that no additional qualification can be attached or added to the prescribed eligibility qualification or method of selection by the Commission holding:-

> "Thus, the Commission has not properly followed and applied the method of selection relating to the service, while making selection, prescribed under rule 8 of Rules 1979."

As regard the eligibility of the Respondents 3, 6 & 9, the High Court noticed that the said respondents did not possess requisite experience observing that the Commission did not specifically explain as to how these Respondents were said to have possessed two years experience as Registrar, Demonstrator or a Senior Resident. It was held:-

> "Respondent No.3 Dr.Jaipal Singh, is having experience as Registrar only of 22 months whereas Respondent No.9 Dr.Jatinder Singh is having experience of 20 months 27 days which is less than two years."

As regard the question No.4, the High Court answered the same in the affirmative relying on various decisions of this Court. It was held that in Engineering Service there is no such rule providing statutory method of selection as is found in Rule 8 of 1979 Rules holding:-

> "Rule 51 providing 100 marks for viva voce against 40 for record, makes a departure and is apparently contrary to the law laid down by the Supreme Court and necessitates re-consideration of Rule 51 for the added reason that there is no consensus of judicial opinion rendered in Abdul Wahid Zargar's case vis-à-vis the judgments of the Supreme Court that marks for viva voce test could exceed the marks assigned for record/academic merit, where the selection is made on the basis of interview alone. There is another reason also that Rule 51 has not taken care of Rule 8 of Service Rules 1979, consequence whereof is that the statutory method of selection has not been comprehensively followed and adopted in the rule. For these reasons Rule 51 is required to be recast."

While answering question No.5, the High Court noticed that no marks had been assigned for the research experience, publications or previous record of work, which could not be ignored as there

was a statutory obligation upon the Commission to make selection according to the statutory rules governing the service and further noticing that the Respondent Nos.4, 5 & 7 (namely, Masood Tanvir Bhat, Samia Rashid and Parvez Ahmed Shah) could not secure any mark out of the 15 marks as they did not possess the requisite research experience etc. and were not found entitled thereto but despite the same had been selected as higher marks were allotted to them in the viva voce test. It was held:-

> "It is established from the record that the selection has been based upon 15 marks for record (as 25 marks could not be utilised) and 100 marks for interview. The claim of the respondent-Commission that 40 marks have been taken into consideration for record while applying Rule 51, is not forthcoming from the record maintained by the Commission.
>
> The Petitioner is admittedly possessed of the higher qualification and record of research experience, publications etc. in comparison to the other selected candidates. Respondents 3 and 9 are not having any such record. The petitioner has been assigned minimum marks in the viva voce which has down-graded him in the merit list of the candidates supplied to the court even though he is D.M. The Commission has turned the merit of the petitioner into de-merit by giving minimum marks..."

Despite such findings, the High Court refused to set aside the entire selection on the premise that the same had been made long ago and one of the respondents had been promoted and proceeded to dispose of the writ petition with the directions as noticed hereinbefore.

Submissions:

Mr.Ranjit Kumar, learned counsel appearing on behalf of the appellant would submit that Rule 51 of 1980 Rules framed by the Public Service Commission is not statutory in nature. He would urge that keeping in view the advertisement issued, the Commission was bound to scrupulously comply with the requirements as regard qualification etc. and should have strictly applied Rule 8 of 1979 Rules which is admittedly statutory in nature. The Learned Counsel would further contend that as the Commission had no jurisdiction to frame such rules, the same should have been declared ultra vires by the High Court. Mr.Ranjit Kumar would urge that Section 133 of the Jammu and Kashmir Constitution which is in pari materia with Article 320 of Constitution of India clearly provides that only in certain situations the Governor can frame regulations as a result whereof the necessity to consult the Commission may be done away with. The Rules framed by the Public Service Commission does not also satisfy the test laid down in the proviso appended to Section 133 of the State Constitution or for that matter Article 320 of the Constitution of India and in any event the same having not been laid before the Legislature as is mandatorily required under sub-section (4) thereof, the selection held pursuant to or in furtherance

of Rule 51 of 1980 Rules must be held to be wholly illegal and without jurisdiction.

The Learned Counsel Kumar would argue that having regard to the findings arrived at by the High Court, the writ petition could not have been disposed of in the manner as was sought to be done inasmuch as some of the private respondents admittedly did not have the requisite qualification or experience to be appointed. Merit of the appellant, it was contended, having admittedly been turned into demerit as was found by the High Court, relief by way of solace given to the appellant by placing him respondent No.6 & 9 must be held to be insufficient and he, in any event, deserved to be placed above some other respondents in view of the fact that he had not been assigned 5 marks for higher qualification. In any view of the matter, awarding of 100 marks in viva voce examination out of the total 115 marks (as no marks have been awarded for academic merit) was bad in law.

The learned counsel would further submit that as some of the respondents did not have two years' experience and as admittedly Respondents No.3 to 5 did not have any higher qualification, there was no reason as to why the entire selection was not set aside. Lapse of time in selection of the candidates may not itself be sufficient ground to uphold his selection, the learned counsel would urge, having regard to the seniority of the petitioner and further having regard to the fact that all the private parties being in the service of the State, they could only be reverted back to their parent departments and would not be out of job.

Mr. Anis Suhrawardy, learned counsel appearing on behalf of the State of Jammu and Kashmir, on the other hand, would submit that keeping in view the fact that appellant Inder Parkash Gupta had already been promoted and furthermore in view of the subsequent event this Court should not interfere in the matter.

No submission was made on behalf of any other parties to the appeals.

Analysis:

Section 133 of the Jammu & Kashmir Medical (Gazetted) Service Recruitment Rules, 1979 admittedly were issued under Section 124 of the Jammu and Kashmir Constitution which is in pari materia with Article 309 of the Constitution of India. The said rules are statutory in nature. Public Service Commission is a body created under the Constitution. Each State constitutes its own Public Service Commission to meet the Constitutional requirement for the purpose of discharging its duties

under the Constitution. Appointment to service in a State must be in consonance with the constitutional provisions and in conformity with the autonomy and freedom of executive action. Section 133 of the Constitution imposes duty upon the State to conduct examination for appointment to the services of the State. The Public Service Commission is also required to be consulted on the matters enumerated under Section 133. While going through the selection process the Commission, however, must scrupulously follow the statutory rules operating in the field. It may be that for certain purposes, for example, for the purpose of short-listing, it can lay down its own procedure. The Commission, however, must lay down the procedure strictly in consonance with the statutory rules. It can not take any action which perse would be violative of the statutory rules or makes the same inoperative for all intent and purport. Even for the purpose of short-listing, the Commission cannot fix any kind of cut off marks. [See State of Punjab & Ors. vs. Manjit Singh and Ors. [2003 (11) SCC 559].

Rule 8 mandates that while selecting the teaching wing of the service, the Commission must have regard to the academic qualification of the candidate, teaching experience, research experience and previous record of work, if any.

Rule 8 does not speak of any viva voce test. It, however, appears that so far as academic qualification is concerned, the same had been laid in the advertisement and the requirement of M.D. (Medical/ General Medical), MCRF, FRCP, Speciality Board of Internal Medicine (USA) or an equivalent qualification of the subject. So far as the teaching experience is concerned, two years experience as Registrar/Tutor/Demonstrator/ Tutor or a Senior Resident in the discipline of medicine in a recognised teaching medical institution recognised by the Medical Council of India was specified.

So far as the teaching experience is concerned, the Commission awarded marks to those who had even less than two years experience. One mark was to be awarded for every full year of experience subject to a total of 5 marks. Sports/Games distinction in NCC activities had also been taken into consideration which were not the criterion prescribed under the 1979 Rules. There is nothing to show that any mark was awarded in relation to the previous record of work, if any.

In its judgment, the High Court did notice that in awarding marks for minimum qualification prescribed for the post, the Commission did not award any mark at all to some respondents. It, therefore, for all intent and purport had considered the candidatures of the candidates only on the basis of 110 marks. If the marks awarded for sports/games and NCC activities are excluded as they are beyond the

purview of Rule 8; and as it fixed 100 marks for viva voce test, a clear case of breach of the Statutory Rules had been made out. While the appellant had been given minimum marks in the viva voce test, the other respondents who even did not fulfill the requisite criterion were awarded higher marks.

The High Court, in our opinion, was correct in holding that Rule 51 providing for 100 marks for viva voce test against 40 for other criteria is contrary to law laid down by this Court.

[See Union of India and Anr. Vs. N.Chandrasekharan & Ors. [AIR 1998 SCC 795], Indian Airlines Corporation Vs. Capt. K.C.Shukla & Ors. [1993 (1) SCC 17], Anzar Ahmad Vs. State of Bihar and Ors. [1994 (1) SCC 150] and Satpal and Ors. Vs. State of Haryana and Ors. [1995 Suppl. (1) SCC 206]

It is true that for allocation of marks for viva voce test, no hard and fast rule of universal application which would meet the requirements of all cases can be laid down. However, when allocation of such mark is made with an intention which is capable of being abused or misused in its exercise, it is liable to be struck down as ultra vires Article 14 of the Constitution of India.

[See Jasvinder Singh & Ors. Vs. State of J & K and Ors.[2003 (2) SCC 132], Vijay Syal and Anr. Vs. State of Punjab and Ors. [2003 (9) SCC-401].

It is also trite that when there is requirement of consultation, in absence of any statutory procedure, the competent authority may follow its own procedure subject to the conditions that the same is not hit by Article 14 of the Constitution of India.

[See Chairman & MD, BPL Ltd. Vs. S.P.Gururaja and Ors. [2003 (8) SCC 567]

We would proceed on the assumption that the Commission was entitled to not only ask the candidates to appear before it for the purpose of verification of records, certificates of the candidates and other documents as regards qualification, experience etc. but could also take viva voce test. But marks allotted therefor should indisputably be within a reasonable limit. Having regard to Rule 8 of 1979 Rules higher marks for viva voce test could not have been allotted as has rightly been observed by the High Court. The Rules must, therefore, be suitably recast.

The High Court assigned sufficient and cogent reasons in support of its conclusions which have been noticed by us hereinbefore. We agree with the said reasonings.

The only question which survives for consideration is what would be the meaning of the 'post' contained in Rule 51 (b)?

In our opinion, a higher qualification than the basic (minimum) prescribed for the post would evidently mean the department of superspeciality for which the appointment was made and not any other superspeciality.

Conclusions:

Having held so, the question which remains to be determined is as to what relief should be granted to appellant herein.

While issuing the Notification dated 22.5.2002 the State evidently did not fully comply with the judgment of the High Court. The appellant in view of the judgment of the High Court was not only entitled to be placed in the select panel above Respondent Nos.3 and 9 but also should have been given all consequential service benefits which would include monetary benefits, seniority etc.

In ordinary course we would have allowed the appeal but we cannot lose sight of the fact that the selections had been made in the year 1994. A valuable period of 10 years has elapsed. The private respondents have been working in their posts for the last 10 years. It is trite that with a view to do complete justice between the parties, this Court in a given case may not exercise its jurisdiction under Article 136 of the Constitution of India.

[See Chandra Singh and Ors. Vs. State of Rajasthan and Anr. [2003 (6) SCC 545], M.P.Vidyut Karamchari Sangh Vs. M.P. Electricity Board [JT 2004 (3) SC 423] and State of Punjab & Ors. Vs. Savinderjit Kaur [JT 2004 (3) SC 470]

We are, therefore, of the opinion that the interest of justice would be subserved if the State is directed to fully comply with the directions of the High Court by giving all benefits to the appellant herein including monetary benefits and seniority by placing him in the select list above Respondents 3 and 9. We further direct that if any respondent has been promoted to the higher post in the meantime the same would be subject to our aforementioned direction. Necessary order in this behalf must be passed by the State.

These appeals are disposed of accordingly. The cost of the appellant herein shall be borne by the State of Jammu and Kashmir quantified at 10,000; we hope and trust that the State of Jammu and Kashmir as also Jammu and Kashmir Public Service Commission shall make all endeavours to see confidence in the Statutory Bodies restored, and they would henceforth comply with legal requirements strictly and scrupulously.

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HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

OWP Nos.442/2005, 150/2006, 423/2005, 424/2005, 425/2005, 510/2005, 540/2005, 542/2005, 553/2005 and 652/2006

SWP Nos.1210/2005, 1341/2005 and 1386/2005

D.D. 10.11.2006

Hon'ble Mr. Justice Y.P.Nargotra, Judge

Kuldeep Kumar & Ors. ... Petitioners

Vs.

State of J&K & Ors. ... Respondents

Examination:

Objective type Examination – Errors in questions/answers; spelling/printing mistakes in question paper – whether re-examination has to be done? – No. Such questions can be deleted and marks for those questions can be distributed on pro rata basis to the remaining correct questions while evaluating the answer sheets.

There were a large number of complaints regarding Combined Services (Preliminary) Examination 2005 made by the candidates in the media pointing out mistakes/errors in the question papers, printing errors etc. – Commission unanimously decided that such of the reported questions as were admittedly wrong, would be deleted and the marks of such deleted questions would be added pro-rata to rest of the questions – Thereafter the result was declared – Petitioners being unsuccessful filed the present petitions – High Court after observing the methodology adopted by the Commission and examining the disputed question in each paper listed the number of questions in various subjects required to be deleted, but by that time in view of the interim order of the Division Bench Main examination was already conducted, allowed the writ petitions to redraw the merit list and to conduct special Main Examination of all such candidates who have secured equal or more than the short listed candidate in accordance with the procedure.

Held:

Conduct of dissenting Members publicly criticizing the majority decision of the Commission was deprecated.

Further held:

In an institution where decisions are required to be taken by a group of persons in position on the basis of majority opinion, if during the decision making process some Member expresses his dissent or reservation, the same gets obliterated when ultimately final decision is taken. Being bound by such a decision, no member of the group is entitled to publicly criticise the decision on the strength of his personal views.

Further held:

Disability of a Member whose kin is a candidate is limited to his participation at such stage of selection where the merit of his ward was to be judged. He is not debarred from participating in the meetings in which general policy decisions were required to be taken.

ORDER

The dispute in this batch of writ petitions relates to the Combined Services (Preliminary) Examination, 2005, conducted by the Jammu and Kashmir Public Service Commission for short listing of candidates for the Main Examination for making selection in respect of the posts in combined services of the State of Jammu and Kashmir.

The State Government referred 132 posts for the combined services to the Jammu & Kashmir Public Service Commission (hereinafter referred to as the Commission) for making selection of candidates for direct recruitment on the basis of Combined Competitive Examination. Procedure for conducting the Combined Competitive Examination is governed by the rules framed under SRO 161 dated 17 July 1995. The rules envisage Combined Competitive Examination consist of two successive stages.

1. Combined Services (Preliminary) Examination (objective type) for the selection of candidates for the main examination; and
2. Combined services (Main) Examination (Written and interview) for the selection of candidates for the various services and posts.

The Preliminary Examination consists of two papers – (i) compulsory paper of General Studies and (ii) optional subject to be opted by the candidates out of 22 specified subjects set out in Appendix-IX of the rules. This examination is meant to serve only as a screening test and the marks obtained by the candidates in the Preliminary Examination, who are declared qualified for the Main Examination, are not to be counted for determining their final order of merit. The number of candidates to be admitted to the Main Examination is not to be more than 1:13 times the total approximate number of vacancies to be filled in various services and posts. It is also provided in the rules that only those candidates who obtain such maximum marks in the Preliminary Examination, as may be fixed by the Commission as its discretion, are to be declared by the Commission to have qualified in the Preliminary Examination in a year, provided they are otherwise eligible for admission to the Main Examination.

The Main Examination consists of written examination and an interview test. The written examination consists of papers of conventional essay type, out of which one paper is to be of qualifying nature only, in the subjects set out in Appendix-IX and as per the detailed syllabus in Appendix-IB. The candidates who obtain such minimum qualifying marks in written part of the Main Examination, as may be fixed by the Commission in any or all the papers at their discretion, would be entitled to be summoned for an interview.

The Commission vide its notification No.PSC/EXM-05/27 dated 1.4.2005 invited applications from the candidates for the Preliminary Examination of J&K Combined Competitive Examination, 2005. In response, 17116 candidates applied. The Preliminary Examination was conducted by the Commission simultaneously at Jammu and Srinagar on 3.7.2005 at 24 centers/sub-centers, in which 15293 candidates appeared. The compulsory paper in the General Studies subject carried 150 marks for 120 questions, each question containing 1.25 marks, whereas the optional paper out of 22 subjects was carrying 300 marks for 120 questions, each question having 2.5 marks. After the Preliminary Examination, a large number of complaints came to be made by the candidates in the media pointing out mistakes/errors in the question papers.

In the face of complaints, the Commission on 6 July 2005 made a public announcement that the general grievance of the candidates would be given due consideration by it while evaluating the answer scripts. The Commission considered the issue in its meetings held on 7 July 2005, which was attended by its Chairman, Mr. M.S.Pandit and four members, namely, M/S M.S.Khan, C.L.Banal, Ch. Bashir Ahmed and Dr. N.A.Jan; the 5th member Prof. B.K.Tiku was not available on the said date. The Commission received the representations of aggrieved candidates up to 10.7.2005. For Combined Services (Main) Examination, the Commission based on the result of Combined Competitive (Preliminary) Examination fixed 50% and 40% of aggregate marks for the general category and reserved category candidates respectively as the minimum qualifying marks for short-listing in the ratio of 1:13.

The Commission unanimously decided that such of the reported questions, as were admittedly wrong, would be deleted and the marks of such deleted questions would be added pro-rata to rest of the questions. While deciding about the modus operandi to deal with the wrong questions, the Commission kept in view the manner in which such like situation was being dealt with by other examination conducting bodies like Union Public Service Commission.

The Commission deleted such questions from the question papers, which according to it were admittedly wrong or had major printing errors. The marks of excluded questions were added to the remaining questions. On 11 July 2005, an extra-ordinary meeting was called by the Commission, in which it was decided to prepare the result of candidates who appeared in the examination, indicating the marks separately obtained in General Studies and Optional paper. It was also decided that thereafter the result would be formally brought before the Commission for its approval, before the

same is notified for general public. This meeting was attended by Mr. M.S.Pandit, Chairman and the Members, namely, Mr.C.L.Banal, Mr.B.K.Tiku, Ch. Bashir Ahmed and Dr. N.A.Jan. On 12 July 2005, the Full Commission in an extra-ordinary meeting approved the result of J&K combined Competitive (Preliminary) Examination, 2005. Pursuant to such approval, the result was declared and notified on the same date.

Consequent upon the declaration of result, the private respondents have been declared qualified for the Main Examination, whereas, the writ petitioners being unsuccessful could not find berth in the select list. Being aggrieved of their exclusion from the competition, they have filed the present writ petitions.

The case of petitioners put broadly is that the two papers, i.e., General Studies and the other relating to optional subjects were containing incorrect questions, which besides wasting the time of candidates in understanding the same, put them in a disadvantageous position and they have been made to suffer without any fault attributable to them. It is also the case of petitioners that while conducting the Preliminary Examination, the Commission violated the examination rules and, therefore, whole of the examination process is bad in law.

The stand of the Commission in short is that the rules for conducting the examination were strictly followed and the wrong questions have been deleted while evaluating the answer sheets of the candidates. Further, the marks of deleted questions have been distributed to the correct questions of each concerned paper on pro-rata basis, therefore, no prejudice whatsoever has been caused to the candidates, especially the petitioner herein.

I have heard learned counsel for the parties and perused the record of Commission as well.

The first question arising for consideration is as to whether there was any violation of examination rules for conducting the Preliminary Examination. The ground of violation of examination rules has specifically been raised in OWP No.150/2006. In the said petition two Members of the Commission, namely, Prof. B.K.Tiku and Dr. N.A.Jan have been impleaded as respondents and they have also filed their personal affidavits.

For determination of the controversy, it would be beneficial to note the following few averments made in the writ petition:

"2. That whole of the proceedings held by the Commission are against the provisions of JKPSC (Business & Procedure) Rules, 1980. It is only the Chairman of Commission who acted in utter disgrace and flagrant violation of said Rules and not only confirmed various proceedings of Commission pertaining to said selection on its own without having approval or consent of other members.

The Commission consists of three members namely,

1. Professor B.K.Tiku
2. Dr. N.A.Jan and
3. Shri Bashir Ahmad Choudhry

Besides the aforesaid three members, the Chairman, namely, Mohd. Shafi Pandit has to act as per the consent of said three members. As per Rule 5 of JKPSC (Business & Procedure) Rules, 1980, the Chairman or a member of Commission is not supposed to participate in selection for reasons of his close kinship with candidate. Shri Bashir Ahmed Chaudhary, one of the Members of Commission was not entitled to participate in the selection process. As per Rule 9 of said Rules, the decision at the meeting of Commission could be taken in keeping with view of majority of members thereof. The Chairman can cast vote in the case of tie only."

"3. It is submitted that after having considered the irregularities, mistakes and errors contained in question paper of General Studies and other optional subjects, out of 3 Members of J.K. Public Service Commission (herein after referred to a Commission) Prof. B.K.Tiku and Dr. N.A.Jan refused to sign the proceedings as well as result of preliminary examination of Commission. Shri N.A.Jan in his dissenting note stated as under:-

"Therefore, I was not in agreement with the modus operandi adopted therein, during the process. In actual practice, those examiners, who have set these papers, should have been called, along with Local Senior Experts, in the subject not less than a Professor in the University and these should have been given a free hand, to go through these documents. No reference books were provided to the Experts, as you cannot expect an expert to be well versed in all relevant disciplines in a particular subject. Without having a text book/ reference books at his disposal, besides spelling mistakes, were not mostly taken into consideration and due to confused questions, a lot of time was wasted with the result candidates have complained regarding the loss of time and loss of concentration and most of the candidates suffered on this account, with no fault of theirs and have not been sufficiently compensated thereof."

Similarly, in separate dissenting note, Prof. B.K.Tiku (Member Commission) raised the following objections.

"It appears that in the present set up the style of functioning of the Hon'ble Chairman smacks of authoritarianism and apparently it appears that a multi-dimensional Commission is leading towards one-man Commission. Now, under the present circumstances, it would be befitting that the Chairman may look himself after the business normally assigned to Member establishment as well with immediate effect. It is pertinent to point out the

order for the appointment of Members Establishment were hesitantly issued after a long gap for the reasons best known to Hon'ble Chairman. This has been in contravention to the practice of appointing the senior most member of the Commission to this position immediately after the vacancy would arise. But in this case a record was set up where it took a very long period of decide whether to follow this constitutional obligation or not."

"4. It is submitted that here that out of 3 members of Commission, as mentioned above, two Members namely, Prof. B.K.Tiku and Dr. N.A.Jan refused to sign the proceedings and result. The third member namely Shri Bashir Ahmed Choudhry, who was incompetent to participate in the selection process, as his son Sh. Suleman Choudhary was one of the aspirants.

Shri Bashir Ahmed Chaudhary, one of the Members of Commission at the insistence of Chairman of Commission, Shri Mohd. Shafi Pandit signed all the proceedings of selection and the result, and the result of preliminary examination was approved and declared by the signature of Shri Bashir Ahmed Choudhary alone, who was incompetent to participate in the selection process.

Thus out of three members of Commission, two refused to approve and sign the proceedings and the result of preliminary examination, and third member was incompetent for participating in the selection process on account of his son, who was also an aspirant in the said selection. Thus the Commission declared the result of preliminary examination on the direction of Chairman only."

From the above averments of the petition, the ground for challenging the examination process has been built upon the edifice that the Commission consisted of Chairman and three Members, namely, Dr. N.A.jan, Choudhary Bashir Ahmed and Professor B.K.Tiku. The two Members, namely, Dr. N.A.Jan and Shri B.K.Tiku dissented, whereas the third Member, Ch. Bashir Ahmed was incompetent to sign the proceedings and the result of Preliminary Examination. The decisions taken by the Commission, therefore, can only be deemed to be the decisions of Chairman and not of the Commission.

It may be curious to note that the two Members, namely, Shri B.K.Tiku and Dr. N.A.Jan, who have been arrayed as respondents, instead of supporting the decisions of Commission, of which they were the Members, have filed their personal affidavits supporting the case of petitioners. At this stage, it would be apt to refer to the relevant portions of their reply affidavits. The relevant averments made by Prof. B.K.Tiku are as follows:

"2. That it is unfortunate that immediately after the conduct of the above preliminary examinations, the procedure and process undertaken by the Commission was griped in a serious controversy in that series of complaints were raised, regarding wrong questions, wrong answers, doubtful keys vis-à-vis the questions, printing errors etc. etc. by the candidates both in the press as also the electronic media."

"As submitted above consequent to the conduct of the preliminary examination on 3.7.2005, large number of complaints came to be expressed by the candidates in the media, pointing out mistakes/errors in the question papers. In the face of said complaints, the matter as well was considered by the Commission in the meeting held on 7th and 14th July, 2005. In the said meetings, the Members of the Commission discussed the procedure being adopted by the Commission for making necessary corrections/deletions in the questions papers, keeping in view the wrong questions, wrong answers and doubtful keys. In fact the answering respondent immediately after examination was over on 3rd July 2005, had been raising the issue that the entire process regarding the matter was not in accordance with the laid down procedure/norms. Notwithstanding the fact that he had not been associated in the matter of selection of paper setters and formulation of question papers, the answering respondent possessed with experience of 35 years as a Teacher and as an expert examiner for number of Universities in the Country for nearly two decades had suggested during the above meetings that in the face of the aforesaid complaints of the candidates, the Commission ought to follow the well settled practice, to invite the paper setters concerned along with local senior experts in the subject in the rank of not less than a Professor in the University. The answering respondent had also suggested that the paper setters and such senior expert should be given a free hand to go through the question papers for examining the objections regarding misprints, wrong answers, defective keys and out of syllabus questions as also the confused questions, before finalization of the results. The answering respondent also emphasized the necessity to opt for cancellation of the examination and holding of fresh examination atleast vis-à-vis those papers, where large scale defects had been pointed out. This according to the answering respondent was warranted in the interests of fairness, so as to enable the candidates to display their talent and merit more effectively.

3. That it is submitted that the Commission besides the answering respondent is comprised of three members, which also include the Chairman, with other members being Dr. N.A.Jan and Shr. Chowdhary Bashir Ahmed. The said member, Chowdhary Bashir Ahmed though disabled to participate for the reason of one of his close relations being a candidate, however, also associated in the meetings aforementioned. It is submitted that the above suggestions made by the answering respondent though supported by the other member, Dr. N.A.Jan, have failed to earn the agreement of the Hon'ble Chairman. It was in this process that the complaints received by the Commission pursuant to the public notice dated 6.7.2005 were examined by the Commission without associating the answering respondent and other Hon'ble Member Dr. N.A.Jan, leading both, the answering respondent and the said member to record their dissent in approving the results of the preliminary examination, which however, was declared by the Commission inspite of the disagreement. It is significant to mention that besides recording his dissent, the answering respondent as well has not signed the results drawn for the said preliminary examinations."

Respondent No.5 Dr. N.A. Jan, taking the identical stand as taken by Prof. B.K.Tiku, respondent No.4 in his reply/affidavit, further stated:

"5. That, in the above back drop, the answering respondent over whelmed by his constitutional obligations deems it proper to state and submit that the examination process

and procedure adopted by the Commission in the matter of conduct of preliminary examinations aforementioned, has not been in accordance with the mandate of law, but is deeply infested with serious and fatal errors, denuding the same of its sanctity. The process and procedure obviously is not fair and just."

From the above averments, the stand of Mr. Tiku and Mr. Jan, the Members of the Commission respondents No.4 and 5 herein, appears to be that the suggestions made by them about the manner in which the issue relating to the questions with the discrepancies should be dealt with, were not given heed to by the Chairman while deciding about the modus operandi to be adopted and for approving the result. One Member, namely, Ch. Bashir Ahmed was disabled to participate in the meeting in view of his ward being one of the candidates. Their further stand is that the complaints of the candidates were examined without associating them in the process.

The stand of the Commission is that the issue for evolving the modus operandi in dealing with the situation was taken in its meeting held on 7 July 2005. The meeting was attended by the Chairman, Mr. M.S.Pandit and the members, namely, M/S M.S. Khan, C.L.Banal, Ch. Bashir Ahmed and Dr. N.A.Jan, in which it was unanimously decided that such of the reported questions as were admittedly wrong, would be deleted and the marks of such deleted questions would be added pro-rata to rest of the questions so that no prejudice is caused to any of the candidates. Relevant extract of the decision reads as follows:-

"The KAS/Combined Services Competitive Examination, 2005 was held at 24 centers and many more sub centers spread over cities of Jammu and Srinagar on 3rd July 2005. During the course of Examination a number of candidates/aspirants represented that both in General Studies paper as well as in optional papers there were a number of in corrections in the form of wrong questions, directionless questions, repetition of questions and so on. Through a press release the candidates for the aforesaid examination were assured that their representations will be considered in consultation with subject matter specialists and necessary adjustments will be made in the evaluation of response sheets and awards there.

Accordingly, based on the representations received so far, experts/heads of the departments from various institutions/universities were requested to go through General Studies and optional papers considered. Based on their scrutiny and recommendations adjustments were made in the number of questions and consequential awards out of the permissible maximum marks of the question papers. The Commission approved the modus operandi for making necessary adjustments based on such representations."

It is also the stand of Commission that it examined all such representations as were received upto 10 July 2005, in consultation with the experts as well as the examiners concerned in the relevant subjects. Based on such examination, the Commission decided to exclude from evaluation such of the questions as were admittedly wrong or had major printing errors (which printing errors remained from being corrected through timely announcements in the examination halls). The marks of the excluded questions were added to the remaining questions. In its reply it has also been submitted by the Commission that after the preparation of result on the above lines and before notifying the same, it was placed before the Full Commission in its extra-ordinary meeting held on 11 July 2005, wherein it was decided that the result of all the candidates, who appeared in the examination, be prepared by separately indicating the marks obtained in General Studies and optional papers. It was further decided that the result would be formally brought before the Commission for approval, before notifying the same for general information.

It is the further stand of the Commission that on 12 July 2005, the Commission in its extra ordinary meeting separately approved the result of J&K Combined Competitive (Preliminary) Examination, 2005. The extra ordinary meeting was attended by Shri M.S.Pandit, Chairman and the Members, namely, M/S M.S.Khan, C.L.Banal, Prof. B.K.Tiku, Ch. Bashir Ahmed and Dr. N.A.Jan. After the Commission approved the result, it was declared on 12 July 2005, separately indicating the marks obtained by the candidates in General Studies and optional papers.

Mr. Bhim Singh, while reiterating the stand taken in the writ petition in the light of affidavit of respondents No.4 and 5, in his inimitable style argued that the Preliminary Examination conducted by the Commission was nothing but a fraud on the constitutional rights of the petitioners, resulting into their ouster from the competition.

The basic assumption, on the basis of which the decision of the Commission taken for evolving the methodology for dealing with admittedly wrong questions is being called in question, is factually misconceived. The Commission did not consist of the Chairman and three Members as is being urged by the petitioners, but indisputably at the relevant time it was consisting of a Chairman and five Members, namely, Mr. M.S.Khan, Prof. B.K.Tiku, Mr. C.L.Banal, Ch. Bashir Ahmed and Dr. N.A.Jan. The decision for evolving the methodology was taken by the Commission in its 10th meeting held on 7 July 2005. As per the stand of Commission, the 10th meeting was attended by the Chairman, Sh. M.S.Pandit and the Members, namely, M/S M.S.Khan, Mr. C.L.Banal, Ch. Bashir Ahmed and Dr. N.A.Jan.

Respondent No.4, Sh. B.K.Tiku did not participate. According to Mr. Raina, learned counsel for PSC, Mr. B.K.Tiku could not participate because on that date he was not available. In his affidavit, Prof. B.K.Tiku has not stated anywhere that he was available in the Commission but was not called for the meeting. Be it so, the fact remains that the meeting was attended by the Chairman and four Members, in which the modus operandi for dealing with the situation was evolved.

From the minutes of 10th meeting dated 7.7.2005, produced by the Commission, it is revealed that all the Members attending the meeting had unanimously resolved for adopting the said modus operandi for dealing with the wrong questions appearing in the question papers. The minutes were recorded by the Secretary of the Commission.

Pursuant to the above decision, the Commission decided to delete the admittedly wrong questions of various subject papers. This decision bears the signatures of all the participants including Dr.N.A.Jan. Thereafter, the Commission again met on 11.7.2005, in which besides the Chairman, all the Members including Prof. B.K.Tiku and Dr. N.A.Jan participated, in which the following resolution was passed:

> "... These representations were scrutinized in consultation with the examiners of relevant subjects and subject experts. Necessary action to be taken in the matter on the lines previously discussed in the Commission was approved.
>
> It was also decided that the result for all the candidates who appeared at the examination be prepared indicating separately the marks obtained in General Studies and Optional papers. The result will be brought formally for the approval by the Commission before the same is notified for general information. After this is done, the candidates in various categories to be called to appear at the Main Examination will be short listed."

Before notifying the result, another meeting was held by the Commission on 12.7.2005, in which it was again unanimously decided that the result be notified. This meeting was attended by the Chairman and all the Members.

The decisions taken in the 10th meeting, dated 7.7.2005 were confirmed by the Full Commission in its meeting held on 14.7.2005, which reads as under:

> "Confirmation of minutes of the 10th meeting of the Commission held on 07.07.05:
>
> The minutes were confirmed with the observation from the Hon'ble Member Dr.N.A.Jan that although he had agreed to the deletions of various questions brought up before the Commission, his reservations regarding the procedure followed for dealing with the representations received from the candidates in respect of various papers set for the J&K Combined Services Competitive (Preliminary) Examination, 2005 be placed on record. He was joined in this regard by Prof. B.K.Tiku. The specific objection that they had to the procedure adopted was not mentioned by them."

From the minutes of the meetings referred above, it is quite evident that the decisions taken by the Commission in these meetings were majority or unanimous decisions. The two Members, namely, Prof. B.K.Tiku and Dr. N.A.Jan though had expressed their reservations to the modus operandi, but their opinion did not persuade the other Members to join with them, so they also ultimately went with the majority. Assuming that they had not joined the majority, even then their dissent per se does not in any manner invalidate the decision of Commission on the ground of procedural impropriety.

As per Rule 6 of Business & Procedure Rules, Examination Rules, 2005, the necessary quorum of the meeting was:

> "Where the number of members is even, one half of the number with the addition of one shall constitute quorum for meeting. Where the number is odd the quorum shall be such number as may exceed half the total number of Members."

In none of the above meetings, the quorum was deficient. Rule 9 provides:

> "Decision at the meeting of the Commission shall be taken in keeping with the views of the majority of members thereof. The Chairman shall have casting vote in case of tie. Where a case is circulated and a difference of opinion exists, the case shall be again referred to the dissenting Member(s). In case the Member(s) stick(s) to the views already expressed by him/them, the case shall be put up at a meeting of the Commission for a final decision."

And Rule 11 provides:

> "All decisions of the Commission taken at its meeting shall be recorded by the Secretary. The draft of the minutes shall be put up by the Secretary to the Chairman for approval; thereafter the minutes shall be circulated to Members and subsequently brought up for formal confirmation at the next meeting of the Commission."

The decisions of the Commission being majority decisions, which were duly confirmed in the next meetings, do not in any manner suffer from the procedural impropriety or invalidity.

As regards the participation of Choudhary Bashir Ahmed, Member in the meetings of the Commission, the contention of petitioners is that he was disabled because his ward was appearing in the examination. The contention is without any merit. The question of his disability could arise only in case of his participation at such stage of selection where the merit of his ward was to be judged. He was not debarred from participating in the meetings in which general policy decisions were required to be taken. Thus, there is no valid ground to hold that there was any infraction of Examination Rules.

Now I would deal with the principal ground of challenge to the validity of Preliminary Examination relating to the questions of question papers having discrepancies.

The case of petitioners is that in all there were 229 wrong questions in General Studies paper and 13 optional subject papers; namely, Agriculture, Botany, Chemistry, Geography, Geology, Indian History, Law, Mechanical Engineering, Mathematics, Physics, Political Science, Sociology and Zoology; whereas the stand of Commission is not that there was no discrepancy at all in any of the question papers. The Commission's admitted stand is that there were discrepancies in 64 questions of General Studies and some optional subject papers, which include 37 questions of Animal Husbandry subject paper, and the same have been deleted and their marks distributed on pro-rata basis to the remaining correct questions of respective subjects, while evaluating the answer sheets.

Before the methodology adopted by the Commission for dealing with the marks of deleted questions is put to judicial scrutiny, it would be appropriate to determine how many questions of the question papers can be treated as wrong questions, because there is a dispute between the parties to the number of such questions. The Preliminary Examination consisted of two papers, i.e., one compulsory paper of general Studies and the other in optional subject out of 22 given subjects.

COMPULSORY PAPER OF GENERAL STUDIES

The paper was having 120 questions carrying 150 marks, with each question having 1.25 marks. The question papers in every subject were set in four series, i.e., A, B, C & D; meaning thereby that the same questions appeared at different serial numbers in each of the series. I would be dealing with 'A' series of the papers. It is the admitted stand of Commission that out of 120 questions of General Studies paper, only 7 questions bearing Nos.2, 26, 33, 41, 42, 93 and 107 were found to be wrong, so those were deleted. According to petitioners, there were 13 questions and not 7 questions with discrepancies. The petitioners' objection relates to question Nos.2, 6, 10, 26, 33, 41, 42, 55, 72, 93, 94, 96 & 107. Thus, the dispute is with regard to question Nos.6, 10, 55, 72, 94 & 96, whereas the remaining questions pointed out by the petitioners have been admitted by the Commission to be wrong and, as such, have been deleted and their marks adjusted to pro-rata basis. The text of wrong questions objected to by the petitioners, stand of the Commission and the key answers read as under:

Q.No.	Text	Objection of Petitioners	Stand of the Commission	Key answer
2.	What is the International Date Line? (a) It is the equator (b) It is the 0 degree longitude (c) It is the 90 degree east longitude (d) It is the 189 degree longitude	No correct option given	The question stands deleted	
6.	What is the length of India's coastline? (a) 7100 km (b) 7500 km (c) 6100 km (d) 5100 km	Two option b & c are correct	Question is OK	"C"
10.	Which State in India has more than 90 percent of its area under forest? (a) Nagaland (b) Arunachal Pradesh (c) Tripura (d) Mizoram	None of the States has ninety percent forest cover. The highest being 86% in Mizoram.	Question is OK	"B"
26.	Iron articles rust because of the formation of (a) Ferrous chloride (b) Ferric sulphate (c) Ferric Chloride (d) A mixture of ferrous and ferric chloride	No correct option given	The question stands deleted	
33.	B is 10 km north-east of A and 10 km south-east of C. How far is C from A? (a) 8 km (b) 10 km (c) 12 km (d) 10/2 km	No correct option	The question stands deleted	
41.	Which Lok Sabh had two Speakers? (a) First (b) Second (c) Third (d) Fifth	Two options a & d are correct	The question stands deleted	
42.	Which Constitutional Amendment in India made primary education a fundamental right?	No correct option given	The question stands deleted	

55.	The New Economic Policy launched in 1991 consisted of (a) Stabilization policy (b) Import control policy (c) Deficit financing (d) Structural adjustment policy	Two options a & d are correct	No representation was received up to 10.7.2005 Question is OK	"D"
72.	How many times Kumbha Mela is held in twelve years? (a) 1 time (b) 2 times (c) 4 times (d) 6 times	Kumb Mela not specified whether Mahakumb or Ardh Kumb	Question is OK	"C"
93	"Kresset" is the name of the Parliament of (a) Ukraine (b) Afghanistan (c) Israel (d) Georgia	i. No correct option given. ii. Spelling mistake in the word "Kresset" in the question	The question stands deleted	
94.	Who started the Home Rule League in 1916? (a) Tilak (b) Besant (c) Gokhale (d) Pal	i. Two options a & b are correct ii. Incomplete question.	Question is OK	"B"
96.	The Anusilan Samiti was started in Dacca by (a) Chittaranjan Das (b) Bipin Chandra Pal (c) Rash Behari Ghose (d) Aurobindo Ghose	No correct option given	Question is OK	"B"
107.	Who was the first Muslim President of the Indian National Congress? (a) Ajmal Khan (b) M.A. Jinnah (c) Maulana Azad (d) Rahimulla Sayani	No correct option given	The question stands deleted.	

From the above table, first thing which is conspicuous, is that the objection of petitioners to question numbers 6, 41, 55 & 94 is that there are two correct answer options, whereas the Commission has deleted Q.No.41 alone, while regarding other questions its simplicitor stand is that the questions are 'OK'. It has not been specifically stated as to whether the objection of petitioners is factually correct or incorrect in the light of any expert's opinion. The Commission ought to have taken a specific stand after obtaining the opinion of expert on the validity of disputed questions, the same being in the realm

of experts. In the absence of expert's opinion, the reply of Commission can only be treated as evasive, therefore, under law deserves to be rejected, and it is to be accepted that the Commission impliedly admits the objection of petitioners being factually correct. As such, there can be no justification for not deleting Q.Nos.6, 55 & 94, when on the same objection the Commission has deleted Q.No.41. Likewise, for the same reason, Q.Nos.10 & 96 ought to have been deleted, because the Commission has deleted Q.Nos.2, 26, 33, 42 & 107 with identical objection and there is no factual denial to the objection in the light of any expert's opinion.

So far as question No.72 is concerned, the question refers to Kumbh and not the Ardh Kumbh. There is sharp distinction between the two. The question cannot be said to be misleading.

Thus, from the above, it comes out that the Commission ought to have deleted 12 questions instead of seven.

OPTIONAL PAPERS

At the time of filling up the application forms, each candidate at his option was entitled to choose one subject out of 22 given subjects. The second paper in optional subjects carried 300 marks for 120 questions, each question having 2.5 marks. As per the stand of petitioners, there were large number of wrong questions in the option papers of 13 subjects out of 22 given subjects. For test check, I am taking the optional subject-papers of Sociology with 'A' series. The following is the text of questions, objections of petitioners, stand of the Commission and the key answers:

Q. No.	TEXT	Objection of Petitioners	Stand of the Commission	Key answer
1.	People who have similar or alike in other ways such as age, occupation and education are sociologically known as: (a) Primary groups (b) Tertiary groups (c) Secondary groups (d) Social classes	Error not specified	Error not specified, as per expert opinion, the question is OK.	"D"
2.	A group which does not allow to similar other groups at one and the same time is called (a) Out group (b) Congregate group (c) In group (d) Closed group	No correct option	As per expert opinion, the question is OK.	"B"

3.	Who among the following the following gave the concept of "primordial primary" group? (a) Edward Shills (b) C.H. Cooley (c) R.K.Merton (d)Max Weber	No correct option	As per expert opinion, the question is OK	"A"
6.	The gap between real and ideal culture tends to be (a) Wider in traditional folk societies than in modern societies (b) Wider in modern societies than in traditional folk societies (c)Wide in types of society (d) Narrow in all societies	Question was subjective in nature, which was open to various interpretations	As per expert opinion, the question is OK	"B"
12.	Folkways are (a) Most popular usages (b) Sanctions and obligatory usages (c) Usages acceptable to the whole society (d) Most useful usages	i. Question was subjective in nature which was open to various interpretations. ii. More than one correct option.	As per expert opinion, the question is OK.	"A"
13.	Those cultural complexes which develop quickly (a) Are condemned by the society (b) Are not needed by the society (c) Are less influential than others (d) Are more influential than others	Question was subjective in nature, which was open to various interpretations.	As per expert opinion, the question is OK.	"D"
17.	Who spoke of 'eidos' and 'ethos' as two aspects of culture? (a) Tylor (b) Kulckhonn (c) Kroeber (d) Linton	Spelling mistake in option b.	Minor spelling mistakes intelligible to the candidate having knowledge of the subject	"C"
18.	Race is built around (a) Cultural differences (b) Physiological differences (c) Economic differences (d) Political differences	i. All options given are ambiguous. ii. Question was subjective in nature which was open to various interpretations.	As per expert opinion, the question is OK.	"B"

19.	The term race is applied to a group of people (a) Speaking same language (b) Professing same religion (c) Having faith in particular mode of worship (d) Having same living standard	i. No correct option given. ii. Question was subjective in nature, which was open to various interpretations	As per expert opinion, the question is OK.	"A"
25.	According to summer what are the needs of an in-group? (a) Peace, accord and cohesion (b) Caste-bias (c) Maintaining differences (d) Recognition of all the members	Question was subjective in nature, which was open to various interpretations	As per expert opinion, the question is OK.	"A"
28.	According to Maciver 'out-group' attitudes are marked by (a) A sense of difference (b) Mutual difference (c) Some degree of differences (d) Prejudicial attitude	Question was subjective in nature, which was open to various interpretations.	As per expert opinion, the question is OK.	"B"
30.	The group which a person adopts as his standard for fashioning his behaviour is called a (a) Primary group (b) Preference group (c) Religious group (d) Secondary group	No correct option given	As per expert opinion, the question is OK.	"B"
35.	In sociology, characteristics of dysfunction is that (a) It is objective (b) It is subjective (c) It is partly objective and partly subjective (d) It is neither objective nor subjective	Question was subjective in nature, which was open to various interpretations.	As per expert opinion, the question is OK.	"A"
36.	Match the following pairs I with II and mark the right answer <u>Pair-I</u> (A) Durkhein (B) Spencer (C) Malinowski (D) Merton <u>Pair-II</u> 1. Social Theory and social structure 2. Biological, instrumental and	Wrong spelling in "durkhein"	Minor printing error 'Durkhein' intelligible to candidates having knowledge of the subject	"A"

43.	When the deviants have strongly internalized both the cultural goals and the institutionalized means, yet they become unable to achieve success, merton calls it (a) Innovation (b) Ritualism (c) Retreatism (d) Rebellion	Question was subjective in nature, which was open to various interpretations	As per expert opinion, the question is OK.	"C"
46.	In tribal societies the "age-sets" are considered as one of the bases of social (a) Allocation (b) Differentiation (c) Enumeration (d) Stratigication	i. Wrong spelling in "Stratigication" ii. No correct option given. Option d stratigication	Minor printing error. 'Stratification'. Intelligible to candidates having knowledge of the subject	"A"
49.	The role of a person is reflected in (a) The work he does (b) The set of legitimate expectations from him (c) The attributes he has (d) His social behaviours	More than one correct option	Candidate has to choose the most appropriate option.	"B"
53.	As per the 2001 census of India, the State with the highest rural population is' (a) Uttar Pradesh (b) Himachal Pradesh (c) Jammu and Kashmir (d) Behar	Wrong spelling in "Behar".	Minor printing error. "Bihar". Intelligible to candidates having knowledge of the subject	"A"
56.	The rise and fall in social scale within a person's own life time is known as (a) Intergenerational vertical mobility (b) Intergeneralised vertical moblity (c) Intergenerational horizontal moblity (d) Intergenerationalised horizontall mobility	No correct option given.	The question stands deleted	
59.	In which of the following tribes touching of the plough is taboo for women? (a) Khasia (b) Khasa (c) Santhal	Correct option not given.	As per expert opinion, the question is OK.	"A"

61.	The belief that a magical practice performed on one object can have an effect upon another is called (a) Repetitive magic (b) Black magic (c) Sympathetic magic (d) While magic	Question was subjective in nature, which was open to various interpretations	As per expert opinion, the question is OK.	"C"
65.	For a person an adopted son is (a) A consanguineous kin (b) An affinal kin (c) Neither an affinal nor consanguineous (d) An affinal kin as well as a consanguineous kin	Question was subjective in nature, which was open to various interpretations.	As per expert opinion, the question is OK.	"B"
70.	Which one of the following is correct statement? (a) The term clan indicates the two divisions of a tribe (b) Clan indicates totemic origin of segments of a tribe (c) Exogamy is the only function of a clan (d) Clan controls the laws of inheritance of a tribe	Question was subjective in nature, which was open to various interpretations.	As per expert opinion, the question is OK.	"D"
72.	Whereas Westernisation is a heterogenetic change in India, Sanskrisisation is (a) A cementic change (b) An othogenetic change (c) A heterogentic change (d) A revolutionary change	Incorrect spelling in 'Othogenetic'.	Minor printing error. 'Orthogenetic' Intelligible to candidates having knowledge of the subject	"B"
73.	Of the following which is asymmetrical form of exchange marriage? (a) Patrilateral cross-cousin marriage (b) Levirate marriage (c) Sororate marriage (d) Matrilateria cross-cousin marriage	Wrong spelling in 'Matrilateria'	Minor printing error 'Matrilateral' Intelligible to candidates having knowledge of the subject	"D"
83.	The term 'Little Community' was introduced by (a) Robert Redfield (b) Malinowski (c) Mead (d) Mckin Marriot	Wrong spelling in 'MC Kin Marriot'	Minor printing error 'Mc Kim Marriot. Intelligible to candidates having knowledge of the	"D"

85.	Which of the following is a feature of an industrial society? (a) Subsistence economy (b) Barter economy (c)Mechanical solidarity (d) Strong family/kinship ties	i. The question has been wrongly set ii. No correct option	As per expert opinion, the question is OK.	"C"
86.	Which one of the following is not a characteristics feature of the bureaucratic authority? (a) Line organisation (b) Democralisation (c) Role Compartmentalisation (d) Hierarchy	Question was subjective in nature, which was open to various interpretations	As per expert opinion, the question is OK.	"C"
93.	Among the Ho tribes marriage by capture is called as (a) Poiothur (b) Anader (c) Oporipi (d) Daiva	Incorrect spelling in 'Oporipi'	Minor printing error 'Oporitipi' Intelligible to candidates having knowledge of the subject	"C"
94.	Which one of the following types of marriage is being practiced by the Todas of India? (a) Adelphic polyandry (b) Non-fraternal polyandry (c) Group marriage (d) Polygamy	More than one correct option.	As per expert opinion the question is OK.	"A"
97	The youngest daughter in a Khasi family, who is incharge of the lions share of the family property is called as (a) Noknja (b) Kakhadduh (c) Heir apparent (d) Dellingson	Incorrect spelling error in 'Kakhadduh'	Minor printing error. Intelligible to candidates having knowledge of the subject	"B"
98.	Who among the following made the distinction between family of orientation and family of procreation? (a) Murdock (b) Maclver (c) Wasner (d) Morgan	Incorrect spelling in 'Wasner'.	Minor printing error "Warner' Intelligible to candidates having knowledge of the subject	"C"

99.	According to studies available, which one of the following has remained the most effective factor of social change among the Dalits? (a) Reservation (b) Social Reforms (c) Industrialisation (d) Collective action	Question was subjective in nature, which was open to various interpretations	As per expert opinion, the question is OK.	"D"
102.	An essential condition of Hindu marriage is (a) Upnayan' (b) Saptapadi (c) Khitwa (d) Kulluka	Question was subjective in nature, which was open to various interpretations	As per expert opinion, the question is OK.	"A"
105.	The Nayar family of Kerela comes under (a) Extended family (b) Consanguine family (c) Expanded family (d) Conjugal family	Two option a & b are correct	As per expert opinion, the question is OK.	"B"
110.	The following diagram depicts a type of family, mark the correct type given below Father Mother Son Daughter Grand Son Grand Daughter (a) Affinal family (b) Consangulnal family (c) Fictional family (d) Matrilineal family	Question was subjective in nature, which was open to various interpretations.	As per expert opinion, the question is OK.	"B"
113.	The Kwekiuti Indians of North American Pacific coast use the 'Potlatch' to express	Wrong spelling in 'Kwekiuti"	The question stands deleted.	
116.	The Article in the Constitution of India which provides for the appointment of a Special Officer for scheduled castes and scheduled tribes by the President of India is (a) Article 164 (b) Article 341 (c) Article 342 (d) Article 338	No correct option given	As per expert opinion, the question is OK.	"D"
118.	A Musician singing at a concert is an example of (a) Act	Question was subjective in nature, which was	As per expert opinion, the question is OK.	"C"

From the above table it is manifest that by and large the objections of petitioners to the questions fall in one or more of the following categories:

a. Printing errors either in the questions or in answer options.

b. Questions carry no correct answer option or have more than one correct answer option.

c. Questions are subjective in nature and open to various interpretations.

These objections relate to 40 questions, out of which the Commission has already deleted two questions and, thus, the dispute relates to 38 questions. I would deal with the objections category-wise.

PRINTING ERRORS/SPELLING MISTAKES:

The Commission does not dispute the fact that there were printing errors/spelling mistakes in the undeleted questions or in answer options.

According to Mr. Raina, learned senior counsel for the Commission, the objection of petitioners is untenable because of the remedial steps taken by the Commission. He submits that firstly the printing errors were so minor that the candidates having knowledge of the subject could have very well interpreted as to what was being asked from them in the question. The mistakes being negligible would not have misled the candidates having knowledge of the subject. Secondly, he submits that during the course of examination when the candidates brought such printing errors to the notice of supervisory staff, the staff in turn through phone conveyed those errors to the Control Room, specially set up by the Commission, where the Chairman and the Controller of Examination opened the original manuscripts of the papers and tallied those with the printed booklets. Thereafter, they conveyed the clarifications to the concerned Supervisors for making necessary announcements, which, accordingly were made in the examination centres, where the candidates were taking the examination in those subject papers having printing errors.

To the contrary, the contention of Mr. Sethi, supported by other learned counsel for the writ petitions, is that the questions with printing errors could be intelligible or not is without any relevance. According to him, the paper was not oral but was a written paper, so a candidates was to understand the questions as they were in the papers and reply the same keeping in view the given answer options. A question with printing error/spelling mistakes cannot be said to be a correct question. He submits that no announcements for correcting the errors were ever made in the examination halls. Assuming

that those were made, even then going by the magnitude of errors, it cannot be reasonably accepted that all the candidates could have made the corrections in the question papers accurately in view of their being in a strenuous state of mind. He further submits that the duration of paper was two hours and in that short spell it was humanly impossible for the Commission to complete the exercise of making verifications, then conveying the correct spellings to the Supervisors for making announcements in the examination halls, when the spelling mistakes not related to one paper but related to about 13 papers.

It is not being disputed by the Commission that in nine optional subject-papers there were spelling mistakes in the questions and in the questions and in answer options of the questions. When a candidate is made to appear in a written paper, he is supposed to take the paper as it is for selecting an answer. It cannot reasonably be accepted that a candidate, who possesses the knowledge of the subject in which he was taking the paper, should have firstly understood the correct meaning of a wrongly spelled question and himself corrected the mistake and then selected the correct answer option. The capability/merit of such a candidate was not to be judged on the basis of his proficiency in correcting the spelling of misspelled words, but was to be judged on the basis of his given answer option, which he would have chosen for answer the question as it was. I, therefore, cannot agree with Mr. Raina that as the spelling errors in the questions could be intelligible to the candidates possessing knowledge of the subject, the same would not affect the correctness of the questions. The spelling mistake in a question of a written question paper invalidates the question itself.

The further contention of Mr. Raina that remedial measures were taken by the Commission by identifying the mistakes in the spellings of questions and rectifying the same by way of announcements made in the examination centres, is equally untenable for the reason that no affidavit of any supervisor of any of such centres, in which the candidates were taking subject question papers having spelling errors, has been filed to say that those announcements were actually made by him in the examination centres.

In this behalf, I have perused the record of Commission. From the record nothing is available to point out as to which were those questions, the spellings of which were sought to be clarified by the supervisory staff of any Examination Centre, and which were the questions actually verified by the Commission and conveyed to the respective Supervisors for making the announcements. In the absence of such record, it cannot be accepted that the printing errors/spelling mistakes in the question papers were duly rectified by actual announcements in the Examination Centres. Therefore, all the questions, which have wrong spellings of the words used therein have to be treated as wrong questions. In all, there are 12 such questions in Sociology paper, i.e., Q.Nos.17, 37, 46, 53, 60, 72, 73, 83, 93,

97, 98 and 113 with printing errors/spelling mistakes. Out of these questions, The Commission itself has deleted Q.No.113. In Q.No.113 there was printing error in the word 'Kwekiuti'.

The stand of the Commission that the questions having only major printing errors or those which had not been corrected by announcements were deleted is equally unacceptable. There is no record available to show the questions which were actually corrected by announcements. Therefore, neither it can be said nor it has been shown by the Commission which were those questions having printing errors and deserved corrections, but had not been corrected through announcements in the examination Centres. Moreover, there is no policy decision shown to have been taken by the Commission for defining which printing errors would be considered as major printing errors and which printing errors would be deemed to be minor printing errors. In the absence of such policy decision, the Commission could not have validly made any distinction between the questions with major printing errors and the question with minor printing errors for the purposes of making deletion of questions from the question papers. If the Commission in its wisdom deleted Q.No.113 from the question paper because of printing error, then on the same principle the Commission ought to have deleted all the questions which were having printing errors in the paper of Sociology. The action of Commission regarding deletion of only one question out of the questions having printing errors/spellings mistakes suffers from the vice of arbitrariness and unreasonableness. Therefore, all the said 11 questions also deserved deletion on the analogy of Q.No.113 from the question paper of Sociology.

Further, let us assume that announcements were made in the examination centres for correcting the spellings of wrong questions. For instance, take the paper of Sociology, in which admittedly there were 12 questions with spelling mistakes/printing errors. Some time must have been consumed by the Supervisors of the concerned centres to register the objections of the candidates, then for conveying the same to the Control Room set up by the Commission. In the Control Room also some time must have been consumed by the Chairman and Controller of Examination to verify the correct spellings from the original manuscripts of the said questions and, thereafter, conveying the same to the supervisory staff. Thereafter, the supervisory staff would also have taken some time for making the announcements for correcting the spellings of 12 mis-spelled questions. In all probability, each question must have taken at least one minute for being corrected. In this way, atleast 12 minutes out of total two hours must have been wasted. It is not the case of Commission that the time fixed for completion of such papers was ever extended. The non-extensions of time also suggests that in the examination centres announcements for correction of spelling mistakes may not have been actually made at all. From whatever angle we look at the issue, only one conclusion we can reasonably reach is that all the

questions, which have spelling errors, must be treated as wrong questions therefore, should also be deleted.

Likewise, the petitioners objected 8 questions of Zoology subject-paper. 11 questions of Geology, 9 questions of geography; 8 questions of Chemistry; 6 questions of Agriculture, 6 questions of Mathematics; 2 questions of Mechanical Engineering and 1 question of law, on the ground of being invalid because of spelling mistakes/printing errors. According to the Commission, these 55 questions of above said eight subjects have not been deleted, as the same were also got corrected through announcements made in the Examination Halls and the mistakes were intelligible to the candidates having knowledge of the subject. For the reasons already given, the stand of Commission in this regard cannot be accepted and, therefore, the above referred 55 questions, in addition to 11 pointed out questions of Sociology subject paper, in all also deserved to be deleted, besides the already deleted questions.

QUESTIONS CARRYING NO CORRECT OPTION/

CARRYING MORE THAN ONE CORRECT OPTION:

The Commission has deleted some of the questions out of the questions pointed out by the petitioners having no correct option or with more than one correct option. The stand of Commission is that the questions objected to by the petitioners were got checked up by the experts, including independent experts, and going by the experts' opinion it deleted the wrong questions.

I have perused the record of the Commission maintained this behalf. I am referring to Sociology subject. The petitioners have objected to 14 questions being Q.Nos.2, 3, 12, 18, 19, 30, 46, 49, 56, 59, 85, 94, 105 & 116. The Commission has deleted Q.No.56 alone. From the perusal of record, it appears that the Commission forwarded the representations of the candidates to the expert other than the paper-setter for his opinion. The expert has rendered two opinions dated 11.7.2005 and 14.7.2005. The first one reads:-

> "I have gone through the representations made by some of the candidates of J&K Combined Services (Preliminary) Examination, 2005 relating to the optional paper "Sociology". In my view the following questions need to be ignored/deleted as there appears to be some printing error in the options shown against these questions.
>
> Series 'B' Question Nos. 26 and 83."

Question Nos. 26 & 83 of B series corresponding to Q.Nos.56 and 113 of A series.

Second opinion of the same expert reads:

> "I have gone through the question paper prepared by an expert. The questions in the question paper are of good standard. It has given fairly good representation to all the topics which are considered important in the Indian Social Ethics. The paper setter has given clear options for the candidates. I have also gone through the key prepared by the examiner and found it correct. However, in the case of some questions there may be difference of opinion among the Sociologist, which is normal in the case of objective type questions relating to the sociological knowledge and its characterization."

The above opinion of the expert though is general in character, but over rules the objection of petitioners. Unless contrary is established by authentic material, the opinion of the expert is established by authentic material, the opinion of the expert cannot be allowed to be questioned and must be respected by the Court. Learned counsel appearing for petitioner seek to refer to various text books on the subject, but this is not the area where the Court should tread upon, the same being in the realm of experts.

It has also been urged by the learned counsel for petitioners that the questions in issue should be referred to an independent expert appointed by the Court. However, in my view it is not necessary, because the necessity of appointing another expert can arise only in case for some valid reason the opinion of the expert is seen as doubtful. Simply because the petitioners are doubting the correctness of the opinion of expert appointed by the Commission, it does not mean the opinion rendered by the expert has become doubtful. The opinion or the credibility of an expert does not stand impeached simply because the expert has been appointed by the Commission on its own. The Commission being not a private person but being a constitutional body, all its actions, howsoever illegal may be, are to be presumed to be free from malice. There is nothing available on record on which any malice towards the petitioners can be inferred. In view of the expert's opinion dated 14.7.2005, the objection of petitioners on the above said ground does not merit to be entertained. Identical is the position with regard to the objections on the above said ground relating to some of the questions of other subject papers.

<u>QUESTIONS ARE SUBJECTIVE IN NATURE AND</u>

<u>OPEN TO VARIOUS INTERPRPATIONS.</u>

The objections in this regard are also not tenable. Note 4 appended to the paper reads:

> "This Test Booklet contains 120 items (questions). Each item comprises four responses (answers). You will select one response which you want to mark on the Response Sheet. In case you feel that there is more than one correct response, mark the

response which you consider the best. In any case, choose ONLY ONE response for each item."

The paper was not essay type. It was objective type, therefore, the candidates were required to choose the best answer out of the given options.

In some of the subject-papers the petitioners have objected the questions which have been repeated. As the key answers are the same, therefore, a question, which has been repeated, cannot be said to be a wrong question. Objection has also been raised to certain questions of some subject-papers on the ground that those are out of syllabus. The opinion of the examiner obtained by the Commission refutes the correctness of the objection. The Court cannot act as an expert to make such an exercise to find out whether the objected questions are within the syllabus or outside the same. The opinion of the examiner can be accepted in this behalf.

This apart, the petitioners have questioned the correctness of some questions of optional papers, in regard to which the Commission has not taken any stand whatsoever. For instance, Q.Nos.28, 56 & 67 of Chemistry paper in "A" series were objected to on the ground that there was no correct functional group given in the option or there was no correct option, but the Commission has not taken any stand so as to say whether the correct functional group was given in Q.No.56 or whether Q.Nos.28 & 67 had one of the correct options. In the absence of specific stand of the Commission as regard the correctness of these questions, it is to be assumed that the Commission impliedly admits that these questions are wrong. Likewise, for the same reason Q.Nos.101 & 110 of Law, Q.No.43 of Political Science and Q.No.89 of Zoology subject-papers in "A" series, and Q.Nos.29, 56, 77, 100 & 112 of Mathematics subject-paper in "B" series are also treated as wrong questions and, therefore, deserved deletion.

From the above factual position, it is evident that apart from 64 wrong questions, which the Commission on its own deleted, many more questions pointed out also deserved deletion under the methodology adopted by the Commission. If that is done now, the merit of the candidates, who have been short-listed for the Main Examination and of those who have remained unsuccessful, would come to be largely altered, which may result in ouster of some of the selected/short-listed candidates from the select list and inclusion of some of the unsuccessful candidates in the select list because of consequent improvement in their merit position.

The contention of Mr. Raina, learned counsel for the Commission is that the individual merit position of most of the writ petitioners is so low that even if they get the benefit of deletion of more questions, even then they cannot reach near the merit of last selected candidate.

Whereas, Mr. Shah, Mr. Kapoor and Mr.Chopra, learned Counsel for the short-listed candidates contend that there is no need to redraw he merit. According to them, in case of deletion of question having printed errors/spelling mistakes and the questions which are admittedly wrong and have not been deleted, the same would change the merit position of the unsuccessful candidates including the writ petitioners. It has been submitted by them that the benefit of deletion of questions and adjustment of marks of such questions pro-rata would confer equal benefit upon all the candidates who have appeared in the papers, of which such questions are to be deleted. According to them, even if the individual merit of a candidate improves, his comparative merit position qua the other candidates of the same paper would remain the same.

The question in issue is not whether petitioners' improved merit would bring them near to the merit obtained by the last selected candidate. The issue under consideration is whether the selection of short-listed candidates is fair. Undisputedly, by deletion of more questions, the merit of the candidates, who appeared in any of the above said subject-papers, would certainly be improved.

In present kind of cut-throat competitions even small fractional difference in marks matters. By alteration of merit, some unselected candidates can find place in the select list, whereas some of the selected candidates may have to go out of the same. Whether the petitioners would find place in the select list or some other unsuccessful candidates, who have not come to the Court, would be immaterial for considering the validity of the selection of selected candidates. Under law, the selection of selected candidates can be up-held only if the merit of all the candidates is found to have been fairly judged. The comparative merit of the candidates cannot be said to have been fairly drawn, because the unsuccessful candidates have been denied the benefit of the methodology adopted by the Commission for distribution of the marks of such undeleted questions, which too ought to have been deleted, as pointed out earlier.

It is true that so far as the paper of General Studies is concerned, such improvement of merit of the candidates would not matter much, as the paper was compulsory and all the candidates will be benefited alike. But, so far as the improvement of merit of the candidates of said optional subject-papers is concerned, their merit is ultimately to be compared with the short-listed candidates, and in the event of re-drawing the merit, the same can lead to the exclusion of some of the selected candidates and inclusion of some of the unsuccessful candidates. Even a fractional improvement of merit position of

an unsuccessful candidate can bring him within the selection zone. As the Commission is bound to select the person who is the best, it would not matter as to who gets selected or who goes out of the select list. The contention is, therefore without any force.

Now, it shall be appropriate to examine the validity of the methodology adopted by the Commission, whereby the admitted wrong questions have been deleted and marks of such deleted questions distributed pro-rata to the remaining questions. For instance, as per the admitted stand of the Commission, in the optional subject paper of Animal Husbandry, 37 questions out of 120 questions were wrong, so those were deleted. Each question was having 2.50 marks, so 37 questions carried in all 92.50 marks. When 92.50 marks were distributed amongst remaining 83 questions, each question's marks got increased to 3.61 marks. Thus, the performance of a candidate was judged on the basis of questions he correctly answered out of 83 questions, each question having 3.61 marks.

The contention of learned counsel for petitioners is that the methodology adopted by the Commission is unfair, unreasonable and impractical. For illustrating his view point, Mr. Rahul Pant, learned counsel for some of the petitioners, submits that suppose a candidate "X", who had opted for Animal Husbandry subject-paper, correctly answered 50 questions out of 83 questions, he would be getting 3.61 x 50 = 180.50 marks. Similarly, a candidate "Y", who appeared in a subject paper with no wrong question, also correctly answered 50 questions out of 120 questions, he would be getting 2.50 x 50 = 125 marks only. Thus, the candidate "X" would be getting 55.50 more marks than the candidate "Y", while both the candidates have correctly answered 50 questions. Mr. Raina, learned counsel for the Commission, submits that in the above illustration the candidate "X" would be in an advantageous position, meaning thereby that the petitioners have gained, so they should not be allowed to raise the grievance.

The question in issue is not whether the petitioners were put in an advantageous position due to the fact that their subject papers had wrong questions or were in a disadvantageous position. The Public Service Commission is a Public Institution created for safeguarding the interests of public by making selection of most meritorious persons to the public offices, so its every act/action towards a selection process for being valid has to meet the test of fairness and reasonableness. No act/action can be fair and reasonable if it is not free from arbitrariness, unreasonableness and malafide. Arbitrariness flow from an action which gives unequal treatment to equals. A selection process, which puts some candidates

in an advantageous position and others in disadvantageous position in the same selection process, would be unfair.

Be it so, the fact of the matter is that the mistakes do have crept in the question papers and the situation/problem arising therefrom warranted immediate remedial measures. One way to deal with the problem could be to cancel all such subject-papers in which there were wrong questions and to hold fresh examination, while the other way would have been to make adjustments of marks while evaluating the answer scripts. The Commission in its own wisdom has preferred the other way to deal with the issue and evolved the already described methodology. A candidate who had opted for any of the subjects, out of the subjects of which the question papers were having wrong questions, was to be pitted against a candidate in whose optional subject-papers there were no wrong questions/mistakes.

In the example cited by the learned counsel for petitioners, it is true that the candidate "X" would have got 180.50 marks by attempting 50 questions correctly and the candidate "Y" would have got 125 marks also by attempting 50 questions correctly, but for determining their comparative merit, it would be required to be seen whether both of them can be said to stand at par. The candidate "X" out of 83 questions answered 50 questions correctly, while the candidate "Y" answered 50 questions correctly out of 120 questions. Both the candidates had similar kind of advantages and disadvantages. "X" had the advantage of having increased marks for each question he attempted correctly and disadvantage of having less number of total questions for making an attempt, while the candidate "Y" had the advantage of having more number of total questions for making an attempt, with disadvantage of each question having less marks. When advantage and disadvantage of both the candidates is balanced, it appears that both of them can be deemed to be at the same position in relation to the available chances for showing their performance. The distribution of marks of deleted questions of a paper to the remaining questions pro-rata, therefore, can not be said to have caused any prejudice to any of them.

The methodology adopted, therefore, can not be considered unfair, because going by the probability factor a candidate's rate of performance for undeleted questions can reasonably be taken as his rate of performance for deleted questions as well. Therefore, by no stretch of reasoning the modus operandi evolved can be said to be unfair or unreasonable.

The net result of the aforesaid discussion is that

(a) there is no violation of examination rules;

(b) the methodology evolved, the Commission in all should have also deleted 83 following questions of different subject-papers and marks of said questions distributed pro-rata to correct questions of the papers;

i. 12 questions of subject-paper Zoology; 11 questions of Geology; 11 questions of Sociology; 9 questions of Geography; 8 questions of Chemistry; 6 questions of Agriculture; 6 questions of Mathematics; 2 questions of Mechanical Engineering and 1 question of Law (total 66 questions) having printing errors/ spelling mistakes;

ii. 5 questions of subject-paper Mathematics; 3 questions of Chemistry; 2 questions of Law, 1 questions of Political Science and 1 question of Zoology (total 12 questions) with regard to which the Commission has taken no stand, and;

iii. 5 questions of compulsory subject-paper General Studies.

In the light of above conclusion/findings arrived at, the question arising for consideration is what relief should be granted in the facts and circumstances of the case. For answering the question, a few more undisputed facts need to be noticed.

That fact of the matter is that after OWP No.442/2005 came to be filed, the Court vide order dated 10.10.2005 passed the following interim direction:

> "Subject to objection from other side, till further orders no action would be taken by the respondents on an advertisement which has been issued for holding of main examination."

Against the above order, two candidates, who were then not parties to the writ petition, went in Letters Patent Appeal before the Division Bench. The learned Division Bench vide its order dated 15.12.2005 disposed of LPA No.126/2005, modifying order dated 10.10.2005 by providing as follows:

1. That the Public Service Commission would be at liberty to proceed with the main examination and the selection process in accordance with the provisions of Examination Rules (SRO 161 of 1995).
2. That private respondents' writ petition, OWP No.442/2005 and all other identical petitions, the numbers whereof are given herein above, shall be batched together and shall be posted before the appropriate Writ Court on 10th February, 2006. All writ petitioners shall take necessary steps to complete the service of respondents in these writ petitions through publication within two weeks. All parties to the writ petitions shall complete their pleadings after exchanging those pleadings within four weeks. The Writ Court is requested to consider and decide this batch of writ petitions on the next date and Registry is directed to explore posting of these writ petitions along before the Court on that date, except those cases where dates have already been fixed.

3. That in case private respondents or other writ petitioners involved in these writ petitions succeed in their writ petitions, respondent-Public Service Commission shall take necessary steps to undertake an exercise in compliance to the Court orders and hold a separate/special examination of all those writ petitions who would qualify pursuant to the writ court orders, if the main examination which is proposed to be held under the impugned notification has already been held by them."

Aggrieved by the order of learned Division bench, the writ petitioners in OWP No.442/2005 filed an application before the Hon'ble Supreme Court for obtaining leave to file the Special Leave Petition. However, the same was sought to be withdrawn by the said writ petitioners and ultimately it came to be dismissed as withdrawn on 3.2.2006.

Pursuant to the directions of Division Bench, the Public Service Commission conducted the Main Examination of the candidates who stood short-listed on the basis of Preliminary Examination under dispute. The Commission has also issued the list to those candidates who have been declared to have qualified the Main Examination. However, interviews of all those qualified candidates are yet to be held by the Commission. In the meanwhile, in an another matter, i.e. IA No.2 (in Writ Petition (Civil No.96/2006) the Hon'ble Supreme Court vide its order dated 28.8.2006 stayed the appointments to be made pursuant to the said selection till the final decision of these writ petitions.

In the above backdrop, the question of relief to be granted in these writ petitions is to be considered.

The contention of learned counsel for petitioners is that whole of the list of short listed candidates, prepared on the basis of Preliminary Examination held by the Commission, should be quashed and holding of fresh Preliminary Examination should be ordered. The implication of doing the same would be that, as a necessary consequence of the cancellation of whole of the list of short-listed candidates, the selection of candidates through the Main Examination shall also have to go. It is also the contention of learned counsel for petitioners that since the order of Division Bench has come to be passed while sitting in appeal over the interim direction issued in the writ petition, therefore, the same would merge in order dated 10.10.2005 and the character of the same would remain to be as that of an interim order passed in the writ petition. According to learned counsel for petitioners, as the interim order cannot control the final order, therefore, at the time of passing of final order it shall be open to the Court to pass any direction which it may deem appropriate in the facts and circumstances of the case, uninfluenced by the contours of the interim order, which includes the order of Division Bench.

On the other hand, the contention of Mr. Z.A. Shah, learned counsel for selected candidates is that pursuant to the order of Division Bench, which acquired finality after the withdrawal of application for seeking permission to file Special Leave Petition from the Hon'ble Supreme Court, the short-listed candidates on the basis of Preliminary Examination were allowed to appear in the Main Examination during the pendency of these writ petitions. He further submits that the list of successful candidates has also been published, whereas for making the final selection only interviews are to be held by the Commission. It is also an undisputed fact that the validity of Main Examination and consequent selection of the candidates is not under challenge, either in the present petitions or in any independent petition, therefore, ends of justice and equity would be better served if in the event of petitioners' success in the writ petitions, they are also directed to be examined in a fresh Main Examination to be conducted by the Commission and, thereafter, fresh merit is drawn of all the candidates, who have already qualified and who may qualify in the fresh Main Examination. Mr. Shah submits that the interest of petitioners, which already stands protected by the order of learned Division Bench, would continue to be protected in the above manner.

The dispute in these writ petitions relates to the Preliminary Examination only for short-listing the number of candidates for the Main Examination. The final selection of a candidate for appointment depends upon his comparative merit obtained in the Main Examination and in the interview to be held. Undisputedly, the marks obtained by the candidates in the Preliminary Examination can be counted only for short-listing and not for making final selection for their appointments. This being the position, the principal and fundamental grievance of the writ petitions and the candidates, who were in identical position, can only be that they have been denied the eligibility to appear in the Main Examination by not judging their merit rightly and properly. Had they been selected by short-listing, they would have only acquired the eligibility to appear in the Main Examination. It is also a fact which cannot be disputed on any valid reason that all the candidates, who have been short-listed, have not appeared in the same optional subject papers, which were having deficiencies, but many of them had appeared in the optional subject-papers which were not having any discrepancy at all. Therefore, the Preliminary Examination, as it relates to those optional subject-papers in which there was no discrepancy at all, cannot be faulted with. It is only the examination of those candidates who appeared in 13 optional subject papers, which were having discrepancies in the questions, is under challenge. In case the Preliminary Examination of candidates, who appeared in the said optional papers having discrepancies, is cancelled and fresh examination is held, their merit position would have to be readjusted in relation

to those candidates who appeared in the subjects which had no discrepancy and who have already appeared in the Main Examination. At the same time, it would also have to be kept in view that quite possibly some of such candidates, who appeared in the subject-papers having no discrepancy, may not have been able to find berth in the final select list, already prepared and issued by the Commission on the basis of merit obtained in the Main Examination and, therefore, are out of competition.

In such like complex situation, in my considered opinion, it would not be appropriate to cancel whole of the Preliminary Examination for holding a fresh examination of all the candidates. In my view, in the peculiar circumstances of the case, without disturbing the selection of short-listed candidates, justice can be done to the unselected candidates, who appeared in the optional subject-papers having discrepancies, by redrawing their merit afresh after deletion of pointed out undeleted questions and distribution of their marks pro-rata amongst the remaining questions, and, thereafter, considering their merit for deciding about their eligibility to appear in the Main Examination, which may be directed to be held afresh in respect of such candidates.

Further, as all the candidates, irrespective of their optional subject-papers, have appeared in the compulsory paper of General Studies having discrepancies, therefore, adjustment of marks of pointed out undeleted questions of General Studies have not to be confined only to the unselected candidates, who have appeared in the optional subject-papers having discrepancies, because there can be such a candidate who has not been selected/short-listed, but he if gets the benefit of adjustment of marks in the compulsory paper, his merit may improve so as to bring him within the selection zone. All the unselected candidates of optional subject-papers having no discrepancy would also be entitled to the benefit of adjustment of marks of pointed out undeleted questions of General Studies paper on pro-rata basis. So far as the candidates, who have already been short-listed for the Main Examination are concerned, they cannot in any manner be prejudiced, as they have already made it to the Main Examination and their merit obtained in the Preliminary Examination is not to be counted towards the final selection for appointment.

For the reasons stated above and in the facts and circumstances of the case, I allow all the writ petitions and direct the Public Service Commission as follows:

(a) To delete the following questions of each paper of "A" series and their corresponding questions in "B", "C" and "D" series and distribute their marks pro-rata to remaining questions of the papers:

i. 13 questions of Zoology (twelve questions with printing error/spelling mistakes,

i.e., Q.Nos.18, 20, 27, 29, 30, 34, 39, 44, 51, 52, 95, 112; and one question where the Commission has not taken any stand, i.e. Q.No.89);

ii. 11 questions of Chemistry (eight questions with printing error/spelling mistakes, i.e. Q.Nos.31, 99, 100, 105, 107, 109, 110, 119; and three questions where the Commission has not taken any stand, i.e., Q.Nos. 28, 56 & 67);

iii. 11 questions of Geology (i.e. Q.Nos.37, 46, 72, 75, 79, 81, 82, 95, 101, 106 & 114 with printing error/spelling mistakes);

iv. 11 questions of Sociology (i.e. Q.Nos.17, 37, 46, 53, 60, 72, 73, 83, 93, 97 & 98 with printing error/spelling mistakes);

v. 9 questions of Geography (i.e. Q.Nos.9, 21, 22, 23, 51, 61, 87, 97 & 106 with printing error/spelling mistakes);

vi. 6 questions of Agriculture (i.e. Q.Nos.18, 64, 69, 74, 79 & 104 with printing error/spelling mistakes;

vii. 3 questions of Law (one question with printing error/spelling mistakes, i.e. Q.No.9; and two questions where the Commission has not taken any stand, i.e., Q.Nos.101 & 110);

viii. 2 questions of Mechanical Engineering (i.e. Q.Nos.37 & 72 with printing error/spelling mistakes);

ix. 1 question of Political Science (i.e. Q.No.43, where the Commission has not taken any stand);

x. 5 questions of General Studies (i.e. Q.Nos.6, 10, 55, 94 & 96);

xi. 11 questions of Mathematics (six questions with printing error/spelling mistakes, i.e. Q.Nos.9, 53, 76, 97, 106, 117; and five questions where the Commission has not taken any stand, i.e. Q.Nos.29, 56, 77, 100 & 112) of "B" series and their corresponding questions in "A", "C" & "D" series;

(b) To separately redraw the merit of all the unselected candidates for the Main Examination in respect of compulsory paper of General Studies.

(c) To redraw the merit of all the unselected candidates for the Main Examination as per direction (a) in respect of said ten optional subjects;

(d) To separately redraw a combined merit list of such candidates who have appeared in the compulsory paper of General studies and optional subject-papers as mentioned in direction (a);

(e) Also to redraw a combined merit of compulsory paper of General Studies and optional papers of those candidates, in whose optional subject-papers there was no discrepancy, i.e., 12 remaining optional subjects, which include the subject-papers of Animal Husbandry, Botany, Indian History and Physics, and who have not been short-listed.

(f) To conduct the special Main Examination of all such candidate, whose such combined redrawn merit is equal to or more than the merit of last short-listed candidate, in accordance with the procedure prescribed by the Examination Rules;

(g) To complete the whole exercise within a period of six weeks;

(h) To pay an amount of rupees one lac and thirty thousands as costs to the writ petitioners, at the rate of rupees ten thousands in each writ petition, to be shared by them equally.

Before parting with this judgment, I would like to say that it is very unfortunate that the candidates, who were competing to get employment in the coveted services of the State, after having put in so many years in studies, have to litigate for their lawful rights, denial of which emanates from the lack of expertise in conducting the examination on the part of none else than the Public Service Commission, which is a premier and constitutional examination conducting body of the State. Out of 23 subject-papers, which include the compulsory paper of General Studies, in which the candidates were examined for short-listing, there were major discrepancies and printing errors in 14 papers. With the experience of conducting the examination, which the Commission had, and with the kind of expertise expected from such like examination conducting body, it should not have happened. Why it happened, the explanation given by the Commission is that it got number of question papers prepared at the hands of very senior Professors/Deans of various Universities and Institutions across the Country and outside the State of Jammu & Kashmir. The paper-setters were required to put the question papers in the envelopes/packets, which were signed and sealed by them. Such sealed packets, with reference to each subject, were pooled in an another question bank. Thereafter, to avoid any possibility of interception/interference of secrecy in the question papers, in the Commission one of such sealed packets/manuscripts/papers of each subject, out of number of sealed packets/manuscripts/papers, was picked up at random by the Chairman of Commission and directly sent to the Printing Press for designing, 'proof reading' and printing of booklet series. Thus, according to the Commission, the spelling mistakes, which were existing in the papers, crept in due to the printing error.

The explanation given in exfacie unacceptable, as it was the duty of Commission to do the job of proof reading itself so as to avoid any printing error. The plea that the said job was left to the Printer itself for maintaining the secrecy is not tenable. Was there any dearth of such officers in the Commission who could be trusted with the job of proof reading of the papers? I am sure there would be many such officers in the Commission whose integrity cannot be questioned. Had any one of them been deputed for the job and a little care taken, the situation would not have been as grave as it is. It is only because of the casual approach, which may be called euphemistically over-cautious approach, the petitioners have been forced to take resort in the litigation. I am sure that this case will serve as an eye-opener for the Public Service Commission and in future no such thing will be allowed to happen, and all the necessary steps for improving the system shall be taken.

At the same time, I would also like to record my displeasure over the manner in which the two Members of the Commission, namely, Professor B.K. Tiku and Dr. N.A. Jan have filed their replies, in which they have made allegations in relation to the working of Commission as well as its Chairman. They deserve to be reminded of the fact that they being the members of the Commission were bound to defend its decisions, which the Commission had taken in its meetings referred to in the earlier part of judgment. In an institution where decisions are required to be taken by a group of persons in position on the basis of majority opinion, if during the decision making process some member expresses his dissent or reservation, the same gets obliterated when ultimately final decision is taken. Being bound by such a decision, no member of the group is entitled to publicly criticize the decision on the strength of his personal views.

These writ petitions along with connected CMPs, accordingly, shall stand disposed of.

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SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS
Petition for Special Leave to Appeal (Civil) No.13019/2005
(From the judgment and order dated 02.05.2005 in LPA No.45/2005 of The High Court of Jammu & Kashmir at Srinagar
D.D. 26.02.2007
Hon'ble the Chief Justice &
Hon'ble Mr. Justice R.V.Raveendran

Rifat Ara ... Petitioner
Vs.
State of Jammu & Kashmir & Ors. ... Respondents

Examination:

Making false allegation of tampering of marks by the candidate against authorities entails imposition of penalty.

ORDER

Petitioner has made series of allegations against the selection conducted by the Public Service Commission. She also alleged that marks obtained by her have been tampered with by the Authorities. At the instance of the petitioner, the papers and marks sheets of the petitioner have been produced by the Authorities wherefrom it appears that the answer papers of petitioner are not tampered with and there are no corrections as alleged by the petitioner. Thus, it is clear that the petitioner's allegation of tampering with marks is false and baseless. The special leave petition is dismissed. Petitioner is directed to pay costs of Rs.10,000/- to the respondent Public Service Commission within a period of two months failing which the concerned District Collector will take appropriate proceedings against the petitioner for recovery of the said amount.

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JHARKHAND PUBLIC SERVICE COMMISSION

IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P. (S) NO.3532 OF 2007
D.D. 05.12.2007
Hon'ble Mr. Justice Narendra Tiwari

Dr. Awadh Kishore Narain & Ors. ... Petitioners
Vs.
State of Jharkhand & Ors. ... Respondents

Appointment :

The petitioners who were appointed to the posts of Tutor/Senior Residents, Medical Officers and Senior Surgical Officer have challenged the notification for recruitment to the posts on regular basis initiated in compliance with the order in PIL case (W.P. (PIL) No.1478/2005 to take appropriate steps to fill up the vacancies by making regular appointments – High Court dismissed the writ petition rejecting the contention of the petitioner that their names appear in the gradation list by observing that the said fact does not go to change the ad hoc nature of the petitioners' appointment into regular appointment.

ORDER

In this writ petition, the petitioners have prayed for quashing Advertisement No.4 of 2007 dated 19th April, 2007 published by the Jharkhand Public Service Commission whereby 75 posts of Tutor/ Senior Residents, Medical Officers and Senior Surgical Officer have been advertised for appointment, whereas the petitioners have been working against the said posts. The petitioners have also prayed for a direction on the respondents, restraining them from disturbing the petitioners from the posts, they are holding in medical college.

2. In I.A. No.3222 of 2007, the petitioners have further prayed for quashing the advertisement dated 14th November, 2007, whereby the candidates have been called for interview for appointment on the aforesaid posts.

3. Mr. Manoj Tondon, learned counsel, appearing on behalf of the petitioners, prayed for hearing and final disposal of the writ petition and interlocutory application in view of the urgency of the matter. Learned counsel for the respondents also agreed for the same. Thus, the writ petition and interlocutory application have been taken up for hearing and final disposal at this stage itself.

4. Now the fresh advertisement has been issued for appointment of the candidates against the posts, which are already held by the petitioners. The petitioners have brought their letters of appointment dated 2nd March 2005, on record, as Annexure-3 to the writ petition. On the basis of the said appointment, gradation list of the teachers of Medical Colleges has been published and in that list, the names of the petitioners appeared at their respective places.

5. According to the petitioners they have been working on different posts of Tutor, Senior Residents and Medical Officer on being appointed earlier, pursuant to the advertisement dated 1st October, 2004, contained in Annexure-I. It has been stated that they had appeared in the test and were selected. They were appointed against the vacant posts.

6. Mr. S. Piparwall, learned counsel, appearing on behalf of the Jharkhand Public Service Commission, submitted that the claim of the petitioners that they were appointed on teaching posts and they are holding the posts after due appointment is without any basis. The appointment letter, brought on record, as Annexure-3, clearly goes to show that ad hoc appointments were made in order to conform to the required norms and provisions of the Medical Council of India and the said ad hoc appointment was provisional and till further order. It has been submitted that the Medical Colleges of the State are facing the risk of de-recognition for want of teachers. A public interest litigation was filed, being W.P.[PIL] No.1428 of 2005. In the said writ petition, directions were issued to take appropriate step to fill up the vacancies by making regular appointments.

7. In view of the said direction of this Court, the State Government took step to make regular appointment against teaching posts of Medical Colleges. Accordingly, on the basis of requisition of the State Government, the Jharkhand Public Service Commission has advertised the posts and has started the process for appointment of regular teachers against the sanctioned teaching posts. The petitioners, who have been working on ad hoc basis, were also given liberty to take part in the process and some of the petitioners have applied for the post[s] and are to appear in the test.

8. Learned J.C. to Sr.S.C.I, almost in similar line, submitted that in view of the direction made in the PIL for regular appointment, steps have been taken to comply with the directions in order to protect the Medical Colleges from de-recognition. The posts have been advertised for regular appointment of teachers in Medical Colleges. It has been sated that there has been no regular appointment earlier and ad hoc arrangement was made provisionally, till further order in order to bring some teachers to Mahatma Gandhi Memorial Medical Colleges, Jamshedpur by Notification No.2/ Est.-3-09/2004 26(2) dated 2nd March, 2005.

9. After hearing learned counsel for the parties and considering the materials on record, I find that by notification dated 2nd March, 2005 (Annexure-3), the petitioners were provisionally posted in Mahatma Gandhi Memorial Medical College, Jamshedpur on ad hoc basis on their own pay scale. The relevant part of the said notification reads as follows:-

"ADHISUCHNA

SANKHYA-2/ASTHA.3-09/2004-26(2)/DINANK 2.3.2005 BHARTIYACHIKITSA PARISHA, NAIE DEILLI DWARA MAHATMA GANDHI SMARAK CHIKITSA MAHAVIDYALAY JAMSHEDPUR KA DINANK 27-28 DECEMBER, 2004 KO KIYE GAYE NIYOJAN KE AALOK ME BHARTIYA CHIKITSA PARISHAD KE MAPDAND, KO PURA KARNE KE LIYE AKIKRIT BIHAR RAJYA KE SWASTHYA SEVA SAMVARG/SAIKSHANIK SAMBARG KE ICHHUK EVAM AVASHYAK YOGAYATADHARI CHIKTSKO KE SEVA SHAIKSHANIK SAMVARG ME LENE KA NIRNAY LETE HUYE NIMNLIKHIT CHIKTSKO KO UNKE APNE HI VETANMAN ME KARYAKARI VEYAVASTHANANTARGAT KARYABHAR GRAHAN KARNE KI TITHI SE UNKE NAM KE SAMAKSH UCHIT VIBHAG EVAM PAD PAR MAHATMA GANDHI SMARAK CHIKITSA MAHAVIDYALAY JAMSHEDPUR ME AGLE AADESH TAK OPBANDHIK RUP SE PAD STHAPIT KIYA JATA HAI....." (Emphasis supplied)

10. On perusal of the said notification, it is clear that the petitioners were posted in the said Medical Colleges at their own pay scale, provisionally, till further order. The said notification, thus, cannot be taken as a letter of appointment permanently posting the petitioners on the teaching posts. The same, being only ad hoc working arrangement till further order, cannot be held to be regular appointment on teaching post.

11. In view of the above, even if the petitioners' names appear in same gradation list that does not go to change the ad hoc nature of the petitioners' appointment into regular appointment. The same also cannot change the petitioner's service cadre.

12. There is, thus, no merit in this writ petition and the same is, accordingly, dismissed.

13. For the aforesaid reasons, I.A. No.3222 of 2007 is also rejected.

14. No order as to cost.

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IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P. (S) NO.1526 OF 2008
D.D. 16.04.2008
Hon'ble Mr. Justice R.K.Merathia

Pramod Kumar ... Petitioner
Vs.
The State of Jharkhand & Ors. ... Respondents

Recruitment:

Petitioners challenged fixing minimum 50% marks in the concerned subjects in recruitment to the posts of Teachers in High School in different subjects – High Court holding that the criteria is applicable to all applicants has dismissed the writ petition.

Held:

Fixing of eligibility criteria is the prerogative of the Government and the Court cannot interfere with the wisdom of the Government in fixing such criteria.

ORDER

Petitioner has challenged the advertisement issued by the Jharkhand Public Service Commission (J.P.S.C.), Ranchi fixing minimum 50% marks in the concerned subjects in terms of Rule 4(1)(iii)(Ka) of the Jharkhand Government, Secondary School (Service Condition) Rules 2004, and also the said rule.

Mr. Atanu Banerjee, appearing for the petitioner, submitted that as per the NCTE norms 45% marks in aggregate in Bachelor Degree Examination is required for admission in B.Ed. course and therefore, the criteria in the advertisement fixing 50% marks in the concerned subjects is illegal and arbitrary.

In the advertisement issued for selecting the teachers for teaching different subjects in the High Schools one of the eligibility criteria contained in Clause 3 (Kha) is that the applicant should have minimum 50% marks in the concerned subject. In my view such eligibility criteria is neither arbitrary nor illegal. It is the prerogative of the Government to fix such criteria and moreover, such criteria appears to be in the interest of standard of education. The fixing of criteria for B.Ed. course has got no relevancy. When the Government wants to appoint teachers in different subjects and think that the applicant should have minimum 50% marks in concerned subject, there is nothing wrong in it. Moreover, such criteria is applicable to all applicants.

I am not inclined to interfere with the wisdom of the Government in fixing such criteria. Accordingly, this writ petition is dismissed. However, no costs.

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IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P. (S) No.1921 of 2008
D.D. 22.04.2008
Hon'ble the Chief Justice M.Karpaga Vinayagam &
Hon'ble Mr. Justice D.G.R. Patnaik

Rupesh Kumar & Anr. ... Petitioners
Vs.
State of Jharkhand & Ors. ... Respondents

Qualification:

Petitioners candidates for the post of Civil Judge Junior Division has challenged Rule 5(b) of Jharkhand Judicial Service (Recruitment) Rules, 2004, whereby a candidate to be eligible to be appointed as Civil Judge Junior Division must be enrolled as an Advocate under the Advocate's Act – In view of the decision of the Supreme Court in (2002) 4 SCC 247 which accepted the recommendations of Shetty Commission that an Advocate with a practice of at least 3 years should be done away with, the Court holding that prescription of enrolment as an Advocate is not contrary to the same decision has dismissed the writ petition.

Held:

It is settled law that it is for the State or employer to prescribe qualification and other eligibility criteria for recruitment [2003 AIR SCW 272].

Cases referred:

2003 AIR SCW 272 - P.U. Joshi & Others versus Accountant General, Ahmedabad and others with Union of India & Others versus Basudeba Dora and others

ORDER

M.Karpaga Vinayagam, C.J.

Rupesh Kumar and Sumee Kumari, the petitioners herein have filed this writ petition seeking for quashing of Rule 5(b) of Jharkhand Judicial Service (Recruitment) Rules, 2004, whereby a candidate to be eligible to be appointed as Civil Judge Junior Division (Munsif) must be enrolled as an Advocate under the Advocates' Act, 1961, as Published in the Jharkhand Gazette Extraordinary dated 4th April, 2005.

2. Mr. M.S.Anwar, learned Senior Counsel appearing for the petitioners, would put forth the following points for challenging the above Rule:-

(i) The Rule 5(b) of the Jharkhand Judicial Service (Recruitment) Rules, 2004, putting a condition that the candidate to be eligible to be appointed as Civil Judge Junior Division (Munsif) must be enrolled as an Advocate under the Advocates' Act,

1961 is arbitrary and illegal as the same is in violation of the judgment dated 21.03.2002 passed by the Hon'ble Supreme Court in the case of All India Judges Association & Others versus Union of India & Others.

(ii) Several other States, in pursuance of the directions of the Supreme Court, have framed and amended the Recruitment Rules for appointment on the post of Civil Judge Junior Division (Munsif) to the effect that the Law Graduates are eligible to be appointed on the aforesaid post and there is no necessity for enrollment as an Advocate under the Advocates' Act.

3. Elaborate arguments have been advanced by both, learned senior counsel for the petitioners, as well as the counsel appearing for the State as well as for the Public Service Commission.

4. In our view, both these points do not deserve acceptance to hold that Rule 5(b) of the Jharkhand Judicial Services (Recruitment) Rules, 2004 as arbitrary or illegal.

5. In regard to the first point,

(a) It is true that Hon'ble Supreme Court in (2002) 4 SCC 247 held that the recommendations of Shetty Commission, which recommended the need of an advocate with a practice of at least three years should be done away with is perfectly justified and consequently, the Hon'ble Supreme Court directed the High Courts and State Governments to amend their Rules so as to enable a fresh law graduate who may not even have put in three years of practice to be eligible to compete and enter the judicial service.

(b) The perusal of the Supreme Court judgment in paragraph 32 of (2002) 4 SCC 247 would indicate that there is only a direction that there should not be any condition that the applicant must be an advocate of at least three years' standing not in respect of the other qualification of eligibility criteria. Let us quote the relevant portions of the judgment:-

> ".....with the passage of time, experience has shown that the best talent which is available is not attracted to the judicial service. A bright young law graduate after 3 years of practice finds the judicial service not attractive enough. It has been recommended by the Shetty Commission after taking into consideration the views expressed before it by various authorities that the need for any applicant to have been an advocate for at least 3 years should be done away with. After taking all the circumstances into consideration, we accept this recommendation of the Shetty Commission..... We, accordingly, in the light of experience gained after the judgment in All India Judges case direct to the High Courts and to the State Governments to amend their rules so as to enable a fresh law graduate who may not even have put in three years of practice, to be eligible to compete and enter the judicial service....."

(c) The reading of paragraph 32 of the judgment does indicate only that there is a prohibition for putting a condition of three years' practice as an advocate. It does not say that the State has no power to fix eligibility criteria, namely, the applicant should be an advocate enrolled as per Advocates' Act.

(d) In other words, the gist of the decision of the Supreme Court as contained in paragraph 32 would only reveal that three years of practice cannot be the mandatory criteria as the said criteria would not attract the bright young law graduates after three years of practice to enter into the judicial service. The above paragraph does not indicate that there was any prohibition for the State Government to fix eligibility criteria as an enrolled advocate. On the other hand, it simply says years of practice should not be insisted.

(e) In other words, putting a condition to the candidate that he must be basically a lawyer is not prohibited. The wordings contained in the said paragraph reads "We, accordingly, in the light of experience gained after the judgment in All India Judges case direct to the High Courts and to the State Governments to amend their rules so as to enable a fresh law graduate who may not even have put in three years of practice, to be eligible to compete and enter the judicial service" The words "who may not even have put in three years of service" would clearly indicate that three years' of practice should not be criteria. On the other hand, any advocate, who has got practice less than three years, also can apply.

(f) So, in the light of the said direction, the State Government thought it fit to frame the Rule 5(b), which quoted as below:-

"5(b). He is a Graduate in law from a recognized University and enrolled as an Advocate under the Advocates' Act, 1961."

As directed by the Supreme Court, this rule does not provide for three years of practice as an Advocate.

(g) It is settled law that it is for the State or employer to prescribe qualification and other eligibility criteria for recruitment. This ratio is decided by the Supreme Court in 2003 AIR SCW 272 [P.U. Joshi & Others versus Accountant General, Ahmedabad and others with Union of India & Others versus Basudeba Dora and others]. The relevant potion of the said judgment reads as under:-

> "Question relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualification and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of policy and within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitation or restrictions envisaged in the Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the

competency of the State to change the rules relating to a service and alter to amend and vary by addition/subtraction the

(h) As indicated above, in the absence of any prohibition with reference to the condition that a candidate must be an advocate enrolled under the Advocates' Act as contained in the Supreme Court Judgement, the Rule 5(b) cannot be said to be illegal.

6. In regard to the second point in which it is stated that all the other States have not insisted for the said qualification:-

(a) It is to be stated that the State of Jharkhand is empowered to prescribe the qualification and eligibility criteria and it cannot be compelled to follow the eligibility criteria which has been fixed by other States.

(b) It is open to every State to frame their own rule relating to recruitment and fix eligibility criteria.

(c) Merely because other States did not insist for the applicant to be an advocate enrolled under the Advocates' Act, the Court cannot give a direction to the State of Jharkhand to follow the other States as it would amount to interference with the exclusive power of the State in fixing the eligibility criteria.

7. Therefore, on these grounds, this writ petition is dismissed. There shall, however, be no order as to costs.

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IN THE HIGH COURT OF JHARKHAND AT RANCHI
L.P.A. No.236 of 2008
D.D. 22.07.2008
Hon'ble the Chief Justice Gyan Sudha Misra &
Hon'ble Mr. Justice D.K.Sinha

Sanjay Kumar Samaiyar ... Appellant
Vs.
State of Jharkhand & Ors. ... Respondents

Age Relaxation

The appellant was a candidate for recruitment to the post of Inspector of Factories and Boiler Inspector wherein the age limit fixed was 21 years minimum and 35 years maximum – Applicant being overaged his application was rejected – Writ petition filed by him was dismissed against which the present appeal was filed – The Division Bench rejecting the contention of the appellant that age relaxation should have been given as the examination had been deferred for several years, has dismissed the appeal.

Held:

The applicant cannot be permitted to challenge the fixation of upper age limit and if at all any challenge could be sustainable, the same could be entertained perhaps by way of a Public Interest Litigation so that the common cause of all the applicants claiming age relaxation could have been raised.

ORDER

This appeal has been preferred against the order passed by the learned Single Judge on 11.6.2008 in W.P. (S) No.385 of 2007 by which the writ petition was dismissed holding therein that the petitioner, appellant herein, could not have been permitted to participate in selection if he had crossed the age of 35 years.

The appellant/petitioner had filed a writ petition before the learned Single Judge challenging the advertisement No.10 of 2006 dated 12th July, 2006 issued by the Jharkhand Public Service Commission by which the application for appointment to the post of Inspector Factories and Boiler Inspector was invited wherein minimum age limit fixed for the post as aforesaid was 21 years and maximum was 35 years.

The appellant/petitioner assailed the advertisement before the learned Single Judge on the ground that the maximum age limit of 35 years could not have been prescribed by the respondent-State and age relaxation ought to have been granted to the applicant since the examination had not been held for the post of Inspector Factories and Boiler Inspector for the last several years and the examination had been deferred for one reason or the other and therefore, the applicants should have been granted

relaxation in the age. The learned Single Judge had been pleased to dismiss the writ petition against which the instant appeal has been preferred.

The counsel for the appellant/petitioner has tried to impress upon this Court that the advertisement fixing age limit up to 35 yeas was clearly illegal and unjustified as the age relaxation ought to have been granted to the applicants since the process of appointment for filling up the vacancies had not been advertised for the last several years.

In our considered opinion, the appellant/petitioner could have challenged the advertisement before he participated in the selection process so that the authorities could apply their mind as to whether the upper age limit of 35 years fixed for the post could be relaxed in view of the fact that the examination for selection to the post of Inspector Factories and Boiler Inspector had not been held for the last several years in the State of Jharkhand. The appellant/petitioner, who had applied for the post, claimed the age relaxation only when he was not considered for appointment after which he filed the writ petition after the entire selection process was over. Besides this, the applicant cannot permitted to challenge the fixation of upper age limit and if at all any challenge could be held sustainable, the same could be entertained perhaps by way of a Public Interest Litigation so hat the common cause of all the applicants claiming age relaxation could have been raised.

Learned counsel for the appellant/petitioner has placed reliance on the case of Sanjeev Kumar Sahay and others vs. State of Jharkhand and Ors. in W.P. (S) No.1840 of 2008 with analogous cases disposed of on 30.4.2008 wherein the Division Bench of this Court held that the Judicial Officers whose examination was held in the year 2003 be granted relaxation but the case of the petitioner/ appellant herein is clearly distinguishable from the aforesaid case.

In All India Judge's Association case (A.I.R. 2002 S.C. 1753) it was brought to the notice of the Supreme Court about the huge backlog of pending cases in the Subordinate Judiciary. In view of the exigency the Supreme Court issued directives for filling up the existing vacancies in the Subordinate Courts at all levels latest by 31st March, 2003. The Government of Jharkhand also could not finalize the Rules related to appointment within time and only with a view to uphold the directives of the Supreme Court, 31st March 2003 was held to be the cut off age for upper age limit by the Division Bench of this Court in Sanjeev Kumar Sahay and others case (supra). No such situation is prevailing in the instant matter and hence we find no parity between the instant case and the case relied upon by the counsel for the appellant.

Learned Single Judge, in our opinion, has rightly not entertained the issue raised by the appellant/ petitioner herein and we find no infirmity in the order of the learned Single Judge. Consequently, this appeal is dismissed at the admission stage itself.

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IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P. (C) NO.4008 OF 2008
D.D. 08.08.2008
Hon'ble Mr. Justice D.G.R.Patnaik

Binod Kumar Mahato & Ors. ... Petitioners
Vs.
State of Jharkhand & Ors. ... Respondents

Examination:

Petitioners who were candidates for the recruitment to the post of Primary Trained Teacher Examination did not receive admit cards for the examination due to the lapse of respondents – Therefore, the High Court allowed the application with a direction to the Commission to issue provisional admit cards to the petitioners.

ORDER

The prayer in this writ application has been made for a direction to the respondents to immediately and forthwith grant admit cards to the petitioners so that the petitioners may appear at the Primary Trained Teacher Examination, 2007 scheduled to be held on 10th of August, 2008.

Learned counsel for the petitioners submits that the petitioners have submitted their respective application forms in response to the advertisement published by the respondents. The petitioner No.1 had submitted his application form before the District Superintendent of Education, Bokaro whereas petitioner Nos.2 and 3 had submitted their respective application forms before District Superintendent of Education, Jamtara and they have been granted receipts/acknowledgements of the submissions of their applications forms. Learned counsel refers to annexures 5, 6 and 7 to the writ application which are dated 27.10.2007, 23.10.2007 and 24.10.2007 respectively. It is further submitted that despite submissions of the application forms, the names of the petitioners do not find in the internet in respect of the admit cards issued to the candidates whose applications were received in the office of the respondents.

Learned counsel for the respondents submits at the outset that the application form of the petitioner No.1 was duly received and the admit card has already been posted in the internet, a copy of which has been handed over to the counsel for the petitioner No.1. As regards the petitioner No.2 and 3, there is no confirmation that the application forms were submitted by them and were received in the office.

There is nothing to dispute the genuineness of the receipts i.e. annexure 6 and 7 filed by the petitioner

No.2 and 3 which prima facie indicate that their applications in response to the advertisement were duly received in the office of the District Superintendent of Education, Jamtara. It is for the respondents, therefore, to search out the application forms and process the same and to issue admit cards to enable the petitioners to appear at the examination. Due to the lapse on the part of the respondents, the petitioners shall not be made to suffer.

Considering the aforesaid facts, the respondent No.2 is directed to grant/issue forthwith provisional admit cards to the petitioner Nos.2 and 3 so as to enable them to appear at the examination which is scheduled to be held on 10th of August, 2008. Thereafter the respondent shall search out the application forms submitted by the petitioner Nos.2 and 3 and process the same. It needs to be specified that mere permission to appear at the examination shall not give the petitioners any right to demand employment since their candidature shall always be subject to the defects, if any, which may be detected in respect of the non compliance with the requisite conditions, as stated in the advertisement.

Learned counsel for the respondent J.P.S.C. is directed to ensure that the provisional admit cards are delivered to the petitioner Nos.2 and 3, if possible today or latest by tomorrow, before the commencement of the examination. Both the petitioner Nos.2 and 3 shall present themselves before the Secretary at the J.P.S.C. office along with their respective identity certificates.

Let a copy of this order may be given to the counsel for the petitioners as well as counsel for the respondent J.P.S.C.

With these observations, this writ application is disposed of.

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IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P. (C) No.4009 of 2008
With
W.P. (C) No.4012 of 2008
D.D. 08.08.2008
Hon'ble Mr. Justice D.G.R. Patnaik

Pramod Kumar Rana & Ors. ... Petitioners
Vs.
State of Jharkhand & Ors. ... Respondents

Examination: Defects in the applications :

Petitioners were candidates for recruitment to the post of Primary Teachers – Their admit cards were not issued on the ground that the applicants had not indicated the requisite information relating to language opted by them – High Court has dismissed the applications holding that the applications are contrary to the stipulations made in the advertisement.

ORDER

Heard the counsel for the parties.

Petitioners in these applications have prayed for the issuance of an appropriate writ directing the respondent Jharkhand Public Service Commission (JPSC) to forthwith issue provisional admit cards to the petitioners to allow them to appear at the examination scheduled to be held on 10th August, 2008 for selection for their appointment on the post of primary teachers.

It is contended on behalf of the petitioners that in pursuance of the advertisement no.5 of 2007 published by the JPSC for appointment on the post of teachers in the primary schools, the petitioners submitted their application forms. However, they did not receive their admit cards; they checked in the Internet and to their surprise, they found that their forms were rejected on the ground "language not applicable". Learned counsel for the petitioners submits that in the application forms which were made available to the petitioners, there was no column wherein the language was to be mentioned and therefore the petitioners presumed that there was no requirement of filling up the language in the application forms. Learned counsel for the petitioners further submits that the petitioners had applied in response to the first advertisement no.5 of 2007 dated 20.4.2007 and therefore it cannot be said that the petitioners' applications suffered from any defect or default.

Learned counsel appearing on behalf of the respondent JPSC, as also the learned counsel for the State explain that as a matter of fact, after first advertisement, a second advertisement was published on 21.9.2007 in terms of which certain amendments were made in the previous advertisement relating to the eligibility criteria, and other particulars, etc. In the second advertisement, it was categorically

stated that the applicants must mention one language corresponding to the district opted by the candidate. It was also specifically mentioned in the revised advertisement that those candidates who had applied earlier in response to the first advertisement have to apply afresh and that applications therefore were to be obtained from the offices of the Deputy Commissioners/District Superintendents of Education of the concerned districts. In the instant case, the applications filed by the petitioners do not contain the essential requirement of the language and therefore their applications were rightly rejected.

I find force in the submissions made on behalf of the JPSC. As per the advertisement dated 21.9.2007, it has been categorically stated that apart from compulsory subjects of Hindi and English besides Science & Mathematics, History, Social Studies and Geography candidates must also opt for the specific regional language applicable to the district for the applicant has applied. It has also been stated in the advertisement that the applicants who had submitted their applications in response to the first advertisement should also make their application afresh incorporating all the necessary particulars as required in the revised advertisement.

Admittedly, the petitioners in these cases have not furnished in their respective applications the requisite information relating the language which they ought to have opted. The applications as submitted by them, were thus contrary to the declaration and stipulations made in the advertisement.

As regards petitioner no.4 (in writ petition no.4012 of 2008) and petitioners no.5 and 6 (in the writ petition no.4009 of 2008) it is submitted by the learned counsel appearing on behalf of the Commission that unlike the application forms of the petitioners no.1, 2 an 3 which were received in the office of the Jharkhand Public Service Commission from the respective districts through the offices of the Deputy Commissioners/District Superintendents of Education, no application which is purported to have been filed by the petitioners no.4, 5 and 6 was ever received in the office of the Commission and as such, no admit card could have been issued. Learned counsel for the petitioners submits that except the number of the application form which the petitioner no.4 claims to have submitted, she does not have any other proof in support of the claim of the petitioners that they had submitted their application forms. As such no admit card could have possibly been issued to petitioners no.4, 5 and 6.

Under such circumstances, I do not find any merit in these applications. Accordingly, these applications are dismissed.

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IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P. (C) No.4013 of 2008
D.D. 08.08.2008
Hon'ble Mr. Justice D.G.R. Patnaik

Kalawati Kumari ... Petitioner
Vs.
The State of Jharkhand & Ors. ... Respondents

Examination: Defects in the applications :

The petitioner was a candidate for recruitment to the post of Primary Teachers Examination 2007 and she sought direction to allow her to appear in the Examination in Khortha language in place of Bangla language as per the admit card issued to her – The applicant instead of mentioning one optional language mentioned as many as 3 languages in the prescribed column – Though such faulty application could have been rejected on this ground itself the Commission allowed the petitioner to appear in Bangla language – Court dismissed the application.

Held:

Since the petitioner has proficiency in both the languages in terms of what she has mentioned in the application the admit card issued to her cannot be said to be faulty in any manner and the petitioner cannot demand alteration in the admit card.

ORDER

Heard the counsel for the parties.

The petitioner in this writ application has prayed for the issuance of a direction to the respondents, particularly respondent no.4 to consider her representation to allow her to appear at the Primary Teachers Examination, 2007 scheduled to be held on 10th August, 2008 in Khortha in place of Bangla language.

Learned counsel for the petitioner explains that in the advertisement published by the JPSC for appointment on the post of Teachers in the primary schools, the petitioner had filled up her application form mentioning the specific languages "khortha" and Bangla besides Hindi. She has, however, received admit card with permission to write the examination in Bangla language.

Learned counsel for the Jharkhand Public Service Commission explains that the application form has not been filled up by the petitioner as required in the advertisement. It had been specifically stated in the advertisement that applicants should fill up any one language as optional language, but instead of that, the petitioner has mentioned as many as three languages in the prescribed column. Such faulty

application could have been rejected on this ground itself. Yet, considering the fact that in the required column, Bangla language has been mentioned by the petitioner and since Hindi is not the optional language, provisional admit card has been issued to the petitioner allowing her to write the examination in Bangla. It is therefore not permissible at this stage to allow the petitioner to make alteration in her application form or admit card issued to her.

From a copy of the original application of the petitioner which has been received by the JPSC, as filed by the learned counsel for the respondent no.2, it does appear that in the column prescribed for language, the petitioner has mentioned Hindi and Bangla languages, though against Bangla language, she has mentioned that she has proficiency in speaking the language. It also appear that above the prescribed column, Khortha has also been written as the optional language with the same remarks that the applicant is proficient only in speaking the language.

Since the petitioner has proficiency in both the languages in terms of what she has mentioned in the application, the admit card issued to her cannot be said to be faulty in any manner and at this stage, the petitioner cannot demand alteration in the admit card.

I do not find any merit in this writ application. The application is accordingly dismissed.

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IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P. (C) NO.4108 OF 2008
D.D. 01.09.2008
Hon'ble Mr. Justice D.G.R. Patnaik

Basanti Kumari Mahato & Sanjeev Kumar Raut ... Petitioners
Vs.
The State of Jharkhand & Ors. ... Respondents

Examination:

Petitioners were not permitted to appear for the examination held in August 2008 for recruitment to the post of Primary Trained Teachers as their applications were not forwarded to the P.S.C. by respondents 2, 3 and 4 – Petitioner sought to conduct a fresh examination or to initiate disciplinary proceedings against the erring respondents – Since the examination was already held Court held no relief could be granted to the petitioners and dismissed the application.

ORDER

Heard the counsel for the parties.

In this application, the petitioners are aggrieved with the purported conduct of respondents no.2, 3, 4 who have failed to forward the petitioners' applications to the respondent Jharkhand Public Service Commission (JPSC) for their appearance at the examination held in August, 2008 for appointment of primary trained teachers.

The contention o the petitioners is that the application submitted by the petitioners pursuant to the advertisement issued by the JPSC, were within time and the petitioners were expecting to receive admit cards. However, the admit cards were not issued to them and on enquiry they were informed that the JPSC had declared/displayed two separate lists on the notice boards, one indicating names of the persons whose applications were found proper and were issued admit cards and the other list showing names of those whose applications were rejected. It is further submitted that neither of the list contained the petitioners' name and on further enquiry it was detected that the respondents no.6 and 7 in fact, did not forward their applications to the JPSC and therefore, they were not issued admit cards as a result of which they were deprived from their appearance at the examination which was held on 10.8.2008.

Learned counsel for the respondents no.5 and 6 submits that on verification of the fact, it is has been found that applications received from the petitioners could not be forwarded to the office of the JPSC within time, on account of inadvertence and although later, the applications were forwarded, but by that time the examination was already over.

The petitioners pray that the respondent JPSC be directed to conduct a fresh examination for the petitioners for one day or in the alternative to initiate disciplinary proceedings against the erring respondents who failed to forward the petitioners' applications and further to pay compensation to the petitioners.

It appears that the petitioners' appearance at the examination has been frustrated on account of the lapses on the part of the respondents no.5 and 6. Holding of fresh examination for the petitioners is within the exclusive discretion of the JPSC depending upon the Rules framed and this Court would not be inclined to pass any direction to the JPSC in this regard.

As regards initiation of departmental proceedings against the erring respondents, this also would be within the jurisdiction of the State. The concerned authorities of the State should nevertheless take a strong view of the lapse on the part of the erring respondents, as pointed out by the petitioners and the learned counsel for the State, and to issue appropriate direction in this regard, so that similar lapses should not occur in future.

Though as submitted by the petitioners, on account of being deprived from appearing at the examination, the petitioners have suffered mentally as well as heavy financial loss, but the manner and extent of the loss suffered by the petitioners has not been explained.

Considering the facts and circumstances as aforesaid, since the examination for which the petitioners had applied has already been held no relief in terms of the prayer can be granted to the petitioners in this writ petition. Accordingly, this application is dismissed.

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IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P. (S) NO.3416 OF 2007
D.D. 18.10.2008
Hon'ble Mr. Justice R.R.Prasad

Anil Kumar Singh ... Petitioner
Vs.
Jharkhand P.S.C. & Ors. ... Respondents
Examination:

The petitioner was a candidate for selection to 5 posts of Assistant Engineer (Mechanical) in the Department of Public Health Engineering (P.H.E.D.) advertised in the year 2003 – Subsequently in 2005 another advertisement was issued for selection to 8 posts of Assistant Engineer (Mechanical) in Water Resources Department, to which the petitioner was not a candidate – Common written test was held – At the fag end of the selection process a Corrigendum to the advertisement issued earlier in the year 2003 wherein vacancy for the candidates of unreserved category was shown as 'Nil' whereas vacancies for SC, ST & OBC were shown as 1, 5 & 1 respectively – In the counter affidavit submitted by the Department that after applying post based roster on the sanctioned post of 19 it was found as against 10 posts meant for the candidates of unreserved category, 11 persons were working and therefore, vacancy as against general category was shown as 'nil' – Considering this fact and the fact that successful candidates who had applied for both the advertisements were asked to opt either for Water Resources Department or PHED the Court has held that there is no inherent defect in the result published wherein even applicants of the year 2005 were shown successful for the posts advertised in the year 2003 and consequently dismissed the writ petition.

ORDER

Pursuant to advertisement issued by Jharkhand Public Service Commission (JPSC), vide advertisement no.12 of 2002-03 inviting applications for the appointments on 5 posts of Assistant Engineer (Mechanical) in the Department of Public Health and Engineering (P.H.E.D.), the petitioner being eligible applied for the same. Subsequently in the year 2005, another advertisement was issued, vide advertisement no.8 of 2005 for the appointments on 8 posts of Assistant Engineer (Mechanical) in the Water Resources Department, to which the petitioner did not chose to apply for. However, for both the posts as advertised in the year 2003 and also in the year 2005, common written test was held and the petitioner came out successful and was called for interview on 20.3.2007. While the selection process was at its fag end, Jharkhand Public Service Commission published a corrigendum (Annexure 6) to the advertisement issued earlier in the year 2003 wherein vacancy for the candidates of unreserved category was shown as 'Nil' whereas vacancies for SC, ST and OBC were shown as 1, 5 and 1 respectively. Thereupon, results were published on 19.5.2007 wherein none of the candidates of unreserved category was shown successful which, according to learned counsel appearing for the

petitioner, is quite illegal as when the petitioner and others of general category had taken examination and also appeared for interview, pursuant to advertisement made in the year 2003, respondent had no authority to change the criteria of the process of selection by showing vacancy for the unreserved category as 'Nil' by applying policy of roster set out subsequent to issuance of advertisement and, as such, corrigendum issued under Annexure 6 is fit to be quashed. Further grievance of the petitioner is that though common written test was held, pursuant to advertisement made in the year 2003 and 2005 for filling up the posts in the Department of Drinking Water and Sanitation and Water Resources Department for which results were prepared separately for both the departments but most strange part of the matter is that even candidates who were the applicants under advertisement published in the year 2005, were declared successful for the posts advertised in the year 2003 and, therefore, the results as contained in Annexure 7 is also fit to be set aside.

However, case of the respondents is that 5 posts of Assistant Engineer (Mechanical) were advertised to be filled up in the Department of Public Health and Engineering (now known as Drinking Water and Sanitation Department) wherein category wise vacancy was never shown. When the Department, before examination was held, found that the vacancies have increased, corrigendum was issued under Annexure B wherein 9 posts of Assistant Engineer (Mechanical) were shown to be vacant. Further case is that before the examination could be undertaken, when the Government did find that vacancies for the posts of Assistant Engineer and Junior Engineer (Civil and Mechanical) do exist in the Department of Water Resources, another advertisement was issued in the year 2005 wherein it was indicated that the position of vacancy is subject to its variation. Thereupon it was decided by the Government as also by the Jharkhand Public Service Commission to hold common written test for the post of advertised in the year 2003 and in the year 2005. Accordingly, admit cards were issued to the candidates indicating therein that though separate admit cards have been issued, but they can chose to appear in only one examination and in that event, admit cards issued for the other examination would stand cancelled automatically. When the result of written test was published, successful candidates were called for interview and at the time of interview, they were asked to give option either for Drinking Water and Sanitation Department (earlier known as PHED) or for Water Resources Department if the candidates have applied for, against the posts advertised in the year 2003 and 2005. But the petitioner had not applied for against the posts advertised in the year 2005 and, therefore, his candidature stood as against the vacancy of the Drinking Water and Sanitation Department. Further case is that during the pendency of the selection process, Drinking Water and Sanitation Department released the

vacancy position after applying principle of roster wherein vacancy as against the general candidate was shown as 'nil' whereas vacancies for SC, ST and OBC were shown as 1, 5 and 1 respectively. Thus, stand of the Department as well as Jharkhand Public Service Commission is that when there was no vacancy for the unreserved category and as such no one of general category was selected for the appointment on the post of Assistant Engineer (Mechanical) in the Drinking Water and Sanitation Department.

Having heard learned counsel appearing for the parties and regard being had to the pleadings of the respective parties, I do not find any substance in the submission advanced on behalf of the petitioner that the entire selection process gets vitiated on account of the fact that criteria of roster clearance adopted subsequent to issuance of the advertisement in the year 2003 was applied for in declaring the result as it is evidently clear that under the advertisement issued in the year 2003, vacancy position had never been mentioned, rather it had been categorically mentioned that "SARKAR DWARA NIRDHARIT VIDHI SANGAT RITI SE ANUSUCHIT JATIYON/ANUSUCHIT JANJATIYON TATHA PICHHDI SHRENI KE UMMIDWARON KE LIYE RIKTIYON KA AARAKSHNAN KIYA JAYEGA".

However, vacancies subsequently increased to 9. Subsequently when the Government came to know before holding examination for the appointment for the posts as advertised that the vacancies for the posts of Assistant Engineer (Mechanical) and also (Civil) have fallen vacant in Water Resources Department another advertisement was issued in the year 2005. Thereupon the Government as well as Jharkhand Public Service did decide to hold common written test for filling up the posts advertised in the year 2003 and 2005. It would be significant to note here that under the advertisement issued in the year 2005, it has also been mentioned that the position of vacancy as advertised shall be subject to variation. When the common test was conducted, Jharkhand Public Service Commission was intimated about the vacancy position of Drinking Water and Sanitation Department as seven wherein vacancy for the general candidates was shown as 'nil' whereas vacancies for SC, ST and OBC candidates were shown as 1, 5 and 1 respectively.

Mr. A.K.Sinha, learned senior counsel appearing for the Jharkhand Public Service Commission by putting emphasis made in the counter affidavit submitted that the department (Drinking Water and Sanitation Department) after applying post based roster on the sanctioned post of 19 did find that as against 10 posts meant for the candidates or unreserved category, 11 persons are working and,

therefore, vacancy as against general category was shown as 'nil'.

Thus, there had been no vacancy for the general candidates for the appointment on the post of Assistant Engineer (Mechanical) in the Department of Drinking Water and Sanitation Department and therefore, if none of the person of the general category has been shown as successful, the authority cannot be said to have acted arbitrary or illegality.

Therefore, in the circumstances, it can never be said that different criteria other than criteria laid down under advertisement issued in the year 2003 was adopted for filling up the posts. Coming to other aspect of the matter, it be noted that it is admitted position that common written test for filling up the posts advertised in the year 2003 and in the year 2005 was undertaken, thereupon successful candidates, who had applied under both the advertisements were asked to opt either for Water Resources Department or Drinking Water and Sanitation Department and accordingly, results were published for Water Resources Department and Drinking Water and Sanitation Department and therefore, I do not find any inherent defect in the result published wherein even the applicants of the year 2005 were shown successful for the posts advertised in the year 2003.

In the result, I do not find any merit in this writ application. Hence, this writ application is dismissed.

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IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P. (C) NO.270 OF 2008
D.D. 20.03.2009
Hon'ble Mr. Justice D.G.R. Patnaik

Jharkhand Ph.D. Dharak Shodh Sangh, Ranchi & Anr. ... Petitioners
Vs.
The State of Jharkhand & Ors. ... Respondents

Recruitment:

Petitioners unsuccessful candidates in the recruitment for the post of lecturer in Colleges/Universities of Jharkhand have challenged the selection process mainly on the ground that allocating 40 marks for interview and 60 marks for academic qualification was arbitrary – High Court examining the relevant provisions and the procedure adopted and the decision of the Supreme Court and the fact that the petitioners have participated after fully knowing the procedure and conditions of selection has held that fixing of 40 marks for interview and 60 marks for academic qualification does make the selection arbitrary or against the guidelines of UGC and dismissed the writ petition.

Held:

Having thus allowed themselves to be interviewed in accordance with the stipulated selection criteria the same candidates cannot be allowed to challenge the selection process on their having been declared unsuccessful at the test. The decisions of the Supreme Court in Ashok Kumar Yadav vs. State of Haryana AIR 1986 SCC L&S 88 and Anjar Ahmad Vs. State of Bihar & Ors. 1993 (2) P.L.J.R. SC 135 regarding awarding of interview marks have been distinguished.

Cases referred:

1) 1981 SCC (L&S) 258 - Ajay Hasia verus Khalid Mojib Sehravardi
2) 1986 SCC (L&S) 88 - Ashok Kumar Yadav versus State of Haryana
3) 1991 ACC (L&S) 555 – Mohindar Sen Garg versus State of Punjab
4) 1992 SCC (L&S) 38 -Ashok versus State of Karnataka
5) 1993 (2) P.L.J.R. SC 435 - Anjar Ahmad versus State of Bihar & Others

ORDER

The petitioners being an Association of holders of Ph.D. Degrees, have prayed in this writ application for quashing the panel and the result (Annexure-5) of the Jharkhand Public Service Commission (J.P.S.C.), published in the newspapers on 15.01.2008, containing recommendations for appointment of lecturers in different Universities of Jharkhand.

2. The main ground of challenge to the impugned panel and the Results, is that it has been prepared in violation of the terms of the advertisement and in violation of the University Grants

Commission Norms and without consulting the U.G.C. and in violation the various orders, passed by the Supreme Court as also by this Court in the matter of fixing the minimum qualifying marks for interview. Terming the impugned panel and the results as arbitrary, discriminatory, illegal and violative of the principles of service jurisprudence, the petitioners, besides praying for quashing the impugned panel and the results, have also prayed for a direction to the respondents to hold a fresh interview for appointment of lecturers in different universities and colleges of Jharkhand.

3. The case of the petitioners is that consequent upon the identification of vacancies in the posts of lecturers in the various subjects in different colleges under the various universities within the State of Jharkhand, the Respondent-J.P.S.C. had published an advertisement dated 31st January, 2007 in the local newspaper, inviting applications from eligible candidates, declaring the eligibility criteria therein. In response to the advertisement dated 31st January, 2007, (Annexure-2), several applications were received including the applications of the members of the Petitioner's Association. After concluding the tests including the viva-voce test, the J.P.S.C. published the results of the examinations along with a panel containing the recommendations for appointment of the successful candidates to the post of lecturers. The petitioners constitute a group of such candidates, who were not declared successful at the tests. Their main grievance is that by fixing minimum 40 marks for interview and 60 marks for academic qualification and failure to attach mark for academic qualifications including the Ph.D. degrees, the Respondents-J.P.S.C. has acted arbitrarily and by way of discrimination, has deprived the members of the Petitioner-Association from their opportunity of appointment to the posts of lecturers. The petitioner Association has also challenged the entire selection process on the ground that it is in violation of the U.G.C. norms and contrary to the directives given by this Court in several cases and also by the Supreme Court in several judgments.

In the matter of (i) Formation of selection committee, (ii) Appointment of experts (iii) Coram of selection Committee (iv) Reservation for SC/ST/Handicapped candidates (v) Appointment of representative experts for SC/ST. Women and handicapped persons (vi) Allocation of marks for Ph.D. publication, Teaching Experience, Research Experience, Ph.D. productions and other academic achievements (vii) seven points scale of U.G.C. and (viii) Consideration of outstanding career, distinctions and other achievements of concerned meritorious candidates.

Learned counsel adds further that the petitioners have also challenged the vires of Section 57(2)(b) of the Jharkhand State Universities Act, 2000 on the ground that the provisions of Section 57, which

enables the Commission to recommend the names for appointment of lecturers in the University and the Constituent Colleges from amongst the eligible candidates solely on the basis of interview. It is in the teeth of the equality clause and fails to satisfy constitutional requirements of Articles 14 and 16 of the Constitution of India. Learned counsel elaborates that by virtue of the said provision, there is a possibility that the authorities may show nepotism or favouritism in favour of one or other candidate.

4. Elaborating the grounds of challenge against the results and the impugned panel, Sri. Indrajit Sinha, learned counsel for the petitioners would submit that the Respondent- J.P.S.C. is only a recruiting Agency and it was a mandatory obligation on its part to consult the U.G.C. and follow the U.G.C. regulations, guidelines and orders in the matter of fixing the eligibility criteria and the percentage of marks etc. for the interview and for finalising the process of selection. Instead, the Respondent-J.P.S.C. appears to have taken a stand that since it has been entrusted by the State Government with the work of conducting the selection and recruitment, it was for the J.P.S.C. to make the Rules as may be applicable for the selection process and that in laying down the Rules, it has followed the Rules and provisions of the Jharkhand State Universities Act.

Referring to the cut-off marks of 40 out of 100 for the viva-voce tests, learned counsel argues that fixation of 40 percent marks for viva voce tests, is arbitrary and discriminatory. To buttress his arguments, learned counsel refers in this context to the various judgments of the Supreme Court in the cases of Ashok Kumar Yadav versus State of Haryana reported in 1986 SCC (L&S) 88; Mohindar Sen Garg versus State of Punjab reported in 1991 ACC (L&S) 555, Ashok versus State of Karnataka reported in 1992 SCC (L&S) 38; Ajay Hasia verus Khalid Mojib Sehravardi reported in 1981 SCC (L&S) 258.

Learned counsel explains that in each of the aforesaid judgments, the Supreme Court has held that fixing of the minimum higher percentage marks for interview at an unreasonably high level, would amount to discrimination as it would tend to eliminate prospective candidates, who are otherwise qualified for the posts.

Learned counsel argues further that fixing of different cut-off marks for different subjects, as has been made by the J.P.S.C., is also arbitrary and discriminatory and is against the spirit of the judgment passed by this Court in the case of Juhi Gupta versus University Grants Commission and others, passed in W.P. (S) No.876 of 2007.

Learned counsel further argues that the limit of 40 marks for viva-voce tests was not stated and declared in the advertisement (Annexure-2) and the petitioners could know about the same only after the commencement of the interview held in the month of March, 2007 and therefore the petitioners had no opportunity to raise this issue earlier.

Further grounds of attack, as advanced on behalf of the petitioners, is that the concerned Universities of Jharkhand and the State Government have not correctly calculated the sanctioned vacant posts in between the period 1997 to 2006. Learned counsel explains that as was admitted by the Respondent-State in a previous writ application vide W.P. (S) No.1059 of 2006, even by a rough estimate, there are as many as about 3000 vacancies, whereas, the respondent-J.P.S.C. has held the interview for only 874 posts and the respondents have thereby deprived several eligible candidates of their rightful opportunities for employment.

5. It may be mentioned here that vide order dated 23.09.2008, while allowing the Respondent-U.G.C. and the J.P.S.C., time to file the counter affidavit, this Court had passed an interim order directing that till the next date fixed in the case, the appointments shall not be finalized. The interim order continued to be extended from time to time and has continued till date.

6. Counter affidavit has been filed on behalf of the Respondent No.4-J.P.S.C. denying and disputing the entire claims of the petitioner and challenging the very maintainability of this writ application. The stand taken by the J.P.S.C. is that in laying down the eligibility criteria and preparation of the selection process, the J.P.S.C. had fully complied with the directives contained in the judgment of this Court, passed in the case of Jharkhand B.E.T.-S.E.T. Association, vide W.P.(S) No.5091 of 2006 and the provisions of the Jharkhand State Universities Act. The rules of eligibility criteria and selection process were prepared and the examination was conducted strictly in terms of the guidelines laid down by the U.G.C. in conducting the J.E.T.-S.E.T. examination.

After publication of the result of the J.E.T. Examination and in pursuance of the requisitions submitted by the different universities of Jharkhand, which was also verified by the Human Resources Development Department, Government of Jharkhand, the J.P.S.C. had issued the Advertisement (Annexure-2), inviting applications from eligible candidates for considering their candidature for appointment to the posts of lecturers and other posts. The advertisement had also declared that the selection process would be conducted in accordance with the directions contained in the judgment of the High Court in

the case of B.E.T.-N.E.T. Association (Supra) and in accordance with the provisions of the Jharkhand State Universities Act, 2000. The minimum qualification for appointment to the posts of lecturers was also categorically stated in the advertisement.

The advertisement had also declared that in pursuance of the Rule contained in Section 57(2)(b) of the Jharkhand State Universities Act, 2000 (Amended upto date), the selection is to be made only on the basis of interview/viva voce test.

Before starting the interview, a joint meeting, headed by the Chairman and comprising of one senior member of the Association, the Vice-chancellors of the different universities, the Deputy Director, Human Resources Development Department, Government of Jharkhand, Ranchi, the nominees of the State Government and the Principals of a few colleges, was held. It was unanimously proposed and resolved at the meeting to allocate 60 marks for the academic qualifications and 40 marks for the interview and to commence the interview from 29.03.2007. Such decision was also placed on the Website for information to all concerned and it was also published in the daily Newspapers on 16.03.2007. A High Power Interview Board, was constituted. After conducting the interview, a panel of the selected candidates was prepared in accordance with the results along with the Commission's recommendations for appointment of the successful candidates to the posts of lecturers in the various Colleges.

7. Mr. Sanjoy Piprawall, learned counsel for he Respondent-J.P.S.C., would explain that in laying down the selection process adopted in the present case, the Respondent-J.P.S.C. has strictly acted in terms of the Guidelines/regulations of the U.G.C and the J.P.S.C. has not violated any norms and regulations either to the U.G.C. or the directions contained in the judgments passed either by this Court or by the Supreme Court in any of the cases referred to by the petitioner. Learned counsel argues further that the ratio laid down by the Supreme Court in Ashok Kumar Yadav's case (supra), would not be applicable in the facts and circumstances of the present case, as because the facts of the Ashok Kumar Yadav's case refer to a competitive examination, consisting of a written examination followed by viva-voce Test and it was in the light of such facts that the Apex Court had observed that the marks allocated for the viva-voce tests, should not exceed 12.2 percent of the total marks. In the present selection process, which is under challenge, the selection has been made only on the basis of interview and not after conducting any written examination.

Learned counsel submits further that on a previous occasion, when the selection process for appointment to the post of lecturer for the Universities of Bihar was commenced in the year 1993 by the Bihar State Universities, (Constituent Colleges) Service Commission in accordance with the provisions contained in the Bihar Universities Act and the Patna Universities Act, a dispute arose and was referred to the Patna High Court by way of a writ petition, being C.W.J.C. No.12382 of 1996, on a similar ground, namely that the fixation of 60 marks for academic qualification and 40 marks for interview, was arbitrary and illegal. The High Court dismissed the writ application by observing "that higher allocation of marks for interview than before may not be said to be arbitrary". The view of the learned Single Judge in the above writ petition was upheld by the Division Bench of the Patna High Court in Appeal. The appeal filed by the aggrieved candidates, against the order of the Division Bench, vide S.L.P. (Civil) Appeal No.3697-3698 of 2000 was dismissed by the Apex Court on 07.04.2000. Learned Counsel submits further, that even having known through the publication in the newspapers and through website about the fixation of 40 per cent of cut-off marks for the interview, quite a few members of the petitioner's Association had appeared at the interview without raising any objection though they could not succeed in the interview. The petitioner cannot therefore challenge the selection process after having accepted the selection criteria and after having appeared at the interview. Moreover, the entire selection process, having been completed, the process of appointment, has been held up only on account of the pendency of this writ application and the interest of more than 700 selected candidates, out of whom approximately 300 candidates are holders of Doctorate degrees, are liable to suffer prejudice.

As regards, the contention of the petitioner that inspite of the existence of large number of vacancies, the advertisement was issued by the J.P.S.C. only for appointment to a limited posts of lecturers, learned counsel explains that in the advertisement itself, it has been mentioned that the selection process was started in pursuance to the requisitions received from the State Government and there could be a possibility of increase/decrease in the number of posts.

8. Counter affidavit has been filed also on behalf of the Respondent-Universities. The stand taken by them is in support of the stand taken by the Respondent-J.P.S.C. affirming that the selection process was adopted strictly in accordance with the provisions of the U.G.C. Act.

9. From the rival submissions, it appears that the main controversy as raised by the petitioners is, in respect of the selection process adopted by the J.P.S.C. including the constitution of the Selection Committee and that the fixation of 40 percent marks for interview and 60 percent for the academic

qualifications. The provisions of Section 57(2)(b) of the Jharkhand State Universities Act, 2000 has also been challenged on the ground that by enabling the Commission to confine the selection process by conducting interview only. The provision fails to satisfy the constitutional requirements of the Article 14 and 16 of the Constitution of India. However, the ground relating to the constitutional validity of Section 57 of the Jharkhand State Universities Act, 2000, having not been pressed by the learned counsel for the petitioner, the same is omitted from consideration.

The twin questions, which arise are (i) whether the respondent-J.P.S.C. had the authority to prescribe the criteria for the selection by fixing 40 percent as the minimum marks for the interview and (ii) whether in doing so, could it be said that the J.P.S.C. has violated the U.G.C. norms and the guidelines and also the directives as contained in the various judgments of the High Court and the Supreme Court.

10. Before answering these questions, it would be relevant to note that the eligibility criteria as laid down in the Advertisement, has not been challenged by the petitioners. It is not disputed that the eligibility criteria as mentioned in the advertisement are in accordance with the U.G.C. Regulations. Likewise the method of selection by way of interview alone has also been not questioned. Challenge on the other hand is only to the criteria for selection by fixing the minimum of 40 marks for the interview as has been fixed by the J.P.S.C. which, according to the petitioner, is arbitrary and would tend to eliminate the deserving candidates, who possess higher academic qualifications.

11. What weightage should be given to the interview marks, has frequently been a subject matter of controversy. A series of judgments have been passed by the Supreme Court on this issue. While some of the decisions relate to admissions in educational institutions, other relate to selection for employment.

12. From the counter affidavit of the U.G.C., it transpires that so far as the distribution of marks for interview and/or viva voce in the process of selection of lecturers is concerned, the U.G.C, has not prescribed any norms or guidelines. The percentage of marks/weightage to be distributed and assigned for interview and/or viva-voce has been left to be considered and decided by the concerned university/ authority undertaking the selection process for the post of lecturer.

The counter affidavit further states that in respect of the query made by the J.P.S.C., the U.G.C. by

its letter dated 13.02.2008 (Annexure-3), has clarified the position. It has also been stated that the only guideline as prescribed by the U.G.C. Regulations is that the minimum qualifications for appointment of lecturer and the same is mandatory in nature as contained in the U.G.C. Regulations on (minimum qualifications required for the appointment of lecturer and the career advancement of teachers and lecturers in universities and institutions affiliated to it) Regulations, 2000, together with the amended Regulation of 2002 and of 2006.

13. From the above, it appears that the J.P.S.C. on being called upon to make the selection of the suitable candidates for appointment on the posts of lecturers in the various universities was left with its own discretion to adopt the selection process, which could be subject only to the eligibility criteria fixed by the U.G.C. Regulations. The J.P.S.C. was therefore at liberty to confine the selection process by way of selection through interview/viva-voce only. Guidance was available to the J.P.S.C. in this regard under the provisions of Rule 57(2)(b) of the Jharkhand State Universities Act 2000, which the J.P.S.C. in its counter affidavit has claimed to have adhered to and followed strictly.

The counter affidavit of the J.P.S.C. declares that even though it was left to its discretion to prescribe the selection process by way of interview/viva voce test yet, it had preferred the matter to be decided upon by a select body of academicians including the nominees of the State Government and the Principals of various colleges, the Vice-chancellor of Universities, Chancellors of Universities and the Chairman and Senior member of the J.P.S.C. It was this Committee which had unanimously proposed and recommended to allocate 60 marks for the academic qualifications and 40 marks for interview. Thus, the selection process as adopted and prescribed by the J.P.S.C. was based on the recommendations of the Select Committee of Academicians and the percentage of marks was accordingly allocated as per the recommendations.

14. It may also be noted that the demand for the Government to take steps for appointment of lecturers in different constituent colleges of universities in the Jharkhand came up for consideration before this Court in the case of Jharkhand B.E.T.-N.E.T. Association versus The State of Jharkhand & Others (W.P. (S) No.1059 of 2006). While disposing of this writ application, this Court has issued a series of directions, which, inter alia comprised of the following:-

(i) Direction to the State Government to verify within the time stipulated, the number of sanctioned teaching posts in the various departments of one or the other Constituent College.

(ii) The number of such posts which had fallen vacant.

(iii) The State Government on receipt of requisition by one or other University or is being made for sanction of posts of lecturer for constituent colleges for Post Graduate Department, will forward the requisitions of the J.P.S.C. within one month thereafter, the J.P.S.C. in its turn will publish notice for appointment and within two months thereof scrutinize the applications, conduct written test/viva voce test etc. as required under the law and will publish the results within three months from the date of publication of the notice inviting applications (advertisement) and to make its recommendation within the said period.

(iv) The University and the Constituent Colleges in their turn, are required to issue letter of appointment in terms of the condition, as may be made by the J.P.S.C. and will fill up all the vacant posts of lecturer within one month from the date of receipt of recommendation by the J.P.S.C. and the total procedure is to be completed preferably within nine months.

15. It was pursuant to the directions contained in the judgment in the aforesaid case that the number of vacancies and the sanctioned posts was identified by the State Government and on the basis of the identification made, the Universities had submitted their respective requisitions to the J.P.S.C. for making the selection and recommendation of candidates for appointment on the posts of lecturers.

16. As noted above, in the case of B.E.T.-N.E.T. Association (Supra), no specified selection criteria was stipulated. The only requirement as per the directions contained in the judgment was that in the matter of selection of the candidates, the U.G.C. Guidelines had to be adhered.

From the counter affidavit of the U.G.C., it transpires that apart from fixing the minimum eligibility criteria, the U.G.C. has not prescribed any specific selection process for selection of candidates by way of interview.

17. As regards, the judgment in the case of Ashok Kumar Yadav (Supra), referred to by Sri. Indrajit Sinha, in my opinion, this judgment cannot be applied in the facts of the present case. Though in the said judgment, the Supreme Court has held that unduly high percentage marks allocated for the interview made the selection arbitrary, yet it did not set aside the selection on the ground that setting aside the selection would upset a large number of appointments already made. Even otherwise, the above observation was made in the context of the selection process in which the selection was made on the basis of not only interview but also on the basis of the written test.

18. An identical issue raised in which the selection process was challenged on the ground that a

higher percentage of marks was allocated for interview in comparison to the marks for the academic qualifications, the Patna High Court in the case of Rajeev Ranjan & Others versus State of Bihar & Others (supra) after referring to various judgments of the Supreme Court including the judgments in the case of Ashok Kumar Yadav (supra) had observed that the higher allocation of marks for interview may not be said to be arbitrary. The view of the Single Judge in the case of Rajeev Ranjan (supra), was upheld by the Division bench of the Patna High Court. In the case of Anjar Ahmad versus State of Bihar & Others 1993 (2) P.L.J.R. SC 435, the Supreme Court has observed that "allocation of and 50 per cent marks for interview and 50 per cent marks for academic performance, where the selection is made on the basis of interview only is valid and does not suffer from the vice of arbitrariness".

19. Furthermore, as it appear from the facts of the case, the selection criteria was placed on the website for information to all concerned. The petitioners Association is therefore deemed to have been made aware of the selection criteria. Quite a few candidates of the petitioner's Association had appeared at the interview on the scheduled dates. Having thus allowed themselves to be interviewed in accordance with the stipulated selection criteria, the same candidates cannot be allowed to change the procedure of selection process on their having been declared unsuccessful at the test.

20. In the light of the above facts, it cannot be said that fixing of minimum 40 marks for interview and 60 marks for the academic qualifications, suffers in any manner from the vice of arbitrariness or that it is against any guidelines issued by the U.G.C. or the guidelines issued by the High Court in the case of B.E.T. – N.E.T. Association (supra).

21. Both the questions having been thus answered in favour of the respondent-J.P.S.C. and finding no merit in this writ application, the same is dismissed.

22. The interim order dated 23.01.2009 is hereby recalled.

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KARNATAKA PUBLIC SERVICE COMMISSION

IN THE HIGH COURT OF KARNATAKA AT BANGALORE
WRIT PETITION NOS.9521-9525, 10709 AND 11332 OF 1999 (S-KAT)
D.D. 12.06.2002
The Hon'ble Mr. Justice R.V.Raveendran &
The Hon'ble Mr. Justice K.Ramanna

S.Srinath & Ors. ... Petitioners
Vs.
The State of Karnataka & Ors. ... Respondents

Recruitment:

Whether notification can contain instructions which are not provided for in the Rules? – Yes

G.P. 1998 Recruitment – Petitioners candidates for the said recruitment were unsuccessful in the Preliminary Examination not qualified to take the Main Examination – Petitioners sought revaluation of their answer scripts – Clause 17(v) of the notification clearly stated that Preliminary Examination was only a screening test and the marks sheet would not be supplied to any candidates – As the petitioners secured lesser percentage than the candidates selected for main examination in the respective categories writ petitions were dismissed.

Held:

Instructions to the candidates may contain matters, which are not part of the Rules. Instructions and conditions of the recruitment notification will be valid as long as they are in accordance with Rules. The Rules do not provide for publishing of marks or revaluation of papers in regard to preliminary examination. Therefore, the instructions contained in clause 17(v) of the notification are neither unreasonable nor arbitrary.

ORDER

Karnataka Public Service Commission [KPSC] by notification dated 9.3.1998 invited applications for recruitment of Gazetted Probationers (Group-A and Group-B) at the request of the State Government. The selection was governed by Karnataka Gazetted Probationers [Appointment by Competitive Examination] Rules, 1997 [for short, the Rules).

2. The scheme of selection under the said notification required the Candidates to undergo the competitive examination at two stages:

(i) a preliminary examination or screening test for selection of candidates for the main examination. The preliminary examination consisted of two objective type (multiple choice) papers, wherein the candidates are required to merely indicate the correct answer by encoding the column and the evaluation of answer scripts was to be made by OMR method i.e. optical mark reading by computer.

(ii) KPSC would notify the list of candidates found eligible to take the main examination and those candidates had to take the main examination, (written examination and personality test). Schedule II (Section I – Note 4) to the Rules required that the number of candidates to be admitted to main examination should be twenty times the vacancy notified in the order of merit and on the basis of the performance in the preliminary examination subject to accommodating in the same ratio, adequate number of candidates belonging to the categories of scheduled castes/Scheduled tribes and each of the other backward classes.

3. Clause 17(v) of the notification made it clear to the candidates that as the preliminary examination was only a screening test, no marks sheet would be supplied to successful or unsuccessful candidates and no correspondence would be entertained with the Commission in that regard. KPSC notified the list of candidates found eligible to take the main examination as per the notification dated 16.11.1998 and required them to submit another set of applications with necessary documents, fixing the last date as 15.12.1998.

4. Petitioners had all appeared for the preliminary examination. Their numbers were not found in the list of eligible candidates published in the notification dated 16.11.1998. Feeling aggrieved petitioners in WP No.9521-25 of 1999 filed Application Nos. 513-20 of 1999, petitioner in WP No.10709 of 1999 filed Application No.1724 of 1999 and petitioner in WP No.11332 of 1999 filed Application No.7164 of 1998, on the file of Karnataka Administrative Tribunal. By a common order dated 11.3.1999, the tribunal rejected Application Nos. 513-20 of 1999 and 7164 of 1998; and by another order dated 25.3.1999, the Tribunal rejected the Application No.1724 of 1999. The said applications were dismissed by the Tribunal by following its earlier decision dated 22.2.1999 in Application No.6959 of 1998, wherein the Tribunal had examined the entire system of examination followed by KPSC with reference to relevant Rules and the notification inviting applications, and held that the preliminary examination is only a screening test and therefore, the question of furnishing marks sheet to either successful or unsuccessful candidates does not arise and that there was no irregularity in the publication of the results as per Notification dated 16.11.1998.

5. Feeling aggrieved, petitioners have filed these petitions for the following reliefs:

a) for quashing the orders of the Tribunals in the said Applications;

b) for quashing the notification dated 16.11.1998, publishing the list of eligible candidates in pursuance of preliminary examination; and

c) a direction to KPSC to re-evaluate the answer scripts of petitioners and publish their results.

In addition to above reliefs, the petitioner in WP No.10709 of 1999 has also sought a declaration that Clause-17(v) of the Notification dated 9.3.1998, providing that no marks sheet would be issued to any of the candidates, as violative of the Rules and Articles 14 and 16 of the Constitution of India.

6. The interim prayer of petitioners that they should be permitted to appear the main examinations scheduled to be commenced on 10.4.1999, was considered by this Court on 9.4.1999. Before such consideration this court called upon KPSC to produce the entire result sheets as well as mark list to satisfy itself whether the petitioners have been unjustly excluded. In pursuance of it, KPSC produced the result sheets containing the results of 58555 candidates who appeared for the preliminary examination (out of 78250 candidates who were found eligible to take the preliminary examination and merit list) in a sealed cover. The court examined the merit list and passed the following order:

> "..... On examination of the merit list and the result sheet, we find that the petitioners are much below in the merit to the last candidate selected in the respective categories and therefore they are not entitled to take the main examination. .... Interim relief is declined."

As a result, the petitioners DID not take the main examination. We are informed by the learned counsel for KPSC that the main examination was held on 10.4.1999 and the results were published, interviews were completed and the final select list has been published. Be that as it may.

7. The first contention urged by the petitioners is that having appeared for the preliminary examination, the petitioners are entitled to know their marks and seek revaluation. Clause 17(v) of the recruitment notification dated 9.3.1998 clearly states that the preliminary examination is only a screening test and therefore the marks sheets will not be supplied to any of the candidates and KPSC will not entertain any correspondence on the question. Having appeared for the preliminary examination subject to the terms of the notification dated 9.3.1998, without protest, the petitioners cannot now ignore Clause 17(v) and require KPSC to supply marks sheets. The evaluation is by Computer by OMR method. This Court on 9.4.1999, even before the main examination, obtained the results sheet and merit list of all the candidates who appeared for the preliminary examination from KPSC and personally satisfied itself that none of the petitioners have obtained marks higher than the marks obtained by the last candidate selected in the respective categories to take the main examination and declined to permit the petitioner to take the main examination. In view of it, the apprehension of petitioners that though they might have secured higher marks than those who have been shown as eligible in the notification dated 16.11.1998 and that they have been wrongly excluded from the list of candidates

found eligible to take the main examination, is without basis. The entire matter has now become academic. Revaluation is not permissible unless the Rules provided for it. In this case, the Rules do not provide for it. Hence the first contention is liable to be rejected.

8. The next contention urged by the petitioners is with reference to the ground urged in the writ petition that "the commencing point of marks of other categories should be less than the last cut off point of the general category, that is the starting point for reserved category [wrongly typed as general category] should not be higher than the last cutoff point of the general category". The learned Counsel for petitioner was not able to elaborate on this ground.

9. KPSC has produced three statements. Annexure R-1 gives the total number of applicants, total number of candidates who appeared for preliminary examination and total number of persons found eligible/selected category wise for taking final examination without rural weightage and with rural weightage. This shows that out of total 79250 applicants, 58555 candidates appeared for the preliminary examination and the persons selected for taking main examination was 9847 [without rural weightage] and 10210 [with rural weightage] 9.1) Annexure R-2 gives the break up of 10210 candidates selected category wise (with rural weightage). It shows that for recruitment of 415 posts, 10201 candidates have been permitted to take main examination. It further shows that in the rate of 1:20, for 415 posts, 8300 candidates will have to be permitted to take main examination. But, as the Rules require the said ratio should be ensured even in regard to reservation categories, it became necessary to go beyond 8300 candidates and select additional 1901 candidates to ensure that 1:20 ratio is maintained in all categories. Annexure R-3 is the corresponding category wise break up statement without rural weightage. It gives the breakup of 9847 candidates, that is 8300 in the ratio of 1:20 for 415 posts, plus further 1547 candidates to ensure 1:20 ratio is reached in all reservation categories.

10. These statements show that to maintain the 1:20 ratio in all reservation categories KPSC has gone below 8300 candidates. Therefore the contention of petitioners that candidate with less marks than petitioner have been selected for main examination is misleading. If a petitioner is in the General Merit category, it is possible that candidates in reservation category with lesser marks than petitioner would be shown as selected. The petitioners can have grievance only if persons with lesser percentage than petitioners in their respective categories have been selected. On 9.4.1999 this court has verified and found that, none with lesser marks in respective categories have been selected.

11. Lastly, it is contended that Clause-17(v) of the notification dated 9.3.1998 is contrary to the Rules, as the Rules do not contain such a provision. The instructions to the candidates may contain matters, which are not part of the Rules. Instructions and conditions of the recruitment notification will all be valid so long as they are in accordance with Rules. The Rules contemplate a preliminary examination and final examination. To give effect to it detailed instructions can be given in the notification. The Rules do not provide for publishing of marks or revaluation of papers in regard to preliminary examination. That is made clear by clause 17(v), which provides that marks sheets of the preliminary examination will not be furnished to any of the candidates. The provision is neither unreasonable nor arbitrary, but give effect to the Rules. At all events, this court having obtained the result sheets and verified the marks of petitioners, with reference to the cutoff marks, this contention also does not survive for consideration.

12. There is no merit in these petitions. Petitions are accordingly dismissed.

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IN THE HIGH COURT OF KARNATAKA AT BANGALORE
WRIT PETITION NO.7749 OF 2005 (GM-RES)
D.D. 21.02.2005
The Hon'ble Mr. Justice N.Kumar

Lokesha C.K. ... Petitioner
Vs.
State of Karnataka & Ors. ... Respondents

Examination:

Whether a candidate can seek postponement of the examination on the ground that he has to be in home town to cast his ballot in a Gram Panchayat Election? - No

Examination to be conducted by the P.S.C. is for the whole of Karnataka - Just to enable the petitioner to cast a vote at a Panchayat Election examination cannot be postponed.

ORDER

The petitioner has sought for a writ of mandamus directing the Karnataka Public Service Commission to postpone its proposed Gazetted Probationers (Preliminary) Exam – 2005 to any other convenient date with prior intimation to the petitioner as the petitioner has to be in his home town in Coorg to cast his ballot in the gram panchayat election held.

2. The examination to be conducted by the third respondent is for the whole of Karnataka. The date has been fixed and throughout Karnataka students are making preparations and they will be taking the examination on 27.2.2005 as already notified. Just to enable the petitioner to cast a vote at a panchayat election at Coorg the said examination cannot be postponed. It is for the petitioner to choose between the election and the examination. Under these circumstances, I do not find any justification to grant the relief sought. The writ petition is misconceived and accordingly it is dismissed.

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IN THE KARNATAKA ADMINISTRTIVE TRIBUNAL AT BANGALORE
APPLICATION NO.4245 OF 2005
D.D. 21.07.2005
The Hon'ble Mr. Justice A.V.Srinivasa Reddy, Chairman &
The Hon'ble Mr. P.Kotilingangoud, Administrative Member &
The Hon'ble Mr. T.Y.Nayaz Ahmed, Administrative Member

Sri. Mohamad Saleem Ahmed ... Petitioners
Vs.
The K.P.S.C. ... Respondent

Reservation:

Whether a candidate can seek change of reservation subsequently? - No

Applicant a candidate for G.P. 2005 Recruitment claimed reservation under GM/Rural category and became eligible for main examination – In the prescribed application for main examination applicant claimed reservation under 2B category – His application was rejected on the ground that rural certificate was not produced and subsequent claim of reservation under 2B category was not permissible – Tribunal dismissed the application upholding the rejection of the application in view of the instructions contained in the notification that request for change of reservation etc., will not be entertained.

Held:

The policy of the respondent is well defined and made known to all the applicants that request for change of reservation/subject/centre originally indicated by them in the application form will not be entertained by the Commission under any circumstances.

ORDER

In this application the applicant has questioned the endorsement bearing No.E(1)160/05-06/PSC dated 12.5.2005 – vide Annexure-A5 issued by the Respondent wherein his case to appear for the Main Examination to Group-A and B posts in the State Civil Services has been rejected.

2. Heard both the learned Counsel for the parties and perused the replies and records.

3. The brief facts of the case are as under:

The applicant had written the Preliminary Examination for Group A and B posts under II-B category, conducted by the Karnataka Public Service Commission (KPSC for short) – Respondent pursuant to the Notification dated 4.11.2004 – Annexure-A1.

4. In the application for the preliminary examination the applicant has claimed reservation under GM and rural category putting "tick" mark in the relevant column. In the preliminary examination the applicant has scored 291.50 marks which was higher than the cutoff marks of 278 under GM/Rural

category, therefore, the applicant became eligible for the main examination. The applicant has submitted the prescribed application for main examination duly filled with the attested copies of the testimonials/ certificates. In that he has claimed reservation under 'II-B' category and in support of his claim he has enclosed II-B certificate dated 16.4.2005 – Annexure-A1, which has been issued by the Tahsildar, Malur Taluk. Whereas, the Respondent has rejected the application of the applicant for main examination vide the impugned endorsement dated 12.5.2005 – Annexure-A4 on two grounds that (1) the applicant has not enclosed the relevant certificate in support of his initial claim for reservation under GM-Rural category and (2) that the subsequent claim of the applicant for reservation under II-B category, is not permissible.

5. Learned Counsel for the applicant submitted that while filling up the application form for preliminary examination, the applicant by inadvertence and over sight had marked the G.M. and Rural columns and hence his candidature has been considered under GM-Rural category. Whereas, the applicant actually belongs to II-B category and in support of his claim the applicant has produced Caste Certificate claiming reservation under II-B instead of GM-Rural and the same has been indicated in the application for the main examination.

6. The Counsel of the applicant further averred that the applicant had not claimed rural weightage, and the Respondent cannot put the applicant under GM-Rural category as he has produced Caste Certificate claiming reservation under II-B category and averred that the endorsement issued is without application of mind. Hence, seeks for an appropriate direction to the respondents.

7. The respondent does not dispute the fact that the applicant was one of the candidates who appeared for the Gazetted Probationers Preliminary Examination 2005. The learned Standing Counsel for KPSC Sri. T.Narayanaswamy made the following submission that, the applicant in his application for the preliminary examination had indicated that he belongs to GM category and also claimed rural reservation and hence his candidature was rightly considered under GM-Rural. Photocopy of the original application is produced as Annexure-R1. The applicant has secured 291.50 marks in the Preliminary Examination and became eligible to write the main examination. Since he had claimed rural reservation under GM category and has secured 291.50 marks which is higher than the cut-off marks under GM-Rural, his candidature was considered for the main examination. The applicant has submitted his application for the main examination as per Annexure-A3 and did not produce any certificate in support of his original claim for rural reservation. Hence, the applicant has been treated

as GM candidate. As the marks secured by the applicant in Preliminary Examination fall below the cut-off marks of 310 under "GM category" he is not eligible to write the main examination under "GM category". In his application for the main examination the applicant has produced Caste Certificate to claim reservation under II-B category. As he has not claim reservation under II-B in his application for the preliminary examination, he cannot claim reservation under II-B category in the main examination.

8. The Counsel for Respondent also brought to our notice that clear written instructions have been given to the candidates for filling up the application form to avoid rejection of the application and loosing an opportunity to appear for the examination. In view of the above instructions it is not open to the candidate to change their reservations and hence, the applicant who has in his application for the preliminary examination claimed that he belongs to GM category Rural, cannot now contend that he should be considered under II-B category. Therefore, the application should be dismissed as devoid of merit.

9. We have considered the claim of the applicant and the replies and records submitted by the learned Counsel for the parties.

10. The written instructions to the candidates for filling up application forms for examination are very clear. These instructions are in the brochure issued along with the application form. The relevant paras are extracted below:

> "5.2 Instructions for filling up the application form:
>
> Candidates are advised to read the instructions given hereunder before filling up application form to avoid rejection of the application and losing an opportunity to appear for the examination. All the spaces provided in the application relevant to the candidate should be filled in.
>
> xxx xxx xxx
>
> Request for change of reservation/subject/centre originally indicated by them in the application form will not be entertained by the Commission under any circumstances.
>
> The candidates should carefully decide about the choice of the centre, optional subject and reservation claimed by them."

11. The applicant chooses to claim reservation under GM-rural category while submitting his application for Preliminary Examination. The benefit of rural (horizontal) reservation is available to those candidates who have studied from 1st to 10th standard in schools situated in rural areas, whereas the applicant has not studied up to 10th standard in rural school. Yet for the reasons best known to the applicant he claimed rural reservation, which he is not entitled to, since he has passed SSLC as a private candidate without attending any school. The plea of the learned Counsel for the applicant is

that, inadvertently and by mistake the applicant marked the column "GM" and "Rural", whereas the applicant actually belongs to Group II-B, which is evident from the certificate dated 16.4.2005-Annexure-A1 issued by the Tahsildar, Malur Taluk. We cannot entertain such a plea from a candidate who is M.A., M.Phil, Ph.D. a highly qualified person aspiring for a high post in civil services. The II-B certificate – Annexure-A1 has been obtained subsequent to the results of preliminary examination notified by the respondent. The policy of the respondent is well defined and made known to all the applicants that "request for change of reservation/subject/center originally indicated by them in the application form will not be entertained by the Commission under any circumstances". More over, the applicant lacks the basic acumen of understanding the written instructions for filling up the application form.

12. Therefore we consider inappropriate to entertain the grievance of the applicant and, hence, his application stands rejected.

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IN THE KARNATAKA ADMINISTRATIVE TRIBUNAL AT BANGALORE
APPLICATION NO.7634 OF 2005
D.D. 02.02.2006
The Hon'ble Mr. Justice A.V.Srinivasa Reddy, Chairman

Smt. N.K.Gayathri Devi ... Applicant
Vs.
The State of Karnataka & Anr. ... Respondents

Recruitment :

Age Limit:

Applicant was a candidate for the post of lecturer in English in Govt. I Grade Colleges under G.M. category upper age limit for which was 35 years – Age relaxation of 10 years was given to candidates working in Collegiate Education – Applicant was aged 45 years 4 months 12 days as on the last date for receipt of applications – Hence her application was rejected as over aged – As the applicant was not eligible for selection even after relaxation up to 10 years was given – Hence the application was dismissed.

Held:

Considering the facts a direction by way of mandamus either to relax the age limit or any such direction which would violate the terms and conditions of the notification cannot be given.

ORDER

In this application, the applicant is seeking a direction to declare the non-calling of the applicant for interview to the post of Lecturer in English as arbitrary, discriminatory and violative of Articles 14 and 16 of the Constitution and for a consequential direction to the respondents to treat the applicant as eligible for selection and appointment by providing relaxation of marks 1% for each year of part-time service under clause 2.2 and to extend all benefits.

2. Heard Mr.Ranganath, S.Jois, learned Counsel for the applicant, Mr. M.L.N. Reddy, leaned Government Pleader for the 1st respondent and Mr.T.Narayana Swamy, learned Counsel for the 2nd respondent.

3. It is undisputed that the applicant was a candidate for selection to the post of Lecturer in English having applied for the said post pursuant to the notification dated 12.7.2005 issued by the 2nd respondent for selection of Lecturers in First Grade Colleges. In the annexure appended to the said notification, clause 2.3 prescribes "maximum age limit" for candidates belonging to 'general merit' as 35 years, candidates belonging to category 2A, 2B, 3A, 3B as 38 years and for candidates belonging to SC/ST and category I as 40 years. However, candidates who have been working in the Collegiate Education are entitled for relaxation of maximum age up to 10 years. Since the applicant was not called for interview in terms of the notification, she has presented the application for the reliefs sought herein.

4. Mr. T.Narayanaswamy, learned Counsel appearing for the 2nd respondent has filed a reply statement inter alia contending as follows:

> "4. The applicant whose date of birth being 8.4.1960 was aged 45 years 4 months 12 days as on the last date for receipt of applications as against upper age limit of 35 years for GM category stipulated under the rules. The applicant being over aged is not eligible for the post.
>
> 5. It is submitted that the applicant has contended that she possesses teaching experience of more than 10 years by working as Lecturer in First Grade College and part time Lecturer in Government First Grade College and therefore, she is entitled to age relaxation to the extent of teaching experience as per the Rules. Under the Rules the applicant is entitled to maximum age relaxation of only 5 years. Therefore, even after giving age relaxation for maximum 5 years for possessing teaching experience provided under the Rules the applicant will be still overaged by over 5 years. Therefore, the applicant has not been considered eligible for interview. The interviews have been completed and the provisional select list has been published on 20.10.2005.
>
> 6. It is submitted that the applicant is not entitled to age relaxation to the extent of 10 years for possessing teaching experience as contended by her. Even if age relaxation is extended to 10 years as claimed by the applicant she is still overaged. Therefore, the applicant is not eligible to apply for the post."

5. In respect of this objection filed by the 2nd respondent regarding the denial of the claim of the applicant on the ground that the applicant is overaged, the applicant has not filed any rejoinder or further statement substantiating the claim made by her in her application. The learned Counsel for the applicant has made a feeble attempt that having regard to the fact that the age bar of the applicant is very narrow and there was delay in making the recruitment, the Tribunal is empowered to issue an appropriate direction in relaxing the age limit in so far as the applicant is concerned. However, Mr.T.Narayanaswamy, learned Counsel appearing for the 2nd respondent has submitted that the Tribunal nor the Court has any power or competence to issue any direction to the Statutory Authority relaxing the age limit or any such direction.

6. This Tribunal after considering the submission made by the learned Counsel for both the parties, finds that a direction by way of mandamus either to relax the age limit or any such direction which would violate the terms and conditions of the notification or the rules in force cannot be issued.

7. Under these circumstances, the relief sought for by the applicant is rejected. Consequently, the application is dismissed.

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IN THE HIGH COURT OF KARNATAKA, BANGALORE
WRIT PETITION NO.683/2006(S-Res)
D.D. 06.02.2006
The Hon'ble Mr. Justice D.V.Shylendra Kumar

Nagaraj & Ors. ... Petitioners
Vs.
The State of Karnataka & Anr. ... Respondents

Qualification:

Recruitment to the post of Junior Health Inspector – Qualification prescribed was Diploma in Course of Sanitary Health Inspector/Health Inspector conducted by either para medical Board of Government of Karnataka or by All India Institute of Local Self Government – Petitioners had Diploma conducted by Kawa Global University at Raipur – Their applications were rejected for not possessing the qualification prescribed – High Court upholding the contention of the Commission that the petitioners did not possess the qualification prescribed in terms of the notification dismissed the writ petition.

Held:

The question as to what can constitute the necessary qualification for filling up the post and candidates possessing Diploma from which particular university are required, is a matter for evaluation by the appointing/recruiting authority and not a matter for evaluation by this Court. If in such an evaluation, if the respondents have acted in a discriminatory manner, then alone the matter calls for interference and no such case has been made out either for quashing the endorsement or for further direction to be issued.

ORDER

Writ petition by persons who had applied for the post of Jr. Health Inspectors. To be appointed for the such posts under the various Town Municipalities, the 1st respondent – Government of Karnataka had taken steps to fill up such posts by availing the services of the Karnataka Public Service Commission (KPSC) who had in turn taken out a publication dated 8.7.2005 inviting applications for the post and also indicating the qualification prescribed for the applicants to apply in terms of the qualification as indicated by Government of Karnataka.

2. Petitioners had not been permitted to write the examination for the reason that they had not fulfilled the requisite qualification, particularly of possessing a Diploma in Course of Sanitary Health Inspector/Health Inspector conducted by either para medical Board of Government of Karnataka or by All India Institute of Local Self Government. The notification while indicated a certificate of Diploma issued by either of these two institutions to be the qualification, had not indicated any other similar institutions for the said purpose.

3. Submission of Smt. Sandhya Jamadagni, learned counsel for the petitioners is that petitioners had possessed a Diploma in a course of this nature conducted by Kawa Global University at Raipur which was a recognized University under Ministry of Human Resources Development of the Central Government and if so, the persons like petitioners would not have been kept out or denied even an opportunity to write the examination; that the action on the part of the respondents is violative of Art. 16 and therefore necessary writ should be issued to accord an opportunity to the petitioners also to write the examination and to take their chances thereof.

4. Respondents have entered appearance. The first respondent – Government of Karnataka is represented by the Government Pleader who has not filed any statement of objections and the second respondent is represented by Sri. Narayana Swamy, who also filed statement of objections interalia indicating that the petitioners obviously did not qualify for taking the examination as the qualification or the Diploma which was possessed was not in terms of the notification as notified at Ann.A and therefore KPSC was justified in not permitting the petitioners to write the examination.

5. On the face of it, petitioners do not have the qualification as is required under the notification. However what is submitted by the learned counsel for the petitioner is that the qualification which the petitioners have is if not better, at least on par with the qualification as indicated in the notification and if so, petitioners could not have been denied an opportunity etc.

6. The question as to what can constitute the necessary qualification for filing up the post and candidates possessing Diplomas from which particular university are required, is a matter for evaluation by the appointing/recruiting authority and not a matter for evaluation by this Court. If in such an evaluation, if the respondents have acted in a discriminatory manner, then alone the matter calls for interference and no such case has been made out either for quashing the endorsement or for further direction to be issued.

7. It is open to the petitioners to bring it to the notice of the concerned authorities who prescribe the qualifications and if the concerned authorities are satisfied with the equivalent qualifications, then it is open to them to so consider it to be so and to ensure that in future employment opportunities, such persons with equivalent qualifications are also be accorded opportunities.

Writ petition dismissed.

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IN THE HIGH COURT OF KARNATAKA AT BANGALORE
WRIT PETITION NO.37832 OF 2004 (S-KAT)
D.D. 09.06.2006
The Hon'ble Mr. Justice Anand Byrareddy

Shri. Jayatheerthacharya … Petitioner

Vs.

The State of Karnataka & Ors. … Respondents

Examination:

Revaluation:

In the Service Examination petitioner F.D.A. appeared for S.A.S. Examination conducted by the Commission – The subject prescribed carried 50 marks each and in order to be successful the petitioner was to secure 35 in each subject – In Part-III Paper-III petitioner secured 17 marks and he was short by half a mark to pass the said paper – Petitioner sought revaluation of his answer book – High Court following the decision of the Supreme Court in 2004 SCC (L&S) 883 dismissed the writ petition.

Held:

In the absence of any provision for re-evaluation in the relevant rules, no candidate has got any right to claim or ask for re-evaluation of answer scripts.

Cases referred:

1. (1984) 4 SCC 27 - Maharashtra State Board or Secondary and High Secondary Education vs. Paritosh Bhupeshkumar Sheth
2. 2004 SCC (L&S) 883 - Promod Kumar Srivastava vs. Chairman, Bihar Public Service Commission, Patna and others

ORDER

The petitioner is working as a First Division Assistant in the office of the Zilla Panchayat, Raichur. The petitioner appeared for S.A.S. examination conducted by the Karnataka Public Service Commission. The subjects prescribed carry 50 marks each and in order to be successful, the petitioner was to secure 35 in each subject. It transpires that the petitioner, in one of the subjects, that is, Part-III of Paper-III, had secured 17 marks. Thereby, the petitioner was short by half a mark to pass the said paper. It is in this background that the petitioner had sought for re-evaluation of his answer book. It is the case of the petitioner that there is an apparent lapse on the part of the examiner in not awarding marks to particular answers.

2. In this regard, this Court had directed production of the answer book of the petitioner, which is produced by the respondent. It is seen that the examiner has not awarded any marks to a particular answer, apparently since it was the wrong answer and it is the petitioner's own say that the petitioner was permitted to answer the said paper with reference to text-books and from a reading of the

answers, it is clear that the petitioner has possibly extracted an irrelevant answer and that is why the examiner has not awarded any marks. In any event, the law on the point stands covered by a judgment of the Supreme Court in the case of Promod Kumar Srivastava vs. Chairman, Bihar Public Service Commission, Patna and others – 2004 SCC (L&S) 883 wherein the Court, while considering the case of a candidate who had appeared for judicial service competitive examination and did not qualify. He has secured only 35 marks in General Science paper and on scrutiny, the Commission had found that there was no mistake in tabulation. Therefore, the aggrieved appellant had approached the High Court seeking a direction to the Commissioner to re-evaluate the paper. A learned Single Judge of the High Court had directed the Commission to produce the answer book of the appellant and after obtaining the opinion of the Standing Counsel for the University, an opinion was formed that the petitioner deserves more marks and accordingly the learned Single Judge had directed the paper to be re-evaluated by expert teachers. After re-evaluation, the answer book was returned to the Court and by virtue of re-evaluation, he had got 63 marks as against 35 marks which had been awarded to him by the examiner of the Commission. The writ petition was allowed and a direction was issued to the Commission to re-consider the case of the appellant. The Commission preferred an appeal and it was pleaded that centralized mode of evaluation is adopted by the Commission and it was pleaded that in the absence of any provision in the Rules for re-evaluation, the said exercise could not have been done. The Division Bench set aside the order of the Single Judge. The matter coming up before the Supreme Court, the Supreme Court held that in the absence of any provision for re-evaluation in the relevant rules, no candidate has got any right to claim or ask for re-evaluation of answer scripts. In such a situation, the procedure adopted was wholly unwarranted and cannot be sustained. The Supreme Court has relied on its earlier judgment in the case of Maharashtra State Board or Secondary and High Secondary Education vs. Paritosh Bhupeshkumar Sheth (1984) 4 SCC 27. The three judge bench of the Supreme Court has strongly criticized the Single Judge of High Court for adopting the procedure that he had in passing the order. Having regard to the stated legal position, no ground is made out to entertain this petition.

3. Accordingly the petition is dismissed.

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IN THE KARNATAKA ADMINISTRATIVE TRIBUNAL AT BANGALORE
A.NO. 1100 OF 1997
D.D. 03.07.2006
The Hon'ble Mr. Justice A.V.Srinivasa Reddy, Chairman &
The Hon'ble Mr. P.Kotilingangoud, Administrative Member

Shivarudraiah V.Kulkarni … Applicant
Vs.
State of Karnataka & Ors. … Respondents

Recruitment:

Reservation :

In G.P. 1992 Recruitment applicant claiming reservation under GM/Ex-MP secured 657.50 marks as against 649.17 marks secured by the 3rd respondent selected under GM/Ex-MP category – The claim of the applicant under Ex-MP category was rejected as he did not fulfill the condition required – Considering the definition of Ex-Serviceman under the relevant rules Tribunal upheld the rejection of the claim of the applicant and dismissed the application.

Held:

The applicant has been discharged from service prematurely as against the stipulated period and he has been discharged at his own request before fulfilling the conditions of enrolment. Therefore, he cannot claim the status of an Ex-serviceman.

ORDER

In this application, the applicant is seeking a declaration to declare the selection of the 3rd respondent to the post of Assistant Commercial Tax Officer under Ex-MP/GM category as null and void; for a further declaration that the applicant is entitled to be selected for the post of Assistant Commercial Tax Officer under Ex-MP/GM category in preference to 3rd respondent and also for a direction to the 2nd respondent to include the name of the applicant in the provisional select list published by the 2nd respondent vide Notification dated 25.7.1996 (Annexure-A1) bearing No.E(1)20781/96-97/PSC under Group-B – Assistant Commercial Tax Officer in Ex-MP/GM category and to direct the first Respondent to appoint the applicant to the said post and to grant all consequential benefits.

2. Heard Mr. M.S.Hiremath, Advocate for Mr. N.B.Bhat, learned Counsel for the applicant, Mr.G.B.Chandregowda, learned Additional Government Advocate for the 1st respondent, Mr. T.Narayanaswamy, learned Counsel for the 2nd respondent and Mr. Javid Hussain, learned Counsel for the 3rd respondent.

3. In response to the Notification dated 24.7.1992 issued by the 2nd respondent – KPSC, for recruitment of Gazetted Probationers Group-A & B posts, the applicant, it is stated, was a candidate. He claims to have participated in the written examination held by the 2nd respondent in July/August 1993 and secured 554 marks in Group-B category. In addition to the marks obtained in the written examination, the applicant is stated to have secured 103.50 marks in the interview. Thus, the applicant has secured 657.50 total marks in Group-B category. The applicant is stated to have given his preference to the post of Assistant Commercial Tax Officer.

4. A provisional select list was published by the 2nd respondent on 25.7.1996 in respect of the selected candidates for various Group-A and B posts on the basis of the written examination and personality test. Candidates have been selected for 59 posts of Assistant Commercial Tax Officers and the 3rd Respondent Sri. Ravi Kumar M.N. who was at Sl.No.58 with a total of 649.17 marks was selected under Ex-MP/GM category. The applicant claims that he also belongs to Ex-MP/GM category. He has secured 657.50 marks i.e., more percentage of marks than the 3rd respondent who has been selected. Therefore, aggrieved by his non-selection, this application is presented.

5. This Tribunal while admitting the application on 14.2.1997, directed both the standing Counsel for 1st and 2nd respondents to take notice and passed an interim order to the effect that "appointment of the 3rd respondent if any shall be subject to the result of this application". Subsequently emergent notice to the 3rd respondent was ordered. On his behalf Sri. Javid Hussain, learned Counsel has filed vakalath. The 2nd and 3rd respondents have filed their reply statements.

6. Mr. T.Narayanaswamy, learned Counsel appearing for the Karnataka Public Service Commission has contended that the selection has been made under the Karnataka Civil Services (General Recruitment) (32nd Amendment) Rules, 1989. (for short, referred to as "Rules 1989") Amended Rule 2(1)(i) defines 'Ex-servicemen' as follows:

> "(i) 'Ex-servicemen' means a person, who has served in any rank (whether) as a combatant or as a non-combatant in the Regular Army, Navy and Air Forces of the Union but does not include a person who was served in the Defence Security Corps, the General Reserve Engineering Force, the Lok Sahayak Sena and the para Military Forces, and
> (a) who has retired from such service after earning his pension; or
> (b) who has been released from such service on medical grounds attributable to military service or circumstances beyond his control and awarded medical or other disability pension; or
> (c) who has been released otherwise than on his own request from such service as a

result of reduction in establishment; or

(d) who has been released from such service after completing the specific period of engagement (otherwise than at his own request or by way of dismissal or discharge on account of misconduct or in-efficiency) and has been given a gratuity;

and includes personnel or the Territorial Army of the following categories, namely:-

(i) Pension holders for continuous embodied service;

(ii) Persons with disability attributable to military service; and

(iii) Gallantry award winners.

Explanation:- The persons serving in the Armed Forces of the Union, who on retirement from service; would come under the category of 'ex-servicemen' may be permitted to apply for re-employment one year before the completion of the specified terms of engagement and avail themselves of all concessions available to ex-servicemen, but shall not be appointed to a State Civil Service or post until they are permitted to leave the uniform.

3. Savings:- Notwithstanding the amendment to the said rules by rule 2, recruitment to any service or post advertised before the commencement of these rules shall be made as if the said rules have not been amended by these rules."

(a) It is therefore contended that having regard to the definition of "Ex-Servicemen" the applicant does not qualify himself to be an ex-serviceman as he has failed to fulfill the condition specified at Clause (d) of the Rules, 1989. Clause (d) stipulates that person would qualify himself as an ex-serviceman who has completed the specific period of engagement. The applicant on his own has produced Annexure-A4 wherein "Item No.14 – Terms of engagement" states that the applicant has agreed to work 20+6 years. It is only after completion of that period the applicant would have become qualified to be called as an ex-serviceman.

(b) Part II of Annexure-A4 is a certificate of discharge from the regular Air Force service issued by the Air Commodore, Air Force Record Office, Officer Commanding (unit). Under this certificate, the applicant is stated to have been discharged from the regular Air Force on 17.10.1985 with reserved liability. The reason for discharge stated is "at his own request before fulfilling the condition of enrolment". This Annexure-A4 is dated 17.10.19085. This is the certificate the applicant has relied on for claiming the benefit of Ex-serviceman". Further the applicant has also relied on a communication dated 21.8.1987 (Annexure-A6) issued by the Director (Employment), Government of India, Ministry of Defence, New Delhi to all Zonal Directors, etc. in which the definition of "Ex-servicemen" has been clarified as follows:

"2. Definition of ex-serviceman as given in Govt. of India Ministry of Personnel, Public Grievances & Pensions OM No.36034/5/85.Est (SCT) of 27 Oct 86 is to be implemented from 01 July 87. the Ministry has clarified that this definition will

only be made applicable to personnel retiring after 01 July 87. All ex-defence personnel who had retired prior to that date and e.g. had done only 5 years service or had served for a continuous period of 6 months after attestation and released for reasons other than at their own request, dismissed, discharge will continue to be treated as Ex-servicemen.

3. Definition given in the OM of 14 April 87 therefore is to read in conjunction with OMs of 27 Mar 87 and 27 Oct 86 which have been sent as enclosures with OM of 14 April 97."

7. On perusal of Annexure-A4 and A6, two things are noticed viz., the applicant has been discharged from service prematurely as against the stipulated period and he has been discharged at his own request before fulfilling the conditions of enrolment. Thus, he cannot claim the status of an Ex-serviceman. Further, the Karnataka Civil Services (General Recruitment) Rules, 1977 has been amended subsequent to the Annexures-A4 and A6 which contains the definition of "Ex-servicemen" as already extracted hereinabove. The definition of "Ex-servicemen" contained in the Karnataka Civil Services (General Recruitment) Rules, 1977 prevails over the Communication dated 21.8.1987 (Annexure-A6) which is only a letter.

8. In the result and for the aforesaid reason we are of the view that the applicant has failed to satisfy himself as an "ex-serviceman" as defined in Rule 2(i) of Rules, 1989 in order to enable him to claim the benefit of reservation. We do not find any illegality or irregularity in the selection of the 3rd respondent by the 2nd respondent.

9. Accordingly, the application is dismissed.

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IN THE KARNATAKA ADMINISTRATIVE TRIBUNAL AT BANGALORE
APPLICATION NOS. 5151 & 5152 OF 1998
D.D. 16.11.2006
The Hon'ble Mr. Justice A.V.Srinivasa Reddy, Chairman

Rayanagouda A Patil & Anr. … Applicants
Vs.
State of Karnataka & Ors. … Respondents

Qualification:

Equivalence of qualification:

Recruitment to the post of Assistant Statistical Officer – As per the qualification prescribed the candidates should possess M.A. in Economics, ought to have studied Statistics as one of the subjects at Post-Graduate or at degree level - As the applicants do not possess the qualification prescribed their applications were rejected – The qualifications possessed by the applicants namely, Applied Statistics and Rural Economics and Farm Management have not been declared as equivalent to the qualification prescribed – Hence the applications were disposed of.

Held:

In the absence of any declaration by a competent authority regarding equivalence of the qualification possessed by the applicants P.S.C. was justified in not considering the claim of the applicants.

ORDER

In these two applications, the applicants have sought for a declaration to the effect that non-consideration of the applicants' claim for selection and appointment as against the posts of Assistant Statistical Officers as illegal; consequently to declare the selection and appointment of respondents 5 to 14 as against the said posts vide Select list dated 18.11.1997 published in Karnataka Gazette dated 22.1.1998 (Annexure-A21) as illegal and void, with a further direction to Respondents 1 to 3 to consider the case of the applicants for appointment against the post of Assistant Statistical Officers with effect from the date on which Respondents 5 to 14 and others were appointed.

2. Head Mr. M.Narayanaswamy, learned Counsel for the applicants. Sri. Raghavendra S.Gayathri, learned Government Pleader for Respondents 1 and 2 and Mr. T.Narayanaswamy, learned Standing Counsel for Respondent No.3.

3. These applications were filed on 18.8.1998. This Tribunal while admitting the applications ordered notice to the respondents. Interim order was neither sought for nor granted. Thereafter, on service of notice on the respondents, the 3rd respondent – KPSC has filed its reply statement. Paras 3 to 5, which are relevant for the purpose of adjudicating the applicants claim, read as follows:

"... 3. It is submitted that as seen from the marks cards produced by the applicants, along with their applications, Rayanagouda A Patil has possessed M.A. in Economics but studied Applied Statistics in B.A. and other applicant Bhanya Naik has possessed M.A. in REFM (Rural Economics and Farm Management) and he has also studied Applied Statistics in the degree level.

4. It is submitted that as per the qualification prescribed for the said post, the candidates who possess M.A. in Economics, ought to have studied Statistics as one of the subjects at Post-Graduate or at degree level. As seen from the marks cards of the degree examination of the applicants, they have studied Applied Statistics which cannot be equated to the subject Statistics. Since the applicants have not possessed required qualification as prescribed in C&R Rules, their applications were rightly rejected. The entire selection process of this recruitment already has come to an end and the final selection list to the post of Assistant Statistical Officers has been published on 18.11.1997 and sent to the Government on the same day. Further, the Government have issued appointment orders to all the selected candidates vide their orders dated 16.3.1998. The applications are highly belated and they are not maintainable due to delay and laches.

5. It is submitted that this application is similar to the application No.3648/1997 filed by R.V.Badiger in which this Hon'ble Tribunal has passed orders on 12.12.1997 by dismissing the said application.

... ..."

It is stated by the 3rd respondent that A.No.3648/1997 filed by one Mr.R.V.Badiger in respect of the very same Notification came to be dismissed by this Tribunal by its Order dated 12.12.1997.

4. However, Mr. T.Narayanaswamy, learned Standing Counsel sought to distinguish the order of this Tribunal dated 12.12.1997 passed by this Tribunal in A.No.3648/1997 stating that the required qualification for the post was compulsory study in Statistics either at degree level or Post Graduate level. On the basis of the materials produced by the applicants in these applications, it is seen that the applicants have studied Applied Statistics, Rural Economics and Farm Management. These qualifications possessed by the applicants as on the date of the Notification have not been declared to be equivalent to that of the qualification prescribed under the Notification.

5. Therefore, this Tribunal is of the view that in the absence of any declaration by a competent authority regarding equivalence of the qualification possessed by the applicants to that of the qualification mentioned in the Notification, the 3rd respondent was justified in not considering the claim of the applicants and selecting them for the posts of Assistant Statistical Officers. Moreover, due to passage of time and in the absence of any interim order protecting the interests of the applicants, it may not be just and proper to disturb the selection already made in the year 1998 itself.

6. Accordingly, the applications are disposed of.

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IN THE KARNATAKA ADMINISTRATIVE TRIBUNAL AT BANGALORE
A.NOS. 12391 OF 2002 & 12074 OF 2002
D.D. 24.01.2007
The Hon'ble Mr. Justice A.V.Srinivasa Reddy, Chairman &
The Hon'ble Mr. T.Y.Nayaz Ahmed, Administrative Member

Sri. H.M.Somashekar & Anr. … Applicants
Vs.
The State of Karnataka & Ors. … Respondents

Recruitment:

Age limit:

Recruitment to 100 posts of Sub Inspector of Excise (SIE) initiated as per notification dated 9.3.1998 was abandoned – Subsequently rules were amended as per Amendment Rules 2002 as per which age limits were prescribed with a proviso that age limit shall not be made applicable to 100 posts of Sub-Inspectors notified in 1998 – Based on the amended rules the Commission notified 254 posts – Age relaxation was given to candidates who had applied against 1998 notification – Petitioners who were unsuccessful challenged among others that reduced upper age limit as per 2002 notification, is irrational, illegal and violative of Articles 14 and 16(1) of the Constitution – The Tribunal dismissed the applications.

Held:

2002 Amended Rules are Special Rules. It is well settled law that rules of a Department prevail over the General Recruitment Rules. Moreover, it is the domain of the policy makers to decide among others, the age criteria also. Therefore, the Tribunal cannot question the wisdom of the policy makers with regard to the age limit prescribed in the 2002 Notification.

ORDER

Sri. H.M.Somashekar and Sri. N.T.Nagaraj, who are the applicants in A.Nos.12391 and 12074 of 2002 respectively, along with several other applicants had questioned the Employment Notification No.E(2)31/PSC/2002-03 dated 31.7.2002 (Annexure-A2 respectively in both the applications) which was issued by the third-respondent-Karnataka Public Service Commission (for short 'KPSC'), to fill up 254 posts of Sub-Inspectors of Excise (for short 'SIE') on the ground that the upper age limit prescribed in the Notification is arbitrary, illegal and unjust and also it violates Articles 14 and 16 of the Constitution of India.

2. Since the written examination for the candidates, who had applied for the said posts was fixed on 27.10.2002 by the KPSC, this Tribunal thought it appropriate at that point of time to direct the respondent-KPSC to permit all the applicants to appear for the written examination, pending final

disposal of their applications. As per the procedure prescribed for selection, based on the merit in written examination, the respondent-KPSC was required to call the candidates for further selection process in the ratio of 1:5. It was brought to the notice of this Tribunal during the course of the hearing of these cases, that except the present two applicants in A.No.12391/2002 and 12074/2002 all other applicants had scored very low marks and therefore they were not within the zone of consideration in the ratio of 1:5 for including them for further selection process. Therefore, all those applications were dismissed as infructuous.

3. Presently, we have before us the two applicants who by virtue of their performance in the written examinations come within the zone of consideration for further selection process viz., physical efficiency and physical standard tests, however, subject to the final decision in these applications.

4. Therefore, the following decision will be confined to the above two applications only.

5. To understand the issue in a proper perspective, we would like to refer to some of the relevant factual information which are as follows:

At the behest of the State-Government, the respondent-KPSC, had issued a Notification bearing No.PSC 1 RTB 98 dated 9.3.1999 inviting applications for the post of 100 Sub-Inspectors of Excise which is Annexure-A1 in these applications. Among other criteria, the age limits prescribed in the aforesaid Notification for various categories of applicants are as follows:

The minimum and maximum age for:

1. GM category – 18 to 33 years
2. 2A, 2B, 3A & 3B categories – 18 to 36 years & for
3. SC/ST categories – 18 to 38 years

This recruitment could not go through for the reason that it was questioned by some of the parties before the High Court of Karnataka and also before this Tribunal and subsequently, Government withdrew the Employment Notification itself and abandoned the recruitment. Later on, the Government has amended the Recruitment Rules of 1996 of the Excise Department and issued a Notification called the Karnataka Excise Services (Recruitment) (Amendment) Rules, 2002 bearing No.DPAR 45 SRD 2001 dated 5.3.2002 which is at Annexure-A4 (hereinafter referred to as the '2002 Rules' for short). As per the said Rules-2002, the age limits prescribed for the post of SIE are as follows:

(i) In the case of SC/STs minimum 21 years and maximum 26 years and

(ii) In the case of others the minimum aged is 21 years and maximum age is 24 years.

6. However, since a large number of candidates had applied for the post of SIE., against the 1999 Notification (Annexure-A1) and the selection process was abandoned in the middle, to safeguard the interest of the applicants against the 1999 Notification, with regard to age, in the 2002 Rules, the following proviso has been made:

> "Provided further that the above age limit shall not be made applicable to 100 posts of Sub-Inspectors advertised in Notification No.PSC 1 RTB 98 dated 11.3.1999".

7. Based on the amended Rules, the State Government has authorized the third respondent-KPSC for recruitment of 254 posts of SIEs., in accordance with the amended-Rules and accordingly, the Third-Respondent has issued a Notification bearing No.E(2) 31/PSC/2002-03 dated 31.7.2002 which is at Annexure-A2 which is impugned by the applicants only on the question of the reduced upper age limit prescribed for eligibility to participate in the selections.

8. The grievance of the applicants is that in the 1999 Notification, higher age limits were prescribed. Whereas, in the impugned Notification the upper age limit prescribed for the candidates to apply has been reduced making the applicants ineligible to apply for the said posts since they have crossed the upper age limit prescribed in the impugned Employment Notification dated 31.7.2002. They claim that the upper age limit prescribed as per the Karnataka Civil Services (General Recruitment) Rules, 1977, should have been prescribed for the post of SIEs., and they have also questioned the age relaxation given to the candidates who had applied against 1999 impugned notification which was abandoned in the middle of the selection process.

9. The learned counsel appearing for the applicants argued that the Government should have prescribed the upper age limits for the post of SIEs., as provided under the General Recruitment Rules, 1977. The reduced upper age limit prescribed as per the impugned Notification of 2002 is arbitrary, illegal and it violates Articles 14 and 16 of the Constitution of India. He further contended that the applicants have all crossed the upper age limit prescribed even though they are educationally qualified and hence, they have become ineligible to apply for the post. As per the 1998 impugned Notification higher age limit was prescribed and further in the 2002 Notification, age relaxation also

has been given to the applicants who had applied against the 1999 impugned Notification, whereas the upper age limit prescribed for others in the impugned Notification of 2002 is lower, and this amounts to discrimination among the candidates seeking employment and therefore, it violates the provisions of Article 14 and 16(1) of the Constitution. He further contended that the different age limits prescribed for the applicants who had applied against the 1999 Notification and for the applicants who have applied for the first time against the 2002 Notification are irrational, illegal and such classification between the group of the applicants is unreasonable which violate the constitutional principle of equality in the matters of appointment for public service.

10. On the other hand, the learned Government Pleader (GP), appearing for the State Government, asserted that the impugned Notification of 2002 issued by the KPSC is in accordance with the cadre and Recruitment (C&R) Rules of the Department, as amended in 2002. He further contended that the 2002 Rules have been finalized after having called for objections from the public in 2001 and the applicants have not filed any objections at the appropriate time. He further submitted that it is legally permissible to have a reasonable classification of persons for the purpose of appointment and hence, age limits prescribed in the 2002 Rules and in the impugned Notification will not violate the Constitutional provisions of Articles 14 & 16(1) of the Constitution of India, which is a settled principle of law. Therefore, the policy to give age relaxation in respect of those candidates who had applied against the 1999 notification which was abandoned in the middle does not violate the principles of equality enshrined in Articles 14 & 16 (1) of the Constitution as it is reasonable to classify those set of candidates of 1999 Notification as against those who applied afresh against the 2002 Notification.

11. We have heard and considered the arguments put forth by the learned counsel for the parties.

12. It is evident from the impugned 2002 Amended Rules, extracted below that as regards the age prescription, the policy makers have prescribed a lower age limit in spite of the fact that in the KCS (General Recruitment) Rules, 1977, higher age limits are prescribed.

> "Age limit:- (i) Notwithstanding anything contained in sub-rule (2A) of rule 6 of the Karnataka Civil Services (General Recruitment) Rules, 1977, must have attained the age of 21 years and not attained the age of 26 years in case of a person belonging to the Scheduled Castes or Scheduled Tribes or Other Backward Classes, and 24 years in the case of any other person, on the last date fixed for the receipt of applications."

13. The 2002 amended Rules are Special Rules in respect of the Department of Excise. Therefore, it is a well settled law that the special rules of a Department prevail over the General Recruitment Rules. Moreover, it is the domain of the policy makers to decide among others, the age criteria also. Therefore, this Tribunal cannot question the wisdom of the policy makers with regard to the age limit prescribed in the 2002 Notification. As regards age relaxation given for such of those candidates who had applied against the 1999 employment Notification, in our considered view, it is justified for the following reasons.

14. It has to be noted that the Respondents have abandoned the selection process initiated in the year 1999 and it is only after three years the impugned Notification has been issued. In the mean time, several persons who had applied have crossed the upper age limit prescribed. It is not the fault of the applicants/candidates who had applied against the 1999 employment Notification. Therefore, they shall not be made to suffer and therefore, in our considered view, the respondents have rightly protected the interest of the applicants/candidates of 1999 Notifications and have not made applicable the lower age prescribed in the impugned Notification for them. This classification certainly in our view is reasonable and such a reasonable classification is permissible in law and it will not violate the provisions of Articles 14 and 16(1) of the Constitution.

15. In view of the above observations, we find no merit whatsoever in the grievance of the applicants and, therefore, we have to dismiss their applications.

Hence, the applications stand DISMISSED.

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IN THE KARNATAKA ADMINSITRATIVE TRIBUNAL AT BANGALORE
A.Nos.6432 to 6437 of 2006 & connected cases
D.D. 11.04.2007
The Hon'ble Mr. Justice S.B.Majage, Vice Chairman &
The Hon'ble Mr. T.Y.Nayaz Ahmed, Administrative Member

Shrikant S.Patil & Ors. … Applicants
Vs.
State of Karnataka & Ors. … Respondents

Recruitment

Age relaxation:

Recruitment to 245 posts of Motor Vehicles Inspector as per notification dated 17.8.2006/ 25.8.2006 – Recruitment for 35 posts of Motor Vehicles Inspector initiated as per earlier notification dated 3.1.1997 was cancelled in 2001 – Applicants claiming to have applied in response to earlier notification challenged the present notification among others for not giving age relaxation to the candidates who had applied for those posts earlier and sought for a direction to segregate out of the posts notified in the year 2006 – Tribunal mainly on the ground of limitation dismissed the applications.

Held:

The applicants have failed to show sufficient cause for condoning the delay in filing these applications beyond time for the reliefs claimed with regard to 35 posts notified on 3.1.1997 and consequently, they are barred by time so far as reliefs are concerned.

Cases referred:

1. (1985) 1 SCC 122 - Jatinder Kumar & Others v/s State of Punjab & Others
2. AIR 1987 SC 1073 - Ambica Quarry Works etc. v/s State of Gujarat & Others
3. AIR 1990 SC 405 - P.Mahendran & Others vs. State of Karnataka & Ors.
4. (1991) 3 SCC 47 - Shankarsan Dash v/s Union or India
5. (1992) 2 SCC 148 = AIR 1992 SC 749) - Dr. P.K.Jaiswal v/s Debi Mukherjee & Others
6. 1993 Supp (2) SCC 600 - Jai Singh Dalal & Others vs. State of Haryana & Another
7. (1994) 6 SCC 151 - State or M.P., & Others v/s Raghuveer Singh Yadav & Others
8. (1998) 4 SCC 202 - Rajasthan Public Service Commission vs. Charan Ram & Another
9. 1998 SCC (L&S) 532 - B.L.Gupta & another vs. M.C.D.
10. (2001) 5 SCC 145 - Delhi Judicial Services Association & Others vs. Delhi High Court & Others
11. (2003) 5 SCC 373 - State of A.P. & Others v/s D.Dastagiri & Others
12. (2007) 1 SCC (L&S) 92 - Pitta Naveen Kumar & Others v/s Raja Narasaiah Zangiti & Others

ORDER

These applications are taken together for consideration since involve same points with identical facts and heard together.

2. In brief, case of the Applicants is: They were qualified and eligible for being selected to the posts of Motor Vehicles Inspectors. So, they had applied for their selection when 35 posts of Motor Vehicles Inspectors were notified for selection vide notification dated 3.1.1997. However, after calling for the applications, selection process was kept in abeyance by the Karnataka Public Service Commission (hereinafter referred to as KPSC) at the instance of the Government in the year 1999 and thereafter, on 18.10.2001, said notification was cancelled/withdrawn stating no need to fill up the posts of Motor Vehicles Inspectors though, in fact, there was no reason or justification for doing so.

Thereafter, within about 5 years, by Notification dated 18.8.2006, KPSC has notified 245 posts of Motor Vehicles Inspectors for selection, and the number of posts came to be reduced to 145 posts later by a corrigendum dated 25.8.2006. Said posts notified include 35 posts notified in the year 1997. But the qualification prescribed for filling up the posts has been changed that too without giving any age relaxation to the candidates who had applied for those posts earlier in the year 1997. Further, they have not been exempted from applying afresh for the posts notified in the year 2006 and hence, they are deprived of an opportunity of being selected to the said 35 posts now also on account of age factor, change in qualification, etc. So, the applicants are before us challenging the Notification and corrigendum issued in the year 2006, requesting to quash earlier Notification dated 18.10.2001 relating to the withdrawal of the Notification dated 3.1.1997 issued for selection of 35 posts of Motor Vehicles Inspectors and sought a direction to segregate/separate 35 posts of Motor Vehicles Inspectors out of the posts notified in the year 2006 and fill up those 35 posts notified on 3.1.1997 by considering them for those posts.

In some of the applications, a direction to relax the age limit for the candidates, who had applied earlier for 35 posts of Motor Vehicles Inspectors in the year 1997, is also sought so that they can take part in the selection process for those posts of Motor Vehicle Inspectors covered by the notification issued now in the year 2006.

3. According to the applicants, the cancellation/withdrawal of the Notification issued earlier for the selection of 35 posts of Motor Vehicles Inspector is bad in law, arbitrary and illegal as it was done

at the instance of the Karnataka Motor Vehicles Inspectors Association, which made representation in this regard and not to fill up those posts for a period of 10 years, though it had no right to object and the material on record shows that there was need for filling up of those posts then, which could also be inferred from the fact that 245 posts had been notified at first instance in the year 2006 though, by corrigendum issued immediately thereafter, the number of posts to be filled up had been reduced to 145 posts, but they include those 35 posts. If there was no need to fill up those 35 posts in the year 1997 or 2001 as the case may be, the total number of posts notified now in the year 2006 would not have been to that extent within a period of 5 years. Further, the posts notified earlier in the year 1997 could not have been clubbed or included in the posts notified in the year 2006, particularly when the rules prevailing in the year 1997 have been changed and amended rules govern the qualification and eligibility of the candidates to be selected now for the posts in the 2006.

It was contended for the applicants, that their valuable right to take part in the process of selection, which had accrued to them in the year 1997, has been taken away by wholly irrelevant and extraneous considerations. Further, the action taken to cancel the process of filling up of those 35 vacancies was arbitrary and capricious as not even informed through public notice or gazette publication about such cancellation process and not refunded/returned the fee paid with applications besides the enclosures submitted for their selection, though required to have been refunded along with enclosures. All this had made them to think that still the Notification dated 3.1.1997 and their applications made seeking their selection to those posts are alive but, it was only after 245 posts were notified on 17.8.2006 (though later corrigendum was issued on 25.8.2006 reducing the posts to 145), when enquired, they learnt about the cancellation of the earlier selection process for 35 posts notified and hence, the delay in approaching the Tribunal seeking relief with regard to the Notification dated 18.10.2001 issued in pursuance of letter dated 4.10.2001 of the Government is bonafide and as such, they require to be considered for the 35 posts notified earlier on 3.1.1997 when they satisfy all the conditions laid down in that Notification.

It is also their case that the decision taken to stop the earlier recruitment process started in the year 1997 was without assessing carefully all the relevant considerations, including the increase in the number of vehicles coming on road, their movements, air pollution, retirement of MVIs and chances of vacancies etc. The very fact that the department had taken different view at different times about the requirement of the posts of Motor Vehicles Inspectors and the Notification issued in the year 2006

make it clear that there was need to fill up the posts in the year 1997 but still not filled up, which has violated their rights guaranteed under Articles 14 & 16 of the Constitution. Lastly, according to them even the principle of promissory estoppel applies in the facts of the case and the action of the respondents in violative of the principle of legitimate expectation, which they had on account of notifying the posts.

4. On the other hand, according to the Government, as the qualification prescribed for the selection of Motor Vehicles Inspectors for 35 posts notified on 3.1.1997 was against the Cadre and Recruitment Rules, if selection for the said posts had been made and challenged, selections would not have stood to the test of judicial scrutiny and as such, the rules required to be amended. In fact, certain applications and writ petitions had been filed challenging the said earlier Notification dated 3.1.1997, and hence, the Notification dated 3.1.1997 was sought to be withdrawn by order dated 4.10.2001 and as such, the same was withdrawn by Notification issued by the KPSC on 18.10.2001 that too, after Gazetting that Notification in the Karnataka Gazette, bringing it to the notice of the public and hence, the statement of applicants that the cancellation was not notified in the Gazette is not correct and, in the circumstances, it could be said that the relief sought for by the applicants so far as the earlier Notification and cancellation of that notification are concerned, is clearly time barred as challenged after more than 9 years from the date of earlier notification and 5 years from the date of withdrawal of that notification and the cause, sought to shown by them requesting to condone the delay, is neither true nor sufficient nor satisfactory and hence, the applicants cannot have reliefs as the withdrawal of the earlier Notification was in the circumstances referred to above and not at the instance of the Karnataka State Motor Vehicle Inspectors Association. At any rate, the applicants have no right much less any vested right to seek a direction for completing the process of selection in pursuance of the earlier notification dated 3.1.1997. In fact, the applicants who were not even called for interview or for any purpose after they filed their applications earlier in the year 1997, have no right at all as it is settled law that even a selected candidate does not have a right to seek a direction to appoint him and the authority, which has initiated the process of selection, has competency to withdraw the same in the circumstances, which cannot be questioned. The fact that the applicants are over aged now to apply for the posts notified in the year 2006 does not help the applicants nor they are entitled to claim age relaxation on the ground of having applied earlier for 35 posts notified in the year 1997 much less to consider them for selection to those posts now. Thus, denying the averments made in the applications, requested to dismiss the applications.

5. More or less, same is the stand of the KPSC.

6. We have heard both sides, who advanced argument in support of their respective case noted above, of course, with certain decisions. Perused the records including the record in file No.2 HTD 373 TME 95 made available by the Department (respondents).

7. The submission made for the applicants is that after issuing a Notification calling for applications from intending candidates for a post or posts, such notification cannot be cancelled or withdrawn. In other words, according the applicants, once the recruitment process starts, it must complete and cannot be scuttled in the middle before the selection process is over. For this, reliance was placed on a decision of the Hon'ble Supreme Court in the case of Dr. P.K.Jaiswal v/s Debi Mukherjee & Others [(1992) 2 SCC 148 = AIR 1992 SC 749).

8. On the other hand, placing reliance on a Constitution Bench Judgment of the Hon'ble Supreme Court in the case of Shankarsan Dash v/s Union or India [(1991) 3 SCC 47] and some other decisions, it was argued for the respondents that the Government has every power to cancel or withdraw the Notification at any stage before the selection process is over and not that once a Notification is issued by the KPSC on the request of the Government, such Notification cannot be withdrawn or cancelled later.

9. At the outset, it may be noted that in the case of Dr. P.K.Jaiswal (supra) relied on for the applicants, the Hon'ble Supreme Court has observed as under:

> "5. …….. If the Government is at a given point of time considering the question of amending the recruitment rules with a view to providing for promotion to the post in question, the Government can before an advertisement is issued by the Commission and the process of selection is under way request the Commission to withdraw the same till it decides on the question of amending the Rules ……. "

So, the said decision instead of helping the applicants supports the case of the respondents. Of course, in the said case withdrawal of the Notification was before the PSC acted on it i.e. before notification was issued calling for applications, which is not so in the matters on hand. Admittedly in the matters before us, except calling for the applications from the intending candidates for the posts notified, no other step had been taken by the KPSC.

10. In the case of Shankarsan Dash (supra), on which the respondents rely, a Constitution bench of the Hon'ble Supreme Court has held thus:

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhas Chander Marwaha, Neelima Shangla v. State of Haryana, or Jatendra Kumar v. State of Punjab." (emphasis supplied)

11. Further, in the case of Jai Singh Dalal & Others vs. State of Haryana & Another [1993 Supp (2) SCC 600], a Bench consisted of 3 Hon'ble Judges has observed thus:

"7. …….. In a recent decision in Shankarsan Dash v. Union of India the Constitution Bench of this Court reiterated that even if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates do not acquire any indefeasible right to appointment against the existing vacancies. It was pointed out that ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. The State is under no legal duty to fill up all or any of the vacancies by appointing candidates selected for that purpose. Albeit, the State must act in good faith and must not exercise its power mala fide or in an arbitrary manner. The Constitution Bench referred with approval the earlier decision of this Court in Subash Chander. Therefore, the law is settled that even candidates selected for appointment have no right to appointment and it is open to the State Government at a subsequent date not to fill up the posts or to resort to fresh selection and appointment on revised criteria. In the present case, the selection was yet to be made by the HPSC. Therefore, the petitioners cannot even claim that they were selected for appointment by the HPSC. The selection process had not been completed and before it could be completed the State Government reviewed its earlier decision and decided to revise the eligibility criteria for appointment. It is, therefore, clear from the settled legal position that the petitioners had no right to claim that the selection process once started must be completed and the Government cannot refuse to make appointments of candidates duly selected by the HPSC." (Emphasis supplied)

12. Again, in the case of State of M.P., & Others v/s Raghuveer Singh Yadav & Others [(1994) 6 SCC 151] also, the Hon'ble Supreme Court has held as under:

"5. …… The Government is entitled to conduct selection in accordance with the changed rules and make final recruitment. Obviously no candidate acquired any vested right against the State. Therefore, the State is entitled to withdraw the notification

by which it had previously notified recruitment and to issue fresh notification in that regard on the basis of the amended Rules." (Emphasis supplied)

13. Even recently also in the case of State of A.P. & Others v/s D.Dastagiri & Others [(2003) 5 SCC 373], a Bench of 2 Hon'ble Judges has observed thus:

"4. ……. the respondents themselves had admitted that the selection process was cancelled at the last stage. In the absence of publication of select list, we are inclined to think that the selection process was not complete. Be that as it may, even if the selection process was complete and assuming that only select list remained to be published, that does not advance the case of the respondents for the simple reason that even the candidates who are selected and whose names find place in the select list, do not get vested right to claim appointment based on the select list. It was open to the State Government to take a policy decision either to have prohibition or not to have prohibition in the State. Certainly, the Government had right to take a policy decision. If pursuant to a policy decision taken to impose prohibition in the State there was no requirement for the recruitment of Constables in the Excise Department, nobody can insist that they must appoint the candidates as Excise Constables……"

14. Of course, as held by the Constitution Bench in the case of Shankarsan Dash (supra) and noted already:

"7. …….. it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bonafide for appropriate reasons……."

15. But, the learned Counsel for the applicants submitted that though they had/have no legal right to insist on their selection and appointment to 35 posts notified on 3.1.1997, the applicants had/have a right to be considered for selection and that right of theirs could not have been taken away by cancelling or withdrawing the Notification.

16. So, now the question is, "whether a candidate, who applies for a post in pursuance of a Notification issued by PSC an indefeasible right to be considered for selection?"

17. For this, reliance was placed on the observation made in the case of Dr. P.K.Jaiswal (supra), wherein the Hon'ble Supreme Court has observed thus:

"5. …….. It is obvious from the ratio of these two decisions to which our attention was pointedly drawn that if the Commission issues an advertisement at the behest of the Government and pursuant thereto calls a candidate for interview, the candidate has a right to be considered for selection but not a right to be selected or to appointment to the post in question."

18. So also, in a very recent decision of the Hon'ble Supreme Court in the case of Pitta Naveen Kumar & Others v/s Raja Narasaiah Zangiti & Others [(2007) 1 SCC (L&S) 92, a Bench consisting of two Hon'ble Judges has observed as under:

> "32. The legal position obtaining in this behalf is not in dispute. A candidate does not have any legal right to be appointed. He in terms of Article 16 of the Constitution of India has only a right to be considered therefore."

19. It is true that in the said two decisions relied on for the applicants, it has been observed that a candidate has a right to be considered for selection.

20. But, it is trite that any observation made in any decision requires to be considered in the context in which such observation came to be made. For this, reference can be had to the observations made by the Hon'ble Supreme Court in the case of Ambica Quarry Works etc. v/s State of Gujarat & Others (AIR 1987 SC 1073) wherein, it has been held as under:

> "18. …….. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically followed from it."

21. Reference can also be had to the following observations made in the case of the Regional Manager and Anr. V. Pawan Kumar Dubey (AIR 1976 SC 1766):

"7. …… It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a word of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

22. Thus, any observation made in any judgment has to be read in the context in which it was made and as such, the context in which the observation relied on for the applicants came to be made, requires to be noted. So, let us consider the context in which the Hon'ble Supreme Court has made the observation relied on for the applicants.

23. In the case of Dr. Jaiswal (supra), though requisition was sent to the PSC for selection of a candidate for filling up a vacancy, before the Commission could advertise the post, Government had communicated the PSC not to proceed with the process of selection because it was examining the issue of giving an avenue for promotion to that post. In spite of that, PSC went ahead with selection.

In those facts and circumstances, matter came to the Tribunal and ultimately reached the Hon'ble Supreme Court, which has observed that action of the Commission was hasty and unjustified and upheld the right of the Government to withdraw the requisition sent to the Commission and not that recognizing the right of a candidate to be considered for selection, withdrawal of requisition was held bad. So, this decision does not come to the aid of the applicants.

24. So also, in the case of Pitta Naveen Kumar (supra), notification issued by PSC was not withdrawn but, by subsequent notification, opportunity was given to some others with age relaxation as they could not apply earlier when notified. When challenged that action, the Hon'ble Supreme Court has observed thus:

> "52. The authority of the State to frame rules is not in question. The purport and object for which the said notifications were issued also cannot be said to be wholly arbitrary so as to attract the wrath of Article 14 of the Constitution of India. The appellants herein no doubt had a right to be considered but their right to be considered along with other candidates had not been taken away. Both the groups appeared in the preliminary examination. Those who had succeeded in the preliminary examination were, however, allowed to sit in the main examination and the candidature of those had been taken into consideration for the purpose of viva voce test who had passed the written examination.
>
> (Emphasis supplied)

25. So based on the observations of the Hon'ble Supreme Court if held whatever may be the situation or circumstance, a candidate has to be considered for selection because of his right to be considered for selection, it will be against the decisions referred to already that the Government has power to cancel/withdraw recruitment process at any stage. In other words, one goes against another. As such, the observations made cannot be read out of context to hold that the Hon'ble Supreme Court has held that a candidate has an indefeasible right to be considered and Government cannot withdraw or cancel the recruitment process when once it starts, particularly when kept in mind the other decisions of the Apex Court referred to already, wherein it is held that the Government has the power to withdraw/cancel the selection process at any stage before a candidate is issued with an appointment order.

26. In this context, we wish to refer what has been observed and held by the Hon'ble Supreme Court in the case of Jai Singh Dalal (Supra), since that makes the position clear:

> "8. Strong reliance was, however, placed on a decision of the Punjab and Haryana High Court reported in Rameshwar Nath Moudgil v. State of Punjab. In that case the petitioner fulfilled all the requirements of the advertisement and answered the eligibility

criteria for appointment under the extant rules. He was permitted to appear at the examination and stood first among the candidates belonging to the category of released Indian Armed Forces Personnel. Since the process of selection had commenced he thought he would in ordinary course get the appointment. At that stage a rule was made which jeopardized his selection for appointment since it rendered him ineligible. The candidate challenged the rule which was given retrospective operation and the High Court invoking Article 16(1) came to the conclusion that his right to be considered for appointment was jeopardized since it violated the guarantee of the said Article. In that case the main question was whether a rule giving retrospective operation could be validly enacted. The High Court came to the conclusion that the rule was aimed at excluding the petitioner and perhaps another candidate belonging to the same category and hence it was not bona fide. Learned counsel, however, placed emphasis on the following observations in paragraph 7 of the judgment:

> "We are of the opinion that exclusion from consideration by the retrospective operation of a rule, when consideration was crystallizing into selection was, in the circumstances of the present case, a denial of the Fundamental Right guaranteed by Article 16(1)."
>
> These observations have to be read in the context of the facts of the case. The fact revealed that the Court was inclined to take the view that the events which had preceded the making of the rule led to an irresistible reference that the rule was aimed at excluding the petitioner and perhaps his companion from being considered for appointment. The explanation offered for the making of the rule was also found to be unsatisfactory. It was in that context that the Court came to the conclusion that when the process of selection had gone to a certain length and was crystallizing into selection, it was not open to the Government to amend the rule retrospectively with a view to excluding the petitioner and perhaps his companion from being considered for appointment. If the observations of the High Court were to be read to convey that merely because the selection process had traveled a certain length it was not open to the Government to interfere with the selection process by revising the criteria for appointment and that the Government was under an obligation to make an appointment on selection, such an interpretation would run counter to the ratio laid down by the Constitution Bench of this Court in the case of Shankarsan Dash and would, therefore, not be good law. We are, therefore, of the opinion that the case of the appellants is weak in the sense that they had not yet been selected for appointment by special recruitment." (Emphasis supplied)

27. So, in our view, the right of a candidate to be considered for selection will be only if the notification is not cancelled/withdrawn. If the notification is withdrawn/cancelled, the question of considering the right of a candidate to be considered for selection does not arise since, in the absence of any notified post for selection, there cannot be any right to be considered for selection. Thus, the right of a candidate to be considered for selection and the power/authority of the State to cancel/withdraw notification could be reconciled.

28. However, it was contended for the applicants that when once a Notification is issued calling for applications from the candidates, selection to those posts has to be made based on the Rules in existence on the date of Notification and not on the basis of any subsequent or amended rules.

29. So, let us consider, whether 35 posts notified on 3.1.1997, but not filled up then and now said to have been included in 145 vacancies notified in the year 2006 after amendment of rules, be filled up in accordance with old rules in force on 3.1.2997 of amended rules of 2005.

30. It is not in dispute that the Rules, which were in force as on the date of notification dated 3.1.1997, have undergone a change by amendment and new Rules 2005 have taken their place. In other words, Rules in force, when 35 posts were notified on 3.1.1997, were different from the Rules in force when posts are notified now in the year 2006.

31. So the learned Counsel for the applicants placed reliance on the decisions of the Hon'ble Supreme Court in P.Mahendran & Others vs. State of Karnataka & Ors. (AIR 1990 SC 405), Rajasthan Public Service Commission vs. Charan Ram & Another [(1998) 4 SCC 202], B.L.Gupta & another vs. M.C.D. [1998 SCC (L&S) 532] and Delhi Judicial Services Association & Others vs. Delhi High Court & Others [(2001) 5 SCC 145], besides an unreported Division Bench decision of the High Court of Karnataka in the case of Sri. K.Narasimha Murthy & Others vs. State of Karnataka & Others (W.P.Nos.5726-5728/1999 & Connected petitions) decided on 3.7.2002, in support of the stand of the applicants that for 35 posts notified in the year 1997 but not filled up and now covered by 145 posts notified in the year 2006, old rules require to be applied and not the rules as amended in the year 2005 and, if done so, the applicants require to be considered for selection.

32. At the outset, it may be noted in the case of Mahendran (supra), what has been held is that the right of a candidate to be considered for selection in accordance with the existing rules cannot be effected by amendment of any rule unless the amended rule is retrospective in nature. In that case, the earlier notification, issued for the selection of posts in accordance with old rule, had not been cancelled/ withdrawn. So, it was held that the amended rules cannot be applied to the candidates, who applied in pursuance of earlier notification when old rules were in force. However, in the present matters, the earlier notification issued, when unamended rules were in force as on 3.1.1997, has been withdrawn. As such, selection to be made in accordance with the earlier notification or as per the old rules is not before us. What is before us is, whether or not the candidates applied in pursuance of earlier notification have a right to be considered now for the posts notified in the year 2006 or not and as such, the decision in the case of Mahendran (supra) has no application to the present matters.

33. So also in the case of Charanram (supra), posts advertised earlier ceased to exist, which is not so in the present matters, wherein the posts notified earlier on 3.1.1997 had not ceased/existed. On the other hand, before us, the number of posts had increased to 145 posts in the year 2006 as against 35 posts notified in the year 1997. That apart, after noting what has been held in the decisions referred that a candidate has no vested right to get the process completed and at the most the Government could be required to justify its action on the touch-stone of Article 14 of the Constitution of India, what has been observed in the decision is as under:

> "17. In the facts of the present case it cannot even be suggested that the action of the State of Rajasthan was in any way arbitrary in interpreting the earlier recruitment process pursuant to the first advertisement dated 4th November, 1993 Annexure-P1 as the Rules themselves had got amended and the posts earlier advertised had ceased to exist."

34. Similarly, the case of B.L.Gupta (supra) relates to promotions and not direct recruitment to the post to be filled up after calling for applications and selections through PSC and as such, even that decision cannot be of any help to the applicants in the present matters. Same could be said with regard to the decision in the case of Delhi Judicial Officers Assn. (supra), relied on for the applicants.

35. So far as unreported Division Bench decision of the High Court of Karnataka in the case of Sri. K.Narasimhamurthy (supra) is concerned, as noted in that decision itself, the Division Bench was concerned with promotion and not direct recruitment and as such observed therein only that, even the principles laid down in the case of V.Rangaiah and B.L.Gupta (supra) have no application to the case before it. At the cost of repetition, it may be noted that we are concerned with the direct recruitment and not the matter relating to promotion and as such, the observations made therein could be of no help to the applicants.

36. Admittedly, the present applications relate to direct recruitment and not promotion. Further, Notification dated 3.1.1997 issued for 35 posts was earlier stayed and later withdrawn in the year 2001, much earlier to notifying 145 posts in the year 2006. Old Rules, which were in force as on 3.1.1997, came to be amended consciously in the year 2005. So, it cannot be said that even after amendment of Rules in the year 2005, those 35 posts notified in the year 1997 and covered by 145 posts notified now, require to be filled up in accordance with earlier Rules of 1976 only, which are no more in force in the year 2006 when notified 245/145 posts. None of the decisions relied on for the applicants had such a situation.

37. AT the cost of repetition, it may be noted that a decision has to be considered in the matrix of facts and not by bifurcating those facts and context in which decision was rendered, as noted already. If there had been no amendment in the Rules besides withdrawal of the Notification, under which 35 posts had been notified for being filled up in the year 1997, the matter would have been different, but not now. So, when considered the facts before us with the facts of the decisions relied on for the applicants besides the observations made by a Division Bench of the High Court of Karnataka in the case of Sri. Narasimhamurthy (supra), we are of the clear view that none of the decisions relied on for the applicants helps the applicants.

38. It was also contended for the applicants strongly that though there was need to fill up the posts of Motor Vehicles Inspectors, as could be seen and said on account of increase in number of posts notified in the year 2006 as 145 posts as against 35 posts notified in the year 1997 not filling up the posts cannot be said to be on account of not requiring them to be filled up but for extraneous reason namely, to support the representation made by the Association of the Motor Vehicles Inspectors, who had requested not to go ahead with the selection for the posts notified in the year 1997. In other words, though, there was need to fill up the posts of Motor Vehicles Inspectors, without taking that into consideration and various other facts, Notification was issued on 18.10.2001 cancelling the earlier selection process for 35 posts and as such it was not bona fide but arbitrary, just to favour the Association of inservice Motor Vehicles Inspectors, who made representation and hence, the same cannot be sustained in the eye of law. In fact, crux of the case is, whether the Notification issued on 18.10.2001 cancelling the Notification issued earlier for filling up of 35 posts of Motor Vehicles Inspectors in malafide and arbitrary or not.

39. According to the applicants, the association for its own reasons, with mala fide intention to see that further selections of Motor Vehicles Inspectors do not take place, had made representation to cancel/withdraw the Notification issued on 3.1.1997 and as such, the notification of cancellation/ withdrawal is bad in law and vitiated. For this, they rely on the different notings made at different times by the Commissioner for Transport and difference in the grounds pleaded now and the ground mentioned earlier for withdrawal/cancellation of Notification dated 3.1.1997. So, necessarily we will have to refer the file made available to us containing notings made at different times by the Commissioner of Transport and view expressed by the concerned Ministers on such notings.

40. We have carefully gone through the file bearing No.HTE 373 TME 95 made available to us. It discloses certain proposals pending before the Government besides certain reasons, not to go ahead with and ultimately withdraw the recruitment process of filling up of 35 posts of Motor Vehicle Inspectors notified on 3.1.1997.

There was a proposal as on 14.5.1996 itself, to fill up 30% of the posts by ladies. In fact, reservation for ladies to that extent was provided in the Notification dated 3.1.1997. But, letter dated 26.7.1997 of the Commissioner at page-19 shows that, for the said posts reserved for ladies, some had raised objections for want of provision in C&R Rules and as such, requested to issue administrative orders on the line of the selection of lady Sub-Inspectors made. So also letter dated 29.1.1998 at page-28 of the Government to the Commissioner for Transport shows that the Government had asked to send a draft notification for framing rules. So, as could be seen from para 14 at page 20 of the Note Sheet, proposal was made (for the selection of ladies as Motor Vehicle Inspectors) to prepare draft rules.

41. Second proposal was to select rural candidates, as could be seen from letter dated 16.11.2000 of the Government stating that posts were to be filled up after taking a decision about rural candidates. At this juncture, it may not be out of place to note that during that relevant period, the issue of providing reservation to rural candidates was before Government and also before Court as that had been challenged. Third proposal before the Department was to reduce number of posts in the Department under economy measures, as is clear from the available correspondence. Fourth proposal before the department was its reorganization.

42. Fifth proposal and in fact the most important one was to amend the C&R Rules as the qualification prescribed for the posts notified was not in consonance with the Central Act and as such, amendment was necessary. It is true that in the notification dated 3.1.1997, the qualification prescribed and the type of driving licence a candidate should possess were in accordance with the requirements of Central Act of 1988, but against the C&R Rules in force then in which the only qualification prescribed was diploma in automobile engineering. But in that not shown diploma in mechanical Engineering and without showing how many years' diploma in automobile engineering was prescribed, which have been shown by amendment to C&R Rules made in the year 2005. So after withdrawal of the earlier notification dated 3.1.1997, posts have been notified in the year 2006 when amendment to C&R Rules came to be amended in accordance with Central Act of 1988 that too, after the period of five years as decision taken was not to fill up the posts then and for about five years and not for ever.

43. In fact, A.Nos.4908 and 5360/1998 had been filed before this Tribunal challenging the Notification dated 3.1.1997 on the grounds mentioned in those applications, which came to be disposed of by order dated 4.2.1999 though, of course, one was filed by the Karnataka Motor Vehicle Inspectors Association and the other was by one Beemesh.

44. Further, introduction of computerization in the Department (which reduced work load) was also taken note in the matter. So also introduction of life time tax for particular type of vehicles besides notification issued for converting some type of motor vehicles as non-transport vehicles and taking over by another department the work of meter calibration of Autorikshas besides improved measures taken in issuing driving licence etc.

45. Of course, the record also shows that the Transport Commissioner, who had once recommended or proposed not to fill up 35 posts notified on 3.1.1997, had given a different opinion later stating that he had given earlier opinion as he was unaware of certain facts and situations and hence, he had recommended not to fill up the posts but, on reconsideration and reexamining the matter, he later opined for filling up 35 posts for the reasons given therein. However, the file shows that except certain notings made and the said later report, the consistent view taken by the Department at different times, including the view expressed by the then concerned Ministers was not in favour of filling up those posts then though there was request after request by MLAs, MLCs and Ministers as well for filling up the posts. In spite of such request pressure in favour of the case of the applicants and subsequent report of the Transport Commissioner besides certain notings found in the file in favour of filling up for 35 posts, the Department had taken a conscious decision not to fill up the posts of various reasons referred though, of course, all those reasons have not been spelt in the letter written for withdrawal of the notification dated 3.1.1997. But when the file maintained and made available is gone through, it cannot be said that it was only at the behest of the Motor Vehicle Inspectors Association, the decision was taken to stay or withdraw the recruitment process started under the notification dated 3.1.1997.

46. It is true that the Motor Vehicle Inspectors Association had made representation not to fill up those posts notified at least for a period of ten years. But, as noted already, the decision was taken after noticing existing fact situation, various aspects and certain proposals pending even earlier to such representation borne out by the record. In fact, the last noting made on 16.5.2001 in the file also shows that the issue of filling up of the vacancies was to be considered as and when they consider and finalise reorganization of the department and not that posts be not filled up for ever. Simply because

some such reasons shown for that decision find place in the representation made, it cannot be held that the decision was on the basis of representation or at the behest of that Association only.

47. It is trite that a notification issued calling for applications to a post or posts could be withdrawn or cancelled at any time and stage of selection process provided the decision to withdraw/cancel the notification is not malafide or arbitrary and not influenced by extraneous consideration with any oblique motive to further the prospect of somebody and/or to effect the prospects of candidate(s) applied for selection.

48. In this connection, we feel it useful to refer the following observations made by a Constitution Bench of the Hon'ble Supreme Court in the case of Shankarsan Dash (supra), as that was the earlier and later view as is clear from the decision of the Hon'ble Supreme Court in the case of Subhas Chander Marwaha [1974(3) SCC 220] and Jai Singh Dalal (supra) and as such it is settled law now.

> "……. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons." (Emphasis supplied)

Unfortunately, for the applicants there is no such material to say that the withdrawal of the notification was malafide or arbitrary or vitiated by any extraneous consideration. On the other hand, for the reasons mentioned already (in paras 40-44), a conscious decision was taken by the Government that the posts called for/notified on 3.1.1997 be not filled up as is clear from various noting made besides the order passed by the then Hon'ble Minister for Transport at paras Nos.147 & 148 of the note sheet in the file.

49. It was vehemently argued for the applicants that as the notification dated 3.1.997 has been cancelled stating that there is no need to fill up the vacant posts of Motor Vehicle Inspectors, the respondents now cannot fall back on grounds other than the absence of need to fill up the posts. The various correspondence and notings made in the file also show that when the decision was taken and communicated, the department did not feel the necessity to fill up those notified posts then. As such, in view of various grounds available in the file referred to already, it cannot be said that the sole reason given for withdrawal of notification is bad in law or not supported by material on record. This could

be said even if ignored for a moment that entire correspondence till the decision was taken requires to be considered without giving undue importance to the letter addressed for the withdrawal/cancellation of notification in which all the grounds have not been spelt. At the cost of repetition, it may be noted that one of the reasons was amendment required in the C&R Rules with regard to qualification, which, if had not been rectified by amendment in C&R Rules, would have vitiated selections, if made in pursuance of notification dated 3.1.1997, as the qualifications prescribed in that notification had not been covered by the C&R Rules in force then and referred to already. So, in the facts and circumstances, no fault could be found with the withdrawal of the notification dated 3.1.1997.

50. Of course, it was contended for the applicants that at least age relaxation should have been given to the candidates, who had earlier applied as those candidates are age barred now. For this, no rule or law or authority has been brought to our notice by the applicants that whenever a notification is withdrawn/cancelled, the selection authority is bound to give age relaxation to the candidates applied earlier. On the other hand, it is well settled that so long as notification issued does not suffer from any infirmity, it cannot be challenged merely on the ground that it does not contain the eligibility criteria stated in the earlier notification withdrawn/cancelled particularly when issued as per C&R Rules.

51. In this regard, it would be sufficient if we note the observations made by a Division Bench of the High Court of Karnataka in an unreported decision in the case of Sri. Ramesh Babu Vs. the Police Sub Inspector Recruitment Committee & Anr. (W.P.No.25240/2003 (S-KAT) rendered on 3.6.2003 by His Lordship Justice R.V.Ravindran (as he then was), when similar contention regarding age relaxation was taken:

> "5. As rightly observed by the Tribunal the State has power to stop the process of recruitment at any time and has also the power to issue a fresh notification changing the criteria for selection. The petitioner does not have any vested right to insist that the age limit criteria should be with reference to any particular date. So long as the notification dated 4.9.2002 does not suffer from any infirmity, it cannot be challenged merely on the ground that it should have incorporated the eligibility criteria as stated in the earlier notification dated 28.3.2002……."

52. In fact, the said decision applies on fours to the present matters as is clear from the discussion made and findings recorded by us. Same could be said to what was canvassed for the applicants that 35 posts notified on 3.1.1997 should have been or be separated from the 145 posts notified now in the year 2006 and selection to those 35 posts requires to be made in accordance with rules in force

then in the year 1997. So, we do not find any force in any of the grounds urged for the applicants in the matters and as such, the applications require to be dismissed on merits.

53. Even otherwise, it may be noted that, according to the respondents, the applications are barred by time since the applicants have not approached this Tribunal within the period of limitation provided and challenged the notification dated 18.10.2001 in the year 2006 and as such, the applications are barred by limitation.

54. Admittedly, within the period of limitation, the applicants have not challenged the order of keeping in abeyance the selection process nor the withdrawal of the notification made on 18.10.2001. They have challenged the same in the year 2006, long after the expiry of limitation period.

55. For this, it was submitted for the applicants that they were unaware of keeping in abeyance the selection process and withdrawal of the selection process on 18.10.2001 thereafter and hence, the delay has been explained satisfactorily and as such, the applications cannot be dismissed on the ground of limitation. In fact, reliance was also placed on the fact that the fee paid by them to KPSC along with their applications in the year 1997 had not been refunded so far along with copies of annexures/documents submitted with applications as even no public notice much less individual notice had been given about the withdrawal of the notification and hence, the delay is explained and the respondents cannot have the benefit of the point of limitation.

56. It is true that individual notice had not been given to the applicants about keeping in abeyance the selection process and/or withdrawal of the notification on 18.10.2001. However, there is a gazette notification, as contended by the respondents, which shows that withdrawal of the notification dated 18.10.2001 was gazetted in the Karnataka gazette dated 13.12.2001. It is trite that a notice/notification in the gazette is a notice to one and all in the State and hence, the applicants cannot take shelter under absence of notice to them about the withdrawal of the notification on 18.10.2001. As such, it cannot be said that the applicants had no knowledge of the withdrawal till they made enquiry in the year 2006 as contended by them.

57. Of course, fee paid with the applications submitted in the year 1997 has not been refunded to the applicants admittedly. But, in the absence of anything in the notification or in any rule showing that whenever notification issued is withdrawn/cancelled, the fee paid along with applications has to be

refunded, it cannot be inferred or held that because the respondents have not refunded the fee paid along with their applications in the year 1997, they had no notice of withdrawal of notification. Further, no law or authority was brought to our notice to hold that non refund of the fee paid along with the applications seeking selection to the posts has given any right to the applicants. So, the said fact though not in dispute, will be of no help to the applicants. So also not returning the copies of the documents/annexures submitted with applications.

58. It was also contended for the applicants that on account of non refund of fee and not issuing individual notice to them, they were legitimately expecting that they would be called for the purpose of selection to the posts of Motor Vehicles Inspectors. Incidentally, they have also relied on the rule of promissory estoppel also.

59. For this, we feel it proper to refer the decision in the case of Jatinder Kumar & Others v/s State of Punjab & Others [(1985) 1 SCC 122], wherein similar contention was raised but the Hon'ble Supreme Court has observed thus:

> "16. An argument of desperation was further advanced about promissory estoppel stopping the State Government from acting in the manner it did in not appointing the appellants although their names had been recommended. The notification issued by the Board in this case was only an invitation to candidates possessing specific qualifications to apply for selection for recruitment for certain posts. It did not hold out any promise that the selection would be made or if it was made the selected candidates would be appointed. The candidates did not acquire any right merely by applying for selection or for appointment after selection. When the proposal for disbandment of the Punjab Armed Police Battalion and instead creating of additional posts for the district police was turned down by the State Government, the appellants were duly informed of the situation and there was no question of any promissory estoppel against the State."

The observations extracted above answer the argument advanced of the applicants and as such, we do not find any force on promissory estoppel nor legitimate expectation pleaded.

60. Further, incidentally it may be noted that the Notification dated 3.1.1997, which the applicants want to give effect or to act upon now in the present applications, had been questioned before this Tribunal in A.Nos.4908 & 5360/1998. So, the applicants could have impleaded themselves before this Tribunal in those earlier applications. However, they or any of them have/has not taken any such step when those applications were pending. Those applications came to be disposed of on 4.2.1999 after the Notification dated 3.1.1997 was kept in abeyance. So, then or thereafter, they could have

approached this Tribunal, but not done.

61. The notification dated 18.10.2001 has been issued much after the disposal of the said applications by this Tribunal. The applicants and/or their Association was pursuing the matter through various persons and authorities, as could be seen from the records available in the file perused by us. So, it cannot be inferred that the applicants had no knowledge of the pendency/disposal of those earlier two applications filed before this Tribunal. Be that as it may, within reasonable time after disposal of those earlier two applications, the applicants could have approached this Tribunal seeking appropriate relief with regard to the Notification dated 3.1.1997. Even that was not done and, for the first time, they have approached this Tribunal in the year 2006 after notification was issued notifying 145 posts of Motor Vehicles Inspectors. So, even these circumstances also could be considered though they do not directly show that the applicants had knowledge of the proceedings instituted and came to an end before this Tribunal in the years 1998 and 1999. So, we are of the view that the applicants have failed to show sufficient cause for condoning the delay in filing these applications beyond time for the reliefs claimed with regard to 35 posts notified long back on 3.1.1997 and consequently, they are barred by time so far as said reliefs are concerned.

62. As noted already, no such infirmity has been alleged except the infirmities already referred and considered in order to go ahead with the Notification dated 17.8.2006 and corrigendum dated 25.8.2008 and hence, the applicants are not entitled to any reliefs claimed. Thus, considered from any angle the applications require to be dismissed.

Accordingly, the applications are dismissed.

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IN THE KARNATAKA ADMINISTRATIVE TRIBUNAL AT BANGALORE
APPLICATION NOS.6627 to 6630 of 2004 & Connected cases
D.D. 18.05.2007
The Hon'ble Mr. Justice A.V.Srinivasa Reddy, Chairman &
The Hon'ble Mr. T.Y.Nayaz Ahmed, Administrative Member

Smt. P.T.Triveni & Ors. … Applicants
Vs.
The State of Karnataka & Ors. … Respondents

Qualification:

Recruitment to 40 posts of Assistant Librarian pursuant to notification dated 13.5.2003 by holding competitive examination – After holding competitive examination the Commission found that out of 759 applications only 233 possessed the prescribed qualification and out of that only 22 could be selected on the basis of merit in the written examination and for the remaining posts the candidates who were meritorious based on written examination marks had different qualifications which are courses in Library Sciences of longer duration – On the recommendation of the Commission the Government gave its approval to consider the applications of the candidates who possessed certificates/Diplomas grants by 10 different Institutes – The applicants who possess the minimum qualification prescribed challenged the selection by such candidates to 18 posts – Tribunal upheld the selection and dismissed the applications.

Held:

The qualifications prescribed in the C&R Rules are only minimum qualifications. Therefore, there is no restriction for participation and selection of persons who possess higher qualifications in the same subject. In the case on hand, the fact remains that the private respondents selected are only on the basis of the merit in the written examination.

ORDER

In this Batch of applications, we have before us ten applicants. All these applicants had participated in the selection process for the post of Library Assistants. All of them have sought a mandamus to the official-respondents who are common in these applications to restrict the selection for the post of Library Assistants in terms of the Employment Notification dated 13.5.2003 (which is at Annexure-A2 in A.No.6627-6630 of 2004).

2. We have taken up all these applications together and heard the learned counsel for the applicants and the learned Additional Government Advocate [AGA] for the official respondents and the learned counsel for the various private respondents.

3. To understand the claims of the applicants, we should refer to some of the relevant facts which are as follows:

4. At the behest of the first respondent viz., the Secretary to Government, Education Department, the 3rd respondents-KPSC had issued an Employment Notification dated 13.5.2003 (which is at Annexure-A2 in A.No.6627-6630 of 2004), inviting applications from the qualified persons for 40 posts of Library Assistants. As per the aforesaid Notification, a candidate is eligible for the post, if he possesses the following prescribed qualifications:

> "1. A pass in SSLC general education
>
> 2. Technical education certificate granted by the Government Library Schools or certificate in Library Science or equivalent qualifications.
>
> 3. Experience: that is one year experience in the Libraries recognized by the Government."

5. The 3rd respondent has conducted a written test for the applicants who had applied against the aforesaid employment notification and on the basis of merit prepared a select list. The grievance of all those applicants is that they have not been selected in spite of possessing the prescribed qualifications. Their further grievance is that the private respondents who are selected do not possess the qualifications prescribed as per the Notification dated 13.5.2003 (which is at Annexure-A2 in A.No.6627-6630 of 2004).

6. The 3rd respondent-KPSC faced a peculiar problem, namely, that, for the forty posts notified, it had received 759 applications, and out of them except 233 candidates others had qualification other than the qualifications prescribed for the aforesaid posts. Since the Government had not declared equivalent qualifications for the posts of Library Assistants, as per the C&R Rules, the third respondent sent a proposal to the Government indicating the number of applicants possessing different qualifications by its letters dated 2.6.2003, 30.8.2003 and 18.9.2003, and sought clarification from the first respondent. In the very same letter the 3rd respondent-KPSC had suggested the first respondent to declare equivalent qualifications for the post of Library Assistants before final select list could be prepared on the basis of the merit and reservation as per the policy of the Government. Evidently, Government has considered the proposals sent by third respondent and by the letter dated 18.10.2003 (Annexure-R1); conveyed its approval to the 3rd respondent-KPSC.

7. Based on the aforesaid clarifications/approval issued by the Government, the third respondent-KPSC has finalized the select list on the basis of merit.

8. The grievance of the applicant is that none of them have been selected in spite of the fact that all of them possess the prescribed qualifications; whereas the private respondents have been selected who do not possess the prescribed qualifications nor their qualifications have been declared as equivalent by the Government.

9. The question that arises for consideration in these applications is that; whether the selection of candidates on merit has to be restricted only from amongst those who possess the prescribed qualifications or qualifications declared as equivalent for the post of Library Assistants or candidates possessing higher qualification could also be selected based on merit in written examination.

10. At the outset, we would like to refer to the qualification prescribed. As per the Employment Notification dated 13.5.2003 (Annexure-A2 in the first applications), the prescribed qualifications for the post of Library Assistant are as follows:

> "1. A pass in SSLC general education
>
> 2. Technical education certificate granted by the Government Library Schools or certificate in Library Science or equivalent qualifications.
>
> 3. Experience: that is one year experience in the Libraries recognized by the Government."

11. It has been brought to our notice by the official respondents that the certificate course conducted by the Government Library Training Schools is of four months duration, which is post-SSLC Certificate course.

12. The third respondent-KPSC had confronted with a very peculiar situation namely that out of 759 applications, only 233 candidates possess the prescribed qualifications and out of them, only 22 could be selected on the basis of merit in written examinations. Whereas for the remaining 18 posts, the candidates who were meritorious based on written examination marks had different qualifications, which are courses in Library Sciences of longer duration. Therefore, on the recommendations of the third respondent-KPSC, Government by its letter dated 18.10.2003 which is Annexure-A9 addressed to the third respondent has given its approval to consider the applications of the candidates who possess the following qualifications.

Sl. No.	Name of Educational Institutions	Course-duration	No.of Applns. Recd.
Xxx		Xxx	Xxx
2.	Academy of General Education, Manipal Course in Library Science	1 year	01
3.	State Council of Vocational Course JOC Diploma by Government of Karnataka	2 years	304
4.	Diploma in Library Science from Govt. Polytechnic	-do-	85
5.	Course in Library Science from: Madras University	6 months	01
6.	Course in Library Science from: Annamalai University	1 year	10
7.	Course in Library Science from: Madurai Kamaraj University	1 year	07
10.	Course in Library Science from: National Open School	1 year	49
Xxx		Xxx	xxx

13. Accordingly, the third respondent has finalized the select list purely on the basis of merit.

14. The common contention of the learned counsel for the applicants is that the selection has to be restricted from amongst those who possess the prescribed qualifications or equivalent qualifications declared by the Government. Since so far no equivalent qualifications have been formally declared, their contention is that the selection has to be confined from amongst the 233 candidates who possess the prescribed qualifications viz., the SSLC with four months certificate course in Library Science. Their further contention is that the candidates who possess different qualifications which are not declared as equivalent and even if it is higher qualification on the basis of the duration of the course they cannot be considered since the qualification possessed by ach one of them is not the qualification prescribed for the post. Their further contention is that a person possessing higher qualification should not be considered for a post if there are candidates with the prescribed and requisite qualifications are available. In support of their claim, they have invited our attention to a decision of the High Court of Karnataka in Writ Petition Nos.29048-29055 of 2002 and connected matters, disposed of on 28.11.2002 (Annexure-A8 in A.No.6876 of 2003).

15. The sum and substance of their arguments and their stand is that if sufficient number of candidates possessing the prescribed qualifications or qualifications declared as equivalent are available, the selection should be confined only from amongst them and applicants with higher qualifications shall not be considered for appointment.

16. On the other hand, the learned counsel appearing for the private respondents vehemently argued that the qualification that is prescribed for the post which is as per the C&R Rules of the Department is the "minimum qualification". Their contention is that there is no bar for selection if a person possesses higher qualifications than the one prescribed under the C&R Rules. Their further contention is that it is always desirable to select persons who possess higher qualification than the prescribed qualifications. They claim that all of them have scored higher marks in the written examination and selection is made based on the marks obtained in the test conducted by the third respondent-KPSC, and not on the basis of the higher qualifications possessed by the candidates.

17. At this juncture, we would like to refer to the C&R Rules of the Department; wherein the education qualifications have been prescribed for the post of Library Assistants. As per the Notification dated 27.10.1978, the C&R Rules of the department have been notified which is Annexure-A1 (in A.No.6627-30 of 2004). For the post of Library Assistants the appointment could be made only by direct recruitment. The qualifications prescribed in Column No.3, are reproduced herein below:

"…….

	Minimum Qualification:
Library Asst. By Direct Recruitment	1) Should be a holder of Certificate in Library Science awarded by the Govt. Library Training School, Bangalore, or equivalent qualification.
	2) Should have not less than year's Experience in a Library recognized by the Govt.
	3) Age: should not have attained the age of 45 years……..."

18. Under the Column No.3 of the above said C&R Rules, the qualifications prescribed are the "minimum qualification". It also means that persons possessing higher qualifications are also eligible for the post of Library Assistant. Further, if we take the length of the course of the Library Science which is prescribed is of four months course conducted by the Government Library Science Schools, Bangalore. It is evident from the details furnished in the Government letter dated 18.10.2003 which is Annexure-R1, that the Government has permitted KPSC to complete selection from among those who have certificates of more than four months duration also. In fact, the duration of the course of the qualifications of the private-respondents, ranges from 6 months to 2 years. Therefore, undoubtedly on the basis of the duration of the course it can be said that the qualification possessed by the private-Respondents are of longer duration and therefore, they hold higher qualifications. The next question is

that, whether the person possessing higher qualification than the qualification prescribed in the C&R Rules or in the employment notification are eligible for the post. Our answer to this question is in the positive for the following reasons.

19. First, the qualification prescribed in the C&R Rules are the minimum qualifications. Therefore, persons holding higher qualifications are eligible for the post.

20. Further, a person with higher qualification will have higher skills/knowledge and therefore, he will be better suited for the post and it is always desirable to appoint such persons for the posts. The salary assigned to a post is fixed and it will not vary on the basis of the qualification of the incumbent. Therefore, for the same salary if persons with more than the minimum qualifications prescribed are selected on the basis of merit in written examination, in our considered view such an option would be always desirable and it will certainly not be in violation of the C&R Rules.

21. It is quite distressing to note that even though the C&R Rules mandates declaration of equivalent qualifications, even after almost three decades the Department has not declared any qualifications as equivalent. However, qualification prescribed in the C&R Rules are only "minimum qualification" and, therefore, in our considered view there is no restriction for participation and selection of persons who possess higher qualifications in the same subject. In the case on hand, the fact remains that the private-respondents selected are only on the basis of the merit in the written examination. Incidentally they also possess higher qualifications. In our considered view, on the basis of the recommendations of the respondent-KPSC, the State Government has rightly taken a decision and conveyed the same to the KPSC by its letters dated 18.10.2003. We find no legal infirmity whatsoever in this communication. In the given circumstances, the aforesaid solution to the problem faced by the third respondent is a proper one and hence we would not like to interfere with it and hence, these applications are required to be dismissed.

Accordingly, these applications are dismissed.

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IN THE HIGH COURT OF KARNATAKA AT BANGALORE
WRIT PETITION NO.20187 OF 2005 (S-RES)
D.D. 30.07.2007
The Hon'ble Mr. Justice D.V.Shylendra Kumar

Parameshwarappa … Petitioner
Vs.
The State of Karnataka & Ors. … Respondents

Recruitment :

Whether rejection of rural reservation claimed for not producing the certificate in requisite form within the time prescribed is correct? - YES

Petitioner a candidate for the post of Environmental Engineer had claimed reservation under 2A/ Rural – Petitioner failed to produce rural certificate in the prescribed form within the time prescribed – Hence his claim of rural reservation rejected – The applicant who secured 179 marks challenged the selection of 5th respondent selected under 2A/Rural category with 163 marks – Tribunal dismissed the writ petition.

Held:

That if the petitioner has not placed the requisite supporting material before the 4th respondent within the prescribed time and 4th respondent has proceeded on the fact that the petitioner has not produced the requisite form in support of his claim as rural candidate, then it cannot be said that 4th respondent has indulged in act of arbitrary action.

ORDER

Writ petition is filed by a person who had applied to the post of Environmental Engineer in terms of a notification dated 16.09.2005 issued by the Karnataka Public Service Commission, produced at Annexure-D. Version of the petitioner is that he had been ranked higher than 5th respondent as the merit list indicated; that the petitioner had scored 179 marks as against 163 marks scored by the 5th respondent; that they had applied as Rural Candidates under the category of Rule 2-A. Another notification dated 13.09.2004 vide Annexure R.5 (a) to the statement of objections is filed on behalf of 5th respondent.

2. Submission of Sri. Ramachandra A.Mali, learned Counsel for the petitioner is that petitioner had in fact produced necessary proof of the fact that he is a person belonging to the category of Rural Candidate. Not withstanding this fact, 4th respondent has recommended appointment of the 5th respondent; that 5th respondent had secured lower marks than the petitioner; action of the 4th respondent is arbitrary, the merit of the petitioner is overlooked; hence this petition for quashing the appointment of 5th respondent and for direction to make a proper recommendation.

3. It appears that the 4th respondent had also indicated the petitioner that his case would not be considered as he had failed to produce necessary certificate in Form No.2 within the stipulated time and the said endorsement is produced at Annexure-K and it is also sought to be quashed. Submission of the learned Counsel for the petitioner is that the endorsement is not tenable. It is an admitted fact that the petitioner is belonging to the category of Rural Candidate, that he had studied in an educational institution located in the rural are for a requisite number of years, that the 4th respondent could not have ignored such a fact and would not have denied the benefit reserved for the Rural candidates.

4. Respondents were noticed and they have entered their appearance through their Counsel.

5. Mr. Khureshi, Learned Additional Government Advocate submits that petitioner has not complied with the requirement of the notification and hence, the petitioner's candidature is overlooked for claiming the benefit of Rural Candidate, therefore, no merit in the case.

6. Mr. Basheer, learned Counsel for the 4th respondent referring to this statement of objection inter alia contended that the petitioner was required to file Form No.2 for claiming the benefit of Rural Candidate, but had not produced the necessary certificate in Form No.2, instead produced other certificate. What was produced in time was not in the requisite format.

7. 5th respondent is represented by Sri. Murali B.S., learned Counsel who submits that if the petitioner had not produced the requisite certificate within the prescribed time, no blame can be placed on the 4th respondent; that the petitioner who was aware of the requirement had not complied with it and therefore, cannot complain before this Court that there is any inaction or any discrimination on the part of the 4th respondent.

8. Even in terms of the Writ Petition averments, as indicated in paragraph- of the petition it is a fact that the petitioner was not able to produce the required form in the requisite format. What has been produced was lacking for the purpose of fulfillment of notified conditions. It may be true as contended by Sri. Kulkarni, learned Counsel for the petitioner that the petitioner in fact is the one who belonged to a particular reserved category. But if the petitioner had not placed the requisite supporting material before the 4th respondent within the prescribed time and 4th respondent had proceeded on the fact that the petitioner has not produced the requisite form in support of his claim as Rural Candidate, then it cannot be said that 4th respondent has indulged in act of arbitrary action.

9. In matter of this nature where there is no irregularity much less any illegal action on behalf of the 4th respondent, no grounds are made out to consider the question in the writ jurisdiction.

10. Hence, Writ Petition is dismissed.

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IN THE HIGH COURT OF KARNATAKA AT BANGALORE
WRIT PETITION NO.8282/2007 & CONNECTED CASES
D.D. 31.07.2007
The Hon'ble Mr. Cyriac Joseph, Chief Justice &
The Hon'ble Mr. Justice S.Abdul Nazeer

Shrikanth S.Patil & Ors. ... Petitioners
Vs.
State of Karnataka & Ors. ... Respondents

This Writ Petition filed against KAT order dated 11.4.2007 in A.Nos.6432-37/2006 and connected cases has been dismissed confirming the order of the Tribunal.

Held:

The Government is entitled to conduct selection in accordance with the changed rules and make final recruitment. No candidate acquires any vested right against the State. The State is entitled to withdraw the notification by which it had previously notified recruitment and to issue fresh notification in that regard on the basis of the amended Rules.

Cases referred:

1. (1991) 3 SCC 47 - Shankarsan Dash vs. Union of India
2. 1993 Suppl (2) SCC 600 - Jai Singh Dalal & others vs. State of Haryana & Another
3. (1994) 6 SCC 151 - State of M.P. vs. Raghuveer Singh Yadav & Others
4. (2003) 5 SCC 373 - State of A.P. & Others vs. D.Dastagiri & Others
5. (2007) 1 SCC (L&S) 92 - Pitta Naveen Kumar & Others vs. Raja Narasaiah Zangiti & Others

ORDER

S.Abdul Nazeer, J., (Oral)

1. In all these writ petitions, petitioners have challenged the order passed by the Karnataka Administrative Tribunal, Bangalore in application Nos.6432 to 6437/2006 and other connected matters dated 11.4.2007 whereby the applications filed by them for a mandamus directing the respondents to fill up 35 posts of Inspector of Motor Vehicles ('IMV' for short) pursuant to a notification bearing No.PSC.1.RTB/1996 dated 3.1.1997 and to consider their candidature to the said post were dismissed.

2. Petitioners are the holders of Diploma in Automobile Engineering. The second respondent vide notification dated 3.1.1997 invited applications for filling up 35 posts of IMVs in Motor Vehicle Department. Pursuant to the notification, petitioners submitted applications in the prescribed form enclosing copies of the certificates in proof of educational qualification, reservation category and

experience certificates along with the prescribed fee by way of demand draft. It is contended that the process of recruitment has been stalled at the instance of Karnataka Motor Vehicles Inspectors' Association which had not only made representations to the third respondent to keep in abeyance the process of recruitment but also initiated proceedings before the Tribunal in application Nos.4908 and 5360/1998 questioning the validity of the notification dated 3.1.1997. It is further contended that after the submission of the applications, none of the petitioners was intimated by the Karnataka Public Service Commission (for short 'Commission') as to the stage of process of selection or action taken on their applications. The association of petitioners, namely, "Unemployed Youth Diploma Holders in Automobile and Mechanical Engineering Forum" submitted representation on 24.12.2004 to the Commission inviting its attention to its earlier representation dated 15.9.2003 pertaining to notification dated 3.1.1997 for recruitment of 35 posts of IMVs and requesting the Commission to issue letters of interview and relieve them of unemployment and hardship. The association renewed its request in the year 2006 to the Commission and other authorities. Despite the said representations, neither the forum nor the petitioners or other authorities, who had submitted their applications were apprised of the factual position. It is contended that succumbing to the external pressure brought upon the Government against the recruitment being processed, the Government kept the process of recruitment vide notification dated 3.1.1997 in abeyance and there was no cancellation or supercession of the notification. It is the case of the petitioners that they were surprised by a news item appearing in 'Vijaya Karnataka' Kannada daily newspaper dated 20.8.2006 in which a notification dated 17.8.2006 issued by the Commission had been published inviting applications for recruitment to 245 posts of IMVs. Within a span of 8 days from the date of publication of the said notification, a corrigendum dated 25.8.2006 was issued by the Commission reducing the number of vacancies from 245 posts to 145 posts which included 35 posts of vacancies which were notified vide notification dated 3.1.1997. It is contended that they were not aware of the cancellation of the notification dated 3.1.1997 since they had not received any communication from the Commission much less the fee remitted along with their application had not been returned to them. Therefore, petitioners filed the applications before the KAT for the following reliefs:

> "a) Call for the records pertaining to notification No.R(2)147/PSC/2001-02 dated 18.10.2001 (Annexure-A13), Notification No.PSC.1.RTB.1/2006 dated 17.8.2006 (Annexure-A11) and Corrigendum No.R(1)79/2006-07/PSC dated 25.8.2006 (Annexure A-12) of the second respondent-KPSC and peruse the same and declare them as improper and illegal;
>
> 'b) As a consequence thereof to quash the Notification No.R(2):147:PSC:2001-02 dated

18.10.2001 (Annexure-A13), of the 2nd respondent-KPSC by issue of a writ in the nature of certiorari or order or direction as the case may be;

c) Issue a writ or mandamus directing the respondents to segregate and separate 35 posts of Motor Vehicles Inspectors out of 245 posts notified vide Notification dated 17.8.2006 – Annexure A11 and/or 145 posts in corrigendum dated 25.8.2006-Annexure-A12 and make recruitment to the said posts in terms of the notification dated 3.1.1997 and consider the candidature of the applicants;

d) Issue a writ in the nature of mandamus directing the respondents to fill up 35 posts of Motor Vehicles Inspectors pursuant to notification bearing No.PSC.1.RTB/1996 dated 3.1.1997-Annexure-A1 and consider the candidature of the applicants and to select them to the said post;

e) To grant such other suitable reliefs as this Hon'ble Tribunal deems fit to grant in the circumstances of the case, in the interest of justice."

3. The State Government as also the Commission have filed their respective objections before the KAT. The State Government in its objections has contended that applicants have no vested right for selection in pursuance of the notification. It is contended that the Central Government has amended Motor Vehicles Act in the year 1989 and on that basis, Central Government has issued a notification dated 12.9.1999 prescribing educational qualification for the post of Inspector of Motor Vehicles. Without amending Cadre & Recruitment Rules ('C&R Rules' for short) of the Department, notification was issued on 3.1.1997, which is contrary to C&R Rules. As the prescription of qualification was without amending the relevant provision of the C&R Rules, certain applications and writ petitions were filed challenging the notification dated 3.1.1997. In view of the same, the first respondent has issued an order on 4.10.2001 withdrawing the notification dated 3.1.1997. Now the respondent has prescribed the qualification amending C&R Rules vide notification dated 24.11.2005 and in view of the amendment, fresh notification calling for appointment to the post of Inspector of Motor Vehicles is issued which is in consonance with C&R Rules as well as the amended provisions of the Motor Vehicles Act, 1989. The first respondent is not at all influenced by the representation of the Association as alleged. In view of the withdrawal of the earlier notification dated 3.1.1997, fresh notification has been published in the gazette and once such gazette notification is made by the respondent, it is deemed that the earlier notification has been withdrawn validly. They prayed for dismissal of the applications. KPSC has filed more or less similar objections.

4. On the basis of the pleadings of the parties, the Tribunal has framed the point for consideration as under:

"Whether a candidate who applies for a post in pursuance of a notification issued by the KPSC has an indefeasible right to be reconsidered for selection?"

5. The Tribunal after considering the materials on record, contentions of the parties and various decisions of the Apex Court, has dismissed the applications. Petitioners have challenged the said order in these writ petitions.

6. We have heard Sri. H.S.Subramanya Jois, learned Senior Counsel along with Sri. S.V.Narasimhan, Sri. S.M. Babu and Sri. D.L.Jagdeesh, learned Counsel appearing for the petitioners and Sri. Udaya Holla, learned Advocate General along with Sri. B.Sreenivasa Gowda, learned Government Advocate and T.Narayanaswamy, learned Counsel appearing for the respondents.

7. Learned Senior Counsel appearing for the petitioners would contend that divergent reasons have been assigned in the reply statement of the Government and the communication dated 4.10.2001. In the communication dated 4.10.2001 of the Government, it is stated that on a detailed consideration of the matter, the Government was of the view that there is no necessity to fill up 35 posts of IMVs and it desires to reorganise the department, whereas in the reply statement, reason for issuing the Government Order dated 4.10.2001 is that without amending the C&R Rules of the Department, in the notification dated 3.1.1997, the educational qualification prescribed for the post was Diploma in Automobile Engineering or Mechanical Engineering. The said prescription of the qualification in the notification dated 3.1.1997 even though was in consonance with the Motor Vehicles Act, 1989, the same is contrary to C&R Rules. That is why the notification dated 3.1.1997 has been withdrawn on 4.10.2001. It is contended that the validity of the notification shall be judged by the reasons so mentioned and cannot be supplemented by fresh reason in the shape of an affidavit. It is further submitted that the reasons assigned by the Tribunal to negate the claim of the petitioners are unjust and improper.

8. On the other hand, learned Advocate General appearing for the respondents submits that the Central Government has amended the Motor Vehicles Act in the year 1989 and on the basis of the new amendment, Central Government has issued a notification dated 12.9.1999 prescribing the educational qualification for the post of Inspector of Motor Vehicles as Diploma in Automobile or Mechanical Engineering. However, there was no corresponding amendment to C&R Rules. The prescription of qualification in the notification dated 3.1.1997 even though was in consonance with the Motor Vehicles Act, the same was contrary to C&R Rules. As the qualification prescribed was

without amending the relevant provisions of the C&R Rules, certain applications and writ petitions were filed. In view of the same, first respondent has issued the order dated 4.10.2001 withdrawing the notification dated 3.1.1997, C&R Rules were amended on 24.11.2005. In view of such amendment, fresh notification calling for appointment to the post of Inspector of Motor Vehicles was issued which is in consonance with the C&R Rules. It is further contended that the first respondent is not at all influenced by the representations of the association. The petitioners are not entitled to have any vested right for continuation of the selection process on the basis of the applications invited from eligible candidates for the post of Motor Vehicles Inspectors.

9. We have carefully considered the arguments of the learned Counsel made at the bar and perused the materials placed on record.

10. Admittedly, the applications relate to direct recruitment and not promotion. The notification dated 3.1.1997 issued for filling up 35 posts of Inspector of Motor Vehicles was earlier stayed and later withdrawn in the year 2001, much earlier to the notification issued for inviting applications for filling up 145 posts of Inspector of Motor Vehicles in the year 2006. The old Rules, which were in force on 3.1.1997, came to be amended in the year 2005. So it cannot be said that even after the amendment of the Rules in the year 2005, 35 posts for which applications were invited earlier and are included in the 145 posts notified now, required to be filled up according to the Rules of 1976 which were no more in force in the year 2006. The submission of the petitioners that after issuing the notification calling for applications from intending candidates for a post or posts, such notification cannot be cancelled or withdrawn is without any merit.

11. It is well established that a notification calling for applications from intending candidates for a post or posts merely amounts to an invitation to the qualified candidates to apply for recruitment and on their selection, they do not acquire any right to the post. Unless the relevant Recruitment Rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. It is true that the State does not have the licence to act in an arbitrary manner. At the same time, the State is under no legal duty to fill up all or any of the vacancies. The applicants have no vested right for selection in pursuance of the notification. If the decision not to fill up the vacancies is to be taken bonafide for appropriate reasons, the same cannot be found fault with. When it was found that the qualifications mentioned in the notification were not the qualifications required under the C&R Rules, the Government decided to

withdraw the notification. Later, Government amended the C&R Rules to make it in conformity with the Motor Vehicles Act as far as the qualifications are concerned. After such amendment, fresh notification has been issued inviting applications. The above actions of the Government cannot be said to be malafide or arbitrary.

12. In the case of Shankarsan Dash vs. Union of India – (1991) 3 SCC 47, the Apex Court has held as under:

> "It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhas Chander Marwaha, Neelima Shangla v. State of Haryana, or Jatendra Kumar v. State of Punjab."

13. In Jai Singh Dalal & others vs. State of Haryana & Another – 1993 Suppl (2) SCC 600, the Apex Court again has held that a notification inviting the applications merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection, they do not acquire any right to the post. It has been further held that the petitioners had no right to claim that the selection process once started must be completed.

14. In State of M.P. vs. Raghuveer Singh Yadav & Others – (1994) 6 SCC 151, the Supreme Court has held that the Government is entitled to conduct selection in accordance with the changed rules and make final recruitment. It has been further held that no candidate acquires any vested right against the State. Therefore, the State is entitled to withdraw the notification by which it had previously notified recruitment and to issue fresh notification in that regard on the basis of the amended rules.

15. In State of A.P. & Others vs. D.Dastagiri & Others – (2003) 5 SCC 373, the Apex Court has held as under:

> "4. ……. the respondents themselves had admitted that the selection process was cancelled at the last stage. In the absence of publication of select list, we are inclined to think that the selection process was not complete. Be that as it may, even if the selection process was complete and assuming that only select list remained to be published, that does not advance the case of the respondents for the simple reason that even the candidates who are selected and whose names find place in the select list, do not get vested right to claim appointment based on the select list. It was open to the State Government to take a policy decision either to have prohibition or not to have prohibition in the State. Certainly, the Government had right to take a policy decision. If pursuant to a policy decision taken to impose prohibition in the State there was no requirement for the recruitment of Constables in the Excise Department, nobody can insist that they must appoint the candidates as Excise Constables……"

16. In Pitta Naveen Kumar & Others vs. Raja Narasaiah Zangiti & Others – (2007) 1 SCC (L&S) 92, the Apex Court has held that a candidates does not have any legal right to be appointed. He in terms of Article 16 of the Constitution of India has only a right to be considered therefor.

17. The contention of the petitioners that divergent reasons have been assigned in the reply statement of the Government and the notification dated 4.10.2001 for withdrawal of notification dated 3.1.1997 is also without any merit. The Tribunal has examined the records in detail in this regard. The Tribunal has examined the various correspondences and notings made in the file and has come to the conclusion that when the decision was taken and communicated, the Department did not feel the necessity to fill up the notified posts then. Undue importance should not be given to the letter addressed for the withdrawal/cancellation of the notification in which all the grounds have not been spelt out. One of the reasons, namely, the amendment required under C&R Regulations with regard to qualification has been mentioned in the withdrawal notification. The Tribunal has pointed out various reasons found in the records for withdrawal of the notification dated 3.1.1997. Having regard to the facts and circumstances of the case, no fault can be found with the finding of the Tribunal in this regard. It is also clear that the decision not to fill up vacancies pursuant to the notification dated 3.1.1997 has been taken bonafide and for valid reasons.

18. Learned Counsel for the respondents have also contended that the applications were barred by time, as the applicants had not approached the Tribunal within the period of limitation. Petitioners challenged the notification dated 18.10.2001 in the year 2006. It is their case that individual notices had not been issued to them intimating the issuance of withdrawal notification. It is not in dispute that notification dated 18.10.2001 was published in the Karnataka Gazette on 13.12.2001 and the said

notification is a notice to one and all in the State. Therefore, the petitioner are not right in contending that in the absence of notice to them about the withdrawal of the notification dated 18.10.2001 they had no knowledge of the withdrawal till they made enquiry in the year 2006.

19. Having given our anxious consideration to the rival contentions made by the learned Counsel at the bar, we do not find any merit in these writ petitions. Accordingly, they are dismissed. No costs.

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IN THE KARNATAKA ADMINISTRATIVE TRIBUNAL AT BANGALORE
APPLICATION NO.183 OF 2000
D.D. 02.08.2007
The Hon'ble Mr. Justice A.V.Srinivasa Reddy, Chairman

Sri. Lingaraju … Applicant
Vs.
The State of Karnataka & Anr. … Respondents

Examination:

Revaluation:

Applicant a candidate for S.D.C. recruitment under 3B category secured 210 marks as against cutoff marks of 222 for selection under 3B category – Applicant sought revaluation which was rejected – Tribunal following the decision of the Supreme Court has dismissed the application.

Held:

In the absence of any provision for re-evaluation of answer books in the relevant rules, no candidate in an examination has got any right whatsoever to claim or ask for re-evaluation of his marks.

Further held:

In the case on hand, the valuation method adopted by the 2nd respondent is one of OMR method. In OMR method, there is no question of any manual correction of answer scripts. It is fully computerised valuation. Mistakes in such a method of valuation are very remote.

ORDER

In this application, the applicant is seeking a direction to quash the Endorsement dated 13/26.6.2000 (Annexure A4) bearing No.E(3)71-246:2000-01:PSC issued by the 2nd respondent – Karnataka Public Service Commission, with a further direction to the 2nd respondent to revalue his answer scripts and to announce the actual marks obtained by the applicant at his cost.

2. Heard Mr. Vijaya Simha Reddy, for Mr.P.C.Reddy, learned Counsel for the applicant, Mr. G.B.Chandregowda, learned Additional Government Advocate for the 1st respondent and Mr.T.Narayanaswamy, learned Counsel for 2nd respondent.

3. Pursuant to the Notification dated 3.10.1996 issued by the 2nd respondent – KPSC for the post of First Division Clerks (FDCs) and Second Division Clerks (SDCs), the applicant, who claims to have passed B.A. in the year 1990 securing 2nd class and later, M.A. degree as an external candidate by securing 1st Class had applied for the post of SDC. The applicant was permitted to write the examination conducted by the 2nd respondent. In the examination, the applicant has scored 210

marks under Category IIIB. Aggrieved by the marks obtained by the applicant, he has presented this application for the relief sought for, as stated supra.

4. The grievance of the applicant is that he was a holder of Master's Degree in Arts and he had expected more than 240 marks out of 300 marks prescribed by the 2nd respondent for the written examination conducted for selection to the post of SDCs. Having regard to his higher qualification and brilliance, the marks secured by the applicant i.e. 210 is bar below his expectation. Aggrieved by the same, the applicant has presented this application.

5. Upon filing, this Tribunal by Order dated 22.8.2000 has ordered notice to the respondents. On service of notice on the respondents, the 2nd respondent has filed a detailed reply statement inter alia contending, that the applicant is not entitled to the relief sought for in this application. The contentions urged by the applicant were denied. The 2nd respondent has stated in the reply statement that revaluation of the answer sheets of the candidate was through computer by Optical Mark Reader, which is called 'OMR' method. Since valuation is by OMR method, the question of revaluation does not arise and the relevant Rules also do not provide for evaluation. Since the Rules do not provide for revaluation, the claim of the applicant cannot be considered or granted. Therefore, the respondents have sought of the rejection of the application. The cutoff percentage under Category III B was 222. Therefore, the applicant could not get selected for the post.

6. After hearing the learned Counsel for both the parties, I have perused the pleadings and the records. The method of valuation of answer script is an important aspect while considering the reliefs sought for by an aggrieved person. In the case on hand, the valuation method adopted by the 2nd respondent is one of OMR method. In OMR method, there is no question of any manual correction of answer scripts. It is fully computerized valuation. Mistakes in such a method of valuation is very remote. Further, the applicant has also not produced or brought to the notice of this Tribunal any rules or regulations either regarding valuation/revaluation or furnishing of copy of answer scripts at the relevant point of time. This Tribunal did not grant any interim order in favour of the applicant at the time of filling of this application. When the application was filed, the applicant was aged 34 years. When this application was taken up for final disposal, the applicant's age is 41 years. Now with the passage of time, in the absence of any interim order in favour of the applicant assuming that the applicant is entitled for revaluation, no useful purpose would served in issuing any direction to the 2nd

respondent for revaluation. The law on the subject is also not in favour of the applicant. The three Judge Bench of the Supreme Court in Pramod Kumar Srivastava vs. Chairman, Bihar Public Service Commission, Patna & Ors. (2004 SCC (L&S) 883) has held that:

> "In the absence of any provision for re-evaluation of answer books in the relevant rules, no candidate in an examination has got any right whatsoever to claim or ask for re-evaluation of his marks. In such a situation, the prayer made by the appellant in the writ petition was wholly untenable and the Single Judge had clearly erred in having the answer book of the appellant re-evaluated. Adopting such a course will give rise to practical problems and in the larger interest, they must be avoided."

7. The learned counsel for the applicant sought sustenance by relying on a decision of the Apex Court of equal strength in the case of Kanpur University & Ors. vs. Samir Gupta & Ors. (AIR 1983 SC 1230).

8. Since the latter decision of a Co-Ordinate Bench would prevail, this Tribunal has no other option but to follow the dictum or the latter decision of the Apex Court in this case. Thus, on an overall consideration of the fact and circumstances of this case, this Tribunal is of the view that the applicant has not made out any grounds for grant of the relief sought for in this application.

Accordingly, the application is dismissed.

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IN THE KARNATAKA ADMINISTRATIVE TRIBUNAL AT BANGALORE

APPLICATION NO.1449 OF 2003

D.D. 05.09.2007

The Hon'ble Mr. Justice A.V.Srinivasa Reddy, Chairman

Sri. Maruthi Nayak … Applicant

Vs.

The K.P.S.C. … Respondent

Reservation:

Applicant a candidate for the post of Sub Inspector of Excise had claimed reservation under 2A category – Aggrieved by the non selection he filed this application claiming reservation under PDP category for the first time – Tribunal dismissed the application as the applicant had not claimed reservation under PDP category.

Held:

The applicant having not claimed reservation in the application under PDP category cannot claim the same after the selection process is over.

ORDER

In this application, the applicant is seeking a direction to consider his case under the reserved category of Project displaced persons as per Government Notification dated 23.11.2000 bearing No.DPAR 23 SRR 99.

2. Heard Mr. S.Prakash Shetty, learned Counsel for the applicant and Mr.T.Narayanaswamy, learned Counsel for respondent.

3. Pursuant to the Notification dated 30.7.2002 issued by the respondent – Karnataka Public Service Commission for recruitment to the post of Sub Inspectors of Excise, the applicant has applied for the post within the last date prescribed in the said Notification. The applicant had also appeared for the examination conducted by the respondent on 27.10.2002. In the application for the post of Sub Inspectors of Excise submitted by the applicant, he had claimed reservation under 2A Rural category. Aggrieved by his non-selection, the applicant has presented this application.

4. However, in the relief column of the application, the applicant, for the first time, is seeking a direction to consider his claim for the post under reservation category of project displaced persons as per Government Notification dated 23.11.2000 bearing No.DPAR 23 SRR 99.

5. This relief claimed by the applicant has been opposed by the learned Counsel for the respondent – KPSC contending that the applicant did not indicate the option in the application form. In the application form, the applicant has preferred reservation under 2A Rural. A perusal of the application form produced by the learned Counsel for KPSC and also Annexure-R1 to the reply statement filed by the respondent shows that the applicant did not prefer selection under PDP category in the application itself and the present application having been filed after the selection process is complete, no relief could be granted by this Tribunal as sought for by the applicant.

Accordingly the application is dismissed as devoid of merits.

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IN THE KARNATAKA ADMINISTRATIVE TRIBUNAL AT BANGALORE
APPLICATION NO.9024 OF 2005
D.D. 14.03.2008
The Hon'ble Mr. Justice A.V.Srinivasa Reddy, Chairman

Sri. Nagappa Ajanal … Applicant
Vs.
The Chairman, K.P.S.C. & Anr. … Respondents

Reservation:

In the recruitment for 532 posts F.D.A. 28 posts were reserved under Ex-MP category – Applicant who claimed reservation under Ex-MP category challenged the selection for his non selection under the said category contending that 10% of posts would be 53 but only 28 posts were reserved – Upholding the contention of the Commission that reservations are made as per roster maintained in each Department Tribunal dismissed the application with costs of Rs.1,000/-.

Held:

That selection and appointments are made to different departments. While so doing, the roster points or the reservation is required to be determined with reference to the number of vacancies available with that particular department and not the total number of posts to be filled up and that is the right way to make selection to the posts.

ORDER

In this application, the application is seeking a direction to the respondents to make 10% reservation to the Ex-servicemen category as per Rule 9 of the Karnataka Civil Services (General Recruitment) Rules, 1977 before publishing the final select list.

2. Heard Mr. Danappa P. Panibhate, learned Counsel for the applicant and Mr. T.Narayanaswamy, learned Standing Counsel for the respondents.

3. It is stated that the respondents published a Notification dated 2.6.2005 calling for applications for filling up of the post of First Division Assistants in various departments of the Government, as required in those departments. The applicant was one of the candidates for the said post under category Ex-Servicemen. The applicant's claim for selection and appointment under Ex-Servicemen category was not found favour with the respondents. Aggrieved by the same, the applicant has presented this application for the reliefs set-forth, inter-alia, contending that the selection is contrary to

Rule 9 of the Karnataka Civil Services (General Recruitment) Rules, 1977 (for short 'GR Rules') under which 10% should have been reserved for Ex-Servicemen category. According to the applicant, total number of vacancies to be filled up was 532 and 10% of the same would be 53 and against the Ex-Servicemen quota, only 28 posts were reserved, which is contrary to Rule 9 of the GR Rules.

4. The application was filed on 3.12.2005. On 6.12.2005, Mr.T.Narayanaswamy, learned Standing Counsel for KPSC was directed to take notice on behalf of the respondents and was directed to file the reply statement. Reply statement dated 3.3.2006 was filed on 19.4.2006 together Annexures R1 to R4. In the reply statement filed by the respondents at paras 4, 5, they have stated as follows:

> "4. It is submitted that there is no obligation on the part of the Commission to classify the posts released for recruitment under different categories. Under G.O.No.SiAaSuE 08 SeHiMA 95, Bangalore, dated 20.6.1995 it is the duty of the appointing Authority to classify the posts for recruitment under different categories. The relevant provision in the said G.O. is as under:
>
> 3. .... ¥Àj²µÀÖeÁw/¥Àj²µÀÖ¥ÀAUÀqÀ ªÀÄwÛÀÄÛ EvÀgÉ »AzÀÄ½zÀ ªÀUÀðUÀ¼À ¥Àæw UÀÄA¦UÉ «ÄÃ¸À°j¸À¯ÁÃPÁzÀ jPÀÛ¸ÁÜ£ÀUÀ¼À¸ÀASÉåAiÀÄ£ÀÄß gÉÆÃ¸ÀÖgï£ÀÄ¸ÁgÀ ¯ÉPÀÌºÁPÀvÀPÀÌzÀÄÝ ªÀÄvÀÄÛ ªÀÄÄÄRå¥ÀnÖ ªÀÄvÀÄÛ ºÉZÀÄÑªÀj ¥ÀnÖAiÀÄ°è DAiÉÄÌ ªÀiÁqÀ¨ÉÃPÁzÀ C¨sÀåyðUÀ¼À¸ÀASÉåAiÀÄ£ÀÄß £ÉÃªÀÄPÁw ¥ÁæÃ¢PÁjDAiÉÄÌ ¥ÁæÃ¢PÁgÀPÉÌ¸ÀªµÀÖªÁV ¸ÀvÀPÀÌzÀÄÝ.

A copy of the G.O. dated 20.6.1995 which also indicates roster points under vertical reservations is produced herewith as **Annexure-R2** and a copy of G.O.No.SiAaSuE 97 SeNeNi 2002, Bangalore, dated 22.11.2002 indicating roster points under horizontal reservations is produced herewith as per **Annexure-R3**. As per Annexure-R3 every 10th vacancy should be reserved for Ex-Serviceman out of the posts reserved under each vertical category of reservation.

5. As stated already, the respective Appointing Authorities which send requisitions to the Commission to initiate recruitment process also make classification of posts under different categories as required under the aforesaid G.O. on the basis of the roster maintained in each department. 10% reservation for Ex-servicemen has to be calculated not on the basis of total number of posts notified for recruitment but total number of vacancies in each department. This explains why only 28 posts are reserved out of 532 posts of F.D.A. notified for recruitment as per notification dated 2.6.2005."

As seen from the reply statement filed by the respondents, it is stated that the selection and appointment are to be made with reference to the roster points in terms of the Government Order dated 20.6.1995 which indicates roster points under vertical reservation also. The respondents have

relied on another Government Order dated 22.11.2002 which indicates roster points under horizontal reservation. According to the respondents, every 10th vacancy should be reserved for Ex-Servicemen out of the posts reserved under each vertical category of reservation. Further, it is also stated that respondents are only Selecting Authority and they make appointments on the basis of the requisition sent to the Commission by the respective Appointing Authority and appointments are made under different categories as required under the relevant Government Orders on the basis of the roster maintained in each department. 10% reservation for Ex-Servicemen has to be calculated not on the basis of the total number of posts notified for recruitment but total number of vacancies in each department. The classification of posts is provided under Annexure R4 – Notification dated 2.6.2005 in respect of each department, 10% reservation was provided for Ex-Servicemen category. Under these circumstances, the contention of the applicant that the respondents have not provided 10% reservation for Ex-Servicemen category and that Notification dated 2.6.2005 is in violation of Rule 9 of GR Rules, is untenable and liable to be rejected as without merits.

5. After hearing the learned Counsel for both the parties, I have perused the averments made by the applicant in the application, the reply statement filed by the respondents to the same as well as the annexures produced by both the parties. The only point to be considered is "as to whether the Notification dated 2.6.2005 for selection and appointment to various departments follows the reservation aspect under Rule 9 of the GR Rules or not?"

6. Para 23 of the Notification states reservations provided to various categories. In that list, Ex-MP (Ex-Servicemen) category is one among various categories included. Annexure-3 to the said Notification provides an insight of total number of appointments to be made in respect of each department. In terms of said Annexure-3, the total number of departments involved are nine and the total number of posts to be selected was 532. This total number of 532 posts is stated to have been enhanced to 1065 by Notification dated 26.5.2006. The applicant, in my view, is under a mis-conception that 10% reservation is not provided for Ex-Servicemen category. He is right in his understanding if we take the total number of posts as 532 under Notification dated 2.6.2005. But the problem is, that selection and appointments are to be made to different departments. While so doing, the roster points or the reservation is required to be determined with reference to the number of vacancies available with that particular department and not the total number of posts to be filled up and that is the right way to make selection to the posts. If we examine the procedure adopted by the

respondents – KPSC, I do not find any illegality or irregularity in the said selection.

7. Mr. T.Narayanaswamy, learned Counsel has also brought to the notice of the Tribunal that similar question was the subject matter. In an earlier batch of applications namely A.No.1424/1997 and other connected cases disposed of on 9.1.2006 in which, the Tribunal, relying on the decision of the Division Bench of the High Court of Karnataka in State of Karnataka & Anr. Vs. Harish and Others reported in 1982 (2) KLJ 345 has held that there was no irregularity in the selection and appointment made by the respondents.

8. For the reasons stated above, the present application is dismissed as devoid of merits with costs of Rs.1000/- each to the respondents.

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2008 (6) AIR Kar R 235
IN THE HIGH COURT OF KARNATAKA AT BANGALORE
W.P. NO.24321 OF 2005
D.D. 08.06.2008
The Hon'ble Mr. Chief Justice Cyriac Joseph &
The Hon'ble Mr. Justice N.Kumar

Karnataka Public Service Commission, Bangalore. ... Petitioner
Vs.
N.T.Madhusudan & Anr. ... Respondents

Recruitment: Reservation :

Whether a candidate can change his reservation category at the time of main examination? - No

Constitution of India, Art.16 – Public employment – Appointment for posts of Groups A and B – Instructions to candidates contained in the notification specifically stated that, request for change for reservation/optional subject/center originally indicated by them in application will not be entertained by Public Service Commission – In applications for preliminary examination, respondents had ticked column for Group-3B category – It is only after results to preliminary examination were declared that respondents claimed reservation under Group 3A category – Writ petition of K.P.S.C. allowed setting aside KAT order allowing the application of respondents.

Held:

Even if it is due to a bona fide mistake that a wrong column was ticked by candidate in application for preliminary examination he is bound by such mistake and he is liable to face consequences. Public Service Commission cannot be faulted for rejecting applications of respondents for change of category.

Cases referred:

1. (1992) 2 SCC 206 : (AIR 1992 SC 952) - Y.C.Shivakumar & Ors. v. B.M.Vijayashankar & Ors.
2. 2005 AIR SCW 5175: (2006 (1) AIR Kar R 4) - A.P. Public Service Commission v. Koneti Venkateswarulu & Ors.

ORDER

CYRIAC JOSEPH, C.J.:-

In response to the notification of the petitioner Karnataka Public Service Commission inviting applications for the post of Group-A and B, Respondents 1 and 2 submitted their applications. In the application submitted for the preliminary examination they claimed benefit of reservation under Group-3B category. After the results of the preliminary examination were published the respondents submitted their applications for the main examination. In the said applications they claimed the benefit of reservation

under Group-3A category. Their applications for appearing in the main examination were rejected by the Karnataka Public Service Commission on the ground that they had not submitted any documents in support of their claim for reservation under Group-B category. The Public Service Commission took the stand that, having claimed the benefit of reservation under Group-3B in the preliminary examination the respondents were not entitled to change the category and claim benefit of reservation under Group-3A category in the main examination. Aggrieved by the rejection of their applications, Respondents Nos.1 and 2 filed Application Nos.5102 and 5103 of 2005 in the Karnataka Administrative Tribunal. The Tribunal passed an interim order permitting the applicants to appear in the main examination subject to the final decision in the applications. Ultimately the applications were allowed as per Annexure-A order dated 21.7.2005 passed by the Tribunal. In Annexure-A order the Tribunal held that, it was due to a bona fide mistake that the applicant ticked the column for Group-3B category instead of Group 3A category and therefore in the peculiar facts and circumstances of the case they should have been allowed to appear in the main examination. In taking the above view, the Tribunal relied on the circumstance that, even before submitting the application for preliminary examination, the respondents had obtained caste certificate issued by the Tahsildar stating that they belonged to Group 3B category. The Tribunal also pointed out that in the preliminary examination the respondents had obtained sufficient marks to qualify for appearing in the main examination both under Group-3A category and Group-3B category. The Tribunal directed the Public Service Commission to allow the applicants to write the main examination under Group-3A category. Aggrieved by Annexure-A the order passed by the Tribunal the Public Service Commission has filed this writ petition.

2. While issuing notice to the respondents we directed the learned counsel for the Public Service Commission to make available to the Court in a sealed cover the marks obtained by the respondents in the main examination. Accordingly, the learned counsel has made available the marks obtained by the respondents in the main examination. It is seen that the first respondents has obtained 621 out of 1800 marks and the second respondent has obtained 594 out of 1800 marks. It is seen that the cut off marks under Group-3A category is 738 and Group-3A Rural is 750. That means, even if the respondents are treated as Group-3A category candidates they are not eligible for being called for personality test. Therefore, the appearance of the respondents in the main examination or the marks obtained by them in the said examination on the strength of the interim order passed by the Tribunal is of no consequence as far as their claim for selection and appointment to the post is concerned.

3. However, in view of the view taken by the Tribunal regarding the strict observance of the instructions contained in the notifications issued by the Public Service Commission it has become

necessary for us to examine whether the order of the Tribunal can be sustained or not. As observed earlier, the only ground on which the Tribunal has allowed the claim of the respondents to appear in the main examination is that, they had claimed the benefit of reservation in Group-3B category in the preliminary examination due to a bona fide mistake. The question is, whether even assuming that it was a bona fide mistake, the respondents were entitled to change the category after appearing in the preliminary examination. It is not disputed that the instructions to the candidates contained in the notification specifically stated that, request for change for reservation/optional subject/center originally indicated by them in the application will not be entertained by the Commission under any circumstances and that the candidates should carefully decide the choice of the center, optional subject and reservation claimed by them. It is also not disputed that in the applications for the preliminary examination, the respondents had ticked the column for Group-3B category. It is only after the results to the preliminary examination were declared that the respondents claimed reservation under Group-3A category. On the face of the clear and unambiguous instructions contained in the notification issued by the Public Service Commission, the candidates cannot be allowed to change the category as claimed by the respondents. Even if it is due to a bona fide mistake that a wrong column was ticked by the candidate in the application for preliminary examination he is bound by such mistake and he is liable to face the consequences. If a different view is taken in the matter, it will unnecessarily lead to confusion in the office of the Public Service Commission in processing the applications and it will also open opportunities for manipulations in dealing with the fate of candidates appearing for such examinations. It is in public interest that the instructions contained in the notification of the Public Service Commission are strictly followed and scrupulously adhered to not only by the candidates but also by the Commission. In this view of the matter, the Public Service Commission cannot be faulted for rejecting the applications of the respondents for change of category and for permitting them to appear in the main examination as Group 3A category. Hence the order of the Tribunal is liable to be set aside and any benefit arising out of the interim order passed by the Tribunal is liable to be denied to the respondents.

4. In taking the above view we are supported by the decision of the Hon'ble Supreme Court in Y.C.Shivakumar and others v. B.M.Vijayashankar and others, (1992) 2 SCC 206 : (AIR 1992 SC 952). In paragraph 3 of the said judgment, the Hon'ble Supreme Court has categorically held that even if the mistake was a bona fide mistake, larger public interest demands insistence of observance of instruction rather than its breach. The Supreme Court observed that, what was attempted to be achieved by the instruction was to minimize any possibility or chance of any abuse. According to the Supreme Court the fact that it was a bona fide mistake is not material. In the above mentioned case,

the candidate wrote the roll number on other pages of the answer book in violation of the clear and explicit instructions on the first page of the answer book that the roll number shall not be written on any page other than the first page. The Supreme Court held that once the roll number is written on another page violating the instructions, the issue of bona fide and honest mistake did not arise.

5. We are also supported by the decision of the Supreme Court in A.P. Public Service Commission v. Koneti Venkateswarulu and others, 2005 AIR SCW 5175: (2006 (1) AIR Kar R 4). It is a case where the candidate left column-11 pertaining to previous employment totally blank. The notification issued by the Commission had specifically informed the candidates that giving any false/wrong information or suppression of material information would lead to cancellation of the candidature. The candidate also had filled up Annexure III which contained a declaration that he was not working in any Government/ Public Sector/Private Sector. However, before the result of the selection process was notified the Public Service Commission learnt that the candidate had been employed and was working as a teacher and that he had suppressed that information by deliberately not filling column-11. After issuing show cause notice to the candidate, the candidature was cancelled. Though the candidate contended before the Supreme Court that it was pure inadvertence on the part of the candidate and not mala fides which lead to the non disclosure of his employment status, the Supreme Court did not accept the contention. The Supreme Court also observed that, it is not open to the candidate to sit in the judgment about the relevance of the information called for and decide to supply it or not. The Supreme Court held that there was suppression of relevant material and the Supreme Court rejected the explanation that the information sought was irrelevant and the omission emanated from inadvertence.

6. For the reasons stated above, we hold that the petitioner is entitled to succeed in this writ petition and the impugned order is liable to be set aside. Hence, the order dated 21.7.2005 passed by the Karnataka Administrative Tribunal in Application Nos.5102 and 5103 of 2005 is set aside.

Petition dismissed.

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IN THE KARNATAKA ADMINISTRATIVE TRIBUNAL AT BANGALORE
A.NOS.1555/2008 C/W 1556/2008, 1557/2008, 1558/2008 & 1666/2008
D.D. 10.07.2008
The Hon'ble Mr. Justice A.V.Srinivasa Reddy, Chairman &
The Hon'ble Mr. P.S.V.Thomas, Administrative Member

Mr. C.S.Shivakumara Swamy & Ors. ... Applicants
Vs.
The State of Karnataka & Ors. ... Respondents

Recruitment:

Whether the Commission can rectify the mistake in the notification regarding production of reservation certificates after the provisional select list is published? – Yes

Selection to the post of the Section Officer in Karnataka Govt. Secretariat by direct recruitment by holding competitive examination – Creamy layer concept was wrongly applied contrary to Government order dated 30.3.2002 – After the publication of the provisional select list objections were filed stating that creamy layer criterion was not applicable to the selection as per the Government order dated 30.3.2002 – Commission took a decision to provide opportunity to all applicants to submit caste/ reservation certificates afresh without creamy layer criterion – Final select list was prepared taking into account the caste certificates received afresh – Applicants who figured in the provisional select list were excluded from the final select list – Aggrieved by the same the applicants filed these applications.

Held:

Statutory provisions need to be up held and the argument of estoppel cannot be allowed to come in its way.

Further Held:

Selecting and Appointing Authorities are required not only to make selection and appointment of candidates as per the numbers prescribed for different reservation categories, but they are also required to apply creamy layer criterion where the said criterion is applicable and not otherwise.

Further Held:

An authority has inherent power to correct inadvertent mistake.

Case referred:

AIR 1984 SC 921 - A.C.Jose –vs- Sivan Pillai & Ors.

ORDER

The applicants in these proceedings were all candidates for selection to the post of Section Officers by direct recruitment from among inservice officials on the basis of competitive examinations conducted

by the Karnataka Public Service Commission in accordance with the Karnataka Gazetted Probationers (Appointment by Competitive examination) Rules, 1997. Following the examination the KPSC published the provisional select list and the applicants were among the successful candidates in the provisional list. There were objections to the provisional select list on ground of KPSC having applied the creamy layer criterion in respect of applicants claiming reservation under Categories 2A, 2B, 3A, 3B and General Merit (Rural). Creamy layer criterion is not applicable to this selection, as per the Government Order relating to reservations bearing No.SWD/225/BDA/2000 dated 30-3-2002 (hereinafter, 'the Reservation Order'). Notwithstanding the provision of the Reservation Order, the notifications of recruitment issued by KPSC in the present case had apparently applied the creamy layer criterion by requiring candidates to produce certificates which contain income in addition to caste. Considering the objections filed to this aspect of the selection, the Commission took a decision to provide an opportunity to all applicants to submit caste/reservation certificates afresh without the income or creamy layer criterion. When the final list was prepared taking into account of the caste certificates received afresh, the applicants no longer figured among successful candidates as other candidates who were stated to have secured more marks and who on the basis of the new caste certificates which excluded the creamy layer concept, were stated to have established that they belonged to the reservation categories, had taken the places earlier occupied by the applicants. Aggrieved by this turn of events, the applicants have sought the orders of this Tribunal for the main relief of quashing the impugned notification No.E(1)1323/2007-08/PSC dated 26-3-2008 issued by KPSC insofar as it relates to the private respondents 3 to 7 who were the successful candidates in the final list, with a further direction to Respondents 1 and 2 to select and appoint the applicants to the post of Section Officers.

2. Heard Mr. K.Subba Rao, learned Senior Counsel for Mr. Girish S.Jambagi, learned Counsel for the applicants in A.Nos.1555/2008, 1556/2008, 1557/2008. 1558/2008, Mr. Ramachandra A.Mali, learned Counsel for the applicant in A.No.1666/2008, Mr. G.B.Chandre Gowda, learned Additional Government Advocate for respondent No.1 in all the applications, Mr. Ravivarma Kumar, learned Senior Counsel for Mr. T.Narayana Swamy, learned Standing Counsel for respondent No.2 – KPSC, in all the applications, Mr. P.S.Rajagopal for Mr. R.S.Hegde, learned Counsel for Respondents Nos.3 to 6 in A.Nos.1555/2008, 1556/2008, 1557/2008, 1558/2008 and Mr. S.V.Narasimhan, learned Counsel for Respondent No.7 in A.Nos.1555/2008, 1556/2008, 1557/2008, 1558/2008 and for Respondent No.3 in A.No.1666/2008.

3. The selection in question was undertaken by the KPSC under the Karnataka Gazetted Probationers (Appointment by Competitive Examinations) Rules, 1997 and the Karnataka Government Secretariat Services (Recruitment) Rules, 1992, both of which were amended by notification No.DPAR/ 61/SRD/97(II) dated 29-6-2000. Consequent on this amendment a total of twenty five posts in the cadre of Section Officers were categorized for being filled by inservice direct recruitment on the basis of competitive examination to be conducted by the KPSC in accordance with the scheme specified in the Annexures to the said amendment. Members of the Karnataka Government Secretariat Service belonging to the cadres of Senior Assistants, Drafting Assistants, Assistants, Stenographers, Junior Assistants and Typists were made eligible to compete for the inservice direct recruitment, and for them there shall be no upper age limit. A total minimum service of not less than five years (excluding the period of probation and officiation) in any one or more of the said cadres was prescribed as a mandatory requirement. The provisions of Rules 8 to 13 of the Karnataka Recruitment of Gazetted Probationers (Appointment by Competitive Examinations) Rules, 1997 were mutatis-mutandis applied for conduct of the competitive examination and selection of the candidates in accordance with the scheme prescribed under the amended Rules. An exception in the selection procedure was that instead of Personality Test of the candidates, there shall be verification of record of service of candidates.

4. The recruitment in question was first notified by the KPSC on 7.12.2005 with 10 seats. This was followed by two more notifications dated 1.8.2006 and 18.11.2006, which raised the number of posts to be filled first to 20 and then to 25. The notifications dated 1.8.2006 and 18.11.2006 contained a 'Special Note' whereby it was intimated that candidates who had already applied in response to an earlier notification did not need to apply again; however if such candidates belonged to reserved categories newly added, they should furnish to the Commission their caste certificates within the last date for submission of applications. There is a contention on the part of the applicants that the said Special Note attached to the two later recruitment Notifications dated 1.8.2006 and 18.11.2006 amounted to further and ample opportunities for the candidates who desired to claim reservation under Backward Classes and Rural categories to submit the appropriate certificates and that the private respondents were candidates who had failed to make use of this opportunity. This point will be examined by us at its place. For the present, it may be noted that it was only much after the last notification dated 18.11.2006 that the selection was conducted by holding the competitive examination on 22nd and 23rd September 2007. The Commission also procured the service records of the provisionally selected candidates for verification as required under the Rules.

5. As stipulated in the final recruitment notification dated 18.11.2006, out of 25 seats to be filled the following reservations were made: 2 seats reserved for Category 2A (Others); one seat each reserved for 2A (Woman), 2A (Rural), 2B, 3A and 3B; three seats were reserved for GM (Rural). Only the selection to these 10 posts in all, belonging to Categories 2A, 2B, 3A and 3B and GM (R) are the subject of these proceedings. The applicants and the private respondents are all claimants to the seats pertaining to their respective reservation categories.

6. In order to arrive at a decision on the issues raised, we propose to consider the contentions raised by the applicants under three groups, as follows, and examine them against the replies furnished by the respondents as well as the applicable provisions of law:

(i) Was the KPSC right in taking note of the objections of the private Respondents to the implementation of the creamy layer criterion in the selection under question after, as pointed out by the applicants, they had participated in the selection process, whereas they had sufficient scope to raise their voice much earlier, and have now raised the issue only, as alleged by the applicants, because they were not selected in the provisional select list?

(ii) Were there defects or anomalies in the recruitment notifications in regard to the submission of caste certificates, or had candidates been given ample opportunity to furnish the appropriate caste certificates and claim reservations where eligible, making the action taken by the Commission to carry out the 'rectification' exercise redundant and illegal?

(iii) Did the KPSC act within its powers in rectifying the alleged error in the provisional list in the manner that it did, or did it act illegally in the manner in which the final select list was prepared?

7. First, in regard to the timing of the objections raised by private respondents and others who brought to the notice of the Commission that applying the creamy layer principle was contrary to the reservation regulation applicable to this particular selection, it is contended by the applicants that when the Commission published the provisional select list, obtained the service records of the candidates in the provisional select list from the State Government, and referred the provisionally selected candidates to the District Caste and Income Verification Committees for verification of the caste and income certificates, the entire process of selection was over. The applicants contend that the unselected candidates i.e. the private respondents 3 to 7 who have raised the objection with regard to non-applicability of the creamy layer concept in pursuance of the notification dated 30.3.2002 were all along aware of the existence of the above said terms and conditions, however had not raised their

objections until they took the examination and were unsuccessful. Questioning the notification itself as it were after the publication of the provisional select list is not only opposed to the selection process prescribed under the Rules but also amounts to republication of the notification itself for the sake of a few disgruntled unselected candidates i.e., the private respondents, contrary to the interest of the selected candidates like the applicants. According to the applicants, the objectors/private respondents, occupying positions in the Secretariat as they did, were aware of the anomaly, if any, in the notification calling for applications at the time they submitted the application. They cannot claim ignorance of law. The applicants further point out that the selection fulfils the requirement of meeting the reservations provided for the post by selecting candidates belonging to each class of reservation within the quota meant for them.

8. In response to this objection, the private respondents have only asserted the illegality and anomaly contained in the notification of recruitment issued by the KPSC, and the inherent power as well as obligation on the part of the Commission to firstly take cognizance of a patent error relating to the reservations regulations in its recruitment notifications, and secondly, rectify the consequence of the error which appeared in the preparation of the provisional select list. On behalf of respondent No.2 – Karnataka Public Service Commission, it is submitted that "the principle ignorance of law is no excuse and the principle that candidates who have participated in the process of selection cannot object to the selection process after they become unsuccessful in the selection cannot be held against respondents 3 to 7 in view of the defect in the recruitment notifications. Consequently, their objections regarding application of creamy layer concept cannot be rejected as the conditions contained in paras 7 and 8 of the recruitment notification are contrary to the creamy layer rule laid down under G.O.No.SWD/225/BCA/2000 dt: 30.3.2002".

9. Having considered these submissions, it is our view that the publication of the provisional select list is only an intermediate stage in the entire process of selection, and the select list is published for the interested parties to see it and point out what they find to be objectionable. It is no doubt true that the instruction in the notification of recruitment which appeared to enforce the creamy layer criterion on candidates belonging to certain reserved categories namely those belonging to categories 2A, 2B, 3A, 3B and GM (Rural), could have been questioned by the private Respondents as soon as the notifications were published by representing to the concerned authorities or by approaching this Tribunal, but it was not done. This does not however prevent them from raising their objections to the creamy

layer application while responding to the provisional select list. During hearing mention was made that the private respondents were 'estopped' from raising the objection relating to erroneous instructions contained in the recruitment notification, since they had, up till the time of publication of the provisional select list, gone along with the recruitment, filed their applications, and participated in the competitive examination, etc., without protest. We are clear that this argument has no merit and take support from the observations of the Apex Court in A.C.Jose –vs- Sivan Pillai & Ors. (AIR 1984 SC 921). The issue there was the use of voting machines in elections, and the appellant had not objected to them when he had opportunity earlier. The court observed:

> "Lastly, it was argued by the counsel for the respondents that the appellant would be estopped from challenging the mechanical process because he did not oppose the introduction of this process although he was present in the meeting personally or through his agent. This argument is wholly untenable because when we are considering a constitutional or statutory provision there can be no estoppel against a statute and whether or not the appellant agreed or participated in the meeting which was held before introduction of the voting machines, if such a process is not permissible or authorized by law he cannot be estopped from challenging the same."

In this instance too the statutory provisions need to be upheld, and the argument of estoppel cannot be allowed to come in its way. The key issue is that of fulfillment of the reservation rules. It is indisputable that as the selecting authority, KPSC has to conform to the provisions of the Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation of Appointments, etc.) Act, 1990 and the rules thereunder, namely the Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation of Appointment etc.) Rules, 1992 in respect of extent and manner of reservations for the members of the Scheduled Castes, Scheduled Tribes and Backward Classes, and to the provisions of the Karnataka Reservation of Appointments or Posts (in the Civil Services of the State) for Rural Candidates Act, 2000, in respect of the horizontal reservation in favour of rural candidates in vacancies earmarked for direct recruitment in each of the categories of General Merit, the Scheduled Castes and Scheduled Tribes and in each of the categories of the Other Backward Classes. In the present recruitment, the Commission was required to follow the Reservation Order dated 30-3-2002. To recall the important provisions, para 3 of the Reservation Order states that 'Candidates belonging to Category II(A), II(B), III(A) and III(B) shall be entitled to reservation in the manner specified in the new comprehensive Creamy Layer Policy.' The Annexure-II to the said Government Order is called 'NEW COMPREHENSIVE CREAMY LAYER' and it opens with the statement 'Under Article 15(4) and 16(4) of the Constitution of India, the following persons shall not

be eligible for reservations of seats of post categorized under IIA, IIB, IIIA and IIIB' but immediately thereafter the Note 1 states 'This rule will not apply to direct recruitment to posts, which insist on a prescribed period of service in a lower post or experience in a post profession or occupation as a qualification or eligibility.' It is therefore crystal clear that the recruitment in question could only have been made without applying the creamy layer concept since it was a case where a qualifying period of service in a lower post had been prescribed.

10. We hold that the Selecting and Appointing Authorities are required not only to make selection and appointment of candidates as per the numbers prescribed for different reservation categories, but they are also required to apply the creamy layer criterion where the said criterion is applicable and not otherwise. It is indisputable that under the rules and regulations applicable to the present recruitment, the creamy layer criterion did not apply. Therefore any selection made applying the creamy layer criterion would be voidable. Irrespective of the source of the information, having been informed of the anomaly in the notification KPSC could not very well have shut its eyes to the said anomaly and proceeded without making the required changes to publish the provisional list, as the final list. The select list will come under the scrutiny of the State Government before accepting and operating it to make appointments. To say that respondents 3 to 7 were unsuccessful candidates itself begs the question, because they are contended to have been unsuccessful only on account of the error in the recruitment notification which applied to them a criterion which was itself inapplicable under regulations. By putting in applications and participating in the selection without objecting to the recruitment notification the private respondents did not barter away their right to be considered to selection without applying the creamy layer criterion. The KPSC was bound to take notice of the objections regarding the anomaly in the recruitment notifications because the issues involved were more than the self-interest of respondents 3 to 7, and went to the very fundamentals by pointing out the failure in the application of the public policy and regulations relating to reservation in respect of categories 2A, 2B, 3A, 3B and GM(Rural). To persist in the error would have been a blatant violation of the recruitment regulations. We, therefore, hold that the Commission could not but have given all consideration to the objection on this score raised by the private respondents.

11. Secondly, we next take up the issue of the anomalies in the notification. The question whether the recruitment notification gave proper guidance to the candidates in respect of the caste certificates to be produced in respect of reservation categories is extremely important and goes to the heart of the

matter in the present proceedings. We observe from the file of the KPSC relating to the objections to the provisional select list received from a number of candidates, that after considering the objections, the Commission itself came to the conclusion that paras 7 and 8 of the recruitment notifications were defective being contrary to the Reservation Order. The para 7 in the notifications required the candidates seeking reservation under categories 2A, 2B, 3A and 3B to obtain certificates from the Tahsildar in Form F and enclose the same with the application. Para 8 of the same notification required the candidates seeking reservation under rural category to obtain certificates from the Tahsildar to the effect that they do not belong to the creamy layer.

12. The applicants, however, state that there is absolutely no anomaly in the notifications published by the KPSC. According to the applicants, the "Special Note" already mentioned above, as abundant caution, advised all candidates who have already applied to the post of Section Officers in pursuance of the notification dated 7.12.2005 that they need not apply once again. However it made it clear that they shall only submit a representation by mentioning the serial number of the application already submitted along with the certificates of newly incorporated Backward Class castes pertaining to Category IIA, IIB, IIIA and IIIB, if any. This Special Note mentioned in the subsequent notifications it is contended by the applicants, gave ample opportunity for all the unselected candidates like the private respondents to submit the caste certificate to which they belong along with their representations. The 'Special Note', the applicants point out, did not insist upon obtaining a creamy layer certificate along with the caste certificate from the office of the Tahsildar. This opportunity given by the KPSC has not been availed by any of the unselected candidates until the publication of the provisional select list. When the opportunity given by the KPSC is not utilized by the unselected candidates for furnishing the caste certificate to which they belong, they cannot now question the selection of selected candidates by submitting objections to the provisional select list on certain untenable grounds. Hence the impugned final select list is liable to be set aside. These are the contentions of the applicants.

13. We have examined the relevant provisions made in the Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation of Appointments, etc.) Act, 1990 (hereinafter 'the Act') and the rules under the Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation of Appointment, etc.) Rules, 1992 (hereinafter 'the Rules'). The relevant part of Section 4-A of the Act reads as follows:

"4-A. Issue of Caste Certificate and Income and Caste Certificate.-

(2) Any candidate or his parent or guardian belonging to Other Backward Classes may, in order to claim benefit of reservation under Section 4, either for appointment to any service or post or for admission to a course of study in University or any Educational Institution, make an application to the Tahsildar in such form and in such manner as may be prescribed for issue of an Income and Caste Certificate.

(3) The Tahsildar may on receipt of an application under sub-section (1) or (2), and after holding such enquiry as he deems fit and satisfying himself regard the genuineness of the claim made by the applicant pass an order issuing a caste certificate or, as the case may be, an income and caste certificate in such form as may be prescribed, or rejecting the application".

14. In the Rules, Rules 3-A (1), (2) and (3) (g) are the relevant provisions relating to caste certificates, and read as follows:

"3-A. Issue of Caste Certificate and Income and Caste Certificate.- (1) Every application for Caste Certificate or Income and Caste Certificate under Section 4-A shall be in forms A, B or C as may be appropriate accompanied by such document and other materials in support of the claim.

(2) On receipt of the application the Tahsildar shall verify the information, documents and such other materials furnished by the applicant and on such verification if he is satisfied with the correctness of the information, documents and evidence furnished by the applicant, he shall issue Caste Certificate or Income and Caste Certificate in Forms D, E and F as may be appropriate within two months from the date of receipt of the application.

(3)(g) The Tahsildar may after holding the inquiry in the manners specified above either issue Caste Certificate or Income and Caste Certificate in Forms D, E and F as may be appropriate or reject the claim with a period of two months from the date of receipt of the application."

15. In the Rules Forms A, B and C are the prescribed forms for applying for issue of caste certificates. Form A and Form B are exclusive to Scheduled Castes and Scheduled Tribes and Backward Classes of Category I, respectively. Form C is simply labeled 'Application for Income and Caste Certificate'. In view of the exclusive nature of Forms A and B, Form C is the only form available for Categories of Backward Classes other than Category I, for making application for issue of caste certificate. Relevant parts of Form C read as follows:

"FORM C"

[See Rule 3-A(1)]

Application for Income and Caste Certificate

To

The Tahsildar

..... Taluk

..... District.

Sir,

I, ... son/daughter/wife/husband of Sr/Smt..... do hereby submit the following information for issue of Caste Certificate for claiming the reservation.

1. Candidate's Name and Occupation ..

4. Name and occupation of father/mother/
Guardian/wife/husband (whether occupation
is Govt./Semi-Govt./Public Sector/Private one) ...

7. Candidate's caste/sub-caste and Category
(Documents produced) ..

9. Annual income of the candidate, candidate's

Father/mother/guardian (if father/mother is not alive)
(If in Government/Semi-Government/Public
Sector/Private)

i. Pay scale
ii. Particulars of Land
iii. Other sources

10. Whether the candidates/father/mother/wife/husband
is eligible after applying by creamy layer principle."

16. Proceeding further, Forms D, E and F are the forms of Certificates to be issued under Rule 3-A(2)(3). Form D is exclusive to Schedule Caste or Scheduled Tribe candidates. Form E is 'Certificate to be issued to a candidate belonging to backward classes', and reads as follows:

"FORM E

(See Rule 3-A(2)(3))

Certificate to be issued to a candidate belonging to Backward Classes)

Certified that Sri/Smt./Kumari.....son/daughter/wife/ husband of Sr/ Smt..... resident of ..... village/Town/City belongs to sub-caste ..... of Caste (Category .....) of the Backward Classes.

Place: Tahsildar

Date: ..... Seal

Office Seal"

17. Form F is labeled 'Income and Caste Certificate to be issued to candidates belonging to Backward Classes other than Category I' and Form F is very evidently the form of certificate when a candidate of Backward Classes other than Category I seeks a certificate which clearly states that his case does not come within the purview of creamy layer specified in the Reservation Order.

18. If so, then which is the form for candidates belonging to categories 2A, 2B, 3A and 3B to apply for a caste certificate without income criterion or the creamy layer principle being applied? And which is the form in which the said certificate is to be issued by the Tahsildar?

19. It appears to us that there is only one application form, Form C, in which candidates belonging to Backward Classes of all categories other than Category I could apply for the Tahsildar's certificate. Form C obliges the applicant to provide particulars of his caste/sub-caste and categories with documentary proof, and also income and particulars required for a determination of the creamy layer status of the applicant, and specifically declare whether the candidate is eligible after or by applying creamy layer principle. After due verification, it appears that the Tahsildar may issue a certificate in either Form E or Form F depending on whether the applicant has claimed creamy layer exemption or not, and based on the Tahsildar's finding relating to the creamy layer status of the applicant. We also notice from the concerned file of the KPSC that the Commission has accepted new caste certificates in Form E as well as what is called Confirmation Certificate, holding that the content was more important than the form, as sufficient proof of the caste status in respect of categories of Backward Classes other than Category I where creamy layer concept is not an issue.

20. Thus had proper instructions been given, as was indeed done much later through the endorsement dated 17.12.2007, the candidates in the recruitment under reference could at the initial stage itself have obtained the appropriate caste certificate in Form E. The pitch was queered in respect of backward class candidates coming within the creamy layer by the specific instruction to obtain that only candidates belonging to Category I should obtain a certificate in Form E, and that candidates belonging to categories 2A, 2B, 3A and 3B should obtain caste certificates in Form F. Therefore, we hold that there was serious defect in the guidelines to the applicants contained in the recruitment notifications.

21. In respect of the candidates claiming General Merit (Rural) reservation, the recruitment notifications prescribed a Form 1 entitled 'Certificate to be furnished in respect General Merit candidates claiming Rural reservation confirming that they do not belong to the creamy layer'. This form consists of an application to be filed by the applicant, below which a Verification Certificate to be issued by the Tahsildar is provided. Note 2 to this form instructs the officer issuing the Verification Certificate to strictly ensure that the points laid down for identifying creamy layer candidates in Government Order No.SWD/251/BCA/94 dated 31.1.1995, which happens to be no longer in force, are applied before issue of the Verification Certificate. Therefore the Form for the claimants for Rural reservation completely ignores the fact that creamy layer criterion does not apply in this case. Hence these guidelines also are seriously defective affecting candidates seeking rural reservation without applying creamy layer criterion.

22. After considering the objections the Head of the Legal Cell in the KPSC came to the conclusion and advised the Commission that the Form F was not the appropriate form as it contains both caste and income particulars, and he advised the Commission and it could not be made the basis for reservation in a recruitment there as in the present case the creamy layer criterion was not applicable. The onus of providing proper guidance to applicants in respect of the reservation matter lay with the KPSC and in this the Commission had inexplicably erred. The applicants followed the instructions as best as they could but the anomaly remained. It is seen that some candidates who came within the reservation categories chose to apply under General Merit category, i.e., to forego reservation, because they could not have got a certificate in Form F which requires the Tahsildar to certify that the applicant does not belong to the creamy layer category. There was no scope for such candidates to indulge in correspondence with the Commission on this issue.

23. We, therefore, conclude that there was serious anomaly in the manner in which the instructions were provided to candidates in the recruitment notifications as regards the caste and rural candidate certificates were to be furnished, and that there was therefore every need for the KPSC to take measures to rectify the error.

24. Thirdly, the final group of contentions of the applicants relates to the measures taken for rectification. The applicants contend that if the plea of the private respondents is to be accepted that they were, as alleged, misrepresented by the KPSC in its notification that the creamy layer concept is applicable for inservice candidates, then the entire selection process is required to be cancelled and a fresh notification is required to be issued for the reason that several hundreds of employees working in the Government Secretariat and who are eligible to apply to the post of Section Officers under the C&R Rules of the Department did not apply for the reason that they were hit by the prescription of creamy layer policy mentioned in the notification. The 2nd respondent, the Karnataka Public Service Commission, can according to the applicants, unilaterally withdraw the entire process of selection and re-do the entire process of selection afresh by inviting applications from all the candidates who were deprived of applying to the post of Section Officers. Based on these grounds, the applications seek that this Tribunal should quash the final select list dated 26.3.2008 so far as it relates to the private Respondents 3 to 7 with a further direction to Respondents 1 and 2 to select and appoint the applicants to the post of Section Officer with all consequential benefits.

25. According to the applicants the Commission ought to have gone back to the beginnings and conducted the selection afresh rather than correct the provisional list and finalise it in the manner it was done. The argument for this contention is that there are many officials who were prevented from applying for this selection because the notification made it impossible for them to apply with the application of the creamy layer criterion. If there are any such candidates, we can only say that such affected officials have not come before us. The problem is therefore confined to those who had participated in the selection, and not to any others, who had not applied for the selection allegedly as stated by the applicants, because of misguidance in the recruitment notification that creamy layer criterion was applicable, because as stated by us, no such officials have come forward with such complaint. In their absence we must assume that there are no such officials who were otherwise eligible but who were prevented from applying on the basis of the creamy layer criterion wrongly indicated in the recruitment notification.

26. The inhouse legal advice of the Commission noted as follows:

> "The above defect affects selection to 10 post out of 25 posts notified for recruitment namely 3 posts reserved under GM/rural, 4 posts under 2A and 1post each under 2B, 3A and 3B categories. But this defect does not vitiate the entire selection process carried out hitherto. As final select list is yet to be published it is open to the Commission to rectify the defect by affording opportunity to the candidates who are entitled to reservation under above categories to claim reservation benefits. The benefit of reservation cannot be limited only to the above 5 candidates. If only the above 5 candidates are given opportunity to claim reservation benefits such action of the Commission if challenged on the ground that the same is discriminatory by candidates similarly situated as the above 5 candidates but have not filed objections to the provisional select list it will be difficult for the Commission to defend its action. Therefore, opportunity will have to be afforded to claim the benefit of reservation to such of those candidates who are entitled to the said benefit and have appeared for the examination."

27. The advise of the Head, Legal Cell of the Commission therefore was that "instead of asking the individual candidates to claim reservation benefit to which they are entitled against reserved vacancies under 2A, 2B. 3A and 3B categories and to produce proof thereto, D.P.A.R. which has the necessary information can be requested to furnish the information regarding caste category of these candidates...Based on the said information of DPAR provisional select list can be suitably revised without reference to status/annual income of such candidates." However the Commission resolved to obtain caste certificate and rural reservation certificate from all candidates who had appeared for the examination. The endorsement dated 17.12.2007 came to be issued as a result of this decision. The said endorsement which was issued to all the candidates for the selection under reference, reads as follows:

> "The Commission has on 27.10.2007 published the provisional select list based on the competitive examination conducted for appointment to the posts of Section Officers (Inservice) in the Karnataka Government Secretariat. Several candidates have filed objections to this provisional select list. The Commission has considered the objections on the point that in its Notification the Commission had not made known the fact that in making appointment to the posts reserved for inservice candidates the creamy layer concept will not be applied. If under the New Comprehensive Creamy Layer Policy as per Annexure-2 to the Government Order No.SWD 225 BCA 2000 dated 30.3.2002 you are eligible to claim reservation under categories 2A, 2B, 3A, 3B then you are informed to obtain caste certificate without income from the Tahsildar. Candidate belonging to General Merit (Rural) category should obtain rural reservation certificate only in Form-2. These certificates should be furnished by 5.1.2008. Certificates furnished after the said date will not be considered." [Translation supplied].

D. After receiving the new caste certificates from whoever among the candidates chose to provide them, the Commission re-worked the select list incorporating in each reservation category the candidates with the highest marks. As a consequence the applicants had to make way to others in the respective reservation categories who had higher marks than the applicants. The recruitment was without blemish in other respects and out of 25 posts only selection to the ten posts in the reserved category are involved in the objections raised by Respondents 3 to 7. To have cancelled the entire selection of all 25 posts to take up a new exercise from scratch would have been unwarranted. In respect of the reserved category, the course adopted by the Commission cannot be faulted. The rectification carried out by the Commission, in our view, was the appropriate way out where there were no other objections of any weight to the recruitment which had been undertaken. Had any eligible official approached the Commission with the contention that he had been altogether prevented from applying for the selection because the notification prescribed the creamy layer criterion, the picture may then have been different, but there were no such objections from anyone. To afford an opportunity to candidates to produce caste certificate after the selection had already been made is no doubt an unusual procedure. The general rule is that the caste certificates valid as on the date of the application should be produced with the application and no such certificates are permitted to be produced subsequently. The present case differs from any other instance of attempting to produce a certificate after submission of application, because the instruction was issued generally to all applicants as a measure of rectification of an erroneous instruction the responsibility for which lay at the door of the Commission itself. The interests of no persons other than those who had already applied and participated in the selection were involved, and they were all afforded the opportunity to produce the correct caste certificate. With regard to the powers of an authority to correct mistakes, we have been referred to the observation of High Court of Karnataka in Writ Appeal No.1740 of 1994 (Deputy General Manager, Canara Bank –vs- J.Dorairaj) where the Bank had to retract certain measures because errors had crept in. The Court observed,

> "There can be no doubt that the bank, as an administrative authority and has an inherent power to correct the accidental mistakes committed by it. It cannot also be disputed that if the inherent power to correct inadvertent mistake is not recognized and accepted, the same will lead to injustice and unwarranted and undesirable consequences."

In the present case, faced with mistakes of its own which impinged on the proper preparation of the list of selected candidates, the Commission applied corrective measure that rectified the error where it occurred, namely in respect of the caste certificates to be produced by the candidates only to reserve categories 2A, 2B, 3A, 3B & GM (Rural). No other measure was required and there was no need to have cancelled the entire process of recruitment that had been gone through.

29. In the light of the foregoing, we see no merit in the applications and we order that they be dismissed.

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IN THE KARNATAKA ADMINISTRATIVE TRIBUNAL AT BANGALORE
APPLICATION NO.4254 OF 2008
D.D. 05.09.2008
The Hon'ble Mr. Justice A.C.Kabbin, Judicial Member &
The Hon'ble Smt. Usha Ganesh, Administrative Member

Sri. Aravind ... Applicant
Vs.
The K.P.S.C. ... Respondent

Recruitment:

Age relaxation:

When the Special Rules of recruitment prescribe age limit whether General Recruitment Rules prescribing the age limit and relaxation of maximum age limit is applicable? – No

Recruitment of Gazetted Probationers under Karnataka Recruitment of Gazetted Probationers (Appointment by Competitive Examination) Rules, 1977, which prescribe age limit – Applicant whose application was rejected on the ground of overage sought relaxation claiming to be in-service candidate under K.C.S. (General Recruitment Rules) 1957 – KAT has dismissed the application.

Held:

No relaxation of upper age limit is provided under the Special Rules to the in-service candidates General Recruitment Rules providing relaxation of age to in-service candidates is not applicable.

ORDER

Sri. T.Narayanaswamy, Advocate, has taken notice on behalf of the Respondent – Karnataka Public Service Commission.

The applicant had applied for the post of a Gazetted probationer in the Karnataka Government service as per the Karnataka Recruitment of Gazetted Probationers' (Appointment by Competitive Examinations) Rules, 1997. His application was rejected by the respondent – K.P.S.C., by endorsement in No.E(1)139/2008-09/PSC dated 7.7.2008 (Annexure-A6) and No.E(1)181/2008-09/PSC dated 5.8.2008 (Annexure-A7) on the ground that he had crossed the age limit prescribed for the post. Challenging these endorsements, the applicant has approached this Tribunal.

2. The contention of the learned counsel for the applicant is that the applicant is an in-service candidate and as per the general recruitment rules, there is relaxation of maximum age limit for in-service applicants and if that is taken into consideration the applicant is within the age limit. He submits

that pending decision in the matter, an interim order may be granted permitting the applicant to appear for the examination subject to the final decision in the application.

3. The learned advocate for the respondent has strongly opposed the application. It is contended by him that admittedly the applicant was aged 37 years i.e., one year more than the maximum age limit prescribed for the post for such applicants, who belong to category 3A and therefore the applicant is not entitled to appear for the examination.

4. The learned counsel for the applicant has placed reliance on clause (b) of sub-rule (3) of Rule 6 of the Karnataka Civil Service (General Recruitment) Rules, 1957 to contend that in the case of a candidate who is holding a post under the Government, he is entitled to relaxation in age limit to the extent of such years during which he is holding the post or 10 years whichever is less.

5. As rightly pointed out by the learned counsel for the respondent, the relaxation in age limit has been specifically prescribed in Rule 5 of the Karnataka Recruitment of Gazetted Probationers (Appointment by Competitive Examinations) Rules, 1997 and therefore the provisions of sub-rule (3) of Rule 6 of the General Recruitment Rules cannot be applied to the candidates to be selected as per special rules. Rule 6 of General Recruitment Rules on which reliance is placed, specifically provides in sub-rule (1) that the age limit prescribed in that rule 6 is in cases in which provision is not made in the rules of recruitment specially made. In which cases age relaxation can be made has been specifically provided in Rule 5 of the Karnataka Recruitment of Gazetted Probationers' (Appointment by Competitive Examinations) Rules 1997. No relaxation of upper age limit has been provided in that special rule to in-service candidates. Therefore, Rule 6(3) of General Recruitment Rules is not applicable to the present case and the endorsements given by the respondents are in accordance with law.

For the above said reasons, we dismiss the application.

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IN THE KARNATAKA ADMINISTRATIVE TRIBUNAL AT BANGALORE
APPLICATION NO.1370/2008 & CONNECTED CASES
D.D. 19.12.2008
Hon'ble Mr. Justice A.V. Srinivasa Reddy, Chairman &
Hon'ble G.Raju Premkumar, Administrative Member

Venkate Gowda & Ors. ... Applicants
Vs.
State & Ors. ... Respondents

Recruitment:

Whether non prescription of qualification or service for in-service candidates vitiates the Rules – No

Prescription of qualification is within the exclusive domain of the executive.

A. Karnataka Public Works Engineering Department Services (Recruitment of Assistant Executive Engineers Division-I by Competitive Examination) Rules, 2007 – Validity thereof, to the extent it relates to recruitment of in-service candidates – It is well settled principles of law that prescription of qualification is within the exclusive domain of executive – No material produced by applicants to show that action of executive in framing rules is contrary to any constitutional provisions or is patently arbitrary – Impugned rules primarily questioned on ground that 2007 Rules do not prescribe any SERVICE for recruitment of in-service candidates – Non-prescription of experience for direct recruitment – Held, does not vitiate 2007 Rules – It is for legislature to regulate method recruitment, prescribe qualification etc. – It is for Courts or Tribunals to trench upon and prescribe qualification – When Rule making Authority does not prescribe any service for in-service candidates – It is open for this Tribunal to prescribe some service – The impugned rules do not violate Article 14 or 16 of the Constitution of India – Nor is it arbitrary for non-prescription of qualification or service for in service candidates – Impugned 2007 Rules, upheld.

B. In-service – Means – All those who are in the service of the Department including probationers.

C. Classification of vacancies – Reservation – Whether contrary to Government order dated 30.3.2002 – No – Note (1) to the Government Order dated 30.3.2002 – Clearly rules out applicability of creamy layer principle to direct recruitment prescribing service or experience as a qualification and eligibility – In-service candidates working as Assistant Engineers have to be excluded from purview of creamy layer concept. Otherwise it would defeat the very object of recruitment to the posts of Assistant Executive Engineers from among in-service candidates.

D. Bifurcation of Departments - PWD and Water Resources Department – Entitlement of candidates working in WRD, for purpose of recruitment – Entitled – Actual bifurcation of PWD & WRD has not taken place, though both the Departments have separate Set of Cadre and Recruitment Rules – In terms of Rules 6 of the Karnataka Public Works (Irrigation Services) (Recruitment and certain other Rules) (Amendment) Rules, 1995 – Both PWD and WRD have to be treated as one Department – Candidates working in both PWD & WRD are entitled to be considered as in-service candidates till actual bifurcation takes place.

E. Interpretation of Statutes – Note - Notes will fill up gaps and notes to rules make explicit what is implicit in the rules - Note found in Schedule to 2007 Rules prescribing minimum marks for

purposes of qualifying to appear for personality test – Whether ultra vires or contrary to Rules 7 and 8 of the 2007 Rules? – No – Schedule to the 2007 Rules prescribing minimum marks - Not ultra vires or contrary to Rules 7 and 8 of the 2007 Rules.

F. Estoppel – Applicants participated in the selection process – Not entitled to challenge the Notification.

G. K.C.S. (General Recruitment) Rules, 1977 - Rule 6(3)(b) thereof - Relaxation of upper age limit – Over riding effect over Rule 6(1) of the General Recruitment Rules and the 2007 Rules – Rule 6(1) starts with phrase "save as otherwise provided" – Rule 6(3) starts with non-obstante clause, "notwithstanding anything contained in sub-rule (1)" – Special Rules 2007 do not provide for relaxation in upper age limit – Rule 6(3)(b) of the General Recruitment Rules would apply to present cases – Rule 6(3)(b) of the General Recruitment Rules have got over riding effect over special rules, notwithstanding anything contained Rule 6(1) of the General Recruitment Rules – On facts held that applicants in A.Nos.5013/2007 and 5003/2007 are entitled for relaxation of age limit.

H. Caste Certificates – Caste certificates issued by Tahsildar –Authority of KPSC in law to ignore caste certificate issued by the Tahsildar under the provisions of the 1990 Act and the Rules – Discussed.

Cases referred:

1. AIR 1953 SC 148 Para 9 – Nilanakhya Bysack Vs. Shyam Sunder Haidar
2. AIR 1955 SC 661 – Bengal Immunity Co. Ltd. Vs. State of Bihar
3. AIR 1955 SC 681 – O. Vs. State of Bihar
4. AIR 1957 SC 907 page 910 – Kanailal Sur Vs. Paramnidhi Sadhukhan
5. AIR 1958 SC 353 page 356 – Workmen of Dimakutchi Tea Estate Vs. Management of Dimakuchi Tea Estate
6. AIR 1958 SC 414 page 416 – State of U.P. Vs. C.Tobit
7. AIR 1959 SC 149 – Basheernath Vs. Commissioner of Income Tax & Anr.
8. AIR 1959 SC 648 – Deepchand Vs. State of Uttar Pradesh
9. AIR 1959 SC 928 – Commissioner of Income Tax, West Bengal Vs. Calcutta National Bank
10. AIR 1963 SC 1207 – M/s New India Surga Mills Ltd; Vs. Commissioner of Sales Tax Bihar
11. AIR 1964 SCC 72 – Pratap Singh Vs. State of Punjab
12. AIR 1966 SC 529 para 14 – The Martin Brun Ltd. vs. The Corporation of Calcultta
13. AIR 1967 SC 1427 – S.G.Jaisinghani Vs. Union of India
14. AIR 1969 SC 267 – Gujarath Electricity Board Vs. Girdharlal Motilal & Anr.
15. AIR 1969 SC 634 – State of Gujarath Vs. Shantilal
16. 1972 SLR 44 para 13 – State of Assam vs. Raghava Gopalachari
17. AIR 1973 SC 974 – T.Govindaraja Mudaliar Vs. State of Tamil Nadu
18. 1975 All India Services Law Journal 619 – Tara Singh and Others Vs. State of Rajasthan & Ors. (SC)
19. AIR 1975 SCC 671 – Naseeruddin Vs. State Transport Tribunal

20. (1975) 16 GLR 896 para 22 – Murtuja Khan Vs. Municipal Corporation
21. AIR 1976 SC 2386 page 2389 – Santa Singh Vs. State of Punjab
22. AIR 1977 SC 835 – Busching Schmitz Private Limitd Vs. P.T.Menghani
23. (1980) 3 SCC 29 para 16 – Dr.N.C.Singhal Vs. Union of India
24. AIR 1980 SC 379 – Tamil Nadu Education department Ministerial & General Subordinate Service Association Vs. State of Tamil Nadu
25. 1984 SCC (L&S) 645 – Ramesh Chandra Mohapatra & Anr. Vs. State of Orissa
26. (1985) 4 SCC 369 – Union of India & Ors. vs. Godfrey Philips India Ltd.
27. (1986) 1 SCC 100 paras 19, 20 – Forward Construction Company Vs. Prabhath Mandal (R)
28. AIR 1986 SC 1043 – Om Prakash Shukla Vs. Akhilesh Kumar Shukla & Ors.
29. 1987 (1) SCC 191 page 201 – S.P.Jain Vs. Krishna Mohan Gupta
30. 1987 LAB.IC.120 – Tileshwar Ram Vs. State of Uttar Pradesh
31. AIR 1988 SC 1060 – Hameedia Hardware Stores Vs. B. Mohal Lal Sowcar
32. AIR 1988 SC 2267 – Baliram Vs. Justice B.Lentin
33. (1989) 4 SCC 378 – M/s. Aphali Pharmaceutical Ltd. Vs. State of Maharashtra
34. AIR 1990 SC 535 – J.Rangaswamy Vs. Government of Andhra Pradesh
35. (1990) 3 SCC 655 – District Collector and Chairman, Vizianagaram Social Welfare Residential School Association, Vizianagaram & Ors. Vs. M.Tripurasundari Devi
36. 1990 KSLJ 1732 – Tulasikumar Vs. KPSC
37. ILR 1991 KAR 3102 – Erappa Vs. State of Karnataka
38. 1992 SCC L&S Supp. 1 – Indra Sawhney & Ors. vs. Union of India & Ors.
39. (1992) 2 SCC 206 – Karnataka Public Service Commission & Ors. Vs. B.M.Vijaya Shankar & Ors.
40. 1993 Supp.(3) SCC 9 paras 3, 6 & 7 – V.K.Sood Vs. Secretary, Civil Aviation
41. AIR 1993 SC 2285 – V.K.Sood Vs. Secretary, Civil Aviation
42. 1995 KSLJ 914 - Seetharamanjaneyalu & Ors. Vs. State of Karnataka & Ors.
43. 1995 (3) SCC 486 – Madan Lal Vs. State of Jammu & Kashmir
44. 1995(5) SLR 337 – Dr.Krishna Chandra Sahu & Ors. Vs. State of Orissa & Ors.
45. (1997) 1 SCC 253 paras 3 & 4 – Commissioner, Corporation of Madras Vs. Madras Corporation Teachers Mandram
46. (1997) 4 SCC 426 – University of Chochin Vs. N.S.Kanjoonjamma
47. (1997) 7 SCC 505 – R.Kandalswamy Vs. Chief Engineer, Madras Port Trust
48. (1997) 9 SC 527 – Raj Kumar vs. Shakti Raj & Ors.
49. AIR 1997 SC 2110 – Raj Kumar vs. Shakti Raj
50. (1998) 1 SCC 727 – State of H.P. vs. J.L.Sharma & Anr.
51. (1998) 8 SCC 66 - Government of A.P. & Ors. vs. Dr.V.Nagaraju & Ors.
52. AIR 2000 SC 3457 – Punjab University Vs. Narinder Kumar
53. AIR 2001 AP 335 – APSRTC Vs. State of Transport Appellate Tribunal
54. AIR 2002 SC 350 – Balco Employees' Union (R) vs. Union of India

55. (2003) 2 SCC 632 (para 10) – P.U.Joshi Vs. Accountant General
56. (2003) 4 SCC 753 – Kanta Devi Vs. Union of India
57. (2003) 9 SCC 193 – State Through Narcotics Control Bureau Vs. Kulwant Singh
58. (2006) 6 SCC 395 – K.H.Siraj Vs. High Court of Kerala
59. (2006) 8 SCC 42 paras 25 to 27 – Sanjay Kumar Manjul Vs. Chairman, UPSC
60. 2007 AIR SCW 3138 – V.B.Prasad Vs. Manager, P.M.D.U.P. School & Ors. (Head Note-B)
61. 2007 (8) SCC 418 – Dhampur Sugar (Kashipur) Limited Vs. State of Uttaranchal & Ors.
62. (2008) 4 SCC 71 – Dhananjay Malick Vs. State of Utaranchal
63. (2008) 5 SCC 237 paras 26 to 28 – UCO Bank Vs. Rajinder Lal Kapoor
64. (2008) 6 SCC 8 – Ahok Kumar Thaku Vs. Union of India
65. (2008) 8 SCC 612 – State of West Bengal & Ors. vs. Kamal Sengupta & Anr.
66. 2008 AIR SCW 3780 – Union Public Service Commission Vs. Dr.Jamuna Kurup
67. 2008 AIR SCW 6564 – Union of India Vs. Pushpa Rani
68. S.S.Ahamed Vs. State & Ors. para 14
69. KAT A.No.2390/1997 D.D. 4.9.1997 – B.S.Basargi Vs. K.P.S.C. & Anr.
70. W.P.No.26021/1997 – Ankaiah Vs. State of Karnataka & Ors.
71. KAT A.No.4254/2008 – Aravind Vs. KPSC

A.V.SRINIVASA REDDY (CHAIRMAN) :-

O R D E R

The challenge in most of these Applications is to the Notification dated 8.8.2007 issued by the Karnataka Public Service Commission (for short, "KPSC") for recruitment to the posts of Assistant Executive Engineers (Division-1) (for short, "AEEs") to the extent it relates to recruitment of in-service candidates and also the Rules called the "Karnataka Public Works Engineering Department Services (Recruitment of Assistant Executive Engineers Division-I by Competitive Examination) Rules, 2007" (for short, "2007 Rules"), to the extent the Applicants are aggrieved.

Common questions of facts and law are involved in these Applications. Hence, they were heard together and are decided by this common Order.

For the sake of convenience, these Applications are classified into four parts.

Applications No.1370, 1400, 1447, 1448, 1496, 1743, 1744, 1745, 1605, 1606 and 3457 of 2008 are classified as Part I.

Part II consists of Applications No.1243, 1382, 1387, 1388, 1389, 1390, 1427, 1445, 1484, 1575, 1576, 1577, 1578, 1579 and 1947 of 2008.

Applications No.1756, 1757, 1758, 1759, 1376 and 1377 of 2008 are classified as Part III.

Applications No.1490, 1770, 1792, 1794, 1801, 1916, 1949 of 2008, 5198 of 2007, 1433, 1471, 1531, 3154 of 2008, 5003 and 5013 of 2007, 3403, 1890, 4795, 4796 and 4797 of 2008 are classified as Part IV.

Part V comprises of Applications No.1546, 1753 and 2364 of 2008.

1. The Applicants are working either as Junior Engineers or as Assistant Engineers in the Public Works Department (for short, "PWD") and Water Resources Department (for short, "WRD"). They are holders of Degree of Bachelor of Engineering (Civil).

1.1 The grievance of the Applicants in Applications classified as Part I is that the term "in-service candidate" has not been defined either in the Notifications or in the relevant rules, as a result of which all Assistant Engineers and Junior Engineers starting from a probationer to a person who is due to retire are made eligible to apply as in-service candidates. In other words, no service period and maximum age limit are prescribed for recruitment.

1.2 In the Applications classified as Part-II, the challenge is to the relevant provisions of the 2007 Rules on the ground that they are arbitrary.

1.3 The challenge in the Applications classified as Part III relates classification of vacancies to the purpose of reservation.

1.4 In the Applications classified as Part IV and Part V, the grievance relates to individual cases. The decision in those cases will depend upon the result in the Applications classified as Parts I, II and III.

2. The undisputed facts of the case are that the KPSC had issued a Notification dated 17.4.2007 inviting applications for recruitment to the posts of AEEs. The number of posts notified were 52 which comprised of 42 for open competition candidates and 10 for in-service candidates. The last date for receipt of applications was 26.5.2007. Subsequently, the KPSC issued another Notification dated 8.8.2007 by which the number of posts were enhanced. The total number of posts notified were 104, out of which 84 posts were earmarked for open competition candidates and 20 for in-service candidates.

The last date for receipt of applications under the said Notification was 10.9.2007. It was stated in the latter Notification that the candidates who had applied pursuant to the first Notification need not again apply. However, if the candidates who had already applied wanted to claim reservation afresh, they should submit the relevant certificate to the KPSC along with a representation by mentioning the application number. The Applicants in all these Applications are in-service candidates. Hence, the challenge to the recruitment process is confined only to 20 posts which are earmarked for in-service candidates.

2.1 The Notification dated 8.8.2007, inter alia, provides for classification of posts, pay scale, conditions for eligibility, mode of examination, educational qualification, age limit, documents to be furnished by candidates claiming reservation, rural candidates and Kannada medium candidates.

2.2. The classification of posts earmarked for in-service candidates is as follows:

(1) Scheduled Castes	:	5 posts,
(2) Scheduled Tribes	:	1 post,
(3) Category I	:	1 post,
(4) Category II(a)	:	2 posts,
(5) Category II(b)	:	1 post,
(6) Category III(a)	:	1 post,
(7) Category III(b)	:	1 post,
(8) General Merit	:	10 posts.

So far as the mode of selection is concerned, the Notification states that the mode of selection shall be in accordance with the 2007 Rules and for more details the candidates may refer to the 2007 Rules. As regards the selection process, the Notification states that the written examination consists of Kannada, English, General Knowledge and Optional subjects and the same will be of descriptive type. Except Kannada Language Examination, all other papers are to be answered in English language. The Notification also states that the maximum marks for personality test shall not exceed 5% of the competitive examination. The details of papers relating to competitive examinations are as under:

(1) Paper-1	:	Kannada	:	100 marks
(2) Paper-2	:	English	:	100 marks
(3) Paper-3	:	General Knowledge	:	100 marks
(4) Paper-4	:	Optional subject (part-A)	:	100 marks

(5) Paper-5	:	Optional subject (part-A)	:	100 marks
(6) Paper-6	:	Optional subject (part-B)	:	100 marks
(7) Paper-7	:	Optional subject (Part-B)	:	100 marks

The Notification also states that the Kannada and English compulsory papers will be of SSLC (first Language Kannada and First Language English) level. The marks obtained in compulsory Kannada and English papers will be of eligibility nature. For securing eligibility the candidates are required to secure minimum marks of 30 in each paper and 35% aggregate marks. However, the marks secured in these two papers will not be considered for determining the eligibility of the candidates. The candidates who fail to secure the prescribed marks in these two papers would not be eligible for personality test, even if they secure more marks in the optional subjects. The Notification also states what are optional subjects in Part-A and Part-B. As far as the educational qualifications are concerned, the Notification states that the "Candidates must be holder of a Degree in Civil Engineering or Construction Technology & Management granted by a University established by Law in India and from an Institute approved by the AICTE, or a Diploma Certificate from the Institution of Engineers (India) that he has passed Part A & B of the Associate Membership Examination of the Institution of Engineers (India). As regards the age limit, the minimum age limit is 21 years and the upper age limit for candidates other than in-service candidates is 35 years in the case of candidates belonging to General Merit, 38 years in the case of candidates belonging to Categories IIA, IIB, IIIA and IIIB and 40 years in case of candidates belonging to Scheduled Castes, Scheduled Tribes and Category-I. As already stated, no upper age limit is prescribed for in-service candidates.

3. The salient features of the 2007 Rules are thus: The Notification states that for more details the candidates may refer to the 2007 Rules. Therefore, if the Notification is silent on any aspect, the provisions of the 2007 Rules have to be taken into consideration and if there is any inconsistency between the Notification and the 2007 Rules, the provisions of the 2007 Rules will prevail over. The 2007 Rules, among other things, provide for method of recruitment, age and academic qualification of candidates, conduct of competitive examination, personality test, list of selected candidates, preparation of additional select list of candidates, application of General Recruitment Rules and other Rules. There is a Schedule to the 2007 Rules which deals with Written Examination, which consists of (1) English, (2) Kannada, (3) General Knowledge and (4) Optional subjects.

4. Heard the learned Senior Counsel and Counsel appearing for both sides.

5. **PART-I APPLICATIONS : A.1370/2008 & CONNECTED CASES:**

The case of the applicants may be stated thus:-

5.1 The Notification issued by the KPSC and the 2007 Rules issued by the Government are silent about the minimum eligibility criteria for in-service candidates of KPWD. There is no reason for not prescribing the service in the cadre of Assistant Engineers or Junior Engineers. As a matter of fact, in the Rules pertaining to Police Department and Karnataka Government Secretariat, a specific provision of minimum years of service in the post held by a candidate is prescribed as eligibility qualification.

5.2 The draft Rules of 2007 had been published in the Karnataka Gazette inviting objections/ suggestions. The Applicants could not file objections. However, in view of the decision of this Tribunal in the case of SEETHARAMANJANEYALU AND OTHERS v. STATE OF KARNATAKA AND OTHERS, reported in 1995 KSLJ 914 and the decision of the Supreme Court in the case of BASHEERNATH v. COMMISSIONER OF INCOME TAX AND ANOTHER reported in AIR 1959 SC 149 & DEEPCHAND v. STATE OF UTTAR PRADESH reported in AIR 1959 SC 648, irrespective of the fact that objections had not been filed by the Applicants to the draft Rules, they are entitled to question the validity of the Rules.

5.3 The classification of vacancies and reservation of posts in the categories 2A, 2B, 3A and 3B and also rural under General Merit category as indicated in Column No.6 of the Notification is contrary to the Government Order dated 30.3.2002 issued by the Social Welfare Department under Article 16(4) of the Constitution of India and the new Creamy Layer Policy Order. Annexure-I to the Government Order deals with Categories. In Annexure-II to the Government Order issued under Articles 15(4) and 16(4) of the Constitution of India, persons who are not eligible for reservation of seats or posts under Categories 2A, 2B, 3A and 3B is detailed. However, there is an exception in the Note in Annexure-II to the Government Order. As per the Note, the Creamy Layer Policy is not applicable to direct recruitment to a post which insists on a prescribed period of service at a lower post or experience in a post, profession or occupation as a qualification of eligibility. Since the minimum service in the cadre of Assistant Engineers is not prescribed in the Recruitment Rules, the exception made in the Note to Annexure-II to the Government Order squarely applies to in-service candidates applying for the post of AEE under the Notifications issued by the KPSC. Serial No.2 of the Note states that the Rule applies to the sons and daughters of the persons specified therein. Serial No.2 of

the table specifically provides that a candidate who is in the service of Government and draws a salary which is not less than that of a Group-B Officer (pay scale of Rs.6000-11200) is governed by Clause-2 of the Note, in that Creamy Layer Policy applies to him. Once the Creamy Layer Policy is made applicable to an Assistant Engineer Group-B Officer in the pay scale of Rs.6000-11200 he is not eligible to claim reservation under Categories 2A, 2B, 3A and 3B. In that view of the matter, the classification of vacancies and the reservation of posts in respect of in-service candidates issued by the KPSC is contrary to Note in Annexure-II to the Government Order dated 30.3.2002. As such, the reservation made is to be held as invalid and contrary to the mandate of Article 16(4) of the Constitution of India. As a consequence, the two Notifications issued by the KPSC and the further selection process conducted by the KPSC is liable to be declared as illegal.

5.4 The discrimination made in the 2007 Rules is writ large. The concept of "in-service candidate" would normally mean a person who is working as an Official after completion of the period of probation as prescribed in the Karnataka Civil Services (Probation) Rules, 1977 and not a new entrant to the service and put in less than one month of service to compete for the competitive examination. As a matter of fact, the KPSC had issued a Notification dated 18.11.2006 to fill up vacant posts of Section Officers (in-service) in the Karnataka Government Secretariat by competitive examination. Clause 1(a) of the Notification specifically states that candidates who have put in 5 years of service (excluding the period of probation) are eligible to apply for in-service category. Similarly, in case of recruitment to the posts of Police Sub-Inspectors (Wireless) including in-service candidates, the eligibility qualification for an in-service candidate is minimum service of 8 years in any wing of the Police Department.

5.5 There are two Departments known as PWD and Water Resources Department (for short, "WRD") and they have got separate recruitment rules. Recruitment to the posts of AEEs in the Irrigation Department (WRD) is governed by the Rules called the Karnataka Public Works (Irrigation Service) (Recruitment of Assistant Executive Engineers Division-I by Competitive Examination) Rules, 1988 (for short, "1988 Rules"). In the Notifications issued by the KPSC, it has been specifically stated in Clause 10.2 that in-service candidates must be working in PWD. Therefore, it is only the in-service candidates belonging to PWD who could have applied against the 20 posts reserved for in-service candidates and permitted to take the competitive examination. Despite the same, the KPSC entertained the applications submitted by Respondents No.3 to 8, who are working in the WRD and also permitted them to appear for the competitive examination conducted by it and what is more they have been

selected and their names figure in the provisional select list.

5.6 In the instant case, the particular qualification for an in-service candidate is that he must belong to and borne on the establishment of PWD. Respondents No.3 to 8 do not satisfy the said requirement. Hence, their selection is contrary to the law laid down by the Supreme Court in the case of DISTRICT COLLECTOR AND CHAIRMAN, VIZIANAGARAM SOCIAL WELFARE RESIDENTIAL SCHOOL ASSOCIATION, VIZIANAGARAM AND OTHERS v. M.TRIPURASUNDARI DEVI, reported in (1990) 3 SCC 655. In that case, the Supreme Court has held thus:

> "It must further be realized by all concerned that when an advertisement mentions a particular qualification and appointment is made in disregard of the same, it is not a matter only between the appointing authority and the appointees concerned. The aggrieved are those who had similar or even better qualification than the appointee or appointees, who had not applied for the post because they did not possess the qualification mentioned in the advertisement. It amounts to a fraud on public to appoint persons with inferior qualification. In such circumstances, unless it is clearly stated that the qualifications are relaxable, no Court should be a party to the perpetuation of the fraudulent practice."

5.7 The procedure adopted by the KPSC in the conduct of the examination suffers from arbitrariness and discrimination. For example, the Applicant in Application No.1570/2008 submitted his application to the KPSC as a General Merit candidate in view of the certificate issued by the Tahsildar that he belongs to Creamy Layer, even though the Applicant belongs to Category 3A. As can be seen from the cut-off marks released by the KPSC who are eligible for the personality test on 13.3.2008, the cut-off marks in the category of General Merit in-service candidates is 280, while that of Category 3A is mere 27. This would demonstrate that the Applicant who has secured 267 marks has been deprived of the benefit of reservation under Category 3A and, consequently, to appear for the personality test. Hence, the entire procedure adopted by the KPSC in the conduct of the examination suffers from arbitrariness and discrimination. Rule 8 of the 2007 Rules deals with candidates to be called for Personality Test and the same reads thus:

> "Based on the merit in the written examination, the candidates shall be required to appear before the Commission for the personality test in the ratio of 1:5 (Vacancy:Candidate) in each category of reservations."

The mandate of this Rule has been violated by the KPSC while issuing call letters for Personality Test as could be gathered from the cut-off marks published by the KPSC. The interview call letters have been issued on the basis of marks obtained by a candidate under General Merit category

irrespective of the reservation claimed by him which is not permissible having regard to the mandate of Rule 8 of the 2007 Rules. Having regard to the marks secured by each of Respondents No.3 to 8, there is every likelihood of the KPSC issuing interview notices to them ignoring the just claims of the Applicants and other similarly situated persons.

6. **PART-II APPLICATIONS (A.1243/2008 & CONNECTED CASES)**

The case of the Applicants is as follows:-

6.1 For the purpose of syllabus for the competitive examination one has to refer to the Schedule. There are two Schedules; one consists of syllabus for the examination in respect of Kannada paper. It is stated that the Kannada paper will be of SSLC level and comprises of comprehension of given passage, essay writing etc. Similarly, in respect of paper on English, it is provided that English paper will be of SSLC level and comprises of comprehension etc. In the Schedule containing the details of the examination in Kannada and English, a Note has been inserted to the effect that the marks obtained in compulsory papers, i.e., English and Kannada shall be of qualifying nature, the minimum marks to be secured being 30% in each paper and the aggregate being 35% in both the papers. This note is in conflict with Rules 7 and 8 of the 2007 Rules. Rule 7 of the 2007 Rules provides that the competitive examination shall consist of written examination in Kannada, English, General Knowledge and Optional subjects specified in the schedule and also the personality test. Rule 8 stipulates that based on the merit in the written examination, the candidates shall be required to appear before the KPSC for the Personality Test. Rule 7 and 8 nowhere state that the papers on Kannada and English will be of qualifying nature. But the note which is a part of the schedule provides otherwise. In view of this conflict, the candidates are required to be invited for Personality Test based on their performance in the competitive examination in all papers including Kannada and English. The note which is a part of the schedule is, therefore, liable to be ignored.

6.2 For instance, the Applicant in Application No.1243/2008 has applied for selection to the post of AEE in pursuance of the Notification in question. He was issued an Admission Card for the competitive examination. He has attended the papers on Kannada, English, General Knowledge and Optional subjects also. The KPSC has published a provisional select list showing the total marks secured by the candidates in the written examination and who have cleared the Kannada and English papers. The name of the Applicant does not find a place in the provisional list of candidates, who are

eligible for being called for the Personality Test. In the Notification at the end, a Note has been inserted informing the candidates that those who are desirous of applying for re-totalling may do so by furnishing details like Name, Register Number, Subject etc. Accordingly, the Applicant has applied for re-totalling but the result of the re-totalling has not been intimated to the Applicant.

6.3 Normally, preliminary examinations are conducted before the main competitive examination for selections is held and only those who pass in the preliminary examination are permitted to take the main examination. But in the present case the provision is different. In the case on hand, the qualifying examination and also the main competitive examination are conducted simultaneously and the answer scripts of all the papers are got valued. The Applicant suspects that after coming to know of the good performance in the optional subjects and as also the General Knowledge he has been deliberately failed in English Paper. Therefore, he has made an application to the KPSC under the Right to Information Act for furnishing him the valued answer scripts in English paper, General Knowledge and 4 papers in optional subjects. He has also sought for furnishing valued answer scripts in respect of two other candidates. But the said documents have not been furnished to him. The mother tongue of the Applicant is Kannada. The first language in the SSLC was Kannada and his second language was English. He has scored 66 marks in the English paper in SSLC examination. It is stated in the syllabus that the papers in Kannada and English shall be of the level of SSLC. If that is the case, he should have been passed by securing at least 35% marks in each of the subjects, viz. Kannada and English. But he has been failed in English paper, by awarding 27 marks out of 100. Hence, the Applicant has prayed for a declaration that he is duly qualified for Personality Test and for a direction to the KPSC to invite him for the Personality Test and to award marks depending upon his performance in the said Test. The reliefs sought for by all the Applicants in Part-II are more or less similar.

7. **PART III APPLICATIONS (A.1756/2008 & CC) :**

The case of the Applicants in these Applications may be stated thus: -

7.1 The "Creamy Layer Concept" is not applicable to General Merit candidates but still the same has been applied by the Respondents to the Applicants who belong to General Merit (Rural) category. The KPSC having called upon three of the four Applicants to appear for "Personality Test" on 25.3.2008 and 26.3.2008 did not permit them to participate in the Personality Test on the ground that they belong to "Creamy Layer" among the General Merit (Rural) Category.

7.2 The action of the KPSC is in violation of Section 3 of the Karnataka Reservation of Appointments or Posts (in Civil Services of the State) for Rural Candidates Act, 2000 (for short, the "2000 Act", published on 6.1.2001. The original of the Act is in Kannada. The proviso to Section 3 states as follows:

"¥ÀgÀAvÀÄ, dÆgÀ¯ï ªÉÄjmï CxÀªÁ 1ÆÃ¥ÀæªÀUÀ¯ÆÀÄ ºÉÆgÀvÀÄ¥Àr¹zÀÄvÉÆÛgÉ »AzÀÄ½zÀ ªÀÄÄdÄ¼ÉÆ¸ÉÃjzÀUÀæ«ÄÃt C¨sÀåyðUÀ¼À¸ÀAzÀ¨sÀðzÀ°è, ¸ÀA«zsÁ£ÀzÀ 16ÆÃ CÆÄZÉÒÃzÀzÀ (4)£ÉÃ RqÀzÀ CrAiÀÄ°è ºÉÆgÀr¸ÀÁzÀ«ÄÃ¸ÀÁvÉ¸ÀASÁ¤ù¹zÀ¸ÀPÁgÀzÀ DzÉÃ±ÀUÀ¼À¥ÀæPÁgÀ ªÉÄÃ®Ä¸ÀÙgÀzÀ ¥ÀjPÀëÉAiÀÄÄ (Qæ«Ä ÉÃAiÀÄgï) AiÀÄ¥ÉÃaÀ ªÀåvÁå¸ÀUÀ¼ÉÆÃqÀ¯ÁV ¸ÀPÀÌzÀÄÝ."

The official Respondents in their Reply Statement have relied upon the English Translated version of the 2000 Act issued on 22.1.2001, wherein the proviso to Section 3 reads as under:

> "Provided that in the case of a rural candidate belonging to General Merit of the other backward classes except Category-I concept of creamy layer as may be applicable as per the orders of Government with regard to reservation issued under Clause (4) of Article 16 of the Constitution shall apply mutatis mutandis."

It is the contention of the official Respondents that the English version is correct and there is a mistake in the 2001 Act issued in Kannada and, therefore, the Applicants are not eligible for consideration for selection under General Merit (Rural) Category. The English Version is a translation and not the original. Actually the mistake is in the imperfect translation to English. If there was a mistake in the original, a suitable amendment could have been made to it. More than seven years have elapsed since the Act is issued but no such amendment is made so far. Whenever there is discrepancy between the original and the translated version of an enactment, rule, regulation or order and the translated version introduces something which is not there in the original, it is always the original that prevails and not the translated version.

7.3 While understanding and interpreting an enactment, the intendment of the enactment has also to be looked into to come to the right conclusion. As could be seen from the preamble to the 2000 Act, the background of this enactment is that before the enactment was made, Rule 3B was inserted in the Karnataka Civil Services (General Recruitment) Rules, 1977 (for short, "General Recruitment Rules"), providing for weightage of marks to rural candidates. This was challenged in Writ Petition No.13157/1998 before the High Court of Karnataka and the High Court declared that the said Note was violative of Articles 14, 15 and 16 of the Constitution. Writ Appeal against the decision of the learned Single Judge came to be dismissed on 26.11.1999 and the Special Leave Petition also came

to be dismissed by the Supreme Court. The High Court while dismissing the Writ Appeal had observed that no comparative study has been made regarding the schools in the rural areas, their standard of education, teaching methods etc. It is in this background a Commission of Inquiry was constituted under the Chairmanship of a former Judge of High Court of Karnataka to examine various aspects relating to rural candidates. It is on the basis of the recommendation of the said Commission, the 2000 Act has been passed. In that Report, the Commission has made the following recommendation on Creamy Layer:

> "(iii) The occupation or income of parents should be the same as applicable to other backward classes as decided by Government vide G.O.No.SWD.150.BCA.94 dated 17.9.1994 for the purpose of reservation policy under Article 15(4) and Article 16(4) of the Constitution of India."

As can be seen, in the recommendation, there is no reference to General Merit and the reference is only to Other Backward Classes falling under Article 15(4) and 16(4) of the Constitution of India. In the Government Order No.SWD.150.BCA.94 dated 17.9.1994 referred to in the recommendation also the reference is only to Backward Categories II(a), II(b), III(a) and III(b). It is on the basis of this recommendation that the enactment in Kannada is made.

7.4 The concept of "Creamy Layer" among the Backward Classes was for the first time introduced by a Nine Judge Bench of the Supreme Court in the case of INDRA SAWHNEY AND OTHERS v. UNION OF INDIA AND OTHERS reported in 1992 SCC L&S Supp.1. Eight among the Nine Judges have upheld the concept of Creamy Layer and in that decision also the reference is only to Other Backward Classes.

7.5 Reservation for Backward Classes under Article 16(4) of the Constitution is exhaustive. Reservation for rural candidates is not under Article 16(4) as they do not fall under the Category of Backward Classes, but it is deemed to be under Article 16(1). If the Rural Candidates also fall under any of the Backward Categories II(a), II(b), III(a) and III(b), then it is a different matter, as they attract creamy layer concept as Other Backward Categories. But General Merit (Rural) candidates do not fall under Other Backward Categories referred to above. The Creamy Layer Concept is applicable only to candidates of Other Backward Classes identified under Article 16(4) and not applicable to General Merit (Rural) candidates falling under Article 16(1) of the Constitution. Hence, there is absolutely no mistake in the original enactment issued in Kannada. The mistake is in the

English version. A translated version cannot introduce something which is not there in the original.

7.6 From this point of view, the Government Order bearing No.Si.A.Su.E./08/Se.Ne.Ni./2001 dated 13.2.2001 which brings the General Merit (Rural) candidates under creamy layer and prescribes Form-I is also in violation of Section 3 of the 2000 Act.

8. We will deal with cases in Parts III and IV a little later.

9. SUBMISSIONS OF MR. S.V.NARASIMHAN APPEARING FOR SOME OF THE APPLICANTS IN PART-I APPLICATIONS:

9.1 Non-prescription of minimum service under the 2007 Rules in so far as it relates to recruitment to 20 posts reserved for in-service candidates by Assistant Engineers suffers from discrimination in that the State has made a departure to the normal rule of prescription of minimum service in a post as in other Departments like Karnataka Government Secretariat and Police Department and the earlier recruitment in the PWD in the year 1992. Consequently, ineligible persons are allowed to compete for the competitive examination along with the Applicants and other eligible candidates and thereby their rights are vastly affected. It is only after the completion of probation period a Government servant becomes a member of service and till then he will be on trial and he cannot be considered as an in-service Government servant for any purpose much less to apply for a post. Therefore, non-prescription of minimum service in the 2007 Rules amounts to arbitrariness, unreasonableness and colourable exercise of power on the part of the rule-making Authority. Even though prescription of qualification of experience in a rule is a policy decision, the said decision should stand the test of equality clause enshrined in Article 14 of the Constitution of India. Hence, the 2007 Rules suffer from the vice of Article 14 of the Constitution.

9.2 The KPSC has committed a serious error in entertaining the Applications of some of the private Respondents in these Applications who do not fulfill the requisite qualification or prescription found in Clause 10.2 of the Notification in that they are not members of the PWD and they are working in WRD which is a separate department. The KPSC has committed a further error in permitting the private Respondents to appear for the competitive examination and awarding marks to them despite the fact that they were ineligible to apply.

9.3 The classification of vacancies notified in the instant case is contrary to the Note contained in Annexure-II to the Government Order dated 30.3.2002, since the minimum service is not prescribed under the 2007 Rules.

9.4 Respondents No.1 and 2 failed to appreciate that having regard to serial No.2 in the Note in Annexure-II to the Government Order dated 30.3.2002, Creamy Layer Policy applies to the post of Assistant Engineers (Group-B posts in the pay scale of Rs.6000-11200) and, as such, it was not permissible for Respondents No.1 and 2 to reserve any posts for them. The action of Respondents No.1 and 2 in providing reservation of posts in the aforesaid categories in the impugned Notification is violative of Article 16(4) of the Constitution of India and the related Government Orders and, consequently, the action taken by the KPSC in conducting the examination and awarding marks to candidates fixing the cut-off marks under these Categories is to be declared as null and void and unenforceable.

9.5 For these reasons, the learned Counsel prays to declare that the 2007 Rules are ultra vires the Constitution since they do not prescribe minimum service or experience to apply/appear for the competitive examination for the post of AEE for in-service candidates of the PWD; to declare that the private Respondents and other similarly situated persons are ineligible to apply for the posts earmarked for in-service candidates and not entitled to appear for the Personality Test and Selection against the in-service quota and to direct Respondents No.1 and to select the Applicants to the posts in question under in-service category.

9.6 **DECISIONS RELIED UPON BY MR. S.V.NARASIMHAN, LEARNED COUNSEL, WITH RELEVANT PASSAGES**:

(1) (1992) 2 SCC 206 : KARNATAKA PUBLIC SERVICE COMMISSION AND OTHERS v. B.M.VIJAYA SHANKAR AND OTHERS: (para 3):-

> "Such instructions are issued to ensure fairness in the examination. In the fast deteriorating standards of honesty and morality in the society the insistence by the Commission that no attempt should be made of identification of the candidate by writing his roll number anywhere is in the larger public interest. It is well known that the first page of the answer book on which roll number is written is removed and a fictitious code number is provided to rule out any effort of any approach to the examiner. Not that a candidate who has written his roll number would have approached the examiner. He may have committed a bona fide mistake. But that is not material. What was attempted to be achieved by the instruction was to minimize any possibility or chance of any abuse. Larger public interest demands insistence of observance of instruction rather than its breach."

(2) (1990) 3 SCC 655 : DISTRICT COLLECTOR & CHAIRMAN, VIZIANAGARAM SOCIAL WELFARE RESIDENTIAL SCHOOL SOCIETY, VIZIANAGARAM AND ANOTHER: (para 6):

"It must further be realized by all concerned that when an advertisement mentions a particular qualification and an appointment is made in disregard of the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. It amounts to a fraud on public to appoint persons with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No court should be a party to the perpetuation of the fraudulent practice. We are afraid that the Tribunal lost sight of this fact."

(3) AIR 1997 SC 2110 : RAJ KUMAR v. SHAKTI RAJ: (para 16)

"Yet another circumstance is that the Government had not taken out the posts from the purview of the Board but after the examinations were conducted under the 1955 Rules and after the results were announced, it exercised the power under the proviso to para 6 of 1970 notification and the posts were taken out from the purview thereof. Thereafter, the Selection Committee was constituted for selection of the candidates. The entire procedure is also obviously illegal……But in this case the Government have committed glaring illegalities in the procedure to get the candidates for examination under the 1955 Rules, so also in the method of selection and exercise of the power in taking out from the purview of the and also conduct of the selection in accordance with the Rules. Therefore, the principle of estoppel by conduct or acquiescence has no application to the facts in this case. Thus, we consider that the procedure offered under the 1955 Rules adopted by the Government or the Committee as well as the action taken by the Government are not correct in law."

(4) (2003) 9 SCC 193 : STATE THROUGH NARCOTICS CONTROL BUREAU v. KULWANT SINGH: (paras 23 and 24):

"The word 'department' by its very nature, is not capable of a precise definition. Given its ordinary meaning in the context of Governmental functions, it connotes a branch or division of Government administration. For the sake of convenience Government work is divided subject-wise or function-wise, and each such Division may be called a department. The word 'department' is capable of wider meaning as also a narrower meaning. The meaning of the word may differ having regard to the context in which it is used. Rule 2 of the Government of India (Allocation of Business) Rules, 1961 provides:

> 'The business of the Government of India shall be transacted in the ministries, departments, secretariats and offices specified in the First Schedule to these Rules (all of which are hereinafter referred to as 'departments')'.

24. In the absence of any precise definition of the word 'department' it must be given its natural and ordinary meaning, unless the legal context in which the word is used requires a different meaning."

(5) (1998) 1 SCC 727 : STATE OF H.P. v. J.L.SHARMA AND ANOTHER: (para 6):

"…We have also considered the submissions of the learned Counsel for the Respondent that such interpretation of ours would be repugnant to other provisions of the Recruitment Rules but on a thorough scrutiny of the Rules we do not find any repugnancy which can be said to occur on account of the interpretation given by us to column (10) of the Schedule and other columns in the Schedule. We have also carefully gone through the decision of this Court in the case of A.N.SEHGAL and we do not find anything stated therein contrary to what we have indicated in the present case in interpreting the provisions of the Recruitment Rules determining the service conditions of the employees of the Himachal Pradesh Forest Service Class-II. In the aforesaid premises, the impugned judgment and order of the Tribunal is set aside and O.A. No.109/1987 stands dismissed. It is held that the training period of the direct recruits shall be counted for determining the seniority in the service provided of course the said direct recruit successfully completes the training and then is absorbed in Class-II Forest Service. This Appeal is allowed but, in the circumstances, there will be no order as to costs."

(6) (1998) 8 SCC 66 : GOVERNMENT OF A.P. AND OTHERS v. DR.V.NAGARAJU AND OTHERS:

"8. The meaning to be attributed to the expression 'in-service candidates' in Rule 19(2) will have to be understood with reference to Rule 3(2) along with the Explanation thereof. The candidates who have been selected against the quota reserved in Rule 3(2) have got to be in rural service of 2 years on duty or more and have got to be selected in the appropriate subjects leading to their being deputed for post graduate studies. If we read Rule 19 along with Rule 3(2), it becomes clear that an in-service candidate is one who has put in a minimum of two years' service in respective fields in the rural areas and is selected against the reserved quota and not all candidates who have put in two years' rural service and are selected to Post Graduate Studies. Thus, the view taken by the Tribunal on the meaning of "in-service candidates" suffers from a fallacy of reading rules in compartments and not together. The intention of the Government in framing these Rules is clear that it is only those candidates who have been selected against the reserved quota who will be entitled to be deputed and not others, that is why Sub-Rule (2) of Rule 19 provided that if any candidate in Government service other than the in-service candidates is selected for any Post Graduation courses he should not be entitled to any kind of leave including extra-ordinary leave without allowances for prosecuting Post Graduate courses, unless he has put in a minimum of two years of service on duty in the respective service. In Government service, there are two kinds of candidates – those who are selected against reserved quota and those who are selected otherwise than such quota. Those candidates who are covered by Rule 3(2) are those who have been selected against the quota reserved for the in-service candidates while others who are in Government service and are selected are those who fall outside such category. The former will be entitled to extra-ordinary leave or other kinds of leave for prosecuting the Post Graduate studies and the condition thereto is that they should have put in a minimum of two years' service. Therefore, the view taken by the Tribunal that the Respondents will be treated on a par with the other in-service candidates cannot be upheld and the Order made by the Tribunal is set aside."

(7) (2008) 8 SCC 612 : STATE OF WEST BENGAL AND OTHERS v. KAMAL SENGUPTA AND ANOTHER: (para 16):

"With a view to achieve the object underlying the enactment of Article 323-A, i.e., expeditious adjudication of service disputes/complaints, the Tribunals established under the Act have been freed from the shackles of procedure enshrined in CPC but, at the same time, they have been vested with the powers of a civil court in respect of some matters including review of their decisions. This is clearly evinced from the plain language of Section 22 of the Act, which is reproduced below:

"22. Procedure and powers of Tribunals:- (1) A Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and subject to the other provisions of this Act and of any Rules made by the Central Government, the Tribunal shall have power to regulate its own procedure including the fixing of places and times of its inquiry and deciding whether to sit in public or in private.

(2) A Tribunal shall decide every application made to it as expeditiously as possible and ordinarily every application shall be decided on a perusal of documents and written representations and after hearing such oral arguments as may be advanced.

(3) A Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure,

1908 (5 of 1908), while trying a suit, in respect of the following matter, namely;

(a) summoning and imposing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or, documents;

(f) reviewing its decisions;

(g) dismissing a representation for default or deciding it ex-parte;

(h) setting aside any order of dismissal of any representation for default or any order passed by it ex-parte; and

(i) any other matter which may be prescribed by the Central Government.'

A reading of the above reproduced Section makes it clear that even though a Tribunal is not bound by the procedure laid down in C.P.C., it can exercise the powers of a civil court in relation to matters enumerated in clauses (a) to (i) of Sub-Section (3) including the power of reviewing its decision."

10. SUBMISSIONS OF MR. M.NARAYANASWAMY, LEARNED SENIOR COUNSEL FOR SOME OF THE APPLICANTS IN PART-I APPLICATIONS:

10.1 Neither the Notification nor the 2007 Rules define who is an "in-service candidate". It is a broad term which includes even a probationer and also a person who is about to retire. A person who has joined service is equated to a person who has put in more number of years of service. By not prescribing the minimum service, the field is enlarged because a probationer can also apply. In-service candidates are also eligible to apply through open competition quota. Therefore, the 2007 Rules or the Notification should have prescribed some minimum service for in-service candidates.

10.2 The 2007 Rules relate to the PWD and they apply to direct recruitment to the category of posts of AEE in PWD. The Notification dated 17.7.2007 also clearly states that the competitive examination is open only to those working in the PWD. Even the application prescribed to be filled up by candidates, namely Column No.2 also discloses that it is applicable to in-service candidates belonging to PWD. However, contrary to the 2007 Rules, applications from candidates belonging to WRD are considered for selection enlarging the field of consideration for selection. Such enlargement of the field of consideration is clearly arbitrary, unjust, illegal and without the authority of law.

10.3 As per Rule 8 of the 2007 Rules, it becomes clear that the rules and orders in force relating to reservation of posts for Scheduled Castes, Scheduled Tribes, Other Backward Classes and Others is applicable to the selection under the 2007 Rules. Government Order dated 30.3.2002 lays down new comprehensive creamy layer reservation policy which is in force is thus applicable to the selection under the Rules. As far as in-service candidates in Groups A and B cadre of the State Government drawing salary of not less than that of a Group-B Officer (Rs.6000 – 11200) come under the category of creamy layer and are excluded for reservation of seats/posts categorized under II-A, II-B, III-A and III-B. However, as far as those Officers drawing Group-B scale of Rs.5000-11200 are entitled to reservation and will be outside the creamy layer policy laid down under Government Order dated 30.3.2002, provided the advertisement for direct recruitment to posts insist on a prescribed period of service in a lower post or qualification or eligibility. As per Rule-8 of the 2007 Rules, the Applicant who is an in-service candidate and who is entitled to application of Government Order dated 30.3.2002 is deprived of the benefit of reservation provided for OBC category, since no minimum period of service in a lower post or experience in a post is prescribed either under the 2007 Rules or under the Advertisement. As per the intendment of the 2007 Rules, it is but eligibility for prescription of minimum

service or experience in the lower post or any posts for in-service candidates. Thus, non-prescription of such an eligibility, qualification has again enlarged the field of consideration even allowing the probationers or persons with lesser service than the prescribed period are made eligible. Thus treating the probationers, who are un-equals with that of regular in-service candidates as equals, is discriminatory and violative of Article 16(1) of the Constitution of India. Thus prescription of minimum service or experience in the lower post or any other posts for in-service candidates is a must, as otherwise Assistant Engineers who are in the scale of Rs.6000-11200 and other in-service candidates above that scale are deprived of their constitutional right to the reservation policy and the benefit of the Government Order dated 30.3.2002. Here again, invidious discrimination is sought to be made amongst the in-service candidates. By non-prescription of minimum service or experience, the candidates drawing lower scale of pay than the prescribed one are made eligible to have the benefit of reservation policy, whereas in-service candidates in the prescribed scales or above it, are rendered ineligible, again creating a class amongst the in-service candidates. Hence, the 2007 Rules and the Notification to that extent are required to be declared as ultra vires the Constitution.

10.4 Though the provisions of the Government Order dated 30.3.2002 is not made expressly applicable, the Advertisement dated 17.4.2007 clearly earmark for reservation in Category IIA, IIB, IIIA and IIIB in a camaflouged manner. Either the 2007 Rules are discriminatory or the Notification or the classification of reserved vacancies. Hence, the process of selection is required to be re-done according to rules and prescribing necessary OBC Certificates to be produced by the candidates and the prescribed minimum service once again, as otherwise the selection process and appointments thereon will be vitiated and it cannot withstand the test of law.

10.5**DECISION RELIED ON BY THE LEARNED COUNSEL WITH RELEVANT PASSAGE:**

Order dated 10.7.2008 passed by this Tribunal in Application No.1555/2008 (C.S.SHIVAKUMAR SWAMY v. STATE AND OTHERS) and connected cases. Para 9 of the said decision is quoted below:

> "Having considered these submissions, it is our view that the publication of the provisional select list is only an intermediate stage in the entire process of selection and the select list is published for the interested parties to see it and point out what they find to be objectionable. It is no doubt true that the instruction in the Notification of recruitment which appeared to enforce the creamy layer criterion on candidates belonging to certain reserved categories namely those belonging to Categories 2A, 2B, 3A, 3B and GM (Rural) could have been questioned by the private Respondents as soon as the Notifications were published by representing to the concerned Authorities or by approaching this

Tribunal, but it was not done. This does not however prevent them from raising their objections to the creamy layer application while responding to the provisional select list. During hearing, mention was made that the private Respondents were 'estopped' from raising the objection relating to erroneous instructions contained in the recruitment notifications, since they had, up till the time of publication of the provisional select list, gone along with the recruitment, filed their applications, and participated in the competitive examination, etc., without protest. We are clear that this argument has no merit and take support from the observations of the Apex Court in A.C.JOSE v. SIVAN PILLAI AND OTHERS (AIR 1984 SC 921). The issue there was the use of voting machines in elections, and the appellant had not objected to them when he had opportunity earlier. The court observed:

> 'Lastly, it was argued by the Counsel for the Respondents that the appellant would be estopped from challenging the mechanical process because he did not oppose the introduction of this process although he was present in the meeting personally or through his agent. This argument is wholly untenable because when we are considering a constitutional or statutory provision there can be no estoppel against a statute and whether or not the appellant agreed or participated in the meeting which was held before introduction of the voting machines, if such a process is not permissible or authorized by law he cannot be estopped from challenging the same.'

In this instance too, the statutory provisions need to be upheld and the argument of estoppel cannot be allowed to come in its way. The key issue is that of fulfillment of the reservation rules. It is indisputable that as the selecting authority, KPSC, has to conform to the provisions of the Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation of Appointments, etc.) Act, 1990 and the rules thereunder, namely the Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation of Appointment etc.) Rules, 1992 in respect of extent and manner of reservations for the members of the Scheduled Castes, Scheduled Tribes and Other Backward Classes, and to the provisions of the Karnataka Reservation of Appointments or Posts (in the Civil Services of the State) for Rural Candidates Act, 2000, in respect of the horizontal reservation in favour of rural candidates in vacancies earmarked for direct recruitment in each of the categories of General Merit, the Scheduled Castes and Scheduled Tribes and in each of the categories of the Other Backward Classes. In the present recruitment, the Commission was required to follow the Reservation Order dated 30.3.2002. To recall the important provisions, para 3 of the Reservation Order states that 'Candidates belonging to Category II(A), II(B), III(A) and III(B) shall be entitled to reservation in the manner specified in the new comprehensive Creamy Layer Policy'. The Annexure-II to the said Government Order is called "NEW COMPREHENSIVE CREAMY LAYER" and it opens with the statement : "Under Article 15(4) and 16(4) of the Constitution of India, the following persons shall not be eligible for reservation of seats of post categorized under IIA, IIB, IIIA and IIIB but immediately thereafter the Note 1 states 'This rule will not apply to direct recruitment to posts, which insist on a prescribed period of service in a lower post or experience in a post, profession or occupation as a qualification of eligibility'. It is therefore crystal clear that the recruitment in question could only have been made without applying the creamy layer concept since it was a case where a qualifying period of service in a lower post had been prescribed."

11. **SUBMISSIONS OF MR. M.S.PADMARAJAIAH, LEARNED SENIOR COUNSEL FOR MR. P.B.BAJENTRI FOR SOME OF THE APPLICANTS IN PART-II:**

11.1 While Rule 7 and 8 of the 2007 Rules provide for selection on the basis of merit in all the papers of the Competitive Examination, the Note provides otherwise. Therefore, the Note is liable to be ignored. In all competitive examinations, preliminary examinations are conducted first and those who clear the Preliminary Examination are permitted to take the main examination. But the 2007 Rules give room for manipulation. Once the so-called Compulsory Papers in Kannada and English are valued and the papers on General Knowledge and Optional Subjects are also got evaluated, the KPSC would come to know the performance of each of the candidates in both the so-called Compulsory Papers and other papers. The Applicant has been failed in English paper and this has rendered him ineligible for being selected for the post of Assistant Executive Engineer.

11.2 The Supreme Court in the case of T.GOVINDARAJA MUDALIAR v. STATE OF TAMIL NADU (AIR 1973 SC 974) has held that in the case of proof of malafides the fundamental principle is that there should be no circumstances giving rise to a reasonable apprehension that impartial justice is not likely to be meted out. In the instant case, the Applicant has a genuine apprehension that justice is not being meted out for the reason that his mother tongue is Kannada, his first language was Kannada and he has secured very high percentage of marks in Kannada and medium of instruction throughout his career of SSLC was Kannada and still he has been failed in Kannada paper. This has lead to real apprehension that he is not being treated impartially. He also referred to the Judgment of the Supreme Court in the case of PRATAP SINGH v. STATE OF PUNJAB, reported in AIR 1964 SCC 72, that if bad faith would vitiate, the same can be reduced as a reasonable and inescapable inference from the true facts. In the instant case, it is incomprehensible that the Applicant has secured only 27 marks out of 100 in the Kannada paper.

11.3 Note to Rule cannot control or govern the Rules. So also, a Schedule in an Act of Parliament is a mere question of drafting. The Schedule may be used in construing provisions in the body of the Act. It is as much an Act of Legislature as the Act itself and it must be read together with the Act for all purposes of construction. Expression in the Schedule cannot control or prevail against the express enactment and in case of any inconsistency between the Schedule and the enactment, the enactment is to prevail and if any part of the Schedule cannot be made to correspond it must yield to the Act. It is

the legislative intent that is material. Note appended to a statutory provision or subordinate legislature must be read in context of substantive provision and not in derogation thereof.

11.4 The members of the Selection Board or for that matter, any other Selection Committee do not have the jurisdiction to lay down the criteria for selection unless they are authorized specifically in that regard by the Rules made under Article 309. It is basically the function of the Rule-making Authority to provide the basis for selection. The Selection Committee does not even have the inherent jurisdiction to lay down the norms for selection nor can such power be assumed by necessary implication.

11.5 **DECISIONS RELIED UPON BY THE LEARNED SENIOR COUNSEL:**

(1) Order dated 12.9.2003 in Application No.1799/2002 and connected cases

(2) Order dated 18.9.2003 in Application No.3855/2002

(3) Order dated 16.11.2004 passed in Writ Petition No.34064/2004

(4) (1989) 4 SCC 378 (M/s. APHALI PHARMACEUTICALS LTD. v, STATE OF MAHARASHTRA: (para 30)

(5) 2007 AIR SCW 3138 (V.B.PRASAD v. MANAGER, P.M.D.U.P. SCHOOL AND OTHERS) (Head Note-B)

(6) 1995(5) SLR 337 (DR. KRISHNA CHANDRA SAHU AND OTHERS V. STATE OF ORISSA AND OTHERS) (para 3)

(7) (1997) 9 SCC 527 (RAJ KUMAR v. SHAKTI RAJ AND OTHERS)

12. SUBMISSIONS OF MR. UDAY HOLLA, LEARNED ADVOCATE GENERAL ON BEHALF OF THE OFFICIAL RESPONDENTS:

12.1 The prescription of qualification is a policy matter. Once a person is in service, he is considered as an 'in-service candidate'. The Rules cannot be challenged on the ground that they do not prescribe any minimum service. The Rules do not exclude the probation period and once a person is in service he is an in-service candidate and even a probationer is an in-service candidate. If a term is not specifically defined under the Rules or in a Statute, one has to go by the common parlance meaning. The only aspect that has to be considered is that he must be a person who has already entered service; be a probationer or otherwise. As to what should the Rule contain is a matter of policy and courts will not interfere in such matters. In support of this contention, he relied on the following three decisions and the observations of the Supreme Court therein:

(1) AIR 1990 SC 535 (J.RANGASWAMY v. GOVERNMENT OF ANDHRA PRADESH): (para 6):

> "So far as the second plea is concerned, admittedly, the Petitioner does not have, while the Respondent has, a Doctorate in Nuclear Physics. The plea of the Petitioner is that, for efficient discharge of the duties of the post in question, the Diploma in Radiological Physics (as applied in Medicine) from the Bhaba Automic Research Centre (BARC) held by him is more relevant than a Doctorate in Nuclear Physics. It is submitted that in all corresponding posts elsewhere, a Diploma in Radiological Physics is insisted upon and that, even in the State of Andhra Pradesh, all other Physicists working in the line, except the Respondent, have the Diploma of the BARC. It is not for the Court to consider the relevance of qualifications prescribed for various posts. The post in question is that of a Professor and the prescription of a Doctorate as a necessary qualification, therefore, is nothing unusual. Petitioner also stated before us that to the best of his knowledge, there is no Doctorate Course anywhere in India in Radiological Physics, i.e., perhaps why a Doctorate in Nuclear Physics has been prescribed. There is nothing, prima facie, preposterous about this requirement. It is not for us to assess the comparative merits of such Doctorate and the BARC Diploma held by the Petitioner and decide or direct what should be the qualification prescribed for the post in question. It will be open to the Petitioner, if so advised, to move the College, University, Government, Indian Medical Council or other appropriate authorities for a review of the prescribed qualifications and we hope that, if a Doctorate in Nuclear Physics is so absolutely irrelevant for the post in question as is sought to be made out by the Petitioner. The Authorities concerned will take expeditious steps to revise the necessary qualifications needed for the post appropriately. But, on the qualifications as they stand today, the Petitioner is not eligible to the post and cannot legitimately complain against his non-selection."

(2) AIR 2000 SC 3457 : PUNJAB UNIVERSITY v. NARINDER KUMAR: (para 5,6 and 8)

> "A plea was taken by non-selected candidates that if the post of a Lecturer in Gandhian Studies is given to a person who has obtained an M.A. Degree in other subjects, the opportunities available to those like him who have a specialization in Gandhian Studies from M.A. level onwards. Get reduced; and this would discourage people from taking a specialization course in Gandhian Studies at the M.A. level. This argument, however, addresses itself on the policy relating to prescribing qualifications for the various posts. Such a policy has to be formulated by the University in accordance with the Norms laid down by the University Grants Commission or any other expert body that may have been specified under the relevant statutes. Court cannot examine such a policy or reframe it."

(3) AIR 1993 SC 2285 : V.K.SOOD v. SECRETARY, CIVIL AVIATION: (para 7):

> "It is not contended that several persons whose names have been copiously mentioned in the Appeal were not qualified to hold the post of Examiner and they were not capable even to set the test papers to the Examinees nor capable to evaluate the papers. We are not called upon to decide the legality of their appointments nor their credentials in this Appeal as that question does not arise nor are they before the Court. It is next contended

by Mr. Yogeshwar Prasad, the learned Senior Counsel that on account of inefficiency in the Pilots' Operational Capability repeatedly air accidents have been occurring endangering the lives of innocent travellers and this Court should regulate the prescription of higher qualifications and strict standards to the Navigators or to the Pilots be insisted on. We are afraid that we cannot enter into nor undertake the responsibility in that behalf. It is for the expert body and this Court does not have the assistance of experts. Moreover, it is for the rule-making authority or for the Legislature to regulate the method of recruitment, prescribed qualifications etc. It is open to the President or the Authorized person to undertake such exercise and that necessary tests should be conducted by UPSC before giving the certificates to them. This is not the province of the court to trench into and prescribe qualifications in particular when the matters are of the technical nature. It is stated in the Counter-Affidavit that due to advancement of Technology of Flight Aviations the Navigators are no longer required and, therefore, they are not coming in large number. Despite the repeated advertisements no suitable candidate is coming forward. We do not go into that aspect also and it is not necessary for the purpose of this case. Suffice to state that pursuant to another advertisement made in July, 1992, the Appellant is stated to have admittedly applied for and appeared before the UPSC for selection and that he is awaiting the result thereof. Under these circumstances, we do not find any substance in this Appeal. The Appeal is, accordingly, dismissed. No costs.

12.2 Merely because some service was prescribed in the earlier Notification the same qualification need not be followed in the subsequent Notification. It is permissible for the Policy Makers to change their policy. Change of policy also is within the domain of the Policy makers and it need not be justified. These matters are outside the province of the court and while Administrator is better qualified to decide these matters, courts have proved to be wrong. Courts cannot annul or change the policy because earlier policy was better and was suited for prevailing conditions. It is only with a view to give incentive to in-service candidates, the service or maximum age has not been prescribed in their case. In support of this proposition, he referred to the following decisions of the Supreme Court:

(1) AIR 2002 SC 350 - BALCO EMPLOYEES' UNION (R) V. UNION OF INDIA: (paras 44 to 46)

(2) 2007 (8) SCC 418 - DHAMPUR SUGAR {KASHIPUR} LIMITED v. STATE OF UTTARCHAL AND OTHERS:

(3) AIR 1980 SC 379 - TAMIL NADU EDUCATION DEPARTMENT MINISTERIAL & GENERAL SUBORDINATE SERVICES ASSOCIATION v. STATE OF TAMIL NADU:

12.3 The classification of vacancies is not contrary to Government Order dated 30.3.2002 and the same stands to reason.

12.4 Note-I to the 2007 Rules does not suffer from any infirmity and it is not open to courts to interfere with the same and it is beyond the pale of scrutiny for the courts of law. In this regard, he referred to the decision reported in ILR 1991 KAR 3102ERAPPA v. STATE OF KARNATAKA to contend that economic legislation cannot be struck down on the ground of crudity and equity. The Rule could have been better worded but it cannot be struck down on the ground that it could have been better evolved. There could be a better policy and there could be evolution of a better Rule but that is not a ground on which the Policy could be interferred with.

12.5 Persons serving in the Irrigation Department are also entitled to be considered as in-service candidate for recruitment to the posts of AEEs. There is no bifurcation of Departments. There are certificates issued by the competent officers that a particular person forms part of PWD or WRD and such certificates are conclusive. In this regard he relied upon the decision of the Supreme Court reported in 1995(3) SCC 486 (MADAN LAL v. STATE OF JAMMU & KASHMIR). As of now, he submitted, there is no bifurcation and all in-service candidates are working in the PWD. In this regard, he referred to the letter written by the KPSC and the reply given by the PWD. As long as there is no bifurcation and as long as employees of WRD are a part of PWD, the Engineers of the WRD are eligible to apply.

12.6 With regard to the Schedule to the 2007 Rules and the Note, they are part of the Rules. Rule 7 of the 2007 Rules itself specifies that Competitive Examination shall comprises of maximum marks for Personality Test. It does not say in what manner it has to be construed. All that it prescribes is exemption. In support of his contention that Schedule and the Note form part of the Rules, the learned Advocate General referred to the decision reported in 1975 All India Services Law Journal 619 (TARA SINGH AND OTHERS v. STATE OF RAJASTHAN AND OTHERS (SC). Therefore, he contends that the contention that the Rules of 2007 are contrary cannot be sustained. The Schedule and the Notes are part of the Rules and the Courts need not fill in the gap where the Rules are silent. The Schedule and the Note are an integral part of the Rules and they have to be read along with the Rules. In support of this contention, he relied on the Full Bench decision of the High Court of Andhra Pradesh, reported in AIR 2001 AP 335 (APSRTC v. STATE TRANSPORT APPELLATE

TRIBUNAL) and referred to para 29, 31 and 32 of the said decision. He argued that Note has to be read in conjunction, if there are any gaps as held by the Supreme Court in AIR 2007 SCW 3138 (V.B.PRASAD v. MANAGER, P.M.D.U.P. SCHOOL AND OTHERS). He also drew our attention to the decision of the Supreme Court reported in AIR 1959 SC 928 (COMMISSIONER OF INCOME TAX, WEST BENGAL v. CALCUTTA NATIONAL BANK).

12.7 Regarding the difference between the Kannada and English Version of the Act, the English Version is authoritative. In support of this contention, he referred to Clause (iii) of Article 348 of the Constitution.

12.8 The KPSC is competent to look into the Certificates issued by the Tahsildar and in support of this argument he relied on the decision reported in 1987 LAB.IC.120 (TILESHWAR RAM v. STATE OF UTTAR PRADESH) and referred to the following observations therein:

> "The Policy underlying the establishment of the Public Service Commission is, amongst others, to ensure selection of persons who are entitled to the same on merits and also of those who could be held to be entitled to the benefit of reservation under Article 16(4) where the State Government is required to consult the Public Service Commission in the matter of selection of candidates, the selection has to be made by the Commission. It is the Commission which will find out the persons who may be entitled to be given appointments. The Government has to fill the posts by appointing those who are selected by the Public Service Commission. Over the decision of the Public Service Commission that a particular candidate is of backward class, the State Government does not exercise the power of an appellate authority."

Therefore, he prays for dismissal of the Applications.

13. **SUBMISSIONS OF MR. H.S.JOIS, LEARNED SENIOR COUNSEL APPEARING FOR SOME OF THE PRIVATE RESPONDENTS**:

The Applicants are estopped from challenging the Notification and the Rules of 2007, once having participated in the selection process. If the Applicants were aggrieved by the Notification and the 2007 Rules they ought to have challenged the same before taking part in the selection process. The Applicants having found that they have secured less marks in the selection list than the private Respondents have filed these Applications challenging the Notification and the 2007 Rules as an after-thought knowing fully that they are not likely to be selected.

14. SUBMISSIONS OF MR. P.S.RAJAGOPAL, LEARNED SENIOR COUNSEL APPEARING FOR MR. M.R.SHAILENDRA, ADVOCATE FOR APPLICANT IN APPLICATION NO.1753/2008 AND RESPONDENT NO.8 IN APPLICATIONS NO.1400/2008 AND NO.3457/2008 :

The Governor of Karnataka in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India has made the Rules called the Karnataka Public Works Engineering Department Service (Recruitment) Rules, 1988 (for short, "1988 PWD Recruitment Rules"). The 1988 PWD Recruitment Rules were notified in the Official Gazette and came into force on 17.8.1989. He referred to Rule 2, which reads thus:

> "Method of Recruitment and minimum qualification etc:- In respect of each category of posts specified in Column (2) of the Schedule below, the method of recruitment and the minimum qualification, if any, shall be as specified in the corresponding entries in columns (3) and (4) thereof"

The learned Senior Counsel also referred to Schedule to the said Rules in so far as it pertains to the posts of AEEs, which is quoted below:

Sl. No.	Category Of post	Method of Recruitment	Minimum qualification
5.	Assistant Executive Engineer Division-I	Seventy five per cent by promotion from the cadre of Assistant Engineers and twenty percent by direct recruitment in accordance with the Karnataka Public Works Engineering Department Service (Recruitment of Assistant Executive Engineers Division-I by Competitive Examination Rules, 1973 Five percent by direct recruitment from among persons (in service) belonging to Karnataka Public Works Engineering Department who possess the qualifications prescribed for direct recruitment in accordance with the Karnataka Public Works Engineering Department Service (Recruitment of Assistant Executive Engineers Division-I by competitive Examination) Rules, 1973.	For promotion: (i) Must be holder of a degree in Civil/Mechanical Engineering as the case may be. (ii) Must have put in a service of not less than five years as Assistant Engineer. Provided that if officers who have put in a minimum service of five years are not available, an officer who has put in three years of service may be considered for promotion.

The learned Counsel submits that a reading of the above Rule goes to show that qualification for recruitment from among in-service candidates is as stipulated for direct recruitment. Additional qualification is that they should be 'in service' meaning the prescribed period of service is minimum of 1 day or experience of at least 1 day. The phrase 'in service' is itself a prescription. 'In accordance with' is more referable to procedure and not qualifications. There is no challenge to Recruitment Rules.

14.1 He also argued that the State of Karnataka in exercise of powers conferred by Section 3 read with Section 8 of the Karnataka State Civil Services Act, 1978 (Act 14/1990) made the 2007 Rules. The 2007 Rules replaced the 1973 Rules. Rules 4 and 5 read as under:

14.2 The learned Counsel took us through Rules 4 and 5 of the 2007 Rules, which read thus:

> "4. Method of Recruitment : Recruitment under these Rules shall be made on the basis of the results of competitive examinations conducted by the Commission. The competitive examination shall be held on such dates and at such place as may be notified by the Commission from time to time.
>
> 5. Age and academic qualification of candidates : Every person who has attained the age of 21 years but not attained 40 years in the case of candidates belonging to the Scheduled Castes/Scheduled Tribes (Cat-I:38 years in case of candidates belonging to Category 2A/2B/3A/3B; 35 years in case of any other candidates as on the last date fixed for receipt of applications shall be eligible to apply for recruitment under these rules.
>
> Provided that there is no maximum age limit for candidates competing under in-service quota.
>
> Candidates must be holder of a Degree in Civil Engineering or Construction Technology & Management granted by a University established by Law in India and from an Institute approved by the AICTE, or a Diploma Certificate from the Institute of Engineers (India) that he has passed Parts A and B of the Associate Membership Examination of the Institution of Engineers (India).

14.3 He submitted that having regard to the phrase in the 2007 Rules 'who possesses the qualifications prescribed for direct recruitment' the Rules have not prescribed any additional qualification above what is prescribed for direct recruitment. There is no challenge to the 1988 Rules and, hence, he contends, on this ground alone the Applications are liable to be dismissed. Rule 3 makes the Rules applicable to all direct recruitments to the posts of Assistant Executive Engineers. Rule 9 speaks of list of selected candidates. Rule 11 speaks of appointment of candidates and Rule 13 speaks of application of General Recruitment Rules. What emerges from the above Rules is that a single select list has to be prepared both for open market candidates and in-service candidates under Rule 9 and appointments shall be made under Rule 11 in the order of merit as found in the select list.

14.4 The learned Counsel submits that Section 4 of the 1990 Act mandates that after the appointed day while making appointments to any office in a civil service of the post of Karnataka or to a civil post under the State of Karnataka appointments or posts shall be reserved for the members of Scheduled Castes, Scheduled Tribes and Other Backward Classes to such extent and in such manner as may be specified from time to time in the order made by the Government under Clause (4) of Article 16 of the Constitution of India. Section 4(4) declares that all appointments made in contravention of the provisions of this Section shall be voidable. Therefore, while making appointments to any civil post or office in a civil service if prescribed percentage of reservation is not made in favour of OBCs the appointments made will be voidable. Entire rule of reservation has to be understood in the light of this provision.

14.5 The Government vide Order dated 30.3.2002 has introduced a comprehensive creamy layer policy. Note-I states that 'This Rule will not apply to direct recruitment to posts which insist on a prescribed period of service in a lower post or experience in a post, profession or occupation as a qualification or eligibility." This Order is issued under Rule 16(4) of the Constitution of India and is traceable to Section 4 of the Reservation Act. Note-I mentioned above does not prescribe a specific period. It does not mean that the rule cannot be applied where period is not specified. The phrase 'prescribed period' could be anything 1 day to infinity. A candidate becomes 'in service' the moment he enters service. All persons who are not out of service are in service. Note-I having been inserted for the benefit of in-service candidates it has to be read in a manner which would effectuate the purpose and any interpretation which would scuttle the object has to be eschewed. It is settled law that a Court must construe a provision to make it workable rather than to make it unworkable. While interpreting a statutory provision no word should be added or substracted unless it is impossible to make the rule workable without such addition or substraction. No part of the rule should be made otiose.

14.6 In respect of Applications No.1400/2008 and 3437/2008, Mr. Rajagopal submitted that all the Applicants who have challenged the Competitive Examinations Rules are those who applied and participated in the selection process without demur. After participation they cannot question. The challenge has been raised after declaration of written test results and after the applicants coming to know that on the basis of marks secured in the competitive examination they have no chance of success. In support of this contention, he referred to the following decisions:

(1) DANANJAY MALICK v. STATE OF UTTARANCHAL – (2008) 4 SCC 71 (Paras 7, 8 and 9),

> "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.

8. In MADAN LAL v. STATE OF JAMMU & KASHMIR this Court pointed out that when the Petitioners appeared at the oral interview conducted by members concerned of the Commission who interviewed the Petitioners as well as the contesting Respondents concerned, the Petitioners took a chance to get themselves selected at the oral interview. Therefore, only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview they have filed Writ Petitions. This Court further pointed out that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the selection committee was not properly constituted.

9. In the present case, as already pointed out, the Respondent-Writ Petitioners herein participated in the selection process without any demur; they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance with the Rules they could have challenged the advertisement and selection process without participating in the selection process. This has not been done."

(2) K.H.SIRAJ v. HIGH COURT OF KERALA – (2006) 6 SCC 395 (paras 72, 73, 74),

"72. The Appellant-Petitioners, in any event, are not entitled to any relief under Article 226 of the Constitution of India for more reasons than one. They had participated in the written test and in the oral test without raising any objection. They knew well from the High Court's Notification that minimum marks had to be secured both in the written test and in the oral test. They were also aware of the High Court decision on the judicial side in REMANY v. HIGH COURT OF KERALA. This case deals with prescription of minimum qualifying marks of 30% for viva voce test. C.S.RAJAN, J., in the above judgment observed as under: (KLT pp. 441-42, para 5).

> 'On the basis of the aggregate marks in both the tests, the selection has to be made. In ICAR case also the relevant Rules did not enable the selection board to prescribe minimum qualifying marks to be obtained by the candidate at the viva voce test. In DELHI JUDICIAL SERVICE case as also UMESH CHANDRA, the Rules did not empower the Committee to exclude candidates securing less than 600 marks in the aggregate. Therefore, in all these cases, the Supreme Court came to the conclusion that prescription of separate minimum marks for viva voce test is bad in law because under the Rules, no minimum qualifying marks were prescribed.'

The High Court also relied in P.K.RAMACHANDRA IYER case and UMESH CHANDRA case.

73. The Appellant-Petitioners having participated in the interview in this background, it is open to

the Appellant-Petitioners to turn round thereafter when they failed at the interview and contend that the provision of a minimum marks for the interview was not proper. It was so held by this Court in para 9 of MADAL LAL v. STATE OF JAMMU AND KASHMIR as under: (SCC p.493):

> '9. Before dealing with this contention, we must keep in view the salient fact that the Petitioners as well as contesting successful candidates being Respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage, there is no dispute between the parties. The Petitioners also appeared at the oral interview conducted by the members concerned of the Commission who interviewed the Petitioners as well as the contesting Respondents concerned. Thus the Petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this Petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the selection committee was not properly constituted. In OM PRAKASH SHUKLA v. AKHILESH KUMAR SHUKLA, it has been clearly laid down by a Bench of three learned Judges of this Court that when the Petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.'

74. Therefore, the Writ Petition filed by the Appellant-Petitioners should be dismissed on the ground of estoppel is correct in view of the above ruling of this Court. The decision of the High Court holding to the contrary is per incuriam without reference to the aforesaid decisions."

(3) UNIVERSITY OF COCHIN v. N.S.KANJOONJAMMA – (1997) 4 SCC 426 (para 4).

> "It is not in dispute that Rules 14 to 17-A having specifically be adopted by the aforesaid Resolutions of the Syndicate and approved by the University, the power of the University to adopt the Rules has not been challenged. The aforesaid Resolutions do indicate that the University has properly made Rules 14 to 17A applicable in relation to the recruitment of non-teaching staff to the University in certain posts, viz., Class-I, Class-III and Class-IV. In furtherance thereof, the Vice-Chancellor was authorized by the Syndicate to advertise the posts and constitute a selection committee for recruitment of the candidates. In furtherance thereof, a Committee was constituted. Advertisement came to be made. It is seen that when the General Rules have been made applicable there is no necessity by the University to make a special reservation rule for special recruitment. Therefore, the non-mention of the special recruitment in the resolution is of little consequence as seen, the Syndicate adopted the Rules in relation to the non-teaching staff of the University. As a consequence, the Advertisement came to be made for special recruitment of the Scheduled Castes and Scheduled Tribes to the posts reserved for them. In fact, the first Respondent also had applied for and sought selection but remained unsuccessful. Having participated

> in the selection, she is estopped to challenge the correctness of the procedure. That apart, we have already held that procedure was correctly followed and, therefore, The omission to mention in the advertisement that it was a special recruitment is of no consequence. The further finding of the High Court relates to Proviso 1 to Rule 4 which provides that when duly qualified candidates are available, the appointment shall be made of them. In other words, if duly qualified candidates are not available, then advertisement could be made for selection. That rule is applicable to the general recruitment. But with reference to the special recruitment of the candidates belonging to the Scheduled Castes and Scheduled Tribes. Rules 12 to 17-A stand attracted. In addition, as seen earlier, the advertisement came to be made as early as on 22.4.1982 by which time the Resolution of the Syndicate was not adopted, the same having been adopted on 7.3.1982. So, Rule 4 is inapplicable to the special recruitment advertised on 1.10.1981. Therefore, the later Resolution applying Rule 4 has no retrospective effect. It is contended by the learned counsel for Respondent 1 that Respondents 3 and 4 have left the jobs and so there is no need to disturb the appointment of the first Respondent. As they are said to be on foreign service, they are entitled to join back on their posts. Thus considered, the High Court was clearly in error in allowing the Writ Petitions."

14.7 He submitted that even though Mr. G.Kumar, Applicant in Application No.4600/2007 filed an Application earlier that was also after submitting application to the KPSC and without challenging the Rules. Therefore, he is deemed to have given up challenge to the Rule by operation of 'constructive res judicata'. All prayers regarding the validity of the Rules, Notification and Creamy Layer were available to be made when the said Mr. Kumar approached this Tribunal in A.4600/2007. But he did not do so. Whatever prayers he had made were also withdrawn by him except prayer to consider his representation. Therefore, the principle of 'Constructive res judicata' operates and withdrawal is dismissal on merits albeit on a concession made by the Applicant. In this regard, the learned Counsel relied on the following decisions:

(1) FORWARD CONSTRUCTION COMPANY v. PRABHATH MANDAL (R) - (1986) 1 SCC 100 (paras 19, 20),

> "19. The second question for consideration is whether the present Writ Petition is barred by res judicata. This plea has been negatived by the High Court for two reasons: (1) That in the earlier Writ Petition the validity of the permission granted under Rule 4 (a) (i) of the Development Control Rules was not in issue; and (2) that the earlier Writ Petition filed by Sri Thakkar was not a bonafide one inasmuch as he was put up by some disgruntled builder, namely M/s. Western Builders.

20. So far as the first reason is concerned, the High Court, in our opinion, was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by it absence in the earlier Petition. Explanation IV to Section 11 CPC

provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force."

(2) MURTUJA KHAN v. MUNICIPAL CORPORATION – (1975) 16 GLR 896 (para 22)

> "There is still one more ground on which the challenge to the Constitutional validity of the relevant provisions of the Act at the instance of the Petitioner is barred in this Writ Petition. The Petitioner seeks the writ of mandamus which is not a writ of course or a writ of right, but is, as a rule, the matter for the discretion of the court. Upon a prerogative writ of that nature there may arise many matters of discretion which may induce the court to withhold the grant of it – matters connected with delay or possibly with the conduct of the parties (See BOMBAY MUNICIPALITY v. ADVANCE BUILDERS, AIR 1972 SC 793 at page 800). Now, as stated earlier, the Petitioner had earlier filed Special Civil Application No.425/1966 in this Court. It is not in dispute that the validity of the Act as a whole was, inter alia, challenged in the said Writ Application. On the issue of the Rule, the Respondents appeared and filed Affidavits and contested the Petition on merits. The Petition was ultimately withdrawn and the Court which allowed the withdrawal made a speaking order. The order was in the following terms:-
>
> > 'Mr. K.J.Vakharia, learned Advocate appearing on behalf of the Petitioner, states that the only point raised in this petition relates to the validity of the provisions of the Bombay Town Planning Act, 1954 and since that point is already covered by two decisions of the Supreme Court, nothing survives in the petition. He, therefore, withdraws the Petition and the Petition accordingly stands withdrawn. There will be no order as to costs of the petition.'

The consequence of the withdrawal of the said writ petition in the eye of law was that it stood dismissed on merits albeit on a concession made by or on behalf of the Petitioner to the effect that the question of the Constitutional validity of the Act was no longer open in view of the decisions of the Supreme Court. In other words, the effect of the dismissal by withdrawal was that the challenge of the Petitioner to the actions of the Respondents under the Act on the ground that the said Act itself was ultra vires stood concluded by an adverse decision of this Court based on his own concession. It is

not the case of the Petitioner as set out in the petition that the concession was wrongly made by his counsel. Indeed such a contention could not have been raised in the view that we have taken as regards the wide ambit of the pronouncement of the Supreme Court and it was, therefore, rightly not raised. In these circumstances, the Petitioner's complaint in the present petition directed against the actions of the respondents under the same statute and based on identical grounds is barred by the general principles of res judicata or at least by principles underlying the doctrine of res judicata, namely that there should be finality in litigation and that a person should not be vexed twice over in respect of the same cause or matter. In any case, the petitioner having himself abandoned without reservation the previous writ proceeding initiated in this very Court with eyes open and after due deliberation, he cannot now be allowed to pick up the thread after a lapse of five years and to start a fresh proceeding to reagitate the very point which he expressly gave up in the previous proceeding. He had set the machinery of law in motion but solemnly brought it to an abrupt halt, indeed forsaken it in midstream, in proclaimed obeisance to the decisions of the Supreme Court. He cannot be permitted to resume it now after a number of years and be heard to say that despite his earlier proclamation, he still wishes to persist in raising the same point in this litigation. Courts moved upon a prerogative writ are not the forum to log a dead horse or to resuscitate a ghost already laid to rest. The doctrine of abandonment has been expressly invoked and recognized in TRILOKCHAND v. MOTICHAND v. H.B.MUNSHI, AIR 1970 SC 898 in a proceeding under Art.32 and relief was refused to the petitioner in that case (although the point that he was arguing was covered in his favour by a Supreme Court decision given in a different case) on the ground that after an adverse decision of the High Court in his Writ Petition under Art.226 he had not moved the Supreme Court by way of appeal, but had chosen to move the Supreme Court directly after a number of years only when 'another person more adventurous than him in his turn get a favourable decision' meanwhile on a point not urged by the Petitioner in his own petition before High Court (see the decision of Hidayatullah, C.J. at page 902 and 903). The principle on which the Supreme Court acted in that case will apply oppositely and with greater force to a situation such as that which obtains in the present case. We are, therefore, of the opinion that even on that ground the petitioner's challenge to the constitutional validity of the Act must fail.'

14.8 Mr. Rajagopal also contended that no mandamus can be issued by this Tribunal to prescribe a particular qualification and prescription of qualification is not the function of the Court and that Recruitment commenced under a particular rule will have to be allowed to go on in terms of that rule. In support of these contentions, the learned Counsel referred to the following decisions:

(1) V.K.SOOD v. SECRETARY, CIVIL AVIATION – 1993 Supp.(3) SCC 9 (paras 3, 6 and 7)

> "3. It is not in dispute that these rules have been made by the President exercising the power under Proviso to Article 309 of the Constitution which reads thus:
>
> > '309. Recruitment and conditions of service of persons serving the Union or a State : Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons aggrieved, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regarding the recruitment, and the conditions of service of persons appointed to such service and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.'

It would thus be clear that the rules made by the President or authorized person under proviso to Article 309 are subject to any law made by the Parliament and the power includes rules regulating the recruitment and the conditions of service or post. They are statutory and legislative in character. The statutory rules thus made are subject to the law that may be made by the Parliament.

4. In B.S.VADERA v. UNION OF INDIA, this Court held that the rules made under the proviso to Article 309 of the Constitution shall have effect subject to the provisions of the Act, i.e., if the appropriate Legislature has passed an Act. In its absence the rules made by the President or by such person as he may direct are to have full effect.

5. In GENERAL MANAGER, S.RLY. v. RANGACHARI, another Constitution Bench held that equality of opportunity need not be confused with absolute equality as such. What is guaranteed is the equality of opportunity and nothing more. Article 16(1) or 16(2) does not prohibit the prescription of reasonable rules for selection in any employment or appointment to any office or post. Any provision as to the qualifications for the employment or appointment to an office or post reasonably fixed and applicable to all citizens would certainly be consistent with the doctrine of the equality of opportunity. In STATE OF MYSORE v. P.NARSING RAO, this Court held that the provisions of Article 14 or Article 16 do not exclude the laying down of selective tests nor do they preclude the Government from

laying down qualifications for the post in question. Such qualifications need not be only technical but they can also be general qualifications relating to the suitability of the candidate for such service as such. The same was the view in another Constitution Bench decision reported in STATE OF J & K. TRILOKH NATH KHOSA. In STATE OF ORISSA v. N.N.SWAMY, this Court held that the eligibility must not be confused with the suitability of the candidate for appointment."

(2) SANJAY KUMAR MANJUL v. CHAIRMAN, UPSC – (2006) 8 SCC 42 (paras 25 to 27):

> "25.The statutory authority is entitled to frame the statutory rules laying down the terms and conditions of service as also the qualifications essential for holding a particular post. It is only the authority concerned which can take ultimate decision therefore.

26. The jurisdiction of the superior courts, it is a trite law, would be to interpret the rule and not to supplant or supplement the same.

27. It is well settled that the superior courts while exercising their jurisdiction under Article 226 or 32 of the Constitution of India ordinarily do not direct an employer to prescribe a qualification for holding a particular post."

(3) P.U.JOSHI v. ACCOUNTANT GENERAL – (2003) 2 SCC 632 (para 10):

> "We have carefully considered the submissions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/ abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of policy and is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the statutory tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/ substraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing the existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service."

(4) COMMISSIONER, CORPORATION OF MADRAS v. MADRAS CORPORATION TEACHERS MANDRAM - (1997) 1 SCC 253 (paras 3 and 4).

> "3. Feeling aggrieved against this order, this appeal has been filed. Shri R.Mohan, learned Senior Counsel for the Corporation, has contended that the creation of the post and prescription of qualification are the legal policy of the Government or the executive policy of the Government. The Tribunal cannot give the direction to create a post or to prescribe the experience or may be required as an incumbent to hold the post. We find that there is force in the contention.
>
> 4. Learned Counsel for the Respondents, in fairness, was unable to meet the contention but he sought to sustain this order on the ground that appointment by transfer affects in-service candidates. We cannot go into it because it is not the subject-matter in this case. Under these circumstances, as stated earlier, the question is whether the Tribunal can give direction to create a post or to prescribe the minimum qualification for the post. It is a well-settled legal position that it is the legal or executive policy of the Government to create a post or to prescribe the qualifications for the post. The court or tribunal is devoid of power to give such direction. The impugned direction, therefore, is clearly illegal.

14.9 The learned Counsel also submitted that interpretation which makes the rule workable has to be preferred. A result flowing from a statute is never an evil and it must be given effect to whether a court likes it or not. He also contended that courts should avoid creating a causus omissus. In support of these propositions, the learned Counsel referred to the following case laws:

(1) DR. N.C.SINGHAL v. UNION OF INDIA – (1980) 3 SCC 29 (para 16):

> "Promotion of Respondents 4 to 24 was questioned on the ground that each of them was ineligible for promotion to super-time grade–II on the date on which each of them was promoted in view of the provision contained in Rule 8(3). Rule 8(3) has been extracted herein before. The contention is that since the initial constitution of service on September 9, 1966, any future promotion to Super-time Grade-II from departmental candidates could be from amongst those who qualify for the same as provided for in Rule 8(3). Apart from academic qualification the experience qualification prescribed is that the General Duty Officers Grade-I and Specialists' Grade Officers should have put in 10 years and 8 years of service, respectively, in that category. Appellant contends that service in the category means service in that category which is constituted under the 1966 Amendment Rules. Rule 2(c) defines category to mean a group of posts specified in column 2 of the Table under Rule 4. Rule 4 provides for classification, category and scales of pay. It provides that there shall be four categories in the service and each category shall consist of the grade specified in column 2 of the Table appended to the Rules. The four categories are: first category which includes super-time Grade-I and super-time Grade-II posts, Category-II is Specialists' Grade posts, Category-II comprises General Duty Officers Grade-I and Category-IV includes General Duty Officers Grade-II. It was contended that the service to be rendered for the qualifying period must be in the category and, therefore, a General Duty Officer Grade-I can only become eligible for promotion after

he renders 10 years of service in that category which came into existence on September 9, 1966, and this would apply mutatis mutandis to the Specialists' Grade Officers who must put in 8 years of service in the category which came into existence on September 9, 1966. If this contention were to prevail, apart from anything else, Appellant himself would not have been qualified for promotion to super-time Grade-II in February, 1971 from which date he claims as being eligible for promotion to super-time Grade-II because he had not put in 8 years of service in the category of Specialists' Grade Officers formed on September 9, 1966. That apart, it is impossible to overlook the history of the service. The Rules were initially framed in 1963. At that time the service was sought to be classified in five categories styled category "A" to Category "E". Expression 'category' in 1963 Rules was defined to mean a group of posts carrying the same scale of pay. Another salient feature of which notice should be taken is that save and except upward revision in scale, category-I under the 1966 Amendment Rules includes Categories "A" and "B" under 1963 Rules……It is a well recognized cannon of construction that the construction which makes the rule otiose or unworkable should be avoided where two constructions are possible and the court should lean in favour of the construction which would make the Rule workable and further the purpose for which the Rule is intended. …"

(2) THE MARTIN BRUN LTD v. THE CORPORATION OF CALCUTTA - AIR 1966 SC 529, (para 14):

"We can now deal with the reasoning on which the High Court in the present case justified the order of remand. It realized that by making the order it was depriving the appellant of one of the chances to object to the valuation, namely the chance under S.139, but it felt that by upholding that right of the appellant it would be depriving the Corporation of its rates wholly as the time limit prescribed by S.131(2) (b) had expired. It thought that it was faced with two evils and that it would be choosing the lesser of the two, if it allowed the Corporation a chance to collect the rates. With great respect, we find this line of reasoning altogether unsupportable. A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the result or not. When the High Court found that S.131(2)(b) had been attracted to the case, it had no power to set that provision at naught."

(3) UCO BANK v. RAJINDER LAL CAPOOR - (2008) 5 SCC 237 (paras 26 to 28):

"26. It is now a well-settled principle of interpretation of statutes that the court must give effect to the purport and object of the Act. Rule of purposive construction should, subject of course to the applicability of the other principles of interpretation be made applicable in a case of this nature.

27. In NEW INDIA ASSURANCE CO. LTD. v. NUSLI NEVILLE WADIA, this Court held (SCC pp.296-97 paras 51-54):

'51(50). …With a view to read the provisions of the Act in a proper and effective manner, we are of the opinion that liberal interpretation, if given, may give rise to an anomaly or absurdity which must be availed. So as to enable a superior court to interpret a statute in

a reasonable manner, the court must place itself in the chair of a reasonable legislature/ author. So done, the rules of purposive constructions have to be resorted to which would require the construction of the Act in such a manner so as to see that the object of the Act is fulfilled, which in turn would lead to beneficiary under the statutory scheme to fulfill its constitutional obligation as held by the Court inter alia in ASHOKA MARKETING LTD.

52(51). Black in his exhaustive work on 'Purposive Construction' explains various meanings attributed to the term 'purpose'. It would be in the fitness of discussion to refer to Purposive Construction in Black's words:

'Hurt and Sachs also appear to treat 'purpose' as a subjective concept. I say 'appear' because, although Hart and Sachs claim that the interpreter should imagine himself or herself in the legislator's shoes, they introduce two elements of objectivity. First, the interpreter should assume that the legislature is composed of reasonable people seeking to achieve reasonable goals in a reasonable manner; and second, the interpreter should accept the non-rebuttable presumption that members of the legislative body ought to fulfil their constitutional duties in good faith. This formulation allows the interpreter to inquire not into the subjective intent of the author, but rather the intent the author would have had; had he or she acted reasonably.

(ABARON BARAK, PURPOSIVE INTERPRETATION IN LAW, (2007) AT P.87).

54(53). The provisions of the Act and the Rules in this case, are thus required to be construed in the light of the action of the State as envisaged under Article 14 of the Constitution of India. With a view to give effect thereto, the doctrine of purposive construction may have to be taken recourse to. (See ORIENTAL INSURANCE CO. LTD v. BRIJ MOHAN).

28. All the regulations must be given a harmonious interpretation. A court of law should not presume a casus omissus but if there is any, it shall not supply the same. If two or more provisions of a state appear to carry different meanings, a construction which would give effect to all of them should be preferred (See: GUJARAT URJA VIKASH NIGAM LTD v. EXAR POWER LIMITED."

(4) NILANAKHYA BYSACK v. SHYAM SUNDER HAIDAR – AIR 1953 SC 148 (para 9)

"…It is not competent to any court to proceed upon the assumption that the Legislature has made a mistake, the court must proceed on the footing that the Legislature intended what it has saidt. Even if there is some defect in the phraseology used by the Legislature, the Court cannot, as pointed out in CRAWFORD v. SPOONER, 6 Moo. P.P.1 (H), aid the Legislature's Defective phrasing of an Act or add and amend or, by construction, make up deficiencies which are left in the Act….

In our view, it is not right to give to the word 'decree' a meaning other than its ordinary accepted meaning and we are bound to say, in spite of our profound respect for the

opinion of the learned Judges who decided them, that the several cases relied on by the Respondent were not correctly decided."

(5) KANTA DEVI v. UNION OF INDIA - (2003) 4 SCC 753, para 8.

"According to Rule 7(b), the Appointing Authority is the Commandant and since the DIG is of higher rank, there is no illegality in the order passed by him in passing the order of dismissal. Just because the IG's approval is required for the purpose of appointment or promotion, the position of the Commandant as the Appointing Authority is not changed and the IG does not become the Appointing Authority. If the submission made is accepted, it would mean addition of words or expressions in Rule 27. It is not a case of casus omissus as contended. A construction which requires for its support addition of words has to be avoided. The words of a statute never shared, in interpretation, be added or substracted from without almost a necessity. It is contrary to all rules of construction to read words into a statute unless it is absolutely necessary to do so. Courts cannot re-frame the words used by the Legislature as they have no power to Legislate. A matter which for the sake of argument, should have been provided but has not been provided for in a statute cannot be supplied by the courts as to do so will be legislation and not construction. (See JOHNSON v. MORETON AND BALIRAM WAMAN HIRAY DR.JUSTICE B.LENTIN) There is no presumption that a casus omissus exists, and language permitting the courts should avoid creating a casus omissus where there is none. Therefore, the conclusion of the Division Bench in holding that the order of dismissal passed by the DIG was legal, does not suffer from any infirmity to warrant interference."

14.10 In the light of these decisions, Mr. Rajagopal submits, the Respondents are to be held to be eligible for reservation under Other Backward Classes, they being in-service candidates. Any addition of 'number of years' to be so eligible will be rewriting the rule, rendering the rule unworkable and contrary to object of the Rule and this will create discrimination within the inservice candidates and also amounts to presuming an omission which is not there.

14.11 Regarding bifurcation of PWD and WRD, Mr. Rajagopal submitted that a Full Bench of this Tribunal in Application No.1429 to 1432/2004 decided on 30.8.2005 has categorically held that there has been no bifurcation of Engineering cadres and services as between Public Works Department and Water Resources Department and it is a combined cadre. This Tribunal has also declared that as of now it is a single cadre and single service and has also indicated steps to be taken for bifurcation of the services. He further submitted that the order of this Tribunal is subject matter of challenge in Writ Petition No.24536/2005 before the High Court of Karnataka. Initially the High Court had granted an interim order staying the operation of the Order of this Tribunal but later the High Court has vacated the interim order on 7.3.2008 and after the vacation of the interim order, options have been called for from the employees as to whether they are willing to continue in the Public Works

Department or the Irrigation Department. Notwithstanding the nomenclature, the Engineers in both the Departments are treated as part of a single service and a combined seniority list is being published from time to time. The documents clearly show that as on today there is only one service, namely Karnataka Public Works Engineering Department Service. Further, the decision of this Tribunal made it clear that until bifurcation of cadres is completed, persons holding the posts in the Karnataka Irrigation Department now known as Water Resources Department will be members of the Karnataka Public Works Engineering Service and hold the posts in the Water Resources Department on deputation basis. That apart, in so far as Respondent No.8 is concerned, even if his deputation to Water Resources Department has been withdrawn, he is working in Public Works Department at the High Court of Karnataka.

14.12 In respect of Application No.1753/2008, Mr. Rajagopal submitted that the grievance of the Applicant Mr. H.M.T. Swamy is that based on his merit in the written examination the KPSC by its Notification dated 13.3.2008 declared that the Applicant is eligible for personality test. He was called for Personality Test to be held on 27.3.2008. On that day, when the Applicant appeared for the interview, the KPSC refused to interview him but did not give any written order or Endorsement setting out any reason. He was however orally informed that his claim cannot be considered under Category II-A since he is working as an Assistant Engineer, he comes within the creamy layer and, therefore, he is not eligible to claim reservation as persons belonging to Category IIA of Other Backward Classes; that the certificate produced by him in support of his claim for reservation under Category IIA is false since he could not have obtained the Certificate as he is holding a Group-B post and that the Applicant having secured 271 marks as against the cut-off marks of 250 under General Merit category, he is not eligible for Personality Test under General Merit category. He further submitted that the Certificate issued by the Tahsildar is a statutory certificate issued by the Tahsildar by virtue of powers conferred on him by Section 4A of the Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation of Appointments etc.) Act, 1990. The said Certificate is valid and until it is cancelled. Rule 3C(1) of the Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation of Appointments etc.) Rules, 1992 states that the caste certificate issued under Section 4A shall be valid until it is cancelled. Power to cancel the caste or income certificate issued by the Tahsildar vests under Section 4C of the Act in the District Caste and Income Verification Committee and in no one else. The KPSC has no power to declare on the correctness of a certificate issued by the Tahsildar.

14.13 Mr. Rajagopal also contended that even though the State Government is a party in all these cases, the Government has taken an unfortunate stand that it adopts the Statement of Objections filed by the KPSC. This stand is taken by the Government to overcome the settled position in law that in a challenge to State action, it is not open to the State to contend or argue that its own rules or orders are bad. In this regard, he relied on the following decisions of the Supreme Court:

(1) 1972 SLR 44 : STATE OF ASSAM v. RAGHAVA GOPALACHARI (para 13),

(2) 1981 (1) SLR 100 : S.S.AHMED v. STATE AND OTHERS (para 14).

14.14. In case of Application No.5013/2007, Mr. Rajagopal submitted that the Applicant who belongs to Scheduled Caste and who holds a B.E. Degree submitted his application dated 24.5.2007 enclosing thereto experience certificate dated 14.2.2007 issued by the Karnataka Small Industries Marketing Corporation Limited to the effect that he was working in the said Corporation as Manager for a continuous period of 12 years and 2 months, i.e., from 3.12.1994 to 2.2.2007. As on the last date prescribed for receipt of applications, he was aged 45 years 3 months and 7 days. His application has been rejected by the KPSC by Endorsement dated 19.11.2007 on the ground that he is beyond the maximum age prescribed as on the stipulated date.

14.15 He submitted that the General Recruitment Rules apply to recruitments to all State Civil Services and to all posts in connection with the affairs of the State of Karnataka except to the extent otherwise expressly provided. This is clear from Rule 1(3) of the General Recruitment Rules. He also referred to Rule 3(a) of the General Recruitment Rules, Rule 13 of the Competitive Examination Rules and Rule 6(3)(b) of the General Recruitment Rules. Rule 6(1) starts with the phrase 'Save as otherwise provided in the Rules of Recruitment specially made and applicable to any service or post prescribing higher age limit'. Rule 6(3) starts with the non-obstante clause "Notwithstanding anything contained in sub-rule (1), the maximum age limit for appointment shall be deemed to be enhanced in cases mentioned therein to the extent mentioned. A plain reading of the above said provision of the Rule clearly shows that while the age limit stipulated by Rule 6(1) is subject to higher age limit prescribed under the Recruitment Rules specially made for any service, Rule 6(3) operates notwithstanding anything stated in Rule 6(1) and not notwithstanding anything stated in the Recruitment Rules made governing a particular service. Therefore, Rule 6(3)(b) would apply in the present case. Applying Rule 6(3)(b) would apply in the present case. Applying Rule 6(3)(b) the maximum age limit for Scheduled Caste

candidates for whom the benefit of Rule 6(3)(b) is applicable shall be deemed to have been enhanced to 50 years. It is not disputed nor can it be disputed that the Karnataka Small Industries Marketing Corporation Limited is owned and controlled by the State Government. The Applicant has worked there for 12 years and 2 months. Therefore, he is entitled for the benefit of 10 years under Rule 6(3)(b) of the General Recruitment Rules. Further, Rule 13 of the Competitive Examination Rules does not contain any non-obstante clause. So also Rule 5 thereof prescribing the age limit. Therefore, the provisions of Rule 6(3)(b) of the General Recruitment Rules apply to the case of the Applicant. For these reasons, he prays for dismissal of the Applications.

15. **SUBMISSIONS OF PROF. RAVIVARMA KUMAR, SENIOR COUNSEL, APPEARING FOR RESPONDENTS NO.3 TO 8 IN APPLICATION NO.1400/2008**

15.1 The Application is liable to be dismissed in limine for the following three reasons:

(1) ACQUIESCENCE : The Applicant is a fence sitter. Having made an application in response to the Notification, after having participated in the selection process and after coming to know that he has failed in the selection it is not open to him to turn around and question the selection process.

(2) PREMATURE : No select list has been published and the rights of the parties are yet to be decided. Therefore, the Application is premature.

(3) LOCUS STANDI : While submitting application to the KPSC, the Applicant has declared that he comes under the General Merit Category and not under any reserved category. He has also produced a certificate wherein he is certified to be a Creamy Layer in General Merit Category. The said Certificate is issued under the Government Order dated 30.1.1995 and not under the Government Order dated 30.3.2002. The Applicant having not claimed the status of a Backward Class person and having not questioned the certificate issued to him, he has no locus standi to question the claims of the Respondents.

15.2 The Cadre & Recruitment Rules of the PWD came into force on 17.8.1989. Rule 2 thereof prescribes the method of recruitment, minimum qualification. The post of AEE is to be filled up both by direct recruitment and on promotion. The qualifications prescribed for direct recruitment to the post of AEE itself does not prescribe any qualifying service for recruitment. Therefore, the 2007 Rules did not prescribe any qualification. It is for the Government to prescribe any qualification of eligibility. In the instant case, the Government with a view to provide an incentive to in-service candidates has not prescribed any minimum service.

15.3 Earlier to 1989, there was only one Department called the PWD. In the year 1989, the Government thought it fit to bifurcate and constitute two separate Departments called the PWD and WRD. Therefore, the Government has issued two separate set of Rules of Recruitment called the (1) Karnataka Public Works Engineering Services (Recruitment) Rules, 1989 and (2) Karnataka Public Works (Irrigation Services) (Recruitment) Rules, 1988. Under the said Rules, a person has to express in writing his willingness to be appointed so and on the said willingness the Government has to take a final decision. Till date the Government has not taken any decision on the willingness called for by it from the concerned Engineers of the PWD. The vertical bifurcation also has not taken place bifurcating the PWD and WRD separately. Taking this fact into consideration, the Government has issued a Notification dated 12.12.1995 amending the Karnataka Public Works (Irrigation Department) (Recruitment and certain other Rules) (Amendment) Rules, 1995. As per the Transitional Rules the administration of the WRD is carried on. The Full Bench of this Tribunal by Order dated 30.8.2005 gave a categorical finding that the Department is not yet bifurcated. The said decision was challenged before the High Court in Writ Petition No.24536/2005 and the High Court passed an interim order of stay on 30.8.2005. The interim order was in operation till 7.3.2008, on which date the High Court vacated the interim order and observed that any bifurcation made would be subject to the final decision of the Writ Petition. The Notifications inviting applications were issued by the KPSC on 17.4.2007 and 8.9.2007. Admittedly, on these dates the Departments of PWD and WRD were not constituted. Therefore, the contention of the Applicants that only the persons belonging to the PWD are entitled to apply as in-service candidates has no merit.

15.4 The Government has issued Government Order dated 30.3.2002 bring into force with immediate effect comprehensive Creamy Layer Policy as detailed in Annexure to the said Government Order. As per the said Government Order, the Creamy Layer Policy does not apply to Scheduled Castes/ Scheduled Tribes and Category-I of the Backward Classes. The Creamy Layer Policy is applicable to the candidates belonging to Categories IIA, IIB, IIIA and IIIB. However, Annexure-II to the Government Order reads as follows:

> "Under Article 15(1) and 16(4) of the Constitution of India, the following persons shall not be eligible for reservation of seats of posts categorized under IIA, IIB, IIIA and IIIB.
>
> **NOTE:**
>
> (1) This Rule will not apply to direct recruitments to posts which insist on a prescribed period of service in a lower post or experience in a post, profession or occupation as a qualification of eligibility.

(2) This rule applies to son(s) or daughter(s) of the persons specified below:

It is not open to screen out these Respondents applying the principle of Creamy Layer, inasmuch as the Creamy Layer has no application for any direct recruitment under the in-service quota. The Government Order dated 30.3.2002 in its Note (1) has clearly ruled out the applicability of the Creamy Layer principle to direct recruitments prescribing the service or experience as a qualification of eligibility. Though no specific period of service is prescribed, a minimum period of service is a must in order to become eligible to apply as an in-service candidate. In the first place, unless he has worked in the Department, he is not eligible. Secondly, he should not only have done so, but should continue to be in service to be eligible to apply. A person who has not put in any service cannot claim to be an in-service candidate. Such a person would be an outsider and not an in-service person. So the fact that no definite period of service of experience is spelt out, it does not mean that the person without experience or service will become eligible. In the circumstances, it is implied in Note (1) that only a person who is already in the service and who continues to be in service alone will become eligible.

15.5 Words of a Statute when there is doubt about their meaning are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the legislature has in view. Their meaning is found not so much in a strict grammatical or etymological propriety or language, nor even in its popularize, as in the subject or in the occasion, on which they are used and the objects to be attained.

15.6 It is a recognized Rule of Interpretation of Statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonize with the subject of the statute and which effectuate the object of the legislature.

15.7 One of the most popular Rule of Interpretation is the Mischief Rule, also known as Rule laid down in Heydon's case. As early as in the year 1957, the Supreme Court has declared that the Rule has attained the status of a classic. The courts must adopt that construction which shall 'suppress the mischief and advance the remedy'.

15.8 In the instant case, the change of law was brought about by the Karnataka State Commission for Backward Classes – Special Report, 2000. Chapter-V of the said Report deals with the principle of Creamy Layer. The Commission had recommended for exemption from the application of the principle of Creamy Layer to the direct recruitments as it is now found in Note (1) of the Government Order dated 30.3.2002. The reason for such recommendation could be seen in para 24 of the Report. Earlier to Government Order dated 30.3.2002, the Creamy Layer was universally applied to all the Departments. It is only on the basis of the recommendation of the Commission, a Note came to be incorporated so that what is given by one hand is not taken away by the other hand.

15.9 The learned Senior Counsel referred to the following case laws regarding Interpretation of Statutes:

(1) AIR 1958 SC 353 - WORKMEN OF DIMAKUTCHI TEA ESTATE v. MANAGEMENT OF DIMAKUCHI TEA ESTATE (page 356).

(2) AIR 1958 SC 414 - STATE OF U.P. v. C.TOBIT (page 416)

(3) AIR 1976 SC 2386 - SANTA SINGH v. STATE OF PUNJAB (page 2389)

(4) AIR 1977 SC 835 - BUSCHING SCHMITZ PRIVATE LIMITED v. P.T.MENGHANI

(5) 1987(1) SCC 191 - S.P.JAIN v. KRISHNA MOHAN GUPTA (page 201),

(6) AIR 1957 SC 907 - KANAILAL SUR v. PARAMNIDHI SADHUKHAN (page 910),

(7) AIR 1955 SC 681 - O. v. STATE OF BIHAR (674),

(8) (2008) 6 SCC 8 - ASHOK KUMAR THAKUR v. UNION OF INDIA

(9) AIR 1975 SCC 671 - NASEERUDDIN v. STATE TRANSPORT TRIBUNAL

Therefore, the learned Senior Counsel prays for dismissal of the Application.

16. <u>SUBMISSIONS OF MR. K.SUBBA RAO, LEARNED SENIOR ADVOCATE</u>:

16.1 Neither the PWD Recruitment Rules nor the 2007 Rules state that the in-service candidates should put in any minimum period of service. Minimum Service is not required for more than one reason. The object of the direct recruitment is that bright students are available at the disposal of the State. Since the selection is on the basis of merit, whether the candidates have put in one year's service or five years' service is immaterial. If the intention of the Rule-making Authority was that for

being eligible to apply for selection to the posts of AEEs under the category of 'in-service candidates' by way of direct recruitment, a definite service should be rendered by a candidate, the Rule-making Authority would have said so. One cannot import something which is not in the Rules. In support of this contention, the learned Senior Counsel drew our attention to the decision of the Supreme Court in UNION PUBLIC SERVICE COMMISSION v. Dr. JAMUNA KURUP, reported in 2008 AIR SCW 3780. The learned Senior Counsel also referred to the decision of the Supreme Court in the case of STATE OF H.P. v. J.L.SHARMA AND ANOTHER, reported in (1998)1 SCC 727, wherein the expression 'in-service' has been used.

16.2 The 2007 Rules do not specifically state that 20 posts of AEEs through Competitive Examination should be selected only from those who belong to PWD. Though the Notifications state that 5% of the candidates for selection through the Competitive Examination should be from in-service from PWD, neither the PWD Recruitment Rules nor the 2007 Rules provide that in-service candidates should be only from the PWD. It is only the Notifications which state that candidates should be only from PWD. This condition put by the KPSC is in excess of the powers of the KPSC. One of the contentions urged on behalf of Applicants in Applications No.1370/2008 and connected cases where the Applicants have challenged the Notifications and the 2007 Rules is that some of the candidates who have been selected are working in the WRD and not the PWD. This argument is fallacious. At the outset, it has to be stated that there has been no bifurcation of the personnel between PWD and WRD. It is no doubt true that the Government wanted to bifurcate PWD and WRD into two different Departments for which the Government took steps and also enacted separate Recruitment Rules for these Departments, but those Rules have not been given effect to. In fact, Rule 3 of the WRD Recruitment Rules refers to the constitution of initial service from the Karnataka Public Works Engineering Department Services by bifurcation and other means. But so far the said Rule has not been implemented and the PWD and WRD continue to be one Department as PWD. The entire matter is under litigation. In fact, in the Full Bench decision of this Tribunal this Hon'ble Tribunal has categorically come to the conclusion that the bifurcation has not taken place and both the PWD and WRD continue to be one Department called PWD. But the directions given by this Tribunal are yet to be carried out. Therefore, it is futile for any one now to contend that the Applicant in Application No.1753/2008 does not belong to PWD.

16.3 The Applicants in Application No.1370/2008 and connected cases have challenged the 2007

Rules and the Notification on the ground that the term 'in-service candidate' has not been defined and no service is prescribed and, therefore, the 2007 Rules and the Notification are vague. The Applicant in Application No.1370/2008 has secured only 260 marks in the written examination. He appeared for the written examination, waited for the results to be announced and when he found that the marks awarded to him in the written examination are low and he has no reasonable chances of being selected, he has undertaken this venture of approaching this Tribunal by challenging the Notification and the 2007 Rules for their vagueness and uncertainty. Such 'fence sitters' should not be permitted to challenge the selection at such a belated stage, especially when such candidates have acquiesced and, therefore, they cannot be permitted to approbate and reprobate.

16.4 The candidates who have challenged the constitutional validity of the 2007 Rules and the Notifications are estopped from challenging the Rules. The Supreme Court has repeatedly pointed out that persons who participate in a selection process are not entitled to challenge the selection process, after coming to know that they have no chances of getting selected. In support of this contention, he referred to the decision of the Supreme Court reported in AIR 1986 SC 1043 in the case of OM PRAKASH SHUKLA v. AKHILESH KUMAR SHUKLA AND OTHERS. This view has been subsequently followed in the case of MADANLAL v. STATE OF J.K reported in (1995) 3 SCC 486. In view of the law laid down by the Supreme Court in the successive decisions, it is impermissible for the Applicants to challenge the validity of the 2007 Rules and the Notifications. Further, all those candidates who have filed the Applications challenging the 2007 Rules and the Notifications have secured less marks in the written examination and none of those candidates have a chance of being selected and that is why they have challenged the Rules. Such candidates should not be permitted to maintain their applications and, therefore, the Applications filed by the unsuccessful candidates are liable to be rejected.

17. On the rival pleadings, the following questions arise for consideration in the Applications classified as Parts I to III:

(1) Whether the 2007 Rules are bad in law for the reason that they do not prescribe the minimum service or experience for in-service candidates ?

(2) Whether the classification of vacancies for the purposes of reservation is contrary to Government Order dated 30th March, 2002 ?

(3) Whether the persons working in WRD are also entitled to be considered as in-service candidates ?

(4) Whether the Note found in the Schedule to the 2007 Rules prescribing minimum marks in Kannada and English papers for qualifying to appear for the Personality Test is ultra vires or contrary to Rules 7 and 8 of the 2007 Rules ?

(5) Whether the Government Order dated 13.2.2001 bringing the General Merit (Rural Category) under creamy layer concept and prescribing Form-I is illegal ?

(6) Whether the Applicants are not estopped from challenging the Notifications having applied in pursuance of the Notifications and the 2007 Rules and having participated in the selection process ?

18. As already stated, the decision in Applications classified as Parts IV and V will depend upon the decision on questions (1) to (6) raised above in Applications in Parts I, II and III.

CONSIDERATION OF QUESTIONS:

19. Before considering the questions, it is worthwhile to refer to what the former Chief Justice of India Mr. Justice E.S.Venkataramaiah (as he then was) speaking for the Bench said as long back as 1988 in the case reported in AIR 1988 SC 1060 - HAMEEDIA HARDWARE STORES v. B.MOHAL LAL SOWCAR regarding construction of a provision:

> "It is no doubt true that the Court while construing a provision should not easily read into it words which have not been expressly enacted but having regard to the context in which a provision appears and the object of the statute in which the said provision is enacted the Court should construe it in a harmonious way to make it meaningful. In SEAFORD COURT ESTATES LTD. v. ASHER (1949) 2 All.ER 155 at p.164, Lord Denning. L.J. said thus:
>
> 'When a defect appears, a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament … and then he must supplement the written word so as to give 'force and life' to the intention of the Legislature…. A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they should have straightened it out? He must then do as they would have done. A Judge must not alter the material on which the Act is woven but he can and should iron out the creases.'

19.1 **QUESTION NO.1** : Whether the 2007 Rules are bad for the reason that they do not prescribe the minimum service or experience for in-service candidates ?. It is a well settled law that prescription of qualification is within the exclusive domain of the Executive. The Supreme Court has consistently taken this view. Even as recently as 29.7.2008, this is what has been held by the Supreme Court in the case of UNION OF INDIA v. PUSHPA RANI, reported in 2008 AIR SCW 6564:

> "Before parting with this aspect of the case, we consider it necessary to reiterate the settled legal position that matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of the employees fall within the exclusive domain of the employer. What steps should be taken for improving efficiency of the administration is also the preserve of the employer. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated due to mala fides. The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer. The Court has no role in determining the methodology of recruitment or laying down the criteria of selection. It is also not open to the Court to make comparative evaluation of the merit of the candidates. The Court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration." (para 29)

As held by the Supreme Court, the power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provisions or is patently arbitrary or is vitiated by malafides. In the instant case, no material is produced to show that the action of the Executive is contrary to any constitutional or statutory provisions or is patently arbitrary. The only contention of the Applicants is that the 2007 Rules relating to recruitment to the posts of AEE to the extent of 5% of the posts are arbitrary for the reason that the said provisions do not prescribe any 'service' for recruitment and as a consequence, all Graduate Engineers right from a probationer to a person who is on the verge of retirement are treated as equals and this amounts to treating un-equals as equals. We are not impressed by the submission that non-prescription of experience for direct recruitment is a ground which would vitiate the 2007 Rules or the Notifications. Such provisions are held to be valid by the Supreme Court, inter-alia, in the case of RAMESH CHANDRA MOHAPATRA AND ANOTHER v. STATE OF ORISSA reported in 1984 SCC (L&S) 645. While in respect of promotions, experience is a requisite qualification, for direct recruits no experience is insisted upon as a prerequisite. It is for the expert body to prescribe or not to prescribe any experience or service and courts do not have the assistance of expert. It is for the Legislature to regulate method of recruitment, prescribe qualification etc. It is not for the Courts or Tribunals to trench upon and prescribe qualifications, in particular, when the matters are of technical nature. Government has every right to frame a policy to ensure efficiency and proper administration and the Courts or Tribunals cannot substitute their own views for the views of the Government or to direct a new policy. The impugned Rule does not violate Article 14 or 16 nor is it arbitrary for non-prescription of qualification or service for in-service candidates. When the rule-making Authority in its wisdom has thought it fit not to prescribe any service for 'in-service candidate' it is not open for this Tribunal to prescribe some service.

"The Courts are warned that they are not entitled to usurp legislative function under the disguise of interpretation and that they must avoid the danger of an appriori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somehow fitted. A statute is an edict of the Legislature and the Conventional way of interpreting or constructing a statute is to seek the 'intention of its maker'. A statute is to be construed according 'to the intent of them that make it' and 'the duty of the judicature is to act upon the true intention of the Legislature – the mens or sententia legis'. The expression 'intention of the Legislature' is a shorthand reference to the meaning of the words used by the Legislature objectively determined with the guidance furnished by the accepted principles of interpretation. If a statutory provision is open to more than one interpretation, the Court has to choose that interpretation which represents the true intention of the Legislature, in other words, the 'legal meaning' or 'true meaning' of the statutory provision. (PRINCIPLES OF STATUTORY INTERPRETATION by Justice G.P.Singh, Tenth Edition 2006) In the instant case, the intention of the Legislature is to fill up certain posts of AEEs by direct recruitment from among 'in-service candidates'. When the Legislature has not defined as to who is an 'in-service candidate' it is not for this Tribunal to define as to who is an 'in-service candidate' and prescribe any service.

19.2 It is also contended that no maximum age limit is prescribed for in-service candidates, while such a prescription is made in case of recruitment for open competition candidates. Article 14 of the Constitution does not prohibit such classification. All that is required to be considered is whether the classification is rational and has nexus with the object sought to be achieved. What is the object of providing an opportunity to in-service candidates is to be examined. Assistant Engineers on completion of five years of service are eligible for promotion. But in reality they do not get promotion even after completion of service of 20 to 25 years. Therefore, the Rule-making Authority in its wisdom has thought of providing an opportunity to in-service candidates. The in-service candidates will be knowing the back-ground of the service and they will be more useful to the Department. It is not as though all in-service candidates will get appointment automatically on the basis of seniority to the cadre of Assistant Executive Engineers. The in-service candidates have to undergo a competitive examination and it is only after they pass in the examination they will get selected on the basis of the marks secured in the examination. Public interest demands that for each category most meritorious candidates should be appointed. It was submitted at the Bar that of late service or experience is dispensed with in recruitment to certain posts. It was also submitted across the Bar that Mr.Justice Katju (former Judge of the

Supreme Court) in a Report has opined that "when a candidate is appointed to a Government service, see his brain and not his personality." In the instant case, the recruitment is to the posts of AEEs who are required to visit spots and take measurements and for this they have to be more meritorious and physically fit. Viewed from this angle also, we do not find any arbitrariness in the non-prescription of service or qualification for in-service candidates.

19.3 One other contention is that the 2007 Rules or the Notification do not prescribe who is an 'in-service candidate' as a result of which even probationers whose probation period has not been declared as satisfactory are made eligible to apply for recruitment to the posts of AEEs. If a term is not specifically defined under the Rules or in a Statute, one has to go by the common parlance meaning. Therefore, 'in-service candidates' in this context means all those who are in the service of the Department.

19.4 It is also contended that Probationers are also made eligible to apply for recruitment. Unless the period of probation is declared as satisfactory, the probationer cannot be treated as a member of the service and that when the period of probation of a person is not declared as satisfactory there is no guarantee that he will discharge the duties of a higher post satisfactorily. This contention also cannot be accepted for the simple reason that if the period of probation of a candidate who is appointed as Assistant Executive Engineer is not declared as satisfactory in the former post, the law will take care of such persons. While confirming such persons in the cadre of Assistant Executive Engineers the Competent Authority is expected to take care of this aspect of the matter.

19.5 The non-prescription of 'service' either in the 2007 Rules or in the Notifications is also not bad in law for another reason. The Governor of Karnataka in exercise of the powers conferred on him under the proviso to Article 309 of the Constitution of India has framed two sets of Cadre & Recruitment Rules for the Departments of PWD and WRD, called the (1) Karnataka Public Works Engineering Services (Recruitment) Rules, 1989 (for short, "PWD Recruitment Rules") and (2) Karnataka Public Works (Irrigation Services) (Recruitment) Rules, 1988 (for short, "WRD Recruitment Rules"). In both the Rules, 5% of the posts of AEEs are earmarked for in-service candidates. Neither of these Rules prescribe any service or experience for in-service candidates. These Rules are the parent Rules, whereas the 2007 Rules only prescribe the procedure for appointment to the posts of AEEs by a competitive examination. When the Applicants have not chosen to challenge the parent Rules, they cannot now contend that the 2007 Rules and the Notification are bad for non-prescription of service or experience.

19.6 Hence, we hold that the impugned Rules and the Notifications are not arbitrary for non-prescription of service or for not defining the term 'in-service candidate'.

20. **QUESTION NO.2** : Whether the classification of vacancies for the purposes of reservation is contrary to Government Order dated 30.3.2002 ? It is relevant to refer to the salient features of the Government Order dated 30.3.2002. The preamble to the said Government Order, inter alia, states that the Karnataka State Commission for Backward Classes have submitted special report and 71 advices vide their letter dated 4.12.2000 and that pending consideration of the entire report, the Government have examined in detail the Creamy Layer Policy contained in the Special Report and 71 Advices relating to inclusions, deletions, correction of spellings etc. The operative portion of the Government Order dated 30.3.2002 reads thus:

> "After careful consideration of the above proposal, the Government are pleased to make the following Orders:
>
> 1. The question of Reservation specified in Government Order dated 17.9.1984 and 31.1.1995 read with at Sl.No.(1) and (2), respectively, is continued for admission to Educational Institutions and Employment.
>
> 2. The revised list of Backward Classes enclosed to this order is at Annexure-I incorporating recommendations of the BC Commission, is brought into force with immediate effect.
>
> 3. A new comprehensive Creamy Layer Policy as detailed in Annexure-I to this Government Order is brought into force with immediate effect. This Creamy Layer Policy does not apply to Scheduled Castes/Scheduled Tribes and Category-I of Backward Classes. Candidates belonging to Category-II(A), II(B), III(A) and III(B) shall be entitled to reservation in the manner specified in the new comprehensive Creamy Layer Policy."

From a reading of this Government Order, it is clear that Question (2) and Question (5) are inter-related. Hence, answer to Question (5) applies to Question (2) also.

21. **QUESTION NO.3** : Whether the persons working in WRD are also entitled to be considered as in-service candidates ?

Though both PWD and WRD have separate set of Cadre & Recruitment Rules and the 2007 Rules also state that the 2007 Rules relate to recruitment to the posts of AEEs in the PWD and further the Notifications issued by the KPSC also state that the recruitment is to the posts of AEEs in the PWD, the actual bifurcation of PWD and WRD has not taken place. Taking this aspect into consideration, the Government has issued a Notification dated 12.12.1995 amending the WRD

Recruitment Rules. Rule 6 of the Karnataka Public Works (Irrigation Services) (Recruitment and certain other Rules) (Amendment) Rules, 1955 reads thus:

> "6. **Transitional Provisions** : Notwithstanding anything contained in the Karnataka Public Works (Irrigation Services) Recruitment Rules, 1988, till the completion of formalities of the constitution of Irrigation Services in accordance with Rule 3, the posts in the Karnataka Irrigation Department Services shall also be filled in accordance with the provisions of the Karnataka Public Works Engineering Department Services (Recruitment) Rules, 1988."

As per the above transitional Rules, the administration of the WRD is being carried on. Therefore, till the actual bifurcation, both PWD and WRD have to be treated as one Department.

21.1 Even after framing of the WRD Recruitment Rules in the year 1988, the WRD has not been bifurcated. Therefore, certain Assistant Engineers working in PWD and WRD had approached this Tribunal in Applications No.1429 to 1432/2004 praying for a direction to the Official Respondents therein not to operate the Seniority List dated 29.3.2003 and on the other hand to operate the Seniority List dated 14.11.2003 for promotion to the cadre of AEEs. Their grievance was that by the operation of the Seniority List dated 29.3.2003 their promotional chances were going to be affected. The matter was referred to a Full Bench of this Tribunal. The Full Bench of this Tribunal disposed of the Applications by Order dated 30.8.2005. In that decision, the Full Bench has categorically held that the Department is not yet bifurcated and for the effective bifurcation of the Department this Tribunal issued certain directions. The decision of this Tribunal is challenged by the aggrieved parties before the High Court of Karnataka in Writ Petition No.23536/2005. The High Court had granted an interim order of stay on 30.8.2005. Subsequently, the interim order has been vacated on 7.3.2008 with an observation that any bifurcation would be subject to the final decision of the Writ Petition. After the interim order was vacated, the PWD has called for willingness from the Engineers and after considering the willingness the Department has to take a final decision. Therefore, as of now, there is no bifurcation of the Departments of PWD and WRD. Due to these practical problems, even if the bifurcation takes place, it could take place only from a prospective date. Till such time, both the Departments have to be treated as one Department. In the Full Bench decision of this Tribunal, this Tribunal has issued the following directions:

> "The decision to establish a separate independent department of Water Resources has been taken by the Government way-back in 1985 when it amended its Allocation of Business Rules, 1977. However, by an Official Notification issued in July, 1989, Karnataka Irrigation Department Services, which is presently called Water Resources Department

have been established. Sixteen years have elapsed, yet the Government has not completed the entire process of allocation of Group A and B Officers working in the combined services of Karnataka Public Works and Irrigation Department. The transitional provision in the 1995 Rules was ad-hoc and meant to be exercised only for a short period of time, until the completion of process of transfer of Engineers/Officers belonging to B & A Groups based on their option. This exercise definitely, in our view, perhaps require six months to a maximum of one year. It is not forthcoming from the arguments of the private and official Respondents as to what is holding back the Government from completing the entire process of establishment of separate services of the Water Resources Department. The fact remains that PWD and Water Resources Department are working independently with separate Ministers and Secretaries to the Government and the entire hierarchy is totally and mutually exclusive. It is high time the Government completed the remaining process for establishment of a separate service of Water Resources Department. Though before us we have a group of Applicants who are in the cadre of Assistant Engineers, this entire process encompass Officers/Officials from Group A to D of the Department. This process also throw-up several service related problems which may lead to endless litigations. Therefore, we would not like to confine to an ad-hoc solution to the grievances of the Applicants. Instead, we prefer to make the following comprehensive order keeping in view the adage 'a stitch in time saves nine'.

Accordingly, the Applications are disposed of with the following directions:

(i) The cadre strength of PWD and Irrigation Department has been fixed by the Notifications dated (common) 5.7.1989 vide Annexure A-2 and A-4. As against this cadre strength of PWD and Irrigation Department based on the composite seniority list, the number of persons working and percentage of vacancies in respect of such cadres, has to be initially determined.

(ii) the allocation of the Officers/Officials between PWD & Irrigation Department will be such that, number of Officers/Officials and the vacancies should be in the same proportion;

(iii) fresh option/willingness shall be obtained from all the officers presently working in various cadres, who would like to serve in the Water Resources Department on permanent basis. This exercise shall be taken up immediately and the process shall complete by the end of 31st December, 2005.

(iv) it is also necessary that number of persons belonging to SC & ST and the number of backlog vacancies should also be proportionately distributed between the two departments, based on options in the manner indicated in Paras (ii) and (iii) supra.

(v) In the event of number of Officers in various cadres or in a particular cadre who have exercised the option for Water Resources Department is far in excess of the proportionate number of Officers to be transferred, in such a case, the junior-most officers in the cadre to the extent of excess number shall be retained in the PW Department.

(vi) In a situation where the number of Officers/Officials opting for irrigation services is less than the proportionate number of Officers in any cadre to the extent of short-fall, the junior-most Officer in the same cadre shall be transferred to the Irrigation Department without any option. This exercise shall be completed by the end of 31st January, 2006.

(vii) with the above exercise, the department would finally segregate the Officers belonging to Group A & B, i.e., from the post of Assistant Engineer to the post of Engineer-in-Chief and finally constitute separate service of the Officers belonging to PWD and the Officers belonging to Water Resources Department.

(viii) the Officers who are finally transferred as indicated above, their seniority shall be in the same order as their names were found in the composite seniority list of the respective cadres.

(ix) respondents shall issue the seniority list of the Officers belonging to Water Resources Department as on 1.1.2006 by 31st March, 2006.

(x) thereafter, the PWD and Water Resources Departments shall consider filling-up of senior vacant posts by direct recruitment as per C & R Rules of each department and by promotions from amongst the Officers belonging to different cadres of each department separately.

(xi) until the completion of the aforesaid exercise, the 2nd Respondent is permitted to promote Officers by operating the composite seniority list of various cadres to fill up the existing senior posts in both the Departments of PWD and Water Resources Department. However, such of those Officers, who will continue in PWD and are promoted to senior posts of Irrigation Department, their promotions shall be ad-hoc and temporary and subject to review after constitution of separate service of Officers belonging to Water Resources Department in terms of the above directions." Even seniority lists of officers of various cadres working both in PWD and WRD that are being published are common for both the Departments. When that is the position, in-service candidates of WRD have also to be permitted to compete for the present selection.

21.2 Further, the KPSC had written a letter dated 10.9.2007 to the Government in the PWD stating that according to the Rules, the in-service candidates should be compulsorily serving in the PWD; that the candidates are required get the applications countersigned by their Appointing Authority and that certain candidates have got their applications countersigned by the other Heads of Departments, Corporations etc. Therefore, the KPSC while forwarding a list of candidates who have applied against the in-service quota to the Government in PWD, sought a clarification from the Government as to which of the candidates could be treated as having been working in PWD and could be considered as 'in-service candidates'. The Government has sent a reply on 31.1.2008 stating that the candidates who have submitted applications through the Chief Engineer, Communications & Buildings (South) and Chief Engineer, Water Resources Department, Bangalore, alone could be considered as 'in-service candidates' and, accordingly, the concerned candidates may be directed to submit the necessary information duly countersigned by the Chief Engineer, Communications & Buildings (South) and Chief Engineer, Water Resources Department, Bangalore, and only the applications of candidates who furnish such information could be considered as 'in-service candidates'. From this correspondence

also it is clear that in the absence of bifurcation, the Government is of the opinion that the in-service candidates working both in PWD and WRD are eligible to apply for the present recruitment.

21.3 For these reasons we hold that the candidates working both in PWD and WRD are entitled to be considered as 'in-service candidates' till the actual bifurcation takes place.

22. <u>QUESTION (4)</u> : Whether the Note found in the Schedule to the 2007 Rules prescribing minimum marks in Kannada and English papers for the purpose of qualifying to appear for the Personality Test is ultra vires or contrary to Rules 7 and 8 of the 2007 Rules ?

22.1 It is a well settled position in law that when the Rules are silent the Notes will fill up gaps and the Notes to the Rule make explicit what is implicit in the Rules. In this regard, it is relevant to refer to the Constitution Bench decision of the Supreme Court in the case of TARA SINGH AND OTHERS v. STATE OF RAJASTHAN AND OTHERS, reported in ALL INDIA SERVICES LAW JOURNAL, 1975 SC 619:

> "Rule 244(2) as it stands now does not specifically mention that an order is to be passed in the public interest. The notes to the rule indicates that the right to pass an order of compulsory retirement is to be exercised only against the Government whose efficiency is impaired and against whom it is not desirable to make formal charges of inefficiency or who has ceased to be full efficient but not to such a degree as to warrant his retirement on compassionate allowance. The Notes further say that it is not the intention to use this rule as a financial weapon that it is to say, that the provision should be used only in the case of Government servants who are considered unfit for retention on personal as opposed of financial grounds. The Notes are promulgated with the Rules in exercise of Legislative power. The Notes are made contemporaneously with the Rules. The function of the Notes is to provide procedure and to control discretion. The real purpose of the Notes is that when Rules are silent the Notes will up gaps.
>
> In the present case the Notes are a part of the Rules because they are for guidance of the Authorities. They are not inconsistent with the Rules but are intended to fill up gaps where the Rules are silent. The question here is that formerly the Rules said that compulsory retirement would be made in public interest but the present Rule does not contain that part of the old Rule. The deletion of that part of the Rule does not mean that the orders of compulsory retirement are not made in public interest. The Notes to the Rule make explicit what is implicit in the Rules.

22.2 It is also relevant to refer to the decision of the Full Bench of the High Court of Andhra Pradesh in the case of APSRTC v. STATE TRANSPORT APPELLATE TRIBUNAL:27 reported in (Full Bench), wherein the High Court has held as follows:

"29. The Note appended to a scheme framed under the statutes must be construed having regard to the fact that it is a purposive enactment. It is a well settled principle of law that where the law is not clear, recourse must be taken to purposive interpretation. In RESERVE BANK OF INDIA v. PEERLESS GENERAL FINANCE & INVESTMENT CO. - 1987 (1) SCC 424: AIR 1987 SC 1023, it was held (at p.1042 of AIR):

> 'Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the Statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a Statute is looked at, in the context of its enactment, with the glasses of the statute maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different then when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase, each word, is meant and designed to say as to fit into the scheme of the entire Act. No part of the statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.

31. The meaning of 'Note' as per P.Ramanatha Aiyar's Law Lexicon, 1997 Edition is a brief statement of particulars of some fact, a passage or explanation. 'Explanation' has various functions. In S.SUNDARAM v. R.PATTABHIRAMAN, AIR 1985 SC 582 at para 52, it has been held:

> 'Thus from a conspectus of the Authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is:
>
> (a) to explain the meaning and intendment of the Act itself,
>
> (b) where there is any obscurity or vagueness in the main enactment to clarify the same as to make it consistent with the dominant object which it seems to sub-serve,
>
> (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,
>
> (d) an explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment, of the enactment."

22.3 In the light of the settled position in law, we hold that Schedule to the 2007 Rules prescribing minimum marks in Kannada and English papers for the purpose of qualifying to appear for the Personality Test is not ultra vires or contrary to Rules 7 and 8 of the 2007.

23. **QUESTION (5):** Whether the Government Order dated 13.2.2001 bringing the General Merit (rural category) under creamy layer concept and prescribing Form I is valid ?. As stated in the submission of Prof. Ravivarma Kumar, Senior Counsel, the Government has issued Government Order dated 30.3.2002 bring into force with immediate effect comprehensive Creamy Layer Policy as detailed in Annexure to the said Government Order. As per the said Government Order, the Creamy Layer Policy does not apply to Scheduled Castes/Scheduled Tribes and Category-I of the Backward Classes. The Creamy Layer Policy is applicable to the candidates belonging to Categories IIA, IIB, IIIA and IIIB. However, Annexure-II to the Government Order reads as follows:

"Under Article 15(1) and 16(4) of the Constitution of India, the following persons shall not be eligible for reservation of seats of posts categorized under IIA, IIB, IIIA and IIIB.

NOTE:

(1) This Rule will not apply to direct recruitments to posts which insist on a prescribed period of service in a lower post or experience in a post, profession or occupation as a qualification of eligibility.

(2) This rule applies to son(s) or daughter(s) of the persons specified below:"

The Government Order dated 30.3.2002 in its Note (1) has clearly ruled out the applicability of the Creamy Layer principle to direct recruitments prescribing the service or experience as a qualification of eligibility. Though no specific period of service is prescribed, in order to become eligible to apply as an in-service candidate the candidate must have put in some service and he should continue to be in service to be eligible to apply. A person who has not put in any service cannot claim to be an in-service candidate. Merely because no definite period of service or experience is spelt out, it does not mean that the person without experience or service will become eligible. In the circumstances, it is implied in Note (1) that only a person who is already in the service and who continues to be in service alone will become eligible.

23.1 It is to be noted that the recruitment in question is to the posts of AEEs. Majority of the 'in-service candidates' are working as Assistant Engineers. If the Creamy Layer concept is made applicable to the candidates who are working as Assistant Engineers then only the cases of Junior Engineers have to be considered. This would defeat the very object of direct recruitment to the posts of AEEs from among the in-service candidates. The object of a recruitment through competitive examination is to have the best candidates. Therefore, the in-service candidates working as Assistant Engineers have to be excluded from the purview of Creamy Layer Concept.

23.2 In this regard, it is relevant to refer to the Special Report of 2000 given by the Karnataka State Commission for Scheduled Classes. Chapter V of the Report deals with the principle of Creamy Layer concept. The Commission had recommended for exemption of the application of the Principle of Creamy Layer to direct recruitments as it is now found in Note (1) of the Government Order dated 30.3.2002. The reason for such recommendation is found at para 24. The relevant portion of para 24 reads thus:

> "For direct recruitment to certain posts long period of continuous service or experience is prescribed for eligibility. But in view of the operation of the Creamy Layer Principle, all those who are eligible because they are working in subordinate posts, are screened out of the Backward Classes. …
>
> Since long and continuous service in a lower post is a condition precedent to get eligibility for such posts applying the Creamy Layer to such posts would result in taking away in one hand what is given by the other. Applying Creamy Layer criterion would frustrate the very object of reservation in such posts."

The Report also discloses that earlier to the Government Order dated 30.3.2002, the Creamy Layer concept was universally applied to all the recruitments. It is only on the basis of the recommendation of the Commission a Note was incorporated. Therefore, we hold that the Creamy Layer Concept is not applicable to the recruitment in question.

23.3 It is also relevant to refer to the latest judgment of the Supreme Court in the case of ASHOK KUMAR THAKUR v. UNION OF INDIA, reported in (2008) 6 SCC 8 wherein the Supreme Court has held as follows:

> "We make it clear that some principle of determining the Creamy Layer for providing 27% reservation for Backward Classes for appointment need not be strictly followed in case of reservation envisaged under Article 15(5) of the Constitution. As pointed by Sri Ravivarma Kumar, learned Senior Counsel, if a strict income restriction is made for identifying the "Creamy Layer", those who are left in the particular caste may not be able to have a sufficient number of candidates for getting admission in the Central Institutions as per Act 5 of 2007. The Government can make a relaxation to some extent so that sufficient number of candidates may be available for the purpose of filling up the 27% reservation. It is for the Union Government and the State Governments to issue appropriate guidelines to identify the "Creamy Layer" so that SEBCs are properly determined in accordance with the guidelines given by this Court. If, even by applying this principle, still the candidates are not available, the State can issue appropriate guidelines to effectuate the implementation of the reservation purposefully."

23.4 It is a well settled principle that when there is a doubt about the statutes, their meaning are to be understood in the sense in which they best harmonize with the subject of the enactment and the

object which the Legislature has in view. It is also a recognized rule of interpretation of statutes that the expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature.

23.5 Regarding 'Interpretation of Statutes', it is relevant to refer to the following decisions and the relevant observations of the Supreme Court therein:

(1) AIR 1958 SC 353 : WORKMEN OF DIMAKUCHI TEA ESTATE v. MANAGEMENT OF DIMAKUCHI TEA ESTATE. In paragraph 9, the Supreme Court has held as follows:

> "The words of a statute, when there is a doubt about their meaning are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained."

(2) AIR 1958 SC 414 : STATE OF UTTAR PRADESH v. C.TOBIT AND OTHERS. In paragraph 9 of the said decision, this is what the Supreme Court has observed:

"It is well settled that the words of a statute, when there is doubt about their meaning, are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion, on which they are used, and the object to be attained. In order, therefore, to come to a decision as to the true meaning of a word used in a statute one has to enquire as to the subject-matter of the enactment and the object which the Legislature had in view."

(3) AIR 1976 SC 2386 : SANTA SINGH v. STATE OF PUNJAB. In paragraph 4 the Supreme Court has stated thus:

> "It is a well settled rule of interpretation, hallowed by time and sanctified by authority that the meaning of an ordinary word is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which it is used and the object which is intended to be attained."

(4) AIR 1963 SC 1207 : M/S. NEW INDIA SUGAR MILLS LIMITED v. COMMISSIONER OF SALES TAX, BIHAR. In paragraph 8, the Supreme Court has held thus:

> "It is a recognized rule of interpretation of statutes that the expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature. If an expression is susceptible of a narrow or technical meaning as well as a popular meaning the Court

would be justified in assuming that the Legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its powers invalid. In interpreting a statute the Court cannot ignore its aim and object."

(5) AIR 1977 SC 1569 : BUSCHING SCHMIDZ PRIVATE LIMITED v. P.T.MENGHANI AND ANOTHER:

"Residential premises are not only those which are let out for residential purposes. Nor do they cover all kinds of structures where humans may manage to dwell. Use or purpose of the letting is no conclusive test. Whatever is suitable or adoptable for residential uses, even by making some changes, can be designated 'residential premises'. And once it is 'residential in the liberal sense S. 14-A stands attracted."

(6) (1987) 1 SCC 191 : S.P.JAIN v. KRISHNA MOHAN GUPTA AND OTHERS:

"We are of the opinion that law should take pragmatic view of the matter and respond to the purpose for which it was made and also take cognizance of the current capabilities of technology and life style of the community. It is well settled that the purpose of law provides a good guide to the interpretation of the meaning of the Act. We agree with the views of Justice Krishna Iyer in BUSCHING SCHMITZ PRIVATE LIMITED case that legislative futility is to be ruled out so long as interpretative possibility permits. Residentiality depends for its sense on the context and purpose of the statute of the project promoted."

(7) 1957 SC 907 : KANAI LAL SUR v. PARAMNIDHI SADHUKHAN :

"The first and primary rule of construction is that the intention of the Legislative must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the Statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise. When the material words are capable of two constructions one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the Courts would prefer to adopt the latter construction. It is only in such cases that it becomes relevant to consider the mischief and defect which the Act purports to remedy and correct."

(8) AIR 1955 SC 661 : BENGAL IMMUNITY CO. LTD. v. STATE OF BIHAR:

"For the sure and true interpretation of the Statutes in general (be they penal or beneficial), restrictive or enlarging of the common law) four things are to be discerned and considered.

First, what was the common law before the making of the law; second, what was the mischief and defect for which the common law did not provide; third, what remedy the Petitioner has resolved and appointed to cure the disease and fourth, the true reason of the remedy; and then the office of all the judges is always to make such construction or

shall suppress the mischief, and advance the remedy and to subtle inventions and condone the continuance of the mischief and pro private commando, and to aid force and life

(9) AIR 1988 SC 2267 : BALIRAM v. JUSTICE B.LENTIN :

"Law must be definite and certain. If any of the features of the law can usefully be regarded as normative, it is such basic postulates as the requirement is consistency in judicial decision-making. It is this requirement of consistency that gives to the law much of its rigour. At the same time, there is need for flexibility. Professor H.L.A. Hart regarded as one of the leading thinkers of our time observes in his influential book "The Concept of Law", depicting the difficult task of a Judge to strike a balance between certainty and flexibility:

'Where there is obscurity in the language of a state, it results in confusion and disorder. No doubt the Courts so frame their judgments as to give the impression that their decisions are the necessary consequences of predetermined rules. In very simple cases it may be so; but in the vast majority of cases that trouble the Courts, neither statute nor precedents in which the rules are legitimately contained allow of only one result. In most important cases there is always a choice. The judge has to choose between alternative meanings to be given to the words of a state or between rival interpretations of what a precedent amounts to. It is only the tradition that judges find and do not make law that conceals this, and presents their decisions as if they were deductions smoothly made from clear pre-existing rules without intrusion of the judge's choice."

(10) (1975) 2 SCC 671 : NASIRUDDIN v. STATE TRANSPORT APPELLATE TRIBUNAL.

In paragraph 27 of the said decision, this is what the Supreme Court has held:

"If the precise words used are plain and unambiguous, they are bound to be construed in their ordinary sense. The mere fact that the results of a statute may be unjust, does not entitle a court to refuse to give it effect. If there are two different interpretations of the words, in an Act, the Court will adopt that which is just, reasonable and sensible rather than that which is none of those things. If the inconvenience is an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if it is read in a manner in which it is capable, though not in an ordinary sense, there would not be any inconvenience at all, there would be reason why one should not read it according to its ordinary grammatical meaning. Where the words are plain, the Court would not make any alteration. (para 27)".

23.6 Following these principles of Interpretation of Statutes we hold that the concept of Creamy Layer is not applicable to the in-service candidates working as Assistant Engineers in the PWD and WRD or in the equivalent cadres in other Departments for the present recruitment.

24. **QUESTION (6)** : Whether the Applicants are not estopped from challenging the Notifications having applied in pursuance of the Notifications and the 2007 Rules and having participated in the selection process ?

24.1 The Supreme Court has repeatedly pointed out that persons who participate in a selection process are not entitled to challenge the selection process, after coming to know that they have no chances of getting selected. In the decision reported in AIR 1986 SC 1043 (OM PRAKASH SHUKLA v. AKHILELSH KUMAR SHUKLA AND OTHERS) this is what the Supreme Court has held in paragraph 23:

> "Moreover, this is a case where the petitioner in the writ petition should not have been granted any relief. He had appeared for the examination without protest. He filed the petition only after he had perhaps realized that he would not succeed in the examination. The High Court itself has observed that the setting aside of the results of examinations held in other districts would cause hardship to the candidates who had appeared there. The same yardstick should have been applied to the candidates in the district of Kanpur also. They were not responsible for the conduct of the examination."

24.2 This view has been reiterated in the case of MADANLAL v. STATE OF J.K. reported in (1995) 3 SCC 486. In the said decision, at paragraph 9 the Supreme Court has held as follows:

> "Before dealing with this contention, we must keep in view the salient fact that the Petitioners as well as the contesting successful candidates being Respondents concerned herein, were all found eligible in the light of marks obtained in the written test to be eligible to be called for oral interview. Up to this stage, there is no dispute between the parties. The Petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the Petitioners as well as the contesting Respondents concerned. Thus the Petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this Petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of the interview was unfair or the Selection Committee was not properly constituted. In the case of OM PRAKASH SHUKLA v. AKHILESH KUMAR SHUKLA, it has been clearly laid down by a Bench of three learned Judges of this Court that when the Petitioner appeared at the examination without protest and when he found that he would not succeed in the examination, he filed a petition challenging the said examination, the High Court should not have granted any relief to such a Petitioner."

24.3 In the light of the law laid down by the Supreme Court in the aforesaid decisions, it is impermissible for the Applicants to challenge the validity of the 2007 Rules and the Notifications.

25. **<u>OUR CONCLUSIONS</u>**:

(1) The 2007 Rules are neither bad in law nor arbitrary for not prescribing the minimum service or experience for in-service candidates.

(2) The in-service candidates working both in PWD and WRD are entitled to be considered as in-service candidates.

(3) The Note found in the Schedule to the 2007 Rules prescribing minimum marks in Kannada and English papers for the purposes of qualifying to appear for the Personality Test is not ultra vires or contrary to Rules 7 and 8 of the 2007 Rules.

(4) The Creamy Layer Concept is not applicable to the recruitment in question.

(5) Applicants who have challenged the validity of the Notifications and the 2007 Rules are not entitled to challenge the same having submitted the Applications under the Notifications and having participated in the selection process under the 2007 Rules.

26. As we have upheld the Constitutional validity of the 2007 Rules and the Notifications, it is necessary to consider the questions involved in Part IV and Part V of the Applications:

27. PART IV APPLICATIONS : APPLICATIONS NO.1490, 1770, 1792, 1794, 1801, 1916, 1949 OF 2008, 5198 OF 2007, 1433, 1471, 1531, 3154 OF 2008, 5003 AND 5013 OF 2007, 3403, 1890, 4795, 4796 AND 4797 OF 2008:

27.1 **APPLICATION NO.1490/2008** : The Applicant has sought for a direction to the KPSC to consider his case for selection to the post of AEE having regard to his merit. The contention of the KPSC is that the Applicant has not furnished any Certificate to show that he belongs to Category II-A and, hence, the candidature of the Applicant under Category II-A cannot be considered. Even assuming that he is entitled for reservation under Category II-A, the Applicant has secured less marks than the cut-off marks in Category II-A and, hence, the Applicant has not been called for interview.

We find no reason to take a different view than what has been taken by the KPSC. Hence, Application No.1490/2008 deserves to be dismissed.

APPLICATION NO.1770/2008 : The Applicant has prayed for a direction to the KPSC not to ignore her claim for selection under Category II-A in view of her letter dated 3.4.2008. The stand of the KPSC is that the Applicant had actually claimed reservation under Category III-A, but subsequently she claimed reservation under Category II-A. She has secured 203 marks. But as per Government Order dated 30.3.2002, Group A and B Officers are not entitled to claim reservation. It is further

contended that the contention of the Applicant that the marks obtained in Kannada and English papers be added is without any basis and the scheme of the Examination does not provide for considering the marks obtained in the said papers for determining the merit.

Since we have held that the concept of Creamy Layer is not applicable to the present recruitment, the KPSC has to consider the claim of the Applicant depending upon the category under which the KPSC finds the Application of the Applicant in order.

27.3 **APPLICATION NO.1792/2008 :** The Applicant has prayed for a direction to the concerned Tahsildar to consider his application dated 21.5.2007 and to issue Certificate to the effect that he belongs to Category II-A of Backward Classes in terms of Government Order dated 30.3.2002 and also a direction to the KPSC to call the Applicant for the Personality Test. The case of the KPSC is that the Applicant has secured 231 marks and since the cut-off marks for General Merit is 280 marks, the Applicant was not called for the Personality Test and that since the Applicant is working as a Group-B Officer, he comes under the Creamy Layer. It is also contended that the contention of the Applicant that he has secured 358 marks including the marks obtained in Kannada and English Compulsory Papers cannot be accepted as the scheme of the Examination does not provide for including the marks obtained in the Compulsory Papers.

In view of our decision that the concept of Creamy Layer is not applicable to the present recruitment, the KPSC has to consider the claim of the Applicant, if the Applicant's claim under Category II-A is in order in terms of the Rules and Government Orders on the subject.

27.4 **APPLICATION NO.1794/2008 :** The Applicant has prayed for a direction to the KPSC not to ignore his claim for selection under Category II-A. The defence of the KPSC is that even though the Applicant has secured 263 marks, he is not entitled to claim reservation under Category IIA in view of the Government Order dated 30.3.2002. It is also contended that since scheme of the Examination does not provide for including the marks obtained in the Compulsory Papers, the request of the Applicant to include the marks obtained in the said papers cannot be considered.

Since we have held that the concept of Creamy Layer is not applicable to the present recruitment, the KPSC has to consider the claim of the Applicant under Category II-A, if the Applicant ulfils the conditions for claiming such reservation in accordance with law.

27.5 **APPLICATION NO.1801/2008 :** The Applicant has prayed for quashing the Endorsement dated 20.3.2008 issued by the Tahsildar and to direct the KPSC to consider the claim of the Applicant under Category III-A of Backward Classes. The stand of the KPSC is that the Applicant has not claimed any reservation and even as on the last date for receipt of applications in pursuance of the Notification dated 8.8.2007, the Applicant has not submitted any Certificate claiming reservation and, hence, his claim was considered under General Merit Category. It is further contended that as per the Government Order dated 30.3.2002 the Applicant is not entitled for reservation. The Applicant being a Group-B Officer comes under the Creamy Layer. It is also contended that the Applicant has secured 163 marks and cut-off marks under General Merit category is 280 for in-service quota and, hence, he was not called for Personality Test. The KPSC has denied the contention of the Applicant that he has secured 246 marks on the ground that the Scheme of the Examination does not provide for counting the marks secured in the Compulsory Papers.

In view of our decision that the concept of Creamy Layer is not applicable to the present recruitment, the KPSC has to consider the claim of the Applicant, if the claim of the Applicant is in accordance with law.

27.6 **APPLICATION NO.1916/2008 :** The Applicant has prayed for quashing the Notification dated 22.2.2007 on the ground that it does not fix lower age limit for in-service candidates. The defence of the KPSC is that fixation of age limit is within the exclusive power of the Executive and the Applicant has no right to dictate terms to the Executive regarding fixation of age limit.

In the light of our answer to Question (1), there is no merit in this Application and, accordingly, Application No.1916/2006 is liable to be dismissed.

27.7 **APPLICATION NO.1949/2008 :** The prayer of the Applicant is to direct the KPSC to consider his representation dated 25.3.2008 and to call him for Personality Test under Category IIA of Backward Classes. The case of the KPSC is that the Applicant has secured 231 marks. Even though the Applicant has claimed reservation under Category II-A he is not entitled for reservation in view of the application of the Creamy Layer concept. Therefore, he was not interviewed under Category II-A. Since the Applicant does not come within the cut-off marks for General Merit category, he is not entitled for any relief.

Since we have held that the concept of Creamy Layer is not applicable to the present recruitment, the KPSC has to consider the claim of the Applicant under Category II-A, if the Applicant's claim is otherwise in accordance with law.

27.8 **APPLICATION NO.5198/2007 :** The prayer made by the Applicants is to quash the Notifications inviting the Applications and to direct the Government to remove the defects pointed out by the Applicants before proceeding to implement the 2007 Rules. The contention of the Applicants is that the direct recruitment to the posts of AEEs would affect the promotional chances of the Assistant Engineers. The case of the KPSC is that the Cadre & Recruitment Rules provide for ratio for promotion and direct recruitment and, hence, the contention of the Applicants is devoid of merits.

In the light of answer to Question (1), this Application is devoid of merits. Hence, Application No.5198/2008 is liable to be dismissed.

27.9 **APPLICATION NO.1433/2008 :** The Applicant has sought for a direction to the KPSC to consider his case under Category III-A. The stand taken by the KPSC is that the Applicant has not claimed any reservation and, hence, his case was considered under General Merit category. The Applicant has secured 112 marks as against the cut-off marks of 280 under General Merit Category and, hence, he was not called for the Personality Test.

In view of low marks secured by the Applicant, the claim of the Applicant is liable to be rejected.

27.10 APPLICATION NO.1471/2008 : The Applicant has prayed for a direction to the KPSC to interview the Applicant and to consider his case under Category III-B of General Merit (Rural). The defence of the KPSC is that the Applicant has not enclosed Form-II as required under the Government Order dated 13.1.2001 to the effect that he does not come under the Creamy Layer Concept and, hence, his case was considered under General Merit Category. Subsequently, the Applicant has submitted Category III-B Certificate along with the Rural Study Certificate obtained long after the last date fixed for receipt of the Applications. Hence, it is contended that in view of the law laid down by the Supreme Court, the claim of the Applicant for reservation under Category III-B cannot be considered.

In view of our decision that the concept of Creamy Layer is not applicable to the present recruitment, we would have directed the KPSC to consider the claim of the Applicant but for the fact that the Applicant has not produced the relevant certificates in terms of the Rules and the Notification. Hence, the Application is liable to be dismissed as devoid of merits.

27.11 **APPLICATIONS NO.1531/2008 AND 3154/2008:** The Applicants have prayed for quashing the Notification dated 22.2.2007 on the ground that the same has not provided for reservation in favour of Physically Handicapped Persons. The defence of the KPSC is that the Applicants have secured less marks than the cut-off marks of 280 under General Merit Category and, hence, they were not called for the Personality Test. As regards the reservation in favour of Physically Handicapped Persons, the contention of the KPSC is that the post of AEE in the PWD/WRD has not been identified for reservation in favour of Physically Handicapped Persons and, hence, the Applicants are not entitled to claim reservation.

Having regard to the nature of the duties attached to the post of AEE, when the Government has taken a decision to exclude the post of AEE from the purview of reservation for Physically Handicapped persons, this Tribunal cannot substitute its own views for that of the Government. Hence, there is no merit in the contentions of the Applicants in these Applications. Accordingly, Applications No.1531/2008 and 3154/2008 are liable to be dismissed.

27.12 **APPLICATIONS NO.3403/2008, 4795/2008, 4796/2008 AND 4797/2008 :** The Applicants have sought for a direction to the KPSC to consider their claims under Category IIIA, IIA, IIB and IIIA, respectively. The stand taken by the KPSC is that the Applicants being Assistant Engineers come within the Creamy Layer Concept and, hence, they are not entitled to claim reservation. On that basis, the KPSC has ignored the Certificates issued by the Tahsildars in favour of the Applicants.

Since we have held that the concept of Creamy Layer is not applicable to the present recruitment, the KPSC is required to consider the claim of the Applicants, if the claim made by the Applicants is otherwise in accordance with Rules and the Government Orders on the subject.

27.13 **APPLICATION NO.1890/2008 :** The prayer made by the Applicant is to set aside the Notification dated 27.3.2008 insofar as it has disqualified the Applicant for selection to the post of AEE and to direct the KPSC to select the Applicant on the basis of the marks secured by him in the Written Examination and in the Personality Test under Scheduled Caste Category. The defence of the KPSC is that the Applicant has not furnished the Employment Certificate that is required to be furnished by Government servants in the application form. Based on the information furnished by the Applicant he was permitted to write the Examination and he secured 253 marks in the Examination. His name was included in the list of eligible candidates and he was called for Personality Test. At the time of the

interview it was noticed that he did not furnish the Employment Certificate duly signed by the Appointing Authority as required under Rule 11 of the General Recruitment Rules and, hence, the Applicant was disqualified and he was not interviewed.

As per Rule 11 of the General Recruitment Rules the candidates who are serving as Government servants are required to forward their Applications through their Appointing Authorities. Non-furnishing of such information vitiates the claim of the Applicant. This requirement is held to be mandatory by this Tribunal in the case reported in 1990 KSLJ 1732 (TULASIKUMAR v. KPSC). Such a major defect cannot be cured subsequently and, hence, the claim of the Applicant for reservation has been rightly rejected by the KPSC. Accordingly, Application No.1890/2008 is liable to be dismissed.

27.14 **APPLICATIONS NO.5013/2007 AND 5003/2007:**

SUBMISSIONS OF MR. K.SUBBA RAO, LEARNED SENIOR COUNSEL AND MR. P.S.RAJAGOPAL, LEARNED SENIOR COUNSEL:

Applicants in Applications No. 5013/2007 and 5003/2007 are working in other Government Departments. They have not been interviewed by the KPSC on the ground that they are over-aged. In these Applications they are seeking relaxation in the upper age limit under Rule 6(3)(b) of the General Recruitment Rules. According to both the learned Senior Counsel, Rule 6(3) of the General Recruitment Rules has got over-riding effect over Rule 6(1) of the General Recruitment Rules and the Special Rules, i.e., 2007 Rules in the instant case. This position is no longer in doubt having regard to the view taken by this Tribunal in Application No.2390/97 (B.S.BASARGI v. KARNATAKA PUBLIC SERVICE COMMISSION AND ANOTHER) decided on 4.9.1997, which has been upheld by the High Court of Karnataka in Writ Petition No.26021/97 DD 29.5.1998ANKAIAH v. STATE OF KARNATAKA AND OTHERS and connected cases decided on 29.5.1998. Hence, the learned Senior Counsel submit that the Applicants in Applications No.5013/2007 and No.5003/2007 are entitled for relaxation in upper age limit under Rule 6(3) of the General Recruitment Rules.

27.15 **SUBMISSIONS OF MR.T.NARAYANASWAMY, STANDING COUNSEL FOR THE KPSC:**

Having regard to the provisions of Sub-Rule (1) of Rule 6 of the General Recruitment Rules, when the maximum age limit is provided by the Special Rules of Recruitment, Sub-Rule (3) of Rule 6 would

not apply and there cannot be any such relaxation. The correctness of the decision in ANKAIAH case has been doubted by a Co-ordinate Bench of the High Court. The learned Counsel also referred to the decision of a co-ordinate Bench of this Tribunal in A.NO. 4254/2008 ARAVIND v. KPSC and submitted that this Tribunal in the said case has held that Rule 6(3) of the General Recruitment Rules has no application where the Special Rules provides for upper age limit.

27.16 In these Applications, the question that arises for consideration is:

QUESTION (7) : Whether Rule 6(3)(b) of the General Recruitment Rules has got over-riding effect over Rule 6(1) of the General Recruitment Rules and the 2007 Rules ?

CONSIDERATION OF QUESTION:

27.17 The relevant provisions of Rule 6 of the General Recruitment Rules read thus:

"(1) Save as otherwise provided in the rules of recruitment specially made and applicable to any service or post prescribing higher age limit, every candidate for appointment by direct recruitment must have attained the age of eighteen years and not attained the age of:

(a) thirty eight years in the case of a person belonging to any of the Scheduled Castes or Scheduled Tribes or Category-I of the Backward Classes;

(b) thirty six years in the case of a person belonging to any of the category- II(a), II(b), III(a) or III(b) of Other Backward Classes; and

(c) thirty three years in the case of any other person, on the last date fixed for the receipt of applications or on suchother date, as may be specified by the appointing authority:

Provided that in the case of the following repatriates the upper age limit shall be relaxed by three years for recruitment through competitive examinations held by the Karnataka Public Service Commission and up to forty five years for all other recruitments, and it shall be further relaxed by five years for persons belonging to the Scheduled Castes and Scheduled Tribes among them:

(a) Persons of Indian origin who migrated to India from East Pakistan (now Bangladesh) on or after 1st January, 1964 but before 26th March, 1971;

(b) Persons of Indian origin from Burma who have migrated on or after 1st June, 1963 and the repatriates from Ceylon (now Sri Lanka) who have migrated on or after 1st November, 1964;

(c) Persons of Indian origin who have migrated from the East African countries of Kenya, Uganda and the United Republic of Tanzania:

(d) persons of Indian origin who have migrated from Vietnam.

(2) Where maximum age limits other than age limits specified in sub-rule (1) are fixed for recruitment for any service or post then unless the rules of recruitment provided for enhanced age limit in the case of a person belonging to Scheduled Castes, Scheduled Tribes, Category-I, Category-II(a), Category-II(b), Category-III(a), Category-III(b) of Other Backward Classes; the maximum age limit shall be deemed to have been enhanced by five years in the case of a candidate belonging to any of the Scheduled Castes or Scheduled Tribes or Category-I of Other Backward Classes and by three years in the case of a candidate belonging to any of the Category II(a) or Category II(b) or Category III(a) or Category III(b) of Other Backward Classes.

(2A) Notwithstanding that the maximum age limits specified in the rules of recruitment to any service or post is less than those prescribed in sub-rule (1), the maximum age limits prescribed in the said sub-rule (1) shall respectively be deemed to be maximum age limits in respect of the class or persons specified therein for recruitment to the said service or post.

Savings : Recruitment to any service or post in the said service pending on the date of commencement of these rules shall be finalized in accordance with the rules which were in force immediately prior to the commencement of these rules.

(3) Notwithstanding anything contained in sub-rule (1) the maximum age limit for appointment shall be deemed to be enhanced in the following cases to the extent mentioned namely:-

(a) in the case of candidate for appointment to a Group-D post on the personal establishment of a Minister, Minister of State of Deputy Minister, by five years, if such appointment is only for the duration of the term of office of such Minister, Minister of State or Deputy Minister;

(b) in the case of a candidate who is or was holding a post under the Government or a local authority or a Corporation established by a State Act or a Central Act or established by the Government under a State Act or Central Act and owned or controlled by the Government by the number of years during which he is or was holding such post or ten years whichever is less."

Rule 6(1) starts with the phrase 'Save as otherwise provided in the rules of recruitment specially made and applicable to any service or post prescribing higher age limit'. Rule 6(3) starts with the non-obstante clause 'notwithstanding anything contained in sub-rule (1) the maximum age limit for appointment shall be deemed to be enhanced in the following cases to the extent mentioned, namely; ….." A bare reading pf the above said provisions clearly shows that while the age limit stipulated by Rule 6(1) is subject to higher age limit prescribed under the Recruitment Rules specially made for any service, Rule 6(3) operates notwithstanding anything stated in Rule 6(1) and notwithstanding anything stated in the Recruitment Rules made governing a particular service. Therefore, Rule 6(3)(b) of the General Recruitment Rules would apply to the present cases.

27.18 When the Special Rules of 2007 do not provide for relaxation in upper age limit and when the General Recruitment Rules are applicable to the recruitment in question, the Applicants are

entitled for relaxation in age limit under Rule 6(3) of the General Recruitment Rules. This position is no longer res-integra having regard to the declaration of the law by this Tribunal in the case of B.S.BASARAGI v. KARNATAKA PUBLIC SERVICE COMMISSION AND ANOTHER (A.NO.2390/97) and connected cases decided on 4.9.1997. In that case, the validity of the Special Rules similar to the 2007 Rules, called the Karnataka Education Department Services (Department of Public Instructions) (Recruitment) (Fourth Amendment) Rules, 1981, to the extent they had not provided for relaxation in upper age limit, came up for consideration. This Tribunal after following the earlier decisions rendered by this Tribunal held that Rule 6(3) of the General Recruitment Rules has got over-riding effect over the Special Rules notwithstanding anything contained in Rule 6(1) of the General Recruitment Rules. The decision of this Tribunal was challenged by one of the Applicants by name ANKAIAH and also by the KPSC in Writ Petitions No.26021/1997 and 31046/1997, respectively, before the High Court of Karnataka. The High Court upheld the view taken by this Tribunal and disposed of the Writ Petitions as per the Order dated 29.5.1998. In pages 22 and 23 of the Order this is what the High Court has stated:

> "The next contention raised by the learned Counsel for the Petitioner/KPSC is regarding the question of verification of age of the candidates. Some of the candidates are in-service candidates. In this regard, the learned Counsel for the Petitioner/KPSC has cited several decisions. After going through the decisions and after noticing that some of the decisions have been considered in detail by the Administrative Tribunal, we do not think that it is necessary to repeat or mention in detail those decisions. On careful examination of the concerned Rules and the various pronouncements cited, we do not think that the contentions now raised by the learned counsel for the Petitioner/KPSC are sustainable in law. In our view also, as rightly observed by the Administrative Tribunal, the Karnataka Civil Services (General Recruitment) Rules, 1977, as amended would squarely apply to the in-service candidates and as such the finding of the Administrative Tribunal in respect of those candidates is just and proper and needs no interference."

The aforesaid decision of the High Court fully covers the issue involved in this Application. Therefore, the Applicants are entitled for grant of relaxation in upper age limit under Rule 6(3)(b) of the General Recruitment Rules.

27.19 Another co-ordinate Bench of this Tribunal in Application No.4254/2008 (ARAVIND v. THE KARNATAKA PUBLIC SERVICE COMMISSION) decided on 5.9.2008 has taken the view that Rule 6(3) of the General Recruitment Rules has no application to cases where there are Special Rules. In paragraphs 4 and 5 of the said Order, this is what a co-ordinate Bench of this Tribunal has held:

> "4. The learned Counsel for the Applicant has placed reliance on clause (b) of sub rule (3) of Rule 6 of the Karnataka Civil Services (General Recruitment) Rules, 1957, to contend that in the case of a candidate who is holding a post under the Government, he is entitled to relaxation in age limit to the extent of such years during which he is holding the post or 10 years whichever is less.
>
> 5. As rightly pointed out by the learned Counsel for the Respondent, the relaxation in age limit has been specifically prescribed in Rule 5 of the Karnataka Recruitment of Gazetted Probationers (Appointment by Competitive Examinations) Rules, 1997 and, therefore, the provisions of sub-rule (3) of Rule 6 of the General Recruitment Rules cannot be applied to the candidates to be elected as per special rules. Rule 6 of General Recruitment Rules on which reliance is placed, specifically provides in sub-rule (1) that the age limit prescribed in that rule 6 is in cases in which provision is not made in the rules of recruitment specially made. In which cases age relaxation can be made has been specifically provided in Rule 5 of the Karnataka Recruitment of Gazetted Probationers (Appointment by Competitive Examinations) Rules, 1997. No relaxation of upper age limit has been provided in that special rule to in-service candidates. Therefore, Rule 6(3) of General Recruitment Rules is not applicable to the present case and the endorsements given by the Respondents are in accordance with law."

The co-ordinate Bench of this Tribunal which decided the case of ARVAIND has not noticed or considered the order of the High Court and, therefore, the decision rendered by the co-ordinate Bench of this Tribunal in the case of ARAVIND (supra) has to be treated as per-incurium. If the order of the High Court had been brought to the notice of the co-ordinate Bench of this Tribunal, may be, the co-ordinate Bench would have come to a different conclusion.

27.20 Though another Division Bench of the High Court doubted the correctness of the decision in ANKAIAH case at the admission stage, the matter was not referred to any larger Bench and subsequently the issue is not considered on merits, we are told. Therefore, the view taken by the High Court in ANKAIAH case holds the field. In this regard, it is relevant to refer to what a Constitution Bench of the Supreme Court has held in the case of UNION OF INDIA AND OTHERS v. GODFREY PHILIPS INDIA LIMITED, reported in (1985) 4 SCC 369.

> "12. …We find it difficult to understand how a Bench of two Judges in JIT RAM case could possibly overturns or disagree with what was said by another Bench of two Judges in MOTILAL SUGAR MILLS case. If the Bench of two judges in JIT RAM CASE found themselves unable to agree with the law laid down in MOTILAL SUGAR MILLS case, they could have referred JIT RAM CASE to a Larger Bench, but we do not think it was right on their part to express their disagreement with the enunciation of the law by a co-ordinate Bench in MOTILAL SUGAR MILLS case."

27.21 Further, "A clause beginning with 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force',

is sometimes appended to a section in the beginning, with a view to give the enacting part of the section in case of conflict an overriding effect over the provision or Act mentioned in the non-obstante clause. It is equivalent to saying that in spite of the provision or Act mentioned in the non-obstante clause, the enactment following it will have its full operation or that the provisions embraced in the non-obstante clause will not be an impediment for the operation of the enactment. Thus, a non-obstante clause may be used as a legislative device to modify the ambit of the provision or law mentioned in the non-obstante clause to override it in specified circumstances. The phrase 'notwithstanding anything' is used in contradistinction to the phrase 'subject to', the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject. A non-obstante clause must also be distinguished from the phrase 'without prejudice'. A provision enacted 'without prejudice' to another provision has not the effect of affecting the operation of the other provision and any action taken under it must not be inconsistent with such other provision. Ordinarily, there is a close approximation between the non-obstante clause and the enacting part of the section and the non-obstante clause may throw some light as to the scope and ambit of the enacting part in case of its ambiguity, but when the enacting part is clear its scope cannot be cut down or enlarged by resort to non-obstante clause" (Principles of Statutory Interpretation – by Justice G.P.Singh – Tenth Edition, 2006).

27.22 Since the decisions of the High Court are binding on this Tribunal, we have to follow the view taken by the High Court in ANKAIAH case and hold that Rule 6(3) of the General Recruitment Rules applies to these two cases. Hence, the KPSC has to be directed to consider the cases of the Applicants in Applications No. 5013/2007 and 5003/2007 by granting relaxation as provided in Rule 6(3)(b) of the General Recruitment Rules.

28. **PART V APPLICATIONS : APPLICATIONS NO.1546, 1753 AND 2364 OF 2008.**

SUBMISSIONS OF MR. K.SUBBA RAO, LEARNED SENIOR COUNSEL IN RESPECT OF APPLICATIONS NO.1546/2008, 1753/2008 AND 2364/2008:

28.1 Application No.1753/2008 and Application No.2364/2008 are filed by the same Applicant. The Applicant in Application No.1546/2008 is working as Assistant Engineer in Panchayat Raj Engineering Sub-Division, Chitradurga, in the PWD since 2001. As far as the Applicant in Applications No.1753/2008 and No.2364/2008 is concerned, he is a post Graduate in Engineering and is working in the High Court Buildings, PWD. In Applications No.1546/2008 and No.1753/2008, the Applicants

have prayed for a direction to the KPSC to interview them for recruitment to the posts of AEEs in the Category of General Merit/III-A and II-A, respectively, in the 'in-service quota'. In Application No.2364/2008, the grievance of the Applicant is that he was not provided additional Graph Sheets at the time of examination. The Applicants were called for Written Test. They appeared for the Written Test and passed in the same by securing high marks. Subsequently, they were called for Interview. They appeared for the Interview but they were not interviewed on the ground that they being Assistant Engineers hold Group-B posts under the Government which comes within the "Creamy Layer Concept".

28.2 Section 2 of the 1990 Act defines the expression "Other Backward Classes", which means the Communities, Castes and Tribes notified by the State Government from time to time under Section 15(4) and 16(4) of the Constitution of India. Section 3 of the Act relates to the applicability of the Act. Section 4 relates to reservation of appointments or posts etc. Sub-Section (1) of Section 4A provides that any candidate or his parent or guardian belonging to the Scheduled Castes and Scheduled Tribes may in order to claim the benefit of reservation under Section 4 either for appointment to any service or post or admission to a course of study in a University or any educational institution may give an application to the Tahsildar in such form and in such manner as may be prescribed for issue of a Caste Certificate. Sub-Section (2) of the same Section provides that any candidate or his parent or guardian belonging to "Other Backward Classes" may in order to claim the benefit of reservation under Section 4 either for appointment to any service or post or for admission to a course of study in University or any educational institution, make an application to the Tahsildar in such form and in such manner as may be prescribed for issue of an Income and Caste Certificate. Sub-Section (3) states that the Tahsildar may on receipt of an application under Sub-Section (1) or (2) and after holding such inquiry as he deems fit and satisfying himself regarding the genuineness of the claim made by the Applicant, pass an Order issuing a Caste Certificate or, as the case may be, an Income and Caste Certificate, in such form as may be prescribed or reject the Application. From a perusal of the aforesaid provisions, it is clear that the Competent Authority to issue a Caste and Income Certificate under the provisions of the Act is only the Tahsildar. Once a Caste Certificate is issued in favour of a candidate by the Tahsildar, such Certificate, prima facie, establishes that the candidate belongs to a particular caste or category. Once the Applicants have produced the genuine certificates issued by the Competent Authority, the KPSC has to accept the same. Section 4A of the Act clearly states that the Competent Authority to issue the Certificate is only the Tahsildar. In fact, the law clearly states that "a thing which has to be done in a particular manner has to be done only in that manner and it cannot be done in any

other manner". In this regard, the learned Senior Counsel referred to the decisions of the Supreme Court reported in (1) AIR 1969 SC 634 (STATE OF GUJARAT v. SHANTILAL) and (2) AIR 1969 SC 267 (GUJARATH ELECTRICITY BOARD v. GIRDHARLAL MOTILAL AND ANOTHER). In the light of these decisions, the KPSC has no authority to ignore the Caste Certificate issued by the Tahsildar. The only Authority which can set aside a Caste Certificate is the Appellate Authority under Section 4-B of the Act on an Appeal. Further, Section 4-C of the Act provides for verification of Caste Certificate and Caste and Income Certificate. Therefore, when the Act has prescribed a procedure for issuing a Caste Certificate and also provides for filing an Appeal by an Aggrieved Person, the Certificate issued by the Competent Authority cannot be nullified by an Authority other than the Authority mentioned in Section 4-A and other Sections of the Act. In this regard, he drew our attention to the decision of the Supreme Court reported in (1997) 7 SCC 405 (R.KANDASWAMY v. CHIEF ENGINEER, MADRAS PORT TRUST). In the light of these decisions, the learned Senior Counsel submits that the decision of the KPSC in declining to interview the Applicants is untenable and a direction will have to be issued to the KPSC to interview the Applicants.

29. In the light of these pleadings, in Part V Applications the following question arises for consideration:

QUESTION (8) : Whether the KPSC is justified in ignoring the Caste Certificates issued by the concerned Tahsildars ?

CONSIDERATION OF QUESTION:

29.1 The Competent Authority to issue a Caste and Income Certificate under the provisions of the 1990 Act and the Rules is only the Tahsildar. Once the candidates produce the genuine certificates issued by the Competent Authority, the KPSC has to accept the same. In this regard, it is relevant to refer to the following decisions of the Supreme Court:

(1) AIR 1969 SC 634 (STATE OF GUJARAT v. SHANTILAL). At paragraph 54 of the said Judgment, while interpreting certain provisions of the Bombay Town Planning Act, the Supreme Court after referring to some judgments of the English Courts at paragraph 54 (page 654) has stated thus:

> "…For it is a settled rule of interpretation of Statutes that when a power is given under a Statute to do certain thing in certain way, the thing cannot be done in any other way… (TAYLOR v. TAYLOR 1875(1) Chd. 426).

(2) The same view has been taken by the Supreme Court in AIR 1969 SC 267 (GUJARATH ELECTRICITY BOARD v. GIRDHARLAL MOTILAL AND ANOTHER). At paragraph 6 of the said judgment at page 269, this is what the Hon'ble Supreme Court has stated:

> "…Legislature has prescribed the manner of its exercise. It must be exercised in that manner and in no other way. It must also be seen that the Parliament deliberately changed the form of the Notice to be given from what it was before Act 32/1959 was enacted."

(3) The decision of the Supreme Court reported in (1997) 7 SCC 505 (R.KANDASWAMY v. CHIEF ENGINEER, MADRAS PORT TRUST) is apposite to the facts of the case. In paragraphs 4 to 7 of the said decision, this is what the Supreme Court has said:

> "4. We have heard learned counsel for the parties and perused the records. Para 4 of the GOMs No.2137 dated 11.11.1989 reads thus:
>
> > 'The Government directs that the Community Certificates in respect of all communities included in the list of Scheduled Tribes, for the purpose of appointments in public services under the Central and State Governments, Public Sector Undertakings, quasi-Government Institutions, Banks etc., shall hereafter be issued only by the Revenue Divisional Offices.'
>
> 5. On a doubt being raised regarding the validity of certificates issued by the Tahsildar prior to 11.11.1989, the Joint Secretary to the Government of Tamil Nadu on 3.4.1991 informed the Collector of various districts in Tamil Nadu that 'the permanent Community Certificate issued to the Scheduled Tribes by Tahsildars upto 11.11.1989 is valid'. This communication had been placed on record in the High Court from a combined reading of GOMs No.2137 dated 11.11.1989 and letter of the Joint Secretary dated 3.4.1881 (supra) it follows that whereas a Community Certificate after 11.11.1989 is required to be issued by the Tahsildar prior to 11.11.1989 are valid certificates. In view of this position, it was not proper for the Respondent to have insisted upon a fresh certificate to be produced by the appellant from the Revenue Divisional Officer as admittedly the Community Certificate produced by the appellant had been issued by the Tahsildar concerned in 1987, that is prior to 11.11.1989.
>
> 6. In our opinion, the Community Certificate issued to a Scheduled Tribe candidate by the Tahsildar prior to 11.11.1989 is a good and valid Community Certificate for all purposes so long as such a certificate is not cancelled. The authorities cannot decline to take that into consideration and insist upon a fresh Community Certificate from the Revenue Divisional Officer.
>
> 7. The judgments of the High court under the circumstances cannot be sustained. They are set aside and by a mandamus we direct the Respondent to take into consideration the Community Certificate issued to the Appellant by the Tahsildar which had already been produced before it for the purpose of consideration of the appellant to the appointment."

From the aforesaid decisions, it is clear that it is not open to the KPSC to ignore the Caste Certificate issued by the Tahsildars.

29.2 Therefore, we hold that the KPSC has no authority in law to ignore the Caste Certificate issued by the Tahsildar and the KPSC has to consider the applications of Applicants in Applications No.1546/2008 and 1753/2008 in accordance with law.

30. As far as the claim of the Applicant in Application No.2364/2008 that he was not provided with additional Graph Sheets is concerned, it was submitted on behalf of the KPSC that the Graph Sheets which were already issued to the Applicant had sufficient space for answering the question and, therefore, additional Graph Sheets were not required. The Applicant has not produced any material in support of this allegation. Therefore, the claim of the Applicant in Application No.2364/2008 is liable to be rejected.

31. In the result, we pass the following

O R D E R

(i) Applications in Part-I and Part-II where the 2007 Rules and the Notifications are challenged, are dismissed;

(ii) Applications in Part III where the Creamy Layer Concept is challenged are disposed of by holding that the Creamy Layer Concept is not applicable to the present recruitment.

(iii) Applications in Parts IV, namely Applications No.1471/2008, 1490/2008, 1916/2008, 5198/2007, 1433/2008, 1531/2008, 3154/2008 and 1890/2008 are dismissed.

(iv) The remaining Applications in Part IV, namely Applications No.1770/2008, 1792/2008, 1794/2008, 1801/2008, 1949/2008, 3403/2008, 4795/2008, 4796/2008 and 4797/2008 are disposed of with a direction to the KPSC to consider the applications of the Applicants in the said Applications in accordance with law without applying the Creamy Layer Concept.

(v) Applications No.1546/2008 and 1753/2008 in Part V are allowed.

(vi) Application No.2364/2008 in Part V is dismissed.

(vii) The KPSC shall consider the cases of the candidates working both in PWD and WRD as 'in-service' candidates for the purposes of the present recruitment;

(viii) The KPSC shall not apply the Creamy Layer Concept to the present recruitment;

(ix) The KPSC shall grant relaxation in upper age limit under Rule 6(3)(b) of the General Recruitment Rules wherever it is claimed.

(x) The KPSC shall consider the Caste Certificates issued by the concerned Tahsildars, if produced in terms of the Notifications in question.

(xi) Since the selection process has been pending for more than one and a half year, the KPSC shall finalise the selection process as early as possible, but not later than two months from the date of receipt of a certified copy of this Order.

32. Before parting with this case, we would like to observe that the KPSC has acted in an indifferent manner while refusing to grant relaxation in upper age limit to certain candidates and also in ignoring the Certificates of Caste issued by the Tahsildars. The KPSC which has been constituted under Article 315 of the Constitution of India is an independent expert body. It has to act in an independent manner in making the selection as per the prescribed norms. In the instant case, the KPSC has acted beyond its powers while examining the validity of the Caste Certificates issued by the Tahsildars under the 1990 Act.

32.1 Further, the KPSC is fully aware of the consistent view taken by this Tribunal that Rule 6(3)(b) of the General Recruitment Rules has got over-riding effect over Rule 6(1) of the General Recruitment Rules and also the Special Recruitment Rules. The KPSC was a party to almost all earlier decisions of this Tribunal on this subject. The KPSC itself had challenged one such decision of this Tribunal in ANKAIAH case before the High Court of Karnataka and the High Court dismissed the Writ Petition preferred by the KPSC. Thereafter, the KPSC did not challenge the decision of the High Court before the Supreme Court and the decision of the High Court has become final. But by not bringing these facts, the KPSC has obtained the Order dated 5.9.2008 at the hands of a co-ordinate Bench of this Tribunal in Application No.4254/2008, wherein the co-ordinate Bench of this Tribunal has held that when the Special Rules prescribes age limit, Rule 6(3) of the General Recruitment Rules is not applicable. If the KPSC had brought the decision of the High Court to the notice of the co-ordinate Bench, the co-ordinate Bench of this Tribunal would have followed the consistent view taken by this Tribunal. The KPSC is wholly responsible for these conflicting decisions.

32.2 It was also submitted at the Bar that some of the candidates who were called for interview have been treated in a shabby manner. The candidates were not allowed by the officials of the KPSC to appear before the Interview Committee to have their say. No reasons were also assigned as to why they were not permitted to appear before the Interview Committee. When the candidates insisted for issuance of Endorsements, no Endorsements were also issued for non-consideration of their case.

32.3 This attitude of the officials of the KPSC, in our view, is contrary to the very object of the constitution of the Institution. Ours is a democratic country and we are governed by the "Rule of Law" and the "Rule established by law". In a system governed by "Rule of Law" discretion when conferred upon executive authorities must be confined within clearly defined limits. The Rule of Law from this point of view means that decisions should be made by the application of known principles of rules and in general such decisions should be predictable and the citizen should know where he stands. If a decision is taken without application of any principle or without any rule of law, it is impracticable and such a decision is the antithesis of a decision taken in accordance with the Rule of Law, as held by the Supreme Court in S.G.JAISINGHANI –Vs- UNION OF INDIA reported in AIR 1967 SC 1427.

32.4. We hope the KPSC will act as a model Recruiting Agency. If an institution constituted under the Constitution acts in an arbitrary manner, people will lose faith in the Institution and the authenticity of selection.

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IN THE KARNATAKA ADMINISTRATIVE TRIBUNAL AT BANGALORE
APPLICATION NO.2074/2009
D.D. 05.10.2009
The Hon'ble Mr. Justice A.V.Srinivasa Reddy, Chairman &
The Hon'ble Mr. G.Raju Prem Kumar, Administrative Member

Sri. U.B.Neralagimath ... Applicant
Vs.
The Secretary, KPSC ... Respondent

Recruitment:

Whether recruitment is bad for non mentioning of date of recruitment, number and date of Notification and also the last date for filing of the applications in the Information Booklet? – No

In the recruitment for the post of Assistant/Junior Assistant carried out for the year 2007-08 the grievance of the applicant is that the Information Booklet did not contain date of recruitment, number and date of notification and also the last date for receipt of applications – KAT in view of the fact that the same Advocate for another applicant challenging the recruitment notification which contained all the details in another application-A.No.2075/2009 has dismissed the application as frivolous making observations regarding duty of an Advocate.

Held:

An Advocate is an Officer of the Court with the following observations:

"We would like to say something about the duty of an Advocate also. Advocate is not a mere mouth piece of his client. In giving opinion to a client, Advocate's duty is to 'act as Judge, responsible to God and man, as also especially to their employers, to advise them soberly, discreetly and honestly to the best of his ability, though the certain consequences be the loss of large prospective gains'. A lawyer is not the servant of the client that engaged him but the true position is that he is the servant of the justice itself. Though it shall be the duty of an Advocate fearlessly to uphold the interests of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other, the Advocate should also advise his clients to refrain from filing frivolous case. The Advocate must remember that he is an Officer of the Court."

ORDER

Some cases are being filed even for 'fall of a hat'. The present case is one such case.

The case of the applicant is that the Karnataka Commission Service Commission (for short, the 'KPSC') had invited applications for recruitment to the posts of Assistants and Junior Assistants for the year 2007-08. In that regard, the KPSC had also issued a booklet to the candidates by collecting Rs.50/- from each candidate. The grievance of the applicant is that the said booklet did not contain the date of Recruitment, Number and date of Notification and also the last date for filing of the Applications and non-mentioning of these details is illegal and contrary to law.

2. Mr. Jagadish Shastri, learned Counsel appearing for the applicants submitted that the action of the KPSC in not mentioning the details in the booklet such as date of Recruitment, order and date of Notification and also the last date for filing of the applications is illegal and contrary to law. He further submitted that the selection process without notifying these detail is illegal.

3. The respondent has opposed the application by filing a reply statement. Mr. T.Narayanaswamy, learned Counsel appearing for the KPSC took us through the Reply Statement and submitted that the information booklet is issued to the candidates to enable the candidates to submit their applications as per the instructions. Applications from eligible candidates have not been invited as per the information booklet and for that purpose a separate Notification has been issued. He further submitted that the Booklet need not contain number and date of the Notification and the last date for receipt of applications. That is not the object for which the Booklet is issued. The necessary details were mentioned in the Notification dated 5.12.2007 by which the application were invited. He further submitted that the applicant has failed to show how he was prevented from applying for the posts after purchasing the Application Form and the Booklet. The learned Counsel finally submitted that the Advocate who is appearing for the applicant in this application has also filed Application No.2075/2009 pertaining to the very same recruitment praying to quash the recruitment Notification dated 5.12.2007 and Application No.2075/2009 and the present application were filed on the same day, namely, 2.5.2009 and, hence, the claim made by the applicant is not bonafide. The learned counsel also submitted that the present application is filed more than one year after the issuance of the application form to the applicant and hence, the present application is barred by limitation. Therefore, the learned counsel prays for dismissal of the application with exemplary costs. He also seeks a direction to the concerned to take action against the applicant under Section 209 of Indian Penal Code.

4. The only grievance of the applicant is that the booklet did not contain the details such as date of Recruitment, Number and date of the Notification and also the last date for filing of the Applications. The applicant has failed to prove how non-mentioning of the said details has prejudiced his case or he was prevented from submitting his application for recruitment. The present application appears to have been filed by the applicant as a desperate attempt to somehow stall the recruitment. Further, the applicant is not an "aggrieved person". A 'person aggrieved' must be a person who has suffered a legal grievance, i.e., a person who has been wrongfully deprived of something or to whom something has been refused wrongfully. Added to this, approaching a Court of law with frivolous claims as has been done in the present case amounts to 'Abuse of the process of the Court'. There is no merit in the application and the same is liable to be dismissed with exemplary costs.

5. We would like to say something about the duty of an Advocate also. Advocate is not a mere mouth piece of his client. In giving opinion to a client, Advocate's duty is to 'act as Judge, responsible to God and man, as also especially to their employers, to advise them soberly, discreetly and honestly to the best of his ability, though the certain consequences be the loss of large prospective gains'. A lawyer is not the servant of the client that engaged him but the true position is that he is the servant of the justice itself. Though it shall be the duty of an Advocate fearlessly to uphold the interests of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other, the Advocate should also advise his clients to refrain from filing frivolous case. The Advocate must remember that he is an Officer of the Court. The Advocate who has filed the present application is in the habit of filing applications even for fall of a hat. Further, from the pleading it is also seen that the Counsel for the applicant has filed Application No.2075/2009 on the file of this Tribunal on the same day challenging the Notification dated 5.12.2007 and consequently details such as the Number and Date of the Notification and the last date for receipt of applications are within the knowledge of the Counsel. Therefore, it is too much for the Counsel for the applicant to contend that because of non-mentioning of Number and Date of the Notification and the last date for receipt of applications in the Information Booklet, the selection was illegal.

6. It is also to be noted that for no fault of the KPSC it has been dragged to this Tribunal for contesting this frivolous application. Therefore, the application is liable to be dismissed.

7. In the result we pass the following:

ORDER

The application is dismissed.

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IN THE KARNATAKA ADMINISTRATIVE TRIBUNAL AT BANGALORE
APPLICATION NO.8912/2003
D.D. 02.11.2009
THE HON'BLE Mr. JUSTICE A.V.SRINIVASA REDDY, CHAIRMAN &
THE HON'BLE Mr. G.RAJU PREM KUMAR, ADMINISTRATIVE MEMBER

Sri P.R.Dayananda … Applicant
Vs.
The State of Karnataka & Anr. ... Respondents

Qualification:

Whether Master's Degree obtained through 'Open University Scheme' without passing Bachelor's Degree is equivalent to Bachelor's Degree prescribed for recruitment under State Civil Services? – No

The applicant was a candidate for recruitment to the post of Assistant/First Division Assistant the qualification prescribed being Bachelor's Degree or equivalent qualification – After competitive examination while preparing the select list it was found that the applicant had M.A. Degree obtained from Open University but had no Bachelor's degree prescribed for the post hence his candidature was rejected – KAT following the decision of the Supreme Court in Annamalai University Vs. Secretary to Govt. etc., (2009) 4 SCC 590, has upheld the rejection of the candidature of the applicant and dismissed the application.

Held:

Master's Degree obtained by the applicant through Open University Scheme without there being a Bachelor's Degree is not a valid qualification for the purpose of recruitment under the State Civil Services.

The Supreme Court has held that the UGC Act and IGNOU Act having been enacted by Parliament under Schedule VII List-I Entry 66 and List Entry 25 of the Constitution, respectively, the question of repugnancy between them would not arise and the provisions of the UGC Act would prevail over those of IGNOU Act irrespective of the fact that IGNOU Act was a later enactment.

[Note: In K.Narasimhamurthy & Ors. vs. K.P.S.C. 2000 (4) Karnataka Law Journal 97 included in the Compilation of Judgments Volume-I Page 366 to 378 pertaining to G.P. 1998 recruitment, Karnataka High Court has held that rule prescribing that no candidate is eligible unless he possesses Bachelor Degree awarded by University or equivalent qualification is unreasonable, arbitrary and there is not rationale in rejecting the candidature of a person with only a Master's degree. But in view of the decision of the Supreme Court in Annamalai University referred to above this decision of High Court is no longer good law.]

Cases referred:

1. AIR 1952 SC 252 - State of Bihar v. Kameshwar Singh
2. AIR 1955 SC 58 at p.836 - Navinchandra Mafatlal v. CIT
3. AIR 1958 SC 560 at p.391 - State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.
4. AIR 1963 SC 703 - Gujarat University v. Krishna Rangnath Mudholkar
5. (1969) 2 SCC 166 at p.489 - Harakchand Ratanchand Banthia v. Union of India

6. (1970) 3 SCC 355 - Check Post Officer v. K.P.Abdulla and Bros.
7. (1984) 2 SCC 302 – Prem Chand Jain v. R.K.Chhabra
8. (1987) 4 SCC 671 - Osmania University Teachers' Association. V. State of A.P.
9. 1994 SUPP.(3) SCC 516 - University of Delhi v. Raj Singh
10. (1995) 4 SCC 104 - State of T.N. v. Adhiyaman Educational and Research Institute
11. (2003) 9 SCC 564 - State of A.P. v. K.Purushotham Reddy
12. (2006) 3 SCC 434 - Bombay Dyeing and Mfg. Co. Ltd. (3) v. Bombay Environmental Action group
13. (2009) 1 SCC 610 - Guru Nanak Dev University v. Sanjay Kumar Katwal
14. (2009) 4 SCC 590 - Annamalai University v. Secretary to Government, Information & Tourism Dept.

ORDER

"Whether the Master's Degree obtained through 'Open University Scheme' without there being a Bachelor's Degree is a valid qualification for the purposes of recruitment under the State Civil Services?" is the question that arises for determination in this Application.

2. The facts of the case disclose that the Karnataka Public Service Commission (for short, 'KPSC') had initiated selection process for recruitment to the posts of Assistants/First Division Assistants as per Notification dated 3.10.1996. The Applicant was one of the candidates for the said recruitment. He had claimed reservation under Category III-A. The recruitment was governed by the Karnataka Civil Services (Recruitment to the Ministerial Posts) Rules, 1978. The academic qualifications prescribed for the post were as under:

> "4. Academic qualifications of candidates : (1) Every person who is not disqualified under Karnataka Civil Services (General Recruitment) Rules, 1977, shall be eligible for appointment by direct recruitment to the posts of -
>
> (i) Assistants or First Division Clerks, if he is a holder of a Bachelor's Degree or equivalent qualification."

The Competitive Examinations were held on 2.11.1997. The candidates including the Applicant were allowed to appear for the Competitive Examination on the basis of the claim made in their application with regard to the qualification, reservation, age etc., without scrutinizing the certificates produced by them. After the Competitive Examination, at the time of preparing the select list while scrutinizing the Certificates it was found that the Applicant did not possess the qualification prescribed for the post, namely Bachelor's Degree. On that ground, his candidature for the post was rejected as per Endorsement dated 19.11.2003. It is that Endorsement which is under challenge in this Application.

3. The case of the Applicant is that the M.A. Degree obtained by him as External Candidate from Mysore University is in no way inferior to the M.A. Degree obtained by regular candidates and, hence, the M.A. Degree obtained by him is also a Degree.

4. On the other hand, the stand of the KPSC is that the M.A. Degree obtained by the Applicant without passing Bachelor's Degree is not equivalent to the Bachelor's Degree prescribed for the post under the relevant Rules. The Government has not notified the M.A. Degree obtained by the Applicant as equivalent to Bachelor's Degree prescribed for the post. It is further contended on behalf of the KPSC that in the absence of a Notification or declaration by the Government as to equivalence of qualification, the M.A. Degree obtained by the Applicant without passing the Bachelor's Degree cannot be said to be equivalent to the qualification prescribed for the post and, hence, the rejection of the candidature by the KPSC does not call for any interference.

5. The short but interesting point that arises for consideration is "whether the M.A. Degree obtained by the Applicant without passing Bachelor's Degree is equivalent to the Bachelor's Degree prescribed for the post of First Division Assistant?"

6. The Applicant passed SSLC in the year 1982. Thereafter, he completed Pre-University Course during 1984. He also completed Diploma in Journalism during 1992. Subsequently, in the year 1994-95 he appeared for the M.A. Examination through Correspondence Course from Mysore University and passed the same.

7. Normally a student cannot enroll for a Master's degree course unless he has a basic Bachelor's degree in the chosen subject. The distinction between a formal system and an informal system is in the mode and manner in which education is imparted. The alternative system envisaged under the Open University Act was in substitution of the formal but not as regards the manner of ensuring the standard of education. The University Grants Commission Act (for short, 'UGC Act') was enacted for effectuating coordination and determination of standards in universities. The provisions of the UGC Act are binding on all Universities whether conventional or open. They apply equally to Open Universities as also to formal conventional Universities. In the matter of higher education, it is necessary to maintain minimum standards of instructions and such minimum standards are required to be defined by the UGC. The purport and object for which the UGC Act was enacted must be given full effect. Recently, in the case of ANNAMALAI UNIVERSITY v. SECRETARY TO GOVERNMENT,

INFORMATION & TOURISM DEPARTMENT, reported in (2009) 4 SCC 590, the Supreme Court has elaborately discussed the scope the UGC Act and the IGNOU Act. The Supreme Court has held that the UGC Act and the IGNOU Act having been enacted by Parliament under Schedule VII List-I Entry 66 and List Entry 25 of the Constitution, respectively, the question of repugnancy between them would not arise and the provisions of the UGC Act would prevail over those of IGNOU Act irrespective of the fact that IGNOU Act was a later enactment.

8. In the case of ANNAMALAI UNIVERSITY, the Appellant N.Ramesh held a Diploma in Film Technology. He also had the requisite experience of five years as Head of Section. He, however, had obtained M.A. Degree in Open University System in an examination held by the Annamalai University. The next promotion from the post of Head of Section was to the post of Principal. Ramesh was placed in additional charge of the post of Principal. That was challenged by one Gabriel before the Tamil Nadu Administrative Tribunal. The Tribunal directed the State of Tamil Nadu to consider the objections of Gabriel having regard to the qualification prescribed for the said post vis-à-vis those possessed by Ramesh. The challenge to the qualification of Ramesh was on the ground that he did not possess a basic graduation degree and thus the post graduation degree conferred on him by the Annamalai University was invalid in law. At that stage, the State of Tamil Nadu appointed one K.Loganathan, which was challenged by Ramesh before the Tribunal. The Application was dismissed by the Tribunal. Ramesh challenged the Order of the Tribunal before the High Court of Tamil Nadu, which had become infructuous, as after retirement of K.Loganathan, Ramesh was appointed as the Principal. Gabriel challenged the said appointment of Ramesh by filing Writ Petition before the High Court of Tamil Nadu. Ultimately, a Division Bench of the High Court held that Ramesh was not eligible to be considered for the post of Principal, as the M.A. Degree obtained by him through Open University System without there being a Bachelor's Degree was not a valid one and the High Court directed the State to take steps to fill up the post of Principal in accordance with law. Aggrieved by the Order of the High Court, the Annamalai University as also Ramesh approached the Supreme Court. The Supreme Court opined that the High Court of Tamil Nadu was correct in rendering its opinion on the qualification of Ramesh.

9. In this regard, it is worthwhile to quote the following observations of the Supreme Court in the said case from paragraphs 40 to 61:

> "40. The UGC Act was enacted by Parliament in exercise of its power under Entry 66 of List 1 of the Seventh Schedule to the Constitution of India whereas the Open University

Act was enacted by Parliament in exercise of its power under Entry 25 of List III thereof. The question of repugnancy of the provisions of the said two Acts, therefore, does not arise. It is true that the Statement of Objects and Reasons of the Open University Act shows that the formal system of education had not been able to provide an effective means to equalise educational opportunities. The system is rigid inter alia in respect of attendance in classrooms. Combinations of subjects are also inflexible.

41. Was the alternative system envisaged under the Open University Act in substitution of the formal system, is the question. In our opinion, in the matter of ensuring the standard of education, it is not. The distinction between a formal system and an informal system is in the mode and manner in which education is imparted. The UGC Act was enacted for effectuating coordination and determination of standards in universities. The purport and object for which it was enacted must be given full effect.

42. The provisions of the UGC Act are binding on all universities whether conventional or open. Its power are very broad. The regulations framed by it in terms of clauses (e), (f), (g) and (h) of sub-section (1) of Section 26 are of wide amplitude. They apply equally to open universities as also to formal conventional universities. In the matter of higher education, it is necessary to maintain minimum standards of instructions. Such minimum standards of instructions are required to be defined by UGC. The standards and the coordination of work or facilities in universities must be maintained and for that purpose required to be regulated. The powers of UGC under Sections 26 (1) (f) and 26 (1) (g) are very broad in nature. Subordinate legislation as is well known when validly made becomes part of the Act. We have noticed hereinbefore that the functions of UGC are all-pervasive in respect of the matters specified in clause (d) of sub-section (1) of Section 12-A and clauses (a) and (c) of sub-section (2) thereof.

43. Indisputably, as has been contended by the learned counsel for the appellant as also the learned Solicitor General that the Open University Act was enacted to achieve a specific object. It opens new vistas for imparting education in a novel manner. Students do not have to attend classes regularly. They have wide options with regard to the choice of subjects but the same, in our opinion, would not mean that despite a Parliamentary Act having been enacted to give effect to the constitutional mandate contained in Entry 66 of List I of the seventh Schedule to the Constitution of India, activities and functions of the private universities and open universities would be wholly unregulated.

44. It has not been denied or disputed before us that in the matter of laying down qualification of the teachers, running of the University and the matters provided for under the UGC Act (sic the Regulations) are applicable and binding on all concerned. The Regulations framed, as noticed hereinbefore, clearly aimed at the open universities. When the regulations are part of the statute, it is difficult to comprehend as to how the same which operate in a different field would be ultra vires the parliamentary Act, IGNOU has not made any regulation; it has not made any ordinance. It is guided by the Regulations framed by the UGC. The validity of the provisions of the Regulations has not been questioned either by IGNOU or by the appellant University. From a letter dated 5.5.2004 issued by Mr. H.P.Dikshit, who was not only the Vice-Chancellor but also the Chairman of DEC of IGNOU it is evident that the appellant University has violated the mandatory provisions of the Regulations.

45. The amplitude of the provisions of the UGC Act vis-à-vis the universities constituted under the State Universities Acts which would include within its purview a university made by Parliament also is now no longer res integra.

46. In PREM CHAND JAIN V. R.K.CHHABRA (1984) 2 SCC 302, this Court held: (SCC pp.308-09, para 8)

> "8….. The legal position is well settled that the entries incorporated in the lists covered by Schedule VII are not powers of legislation but 'fields' of legislation. (Harakchand Ratanchand Banthia v. Union of India (1969) 2 SCC 166 at p.489.) In State of Bihar v. Kameshwar Singh (AIR 1952 SC 252) this Court has indicated that such entries are mere legislative heads and are of an enabling character. This Court has clearly ruled that the language of the entries should be given the widest scope or amplitude. (Navinchandra Mafatlal v. CIT (AIR 1955 SC 58 at p.836.) Each general word has been asked to be extended to all ancillary or subsidiary matters which can fairly and reasonably be comprehended. (See State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.(AIR 1958 SC 560 at p.391.] it has also been held by this Court in Check Post Officer v. K.P.Abdulla and Bros. (1970) 3 SCC 355, that an entry confers power upon the legislature to legislate for matters ancillary or incidental, including provision for avoiding the law. As long as the legislation is within the permissible field in pith and substance, objection would not be entertained merely on the ground that while enacting legislation, provision has been made for a matter which though germane for the purpose for which competent legislation is made it covers an aspect beyond it. In a series of decisions this Court has opined that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the legislature enacting it, it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature.

47. In University of Delhi v. Raj Singh, 1994 SUPP.(3) SCC 516, this Court held: (SCC pp.526-27, para 13)

> "13….By reason of Entry 66, Parliament was invested with the power to legislate on 'coordination and determination of standards in institutions for higher education, or research and scientific and technical institutions'. Item 25 of List III conferred power upon Parliament and the State legislatures to enact legislation with respect to 'vocational and technical training of labour'. A six-Judge Bench of this court (the reference is to Gujarat University v. Krishna Rangnath Mudholkar, AIR 1963 SC 703) observed that the validity of the State legislation on the subjects of university education and education in technical and scientific institutions falling outside Entry 64 of List I as it then read (that is to say, institutions for scientific or technical education other than those financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance) had to be judged having regard to whether it impinged on the field reserved for the Union under Entry 66. In other words, the validity of the State legislation

depended upon whether it prejudicially affected the coordination and determination of standards. It did not depend upon the actual existence of the Union legislation in respect of coordination and determination of standards which had, in any event, paramount importance by virtue of the first part of Article 254 (1)."

48. In State of T.N. v. Adhiyaman Educational and Research Institute (1995) 4 SCC 104, this Court laid down the law in the following terms: (SCC pp.134-35, para 41)

"41. What emerges from the above discussion is as follows:

(i) The expression 'coordination' used in Entry 66 of the Union List of the Seventh Schedule to the Constitution does not merely mean evaluation. It means harmonisation with a view to forge a uniform pattern for a concerted action according to a certain design, scheme or plan of development. It therefore, includes action not only for removal of disparities in standards but also for preventing the occurrence of such disparities. It would, therefore, also include power to do all things which are necessary; to prevent what would make 'coordination' either impossible or difficult. This power is absolute and unconditional and in the absence of any valid compelling reasons, it must be given its full effect according to its plain and express intention.

(ii) To the extent that the State legislation is in conflict with the Central legislation though the former is purported to have been made under Entry 25 of the Concurrent List but in effect encroaches upon legislation including subordinate legislation made by the Centre under Entry 25 of the Concurrent List or to give effect to Entry 66 of the Union List, it would be void and inoperative.

(iii) If there is a conflict between the two legislations, unless the State legislation is saved by the provisions of the main part of clause (2) of Article 254, the State legislation being repugnant to the Central legislation, the same would be inoperative.

(iv) Whether the State law encroaches upon Entry 66 of the Union List or is repugnant to the law made by the Centre under Entry 25 of the Concurrent List, will have to be determined by the examination of the two laws and will depend upon the facts of each case.

(v) When there are more applicants than the available situations/seats, the State authority is not prevented from laying down higher standards or qualifications than those laid down by the Centre or the Central authority to shortlist the applicants. When the State authority does so, it does not encroach upon Entry 66 of the Union List or make a law which is repugnant to the Central law.

(vi) However, when the situations/seats are available and the State authorities deny an applicant the same on the ground that the applicant is not qualified according to its standards or qualifications, as the case may be, although the applicant satisfied that standards or qualifications laid down by the Central law, they act unconstitutionally. So also when the State authorities de-

recognise or dis-affiliate an institution for not satisfying the standards or requirements laid down by them, although it satisfied the norms and requirements laid down by the Central authority, the State authorities act illegally.

49. In State of A.P. v. K.Purushotham Reddy (2003) 9 SCC 564, this Court held: (SCC p.572.para 19)

"19. The conflict in legislative competence of Parliament and the State Legislatures having regard to Article 246 of the Constitution of India must be viewed in the light of the decisions of this Court which in no uncertain terms state that each entry has to be interpreted in a broad manner. Both the parliamentary legislation as also the State legislation must be considered in such a manner so as to uphold both of them and only in a case where it is found that both cannot coexist, the State Act may be declared ultra vires. Clause (1) of Articles 246 of the Constitution of India does not provide for the competence of Parliament or the State Legislatures as is ordinarily understood but merely provides for the respective legislative fields. Furthermore, the courts should proceed to construe a statute with a view to uphold its constitutionality.

It was observed: (Purushotham Reddy case (2003) 9 SCC 564, at para 20)

"20. Entry 66 of List I provides for coordination and determination of standards inter alia for higher education. Entry 25 of List III deals with broader subject, namely, education. On a conjoint reading of both the entries there cannot be any doubt whatsoever that although the State has a wide legislative field to cover, the same is subject to Entries 63, 64, 65 and 66 of List I. Once, thus, it is found that any State legislation does not entrench upon the legislative field set apart by Entry 66, List I of the Seventh Schedule of the Constitution of India, the State Act cannot be invalidated."

50. The UGC Act, thus, having been enacted by Parliament in terms of Entry 66 of List I of the Seventh Schedule to the Constitution of India would prevail over the Open University Act.

51. With respect, it is difficult to accept the submission of the learned Solicitor General that the two Acts operate in different fields, namely, conventional university and Open University. The UGC Act, indisputably, governs open universities also. In fact, it has been accepted by IGNOU itself. It has also been accepted by the appellant University.

52. Reliance placed by Mr. K. Parasaran on Guru Nanak Dev University v. Sanjay Kumar Katwal (2009) 1 SCC 610, in our opinion, is not apposite. The question, which arose for consideration therein, was as to whether Guru Nanak Dev University was entitled not to treat the degrees awarded by IGNOU as it is not equivalent to three years' degree course. Even therein it was noticed: (SCC p.615, para 12)

"12…..It is true that normally a student cannot enroll for a Masters degree course unless he has a basic Bachelor's degree in the chosen subject. Unfortunately, attention of this Court was not drawn to the Regulations, which are imperative in character. The question, as noticed hereinbefore, before this Court therein was the question of equivalence.

53. It has been noticed in Guru Nanak Dev University v. Sanjay Kumar Katwal (2009) 1 SCC 610, that the appellant University did not wish to treat correspondence courses and distance education courses as being the same. It was stated to be a matter of policy. Observations which have been made for holding the degrees granted by the appellant University as valid must be considered keeping in view the question involved therein, namely, equivalence of degree and not any other question. The questions, which have been posted before us did not fall for its consideration. The mandatory Regulations were also not brought to its notice. We, therefore, are of the opinion that Guru Nanak Dev University v. Sanjay Kumar Katwal (2009) 1 SCC 610 has no application to the facts of the present case.

54. This Court in Osmania University Teachers' Association. V. State of A.P. (1987) 4 SCC 671 held as under ¨(SCC pp.676 and 685, paras 14, 15 and 30)

> "14. Entry 25, List III relating to education including technical education, medical education and universities has been made subject to the power of Parliament to legislate under Entries 63 to 66 of List I. Entry 66, List I and Entry 25, List III should, therefore, be read together. Entry 66 gives power to Union to see that a required standard of higher education in the country is maintained. The standard of higher education including scientific and technical should not be lowered at the hands of any particular State or States. Secondly, it is the exclusive responsibility of the Central Government to coordinate and determine the standards for higher education. That power includes the power to evaluate, harmonise and secure proper relationship to any project of national importance. It is needless to state that such a coordinate action in higher education with proper standards is of paramount importance to national progress. It is in this national interest, the legislative field in regard to 'education' has been distributed between List I and List III of the Seventh Schedule.
>
> 15. Parliament has exclusive power to legislate with respect to matters included in List I. The State has no power at all in regard to such matters. If the State legislates on the subject falling within List I that will be void, inoperative and unenforceable.
>
> 30. The Constitution of India vests Parliament with exclusive authority in regard to coordination and determination of standards in Institutions for higher education. Parliament has enacted the UGC Act for that purpose. The University Grants Commission has, therefore, a greater role to play in shaping the academic life of the country. It shall not falter or fail in its duty to maintain a high standard in the universities. Democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs. It is hoped that University Grants Commission will duly discharge its responsibility to the nation and play an increasing role to bring about the needed transformation in the academic life of the universities."

55. The submission of Mr. K.Parasaran that as in compliance with the provisions contained in Regulation 7, UGC had been provided with information in regard to instructions through non-formal/distance education relating to the observance thereof by itself, in our opinion, would not satisfy the legal requirement. It is one thing to say that informations have been furnished but only because no action had been taken by UGC in that behalf, the same would not mean that an illegality has been cured. The power of relaxation is a statutory power. It can be exercised in a case of this nature.

56. Grant of relaxation cannot be presumed by necessary implication only because UGC did not perform its duties. Regulation 2 of the 1985 Regulations being imperative in character, non-compliance therewith would entail its consequences. The power of relaxation conferred on UGC being in regard to the date of implementation or for admission to the first or second degree courses or to give exemption for a specified period in regard to other clauses in the Regulations on the merit of each case do not lead to a conclusion that such relaxation can be granted automatically. The fact that exemption is required to be considered on the merit of each case is itself a pointer to show that grant of relaxation by necessary implication cannot be inferred. If mandatory provisions of the statute have not been complied with, the law will take its own course. The consequences will ensue.

57. Relaxation, in our opinion, furthermore cannot be granted in regard to the basic things necessary for conferment of a degree. When a mandatory provision of a statute has not been complied with by an administrative authority, it would be void. Such a void order cannot be validated by inaction.

58. The only point which survives for our consideration is as to whether the purported post facto approval granted to the appellant University of programmes offered through distance modes is valid. DEC may be an authority under the Act, but its orders ordinarily would only have a prospective effect. It having accepted in its letter dated 5.5.2004 that the appellant University had no jurisdiction to confer such degrees, in our opinion, could not have validated an invalid act. The degrees become invalidated in terms of the provisions of the UGC Act. When mandatory requirements have been violated in terms of the provisions of one Act, an authority under another Act could not have validated the same and that too with a retrospective effect.

59. The provisions of the UGC Act are not in conflict with the provisions of the Open University Act. It is beyond any cavil of doubt that the UGC Act shall prevail over the Open University Act. It has, however, been argued that the Open University Act is a later Act. But we have noticed hereinbefore that the nodal Ministry knew of the provisions of both the Acts. The regulations were framed almost at the same time after passing of the Open University Act. The Regulations were framed at a later point of time. Indisputably, the Regulations embrace within its fold the matters covered under the Open University Act also.

60. Submission of Mr. K.Parasaran that in terms of sub-section (2) of Section 5 of the Open University Act a non obstante clause has been created and, thus, would prevail over the earlier Act cannot also be accepted. Apart from the fact that in this case repugnancy of the two Acts is not in question (in fact cannot be in question having (sic not) been enacted by Parliament and a State in terms of the provisions of the Concurrent List) the non obstante clause contained in the Open University Act will be attracted

provided the statutes operate in the same field. The UGC Act, as noticed hereinbefore, operates in different field. It was enacted so as to make provision for the coordination and determination of standards in universities and for that purpose, to establish a University Grants Commission. Its directions being binding on IGNOU, sub-section (2) of Section 5 of the Open University Act would not make the legal position otherwise.

61. Reliance has been placed upon a decision of this Court in Indian Express Newspapers Bombay (P) Ltd v. Union India (1985) 1 SCC 641 wherein it was opined that subordinate legislation must yield to plenary legislation. The same legal principle has been stated recently in Bombay Dyeing and Mfg. Co. Ltd. (3) v. Bombay Environmental Action group (2006) 3 SCC 434 wherein this Court held: (SCC p. 488 para 104)

> "104. A policy decision, as is well known, should not be lightly interfered with but it is difficult to accept the submissions made on behalf of the learned counsel appearing on behalf of the appellants that the courts cannot exercise their power of judicial review at all. By reason of any legislation whether enacted by the legislature or by way of subordinate legislation, the State gives effect to its legislative policy. Such legislation, however, must not be ultra vires the Constitution. A subordinate legislation apart from being intra vires the Constitution should not also be ultra vires the parent Act under which it has been made. A subordinate legislation, it is trite, must be reasonable and in consonance with the legislative policy as also give effect to the purport and object of the Act and in good faith."
>
> There is no quarrel with the aforementioned proposition of law. Regulation 2, however, is not contrary to the Open University Act and, thus, the said decisions will have no application."
>
> In the light of the law laid down by the Supreme Court in the aforesaid case, we hold that the Master's Degree obtained by the Applicant through 'Open University Scheme' without there being a Bachelor's Degree is not a valid qualification for the purposes of recruitment under the State Civil Services. The KPSC has rightly rejected the candidature of the Applicant and, hence, the impugned Endorsement is neither arbitrary nor illegal.

10. In the result, we pass the following

ORDER

The Application is dismissed.

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KERALA PUBLIC SERVICE COMMISSION

IN THE HIGH COURT OF KERALA AT ERNAKULAM
W.A. NO.1638 OF 2006 (D)
D.D. 11.4.2007
The Hon'ble Mr. Justice P.R.Raman &
The Hon'ble Mr. Justice Antony Dominic

The Kerala P.S.C. & Anr. ... Appellants
Vs.
A.Divakaran & Ors. ... Respondents

Reservation:
Roster:

Recruitment to the post of High School Assistant (HSA) (Maths) - 4th respondent ranked 3rd in the merit list Ezhava reservation candidate selected against roster point No.18, a slot reserved for OBC by operating T.P.O. (temporarily passed over) as per internal guidelines – The grievance of the 1st respondent ranked 6 under Ezhava category is that if 4th respondent was selected against O.C. (open competition) vacancy by virtue of merit 1st respondent would have been selected against Point No.18 OBC Ezhava vacancy – The Division Bench interpreting the guideline TPO has to be satisfied at the earliest opportunity has to be read consistent with Rule 14(b) has held 4th respondent-3rd candidate in the merit list ought to have been selected against OC vacancy and 1st respondent ought to have been selected against reserved Ezhava vacancy and dismissed the appeal filed by the Commission challenging the order of Single Judge in W.P. 1258/2004.

Held:

Rule 14(b) of the General Rules prescribed that the claims of members of SC/ST and OBCs shall also be considered for appointments to vacancies filled up on merit and where a candidate belonging to these categories is selected on merit, the number of posts reserved for the said categories shall not in any way be affected. The purport of this Rule is that if a candidate belonging to a reserved category is included in the general quota by virtue of his merit, he is entitled to be appointed with the general candidates and his appointment cannot be adjusted against the reserved quota.

Further held:

The guideline has to be read consistent with Rule 14(b) and if that be so, the prescription in the guideline cannot be understood as one requiring the appellants to advise a reserved candidate included in the merit list against a reserved vacancy.

Cases referred:

1. 1975 KLT 111 (F.B.) - Pulomaja Devi v. Gopinathan Nair & Others
2. AIR 1996 (SC) 448 - Union of India v. Virpal Singh Chauhan
3. 1997(2) KLT 218 - Life Insurance Corporation of India v. Wilson George
4. 2001 (8) SCC 676 - Bharathidasan University & Anr. vs. All India Council for Technical Education & Ors.

JUDGMENT

Antony Dominic J.

Kerala Public Service Commission and its District Officer Palakkad, the 1st and 2nd respondents in W.P.(C) No.1258 of 2004, are the appellants herein. The 1st respondent in the appeal filed the writ petition praying for quashing Ext.P1, a letter issued by the 1st appellant rejecting his representation and to declare that he is entitled to be advised and appointed at the fourth turn against the first vacancy in the third recruitment year. He also seeks to quash the appointment order issued to the 4th respondent. The learned Single Judge by judgment dated 25.4.2006, allowed the writ petition quashing Ext.P1 and declaring that the 1st respondent is entitled to get advised and appointed at the fourth turn, against the first vacancy in the third recruitment year. The appellants were directed to advise the petitioner against the turn of Ezhava community, if need be after terminating the appointment of the 4th respondent. It is against this judgment, this writ appeal is filed.

2. The facts which led to the filing of this writ appeal are that, after a due process of selection, the 1st appellant published a rank list for the post of High School Assistant (Maths), Tamil Medium in Education Department for Palakkad District. In the rank list thus published on 2.4.2001 the 1st respondent herein was included at Rank No.6 with the community benefit of Ezhava. During the currency of the rank list 6 vacancies and one NJD vacancies were reported and candidates were advised to the post. It is stated that in the previous selection, the communal rotation ended at MR1 15 OC and the rotation following the advice against the three vacancies notified in the first year of recruitment, started at MR1 18. The details of reporting of vacancies and the manner in which the candidates were advised is as under:

First year of recruitment:

1. MR1 16 M Abdul Basheer K (R.2) Muslim
2. MR1 17 OC Sarikadevi.J (R1)
3. MR1 18 E TPO
   19 OC Shafeeq Rahiman M (R.8) Maplla

Third year of recruitment:

4. MR1 18 E (Saji V.S. (R.3)) TPO satisfied) E
5. MR1 20 V TPO
   21 OC Ragothaman. R (R.4)
6. MR1 22 LC/A1 TPO
   23 OC Raju N (R.5) OBC

Though there was one NJD vacancy of Muslim against which Rank No.11 Shaheed Ali was advised, that is not relevant for the purposes of this appeal. It is stated that MR1 18, an Ezhava vacancy was temporarily passed over, on account of the rule fixing 50% ceiling on reservation and in terms of the rules the TPO turns are to be filled up at the earliest opportunity and it is on account of this compulsion that during the third recruitment year when vacancies were apportioned in 2:1 the third rank holder Saji V.S., an Ezhava candidate entitled to the benefit of reservation, was adjusted against, MR1 18.

3. In the above background, the 1st respondent herein, an Ezhava candidate, with Rank No.5 filed the writ petition contending that reading Rule 14(b) and the third proviso and Rule 14(c) of the General Rules of KS & SSR, Sri. Saji V.S. though an Ezhava candidate should have been appointed in the open competition quota and not against the reserved quota. It is contended that the advice and appointment in the Ezhava quota should have been given to the petitioner, the next rank holder in the Ezhava quota. According to him after making appointment as above rank should have been fixed as per Rule 27 of the General Rules.

The Learned Single Judge found that:

> "Both Saji and the petition belong to Ezhava community. The first vacancy in the third recruitment year was the reservation turn of the Ezhava community. If the PSC had strictly adhered to the relevant rules, as was done in the case of rank Nos.2 and 8 belonging to Muslim community, the PSC should have advised the writ petitioner against MR1 18 Ezhava turn and should have advised Saji V.S. against MR1 21 OC turn. Instead of working out the rotation in that manner, what was done was to advise Saji V.S., an Open Competition candidate against MR1 18 Ezhava community turn and then pass over MR1 20 Viswakarma and then advice Ragothaman R., the 4th respondent against MR1 21 OC turn. I do not find any convincing explanation given by the PSC for advising third rank holder Saji V.S. against MR1 18 Ezhava instead of advising him against MR1 21 OC. I am of the view that the petitioner should have been advised against MR1 18 and Saji V.S. against MR1 21 and then interchanged their position in terms of the third proviso to Rule 14(c) of KS & SSR. The arguments of Mr.Ravikumar have the support of the judgments of this Court in V.P.Jose v. Kerala Khadi and Village Industry Board (supra) and also the principles laid down in L.I.C. of India v. Wilson George (1997 (2) KLT 218)."

Having briefly set out the back ground in which, the issue has come before us, we now proceed to deal with the contentions raised. The 1st respondent writ petitioner has no quarrel with the manner in which the candidates were advised or the roster was operated during the first year of recruitment. The appellants have no case that in the third year of recruitment, they have followed the same method as in

the first year of recruitment. On the other hand they are seeking to justify the advice of the third candidate Sri. Saji V.S. against the temporarily passed over 18th point, on the basis that their rules require them to restore the reservation to the particular community at the earliest possible opportunity. According to them in implementation of the said Rule, they had to advice the top most rank holder available from the Ezhava community, the one passed over, and it was accordingly that Sri. Saji V.S. who was Rank No.3 was advised against the first vacancy in the third year of recruitment.

4. The Rule that is relied on by the appellants is an internal guideline followed by them, which is quoted as follows:

> "While observing the 50% rule it may become necessary to pass over certain reservation turns and to fill up the subsequent O.C. turns. Such passing over the turn is only temporary and hence referred to as T.P.O. In such cases against the reservation turn so passed over the entry T.P.O. to keep 50% Rule have to be made and the turns are to be entered in the T.P.O. Registrar for satisfying the pending T.P.O. turns in future. The pending T.P.O. turns are to be satisfied at the earliest opportunity subject to the 50% rule. While working out rotations the T.P.O. turns are to be filled up before proceeding to fill up unit of 20".

It is relying on the prescription that T.P.O. turns are to be satisfied at the earliest opportunity, subject to the 50% rule that appellants are seeking to justify the advice of the third rank holder against the reservation point.

5. Rule 14(b) of the General Rules prescribed that the claims of members of SC/ST and OBCs shall also be considered for appointments to vacancies filled up on merit and where a candidate belonging to these categories is selected on merit, the number of posts reserved for the said categories shall not in any way be affected. The purport of this Rule is that if a candidate belonging to a reserved category is included in the general quota by virtue of his merit, he is entitled to be appointed with the general candidates and his appointment cannot be adjusted against the reserved quota.

6. In so far as the facts of this appeal is concerned, the controversy is in relation to the advice of the third rank holder Sri. Saji. V.S. who is also entitled to the benefit of reservation being an Ezhava candidate, against Point No.18, a slot reserved for Other Backward Classes. If by virtue of his ranking in the list, he was to be offered appointment, in view of Rule 14(b), such appointment offered to him cannot be adjusted against the reservation points in the roster. In this case, although he was No.3, the appellants plead that his appointment had to be against point No.18 in the roster as they were obliged to satisfy the T.P.O. turn of the first recruitment year, at the earliest opportunity, when the

first vacancy arose in the third recruitment year. In this case, if appointment was offered to Sri. Saji.V.S. against an OC vacancy, apart from him, by virtue of the benefit of reservation in his favour, the 1st respondent would have got appointed against the reserved point and that precisely is his contention.

7. While appreciating the contention of the appellants, we have to bear in mind that the benefit of reservation has to be given its full meaning and by a process of interpretation or an implementation of a rule made by it, the appellants cannot deny the benefit of reservation available to a candidate. In a given set of facts it may be that by virtue of the satisfaction "at the earliest opportunity", as prescribed by the guidelines of the appellants themselves, a candidate belonging to a reserved category who is also included in the merit list, might get appointed earlier than his turn in the merit list, the issue has to be approached as to whether the reserved category as a class is benefited in the process or not. This precise question was examined by a full bench of this Court in the case of Pulomaja Devi v. Gopinathan Nair & Others (1975 KLT 111 (F.B.)) where it has been held as follows:

> "We think too, that consistent with the purpose and object of Rule 14(b), the 'backward class' and its members are entitled to claim the best of both the words on the basis of merit and of reservation. To oblige a candidate of a 'backward class' who is entitled to selection on basis of merit, although to a lower rank, to take a higher rank on basis of reservation, may promote the chances of the individual, but might, in conceivable cases, deprive the "class" of its legitimate due. In this case, for instance, on the view of the learned Judge, No.3 in Ext.P2 who is anyway entitled to be selected on the basis of merit, is asked to take the place No.2 on the basis of reservation; with the result, that the chance of another member of the backward classes to take place No.2 on basis of reservation and leave No.3 to come in on his merit, is lost. We do not think therefore that this mode of selection would advance the claim of the 'Backward Classes'. In this view, again, we are of the opinion that adequate justice to the Backward Class is better secured by adopting the process of selection put forward on behalf of the Kerala Public Service Commission which was endorsed by the learned Advocate General."

In the judgment of the Hon'ble Supreme Court in the case of Union of India v. Virpal Singh Chauhan (AIR 1996 (SC) 448), it has been held as follows:

> "Sri. Dhawan points out yet another anomaly. Where a candidate belonging to Schedule Caste gets selected on his own merit, ie., in the general category, he will be treated as a general candidate and on that account he suffers prejudice vis-à-vis another reserved category candidate who could not be selected on his own merit (ie., in the general category) and was selected only because of and under the rule of reservation. For illustrating his submission, learned counsel says, take an instance where out of forty candidates selected, a Scheduled Caste candidate selected on merit stands at Sl.No.18 in the select list,

> whereas another Scheduled Caste candidate selected under and only because of the reserved quota stands at Sl.No.33. But when the occasion for appointment arises, the Scheduled Caste candidate at Sl.No.33 will be appointed against the first roster point, whereas the Scheduled Caste candidate S.No.18, being a general candidate has to wait for his turn. This, the learned counsel says, amounts, in effect to punishing the Scheduled Caste candidate at Sl.No.18 for his merit. Because he was meritorious, he was selected in general category and is treated as a general candidate. He suffers all the disadvantages any other general candidate suffers while another Scheduled Caste candidate, far less meritorious than him and who was selected only by virtue of rule of reservation, steals a march over him in the matter of initial appointment and in promotion after promotion thereafter. This is undoubtedly a piquant situation and may have to be appropriately rectified as and when the occasion arises."

Following the aforesaid judgment of the Hon'ble Supreme Court, a Division Bench of this Court had occasion to deal with an identical situation in the case of Life Insurance Corporation of India v. Wilson George (1997(2) KLT 218), where it has been held as follows:

> "In the present case, if the respondents are treated as persons entitled to get the benefit of reservation of Other Backward Classes and appointed against the roster point belonging to OBCs, three other candidates who got appointment on the basis of reservation of OBCs will not be entitled to get selection. Those candidates, who are replaced by these respondents are persons who are included in the OBC list. They are persons who secured lesser marks than the last person, who is included in the general merit. So, they cannot be given appointment against the vacancies left by respondents. The respondents got rank No.18, 20 and 21 and they are entitled to be appointed on merit quota whereas the last three candidates in the OBC list could not have secured marks necessary to get appointment under the merit quota to replace candidates who secured rank No.18, 20 and 21. So, this is a situation which cannot be rectified in the way as held by the learned single Judge."

Therefore, in a situation like this, the issue to be examined is which of the interpretation of the rule is beneficial to the reserved category as a class and not to the individual candidate concerned. The guideline framed by the 1st appellant cannot run counter to the general rules in the KS & SSR. In this context the law laid down by the Apex Court in Bharathidasan University and another vs. All India Council for Technical Education and Others (2001 (8) SCC 676) is of relevance. We quote:

> "The fact that the Regulations may have the force of law or when made have to be laid down before the legislature concerned does not confer any more sanctity or immunity as though they are statutory provisions themselves. Consequently, when the power to make regulations is confined to certain limits and made to flow in a well defined canal within stipulated banks, those actually made or shown and found to be not made within the confines but outside them, the Courts are bound to ignore them when the question of their enforcement arises and the mere fact that there was no specific relief sought for to strike down or declare them ultra vires, particularly when the party in sufferance is a respondent to the lis or proceedings cannot confer any further sanctity or authority and validity which it is shown and found to obviously and patently lack."

Even without pronouncing on the validity or otherwise of the guideline relied on by the appellants, according to us, even as per the guidelines, the satisfaction is required to be only at the earliest opportunity subject to 50% rule. This guideline has to be read consistent with Rule 14(b) and if that be so, the prescription in the guideline cannot be understood as one requiring the appellants to advice a reserved candidate included in the merit list against a reserved vacancy.

8. If that is the position as available in the Rule, Saji V.S. the third candidate in the merit list ought to have been advised against an open competition vacancy and the 1st respondent, against the reserved vacancy of Ezhava community. However, we cannot agree with the view of the Learned Single Judge that the 1st respondent ought to have been advised against the first vacancy in the third recruitment year, making the ranked Sri. Saji V.S. to wait until the availability of a general vacancy despite his having proved to be more meritorious than the 1st respondent. This situation could be reconciled in the same manner as ordered to be done by the Division Bench in the case of Life Insurance Corporation of India v. Wilson George (1997 (2) KLT 218) by allowing the appointing authority to take an appropriate decision on the post of seniority among Saji V.S. and 1st respondent.

In the result we do not find any merit in the writ appeal and the appeal will stand dismissed without any order as costs.

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IN THE HIGH COURT OF KERALA AT ERNAKULAM
W.A. NO.803 OF 2007
D.D. 25.7.2007
The Hon'ble Mr. Justice K.S.Radhakrishhan &
The Hon'ble Mr. Justice Antony Dominic

The Kerala P.S.C. & Anr. ... Appellants
Vs.
Abdul Rasheed.K. & Ors. ... Respondents

Qualification:

Whether PSC can disqualify on the ground that Bachelor Degree possessed by the candidate was through Distance education (correspondence course) and not through regular course? – No

Recruitment to the post of HSA (Arabic) – 1st respondent had the qualification prescribed for the post – After 1st respondent qualified in the written examination appeared for interview his application was rejected on the ground that he obtained Bachelor Degree in Arabic through correspondence course and not through regular course – Writ Petition No.15755/2006 filed by the 1st respondent was allowed and P.S.C. was directed to include the name of the 1st respondent at the appropriate slot on the basis of merit – This Writ Appeal filed by P.S.C. has been dismissed.

Held:

P.S.C. tried to exclude the petitioner on the ground that he has not obtained the Degree through regular course. P.S.C. is not justified in tinkering with the qualifications laid down by the appointing authority. P.S.C. should conform to the provisions of the law and has also to abide by the rules and regulations on the subject and to take into account the policy decisions which are within the domain of the State Government and that P.S.C. cannot impose its own policy decision in a matter beyond its purview.

Cases referred:

1. 1984 KLT 625 - Prathapan v. Registrar of High Court of Kerala
2. 1987 (2) U.J.S.C. 657 - Shri Durgacharan Misra v. State of Orissa
3. 2000 (2) S.C.C. 606 - Mohammed Riazul Usman Gani
4. (2003) 11 S.C.C. 559 - State of Punjab v. Manjit Singh
5. AIR 2003 S.C. 4580 - State of Punjab v. Manjit Singh
6. 2004 (6) S.C.C. 786 - J & K Inder Parkash Gupta v. State of J & K
7. 2005 (1) KLT 680 - Mujeeb Rahman v. State of Kerala
8. 2006 (1) KLT 846 - State of Kerala v. Sujakumari
9. ILR 2007 (1) Kerala 244 - Antony P.A and Others v. Krishnadas M.N and others

JUDGMENT

Radhakrishnan, J.

Public Service Commission invited applications for the post of High School Assistant in Arabic in the Thrissur district by notification published on 1.06.2004. Following are the qualifications prescribed for the post.

1) A Degree in Arabic (or Arabic as one of the optional subjects under Pattern II of Part III) and B.Ed/B.T/L.T conferred or recognised by the Universities in Kerala;

2) A Title of Oriental Learning in Arabic awarded or recognised by the Universities in Kerala and Certificate in Language Teachers Training issued by the Commissioner for Government Examinations, Kerala.

Note: (1) Post Graduate Learning in Arabic are also eligible to apply if they possess B.Ed/B.T./L.T.

(2) B.Ed shall be in the concerned subject.

Petitioner also applied in response to the notification issued by the P.S.C. He was called for written test and he came out successful in the written test and was then called for interview on 14.02.2006 and participated in the interview. Later rank list was published on 30.03.2006. Petitioner's name did not figure in the rank list, consequently he made enquiries and was informed that his name was withheld from the rank list on the ground that he has obtained B.A. Degree from the Calicut University by Distant Educational Scheme (Open Stream). Petitioner did not get any communication as such from the P.S.C. Consequently he approached this Court seeking a writ of mandamus directing respondents 2 and 4 therein to include his name in the rank list and to advise him on the basis of his position in the rank list and also for a declaration that he is eligible to be included in the rank list for the post of H.S.A. (Arabic) in Thrissur district.

2. Public Service Commission filed counter affidavit in the writ petition. They took up the stand that B.A. Degree obtained by the petitioner through correspondence course cannot be treated as B.A. Degree obtained through regular course. Further it was pointed out that petitioner has obtained B.A. Degree in History through open stream without undergoing the course under 10 + 2 + 3 pattern. Further it is also stated that the Commission has taken a conscious decision that a degree obtained without undergoing SSLC need not be accepted. Further it is stated that a large number of candidates who have obtained degree under regular course were available for consideration and hence limiting the zone of consideration on that basis was justified. Learned single judge noticed that the petitioner has obtained B.A. Degree from Calicut University and has also obtained Bachelor's degree in Education (B.Ed) and passed the State Eligibility Test. Learned single judge noticed that the notification issued by the Commission also permitted candidate with Post Graduate in Arabic to apply if they possess B.Ed/BT/LT. Learned judge noticed that Exts. P6 and P7 would show that the petitioner has passed B.Ed examination in Arabic and obtained Master's degree in Arabic. Learned Judge also referred to the decisions in State of Kerala v. Sujakumari (2006 (1) KLT 846) and Mujeeb Rahman v. State of

Kerala (2005 (1) KLT 680) and took the view that petitioner was fully qualified for the post. Consequently it was held that P.S.C. was not justified in excluding the petitioner from the rank list for the sole reason that he had obtained Bachelor's degree through correspondence course. Aggrieved by the said judgment P.S.C. has come up with the present appeal.

3. P.S.C. submitted that there were large number of candidates who had obtained B.Ed degree after undergoing 10 + 2 + 3 pattern of study. Consequently the Commission decided to consider only those candidates who possess the qualification of 10 + 2 + 3. Further it was stated that P.S.C. had noticed the distinction between a candidate who acquired qualification after undergoing regular study and a candidate who acquired the qualification through correspondence course. Commission also took up the stand that it has got power to eliminate candidates on a reasonable criteria. Reference was made to the decision of the apex court in Mohammed Riazul Usman Gani (2000 (2) S.C.C. 606) and also various decisions of this Court. Reference was also made to the decisions of this Court in Prathapan v. Registrar of High Court of Kerala (1984 KLT 625) and Antony P.A and Others v. Krishnadas M.N and others (ILR 2007 (1) Kerala 244).

4. Sri Kaleeswaram Raj, counsel appearing for the writ petitioner on the other hand contended that the issue raised in this case is fully covered by the decision in Mujeeb Rahman's case supra. Learned counsel also submitted that the petitioner is fully qualified for the post on the basis of the notification issued by the P.S.C. and the Commission was not justified in not including his name in the rank list on the sole ground that he has obtained B.A. Degree through correspondence course. Counsel submitted that once it is found that the petitioner was fully qualified to apply on the basis of the notification published, no power is conferred on the P.S.C. to exclude a person who is fully qualified on the ground that he did not possess SSLC or Plus Two. Counsel submitted that P.S.C. is bound by the qualification prescribed by the rule making authority. Reference was made to the decision in State of Punjab v. Manjit Singh (AIR 2003 S.C. 4580).

5. The sole reason for excluding the petitioner from the rank list is that the petitioner had not undergone the course of study of 10 + 2 + 3 pattern. P.S.C. has no power to go beyond the qualification prescribed by the appointing authority which is reflected in the notification. Petitioner was fully qualified to apply on the basis of the qualification stipulated in the notification and hence he was called for the written test and also for the interview. P.S.C. has now taken up the stand that they can weed out those candidates who had not undergone the course in 10 + 2+ 3 pattern. As we have already indicated, petitioner has obtained Master's degree in Arabic from the Calicut University and also the Bachelor's Degree (B.Ed) and has passed the State Eligibility Test. Above mentioned qualifications would satisfy

the qualifications prescribed in the notification. Appointing Authority has no case that the petitioner does not possess the prescribed qualification. This question has been pointedly considered by this Court in Mujeeb Rahman's case. Reference may be made to paragraph 6 of the judgment wherein it has been specifically held that the rule making authority has not made any distinction between persons who have acquired M.A. Degree after undergoing regular course of study and those who have acquired the M.A. Degree after undergoing course of study through distance education or correspondence course. P.S.C. tried to exclude the petitioner on the ground that he has not obtained the Degree through regular course of study and also did not undergo the study in the 10 + 2 + 3 pattern. P.S.C, in our view, is not justified in tinkering with the qualifications laid down by the appointing authority. Apex Court in Shri Durgacharan Misra v. State of Orissa (1987 (2) U.J.S.C. 657), State of Punjab v. Manjit Singh (2003) 11 S.C.C. 559) and Inder Parkash Gupta v. State of J & K (2004 (6) S.C.C. 786) has clearly laid down the law that Commission should conform to the provisions of the law and has also to abide by the rules and regulations on the subject and to take into account the policy decisions which are within the domain of the State Government and that P.S.C. cannot impose its own policy decision in a matter beyond its purview. In such circumstances, we are inclined to uphold the judgment of the learned single judge and dismiss the appeal.

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IN THE HIGH COURT OF KERALA AT ERNAKULAM
W.P. (C) NO.15554 OF 2005 & W.A.NO.1436 OF 2007
D.D. 24.8.2007
Hon'ble Mr. Justice K.S.Rahdkrishnan &
Hon'ble Mr. Justice V.K.Mohanan

In W.A. No.1436 of 2007:

Kerala P.S.C.	**...**	**Appellant**
Vs.		
Suhash Kizhakkeveettil & Anr.	**...**	**Respondents**

W.P. (C) No.15554 of 2005:

Dilip.S.	**...**	**Petitioner**
Vs.		
State of Kerala & Ors.	**...**	**Respondents**

Qualification:
Experience:

Whether experience gained before acquiring the basic qualification can be counted? – No

Recruitment to the post of Work Engineer (Blacksmith Grade-II) in the State Road Transport Corporation – Qualification prescribed includes ITI Certificate in the trade of Blacksmith with not less than 3 years of practical experience in General Black smithy work – As experience certificate produced showed that petitioner gained major part of his experience before acquiring basic qualification and before attaining the age of 18 years – Hence his application was rejected – There was conflict between two Single Judge decisions hence matter was referred to the Full Bench – Full Bench held that experience should be gained before acquiring the basic qualification.

Held:

Candidate should satisfy the criteria of age, as well as, should gain experience after acquisition of the basic qualification. Hence no illegality in rejecting the petitioner's application since he does not possess the required experience after acquiring the basic qualification.

JUDGMENT

Radhakrishnan, J.

WP(C) No.15554 of 2005 has been placed before us on a reference by a learned single Judge of this court (K.Balakrishnan Nair, J.) after having doubted the correctness of judgment in Subash Kizhakkeveettil v. KPSC (ILR 2007 (2) Ker. 525) which is appealed against in WA No.1436 of 2007.

2. Question that is referred for our consideration is whether the experience prescribed in the notification issued by Public Service Commission is an experience gained after attainment of 18 years of age so as to make one eligible for appointment to the post of Work Assistant in the Kerala State Road Transport Corporation.

3. Public Service Commission published a notification in the Gazette dated 20.4.1999 inviting applications for the post of Blacksmith Grade-II in the service of the Corporation. Qualifications prescribed for the post are as follows:

"Method of appointment : Direct recruitment
Age limit Must have completed 18 years and should not have completed 35 years of age as on 1.1.1999

Educational qualification:

1. ITI Certificate in the trade of Blacksmith with not less than 3 years of practical experience in General Black smithy work.

a) Ability to read and write Malayalam, Tamil or Kannada and
b) Proficiency in all works connected with smithy and allied trades for a period of five years.

Note: 1. The experience certificate should be from a Registered Small Scale Industries or any factory or Workshop registered under he Factories Act. Experience obtained only after the date of registration of the institution will alone be considered. In case of persons having their own workshop, experience certificate should be attested by President of the Panchayat or Chairman of Municipality or a Gazetted Officer. The certificate of practical experience should be in form given under para 22 of the general conditions. The certificate not in the prescribed form will not be considered.

2. Experience as Apprentice, Trainees or such other experience will not be accepted.

3. In the case of persons having ITI qualifications, experience gained after obtaining ITI certificate alone will be considered."

Petitioner who possessed SSLC and 5 years experience in Black smithy in the concerned trade also submitted his application. Public Service Commission processed applications of the candidates who were included in the short list and it was noticed that the petitioner had not submitted the application in the prescribed form as provided under clause 22 of the Gazette Notification. PSC therefore issued Ext.P2 memo dated 18-6-03 directing him to produce experience certificate in the prescribed form. Petitioner in response to memo submitted Ext.P3 certificate dated 24.6.03 stating that he had worked as a regular worker on a monthly salary of Rs.2750/- for a period of 6 years and 1 month from June 1992 to July 1998. Commission did not accept the same and his application was rejected. Petitioner then approached this Court and filed WP (C) No.21136 of 2004 which was disposed of by this court enabling the petitioner to produce a proper certificate within one week from the date of judgment and PSC was directed to consider the same. Petitioner then produced an experience certificate dated 12.10.2004 from MVS Smithy Works showing that he had worked as a Blacksmith on a monthly salary of Rs.2,750/- for a period of 5 years 2 months 20 days from 1st February 1994 to 20th April

1999. Certificate states that the unit had got registration as SSI Unit on 27.1.1994. Petitioner later noticed that his application with the certificate dated 12.10.2004 was not accepted by the Public Service Commission and later he was served with a letter dated 2.2.2005 (Ext.P11) stating that he had not shown that he had acquired experience after attaining 18 years of age. Aggrieved by the same petitioner has approached this Court filing the present writ petition seeking a writ of certiorari to quash Ext.P11 and for a declaration that the experience acquired by the petitioner is sufficient experience as per notification. Learned single Judge found favour with the petitioner and allowed the writ petition taking the view that the experience gained by the petitioner prior to the attainment of 18 years of age would satisfy the eligibility criteria which was doubted by another learned single Judge of this Court in WP (C) No.15554 of 2005 and has referred the matter to us for an authoritative pronouncement.

4. Sri. Kaleeswaram Raj as well as Sri. P.Santhoshkumar, Advocates submitted that on a close scrutiny of the notification as well as the general condition would indicate that the experience gathered by a candidate prior to the attainment of 18 years can also be reckoned for satisfying the eligibility criteria for the post of Blacksmith Gr.II. Learned counsel referred to rule 10 (ab) of Part II of KS & SSR as well as clause 21 of general conditions and also the provisions of the Factories Act and submitted that there is no legal impediment in a minor gaining experience after attainment of 14 years of age. Counsel submitted even if it is assumed that the age is a basic qualification for the purpose of clause 21, then also there are enough indications in the notification to hold that a candidate can acquire requisite qualification even before attaining 18 years of age. Counsel submitted, if 5 years experience is reckoned after attaining 18 years of age then the age limit for submission of application would be within the range of 23 to 35 which will defeat the purpose of the notification. Counsel submitted that to insist acquisition of experience qualification after the candidate attained 18 years of age is unreasonable and unrealistic.

5. Sri. P.C.Sasidharan, counsel appearing for the PSC on the other hand, referred to clause 21 of general conditions and submitted that the same is binding on all the candidates and consequently the experience acquired by a candidate must be after acquiring the basic qualification prescribed for the post. Counsel submitted that the age requirement of 18 years is also one of the basic qualifications and therefore notification read with clause 21 would show that only the experience gained by a candidate after attaining 18 years of age alone need be reckoned. Counsel referred to rule 10(ab) of Part II of KS & SSR and submitted that the age is a basic qualification under Rule 10(ab) and the experience gathered be only after attaining 18 years of age.

6. Petitioner possesses SSLC and 5 years experience in blacksmithy. Petitioner has also attained more than 18 years of age. But he has to show that he has practical knowledge in smithy and allied trades for a period of 5 years. Note attached to the qualification is relevant which says that the experience certificate should be produced from a registered small scale industries or any factory registered under the Factories Act or a workshop. Note further says that experience acquired after the date of registration of the institution will alone be considered. The SSI Unit from which the petitioner had acquired experience was registered on 27.1.1994. The certificate of experience dated 12.10.2004 was issued from that SSI Unit stating that the petitioner had gained experience as Blacksmith from 1st February 1994 to 20th April 1999. Major portion of experience gained by the petitioner was prior to the attainment of 18 years of age since his date of birth being 3.4.1978. Question raised is whether the experience gained by him prior to attainment of 18 years of age could be counted as experience, so as to satisfy the requirement of the notification as well as clause 21 of general conditions and rule 10(ab) of Part II of KS & SSR. Clause 6 of the notification prescribes the age limit which says that a candidate should have completed 18 years of age as on 1.1.1999 and shall not be beyond 35 years on that date. We may also refer to general condition No.21 which reads as follows:

> "Unless other wise specified, the experience prescribed as qualification for any post in para 1 of this notification shall be one gained by the candidate holding temporary or regular appointments in Central or State Government service or in Public Sector Undertaking or Registered Private Sector Undertaking after acquiring the basic qualifications prescribed for the post."

Clause 21 shows that the experience prescribed should be acquired after the acquisition of basic qualification for the post. Rule 10(ab) of Part II of KS & SSR also says that where the Special Rules of Recruitment Rules for a post in any service prescribe qualification of experience, it shall, unless otherwise specified, be one gained by persons on temporary or regular appointment in capacities other than paid or unpaid apprentices, trainees and Casual Labourers in Central or State Government service or in Public Sector Undertaking or Registered Private Sector Undertaking, after acquiring the basic qualification prescribed for the post provided that the experience gained as factory workers on daily wages of a permanent nature may be accepted if the service is continuous and not of a casual nature.

7. Qualification mentioned in clause 21 as well as rule 10(ab) of Part II of KS & SSR is the basic qualification though the age is also a qualifying factor. Age may be a qualifying factor, but not a "qualification of experience" under Rule 10(ab). Age is a separate eligibility criterion every applicant has to satisfy. Since we have found that the age will not fall within the expression "qualification of

experience" under Rule 10(ab), the question of application of the provisions of the factories Act does not arise. Both 'Age' as well as the 'qualification of experience' has to be independently satisfied. Candidate should satisfy the criteria of age, as well as, should gain experience after acquisition of the basic qualification. Certificate of experience produced by the petitioner would not show that he had acquired the experience qualification after acquiring the basic qualification. Major part of his experience is before acquiring the basic qualification and that too before his attaining the age of 18 years.

8. Under such circumstance we find no illegality in rejecting the petitioner's application since he does not possess the required experience after acquiring the basic qualification. We are therefore inclined to allow W.A. No.1436 of 2007 and dismiss W.P. (C) No.15554 of 2005, overruling the judgment in Subash Kizhakkeveettil's case, and answer the reference accordingly.

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MADHYA PRADESH PUBLIC SERVICE COMMISSION

IN THE HIGH COURT OF MADHYA PRADESH
DIVISION BENCH
Miscellaneous Petition No.260 of 1976
D.D. 20.2.1978
Hon'ble Mr. Justice G.L.Oza & Hon'ble Mr. Justice P.D.Mulye

Adarsh Kumari Bharthi ... Petitioner
Vs.
K.N.Sinha & Ors. ... Respondents

Selection:

Whether selection made by Chairman alone could be said to be a selection by P.S.C.? - No

Petitioner and Respondent No.3 were among the candidates for the post of Deputy Director (Women's Welfare) Class-I Gazetted – Chairman sitting with 3 non Members as Interview Committee conducted the interview – Respondent No.3 was selected and the petitioner was put in the reserved list – Petitioner challenged the selection on the ground that the selection conducted by the Commission was illegal as the Chairman alone sat at the interview besides alleging bias – At the relevant time besides the Chairman the Commission consisted of 2 other Members – 2 other Members were constituted a Committee to conduct interview for the post of lecturer in Bio Chemistry – The selection list was signed by 2 other Members by endorsing as 'seen' – The High Court in view of the fact that the functions for the selection for the post were not delegated by the Commission held that the selection was not a selection done by the P.S.C. and consequently the appointment of the 3rd respondent was bad.

Held:

It therefore is clear that if the Commission had chosen to delegate its functions to one of its Members and subsequently endorsed the decision of that Member by approval, it could not be said that consultation was not with the Public Service Commission. But in the present case, as stated above, the Commission did not delegate the functions to the Chairman nor did the Commission approve the selection.

Further held:

It is therefore clear that the selection of respondent No.3 made by the Chairman, the only Member of the Commission sitting at the interview, was not a selection done by the Public Service Commission of Madhya Pradesh. And it was on this selection that the State Government has chosen to base the order of appointment. It is therefore clear that the State Government has made the appointment in contravention of the provisions contained in Article 320(3) of the Constitution and Rule 7 of the Madhya Pradesh Civil Services (General Conditions of Services) Rules 1961 and also in contravention of Rule 5 of M.P. Public Service Commission (Limitation of Functions) Regulations 1957.

ORDER

The following Order of the Court was delivered by Oza –

This is a petition filed by the petitioner for quashing of the order of the Government dated 9th July 1976 appointing respondent No.3 as Deputy Director, Women's Welfare (In charge of applied nutrition) on her being selected by the Public Service Commission. The petitioner has in fact challenged the selection by the Public Service Commission on the ground that selection was not validly made by the Public Service Commission.

2. According to the petitioner she is posted as Deputy Director (Women's Welfare) In charge of Applied Nutrition, in the Department of Panchayat and Samudayik Vikas, Government of Madhya Pradesh, Bhopal according to her this is a Class I post on which the petitioner was working on the date of this petition. It is further alleged that the petitioner's claim for promotion to this class I post was neglected or refused by respondent No.4 the State of Madhya Pradesh. Hence she filed a writ petition which was Misc. Petition No.684 of 1973 and was heard by this Court at Jabalpur and by order dated 6.2.1975 was allowed. A review petition was filed by the State respondent No.4 which was also rejected by order dated 8.10.1975. It is further alleged that respondent No.4 State filed a special leave petition to the Supreme Court against the judgment of the High Court. The Special leave petition (No.3564 of 1976) was also summarily rejected by the Supreme Court on 5.1.1977.

3. According to the petitioner, an advertisement No.5 of 1975 in continuation of advertisement No.15 of 1974 was issued and a temporary post of Deputy Director (Women's Welfare) a post Gazetted and in Class I service on revised pay scale of Rs.650-1150 was advertised. According to the petitioner in this advertisement the qualifications and preferential qualifications were stated. The petitioner, respondent No.3 and about 65 other applied in response to the aforesaid advertisement no.5 of 1975 and the petitioner was interviewed on 29th June 1976 whereas respondent No.3 was interviewed on 28th June 1976.

4. It is alleged by the petitioner that interviews were conducted only by the Chairman of the Public Service Commission (who is joined as respondent No.1) whereas the non-members were, the Deputy Secretary of Panchayat and Community Development and one Deputy Director of Panchayat and Social Welfare as Departmental Representatives and Smt. Vishakha Dixit. It is alleged that after the interviews the result was declared and notified on 29th June 1976 itself which showed respondent No.3 as the selected candidates on merit and the petitioner was put on the reserve list.

5. According to the petitioner under Rule 3 of the Madhya Pradesh Public Service Commission (Condition of Service) Regulations 1968, the Commission is to consist of not more than five members and on the date these interviews were conducted, it is alleged that the Commission consisted of three members including the Chairman – respondent No.1. It is also alleged that under Rule 5 it was provided that whenever recruitment to a service or post is to be made by selection in consultation with the Commission, the Commission will, after conducting interviews of the candidates, submit the list of candidates selected. It is also provided that the Commission may agree to have at the interview any officer appointed by the appointing authority to represent the Department and may also invite technical experts to advise the Commission. It is further alleged that there are some rules of procedure adopted by the Commission which have been stated in the petition and on this basis it was alleged that on the dates on which interviews for the post for which the petitioner was a candidate as stated above were conducted i.e. on 28th and 29th June 1976, the Chairman alone sat at the interviews and the selection was made by him alone. Thus, according to the petitioner, this could not be said to be a selection made by the Public Service Commission. It was also alleged by the petitioner in this petition that on the basis of the essential qualifications and preferential requirements the petitioner was more suitable than respondent no.3. It is further alleged by the petitioner that respondent No.1 was interested in the selection of respondent No.3 as it is alleged that respondent no.3 was very well known to respondent No.1 and they were on visiting terms. It is further alleged by the petitioner that the appointment of the petitioners as Deputy Director was held up at the instance of respondent No.1.

6. On these facts, it was contended by the petitioner that the selection conducted by the Public Service Commission is illegal as the Chairman alone sat at the interview and there is nothing to indicate that the functions for selection for this post were delegated to respondent No.1. It is also contended that there is nothing to indicate that the selection made by respondent No.1 alone was ultimately accepted by the Commission as such. It is also contended that the selection done by respondent No.1 is bad because of bias.

7. In the return filed by the three respondent Nos.1, 2 and 4 the facts about the filing of the earlier petition and the judgment of this Court are not disputed. It is further stated that in pursuance of the advertisement as alleged by the petitioner 67 candidates submitted their applications out of which 19 only were called for interview and out of the 19 only 15 appeared and these interviews were conducted on 28th and 29th June 1976. It is also not disputed that in these interviews respondent No.3 was

selected and the petitioner was not selected for the post of Deputy Director (Women Welfare) and the name of the petitioner was kept in the reserve list. It is also admitted that this selection was communicated to the Government on 30th June 1976 and that on 9th July 1976 respondent no.3 has been appointed as Deputy Director. As regards interviews having been conducted only by the Chairman, in this return the fact that it was the Chairman only who conducted the interviews is not disputed; but it is stated that the two other Members were busy holding other interviews for the post of Lecturers in the Education Department. It is however contended that the selection by the Chairman alone is not illegal. It is also admitted in this return that the result of the interview was declared on the 29th June 1976 it self and was put on the notice board.

7. As regards the Madhya Pradesh Public Service Commission (Condition of Service) Regulations, these respondents in their return admitted them. But as regards the rules of procedure it is stated that these rules of procedure were only applicable to the meetings and are only executive instructions framed by the Public Service Commission; but they do not apply to the conducting of interviews and they have no statutory sanction. It is further contended that the Chairman alone sat at these interviews because the other two Members were busy with other interviews. It is also disputed that respondent No.3 does not possess the necessary qualifications. The allegation about respondent No.1 that he was known to respondent No.3 and they were on visiting terms also is denied. It is further alleged that the Madhya Pradesh High Court sitting at Jabalpur in their judgement had held in favour of the petitioner that she was entitled to continue as Deputy Director (Women's Welfare) till selection was made by the Public Service Commission. It is also admitted that special leave petition was filed; but it is stated that the petitioner was permitted to continue on this post till the selection is made. It is further contended in the return that there is no statutory provision requiring all the Members of the Commission to sit at on interview and prohibiting the Chairman alone to conduct interviews for a Class I Post. The bias alleged against respondent No.1 was also denied.

8. This return was filed on 30th July 1976. But during the course of arguments it appears that the learned Government Advocate appearing for respondents 1 2 and 4 submitted an application seeking to amend the return by stating that when these interviews were to be conducted by Chairman by his own order constituted the Board of interviews and nominated himself to conduct these interviews for the post of Deputy Director (Women's Welfare) and also constituted another Board of the other two Members for interviews of Lecturers in Biochemistry and Pharmacy. Along with this application learned Government Advocate also submitted a note-sheet which shows that the Secretary of the

Commission submitted a note to the Chairman for constitution of the Board and the Chairman by his own orders constituted the Board as stated in this application.

9. During the course of the arguments learned Government Advocate also sought permission to file an affidavit of respondent no.1 denying the allegations about him being interested in respondent no.3 although such an affidavit in spite of the fact that respondent no.1 was joined as party to this petition was not filed till then. But learned Government Advocate during the course of arguments also submitted an affidavit filed by respondent No.1

10. Learned counsel appearing for respondent no.3 also objected to the statement in the return filed by respondent nos.1, 2 and 4 which shows that it was a return filed by respondents nos.1, 2, 3 and 4. But according to learned counsel for the respondent No.3 the 3rd respondent never joined the other respondents in filing the return but in fact she has filed a separate return.

11. In the separate return filed by respondent No.3 the main contention advanced is that the rules quoted by the petitioner are not relevant whereas it has been asserted that Rule 11 provides that in matters for which no provision is made in these rules the Commission may regulate its proceedings in such manner as it thinks fit. It is also contended that it is nowhere provided that all the Members of the Commission should be present at the time of each interview, although the fact that respondent No.1 alone sat during the interview of respondent no.3 is not disputed. This respondent also in her return contended that Rule 11 relied upon by her permitted delegation of functions by the Commission to one or more of its Members and therefore she contends that delegation should be assumed although she asserted that she is not in know of it as it is not possible to know. As regards the qualifications she asserted that she has the requisite qualifications. She also denied her acquaintance or close association with respondent no.1. Apart from it, this respondent also asserted that the petitioner has made various allegations of fact which could only be made after having a probe into the affairs of the Public Service Commission. However, that is not so material for determination of the questions raised in this petition.

12. Before this petition came up for actual hearing respondent No.1 had neither filed a separate return nor filed an affidavit and it is unfortunate that in the petition allegations are made against respondent no.1 who is the Chairman of the State Public Service Commission; it is equally unfortunate that till the petition came up for hearing no affidavit denying the allegations also was filed by respondent No.1. It is also interesting to note that the fact, that the Chairman of the Public Service Commission was the

only Member of the Commission sitting in the interview for the post for which the petitioner and respondent No.3 were candidates, was alleged but upto the date of hearing nothing also was stated on behalf of the Public Service Commission excepting the fact that as other Members were busy with other interviews respondent no1 Chairman conducted the interviews for the present post. It was not the case of the Public Service Commission that by some mutual arrangement or delegation of powers respondent no.1 alone was authorised by the Public Service Commission to conduct the interviews for the post in question. But after the arguments of the petitioner were over learned Government Advocate, probably realizing the need for an affidavit by the Chairman and further clarification by the Commission sought time and ultimately filed an application. By this application permission was sought for amending the return by adding a paragraph which shows that the Chairman of the Public Service Commission on 26th June, 1976 passed an order saying that for the interview in respect of the post of Deputy Director (Women's Welfare) Panchayat and Community Development, the Chairman shall sit while for the post of Lecturers in Bio-Chemistry and Pharmacy the two other Members will sit for the interview. On behalf of the petitioner a reply has been filed contending that this amendment should not be allowed whereas respondent No.3 contended that the amendment in the interest of justice must be allowed. In the circumstances of the case, in our opinion, this plea raised by respondents 1, 2 and 4 also can be considered as on facts this is not challenged and what is stated is that the Chairman by his own order appointed two Boards to sit for interviews and in one he himself sat, which was for the interview in respect of the post for which respondent No.3 and the petitioner were candidates.

13. With the affidavit of respondent No.1 now on record it is clear that the allegations against respondent No.1 made by the petitioner have been denied on oath and in our opinion therefore it is not necessary for us to go into that question. The only questions which ultimately survive and on which learned counsel for the parties made there submissions are:-

(a) Whether the selection done by respondent No.1 alone could be said to be a selection by the Public Service Commission?

(b) As the two other Members signed the selection list by noting "seen", could it be said that ultimately the selection was approved by all the Members of the Public Service Commission?

(c) If the selection of respondent No.3 is not by the Public Service Commission, whether the appointment made in pursuance of this selection in view of Madhya Pradesh Public Service Commission (Limitation of Functions) Regulations, 1957 and in view of Article 320 of the Constitution could be said to be a valid appointment?

14. Learned counsel for the petitioner contended that under Article 320 of the Constitution the consultation is to be with the Public Service Commission and "Public Service Commission" means the Public Service Commission constituted under the scheme of the Constitution for the State and as the selection in the present case was done by the Chairman of the Commission it could not be said that the selection was by Public Service Commission. It was also contended that although it is alleged that the Chairman had ordered the constitution of Board for conducting different interviews, but it is not the case of the Public Service Commission that the Commission as such delegated the functions to one of the Members to discharge the duties of the Commission in interviewing and selecting candidates for the post in question. It was further contended that although it has now been stated that the selection was approved by the two other Members, but the documents produced go to show that the two other Members signed the papers after writing "seen" which only means that they noted it for information and not for approval. Apart from it, it is not in dispute that before the signatures of the two other Members were obtained the selection was notified by the Chairman himself. Thus, according to learned counsel, even considering the return and the amendment sought during the course of arguments, still, the fact remained that the selection was done by the Chairman sitting alone and while doing so powers were not delegated to him by the Public Service Commission nor did the Commission ultimately approve the selection. Therefore, according to learned counsel, the selection is not made by the Public Service Commission as contemplated under Article 320 of the Constitution and Rule 7 of the Madhya Pradesh Civil Services (General Conditions of Service) Rules 1961.

15. It was also contended by learned counsel for the petitioner that in view of the rules referred to above it could not be said that the selection by the Public Service Commission was essential before the appointment, even if it is accepted that the provisions contained in Article 320 of the Constitution are directory and not mandatory; but according to learned counsel the State Government itself has appointed respondent No.3 not in disregard of the advice given by the Public Service Commission but in fact in pursuance of and accepting the advice of the Public Service Commission as is clear from the order Annexure R-4 dated 9th July 1976 produced by the respondents 1, 2 and 4 and also by respondent no.3 along with her return. It was therefore contended that the State Government made this appointment treating the selection of respondent no.3 to be a selection by the Public Service Commission and if the selection is not by the Public Service Commission the appointment could not be said to be valid. He therefore contended that this appointment cannot be maintained as valid.

16. It was also contended that the petition filed by the petitioner under Article 226 of the Constitution will clearly be maintainable under Article 226(i) sub-clauses (a) and (b) as it has resulted in injury to the petitioner on account of noncompliance with the provisions of Rule 7 of the MP Civil Services (General Conditions of Service) Rules 1961 and Article 320 of the Constitution. Learned counsel for the petitioners placed reliance in support of his contentions on the decisions reported in Hari Moham Gupta v. State of Rajasthan 1976 Service Law Reporter 582; Chandra Mohan v. State of U.P. AIR 1966 S.C. 1987; and State of U.P. v. Manbodhan Lal, AIR 1957 S.C. 912.

17. Learned Government Advocate appearing for respondents 1, 2 and 4 contended that looking to the additional papers filed along with the permission to amend the return it is clear that it was the Chairman who constituted the different Boards for conducting the interviews. He therefore contended that it is not necessary to go into the question as to whether powers were delegated to the Chairman by the Commission as such or not as according to learned Counsel the consultation with the Public Service Commission in view of Article 320 of the Constitution is merely directory and not mandatory. Learned counsel placed reliance on the decisions reported in AIR 1957 S.C. 912 (supra) and Devjit Chaliha v. Harond Nath, AIR 1971 Assam 136. As regards the allegations made against respondent No.1 learned counsel contended that in view of the affidavit filed by respondent No.1 they could not now be gone into.

18. Learned counsel appearing for respondent no.3 vehemently contended that the Public Service Commission is a body constituted under the Constitution itself and therefore this Court cannot look into the internal working of the Public Service Commission. As the order of the State Government discloses that respondent no.3 was appointed being selected by the Public Service Commission, it is enough and it could not now be considered as to whether in fact respondent no.3 was selected by the Public Service Commission as a whole or by one Member only. According to learned counsel the matter of internal arrangement between the Members of the Public Service Commission cannot be gone into. Learned counsel placed reliance on the decisions reported in D.Made Gowda v. The State of Mysore, AIR 1966 Mysore 220; AIR 1957 S.C. 912 (supra); Laxman Hirway v. State of Madhya Bharath AIR 1958 MP 135; and Tuhi Ram Sharma v. Prithvi Singh AIR 1971 Punjab 297.

19. Learned counsel for the petitioner contended that there is no question of looking into the internal arrangement between the Members of the Public Service Commission. The material placed by the Public Service Commission itself discloses that the selection has not been done by the Public

Service Commission as such. It has been done only by the Chairman alone without the power being delegated to him and the selection not having been approved by the Public Service Commission on the face of the facts placed by the Public Service Commission itself it could not be contended that the selection should be considered to be a selection by the Public Service Commission. As regards consultation being directory, learned counsel contended that in absence of rules it is no doubt true that their Lordships of the Supreme Court held that provisions contained in Article 320 of the Constitution are directory. But in that decision itself their Lordships clearly observed that where rules are framed they have to be followed; and in view of this and in view of the fact that in the present case the Government itself acted on the recommendation of the Public Service Commission, treating it to be a recommendation of the Public Service Commission, the question of Article 320 of the Constitution being directory or mandatory is of no consequence. Learned counsel therefore contended that the appointment of respondent no.3 cannot be maintained as legal and valid appointment.

20. The facts that clearly emerge are that the Chairman respondent no.1 sat alone at the interview for the post in dispute, the additional document filed along with the application for amendment of the return shows that the Secretary of the Public Service Commission submitted a note to the Chairman saying that interviews will commence from 28th June 1976 onwards. He therefore prayed that "necessary order may kindly be passed for the constitution of the Board in respect of the posts. For which interviews have been fixed". On this note of the Secretary the Chairman passed the following order:

"28 & 29.6.76

1. For Dy. Director Women's Welfare, Panchayat and C.D. Department.	Chairman
2. For Lecturer Bio-Chemistry	Ms I & II (Shri Lal and Shri Siddiqui)

This clearly goes to show that the Chairman alone sat for the interview on 28th and 29th June 1976 for the post of Deputy Director, Women's Welfare, Panchayat and Community Development Department and this he did under orders passed by himself and without any delegation of powers by the Commission as a whole. It is also not the case set up in the return filed by the Public Service Commission or by the State that the Public Service Commission by any rule or regulation had authorized the Chairman to constitute various Boards; nor is it the case that he sat at the interview under the delegated functions, delegated to him by the Public Service Commission.

21. The petitioner has filed the copy of the notice put up on the notice board of the Public Service Commission which shows that this notice was put up on 29th June 1976 and it showed respondent

no.3 at serial No.1 in the merit list whereas the petitioner at serial No.1 in the reserve list. Respondents 1, 2 and 4 have also submitted a document Annexure R-7 to contend that this selection was approved by the other Members of the Public Service Commission also was put at serial No.1 in the merit list and petitioner was put at serial No.1 in the reserve list. It is signed by the Chairman on 29th June 1976. The two Members have signed this by putting an endorsement "seen" and Shri Rambiharilal's signature bears the date "30/6" whereas Shri O.R.Siddiqui's signature bears the date "29/6". It could not be doubted that this document does not indicate that the two other Members approved of the selection of respondent No.3 before it was commenced and these two Members have not signed by way of approval but have only signed by saying "Seen" which clearly goes to show that it was sent to them for information and that is why one of the Members has signed it a day after the selection was notified on the notice board. This therefore also clearly establishes that it is not a case where the selection done by one Member was approved by the other Member also but it only indicates that the selection of respondent No.3 was intimated to the other two Members of the Public Service Commission and they have signed it only as having received the information. This therefore clearly established (a) that the Chairman sat alone to conduct the interviews for the post for which the petitioner and respondent NO.3 were candidates; (b) that he did so under his own orders without any powers being delegated to him for that purpose; (c) that he conducted those interviews sitting as a Chairman-Member and not exercising any functions delegated to him by the Commission; and (d) that this selection done by the Chairman has not been approved by the rest of the Members of the Public Service Commission.

22. Part XIV. Chapter II of the constitution provides for the establishment of the Public Service Commissions for the Union and for the States. Article 315 contemplates a Public Service Commission for the Union and a Public Service Commission for each State. Article 320 Clause (3) provides for consultation and reads:

"320... (3) the Union Public Service Commission of the State Public Service Commission, as the case may be, shall be consulted –

(a) On all matters relating to methods of recruitment to civil services and for civil posts;

(b) On the principles to be followed in making appointment to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

(c) On all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a Civil capacity including memorials or petitions relating to such matters;

(d) On any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity that lavy costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;

(e) On any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award;

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor of the State, may refer to them:

Provided that the President as respects the all India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any, particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

This clause clearly talks of a State Public Service Commission as the body which should be consulted in matters enumerated in Sub-clauses (a) to (e) of Clause (3) of Article 320 of the Constitution.

23. Rule 7 of the Madhya Pradesh Civil Services (General Conditions of Service) Rules 1961 provides -

"7. Candidates shall be selected for appointment to a service or post by one or more of the following methods as may be prescribed, namely:-

(i) direct recruitment;

(ii) promotion;

(iii) transfer of person or persons already employed in another service or post;

Provided that the Commission shall be consulted before - a person is appointed to a service or post if such consultation is necessary under Article 320 of the Constitution read with the Madhya Pradesh Public Service Commission (Limitation of Functions) Regulations, 1957".

The proviso to this rule indicates that the Commission shall be consulted before a person is appointed to a service or post if the consultation is necessary under Article 320 of the Constitution that means if the appointment to the post is indicated under Article 320 then the Commission shall be consulted before the appointment is made. This proviso, however, talks of Article 320 read with the Madhya Pradesh Public Service Commission (Limitation of Functions) Regulations 1957 and these Regulations provide for those cases in which consultation is not necessary. Sections 3 and 5 of these Regulations

talk of those exceptions when the consultation is not necessary. A reading of the provisions contained in Section 5 clauses (1) and (2) will indicate that in all other cases which are not covered by these two sections direct recruitment could not be made in consultation with the Public Service Commission:

> "5. (1) It shall not be necessary for the Commission to be consulted on the suitability of a person for appointment, promotion or transfer to a post, the period of which does not exceed six months.
>
> (2) In other cases where appointment, promotion of transfer to a service or post would otherwise require consultation with the Commission, it shall not be necessary to consult the Commission, if owing to an emergency the Commission cannot be consulted without detriment to Public Service;
>
> Provided that –
>
> (i) intimation of such appointment, promotion or transfer shall be sent to the Commission at the same time; and
>
> (ii) action to fill up the post in the normal way or to obtain the concurrence of the Commission, as the case may be, shall be initiated as early as possible.

It therefore clearly emerges that appointment of respondent No.3 to the present post could not be made except in consultation with the Public Service Commission.

24. Article 320 of the Constitution talks of State Public Service Commission and the word "Commission has been defined in the Madhya Pradesh Public Service Commission (Limitation of Functions) Regulations, 1957 as

> "2 (a) "the Commission" means the Public Service Commission,
>
> Madhya Pradesh;

Similarly, in Madhya Pradesh Civil Services (General Conditions of Service) Rules, 1961 also "Commission" has been defined as

> "2.(b) "Commission" means the Madhya Pradesh Public Service Commission;

Thus looking to all these definitions of the word "Commission" the Constitution and in the Rules it is clear that when consultation with the Public Service Commission is expected it has to be with the Madhya Pradesh Public Service Commission and not with any one of the Member thereof.

25. Learned counsel for the petitioner referred to a decision of the Rajasthan High Court reported in Anandi Lal Verma V. State of Rajasthan 1975 Service Law Reporter 49 wherein a Division Bench of that Court considered the question in the context of the term "High Court" and held that "High Court" means the Full Court and not only the Chief Justice. Similarly, in AIR 1966 S.C. 1987 their Lordships of the Supreme Court observed:

> "The learned Attorney-General argued that the High Court, can under the Rules, refuse to recommend any of the names found in the list and go on doing so every time a new list is sent to it till the names it finds suitable are found in the list. This suggestion of obstructive tactics on the part of the High Court to achieve its objective may indicate a loophole in he Rules but it clearly demonstrates that the Rules are intended to tie down the hands of the High Court in the matter of consultation. Apart from the fact that a High Court cannot be expected to resort to such obstructive tactics, the Governor can easily prevent such a situation, as he may appoint persons recommended by the Selection Committee on the ground that the refusal by the High Court to send their names complied with the constitutional requirement of consultation. While the constitutional provisions say that the Governor can appoint District Judges from the service in consultation with the High Court, these rules say that the Governor can appoint in consultation with the Selection Committee subject to a kind of veto by the High Court which can be accepted or ignored by the Governor.
>
> The position in the case of District Judges recruited directly from the Bar is worse. Under Art.233(2) of the Constitution, the Governor can only appoint advocates recommended by the High Court to the said service. But under the Rules the High Court can either endorse the recommendations of the Committee or create a deadlock. The relevant rules therefore, clearly contravene the constitutional mandate of Art.233(1) and (2) of the Constitution and are, therefore, illegal."

It therefore could not be disputed that where the Public Service Commission is to be consulted it only means the Commission as understood within the scheme of our Constitution and defined in the Rules referred to above has to be consulted and consultation with one Member – the Chairman alone, who out of the Members of the Public Service Commission was the only Member present at the time of selection of respondent No.3, could not be said to be consultation with the Public Service Commission.

26. Learned counsel for the respondents contend that consultation is not mandatory but directory and they placed reliance on he decision reported in AIR 1967 S.C. 912 (supra). In this decision it was observed:

> "Article 320 does not come under Chap.I headed "Services" of part XIV. It occurs in Chapt. II of that part headed "Public Service Commissions". Articles 320 and 323 lay down the several duties of a Public Service Commission. Article 321 envisages such "additional functions" as may be provided for by Parliament or a State Legislature. Articles 320 and 323 begin with the words, "It shall be the duty ... and then proceed to prescribe the various duties and functions of the Union or a State Public Service Commission, such as to conduct examinations for appointment; to assist in framing and operating schemes of joint recruitment; and of being consulted on all matters relating to methods of recruitment or principles in making appointments to Civil Services and on all disciplinary matters affecting a civil servant.
>
> Perhaps because of the use of the word "shall" in several parts of Art. 320, the High Court was led to assume that the provisions of Art. 320(2)(c) were mandatory, but in our opinion, there are several cogent reasons for holding to the contrary. In the first place, the proviso to Art.320, itself, contemplates that the President or the Governor, as the

case may be "may make regulations specifying the matters in which either generally, or in any particular class of case or in particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

The words quoted above give a clear indication of the intention of the Constitution makers that they did envisage certain cases or classes of cases in which the Commission need not be consulted. If the provisions of Art. 320 were of a mandatory character, the Constitution would not have left it to the discretion of the Head of the Executive Government to undo those provisions by making regulations to the contrary. If it had been intended by the makers of the constitution that consultation with the Commission should be mandatory, the proviso would not have been there, or, at any rate in the terms in which it stands. That does not amount to saying that it is open to the Executive Government, completely to ignore the existence of the Commission or to pick and choose cases in which it may or may not be consulted.

Once, relevant regulations have been made, they are meant to be followed in letter and in spirit and it goes without saying that consultation with the Commission on all disciplinary matters affecting a Public servant has been specifically provided for, in order, first to give an assurance to the Services that a wholly independent body not directly concerned, with the making of orders adversely affecting public servants, has considered the action proposed to be taken against a particular public servant, with an open mind and secondly, to afford the Government unbiased advice and opinion on matters vitally affecting the morale of public services.

It is, therefore, incumbent upon the Executive Government when it proposes to take any disciplinary action against a Public servant, to consult the Commission as to whether the action proposed to be taken was justified and was not in excess of the requirements of the situation.

Secondly, it is clear that the requirement of the consultation with the Commission does not extend to making the advice of the Commission on those matters, binding on the Government. Of course, the Government, when it consults the Commission on matters like these, does it not by way of a mere formality but with a view to getting proper assistance in assessing the guilt or otherwise of the person proceeded against and of the suitability and adequacy of the penalty proposed to be imposed.

If the opinion of the Commission were binding on the Government, it may have been argued with greater force that non-compliance with the rule for consultation would have been fatal to the validity of the order proposed to be passed against a Public servant. In the absence of such a binding character, it is difficult to see how non-compliance with the provisions of Art.320(3)(c) could have the effect of qualifying the final order passed by the Government."

It is clear that in this decision their Lordships although held that the provisions contained in Art.320 are directory and not mandatory, but still, their Lordships observed that it does not amount to say in that it is open to the executive Government completely to ignore the existence of the Commission and further their Lordships observed that once relevant regulations have been made they are meant to be followed in letter and in spirit. It cannot be doubted from the regulations and rules quoted above that

regulations have been made which go to indicate that appointment by direct recruitment could only be made in consultation with the Public Service Commission. It therefore cannot be contended that this consultation was not necessary.

27. Apart from it, in the instance case, the order of appointment issued in favour of the respondent No.3 goes to show that the Government in appointing respondent no.3 has chosen to accept the advice of the Public Service Commission as the first sentence of the order reads:

"Omitted as the matter is in Hindi"

It, therefore, in the facts of this case, is mere academic argument to contend that consultation with the Public Service Commission was not mandatory. In fact, the respondent no.3 was appointed because the Government accepted this recommendation treating it to be a recommendation of the Public Service Commission. It is not even the case set up in the return by the State Government that the State Government did not make this appointment in consultation with the Public Service Commission as it was not mandatory but made the appointment in consultation with any one else, may be, the Chairman of the Public Service Commission assisted by some other Heads of Departments and experts.

28. Learned counsel for the respondents placed reliance on the decisions reported in AIR 1958 MP 135 (supra) AIR 1966 Mysore 220 (supra); and AIR 1971 Punjab 297 (supra). In AIR 1958 MP 135, the question before the Court was as to whether in matter of removal of a civil servant the opinion of the Public Service Commission was binding and the Government could not depart from the opinion given by the Public Service Commission and in that context it was held that the opinion of the Public Service Commission is only an advice and as consultation is only directory it could not be contended that Government could not depart from the opinion expressed by the Public Service Commission. In the Mysore case again the question was about removal of a civil servant from office and it was contended that it could not be done without following the procedure prescribed under Art.320(3)(c); and in that context it was observed, reliance being placed on the decision reported in AIR 1957 S.C. 912 (supra), that consultation with the Public Service Commission is only directory and non compliance will not nullify the order passed by the Government. In the Punjab decision referred to above their Lordships held that in matters of promotion from subordinate agricultural service as District Agricultural Officer, non compliance with the requirement of consultation with the Public Service Commission will not affect the validity of the appointment because consultation is not

mandatory but it is only directory. Apparently therefore, all these cases on which reliance has been placed by learned counsel for the respondents that consultation with the Public Service Commission is not mandatory but only directory are cases where the Government in its wisdom choose not to consult the Public Service Commission. But as has already been stated, in the present case it is not that the Government has not consulted for has rejected the recommendation of the Commission, but has consulted and accepted the advice given by the Chairman and it was only on that recommendation that the Government acted in appointing respondent No.3. Therefore the question whether the Government should have accepted the recommendation of the Public Service Commission or not is a more academic question. The real question that arises is as to whether what the Government accepted as the recommendation of the Public Service Commission was in fact the recommendation of the Public Service Commission or not.

29. In this connection learned counsel for the petitioner placed reliance on the decision of the Rajasthan High Court reported in K.K.Bhatia v. Rajasthan Public Service Commission, 1972 Rajasthan Law Weekly 22. In that case Shinghal J. observed -

> "A reference to article 320 of the Constitution shows that this argument of Mr. Daphtary is quite correct. That article specifies two important functions of a State Public Service Commission as follows –
>
> (1) to conduct examinations for appointments to the services of the State. And
>
> (2) to be consulted on the matters specified in clause (3).
>
> Each of these is a distinct function, so that the provisions of clause (3) of article 320 making it obligatory that the Commission shall be consulted on the matters enumerated in it cannot be wrested for interpreting clause (1) thereof. It follows therefore that in discharging its duty of conducting an examination for the selection of candidates for appointment as Assistant Engineers in Rajasthan Ground Water Board Service, the Commission was required to discharge a duty which was quite different from what it was required to do while answering a reference on consultation under clause (3). It appears to me therefore that it was permissible for the Commission to discharge the duty of conducting the examination by entrusting it to one or more of its members and that it was not necessary for it to act in a body. In fact my attention has not been invited to any general or special requirement of any law under which it could be said that it was necessary for the entire Commission to constitute itself into a board of examiners for the purpose of selecting for appointment to a service of which the rules made a provision that the candidates shall appear before the Commission for interview. It follows therefore that it was permissible for the Commission to nominate the examiners from amongst themselves, and to conduct the examination in that manner. In such a case it would be futile to contend that the examination would be illegal merely because all the members of the Commission did not choose to examine the candidates. It would not therefore matter if the test of examining the candidates was assigned to one or more members of the Commission, and the

examination would not be illegal if the other members were not directly associated with it."

It therefore is clear that if the Commission had chosen to delegate its functions to one of its Members and subsequently endorsed the decision of that Member by approval, it could not be said that consultation was not with the Public Service Commission. But in the present case, as stated above, the Commission did not delegate the functions to the Chairman nor did the Commission approve the selection.

30. Reliance was also placed by learned counsel for the respondents on the decision of the Full bench of the Assam High Court reported in AIR Assam 136 (Supra). In this decision their Lordships observed:

> "The Constitution of the Commission as such has not been challenged by the learned counsel and indeed it cannot be challenged in view of the submission of the learned counsel that our earlier decision (A.C.Sarkar's case) ... does not require any reconsideration and on the basis of which he seeks to make out a case. Further, the petitioner does not deny that the nomination of the respondent No.1 was made by the Commission. His whole objection as can be seen from paragraph 28 of his application is that the Commission made recommendation "pursuant to the aforesaid illegal interview dated 29.1.69 for its acceptance by the Government of Assam". This objection is devoid of substance. Mr.Lahiri submits that in A.C. Sarkar's case the Commission was manned by the Chairman and another Member, but the vacancy on the retirement of the Third Member was not filled up. Since, however, under the Regulation then in force, the minimum number was two, namely the Chairman and another Member, the interview conducted by two members was unexceptionable. The learned counsel submits that in the instant case, the interview, being conducted by the Chairman and another Member when the minimum number under the amended Regulation is three, is absolutely invalid and without jurisdiction. This argument however does not bear scrutiny when we take into consideration Article 316 (1-A) and 317(2) of the Constitution. Omitting the portion that is not necessary for our purpose, Articles 316(1-A) and 317(2) read as follows:
>
> "If the office of the Chairman of the Commission becomes vacant or if any Chairman is by reason of absence or for any other reason unable to perform the duties of his office, those duties shall, until some person appointed under clause (i) of the vacant office has entered on the duties thereof or, as the case may be, until the Chairman has resumed his duties, be performed by such one of the other members of the Commission .... and the Governor of the State in the case of a State Commission, may appoint for the purpose."
>
> Article 317(2):
>
> " ..... the Governor, in the case of a State Commission, may suspend from office the Chairman or any other member of the Commission in respect of whom a reference

> has been made to the Supreme Court under Clause (1) until the President has passed orders on receipt of the report of the Supreme Court on such reference." The above are the contingencies in which the Chairman of the Commission may become unavailable. The Commission shall be continued to function with the remaining members, one of whom will be appointed by the Governor to exercise the functions of the Chairman under Article 316(1-A) during the period. The Commission does not come to an end the moment the Chairman becomes unavailable. This would go to show that the Commission can function and carry out its various duties even though there may be a vacancy on a certain member or members becoming unavailable either permanently or temporarily. It is understandable that some time, although not inordinately long time, may be taken by the Governor in filling up the vacancies. Besides, conducting of an interview for recommending certain candidates for appointment on the ground of suitability, need not require the presence of all the members of the Commission. Any one or two members may be entrusted with the duty in absence of any rules to the contrary. This is an internal working of the Commission which is a highly responsible body and can be trusted to discharge their duties with due regard to high propriety and fairness to all concerned. We are, therefore, clearly of opinion that the interview conducted by the Chairman and another Member in the case of the petitioner is not without jurisdiction nor is the recommendation as a result of that interview can be said to be invalid under the law. We have not been shown any rules which debar the Commission to work in compartments while interviewing candidates for appointment."

The observations made in this paragraph quoted above clearly go to show that what their Lordships felt was that if one or two Members of the Commission were entrusted with the duty of interviewing the candidates in absence of the rules to the contrary it would be permissible. In fact, that is not the stand taken by the Public Service Commission or the Stat Government in the present case and it is also not he case where we do not know how the Chairman alone conducted the interview as it was in the Assam case and their Lordships observed –

> "This is an internal working of the Commission which is a highly responsible body and can be trusted to discharge their duties with due regard to high propriety and fairness to all concerned."

These observations were made by their Lordships on an assumption, as is clear from the observations quoted above, that one or two Members may be entrusted with the duty by the Commission. But in the present case there is nothing left for us to infer as the positive case set out by the Public Service Commission itself in their return and the amendment to the return is that it was not the Commission which entrusted the duty to conduct these interviews to the Chairman but it was the Chairman himself who took upon himself to conduct the interviews for the post in question. Under these circumstances, therefore, this decision in the Assam case also is of no assistance.

31. It is therefore clear that the selection of respondent No.3 made by the Chairman, the only Member of the Commission sitting at the interview, was not a selection done by the Public Service Commission of Madhya Pradesh. And it was on this selection that the State Government has chosen to base the order of appointment. It is therefore clear that the State Government has made the appointment in contravention of the provisions contained in Article 320(3) of the Constitution and Rule 7 of the Madhya Pradesh Civil Services (General Conditions of Services) Rules 1961 and also in contravention of Rule 5 of M.P. Public Service Commission (Limitation of Functions) Regulations 1957.

32. It could not be disputed that by selection of respondent No.3, the petitioner who was working on the post in consequence of the earlier decision of this Court was reverted and therefore it resulted in substantial injury to the petitioner. Consequently, the petition squarely falls within the ambit of Article 226 (1)(a) and (b) of the Constitution.

33. In the light of the discussion above, therefore, the petition is allowed. The order passed by the State Government (Annexure-R-IV, dated 9th July 1976) appointing respondent No.3 as Deputy Director (Women's Welfare) Applied Nutrition Programme, is hereby quashed. In consequence the order (Annexure R-V) dated 9th July 1976) also is quashed and it is directed that the operative part of the judgment in Misc. Petition No.684 of 73 dated 6.2.75 shall remain operative till a fresh selection for the post of Deputy Director (Women's Welfare) Applied Nutrition Programme, is made. In the circumstances of the case parties are directed to bear their own costs.

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IN THE HON'BLE HIGH COURT OF MADHYA PRADESH, JABALPUR
Misc. Petition No.813 of 1981
D.D. 6.11.1981
Hon'ble Mr. Justice G.L.Oza

S.K.Grover & 3 Ors. ... Petitioners
Vs.
State of Madhya Pradesh & Ors. ... Respondents

Qualification:

Whether acquisition of qualification prescribed for the post after the notification before selection/ appointment is sufficient? - No

Whether Study Leave can be treated as Teaching Experience prescribed for the post? - No

One post of Reader/Assistant Professor in Telecommunication in Engineering College prescribing post graduate in Engineering with 3 years teaching experience of which one year in Engineering College or B.E. (II Class) with at least 5 years experience of which one year in Engineering College was advertised as per notification issued in February 1980 – 6 candidates including 4 petitioners and 3rd respondent were interviewed on 25.8.1980 and 3rd respondent was selected as per letter dated 29.8.1980 of the Commission and he was appointed on 18.6.1981 – Petitioner challenged the selection and appointment on the ground that Respondent No.3 was holding only B.E. Degree at the time of the advertisement, he having joined as lecturer in December 1974 went on Study leave to do M.E. in July 1978 and as such he had only 3½ years experience consequently he did not have the qualification prescribed for the post – After the advertisement Government by its notification dated 6.6.1980 accepted the recommendation of ACTE and prescribed qualification of I Class Master's Degree in appropriate field with minimum 5 years of experience in teaching/research in institutions of University standard – The 3rd respondent was selected and recommended for appointment in the old pay scale – High Court after examining the relevant provisions quashed selection and appointment of the 3rd respondent.

Held:

The Government Order dated 6.6.1980 accepting the qualification and pay scale prescribed by ACTE had the force of Rule as it amended and substituted the Rules which were in force earlier with respect of pay scale and educational qualifications.

Further Held:

After 6.6.1980 respondent No.3 can only be selected and appointed as Reader if he fulfilled the qualifications as indicated in the Government Order dated 6.6.1980.

Further Held:

Study leave taken to do M.E. in Roorkee University cannot be treated as experience in teaching/ research work/practical prescribed for the post.

Cases referred:

1. (1975) 3 Supreme Court cases 602 - State of Bihar and others v. Dr. Asis Kumar Mukherjee and others
2. (1979) 2 Supreme Court cases 339 - Dr. M.C.Gupta and others v. Dr. Arun Kumar Gupta and others
3. (1979) 3 Supreme Court Cases 165 - Smt. Swaran Lata v. Union of India

ORDER

This is a petition filed by the four petitioners challenging an order of appointment of respondent No.3 as Reader in Government Engineering College, Jabalpur, dated 18.6.1981 and also his selection by the Public Service Commission on the basis of which this order of appointment was issued.

2. According to the petitioners:

(1) the petitioners 1 to 3 are holding Master's degree in Engineering (M.E.) in Telecommunication and are working as Lecturers since last more than 5 years. Petitioner No.4 holds B.E. degree in Telecommunication and has been serving as a Lecturer in Telecommunication since last about 14 years. The petitioner No.4 had also completed his M.E. in Telecommunication and had to submit his thesis in August 1981. Thus, all the petitioners are eligible for promotion – appointment as Readers in Telecommunication in Engineering College.

(2) The post of Reader in Telecommunication in Engineering College carried a pay scale of Rs.720-1250. The minimum requirement for this pay scale and post was a post-graduate degree in Engineering with 3 years teaching experience of which one year should be in Engineering College or, in the alternative, a B.E. (Second Class) with at least 5 years experience of which one year should be in an Engineering College. The pay scale and education qualifications of technical teaching course are fixed on the basis of recommendations of All India Council of Technical Education. The revision of pay scales of teaching post including the post of Reader in Telecommunication was under consideration of the said Council and it is alleged that the Council recommended a new pay scale for all teaching posts and requested the Government to enforce the same pay scales retrospectively from 1.4.1976. The Council recommended the pay scale of Rs.1200-1900 for Readers in Telecommunication and prescribed First Class Master's degree in appropriate field with minimum of 5 years experience in teaching/research in institutions of University standard. The respondent State accepted the scales and prescribed the same with effect from 1.4.1976 by its notification dated 6.6.1980, Annexure-A. Clause 3 of this notification provided the prescribed qualifications and further stated that all selections on these posts in future will be in accordance with this notification. According to the petitioners, the effect of this notification was to abolish the old scales and replace them by the new pay scale. All the incumbents who did not have the requisite qualifications were also given the new pay scale with the condition that they should acquire the newly prescribed qualifications within a period of 5 years failing

which they shall not be entitled to any annual increment. It is alleged that petitioners 1 to 3 already held the requisite qualifications and have been given revised pay scales as Lecturers. Petitioner No.4 does not have the minimum qualification prescribed in this notification but has been given the new pay scale and is required to acquire the prescribed qualifications within a period of 5 years.

(3) That a post of Reader/Assistant Professor in Telecommunication fell vacant and was required to be filled in through the Public Service Commission of the State. The respodnent, Public Service Commission, therefore, issued an advertisement No.1 of 1980 sometimes in February 1980 inviting applications for the post of Reader in Telecommunication besides several other posts. The advertisement prescribed a pay scale of Rs.720-1250 for the post of Reader/Assistant Professor and required candidates having post-graduate degree in Engineering or equivalent thereof with three years teaching experience of which one year should be in Engineering College or, in the alternative, a Second Class B.E. Degree in Telecommunication or equivalent thereof, with at least 5 years teaching experience of which at least one year should be in the Engineering College. A copy of the advertisement is filed along with this petition and is Annexure-B. This advertisement was issued before the orders of the Government were notified prescribing new pay scales and that is why in the advertisement the old pay scales were indicated for the post of Reader. The respondent No.3 was only holding a B.E. degree in Telecommunication at the time of the issuance of this advertisement. Since he had joined the post of Lecturer in Telecommunication only in December 1974 and had worked only upto July 1978 when he went on study leave to do his M.E. in Telecommunication he had only put in 3½ years experience. According to the petitioners, therefore, respondent No.3 did not fulfill the requisite qualifications prescribed by this advertisement and was, therefore, not entitled to apply for the post of the Reader.

(4) The respondent No.3 submitted his application and according to the petitioners, it was directly sent to the respondent, Public Service Commission. It is alleged that respondent No.3 being a Government servant was also expected to send along with the application a certificate that he was a Government servant. It is alleged by the petitioners that this was not done. The respondent Public Service Commission called respondent No.3 as well as the petitioners for interview. This was conducted by respondent Public Service Commission on 25.8.1980. It is alleged by the petitioners that by this time, the new pay scale had come into force and therefore, the respondent Public Service Commission should have interviewed only those candidates who had the necessary qualifications prescribed by the respondent State Government while applying the new pay scale vide, their Notification dated 6.6.1980 and it is alleged by the petitioners that since respondent No.3 did not fulfill the minimum qualifications as required under the notification of the State Government dated 6.6.1980, should not have been

called for interview. It is alleged by the petitioners that respondent NO.3 because of the influence, secured an invitation for interview which was to be held on 25.8.1980

(5) The petitioners alleged that they were apprehensive about the interviews and, therefore, they made a representation on 3.9.1980 to the State Government complaining about the selection of respondent No.3 by the Public Service Commission. Respondent No.3 was selected by Public Service Commission and his name was recommended for appointment as Reader and it is alleged by the petitioners that on the date of selection i.e. 25.8.1980, the respondent No.3 did not possess the requisite qualifications as contemplated under the notification of the State Government dated 6.6.1980 and, therefore, was not entitled to be considered for appointment.

(6) The respondent No.3 completed his M.E. in Telecommunication in November-December 1980 from Rourkee University and became eligible for holding the post of Reader/Assistant Professor. It is alleged by the petitioners that respondent No.3 could exercise influence in the State Government and kept his appointment pending till he obtained the requisite qualifications and ultimately, an order dated 18.6.1981, Annexure-D was passed appointing respondent No.3 as a Reader. It is further alleged that this appointment is in pursuance of the advertisement published in February 1980. It is alleged by the petitioners that the interviews held on 25.8.1980 on the basis of the old pay scale and requirements of educational qualifications is contrary to law.

(7) The pay scale of Rs.720-1250 was abolished by the orders of the Government dated 6.6.1980 and the new pay scale of Rs.1200-1900 was brought into force. But respondent No.3 was appointed in the old pay scale of Rs.720-1250 which was not in existence on the date on which the appointment was made. It is also stated in the appointment order that he is required to obtain the requisite qualifications within 5 years on condition which could not have been put in the case of respondent NO.3 and this was contrary to clause 3 of State Government's notification dated 6.6.1980. It is alleged that under orders of the State Government dated 6.6.1980, Annexure-A, the future appointments and selections could only be on the basis of new qualifications and it is alleged that respondent No.3 is the only person who has been given this favour of selection on the basis of old qualifications and the appointment under the old pay scale. It is further alleged that all others in different subjects appointed on the basis of this advertisement are persons who held qualifications in accordance with the Government's order dated 6.6.1980 and, therefore, have been given the new pay scales which are in existence at present. Thus, according to the petitioners the appointment of respondent No.3 in non-existing pay scale is nothing but a favour shown to him and this, according to the petitioners, is in violation of Article 16 of the Constitution of India. The petitioners, therefore, have challenged the appointment of respondent No.3, being contrary to the provisions of Constitution and not in accordance with law.

3. Respondent No.1 state in their return has admitted the facts about the educational qualifications of petitioners 1 to 3. It is further stated in the return filed by respondent No.1 that the State Government, in exercise of powers conferred under Section 309 of the Constitution have framed rules with regard to the Madhya Pradesh Education Service (Technical Branch) Recruitment Rules, 1967, and it is stated that these rules were brought in force from 24.5.1968. In these rules, the qualifications for the post of a Reader are given in Schedule III which reads:-

> "Post Graduate Degree in Engineering or equivalent thereof with about 3 years experience in teaching/research works/practical/administration of Technical Education of which about one year of teaching in an Engineering College.
>
> OR
>
> At least II Class Degree in appropriate branch of Engineering or equivalent thereof with about 5 years experience in Teaching/Research works/Practical/Administration of Technical Education out of which about year should be in teaching in an Engineering College. Preference will be given to the candidates possessing Post Graduate Degree."

It is stated in the return that respodnent No.3 was appointed as a Lecturer in Telecommunication by orders of the Government dated 4.12.1974 and he joined his duties on 7.12.1974. It is further stated that he was a direct recruit and his appointment was made after selection by the Public Service Commission. It is also stated that respondent No.3 continued to function as a Lecturer in the Government Engineering College, Jabalpur till 26.7.1978 when he was sponsored to University of Roorkee under Quality Improvement programme initiated by the State Government in 1971-72 and under this scheme, according to the State Government, the respondent No.3 went to Roorkee for completing his Master's degree and after completing his training and studies he came back and joined as Lecturer in 26.7.1980 at the Government Engineering College, Jabalpur. It is also stated that respondent No.3 obtained his Master's degree from the said University on 15.2.1981 after passing the final examination for the said degree in 1980.

4. According to the return filed by the State, respondent No.3 applied for the post of Reader in Telecommunication advertised by the Public Service Commission vide, their advertisement No.1 of 1980 while in training under the Quality Improvement Programme and a 'No objection Certificate' was issued by the State Government for attending the interview for the post, held on 25.8.1980. A copy of the Certificate dated 23.8.1980 is filed along with the return and is Annexure R-III. It is further alleged that respondent No.3 was selected for the post by Public Service Commission. According to the return filed by the State, the Public Service Commission vide, their letter dated

29.8.1980 intimated to the Government in Education Department the result of interviews held on 23.8.1980 and it was mentioned that the total number of applicants for the post were 6, all of them were called for interview and the name of the respondent No.3 was included in the merit list on the basis of his selection on merits and recommended that he may be appointed to the post of Reader. A copy of this letter was also filed along with the return as Annexure R-IV. It is stated in this return that "the State Government considered the matter of appointment of respondent No.3 at length" and respondent No.3 was appointed as Reader in Telecommunication in the old pay scale of Rs.720-1250 till such time that he acquired the qualifications prescribed for the post under the new pay scale i.e. 1200-1900. It is stated that this decision was taken in view of the fact that he was found eligible for selection in accordance with the terms and conditions of qualification and experience according to the advertisement of the Public Service Commission in the old pay scale and was selected and recommended for appointment. The appointment order in respect of respondent No.3 was issued on 18.6.1981 and he joined the post on 20.6.1981.

5. It is admitted by the respondent State in the return that on the recommendations of the All India Council of Technical Education, the State Government in Education Department revised the scales of pay of the various teaching posts in Engineering Colleges of the State with effect from 1.4.1976 by order dated 6.6.1980. It is also not disputed that under the new pay scale the requirements of educational qualifications and experience for the post of Reader are:

> "First Class Master's Degree/Doctorate Degree in appropriate field with minimum of 5 years experience in teaching/research in institutions of University standard. Specialised knowledge in one or more specified field/subject with outstanding teaching research experience and Doctorate Degree or published work of equal standard desirable."

It is also admitted that in the order of the State Government applying the new pay scales which have been made applicable from 1.4.1976 it has further been provided that Lecturers working in Engineering Colleges who do not fulfill the prescribed qualifications would be given the advantage of new pay scale but they will have to acquire the requisite qualifications within 5 years from 1.1.1980 failing which they will not be eligible for further increments in their scales of pay and it is also admitted that however the respondent No.3 on selection was given the appointment in the post of Reader in the old pay scale on the basis of advertisement although the Government's orders vide notification dated 6.6.1980 provided that future appointments will be in the new pay scales.

6. It is further stated in the return filed by the State Government that at the time when the respondent No.3 submitted his application on the basis of the advertisement i.e. Advertisement No.1 of 1980

issued in February 1980 by the Public Service Commission, the respondent No.3 did not possess a Master's degree but had a Bachelor's degree in Telecommunication and on the basis of the advertisement, he could be considered to have a Bachelor's degree with 5 years experience in teaching/research work/practical/ administration of technical education and it is alleged that although before completion of 5 years experience, this respondent No.3 was sent to Roorkee for doing his Master's degree yet under Fundamental Rule 9(6) S.R. (i) the period during which he was studying in Roorkee and taking training will be deemed to be duty as he was sent under the scheme of the Government and, therefore, it could be said that he fulfilled the qualification of 5 years experience. It is also alleged in the return filed by the State Government that the Public Service Commission found respondent No.3 eligible under the advertisement and felt that he fulfilled the requisite qualification and, therefore, he was called for interview and selected. The allegations about influence and favour, alleged by the petitioners, have been denied by the respondent-State in their return. As regards the representation made by the petitioners making a grievance about selection it is stated in the return that as it did not contain any material, it was not considered.

7. The Public Service Commission initially filed a return on 25.9.1981. In the return filed by the Public Service Commission, it is stated that in accordance with the advertisement No.1 of 1980, six applications were received by the Commission and amongst these 6, were all the petitioners and the respondent No.3. It is stated that all the six candidates were called for interview. Along with this return, the Public Service Commission has filed an extract of application submitted by respondent No.3 and it is stated in this return that respondent No.3 showed in the column "Practical experience, if any, with dates" as "from 1974 till now" and the Public Service Commission has filed a true copy of the extract of the application as Annexure R-II.

8. According to this return, it is stated on behalf of the Public Service Commission that the application was received on 18.3.1980 and experience was counted with effect from 1974 to 25.3.1980 i.e. the last date for receipt of applications for the post in question and on the basis of the statement in the extract quoted above, according to the Public Service Commission, it was found that respondent No.3 had more than 5 years experience. It is further stated in this return that respondent No.3 did not disclose in the application form that for his M.E. degree he had gone to the University of Roorkee on 26.7.1978. It is stated that a copy of this application was forwarded to the State Government by the head of the Institution where the respondent No.3 was serving and the State Government or the Principal of the Institution where the respondent No.3 was serving did not inform the Commission that the respondent No.3 had gone to Rourkee on 26.7.1978 for his M.E. Degree. The Commission was

not posted with correct information either by respodnent No.3 or by the State Government and it is further stated that the Commission judged the eligibility on the basis of the information given in the application of respondent No.3. It has been further stated that the Commission goes by the facts presented to it and inaccuracy therein is the responsibility of the person attesting to them or affirming them. The Commission denied the allegation of the petitioners about influence of respondent State. The relevant portion of the return pertaining to the qualification of respondent No.3 is being reproduced here. It reads:-

> "The respondent No.3 did not disclose in the application form that for his M.E. Degree he had gone to the University of Roorkee on 26.7.1978. A copy of the application was forwarded to the State Government by he Head of the Institution where the respondent No.3 was serving. The State Government or the Principal of the Institution, where the petitioner was serving, did not inform the Commission that the respondent No.3 has gone to Roorkee on 27.7.1978 for his M.E. Degree. The Commission was not posted with correct information either by the respondent No.3 or by the State Government. The Commission judged the eligibility on the basis of the information given in the application of the respodnent No.3. The Commission goes by the facts presented to it. Any inaccuracy therein is the responsibility of the person attesting to them or affirming them."

9. It is further stated that the petitioners 1 to 3 were considered by the Commission and they were not found suitable. It is stated that advertisement No.1 of 1980 required a Second Class Degree in Engineering and teaching experience of more than 5 years and, therefore, respondent No.3 was considered it for calling for interview as he had teaching experience of more than 5 years from 1974 including training or further study which gives him teaching experience of 5 years. This return, on the one hand, showed that the Public Service Commission was not informed that this respondent No.3 went to the University of Roorkee on 26.7.1978 and on the other, the Public Service Commission accepted the statement made in the application that he was a Lecturer since 1974 till now and, therefore, considered his case on the basis of this information and found that he had more than 5 years teaching experience, although it was also stated in this return that he hd teaching experience of more than 5 years including training or further studies which gives him teaching experience of 5 years as it was stated in para 4 of the return as under:-

> "He also has teaching experience of more than five years from 1974 including training or further study which gives him teaching experience of five years.."

10. During the course of arguments, some controversy arose with regard to the application submitted by respodnent No.3 as to whether the application was sent to the Public Service Commission directly or through proper channel and as to whether before the Public Service Commission there was the application on the prescribed form or only an extract of the application on which reliance has been

placed in the return filed by the Public Service Commission, as the stand of respondent No.3 was that he has sent the application in proper form and that was before the Public Service Commission and in that everything are clearly stated and what has been stated in the return (para 3) of the Public Service Commission, quoted above, is not correct, as according to the respondent No.3 in his application form he has clearly stated that he had gone to Roorkee for his M.E. Degree under the scheme of the Government on study leave. In view of this, the learned Deputy Government Advocate who appeared for the State and also for the Public Service Commission sought leave to file an additional return on behalf of the Public Service Commission and an additional return has been filed by the Public Service Commission, respondent No.2

11. In this additional return filed by the Public Service Commission, it was stated that after selection of respondent No.3, the application of respondent No.3 in original along with the enclosures was forwarded to the State Government along with the result of selection and the Public Service Commission was left with only the abstract of the application. The return of the Public Service Commission filed earlier could not be as comprehensive as it should have been and it has been further stated that in the application, informations regarding educational qualifications and experience were stated. It is also stated that the application form was directly sent to the Public Service Commission and on this application, the scrutiny clerk of the Public Service Commission endorsed that an application through proper channel was awaited and as the application through proper channel was not received, a cyclostyled interview letter was issued to respondent No.3 and Public Service Commission asked the candidate to produce 'No objection certificate' from the appointing authority. A copy of the interview letter issued to respondent No.3 is filed along with this return as Annexure R-II and it is also stated that respodnent No.3 produced the 'No Objection Certificate' from the Under Secretary to Government, Education Department on the date of interview itself i.e. 25.8.1980. an attempt has also been made in this additional return filed after a part of the arguments was heard to explain the endorsement on the abstract of application and it has also been stated that Shri D.B.Naik, Assistant Secretary made some clarifications from the Professor in G.S. Institute of Technology and Science at Indore to confirm that B.E. Telecommunication is identical to B.E. Electronics/Telecommunication. It is also stated in this additional return that the respodnent No.3 was eligible in terms of the advertisement as he was B.E, in Electronics and Telecommunication in First Class and had "more than 5 years" experience in teaching/ research work/practical works/ administration of technical education. This additional return filed by the Public Service Commission is dated 20.10.1981.

12. The respondent No.3 in his return has alleged that he had sent his application through proper channel and an advance copy was sent to Public Service Commission also. Allegations about the influence exercised by respondent No.3 are denied. It is also stated that although respondent No.3 had gone away to Roorkee for his Master's degree yet, in view of F.R. 9(6) Supplementary Rule (i), it was contended that he will be deemed to be a Lecturer through out and the privileges of a Lecturer will be available to him and on this basis, it was contended that the period during which he was in Rourkee for his Master's degree will also be counted as his experience as Lecturer and, therefore, he would be eligible for consideration.

13. From these respective pleadings of parties, the facts which emerge as undisputed are:-

(1) that respondent No.3 submitted an application in accordance with advertisement No.1 of 1980 issued by Public Service Commission sometimes in February 1980 for the post of Reader in Telecommunication;

(2) that the respondent No.3 sent an application directly to the Public Service Commission and an application through proper channel did not reach the Public Service Commission and Public Service Commission allowed him to face the interview on the basis of a No Objection Certificate issued by the Education Department;

(3) that before the date on which the interviews were held, a notification bringing the new pay scales in force has already been issued as admittedly it was issued on 6.6.1980 and the requirement of educational qualifications and experience under this new pay scale was such that respondent No.3 could not have been considered as he had not obtained a Master's degree till that date in telecommunication.

(4) It is also not in dispute that from the abstract of the application, it is not very clear as to when he left the Engineering College at Jabalpur and went Roorkee for studies to secure a Master's degree.

14. The only controversy, leaving aside the allegations made by the petitioners about influence and other things and denied by the respondents in their return, is as to whether respondent No.3 was eligible in terms of the advertisement for being called for interview as, in view of the fact that he had left the Engineering College, Jabalpur and gone to Rourkee for studies, he had not completed 5 years teaching experience.

15. The other controversy that appears to be is that after the Government's order dated 6.6.1980 applying the new pay scales and laying down that all future appointments will be in the new grade, could respondent No.3 be appointed on the basis of the educational and other qualifications required under the old rules when he was not qualified according to the new pay scales and recruitment and could he be appointed on the old pay scale and when there was no such exception for the post of Reader in the order issued by the State Government dated 6.6.1980.

16. Learned counsel for the parties referred to decisions of their Lordships of the Supreme Court about the scope of scrutiny in a petition under Article 226 with regard to selections done by the Public Service Commission. It is settled as is observed by their Lordships of the Supreme Court in Smt. Swaran Lata v. Union of India [(1979) 3 Supreme Court Cases 165], where their Lordships quoted the following passage:-

> "It is entirely in the wisdom and discretion of the Commission what mode or method it would adopt. That is subject to statutory provisions, if any. Where minimum qualifications for eligibility are prescribed by a statute or by the Government, the Public Service Commission cannot select a candidate who does not possess those qualifications. However, the Public Service Commission is free to screen the applicants, classify them in various categories according to their plus qualifications and/or experience, and call for interview only those candidates who fall within those categories, eliminating others who do not satisfy those criteria."

In State of Bihar and others v. Dr. Asis Kumar Mukherjee and others [(1975) 3 Supreme Court cases 602] their Lordships considered the scope of Article 226 in matters of selection and appointment and it was observed:-

> "There is some force in the grievance of Counsel for the State that the Court should not ordinarily call for cabinet papers and start scrutinising the notings and reports of the various officers merely because a writ petition challenging the order has been made. When a writ of certiorari is moved, the Court has the power to call for the record, but in cases where mala fides is not alleged or other special circumstances set out, sensitive material in the possession of Government may not routinely be sent for. The power of the Court is wide but will have to be exercised judicially and judiciously, having regard to the totality of circumstances, including the impropriety of every disgruntled party getting an opportunity to pry into the files of Government. Of course, acts of public authorities must ordinarily be amenable to public scrutiny and not be hidden in suspicious secrecy. We are not satisfied that the High Court in this case should necessarily have looked into the cabinet papers and back records, but the question has not been argued, except to the extent of mentioning that the Court was not in order although the State Government had produced the document on a direction. We leave the matter at that, for this reason.

21. What do the alleged infirmities add up to? Shri Jagdish Swaroop rightly stressed that once the right to appoint belonged to Government the Court could not usurp it merely because it would have chosen a different person as better qualified or given a finer gloss or different construction to the regulation or on the score of a set formula that relevant circumstances had been excluded, irrelevant factors had influenced and such like grounds familiarly invented by parties to invoke the extra ordinary jurisdiction under Article 226. True, no speaking order need be made while appointing a government servant. Speaking in platitudinous terms these propositions may deserve serious reflection. The administration should not be thwarted in the usual course of making appointments because somehow it displeases judicial relish or the Court does not agree with its estimate of the relative worth of the candidates. Is there violation of a Fundamental Right, illegality or akin error of law which vitiates the appointment? The overlooking of alleged superlative abilities claimed by Dr. Mukherjee is not of judicial concern but of public resentment and individual injustice, if wrongly discarded by an appointing authority – in the absence of proof of bad faith or oblique exercise or other error of law. Nor is the corrective judicial review but an appeal to other democratic processes which hold sanctions against misdoings of any administration and its minions. The Court is not to evaluate comparatively but to adjudicate on legal flaws.

22. Viewed in this perspective, was the High Court right in issuing a Writ? We are disposed to say 'yes'. Undoubtedly, appointments to posts need not be accompanied by speaking orders or reasoned grounds. Then the wheels of Government will slow down to a grinding halt, tardy as it is even otherwise, and comity of constitutional instrumentalities forbids unfriendly interference where jurisdiction does not clearly exist. Granting this institutional modus vivendi, has the Court gone awry? No, and we will give our grounds."

17. Similarly, in Dr. M.C.Gupta and others v. Dr. Arun Kumar Gupta and others [(1979) 2 Supreme Court cases 339] their Lordships considered the scope of jurisdiction under Article 226 in matters of selection by Public Service Commission and it was observed:-

"When selection is made by the Commission aided and advised by experts having technical experience and high academic qualifications in the specialist field, probing teaching/research experience in technical subjects, the Courts should be slow to interfere with the opinion expressed by experts unless there are allegations of mala fides against them. It would normally be prudent and safe for the Courts to leave the decision of academic matters to

> experts who are more familiar with the problems they face than the Courts generally can be. Undoubtedly, even such a body if it were to contravene rules and regulations binding upon it in making the selection and recommending the selectees for appointment, the Court in exercise of extraordinary jurisdiction to enforce rule of law, may interfere in a writ petition under Article 226. Even then the Court, while enforcing the rule of law, should give due weight to the opinions expressed by the experts and also show due regard to its recommendations on which the State Government acted. If the recommendations made by the body of experts, keeping in view the relevant rules and regulations, manifest due consideration of all the relevant factors, the Court could be very slow to interfere with such recommendations (see, University of Mysore v. C.D.Govinda Rao). In a more comparable situation in State of Bihar v. Dr. Asis Kumar Mukherjee, this Court observed as per para 31 of that decision already quoted in para 16 of this order.)"

17. It is, therefore, settled that this Court exercising jurisdiction under Article 226 could interfere if there is an infringement of fundamental right on a rule and in the present case, therefore, what has to be seen is as to whether the respondent No.3 satisfied the qualifications as prescribed under the rule and notified in the advertisement. It is not disputed that on the date on which the application was made and the date on which the interviews were held, this respondent No.3 was not possessed of qualifications (post-graduate degree) but he has been called for interview on the basis that he held a Second Class degree and had about 5 years teaching experience. The controversy has been further narrowed because it is now admitted that on 26.7.1978 this respondent No.3 left the Engineering College, Jabalpur and joined Rourkee University for his post-graduate studies and it is also not in dispute that if his teaching experience is counted upto 26.7.1978, he does not fulfill the requirement of about 5 years experience in teaching. The controversy is as to whether the time spent in Rourkee for studies for a post-graduate degree could be considered as teaching experience.

18. In the initial return filed by the Public Service Commission paragraph 3 of which has been quoted above, it appears that the Public Service Commission took the stand that they did not have full particulars and as the Government did not place before the Public Service Commission the necessary material, the Commission considered the abstract of application and, therefore, as they did not know that this respondent No.3 left the Engineering College, Jabalpur on 26.7.1978 for his Master's degree, it was presumed that he must be continuing and, therefore, on the date of application he completed 5 years teaching experience as required under the rule and also under the advertisement. It was contended by the learned Deputy Advocate-General that in para 4 of the initial return itself, which has been quoted above, the Public Service Commission felt that he had fulfilled the required qualification of teaching experience as it felt that teaching experience of more than 5 years means the period including training or further studies as it was stated in this para:-

"including training or further studies which gives him teaching experience of 5 years."

Apparently, training or further study has not been included as equivalent to teaching experience under the rule as the rule only says:-

"about 5 years experience in Teaching/Research work/Practicals/ Administration of Technical Education."

It is not stated in this return that his further studies for Master's degree would fall in the category either of research work or Practicals or Administration of Technical Education.

19. It appears that what has been stated in the return indicates that training and further study is equivalent to teaching. It is, therefore, plain that in the initial return the Public Service Commission took the stand that the fact that this respondent No.3 had gone to Rourkee for further studies was not brought to the notice, meaning thereby, by implication, that if it was brought to their notice they would not have considered his case as one which fulfills the requirements of the advertisement and what is stated in para 4 only indicates that a vague suggestion was made that training and further studies may also be included in the category of teaching experience, although it is not the requirement of the rule nor the requirement of the advertisement. Realising this difficulty, during the course of the argument, he learned Deputy Advocate-General sought some more time for filing an additional return and ultimately an additional return has been submitted by the Public Service Commission and in this additional return, as regards this requirement, it has been stated:

".....had more than five years experience in teaching/research work/practicals/ administration of Technical Education."

20. This statement made in the additional return does not carry the case of Public Service Commission any further. It has not been clearly stated that the period during which this respondent No.3 was studying for his post-graduate degree in Rourkee has been considered by the Public Service Commission as the experience of teaching or has been considered as period spent in research work or period spent in practicals. The mentioning of the three only shows that the Public Service Commission itself was not clear as to whether this study for Master's degree could be considered under what head. Admittedly, a student while studying cannot be said to be a student who is teaching "except, of course, in Educational Colleges where a degree is conferred for methods of teaching". The Public Service Commission, therefore, could not say that teaching is equal to learning and, therefore, it could not

decide as to whether this period during which he was a student in Rourkee University for Master's degree could be considered under what head, i.e. research work or practicals. Admittedly, it could not be considered as 'administration of technical Education'. It is, therefore, apparent that by submission of this additional return, so far as the controversy about respondent No.3 fulfilling the requisite qualification is concerned, does not carry the case any further.

21. An attempt was made by the Deputy Advocate-General appearing for the Public Service Commission to contend that if the period during which respondent No.3 was studying in the Rourkee University has been accepted by the Public Service Commission an equal to teaching experience, it being an expert opinion, this Court should not interfere with the opinion. It is no doubt true that the Public Service Commission is a body under Constitution and its opinions deserve all respect. But it is not the opinion of the Public Service Commission with regard to merits of a candidate as on that matter this Court will not interfere with the opinion of the Public Service Commission unless mala fides are alleged and established. But whether a particular candidate fulfills the requirement of a rule is a question of enforcement of the rule itself and unfortunately the return filed by the Public Service Commission in two installments clearly goes to show that the Public Service Commission also is not clear as to how they felt that this respondent No.3 fulfilled the required qualification. It is unfortunate that an institution like Public Service Commission once took the stand that they were mis-guided by the abstract of application and as fuller information was not furnished by the Government they did not notice that this respondent No.3 left the Government Engineering College, Jabalpur and had joined the Rourkee University for his post-graduate studies. This stand clearly goes to show that the opinion of the Public Service Commission, when this return was filed, was that if this fact was known to them they would not have allowed this candidate to appear in the interview as he was not qualified as he did not possess about 5 years teaching experience. In this return itself in para 4 when it was stated that training and further studies will fall within teaching experience, it appears, is a statement made without carefully looking to the advertisement or the rule. It is also not the case of the Public Service Commission in either of the returns that teaching experience is equal to learning in a College. Apparently, that could not be the stand otherwise, if a student passes his Bachelor's degree in Engineering after his studies in the College for 5 years, immediately on his passing he will fulfill the qualifications under this rule for being appointed as a Reader as experience of learning for 5 years will be meaning teaching experience for 5 years and it was because of this that it was not stated in the return that learning experience is equal to teaching experience.

22. It is still unfortunate that when the additional return was filed even then what was stated is that his teaching experience in the Government Engineering College, Jabalpur coupled with his studies in the Rourkee University is good enough to be considered as "5 years experience in teaching/research work/practicals". Apparently, when the rule prescribes these three things, they all do not mean the same and under which head, the studies in Rourkee University has been considered has not been clearly stated. This also goes to show that these are different stands taken by the Public Service Commission in the two returns which have been filed after intervals and it, therefore, becomes doubtful as to what was in the mind of the Public Service Commission when they accepted the application of this respondent No.3 and granted him an interview card. It is, therefore, clear that circumstances appearing in this case do not show that while considering the requirement of the advertisement, the Public Service Commission formed any opinion which could be said to be an opinion of an expert body which should be considered with respect and the Court should be slow in interfering with it. The circumstances appearing and discussed above clearly go to show that this respondent No.3 was granted the interview card without considering as to whether he did fulfill the requirement of teaching experience of 5 years and, therefore, in return different inconsistent stands have been taken when the returns are filed after an interval and after a part of the arguments in the case was heard.

23. The question, therefore, that deserves to be considered is as to whether the period during which this respondent No.3 was studying for his Master's degree in Rourkee University could be considered as teaching experience/research work/practicals. Admittedly, it could not fall in the category of "administration of Technical Education" and this requires the consideration of the phrase 'teaching experience'.

24. In State of Bihar and others v. Dr. Asis Kumar Mukhrjee and others [(1975) 3 Supreme Court Cases 602], their Lordships of the Supreme Court considered a similar situation and their Lordships after quoting Denning, L.J. held that the Court has to examine the matter as it was observed:-

> "When a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament .. and then he must supplement the written words so as to give 'force and life' to the intention of Legislature. A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? We must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

In this view of the matter, therefore, it is plain that being a student would not be said to be equal to being a teacher and, therefore, the experience gained during learning as a student could not be equated

to an experience of teaching. There is no material to indicate that this respondent No.3 was involved in research work nor it appears from the return of the Public Service Commission that they considered his work and felt that this period could be considered as time spent in research work. There is also nothing in the return of the Public Service Commission to indicate that they examined his studies in Rourkee and found that this time he spent in practicals and, therefore, they considered this period spent in Rourkee as period spent in practicals. In absence of any one of these things, it is plain that this candidate respondent No.3 did not fulfill the required qualification of having about 5 years teaching experience and, therefore, the selection made by the Public Service Commission and appointment made thereafter by the State Government is in violation of the rule and also in violation of the advertisement and, therefore, this being in contravention of the rule having the force of law, could not be allowed to remain.

25. The second question that is material in this case is that after the advertisement but before this interview and long before the appointment of respondent No.3, the State Government accepted the recommendation of All India Council of Technical Education and by notification issued by the State Government, the new pay scales and the requirement of education qualifications under the new pay scales was notified by orders of the State Government dated 6.6.1980. It is not disputed by learned counsel appearing for the State Government that after this notification all appointments have to be made in accordance with this new order and it practically supersedes the rule under which the advertisement was issued as it was stated in this order -

"Omitted as the matter is in Hindi"

It is, therefore, plain that after 6.6.1980, the respondent No.3 could only be selected and appointed as a Reader if he fulfilled the qualifications as indicated in the order of the State Government dated 6.6.1980. It is also not in dispute that on the date on which the interview was held, this respondent No.3 did not fulfill the requirement as contemplated in the orders of the State Government dated 6.6.1980. It is also plain that the only exception permissible under this order dated 6.6.1980 was about Lecturers who are already working and who have not the requisite qualifications and, therefore, it was provided that they will be given the new pay scales but they are expected to acquire the necessary qualifications within a period of 5 years and if they did not do so, they will not be entitled to increments. As regards Readers, which is the relevant post for the purposes of this petition, no such exception was made and it is, therefore, plain that after the orders passed by the State Government dated 6.6.1980 appointment of respondent NO.3 could not be done.

26. It appears that seeing this difficulty after the selection, appointment of respondent No.3 was delayed and an order of appointment was ultimately passed on 18.6.1981. But it is strange, that in spite of the fact that the order dated 6.6.1980 had already been notified still this respondent No.3 was appointed in the old pay scale as the Government, it appears, was in doubt as to whether they could appoint him in the new pay scale in view of the order of the State Government dated 6.6.1980. An attempt was made by the learned Deputy Advocate General appearing on behalf of the State to contend that as the advertisement was issued when the old rules were in force and the appointment was made when this order has already been passed, an exception was made in the case of respondent No.3. But learned Deputy Advocate General has not been able to show as to whether any order was passed by the State Government relaxing the enforcement of the order of the State Government dated 6.6.1980 for any particular category of cases. What appears to be is that this respondent No.3 was appointed inspite of the fact that he could not have been appointed in view of the order passed by the State Government dated 6.6.1980 which admittedly had the force of rule as it amended and substituted the rules which were in force earlier with respect of the pay scales and educational qualifications. Merely because the appointment was made after he had obtained the Master's degree will not bring him within the requirement of the rule as admittedly on the date on which he was selected for appointment he did not possess a Master's degree and the only course open to the State Government was to cancel this selection and advertise the post afresh in view of the order passed by the State Government dated 6.6.1980. May be, that the advertisement may have been issued after the respondent No.3 had acquired his Master's degree so that he may also be eligible for being considered for that post. It is, therefore, plain that his appointment in the old pay scale on the basis of the requirements of the rule which was not in existence on the date on which the appointment was made in violation of the order of the State Government having the force of the rule, dated 6.6.1980 also could not be maintained as being contrary to law.

27. The petition is, therefore, allowed. The selection of respondent No.3 by the Public Service Commission for the post of Reader and the consequent order of appointment made by the State Government of respodnent No.3 to the post of a Reader are hereby quashed. The petitioners shall be entitled to costs of the petition. Counsel's fee Rs.250/- if certified. The petitioners shall also be entitled to the refund of the security amount deposited by him.

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IN THE HON'BLE HIGH COURT OF MADHYA PRADESH, JABALPUR
Misc. Petition No.2094 of 1984
D.D. 15.3.1985
Hon'ble Mr. Chief Justice G.L.Oza &
Hon'ble Mr. Justice B.M.Lal

Dashrath Singh & Ors. ... Petitioners
Vs.
State of M.P. & Anr. ... Respondents

Recruitment:

Whether the Commission can prescribe additional criteria for selection apart from the criteria prescribed under the Recruitment Rules and whether the Commission can change additional criteria at a later stage of the selection? - No

Recruitment Notification dated 30.10.1982 was issued for recruitment to the post of Assistant Engineer in Irrigation Department under Madhya Pradesh Irrigation Engineering Services (Gazetted Recruitment) Rules, 1968 – Method of direct recruitment by selection is provided in Rule 12 as per which the selection is to be made by the Commission after interviewing them – The Commission prescribed written examination in the notification and it was also stated on the basis of the marks obtained in the interview selection would be made – Petitioners were candidates and qualified in the written test appeared for interview but the petitioners were not selected – The petitioners alleged that the criterion for selection was challenged after conducting the interview in as much as prescribed minimum marks in each paper and as a result of this the candidates who had obtained higher total marks were screened out as they had obtained less than minimum marks in one of the papers and the candidates who had secured less marks were included in the select list – High Court in view of Rule 12 which prescribes only interview held that written test can be held only for finding out eligible candidates for interview and consequently, selection should be made on the basis of the marks obtained in the interview and quashed the select list with a direction to the Commission to prepare select list of candidates in the order of merit on the basis of marks obtained by them at the interview in accordance with Rule 12.

Held:

It is apparent that as Rule 12 did not provide for any written examination, the question of adding of marks in the written examination and also laying of criteria of obtaining minimum marks in each paper in the written examination is without authority. It is also clear that as Rule 12 did not prescribe any criterion of obtaining minimum marks at the interview, that criterion also could not be justified within the language of Rule 12.

Cases referred:

AIR 1981 SC 1977 – Lila Dhar v. State of Rajasthan

AIR 1984 SC 541 - P.K.Ramachandra Iyer v. Union of India

AIR 1984 SC 873 – Javid Rasool Bhat v. State of Jammu & Kashmir

ORDER

The following order of the Court was delivered by Oza, C.J.

This petition and Misc. Petition No.3165 of 1984 raise common questions about selection of Engineers for the Irrigation Department. According to the petitioners, they are working in the Irrigation Department as Ad-hoc Assistant Engineers. Petitioner No.1 was appointed in September 1979, petitioner No.2 in April 1982, and petitioner NO.3 in August 1982 respectively. According to the terms of their employment, the petitioners were required to apply for the post of Assistant Engineer for their regular appointment on the basis of selection through the Public Service Commission.

2. Direct Recruitment to the post of Assistant Engineer in the Irrigation Department is governed by Statutory Rules framed under Article 309 of the Constitution of India, namely, Madhya Pradesh Irrigation Engineering Service (Gazetted) Recruitment Rules, 1968. The method of direct recruitment by selection is provided in Rule 12 of the said Recruitment Rules. This selection is to be made by the Public Service Commission after interviewing the candidates and 15% and 18% of the available vacancies for direct recruitment are to be reserved for candidates who are members of the Scheduled Castes and Scheduled Tribes respectively.

3. It is alleged that in accordance with Rule 12 of the above Recruitment Rules, an advertisement was issued by the Public Service Commission vide order No.0782 on 30th October 1982 (Annexure-A). By this advertisement, applications were invited for 653 posts of Assistant Engineers in the Irrigation Department and for 28 posts for Rural Engineering Services. Out of the above posts, 98 posts and 118 posts in the Irrigation Department were reserved respectively for Scheduled Castes and Scheduled Tribes. Similarly, for Rural Engineering Services 7 posts and 10 posts were reserved for Scheduled Castes and Scheduled Tribes respectively. In the advertisement, condition No.(6) provided that in case the Commission arranges a written test, a separate examination fee will be required to be paid by the candidates and the examination programme, syllabus and other details of the examination or the written test would be separately published to enable the candidates to take the examination. It was also stated in the said condition on the basis of the written examination the eligible candidates will be interviewed. It was also mentioned in this condition No.(6) that final selection shall be made on the basis of marks obtained in the written examination and the interview.

4. It is further alleged that in pursuance of this condition No.(6) of the advertisement, the Public Service Commission decided to hold a written examination and the scheme of examination was published by the Public Service Commission which is filed by the petitioners as Annexure-B. The scheme contained a syllabus mentioning the papers in which the candidates are required to be examined. The scheme of examination provided for maximum marks but it did not prescribe minimum passing marks. The petitioners along with other candidates, who had applied for the post, were supplied with printed instructions along with the application forms. Under Instruction No.13 procedure for selection was indicated and it was stated that the Commission shall have authority to restrict the number of candidates for being called to interview looking to the total number of applications received. It was also stated that in case it was found necessary before the interview, a written examination will be taken and in that event final selection will be based on the basis of total marks obtained in the written test and the interview.

5. It is contended that Instruction No.13 indicated to the candidates that in order to seek selection for the post, they have to obtain maximum marks in the whole written examination and also in the interview. It is alleged that approximately 2300 candidates applied for the total 681 seats inclusive of 28 posts in the Rural Engineering. It is further alleged that after the written test, interview cards were issued to approximately 1900 candidates. The petitioners also were called for interview. Calling the petitioners for interview clearly indicated that they were held qualified and eligible for selection on the basis of written test and their final selection was to be based on their performance in the interview. The letter of interview issued to the petitioners also clearly stated that they were also eligible for selection through interview on the basis of written test. A Photostat copy of this letter has also been filed by the petitioners as Annexure-D.

6. According to the petitioners, they appeared in the interview and on the basis of their performance they expected that their names will be included in the merit list of selection for appointment to the available vacancies.

7. It is further alleged that the Public Service Commission first published the result of the written test on 21st May 1983 and copy of this publication in the Gazette dated 17th June 1983 is filed as Annexure-E. This is a list of roll numbers of the candidates who were eligible for interview on the basis of the written test and it is alleged that petitioners' roll numbers were included in the same as

having successfully passed the written test. It is further alleged that after the interview the final result of selection was published on 10th July 1984, copy of which is annexure-F, and the petitioners were not in the list of selected candidates.

8. The petitioners allege that while preparing the list of finally selected candidates, the Public Service Commission changed the criteria of selection and this criteria was changed after conducting the interview and in doing so, according to the petitioners, the Public Service Commission was not justified. It is also alleged that initially cards were issued to 1900 candidates and suddenly in the midst of interviews one more Selection Committees was declared for interview of merely 90 candidates from the Rewa Circle although these candidates also gave their written test at Jabalpur and it is alleged by the petitioners that this constitution of a separate Selection Committee during the course of conducting the interview, that too only for 90 candidates from Rewa Circle, has given rise to apprehension in the minds of the candidates and it is alleged that this was done to favour some candidates and this, according to the petitioners, was discriminatory.

9. It is alleged that at the time of preparation of the selection list after the written test and the interview, the criteria was changed and according to the petitioners, under Instruction No.13 the candidates were to be selected finally on the basis of total marks obtained in the written test and interview but while preparing the list at a later stage the Public Service Commission changed the criteria by screening out such candidates who had obtained less than the prescribed minimum marks in each paper and as a result of this although the candidates who had obtained higher total marks and who should have been included in the merit list were eliminated or screened out as in one of the papers they had obtained less than the minimum and those who had obtained even lesser marks total were included in the list of selected candidates. It is, therefore, alleged by the petitioners that this change of criteria at a late stage after the interview, which was not the criteria indicated in the advertisement or in the rules, was not permissible.

10. According to the petitioners, under the rules the selection ought to be only on the basis of marks obtained at the interview. The written test was for purposes of screening so that the candidates for interview could be found out and that in fact was done after the written test and eligible candidates were issued interview cards. Even the addition of marks in the written test in the process of selection was not in accordance with Rule 12 and therefore further change of criteria about obtaining minimum

marks in each paper is also contrary to Rule 12 and therefore is not justified. It was also contended that as this criteria which was adopted at a later sage was not even mentioned in the advertisement and was done at the back of the candidates and they were not even told before the selection that they have also to fulfill the best of minimum marks in each paper and this, according to the petitioners, was not fair to the petitioners and the candidates in general. It is also alleged that this change of criteria was done contrary to the instructions at a later stage and this, according to the petitioners, has been done to accommodate some candidates in an unfair manner and to this extent the petitioners also allege mala fides. It is also alleged that on 10th July 1984 although the result had been published which has mentioned the roll numbers of the candidates who had been found fit but no appointments have been made and this selection is only recommendatory and these candidates who have been found suitable and recommended to the State Government for appointment have no vested right.

11. In the return filed by respondent No.2 the Public Service Commission, most of the facts are not in dispute. It is stated that at the time of preparation of the final selection list in the meeting of the Public Service Commission held on 30th June 1984 it was decided that only those candidates should be included in the list who in each written paper has obtained 33% marks and in the interview 23% marks and it was also ultimately decided that for Scheduled Casts and Scheduled Tribes this percentage should be 30 and 20 and ultimately it was decided that for all general and reserved categories the percentage of minimum marks in each paper should be 30 and interview 20, and it was further stated that this will be kept in the meeting of the Commission on 19th July 1984 for consideration. There is also a note that on this decision four members signed as approving this decision.

12. Learned counsel for the petitioners mainly raised two contentions. It was contended that Rule 12 of the Madhya Pradesh Irrigation Engineering Service (Gazetted) Recruitment Rules, 1968, provided that the selection will be made only by interview and this rule does not provide for any written examination. It was, therefore, contended that so far as conducting the written examination for screening and finding out candidates as being fit for interview no grievance could be made but the written examination could not be made a part of the process of selection as Rule 12 which is a rule framed by the Governor of the State under Article 309 of the Constitution, what is provided is that the selection of candidates for the Service shall be made by the Commission after interviewing them. It was, therefore, contended that the Public Service Commission had no authority under Article 309 to modify or amend this rule. Learned counsel placed reliance on a decision in P.K.Ramachandra Iyer v. Union of India (AIR 1984 SC 541) wherein an identical situation has been considered by their Lordships of the Supreme Court.

13. Alternatively it was also contended that even if the marks of the written test are to be added as it was provided in the advertisement itself, the Public Service Commission could not go behind what was stated in the advertisement and as in the advertisement no criteria of obtaining minimum marks in each written paper and also in interview was indicated either in condition No.(6) or in Instruction No.13, this change of criteria at the time of preparation of the final list is not justified. It was also contended that it is not in dispute that this criteria was invented for the first time by the Public Service Commission after the written examination after the candidates were interviewed and only at a stage when the final selection list was being prepared and there is no valid or justifiable reason indicated by the Public Service Commission for introduction of this new criteria which was neither in the rules nor in the advertisement and on this basis it was contended that this selection list deserves to be struck down.

14. Learned Deputy Advocate General appearing for the State and also for the Public Service Commission contended that although Rule 12 does not talk of any written examination but talks of interview only but it was contended that Article 320 of the Constitution confers power on the Public Service Commission to hold examinations and therefore the Public Service Commission in exercise of its powers under this Article held the examination for selection and therefore it could not be said that the Public Service Commission had done anything beyond its authority. It was contended that although Rule 12 does not talk of written examination, but talk of interview only, but it was contended that there is no prohibition in this rule for conducting examinations. Learned counsel placed reliance on the decision of this Court in Anil Kumar Jain and four others v. State of Madhya pradesh & another (M.P.No.813 of 1984, decided on 3.1.1985). It was also contended that so far as written examination for purposes of screening is concerned, it has been held in Omprakash v. State of M.P. (1978 M.P.L.P. 136) as valid and it was also contended that holding of a written test in a selection of this kind was considered to be proper and reliance was placed by learned Deputy Advocate General on observation of their Lordships in Javid Rasool Bhat v. State of Jammu & Kashmir (AIR 1984 SC 873), T.N.Manjula Devi V. State of Karnataka (1980 LAB.I.C. 759) and Lila Dhar v. State of Rajasthan (AIR 1981 SC 1977). As regards the change of criteria, learned Deputy Advocate General frankly conceded that it is no doubt true that this was not indicated in the advertisement nor in the instructions issued to the candidates along with the application form but what he contended was that at the time of selection the Public Service Commission felt that at least obtaining minimum marks in each paper and also in the interview should be put as a criteria although in the return no reasons have been stated as to why this

question of additional criteria sprang up at the time of preparation of the final list and was not the criteria earlier so that it could be included in the advertisement itself or in the instructions to the candidates.

15. So far as holding of a written test for purposes of screening and finding out eligible candidates to be called for interview is concerned this Court has held that such a procedure is permissible. The decision of this Court in the case of selection of Civil Judges on which reliance is placed in which addition of marks of written test has been held as valid is on a different footing. For the selection of Civil Judges there were no rules and the advertisement was with the concurrence of the High Court and the Government and therefore virtually it amounted to the rules for selection and it is in that context that as it was clearly indicated in the advertisement that the marks obtained in the written test will be added up for purposes of selection it was held valid. So far as the two Supreme Court cases on which reliance has been placed by the learned Deputy Advocate General, i.e. Javid Rasool Bhat v. State of Jammu & Kashmir (AIR 1984 SC 873) and Lila Dhar v. State of Rajasthan (AIR 1981 SC 1977), their Lordships were considering the propriety of holding a written examination but the question as to whether that was prescribed in the rule or not was not before their Lordships. In T.N.Manjula Devi v. State of Karnataka (1980 LAB.I.C.759), which is a case from Karnataka High Court, their Lordships were considering rules wherein a specific rule provided:

> "6. Subject to these rules the Selection Committee shall, for making selection, adopt such procedure as it may consider appropriate."

and it is because of this it appears that holding of a written test was found justified although no specific question appears to have been raised in that decision. It is, therefore, clear that none of the decisions referred to and relied on by the learned Deputy Advocate General is a case where a rule which is statutory only provided for interview and still the additional criteria of written examination by the Public Service Commission was held to be valid. On the contrary, in P.K.Ramachandra Iyer v. Union of India (AIR 1984 SC 541) their Lordships specifically ruled that when the rule did not provide for a particular method of assessing marks for preparing the merit list it was not permissible as it was not in accordance with the rules. Their Lordships observed:

> "Mr. Ramachandran, learned counsel for the petitioner contended that Rule 13 does not envisage obtaining minimum marks at the viva voce test even though it contemplates obtaining minimum marks at the written test so as to be eligible for being called for viva voce test. It was further urged that Rule 14 specified the manner in which merit list is to

be arranged. Rule 14 provides that after both written and viva voce tests are held, the candidates will be arranged by the Board in the order of merit in each category (Professional-subjectwise) as disclosed by the aggregate marks finally awarded to each candidate and such candidates as are found by the Board to be qualified by the examination shall be accommodated for appointment upto the number of unreserved vacancies decided to be filled on the result of the examination. On a combined reading of Rules 13 and 14, two things emerge, it is open to the Board to prescribe minimum marks which the candidates must obtain at the written test before becoming eligible for viva voce test. After the candidate obtains minimum marks or more at the written test and he becomes eligible for being called for viva voce test he has to appear at the viva voce test. Neither R.13 nor R.14 nor any other rule enables the ASRB to prescribe minimum qualifying marks to be obtained by the candidate at the viva voce test. On the contrary, the language of Rule 14 clearly negatives any such power in the ASRB when it provides that after the written test if the candidates has obtained minimum marks, he is eligible for being called for viva voce test and the final merit list would be drawn up according to the aggregate of marks obtained by the candidate in written test plus viva voce examination. The additional qualification which ASRB prescribed to itself namely, that the candidate must have a further qualification of obtaining minimum marks in the viva voce test does not find place in R.13 and 14, it amounts virtually to a modification of the Rules. By necessary inference, there was no such power in the ASRB to add to the required qualifications. If such power is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reasons that such deviation from the rules is likely to cause irreparable and irreversible harm. It however does not appear in the facts of the case before us that because of an allocation of 100 marks for viva voce test, the result has been unduly affected. We say so for want of adequate material on the record. In this background we are not inclined to hold that 100 marks for viva voce test was unduly high compared to 600 marks allocated for the written test. But the ASRB in prescribing minimum 40 marks for being qualified for viva voce test contravened Rule 14 inasmuch as there was no such power in the ASRB to prescribe this additional qualification, and this prescription of an impermissible additional qualification has a direct impact on the merit list because the merit list was to be prepared according to the aggregate marks obtained by the candidate at written test plus viva voce test. Once an additional qualification of obtaining minimum marks at the viva voce test is adhered to, a candidate who may figure high up in the merit list was likely to be rejected on the ground that he has not obtained minimum qualifying marks at viva voce test. To illustrate, a candidate who has obtained 38 marks at the viva voce test, if considered on the aggregate of marks being 438 was likely to come within the zone of selection, but would be eliminated by the ASRB on the ground that he has not obtained qualifying marks at viva voce test. This was impermissible and contrary to Rules and the merit list prepared on contravention of the Rules cannot be sustained."

So far as these selections are concerned, it is not disputed that these selections are made in accordance with the Madhya Pradesh irrigation Engineering Service (Gazetted) Recruitment Rules, 1968, and these are rules framed by the Governor of the State under Article 309 of the Constitution. Rule 12 of these rules reads:

"12. Direct Recruitment by Selection:-

(1) Selection for recruitment to the Service shall be hold at such intervals as the Government may, in consultation with the Commission, from time to time determine.

(2) The selection of candidates for the service shall be made by the Commission after interviewing them.

(3) 15 percent and 18 percent of the available vacancies for direct recruitment shall be reserved for candidates who are members of the Scheduled Castes and Scheduled Tribes respectively.

(4) In filling the vacancies so reserved candidates who are members of the Scheduled Castes and the Scheduled Tribes shall be considered for appointment in the order in which their names appear in the list referred to in rule 15 irrespective of their relative rank as compared with other candidates.

(5) Candidate belonging to the Scheduled Castes or the Scheduled Tribes selected by the Commission to be suitable for appointment to the service with due regard to the maintenance of efficiency of administration, may be appointed to the vacancies reserved for the candidates of the Scheduled Castes or Scheduled Tribes, as the case may be, under sub-rule (3).

(6) If a sufficient number of candidates belonging to the Scheduled Castes and the Scheduled Tribes are not available for filling all the vacancies reserved for them, the remaining vacancies shall be filled from among other candidates and an equivalent number of additional vacancies shall be reserved for candidates belonging to the Scheduled Caste and the Scheduled Tribes for the next selection;

Provided that if a sufficient number of suitable candidates are not available at the next selection to fill all the reserved vacancies, including the additional vacancies, the additional vacancies or such of them as are not filled shall lapse."

Sub-rule (2) of this rule provides that selection of candidates for the service shall be made by the Commission after interviewing them. It is apparent that interview does not mean written test or written examination and this rule did not provide for the selection of candidates on the basis of any written examination. Learned Deputy Advocate General placed relief on Article 320(1) which reads:

> "320(i) It shall be the duty of the Union and the State Public Service Commission to conduct examinations for appointments to the services of the Union and the services of the State respectively."

It only provides that it will be the duty of the Public Service Commission to conduct examinations for appointment to the services of the Union and the services of the State respectively but it does not provide that if the rules under which the recruitments are to be made do not provide for any written

examination, Article 320 empowers the Public Service Commission to modify the rules. It is, therefore, clear that the Public Service Commission had no authority to amend Rule 12 or modify it to any extent. It is also not contended by the learned Deputy Advocate General that the Public Service Commission had any authority to amend or modify Rule 12. In the decision of their Lordships of the Supreme Court, quoted above, it has been clearly held that according to the rules the final merit list would be drawn up according to the aggregate of marks obtained by the candidate in the written test plus viva voce examination, and therefore their Lordships held that there was no power in the Board to prescribe additional qualification prescribing minimum marks 40 for being qualified in final test and this was held to be bad. It is, therefore, apparent that although the Public Service Commission in the advertisement mentioned that the marks of written test will be added for purposes of selection but that part of the advertisement is not in accordance with Rule 12 and, therefore, could not be enforced. In this view of the matter, therefore, the question of prescribing a further criteria does not arise.

16. But, if this question of additional criteria is examined independently, it is clear that condition No.(6) of the advertisement and Instruction No.13 of the Instructions issued to the candidates nowhere provide that there is a requirement of obtaining minimum marks in each paper in written examination and also in the interview and as these two criteria were not even included in the advertisement, there is no authority with the Public Service Commission to change this criteria at the later stage as their Lordships of the Supreme Court in the decision quoted above clearly held that if this requirement of minimum marks is not in the rules, the Selection Board had no authority to impose such a restriction. Although no positive allegation of mala fide or facts to justify mala fide has been made but from the circumstances that some attempt was made at a later stage to change this criteria to favour some candidates but in our opinion it is not necessary to into that question as it is apparent that as Rule 12 did not provide for any written examination, the question of adding of marks in the written examination and also laying of criteria of obtaining minimum marks in each paper in the written examination is without authority and, therefore, that could not be justified. It is also clear that as Rule 12 did not prescribe any criteria of obtaining minimum marks at the interview, that criteria also could not be justified within the language of Rule 12. It is therefore plain that all that which was done at the stage of preparation of the selection of the candidates is not justified and is without the authority of law.

17. As discussed earlier, it was within the competence of the Public Service Commission to hold a written test for purposes of finding out eligible candidates who could be called for interview and it is

therefore clear that after the written test when the result was declared and interview cards were issued, the purpose of the written test was over and in this view of the matter, therefore, it is now open to the Public Service Commission to prepare a selection list in order of merit on the basis of marks obtained by candidates in the interview alone and without adopting any further criteria or restriction.

18. The contention that for some candidates a separate Selection Board was constituted to hold interviews at Rewa although may appear to be not very satisfactory as it was done when the process of interview was on, but still in the absence of any positive allegation of mala fide no grievance could be made as it would only provide a place for interview easily accessible to candidates to a particular region.

19. The interveners' contention was that the petitioners have not joined all the candidates who have been selected and some of them have come to intervene and support the selection but it is not disputed that the list of selection is only recommendatory as the appointing authority is the State Government and so long as no appointments are made, there is no vested right in any one of the candidates and therefore the objection that all those who were selected have not been joined could not be accepted.

20. In the light of the discussion above, therefore, it is not necessary to strike down the whole process. So far as the written test for purposes of finding out eligible candidates are concerned it could not be said to be bad. The petition is therefore partly allowed and it is directed that respondent No.2, the Public Service Commission, will prepare a list of candidates in order of merit on the basis of marks obtained by them at the interview in accordance with Rule 12. The Selection List published by adding up all the marks of the written test and by applying the criteria of minimum marks is held to be invalid and is quashed. It is further directed that as the process has already taken a long time, the Public Service Commission will prepare the list as indicated and submit it to the Government for appointments within three months from today. Parties are directed to bear their own costs.

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IN THE HIGH COURT OF MADHYA PRADESH
Miscellaneous Petition No.707 of 1985
D.D. 12.4.1985
Hon'ble Mr. Justice G.C. Gupta

Dr. (Mrs.) Shaila Sapre & Anr. ... Petitioners
Vs
State of M.P. & Others ... Respondents

Recruitment:

Whether selection and appointment of a person included in the reserve list against a future vacancy is valid after the selection process has come to an end after exhausting the select list? - No

Selection to 5 posts of Reader in Gynecology and Obstetrics in State Medical College was made as per Rules – After the selected candidates were appointed, one vacancy arose due to promotion of Reader as Professor as per the requisition of the State to send name from the reserve list, the name of Respondent No.3 who was in the reserve list was sent and he was appointed – Challenging the same the petitioners filed this writ petition on the ground that the Commission did not advertise the post – In view of Rule 11 of the Recruitment Rules the High Court allowed writ petition quashing the appointment of respondent No.3.

Held:

Even if it was to be assumed that the letter of the respondent State dated 15.5.1982 was a requisition within the meaning of Sub-Rule (1) of Rule 11 of the Rules, the appointment of respondent no.3 would be illegal in the absence of any selection made by the respondent Commission. As clarified earlier, it is the obligation of the respondent Commission to hold selection on receipt of requisition from the respondent Government. The process of selection in order to satisfy requirements of Article 16 of the Constitution must include consideration of all eligible candidates and judgment on their respective merits after interviewing them. Admittedly, this had not taken place. Under the circumstances, there is no escape from the conclusion that appointment of respondent No.3 vide order dated 4.4.1983 is illegal.

Further held:

The select list is a list of persons in which the names of selected candidates are arranged in order of merit. The list is supposed to contain sufficient names so as to fill all the vacancies notified. Once the select list is made, submitted by the Commission and persons therein appointed against the posts notified, not only the selection process but also the select list comes to an end. The selection process is required to be repeated if subsequent vacancies are to be filled by direct recruitment. Considered from this view, the "reserve list" cannot be treated to be the "select list" and hence the State would not be entitled to appoint a person from the reserve list.

ORDER

This order shall also govern the disposal of M.P.No.1408 of 1983 [Dr.N.Subedar & Others Vs. State of M.P. & Others] which raises an identical question for consideration of this Court on similar facts.

2. The petitioners are lecturers in Gynecology and Obstetrics at G.R. Medical College, Gwalior and M.C. Medical College, Indore and feel aggrieved by the appointment of respondent No.3 as a Reader in Obstetrics and Gynecology by order dated 4th April, 1983 and seek a writ of certiorari for quashing the same by filing this petition under Article 226 of the Constitution of India. This very order is also impugned in Misc. Petition No.1408 of 1985.

3. It is not disputed that the matter of appointment of Reader in Obstetrics and Gynecology in State Medical College is governed by the M.P. Health (Gazetted) Service Recruitment Rules, 1967 (hereinafter referred to as 'the Rules'). It appears that on 18.12.1980 an advertisement was issued by the respondent Public Service Commission (Annexure P-2) inviting applications from eligible candidates for appointment of 5 Readers in Obstetrics and Gynecology in different Medical Colleges in the State. In pursuance of this advertisement several candidates including respondent no.3 submitted their applications and seek interview before the respondent Public Service Commission. The respondent Public Service Commission sent a list of candidates to the respondent State who had successfully competed for the appointment and whose names appeared in the select list prepared on merit. The respondent No.3 was not included in the said list. After receiving the said list the respondent State Government by order dated 29.3.1982 (Annexure P-3) appointed all 5 of them against 5 posts for which the advertisement had been issued. The petitioners do not have any grievance against the selection and appointment of these 5 persons and that is the reason why these appointees are not made parties to these petitions. It however appears that one Dr.Saxena who was working as Reader in Gynecology and Obstetrics had been promoted as a Professor in the month of August, 1981 and the post of Reader occupied by him was likely to be vacated. Dr. Saxena, however, did not join his assignment as Professor, until 29.3.1982 when the post of Reader occupied by him also became available. It is not disputed that the respodnent Sate thereafter requested the respondent Public Service Commission on 15.5.1982 to send name from the reserve list for appointment against the vacancy caused due to promotion of Dr. Saxena. The Public Service Commission vide its communication dated 31.5.1982 (Annexure R-3) sent the name of respondent No.3. On receipt of her name by the

respondent State Government, as aforesaid the impugned order dated 4.4.1983 was passed. It is not disputed that before passing the aforesaid order, the post was neither advertised nor applications received nor any selection made for the said purpose. The petitioners feel aggrieved by this appointment and challenge the legality thereof in this petition filed under Art. 226 of the Constitution.

4. The submission of the learned counsel for the petitioners is that an appointment to a vacant post can be made only in accordance with Rule 11 of the Rules by selecting candidates for the purpose after interviewing them. He further submits that the waiting list prepared in pursuance to the advertisement dated 18.12.1980 had no relevance to the vacancy which has arisen on 29.3.82 and hence the respondent No.3's appointment was contrary to the Rules. It is also submitted that the Rules prescribe a quota for direct recruitments and promotees but the respondent Government had taken no action to fill the quota reserved for promotees thereby creating an analogous situation having serious adverse consequence upon the petitioners who are in line for promotion. It is also submitted that the respondent no.3 does not have the necessary experience for being considered for appointment as a Reader and hence her appointment is illegal. The learned Govt. Advocate, however, submitted that the respondent State Government is making every effort to fill the quota reserved for promotees and the D.P.C. is likely to meet very soon for the said purpose. He also submitted that waiting list remained valid on the date the name of the respodnent no.3 was received and hence the respondent State did not make any mistake in appointing her. Learned Govt. Advocate also relied on Rule 21 of the Rules which according to him permits relaxation of Rules for purposes of appointment. The learned counsel appearing for respondent no.3 besides adopting the submission of the respondent Government submitted that there was sufficient compliance of Rule 11 of the Rules and no one had been prejudiced by breach, if any.

5. Before considering the submissions of the parties it may be useful to refer to the Rules in so far as they are relevant for purposes of this petition. It is not disputed that Rules were brought in force on 11.5.1970 and all appointments thereafter have to be made in accordance with these Rules. Schedule to the Rules provides that appointment to the post of Readers would be 50 percent by direct recruitment and 50 percent by promotion. Rule 11 provides procedure for direct recruitment and requires the respondent Public Service Commission to hold selection as and when necessary when the requisition in this behalf is made by the Government. The Rules do not provide for issuance of an advertisement but it was admitted at the Bar that there is a circulation of the respondent Public Service Commission enabling them to notify all vacancies by issuing advertisement in several newspapers and inviting

application from eligible candidates. Sub-Rule (2) of Rule 11 provides that selection of candidates for the service shall be made by the Commission after interviewing them. The Commission is required by Rule 12 of the Rules to forward to the appointing authority the names and other details of the candidates whom they consider suitable duly arranged in order of preference. Rule 18 of the Rules requires the authority to make appointment of officers included in the select list in the same order in which the names of such officers appears in the list. Rule 21 provides that nothing in these Rules shall be construed to limit or abridge the power of the Government to deal with the case of any person to whom these Rules apply in such a manner as it appears to be just and equitable provided that the case shall not be dealt with in any manner less favourable to him than that provided in these Rules. The Rules have been considered from time to time and explained in all details. In V.K.Seth Vs. State of M.P. (1980 M.P.L.J. 287) a Division Bench of this Court considering these Rules in so far as they deal with direct appointment and held that the Authority of the Commission to make selection under Rule 11(1) arises when the requisition in this behalf is made by the Government. The Division Bench also held that a selection made in the absence of a requisition would be without jurisdiction and would serve no purpose. In the said case the respondent State under requisition for 4 posts for which the selection has been made by the Commission. The Commission, however, besides sending the select list containing 4 names, also sent a reserved list. After the advertisement and selection, a fifth vacancy had arisen and the petitioner, in the aforesaid case, claimed his appointment to the said post as his name was included at serial no.1 in the select list. The Division Bench did not appreciate the claim of the petitioner and held that since the Government has not sent any requisition for the fifth vacancy and as that post had not been advertised, the person included in the list recommended by the Commission could not claim any right for appointment against a new vacancy. The reserve list, according to the Division Bench only meant that for some reason or the other any one out of 4 candidates could not be appointed to one of the 4 posts that were advertised, the petitioner had a chance of being appointed to that post but the inclusion of the petitioner's name in the reserve list did not enable him to claim any right for appointment to a post which was never advertised. The aforesaid decision was followed by another Division Bench of this Court in Dr. B.P.Pawar and others Vs. State of M.P. and other (Misc. Petition No.1368 of 1982, decided on 22nd June, 1983). The following observations of the Division Bench in this regard are relevant for purposes of this decision and are reproduced as under:-

> "We may point out that the purpose of maintaining a reserve list is very limited and obviously did not cover the subsequent vacancy which occurred after the two posts advertised were filled in. The subsequent vacancy to which respondent no.3 was recommended by the Commission was neither a "new post created by the department' nor was due to the failure of the selected candidate to join the post nor was it a de-reserved post. In addition, there was no requisition sent to the Commission by respondent no.1 to recommend names for anticipated future vacancies. In view of this, the Commission was wrong in recommending the name of respondent no.3 for the appointment."

6. We may now examine the respective submissions of the parties in the context of aforesaid legal provision. It is not disputed that advertisement dated 18.12.1980 was issued for 5 posts which were vacant at that time. It is also not disputed that a select list of 5 persons was sent by the Commission to the respondent State Government from which 5 appointments were made by order dated 29-3-1982 (Annexure P-3). It is further not disputed that on 15.5.1982 the respondent State Government required the respondent Commission to send a name from the reserve list. A copy of the said communication has been filed by the respondent State as Annexure 3 to their return in M.P.No.1408 of 1983. It is in pursuance to the aforesaid requisition that the respodnent Commission had submitted the name of respondent no.3 by their communication dated 31.5.1982, filed as Annexure R-4 in M.P.No.1408 of 1983. The fact that the vacancy for which this name was sent for had arisen on 29.3.1982 when Dr. Saxena vacated the post of Reader on his promotion as Professor is not in dispute. The further fact that the Commission did not advertise this post and did not hold any selection thereafter is also not in dispute. The question, therefore, for consideration of this Court is whether selection and appointment of respondent no.3 for the sixth vacancy arisen on 29.3.1982 was in accordance with law? Not only Rule 11 of the Rules but also the two aforesaid Division Bench cases sufficiently established that the selection process starts after the State Government has sent a requisition in this behalf to the Commission. The selection process, admittedly consists of issuing advertisement and thereby inviting applications from eligible candidates and thereafter selecting them on the basis of an interview to judge their merits. In the instant case the original requisition sent by the respondent State was for 5 posts and hence the respondent Commission advertised those 5 posts and made selection of candidates for those posts. Not only this, the respondent Commission submitted the select list of 5 candidates for appointment and in fact those 5 candidates were appointed. With the appointment of 5 candidates against 5 posts the process of recruitment remained completed. Rule 11(1) of the Rules permits the respondent Commission to make selection for recruitment as and when necessary and clearly indicates that the Commission can make fresh selection when the requisition in that behalf is made by the Government. A reading of the Rule in this manner is sufficient to indicate that the Commission is not required to maintain a list of selected candidates for all time to come and supply

the names from that list as and when the Government sends requisition. The rule on the contrary requires the Commission to held the selection as and when necessary when the requisition in that behalf is sent by the Government. Clearly, therefore, the requirement of making selection by the Commission arises whenever a requisition in this behalf is made by the Government. In other words, the requisition by the Government and selection by the Commission are related to each other and the purpose of requisition remains exhausted after selection has been made by the Commission in pursuance thereof, therefore logically follows that whenever a requisition is made by the respondent Government, the respodnent Commission is under a legal obligation to hold selection in the manner prescribed under Rule 11 of the Rules. In the instant case the respondent State Government first issued a requisition for selection of 5 candidates for appointment against 5 posts and the Commission made the selection in pursuance thereof and submitted the select list as required under Rule 12 to the respondent State for appointment. The process of selection initiated on this requisition came to an end after the appointment of these persons by order dated 29.3.1982, vide Annexure P-3. Thereafter, if any other vacancy was required to be filled by direct recruitment, it was the obligation of the respondent State to send a requisition to the respondent Commission for making selection for the purpose. It is rather unfortunate that the respondent State did not follow this Rule and instead of making a request as required, they required the respondent Commission to send only one name from the reserved list. Their communication dated 15.5.1982 in this regard falls short of a requisition contemplated under sub-rule (1) of Rule 11 of the Rules. In the absence of a requisition appointment of respondent no.3 against the sixth vacancy which had arisen on 29.3.1982 would be illegal in view of the decisions of this Court in V.K.Seth Vs. State (supra) and B.P.Pawar's case (supra).

7. Even if it was to be assumed that the letter of the respondent State dated 15.5.1982 was a requisition within the meaning of Sub-Rule (1) of Rule 11 of the Rules, the appointment of respondent No.3 would be illegal in the absence of any selection made by the respondent Commission. As clarified earlier, it is the obligation of the respondent Commission to hold selection on receipt of requisition from the respondent Government. The process of selection in order to satisfy requirements of Article 16 of the Constitution must include consideration of all eligible candidates and judgment on their respective merits after interviewing them. Admittedly, this had not taken place. Under the circumstances, there is no escape from the conclusion that appointment of respondent No.3 vide order dated 4.4.1983 is illegal.

8. It is clear that the name of respondent no.3 appeared at serial no.1 of the reserved list maintained by the respodnent Commission in pursuance to the advertisement dated 18.12.1980. The said reserved list was, however, not sent to the respondent Government, as according to the Commission this did not form the select list. A select list is required to be maintained under Rule 12 of the Rules for purposes of appointment to the service and no appointment can be made from outside the said list as is clear from Rule 18 of the Rules. The question, therefore, is whether a "reserved list" can be treated to be a "select list" for the purpose? The answer must be an emphatic "no". The select list is a list of persons in which the names of selected candidates is arranged in order of merit. The list is supposed to contain sufficient names so as to fill all vacancies notified. Once the select list is made, submitted by the respondent Commission and persons therein appointed against the posts notified, not only the selection process but also the select list comes to an end. The selection process is required to be repeated if subsequent vacancies are to be filled by direct recruitment. Considered from this view, the "reserved list" cannot be treated to be the "select list" and hence the respondent State would not be entitled to appoint a person from the reserve list. The appointment of respondent no.3 would consequently be illegal as violating Rules 12 and 18 of the Rules. This is in addition to the reason given by the Division Bench in V.K.Seth v. State (supra) and B.P.Pawar's case (supra) that a reserved list is not intended to be select list for purposes of appointments under the Rules.

9. As a result of the discussion aforesaid, it is not possible to sustain the appointment of respondent No.3 as a Reader in Gynecology and Obstetrics. The impugned order dated 4.4.1983 must therefore be quashed. The submission of the learned counsel for the respondents that they are entitled to deviate from the Rules because Rule 21 or that Rule 11 has been substantially complied with should not detain us long. Rule 21 which permits relaxation has no application to the facts and circumstances of the case nor does it extend to giving a go-bye to the process of selection as contained in Rule 11. Such an interpretation of the Rule would make it arbitrary and violative of Articles 14 and 16 of the Constitution. The Rules, therefore, cannot be accepted as conferring unguided and arbitrary powers in the Government to appoint any person without selecting him. The argument of sufficient compliance cannot also be considered seriously as there has been no compliance of Rule 11of the Rules. Not only there has been no requisition by the respondent State for the sixth post but also there had been no selection for the aforesaid post.

10. This, however, does not specify the whole case of the petitioners who are inline for promotion in the quota reserved for promotees. The Rules provide a 50 – 50 quota for direct recruits and

promotees but does not provide any method by which this quota should be worked. Even though Rules do not specify a method of working out the quota rule, the respondent State is not entitled to fill posts by direct recruitment only and do nothing for filling posts by promotion. There are various methods known to law whereby aspirations of both categories can be legitimately fulfilled. Though rota Rule is one of the methods of satisfying these aspirations, it is not the only method known to law. Whatever method the Government follows, its approach has to be reasonable, just and fair so as to fall in line with constitutional discipline guaranteed under Articles 14 and 16 of the Constitution. Their inaction in relation to promotional quota is by itself sufficient to accuse them of their arbitrary, unfair and wholly unjustified attitude towards the promotees. It is not too late even now and their statement that D.P.C. is likely to be commissioned for this purpose should make this Court feel that they have become aware of their responsibilities in this behalf. A perusal of the Rules would sufficiently indicate that the D.P.C. is required to meet "at intervals ordinarily not exceeding one year". (Rule 13(2) of the Rules). No reasons whatsoever have been assigned by the respondent State for not giving affect to this Rule. The dereliction of duties in this behalf is, therefore writ large. Under the circumstances, it is a fit case where the respondent State should be directed to constitute the D.P.C. in accordance with the Rules immediately so that it can hold its sittings and recommend names of candidates for appointment against promotional quota at the earliest.

11. Since the aforesaid conclusions are sufficient to dispose of all controversies raised in the two petitions, it is not necessary to consider various other arguments submitted by the parties.

12. The petition consequently succeeds and is allowed. The impugned order dated 4.4.1983 appointing the respondent No.3 as a Reader in Obstetrics and Gynecology is hereby quashed. The respondent State is directed by a writ in the nature of mandamus to constitute a D.P.C. for selecting candidates for filling vacancies in promotional quota within a period of two months from date. The D.P.C. shall therefore meet and select candidates within a period of 2 months from the date of its constitution and thereafter the respondent State shall take action to make appointment of promotees within a period of 2 months from the date of receipt of list of suitable candidates from the D.P.C. The petitioners shall be entitled to the costs of these petitions. Counsel's fee is Rs.200/- in each petition. The outstanding amount of security deposit, if any, shall be refunded to the petitioners.

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IN THE HON'BLE HIGH COURT OF MADHYA PRADESH
Miscellaneous Petition No.1366 of 1988
D.D. 11.3.1989
Hon'ble Mr. Justice A.C.Qureshi &
Hon'ble Mr. Justice S.K.Dubey

Navnit Kumar Potdar ... Petitioner
Vs.
M.P. P.S.C. & Anr. ... Respondents

Eligibility:

Whether P.S.C. can revise eligibility criteria contrary to the Statutory Rules? – No

Recruitment to the post of Presiding Officer of Labour Courts – Section 8(3) of M.P. Internal Relations Act prescribes qualification according to which a person who has any judicial office in India for not less than 3 years ..... or a Law graduate with 5 years practise as an Advocate is eligible for appointment – This requirement was incorporated in the advertisement – The petitioners were not called for interview hence they filed this writ petition alleging among others that the Commission changed the eligibility criteria by raising the practising experience from 5 years to 7½ years which being contrary to the Statutory Rules – The High Court allowed the writ petition with a direction to carry out selection as per Rules.

Held:

In view of the above Rule, the Public Service Commission has got two courses of action open to it for short listing the applications received. One is to short list them through screening rest or to short list them on the basis of predetermined criteria relating to academic qualifications and experience. Therefore, when the Public Service Commission adopts the second criteria i.e. short listing the candidates on the basis of academic qualification and experience; firstly it should be ascertained that while laying down a criteria based on qualifications and experience, there is no violation of any prescribed statutory qualification and if there be no such violation then the criteria should always be a predetermined criteria and not a criteria to be evolved after seeing the different applications. If the criterion is not predetermined then there may be a charge of bias or favouritism. Secondly, when a criterion has to be adopted it should be based both on experience and qualification. The words used in the Rules are 'experience and qualification' and not 'experience or qualification'.

ORDER

The following order of the Court was delivered by A.G.Qureshi, J:

This order shall govern the disposal of M.P.No.1385 of 88 (Ku.Manorama Singha Vs. P.S.C. Indore and three others) M.P. 1393 of 88 (Narendra Kumar Choudhury V. M.P. Public Service Commission, Indore and M.P. State) M.P. 1403 of 88 (Ku.Asha Pandey V. State of M.P. and P.S.C. Indore) M.P. 1406 of 88 (Pawan Kumar Gupta V.Madhya Pradesh P.S.C. and another) and M.P.

1407 of 88 (Bhanvarlal V. M.P. Public Service Commission, Indore and State of M.P.) All these Petitions are directed against the Madhya Pradesh Public Service Commission.

2. The grievance of the petitioners, in all these petitions, is that the petitioners though qualified to be appointed as Labour Judge in the M.P. Labour Judiciary Service they have not been called for interview by the Public Service Commission. The yardstick adopted by the Public Service Commission is discriminatory arbitrary and capricious. Therefore, all the petitioners have prayed that M.P. Public Service Commission be directed to call the petitioners for interview for recruitment as Presiding Officer, Labour Court in the M.P. Labour Judicial Service of the State.

3. It is a common ground that the M.P. Public Service Commission issued a public notice for recruitment of candidates to the post of Presiding Officers of Labour Courts constituted under the provisions of S.8 of the M.P. Industrial Relations Act 1968 (hereinafter called the Act). The qualification for being appointed as a Presiding Officer to the Labour Court is enumerated in S.8(3) of the Act, according to which a person who has held any judicial office in India for not less than three years, or has held any office in the Labour Department not below the rank of a Labour Officer for a period of not less than five years and is a law graduate, or has practised as an Advocate or a pleader in Madhya Pradesh for a total period of not less than five yeas, or is or has been a Presiding Officer of a Labour Court Constituted under any law is eligible to be appointed to that post. The advertisement issued for recruitment by the Public Service Commission has specified the number of posts which are likely to be filled up. The qualifications for appearing at the interview to be held for selection for the post of Presiding Officer Labour Court, were also reproduced in the advertisement, which are in accordance with S.8(3) of the Act. The age of the candidates has also been specified in the advertisement according to which the candidate should be minimum of 25 years of age and not more than 35 years of age on 1.1.1980.

4. In response to the above said advertisement all the petitioners submitted applications to the Public Service Commission for appointment to the post of Presiding Officer. The Public Service Commission did not call the present petitioners for interview. Therefore, they have filed these petitions.

5. According to the petitioner in M.P.No.1366 of 88 (Navnit Kumar) he fulfills all the qualification prescribed by the law and the Rules for being appointed as a Presiding Officer of the Labour Department. He is 32 years of age, has passed B.Com, LL.B. and a practising Advocate since 13th November

1982. According to petitioner in M.P.No.1393 of 88 (Narendra Kumar Choudhary) he is enrolled as an Advocate since 5.11.1982 and is 28 years of age. Therefore, he possesses all the qualification for appointment as Presiding Officer of the Labour Department. The contentions of the third petitioner Bhanwarlal is that he possesses all the requisite qualifications for being appointed as Presiding Officer. He has wrongly been deprived of an opportunity to appear at the interview. According to petitioner Pawankumar also he has wrongly been deprived of an opportunity to appear at the interview although he possesses all the requisite qualifications which are prescribed by the Act and Rules framed thereunder.

6. The grievance of the two petitioners Ku. Manorama Singhal and Miss Asha Pande are a little different. According to them, they being over age were probably not called for interview. Their grievance is that although they have not been called for interview by the Public Service Commission, in view of the fact that they were over age, but Shri. Dhananjay Tambe and Smt. Ranjana Saxena have been called for interview although they both are also over aged as such it is a clear case of discrimination they have also averred that in the earlier selection process in which Smt. Ranjana Saxena and Shri Dhananjay Tambe were selected as Presiding Officers of Labour Courts, both the petitioners had also competed and, therefore, even if these two candidates are treated as falling in different category, the petitioners are all in the same category.

7. As the cases of Ku. Manorama Singal and Miss. Asha Pande are of different footings than the other petitioners, we propose to deal with these petitions first.

8. In reply to the averments made by Ku. Asha Pande and Ku. Manorama Singhal, the Public Service Commission has stated that the respondents No.3 and 4 in M.P. 1385 of 88 i.e. Shri Dhananajay Tambe and Smt. Ranjana Saxena have been called for interview by the Public Service Commission because the State Government in the Labour Department, vide order No.1(A)6/88/16-!/88 dated 5.7.1988 have relaxed the upper age limit in respect of respondents Nos.3 and 4. The copies of the orders of the State Government have also been filed with the return.

9. According respondent No.3 the State Government had power under Rule 21 of the M.P. Labour Judiciary Service (Gazetted Recruitment) Rules 1965 (hereinafter called the Rules) and therefore, in exercise of this power the State Government relaxed the age of the respondent No.3 in view of the fact that he was already appointed as a Presiding Officer of the Labour Court, but due to some technical defect the appointment did not continue and as a glaring injustice was done to the respondent

the State Government while advertising the same post on one of which the respondent No.3 was appointed, relaxed the age limit of the respondent No.3. Therefore, there is no question of adopting two yardsticks by the Public Service Commission.

10. By way of additional return respondent No.3 has further averred that the age of a candidate is relaxable if he had undergone full time training in the N.C.C. on or after 1.1.1963. Provision for this relaxation has been made in clause 5 of the conditions given in the advertisement. The respondent No.3 had the requisite N.C.C. training for four years i.e. 2 years 'A' certificate and 2 years for 'B' certificate. Therefore he was entitled under the advertisement conditions itself to get age relaxation of two years. Therefore, even in the absence of the order of the State Government, his application was valid and it could not be rejected on the ground of he being over age.

11. The respondent No.4 has also taken a similar defence as that taken by respondent No.3 and by way of additional plea she has averred that as she is a green card holder, which is filed as Annexure-R1. She is entitled to relaxation according to the terms of the advertisement itself irrespective of the relaxation in age granted by the State Government.

12. It is not in dispute before us that the orders of the State Government relaxing the age of respondents Nos.3 and 4 in M.P.No.1385 of 88 were passed after the respondent Nos.3 and 4 had applied for the recruitment of Presiding Officer of the Labour Court. As such there being no relaxation of age in existence of the date of the application, therefore, applications for recruitment could not be considered. Therefore, a subsequent order of the State Government about the relaxation of the ages of the respondents Nos.3 and 4 is material only if the applicants are found fit for appointment and the case goes before the State Government for consideration of their appointment. However, in the instant case according to respondents Nos.3 and 4 both of them claim entitlement for the relaxation of two yeas in their age on the basis of N.C.C. training and holding of green card respectively. Therefore, it is for the Public Service Commission to verify the authenticity of these documents and if it is found that they are entitled to get relaxation of two years in upper age limit, then the Public Service Commission may take a decision in this behalf. We, therefore, refrain to express any opinion on this issue.

13. It is true that Rule 21 of the Rules empowers the State Government to relax any of the conditions of eligibility in the matter of recruitment to the post of Presiding Officer, Labour Court and if the State Government makes any relaxation in this behalf it is competent to do so. But it should be borne in

mind that such a relaxation can be given in respect of particular candidates or class of candidates before their application for the recruitment is made. In case there is an advertisement for general recruitment and relaxation in respect of certain persons have been made by the State Government, then it has to justify that there is no violation of Art. 14 or Art. 16 of the Constitution of India and it is not a case of discrimination. However, in the instant case, as discussed above, relaxation was not made before the date of the application made by respondents Nos.3 and 4. Therefore, the application could not be treated as valid applications in view of the fact that no relaxation order was passed by the State Government on the date of the application for recruitment.

14. The petitioners in M.P.No.1403 of 88 and M.P.No.1385 of 88 Miss Asha Pande and Ku. Manorama Singhal claim age relaxation on the ground that the age was relaxed in case of Smt. Ranjana Saxena and Shri. Dhananjay Tambey by the State Government. Therefore, the benefit of age relaxation be extended to them also. In view of the finding in preceding paragraph the relief sought by the two petitioners (Ku. Singhal and Ku. Pande) cannot be allowed as the relaxation of age of Smt. Saxena and Shri Tambey can be considered by the P.S.C. on the basis of holding the green card and N.C.C. training respectively. In the absence of the above grounds of relaxation of age, the order of the State Government passed subsequent to the submission of the application form would not validate the form which was invalid on the date of its submission on the ground of the candidate being over age. As such a question of extending the benefit to the two petitioners does not arise at all.

15. The grievance of petitioner Pawan Kumar is that despite his being eligible for an interview call even according to the revised criteria of the P.S.C. he has not been called for interview. According to him he was enrolled as an Advocate with the Bar Council of M.P. at No.772 to 80. Since 4.5.81 the petitioner is practising continuously and he is also oath Commissioner at Rajpur Tahsil. According to him, although he had produced the necessary certificate about his practice along with his application the Public Service Commission misinterpreted the certificates and, thus, deprived him of an opportunity to appear for an interview. Certificate Annexure-H clearly shows that the District Judge, Indore has certified that the petitioner was enrolled as an Advocate on 31.10.1980 at the District Bar, Indore and is practising since 4.5.81. Another certificate is from District Judge, Mandleshwar which certifies that since 1.1.85 the petitioner is a Member of the Anjad Bar Association and from 31.10.1980 to 31.12.1984 he was Member of Indore Bar Association. Although these two certificates show an overlapping period of practice at Indore and Anjad, still it is clear that since the enrolment of the petitioner as an Advocate he is continuously practising at Indore and Anjad. We fail to see how the

Public Service Commission came to the conclusion that the petitioner is not in continuous practice. It appears that there is an error in computing the period of practice of the petitioner by the Public Service Commission. The petitioner is, therefore, held entitled to claim practising experience since May 1981.

16. As regards and the other petitioners their grievance is that they have been deprived of their right to appear for the interview by the P.S.C. although according to the statutory requirement they are qualified to be appointed as Presiding Officer of the Labour Court. It has been strenuously argued on behalf of all these petitioners that the statutory Rules cannot be changed by any authority through executive instructions. The criteria evolved by the Public Service Commission in changing the years of experience as a minimum qualification for being appointed as a Presiding Officer, Labour Court from 5 years to 7½ years is arbitrary and without any reasoning. It is also against the statutory qualifications laid down in the Act itself.

17. On the other hand it has been argued on behalf of the P.S.C. that the Public Service Commission has got powers of short listing the candidates to be called for interview. Since in the instant case the number of applicants was much higher than the number of posts to be filled by the Public Service Commission it had no other alternative but to evolve a criteria for calling reasonable number of candidates for interview. Such a mode is permissible and the Public Service Commission has been given powers to short list the candidates when it feels that the number of applicants is very high in proportion to the number of posts which have to be filled in.

18. According to the learned Government Advocate, the M.P. High Court in an earlier decision had held that the Public Service Commission could not change the criteria of educational qualification. Therefore the P.S.C. has no option but to change the criteria of experience for short listing the candidates and such a course is permissible.

19. To appreciate the respective contentions of the parties, let us examine the different decisions of this Court relied upon by the learned Advocates. In Jayant Kumar Chavhan v. Public Service Commission, M.P. Indore and another (1978 MPLJ 748) a Division Bench of this Court considered the case of State of Haryana v. Shamsher Jang (AIR 1972 SC 1546) and has held that there can be no dispute with the proposition that statutory rules cannot be modified by administrative instructions. However, in that case which was a matter pertaining to recruitment of Civil Judges to the State Judicial Service, it was found that no Rules were framed, for recruitment of the Civil Judges and according to executive instructions of the Government, defunct 1955 Rules of the erstwhile State of C.P. and Berar

were adopted for providing guidelines for recruitment to the Judicial Service and in these Rules, Rule 21 contemplated that the Commission will have the choice of making a preliminary selection and in accordance with Rule 21, general instructions in clause B were issued to the same effect. As such it was a case herein there was no violation of any statutory Rules by executive instructions. On the contrary the whole interview process was an outcome of the administrative instruction. Therefore the case of Jayant Kumar Chavhan v. Public Service Commission M.P. Indore and another (supra) cannot be pressed into service for the proposition that the Public Service Commission has got unfettered powers to evolve a criteria of its own choice.

20. Another Bench of this Court had an occasion to consider the powers of the Public Service Commission pertaining to evolving its own criteria for calling candidates for interview in Praveen Kumar Trivedi V. Public Service Commission M.P. & Industrial Cases, 1990). In that case also this Court has held that the Public Service Could not ignore the statutory requirement for filling up a particular post and could not opt a criteria whereby candidates fulfilling the statutory requirements were thus eliminated from being even called for interview and should give no cause to create an apprehension in the minds of the candidates that a particular criteria has been purposefully adopted so that certain favoured candidates may be benefited thereby, which may shake their confidence in the procedure adopted by the Commission.

21. A division Bench of the Bombay High Court in Jayant and etc. v. Maharashtra Public Service Commission and Others (1986 Labour & Industrial Cases 489) while considering the question of recruitment for the post of Civil Judges and the eligibility criteria adopted by the P.S.C. has clearly held that the administrative instructions by the Public Service Commission cannot modify statutory rules. In that case the criteria for eligibility of a candidates for the post of Civil Judge was practice as an Advocate for three yeas, but the Public Service Commission had enhanced the practising experience from 3 years to 5 years. The Division bench of the Bombay High court in the aforesaid circumstances has held that the assumption of the Commission in this regard is entirely without any basis. The method applied for deleting all eligible candidates who have not practised for a minimum period of five years was entirely arbitrary and cannot stand a scrutiny of reasonableness. The suitability of a candidate does not depend merely on the number of years put in at the Bar but upon the experience he has gathered by working out matters in Court. The Commission has travelled beyond the statutory provisions by evolving a criteria of inviting for an interview only those candidates who had put in practice of over

five years. It is not permissible for the Commission to adopt a criteria which is in violation of the statutory rules.

22. In the light of the above mentioned decisions it is clear that the adoption of any criteria in violation of the statutory Rules is not permissible. When a statute prescribes the minimum qualification for a particular post, it is not open for the Public Service Commission to change that criteria by executive instructions. It is not in dispute in the instant case that the eligibility of a candidate for being appointed as Presiding Officer, Labour Court is 5 years practice at the Bar. The P.S.C. with a view to reduce the number of candidates for being called for interview enhanced the experience period and made it 7½ years instead of 5 years. We fail to understand the reason behind fixing such a criteria. It cannot be debated that the minimum eligibility prescribed by the Act is 5 years practice at the Bar. Now enhancing the period of experience at the Bar is clearly contrary to the statutory provision. The Public Service Commission has no right to change the conditions of eligibility prescribed by the statute. It is now a settled position of law that the administrative instructions in no way can change the statutory provisions, and if some order in violation of the Statutory provisions is passed by any executive or administrative authority, that order shall be held to be void and illegal.

23. In the instant case the Public Service Commission wanted to achieve a goal of getting the best possible candidates for interview by screening the candidates from amongst those who had made application for being considered for appointment to the post of Presiding Officer, of the Labour Court. But while doing so the Public Service Commission has not taken into consideration the statutory qualifications laid down by the Legislative which inter alia lays down 5 years of practice as an Advocate of pleader as a qualification for being appointed as a Presiding Officer, Labour Court. While enhancing the period of experience it cannot be said that the P.S.C. has adopted a criteria of getting the best possible candidates out of the list of applicants. Further, it may be noted that the P.S.C. has adopted the impugned criteria even in violation of its own rules. The M.P. Public Service Commission has adopted the Rules of the Union Public Service Commission for the discharge of its business and for regulating the procedure and functions of the Commission. Now, Rule 4 under the head of 'By Selection' clearly says that if the number of applications received is such where short listing of the applications may be necessary, then the P.S.C. shall adopt the following procedure:

> "Consider all applications received and short list them for interview either through screening tests or on the basis of predetermined criteria relating to academic qualifications and experience".

24. In view of the above Rule, the Public Service Commission has got two courses of action open to it for short listing the applications received. One is to short list them through screening test or to short list them on the basis of predetermined criteria relating to academic qualifications and experience. Therefore, when the Public Service Commission adopts the second criteria i.e. short listing the candidates on the basis of academic qualification and experience; firstly it should be ascertained that while laying down a criteria based on qualifications and experience, there is no violation of any prescribed statutory qualification and if there be no such violation then the criteria should always be a predetermined criteria and not a criteria to be evolved after seeing the different applications. If the criteria is not predetermined then there may be a charge of bias or favouritism. Secondly, when a criteria has to be adopted it should be based both on experience and qualification. The words used in the Rules are 'experience and qualification' and not 'experience or qualification'.

25. Undisputedly the impugned criteria adopted by the Public Service Commission is based only on experience and that too it is not a predetermined criteria. Further, it is in violation of the prescribed statutory qualifications. Therefore, we are of the opinion that the order impugned laying down the criteria by the Public Service Commission by raising the practising experience from 5 years to 7½ years and short listing of candidates on that basis is contrary to law and therefore, the order refusing to call the petitioners for interview on the revised criteria is illegal. The order impugned passed by the Public Service Commission revising the criteria for calling the candidates for interview is, therefore, set aside. The Public Service Commission is directed to either call all the candidates who have applied for interview or to screen the candidates through some screening test according to the aforesaid Rule of the Public Service Commission and therefore call only those candidates for interview, who qualify for interview in the screening test. We may observe that in the other services and especially in the M.P. Judicial Service, written tests are being held. However, for the recruitment to the Labour Judiciary rules provide only interview as mode of selection. Therefore, atleast a screening test can be held for getting the best possible candidates for interview for the post of Presiding Officer Labour Court.

26. As a result of the aforesaid discussion M.P.Nos.1393 of 88, 1366 of 88, 1406 of 88 and 1407 of 88 are allowed. The order of the P.S.C. revising the criteria of practising experience for the purpose of interviews is quashed. The Madhya Pradesh Public Service Commission is directed to either hold a screening test for reducing the number of candidates for interview or to call the four petitioners along with all the other candidates for interview in case the Public Service Commission decides not to hold any screening test.

27. As regards petitioners in M.P.No.1385 of 88 Ku.Manorama Singhal and M.P.No.1403 of 88 Ku. Asha Pandey, in the light of the discussion made above it is clear that these two petitioners have crossed the age of eligibility for applying to the post of Presiding Officer, Labour Court and it has also been held that the two candidates Smt. Saxena and Shri Tambe should be held eligible or in eligible on the basis of their extra qualifications i.e. N.C.C. training and green card holding. Consequently the petitioners Ku. Singhal and Ku. Pande cannot claim that they should also be called for interview. The petitions of these two petitioners are, therefore, dismissed.

28. The petitions of the remaining petitioners are allowed as aforesaid. Parties to bear their own costs in all these petitions as incurred. The security amount if deposited by the petitioner, after verification be refunded to them.

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IN THE HON'BLE HIGH COURT OF MADHYA PRADESH, JABALPUR
BENCH AT GWALIOR
M.P. NO.1185 OF 1989
D.D. 2.5.1990
Hon'ble Mr. T.N.Singh, Judge & Hon'ble Mr.R.C.Lahoti, Judge

Dr.C.P.Kulshrestra ... Petitioner
Vs.
Government of Madhya Pradesh through Chief Secretary, Bhopal & Ors. ... Respondents

Jurisdiction and Selection:

Whether Chief Officer of Municipality is the Government servant entitled to claim age relaxation under the Rules? – Yes

In the recruitment to the post of Civil Judge petitioner working as Chief Officer in Municipality appeared for written examination but not called for interview on the ground that he was not entitled to age relaxation – Writ petition filed by the petitioner at Gwalior Bench was resisted on the ground that in view of order dated 22.4.1981 only Main Bench at Jabalpur has jurisdiction – High Court overruled the objection regarding jurisdiction and also the objection that Chief Officer is not Government servant and allowed the writ petition directing the Commission to call the petitioner for interview.

Held:

Right to public employment contemplated under Article 16 of the Constitution is a fundamental right of every citizen and a candidate offering himself for selection for the post of a Judicial Officer suffers neither any change in his status nor any dilution of his rights till such time as he has not been inducted into the Judicial service. Articles 14, 16, 21 and 39A must interdict any attempt to restrict in any manner the enjoyment of his right to challenge freely at any Seat of this Court any arbitrary action of any authority in the pre selection stage.

Further Held:

In view of the provisions of M.P. Municipalities Act, 1961, M.P. State Municipal Service (Executive) Rules, 1973 and Section 16 of the M.P. General Clauses Act, 1957, the Chief Municipal Officer is a "servant" of the State Government and not a "servant" of the Municipal Council. His appointment, transfer and also matters concerning disciplinary action to be taken against him, all lie within the competence of the State Government.

Cases referred:-

1. AIR 1959 SC 756 - Kerala Education Bill
2. (1976) 3 SCC 108 - Union of India v. Steel Stock Holders Syndicate
3. (1976) 4 SCC 190 - Santa Singh
4. 1976 JLJ 706 - Abdul Taiyab Bahai and Five Others vs. Union of India and Five others
   5. 1976 JLJ 745 - Balkrishnan Das v. Harnarain
6. AIR 1978 SC 771 - Pathumma
7. AIR 1980 SC 1789 - Minerva Mills

8. AIR 1983 SC 624 - Ranjan Dwivedi,
9. AIR 1983 SC 803 - Chandrabhan
10. AIR 1986 SC 1499 – Girdharilal
11. AIR 1987 SC 386 - S.P. Sampath Kumar
12. AIR 1987 SC 1454 - Utkal Constructions

ORDER

The following order of the Court was passed by Dr. T.N.Singh, J.

Two petitions were heard analogously for two reasons : one, our competence to hear both petitions at Gwalior Bench was challenged; two, both petitioners have challenged (on different grounds though) the same action of Public Service Commission refusing to call them for interview for the post of Civil Judge. This order shall accordingly govern disposal of both matters, namely, Misc. Petition No.1185 of 1989 and Misc. Petition No.1464 of 1989 (Omprakash Gupta v. State of Madhya Pradesh and others).

2. We set out below the order dated 22.4.1981, passed by the Hon'ble the Chief Justice as that is the source of challenge to our competence to hear the petitions :

> "In accordance with orders of my predecessor dated 5.2.1976, issued under the proviso to notification No.16/20/68-Judl.III, dated November 28, 1968, issued by the President under section 51(2) of the States Reorganisation Act, 1956, (No.36 of 1956) and in supersession of my orders dated 6.1.1981, I hereby order that all cases relating to selection and/or appointment to Judicial officers; and all cases instituted by or against Judicial Officers or Ex-Judicial Officers of Madhya Pradesh relating to termination of service or any other service matter shall be heard at Jabalpur.
>
> This order shall also apply to pending cases."

3. Although strong reliance was placed on two Full bench decisions of this Court, for reasons to follow, we regard that exercise to be misconceived. The decision cited at Abdul Taiyab Bahai and Five Others vs. Union of India and Five others (1976 JLJ 706); Balkrishnan Das v. Harnarain (1976 JLJ 745).

4. In Abdul Taiyab Bhai (supra), the Court was required to address itself mainly to the scope of the power of the President and of the Chief Justice envisaged under Section 51(2) of the States Reorganisation Act, 1956, for short, S.R. Act. Indeed, the vires of the provision was agitated and the challenge was negatived. It is true that some discussion can be read in the two separate judgments in that case on the purport and import of the expression "in respect of cases arising in" used in the presidential order dated 28.11.1968 passed under Section 52, but that exercise was evidently inhibited

by Apex Court's view expressed in kindered circumstances in regard to that expression in Nasiruddin's case (AIR 1976 SC 331). In Balkrishan Das (supra), the scope of two orders passed on same date, 5.2.1976, by the Hon'ble the Chief Justice, deriving authority from the same Presidential Order, was required to be determined. In that case, the Court found it necessary to determine the meaning to be attached to the words "hearing" and "determine" used in those orders as the question posed was whether writ petitions which raised questions of vires of any enactment, rule or notification had to be listed even for admission and interim order at Jabalpur and the Indore and Gwalior Benches had no jurisdiction to deal with those matters.

5. In the instant case, we are required to construe a different order, albeit passed by the Hon'ble the Chief Justice in virtue of the same Presidential Order. We are required, in our view, to construe the order extracted aforesaid on its own term and language and that indeed, in the perspective of constitutional imperatives. The question that precisely arises for our determination in this case is, what meaning is to be attributed to the clause "cases relating to selection" in its context and setting in the order afore extracted. On behalf of the petitioners, it has been urged that the phraseology needs careful examination and proper meaning is to be attributed mainly to the words "cases" and "selection". It is also urged that the meaning should accord with constitutional imperatives and the order be so construed as to maintain its constitutionality. The object of the order, it has been further urged, must be kept in view as that can be regarded as the most reliable guide for divining the meaning of the crucial words.

6. It cannot be doubted that the Order afore extracted is a place of subordinate legislation and due primacy is to be attached, therefore, to current norms or purposive interpretation. (See – Girdharilal, AIR 1986 SC 1499 ; Utkal Constructions, AIR 1987 SC 1454). The role of Directive Principles in evaluating statutory objective is also stressed by the Apex Court consistently for more than a decade. (See – Pathumma, AIR 1978 SC 771; Minerva Mills, AIR 1980 SC 1789; Ranjan Dwivedi, AIR 1983 SC 624). Importance attached judicially to the particular norms fulfilling this imperative needs also to be noted. The fore-most is that High Court's jurisdiction to grant relief under Article 226 of the Constitution can be curtailed only by Constitutional amendment (In re. Kerala Education Bill, AIR 1959 SC 756 etc.). Also noteworthy is the principle enunciated in S.P. Sampath Kumar's case (AIR 1987 SC 386) in which it was held that the said jurisdiction extends not only to one seat but "Seats of each High Court" and that for exercise of the power of judicial review under Article 227, suitable mechanism must exist "at every place where there is a Seat of the High Court."

7. Reading the order as a whole, we are able to gain an insight into its objective. It is supposed to subserve the purpose of Articles 233, 234 and 235 of the Constitution. All manners of administrative

control over all subordinate courts in the State are vested thereunder in the High Court, such as selection, appointments, transfers, promotions etc. It can be safely presumed, in our view, that it was considered appropriate and legitimate to hear such matters at the Main Seat as involved rights of such persons who had been either duly selected or appointed as Judicial Officer in addition to the general litigation concerning service maters of such officers because service records of such officers are maintained at the Main Seat at Jabalpur and administrative decisions in those matters are also taken there.

8. We do not think if there can be any other legitimate object except that and it could not be, in our view, the intention of the order to impair rights of citizens qua citizens who had not been selected as Judicial Officers so as to prevent them from complaining to this Court on the Judicial Side at any of the Benches also in regard to any grievance concerning the selection procedure. If that view is not taken, the validity of the order can be questioned on the anvil not only of Articles 14, 16 and 21, but also of Article 39-A of the Constitution. In Vijay Singh Jadon No.2 (1989 MPLJ 255 – 1989 MPJR 442), this aspect was considered in another context by a Division Bench of this Court by referring to the decision in Chandrabhan's case (AIR 1983 SC 803) wherein public employment opportunity was regarded as "national wealth". It was held that a citizen qua citizen cannot be denied access to High Court to enforce his fundamental right under Articles 14, 16 and 21. What has to be further stressed in this connection in the particular fact situation of this case, is that easy access to justice is an integral part of the right to move the High Court under Article 226 of the Constitution and that flows from the benevolent mandate of Article 39-A. That imperative is appropriately stressed in Ranjan Dwivedi's case (supra). Before any citizen is drafted into Judicial Service, he remains a citizen suffering no disability of any type and his cause cannot be reasonably put into a separate class or category to be dealt with differently. There can, therefore, neither any case or reasonable classification nor of a reasonable nexus to take the view that even pre-selection cases are covered by the Order.

9. Looking at the order which is in two parts, the rationale of the split arrests immediate attention. Two types of "cases" are chosen and specified to be dealt with exclusively at the Main Seat at Jabalpur, leaving other cases unaffected by the contemplated jurisdictional constraint. A zone of enumerated jurisdiction is deliberately carved out for the Main Seat, allowing matters unspecified to constitute the residuary jurisdiction to be exercised at other seats in the ordinary or normal course. The words used in two parts are chosen ex-hypothesi to match the object of the split. The settled law also is that, "the meaning of an ordinary word is to be found not so much in strict etymological propriety of language,

nor even in popular use, as in the subject or occasion on which it is used and the object which is intended to be attained." (See Santa Singh, (1976) 4 SCC 190). Obviously, with deliberate care, in both parts, the word "cases" is used; care is taken to avoid the words "matters" or "questions" of admittedly wider import and connotation. It cannot be gain said that if the first part of the order would have read as "all matters (or questions) relating to selection and/or appointment", there would have been left nothing to be agitated at any other seat (outlying bench) of the Court in regard to "selection" or "appointment" of a Judicial Officer. But that was prevented deliberately by securing to the Main Seat Jabalpur only enumerated jurisdiction.

10. To divine the meaning of the word "selection" in its context and setting it is significant to note that the same gerundial verb "relating" serves simultaneously two subjects ("selection"; "appointment") and both again are inter-linked by two conjunctions – "..... relating to selection and/or appointment". This construction provides intrinsic evidence for the conclusion that the words "selection" and "appointment" are used in ejusdem generis sense and both words indicate the perfected state or status of the right accrued to the person concerned, of his being inducted into the judicial service. In Union of India v. Steel Stock Holders Syndicate, (1976) 3 SCC 108, the words used in Section 76 of the Railways Act, "loss, destruction, damage or deterioration" were held as used in ejusdem generis sense to indicate the actual and physical loss or change in the goods in relation to the right contemplated in regard thereto under Section 76. It may be legitimate to conclude that when cognate expressions of the same genre are used in a particular collocation in dealing with any right to pursue any remedy, it may provide a safe guide to determine the status of the suitor and of the right to be enforced.

11. For all the foregoing reasons, we are of the view that only cases of perfected right of a candidate offering himself for selection as a Judicial Officer, such as of his being duly selected for appointment as such officer, come within the purview of the afore quoted order. It shall be open to any candidate, qua citizen, to challenge any arbitrary action of any authority by which the pre-selection procedure is vitiated and his right to selection is infringed. Roshanlal (AIR 1967 SC 1889) had stated law long ago that the citizen does not suffer the disability ordinarily attached to a civil servant in the exercise of his rights until his status changes on his induction into service. The pronounced role and relevance in this context of Chandrabhan's case (supra) has also to be underlined. Right to public employment contemplated under Article 16 of the Constitution is a fundamental right of every citizen and a candidate offering himself for selection for the post of a Judicial Officer suffers neither any

change in his status nor any dilution of his rights till such time as he has not been inducted into the Judicial service. Articles 14, 16, 21 and 39A must interdict any attempt to restrict in any manner the enjoyment of his right to challenge freely at any Seat of this Court any arbitrary action of any authority in the pre selection stage.

12. We hold, therefore, that the preliminary objection is merit less and that is rejected. We hold that sitting at Gwalior Bench, we are competent to examine the grievance of the petitioners agitated in the two petitions and decide the same on merits.

13. Petitioner Dr. C.P.Kulshrestra of Misc. Petition No.1185 of 1989 has a short grievance. His date of birth (26.1.1953) is not disputed. Admittedly, age relaxation has been allowed in the advertisement published on 10.11.1988 by M.P. Public Service Commission (respondents 2/3) permitting any person employed on temporary or permanent basis in Government service, to apply for the post of a Civil Judge and to take part in Judicial Service Examination for the year 1988-89 if he had not attained the age of 38 years. Admittedly, the petitioner appeared in the written examination, but was not called for the interview and in the return the only ground to disqualify him is based on challenge to relaxation claimed by him. It is not the case of the respondents that the petitioner was over 38 years or was otherwise disqualified on account of his performance in the written examination.

14. What is not denied is that at the relevant time and till today the petitioner has been serving as Chief Municipal Officer at Mungavali. Respondents have relied on a circular letter dated 21.7.1988 of the Under Secretary to the Government of Madhya Pradesh, Local Government Department, Bhopal. He intimated thereby to the concerned authorities that the order dated 1.1.1987 of the General Administration Department under which employees of municipal corporations and municipal councils were enjoying age relaxation upto 38 years had been withdrawn. In the return, it is also stated that petitioners' reliance in the writ petitions on this Court's decision in Alok Awasthi's case (1987 MPRCJ 143) would not avail him.

15. We have no doubt that the objections of respondents are wholly merit less. The circular letter can have no effect on the advertisement of the respondents and entitlement thereunder of the petitioner. The only point to be considered is whether the petitioner was, at the relevant time, and also today, a Government servant. In a different context, that question came to be decided in Alok Awasthi's case (supra). It was held in categorical terms in that case that the "Chief Municipal Officer" was a Government servant and that view was taken giving due consideration to the provisions of M.P. Municipalities Act,

1961, M.P. State Municipal Service (Executive) Rules, 1973 and Section 16 of the M.P. General Clauses Act, 1957. It was held that the Chief Municipal Officer was a "servant" of the State Government and was not a "servant" of the Municipal Council. His appointment, transfer and also matters concerning disciplinary action to be taken against him, all lie within the competence of the State Government. We are in complete agreement with the view expressed in Alok Awasthi and we have no doubt that the petitioner is not an employee of the Municipal Council, but he is a Government servant. He is accordingly not hit by the circular letter dated 21.7.1988 and he is entitled to the age relaxation contemplated under the advertisement in question.

16. We direct respondents to declare his result of the written examination and on his performance being found adequate, meeting the requirement of call for interview, needful shall be done in that regard. Within a week; his result shall be declared and within three weeks, interview shall be held to allow him to test his fortune. If he is duly selected, his case for appointment may be considered in accordance with his performance in the written test and the interview.

17. In regard to the case of the other petitioner, Omprakash Gupta, there was some controversy about his performance in the written test. Accordingly, we had called for the "Model Answers" and also the "Answer Script" of the petitioner. After examining the same, we found arbitrary marking in respect of several questions, such as questions No.94, 129, 142, 162 and 184. We recorded our finding on 25.4.1990 after hearing counsel on that date in regard to the controversy that the petitioner could not be said to have secured less than 147 marks and, therefore, he was entitled to be called for interview. He was denied the chance to appear at the interview as he was held to have secured 142 marks only as against the minimum of 145 marks. Because petitioner's stake to appointment would depend on his performance in written test and also interview, we took the view that revaluation had to be undertaken by the concerned authority as it may be a case of petitioner's securing still higher marks. We had reserved orders on that date as the decision on the preliminary question had to be given.

18. Accordingly, we direct respondent No.2/M.P. Public Service Commission to revalue carefully petitioner's answer script and also make arrangements for his interview. Within a week, revaluation shall be completed and within three weeks, interview shall be held to allow him to test his fortune. If he is duly selected, his case for appointment may be considered in accordance with his performance in the written test and the interview.

19. In the result, both petitions succeed and are allowed in terms of directions herein made. However, there shall be no order as to costs.

A copy of this order shall be placed on records of connected petition, namely, Misc. Petition No.1464 of 1989.

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MADHYA PRADESH ADMINISTRATIVE TRIBUNAL, JABALPUR
Original Application No.3110/89
D.D. 6.9.1990
Hon'ble Chairman Justice Sri. K.N.Shukla

Sanjay Upadhyaya ... Applicant
Vs.
State of M.P. & Ors. ... Respondents

Selection

Preference:

Recruitment to posts in Class-II & Class-III service including the posts of Sales Tax Inspector and Excise Sub Inspector indicated in the advertisement Code Nos.15 & 17 but in the application form as Code Nos.17 & 16 – The applicant in the application form given his first preference to Code No.17 and second preference Code No.16 – though he secured more marks than the last candidate selected to the post of Sales Tax Inspector he was selected to the post of Excise Inspector on the ground Code No.17 was for the post of Excise Sub Inspector – The High Court allowed the application and directed the Government to select the applicant to the post of Sales Tax Inspector which was kept vacant as per interim order.

Held:

The applicant gave his preference for the post for which Code No.17 had been assigned i.e., for the post of Sales Tax Inspector. It was not open to the Public Service Commission to consider the code number given in the advertisement ignoring the code number given in the application form which was to be filled in by the candidates. No reason has been given as to why code number for the post of Excise Sub Inspector given in the application form i.e. 16 was changed in the advertisement to code number 17. If this was done by the Public Service Commission under some mistake then justice and fairplay demanded that it should rectify it and give the candidate his due.

ORDER

The following order of the Bench was passed by Hon'ble Chairman Justice Shri K.N.Shukla.

2. Madhya Pradesh Public Service Commission issued an advertisement for various posts in the "Rojgar Aur Nirman" weekly dated 18th August, 1988 (Annexure-A1). The applicant applied for all the posts in Class-II and Class-III services. After his written examination he was selected for Class-III service. The applicant was selected for the post of Excise Sub Inspector.

3. Applicant's grievance is that he had filled in the application form supplied by Public Service Commission showing therein his first preference for the post of Sales Tax Inspector. He was, however, not selected for that post though a candidate who obtained lesser marks was so selected. He has therefore sought a writ of mandamus to the respondents to appoint him against the post of Sales Tax Inspector and not against the post of Excise Sub Inspector for which he had not given his first preference.

4. Only the Public Service Commission, respondent No.3, has filed its return. In substance they have pleaded that the code No. as per the advertisement, for the post of Sales Tax Inspector was No.15 whereas in the application form the applicant had filled in code No.17 which related, as per the advertisement, to the post of Excise Sub Inspector. In this manner the Public Service Commission has justified applicants' selection for the post of Excise Sub Inspector and not for the post of Sales Tax Inspector.

5. To satisfy myself I had directed that the original application form which was submitted to the Commission may be produced. The same was produced before me. Under the heading "Important Instructions", in column No.8 various "codes" have been assigned to different services categories Class-I, II and III. There is a specific instruction that preference has to be shown by the candidate only by codes and not by reference to the post. In this application form for the post of Sales Tax Inspector the code no. is 17 while for the post of Excise Sub Inspector of Code No. is 16. The applicant in the application form gave his preference for class III services as follows:-

17/19/16/21/18/20.

Thus as per the "Important Instructions" in the application form issued by the Commission the first preference in Class III services given by the applicant was for the 17. He had given third preference for the post of Excise Sub Inspector for which the code No in the "Important Instructions" was 16.

6. It was not disputed that a person who had obtained lesser marks than the applicant has been selected for the post of Sales Tax Inspector. In other words if the applicant has properly indicated his first preference for the post of Sales Tax Inspector, he will be entitled to be selected and appointed as Sales Tax Inspector only.

7. The Public Service Commission took the stand that under the advertisement (Annexure A-1) code number assigned for the post of Sales Tax Inspector was 15 while code number 17 related to the post of Excise Sub Inspector. That being so the Commission was justified in selecting the applicant for the post of Excise Sub Inspector.

8. After carefully going through the various documents filed by the parties, I am satisfied that the plea raised by the Public Service Commission is unjust and hyper technical. The applicant was furnished an application form by the Public Service Commission with a clear direction to verify the "Important

Instructions" given in the said form. Code number assigned for the post of Sales Tax Inspector there in was 17. The applicant gave his preference for the post for which this code number had been assigned i.e. post of Sales Tax Inspector. It was not open to the Public Service Commission to consider the code number given in the advertisement ignoring the code number given in the application form which was to be filled in by the candidates. No reason has been assigned as to why different code numbers for different posts were given in the advertisement and in the application forms. Thus it is not proper for the Public Service Commission to take a stand that it will not accept the code number given in the application form but only refer to the code number given in the advertisement. This is so particularly because no reason has been given as to why code number for the post of Excise Sub Inspector given in the application form i.e. 16 was changed in the advertisement to code number 17. If this was done by the Public Service Commission under some mistake then justice and fairplay demanded that it should rectify it and give the candidate his due.

9. For reasons stated above this application is allowed. Applicant's selection for the post of Excise Sub Inspector is set aside and he will be deemed to be selected for the post of Sales Tax Inspector. Appointment order as per rules may be issued by the State Government accordingly. As per the interim order dated 15.12.89 one post of Sales Tax Inspector was ordered to be kept vacant. The applicant will be entitled to be appointed against that post.

10. No costs.

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MADHYA PRADESH ADMINISTRATIVE TRIBUNAL, JABALPUR
TRANSFERRED APPLICATION NO.1069/88
D.D. 13.01.1994

Baijnath Prasad Basadia ... Applicant
Vs.
State of M.P. & Ors. ... Respondents

Direct Recruitment:

Whether selection under old Rules is affected by subsequent amendment? – No

Selection to 30 posts of Deputy Director of Agriculture was made by the Commission under M.P. Agricultural Services (Gazetted) Recruitment Rules, 1966 – Out of the select list 25 candidates were appointed – 5 posts-4 under ST and 1 under GM category remained unfilled – Petitioners who were placed in the waiting list filed this application to appoint them against unfilled posts – The State contended that as per subsequent amendment dated 26.8.1988 filling up of posts of Deputy Director 100% by promotion – Accepting the contention of the petitioners that selection commenced under the old Rules will be governed by the unamended Rules has partly allowed the application with a direction to fill up remaining 5 vacancies by issuing appointment orders to the candidates in the waiting list in order of merit and to carry forward the additional vacancies under ST as per Rules.

Held:

Since the process of selection had commenced under the unamended rules, the rights of the petitioners have to be decided only in accordance with the unamended rules. The amendment subsequently made cannot be relied upon to deny the claims of the petitioners.

Cases referred:

1. AIR 1983 SC 1199 - Dr. Vinay Rampal Vs. State of Jammur & Kashmir.
2. AIR 1988 SC 2068 - P. Ganeshwar Rao Vs. State of A.P.
3. AIR 1990 SC 405 - P.Mahendran vs. State of Karnataka
4. AIR 1991 SC 1612 - Shankasan Dash vs. Union of India
5. AIR 1993 SC 582 - Y.V.Ranaiah Vs. Sreenivasan Rao & others & State of A.P. Vs. J.Sreenivasan Rao

ORDER

In response to advertisement No.0883 (Ann.A) issued by Public Service Commission, M.P., inviting applications for appointment of Deputy Director Agriculture the 3 petitioners applied for the same as members of general categories. Out of 30 posts five were reserved for Scheduled Caste, six for Schedule Tribes and the rest 10 for general category. The petitioners faced the selection and were placed in waiting list at Sl.No.3, 4 & 5 respectively. Copy of the select list issued by the Public Service Commission on 27.7.86 is Annexure 'B'. From the said list, twenty five candidates were appointed as Deputy Director of Agriculture on 21.2.1987 by appointment order dated 11.2.87

(Annexure 'C'). Among these five appointees are member of Schedule Castes and two are of Schedule tribes. Thus five posts namely four of Schedule Tribes and one of General Category remain unfilled.

2. The petitioners submit that the respondents were obliged to divert the remaining vacancy to appoint the candidates in the waiting list. They pray for mandamus to that effect. Recruitment of Gazetted Officers including Deputy Director of Agriculture is governed by M.P. Agricultural Service (Gazetted) Recruitment Rules, 1966, Rules 11(6) of the Rules is produced below:

> "If a sufficient number of candidates belonging to Scheduled Castes and Scheduled Tribes are not available for filling up all the vacancies reserved for them, the remaining vacancies shall be filled in from among other candidates and an equivalent number of additional vacancies shall be reserved for candidates belonging to the Scheduled Castes and Scheduled Tribes for the subsequent selections."

3. The petitioners submitted representations (Anns. D to D5) but the respondents further did not reply nor filled the remaining posts in accordance with the Rules and thereby causing hardships to the petitioners. The P.S.C. has not issued any advertisement, thereafter, nor any post of Deputy Director of Agriculture had been filled in till date by direct recruitment.

4. The respondent Nos.1 & 2 submitted that after appointment of twenty candidates from the merit list, it was not necessary for the State Government to fill the remaining posts. As per advertisement six posts were reserved for Schedule Tribe candidates but in the absence of sufficient number of suitable candidates, only, one candidate was appointed. The Recruitment Rules of 1966 was amended by notification dated 26.8.88 published in M.P.Rajpatra Part 4(G) dated 16.9.1988 (Ann. R-3) Under the unamended Rules of 1966 the ratio for appointment of Deputy Director Agriculture by direct recruitment and promotion was 25% and 75% respectively. After amendment by Ann. R-3 all the vacancies in the post of Deputy Director Agriculture have to be filled up 100% by promotion.

5. The respondents further submitted that the select list of direct recruits survives only for a period of one year. The list was issued on 27th July 1986 and it stood exhausted on 11.2.87 with the issue of appointment order (Annexure C). After expiry of one year no appointment can be issued on the basis of select list which had lapsed. The respondents reproduced Rule 11(6) of Recruitment Rules as under:

> "If a sufficient number of candidates belonging to the Scheduled Castes and the Scheduled Tribes are not available for filling all the vacancies reserved for them, the remaining vacancies shall be re-advertised exclusively for these candidates. If even after

re-advertisement any vacancies remain unfilled, they shall be filled from among the general candidates and an equivalent number of additional vacancies shall be reserved for candidates belonging to the Scheduled Castes or the Scheduled Tribes, as the case may be, during the subsequent selections."

In view of the said provision, the representations of petitioner for appointment against the posts of reserved quota were without substance, and were accordingly rejected by order dt. 27.5.88 (Ann. R-4).

6. The question for decision is whether the right of the petitioners came to an end by virtue of amendment in the Recruitment Rules, 1966 providing to filling up of the post of Deputy Director Agriculture 100% by promotion. In Y.V.Ranaiah Vs. Sreenivasan Rao & others & State of A.P. Vs. J.Sreenivasan Rao (AIR 1993 SC 582), it was laid down that when the rules are amended the vacancies which occur prior to amendment would be governed by the old rules and not by the amended rules. Similar view was taken in Dr. Vinay Rampal Vs. State of Jammu & Kashmir (AIR 1983 SC 1199). P. Ganeshwar Rao Vs. State of A.P. (AIR 1988 SC 2068) and P.Mahendran vs. State of Karnataka (AIR 1990 SC 405). Since the process of selection of the petitioners commenced under the old rules, they will be governed by the unamended rules.

7. Learned Government Advocate justified the action of the State in not appointing the petitioners on the ground that Schedule II of the Recruitment Rules stood amended by notification dated 26.8.88 published in M.P. Rajpatra dated 16.9.88 (Ann R3). By this amendment all vacancies in the posts of Deputy Director Agriculture had to be filled up 100% by promotion and as such their right of appointment by direct recruitment came to an end. There is no merit in this argument. Since the process of selection had commenced under the unamended rules, the rights of the petitioners have to be decided only in accordance with the unamended rules. The amendments subsequently made by the State Government are wholly irrelevant and cannot be relied on to deny the claims of the petitioner.

8. Learned Government Advocate then submitted that the select list was published by the P.S.C. on 27.7.86 vide (Ann. B) and all the 25 candidates enlisted in the merit list were appointed by order dated 21.2.1987 (Annexure 'C'). On expiry of one year, the said list lapsed. The respondents did not place any Government circular on record in support of their plea. Even if there is any such circular, it will not affect the rights of the petitioners to seek appointment in the present case since the State Government failed to take any step as it was required to take under Rule 11(6) of the Recruitment Rules. the State Government cannot be allowed to take advantage of its own inaction. Had the number of posts not been reserved for the members of the Scheduled Tribes, the petitioners would

have been included in the merit list and not in the waiting list. The P.S.C. did not find sufficient number of Scheduled Tribe candidates, therefore, it did not enlist any candidate against those vacancies. In such a situation Rule 11(6) became operative and it was the duty of the State Government to fill in those vacancies by issuing appointment orders to the candidates of general category from the waiting list and to carry forward those vacancies for the subsequent selection. Petitioners submitted representations within time and still the State Government took no action on their representations. Those representations were rejected by a non-speaking order only on 27.5.88 (Annexure R/4).

9. If the language of Rule 11(6) is that as is quoted by the respondents in para '7' of their return, in that case, the limitation of one year would not be attracted at all, since the Rule 11(6) requires re-advertisement of the vacancies left unfilled. This is usually done by the P.S.C. on request by the State Government. Even after such re-advertisement if the vacancies remain unfilled, the State Government is required to fill up those vacancies from amongst the general candidates and an equivalent number of additional vacancies to be carried forward for the subsequent selections This process is bound to consume much more time than one year before it reaches the stage of issue appointment orders to the members of the general category. If the limitation of one year is applied to these appointments it will result in not only breach of the Recruitment Rules but shall result in denial of rights Art. 16 of the Constitution. Therefore, the submission made on behalf of the respondents cannot be accepted.

10. Lastly it was urged that mere inclusion of the name in the select list does not confer any right of appointment on the candidates. Further the State is under no obligation to fill up all the 30 vacancies advertised by it. The argument cannot be accepted. It is correct that the State is under no obligation to fill up all the posts advertised nor the petitioners get an indefeasible right to be appointed as was held in Shankasan Dash vs. Union of India (AIR 1991 SC 1612). This decision however, further lays down that the State cannot be allowed to act arbitrarily. In the present case the respondents have been denying the claim of the petitioners by mis-interpreting the relevant Recruitment Rules. Therefore, the objection raised during argument must be rejected.

11. In view of the foregoing discussions, the petition is partly allowed, the respondents State is directed to fill up the remaining 5 vacancies by issuing appointment orders to the candidates in the waiting list in order of merit and to carry forward the additional vacancies of Schedule Tribes as provided under Rule 11(6). The petitioners shall be entitled to notional seniority w.e.f 11.2.87, the date from which the appointment orders were issued to other candidates. No order as to costs.

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MADHYA PRADESH ADMINISTRATIVE TRIBUNAL, INDORE
Original Application 481/1993
D.D. 17.2.1994
Hon'ble Mr. Justice R.C. Sharma, Member

Smt. Vanitha Shrivastava ... Applicant
Vs.
The Madhya Pradesh P.S.C. & Anr. ... Respondents

Qualification:

The applicant holder of M.Sc. in Chemistry from I.I.T. Kanpur was a candidate for the post of Assistant Professor in Physical and Inorganic Chemistry and appeared for the competitive examination conducted by the Commission – Aggrieved by her non selection the applicant has filed A.No.393/92 – The Tribunal on the statement made by the 1st respondent–Government directed to constitute a Committee of Experts to consider the qualification possessed by the applicant satisfies the requirement of eligibility – The Committee set up by the Commission held that the applicant failed to fulfill the basic requirement of eligibility – Therefore, the applicant filed this application – Tribunal in view of the fact that the Committee did not give clear information as to whether M.Sc. from I.I.T. is equivalent to degree passed from any other University allowed the application and directed the respondent to consider the case of the applicant on the basis of syllabus I.I.T. Kanpur and Indore University or other Universities if necessary to constitute a Committee by including a nominee from Kanpur.

ORDER

The applicant in this case is a candidate in the Public Service Commission Examination held for selection and appointment to the post of Assistant Professor advertised by the P.S.C. of Madhya Pradesh for appointment to the post of Assistant Professors in various subjects. This advertisement was published in Rozgar Aur Nirman, Bhopal dt. 27th September, 1990. The applicant, applied for the post of Assistant Professor in Physical and Inorganic Chemistry in response to the said advertisement. She passed her M.Sc. in Chemistry in the year 1987 in 1st division with 81% marks from I.I.T. Kanpur. She appeared at the competitive examination held in March, 1991 by the Public Service Commission and as per self assessment she was confident about her success in the written examination. On 25.9.91 the respondent No.1 informed the applicant that there is no mention of specialisation in the final year mark sheet of M.Sc. submitted by her and she was asked to produce a certificate from the concerned University as regards specialisation in the subject. Accordingly the applicant submitted a certificate from I.I.T. Kanpur (Ann.P/8), but till the declaration of results nothing was communicated to the applicant. (The P.S.C. did not mention about any such specialisation in their advertisement nor it rejected the certificates issued by I.I.T. Kanpur). When the result was declared the name of the applicant was missing from result sheet. She made a representation to respodnent No.1 (P.S.C.)

which went un-responded. She then served a notice for demand of justice but that too with no avail. Aggrieved by the action of the respondents, she made an application before this Tribunal which was registered as O.A.No.393/92.

On 12.1.93 the counsel for the applicant submitted in the said application before the Tribunal that P.S.C. has taken steps to set at rest the grievance of the applicant by appointing a Committee of Experts to ascertain whether the examinations passed by the applicant and the certificates produced by her satisfy the eligibility requirement for the post of Assistant Professor in Inorganic and Physical Chemistry. This Tribunal on statement of the Counsel for the respondent No.1 disposed of the matter in terms of the order re-produced below:-

> "Shri Bagadia submits that P.S.C. has taken steps to set at rest the grievance of the applicant by appointing a Committee of experts to ascertain whether the examinations passed by her and the certificates produced satisfy the requirements of eligibility viz. for appointment to the post of Assistant Professor Inorganic Chemistry and/or Physical chemsitry. Shri Patne does not dispute it. Since the matter is already settled and steps are likely to be taken with the consent of both parties, this petition is rendered infructuous and is accordingly disposed of. No order as to costs."

3. Thereafter nothing was heard from the respondents inspite of representation being made she was not informed whether any committee as directed was constituted and of which experts. The applicant, therefore, filed this application before this Tribunal. The grievance of the applicant in the present application is that inspite of the applicant have cleared the written test and successfully faced the oral interview her result is being not declared. The applicant was not given to know how the Committee was constituted. She was also not called by the Expert Committee for explaining the qualifications nor any expert from I.I.T. Kanpur was called for giving opinion and explaining the fact that the M.S.C. degree of I.I.T. fulfils eligibility criteria of qualifications. The applicant has raised various grounds to challenge the action of the respondents.

4. The respondent No.1 (P.S.C.) has submitted a parawise reply denying generally all the averments made by the applicant in her application. It is unnecessary to reproduce the detailed contents of the reply. However, the facts stated in para 1 are not disputed. Respondent No.2 has not filed any reply.

5. The main question in this case which comes up for consideration is whether the respondents have acted in terms of commitment made before this Tribunal by the counsel for the respondents, because the matter was disposed of on the statement made before this Tribunal by the Counsel for the

respondent No.1. As is implicit from the order the P.S.C. had to take steps to set up a Committee of experts to ascertain whether examinations passed by the applicant and the certificates produced satisfy the requirements of eligibility for appointment to the post of Assistant Professor in Inorganic and Physical Chemistry. The contention of the learned Counsel for the applicant is that the respondents did not make any reference to the Experts Committee in terms of the agreement made before this Tribunal by the parties. Further the Committee of experts was appointed to examine whether the certificates exhibiting qualifications of the applicant fulfill the required eligibility criteria but on the contrary, the Committee only went through the language of the advertisement and closed the matter without application of mind to the issue for which the same was constituted.

6. The respondents have submitted (Ann.R-5) which contains the minutes of the meeting of the Committee. The Committee was constituted of four persons namely:

1. Prof.D.D.Mishra	2. Prof. S.P.Banarjee
3. Prof.T.C.Sharma	4. Shri Moti Singh, Commissioner Higher Education (Govt. Nominee)

The Committee has expressed its opinion in the following terms:-

> "The Committee has carefully examined all the facts of the case in detail and in its broader perspective and gone through all the relevant papers pertaining to this specific case submitted by the candidate and the P.S.C. The Committee is of the unanimous opinion that looking to the condition of advertisement wherein special branches namely Inorganic, Physical and Organic Chemistry are mentioned as the basis of requirement for eligibility for appointment, the case under review fails to fulfill the basic requirement of eligibility."

The respondent No.1 has enclosed the copy of minutes of another Committee of local Professors for making reference to the Committee of Experts stated above.

7. The short question which calls for consideration in this case is whether a reference was made as per the commitment made by the respondent No.1 before this Tribunal in O.A.No.393/92 and whether the Committee has considered the case of the applicant from the angle suggested in the reference.

8. On going through the minutes of reference (enclosed with the opinion of the experts), it appears that the referring Committee did act look to the substance of the agreement/commitment made before the Tribunal. It only gives a narration of incidents in the back ground and opinion of the local Committee which examined the eligibility.

9. The Experts Committee too has not even considered the points referred to it. It has confined its consideration to the terms of the advertisement and has given a vague opinion which does not lead to any definite conclusion as regards eligibility of the applicant with particular reference to speciality in the subject she applied for. It is not in terms of the agreement made by the parties before this Tribunal. It may be stated here that so far as the advertisement is concerned, it does not make any specific mention as regards any speciality in any branch or subject. What it requires is that the candidates should have obtained the degree of Master of Science in the subject. It was brought to my knowledge during the course of the arguments that the appointments from the select list are being done irrespective of any speciality which is advocated against the applicant. The opinion of the Committee certainly does not give a clear opinion as to how they treat the qualification of the applicant not at par with the others nor they say that a degree of M.Sc. from I.I.T. is not equivalent to the degree passed from any other University. The Experts have not taken cognizance of other qualifications acquired by the applicant. Undisputedly she has exhibited a very meritorious educational career as appears from the certificates produced by her. Obviously, she could not have been allowed to do her Ph.D. unless she fulfills the requisite qualifications or have acquired speciality in that branch. This Tribunal cannot thrust its opinion as an expert but it can certainly expect that the parties should have acted upon their agreement made before this Tribunal terms, and not otherwise, or in a superfluous manner.

10. Thus, without going into further discussion on the issues raised in this application I am of the view that neither the reference was made by the local Committee of P.S.C. in terms of the agreement of the parties as stated in the order of this Tribunal nor the Experts Committee (which did not include any expert from I.I.T. Kanpur) constituted to examine the qualification considered in terms of reference. Thus the grievance of the applicant is justified.

11. Hence, this application is allowed and as prayed for, the respondents are directed to consider the case of the applicant on the basis of syllabus of the IIT. Kanpur and the Indore University or other Universities. If the respondents find it necessary to re-constitute a Committee a nominee from IIT, Kanpur also shall be included in it. If the applicant makes a prayer she may be given a personal hearing. No order as to costs.

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MADHYA PRADESH ADMINISTRATIVE TRIBUNAL: JABALPUR
Original Application No.3/89
D.D.22.2.1994
Hon'ble Mr. Justice P.C.Pathak, Chairman

Dr, Tulsidas Tiwari ... Applicant
Vs.
The State of M.P. & Ors. ... Respondents

Selection & Regularisation:

The applicant was appointed as Demonstrator was promoted as Lecturer - According to the channel of promotion the Demonstrator is eligible for promotion as Lecturer - On completing of 5 years of service, he is also eligible for consideration for promotion as Reader - One of the conditions of the appointment was that he shall apply for appointment as Reader as and when the vacancies on the post of Reader are advertised by the P.S.C. – When the vacancy was notified by advertisement his application was rejected on the ground that he had crossed 38 years of age – After considering the relevant rules the Tribunal allowed the application with a direction to constitute a Committee with consultation with P.S.C. to screen the applicant for the post of Reader and if found suitable to treat him as Reader.

Held:

The question for consideration is whether the P.S.C. was right in rejecting the applicant's candidature on the ground of over age. There was no Recruitment Rule governing the appointment of the Readers in Ayurvedic Colleges. The age limit of 38 years as on 1.1.87 was prescribed by the P.S.C. of its own. The application submitted by him was not an application from the open market but was an application in compliance with the condition of appointment by a candidate already working as ad hoc Reader. Therefore, his application could not have been subjected to scrutiny as per terms and conditions of the advertisement. Instead he was governed by the condition of his appointment letter itself. The refusal by the P.S.C. to call him for interview by letter dt. 6.6.1987 was, therefore, illegal and it resulted in denial of opportunity to get himself selected by the P.S.C.

ORDER

This application has been filed for a direction to the respondents to regularise the applicant on the post of Reader and also to give him seniority on the said post with all monitory and other consequential benefits from the date i.e. 22.12.1979 he joined the post of Reader in pursuance to promotion order dt. 10.12.79.

2. The applicant was appointed as demonstrator in Ayurved by order dt. 29.5.1974 (Ann.R/I) and was posted at Jabalpur. Thereafter he was promoted as Lecturer (dosh dhatu mal) on a temporary basis by order dt. 2.12.75 (Ann.P/1). The applicant was regularised on the said post by order dt. 28.2.78 (Ann.P/2). According to the channel of promotion the demonstrator is eligible for promotion as Lecturer. On completing of 5 years of service, he is also eligible for consideration for promotion as

Reader. Since he had completed 5 years of qualifying service as Lecturer by order dt. 10.12.79 (Ann. R/II of the return) he was promoted as Reader (dosh Dhatu mal) on ad hoc basis. One of the conditions of the appointment was that he shall apply for appointment as Reader as and when the vacancies on the post of Reader are advertised by the P.S.C. On the date of his promotion as Reader, he was merely about 32 years; his date of birth being 3.9.47. After he took charge as Reader, the P.S.C. did not notify the vacancy until he crossed the age of 38 years on 3.7.85. The vacancy was for the first time notified by an advertisement No.0286 (Ann.P/4). His application was, however, rejected and was not called for the interview by the P.S.C. vide letter dt 6.6.1987 (Ann.P/5) on the ground that he had crossed the age of 38 years. The applicant submitted representation (Ann. P/6) on 11.8.88 and reminders (Ann. P/7 to P/9). Since no action was taken he filed the present petition on 2.1.89.

3. During the pendency of this petition, the P.S.C. issued another advertisement No.0486 inviting applications by 25.3.1989 to fill in the several posts of Professors, Readers etc. At Sl.No.7 applications were also invited to fill in one post of Reader in "dosh dhatu mal". The applicant filed an application for grant of interim relief viz., to keep one post of Reader in dosh dhatu mal vacant. The Tribunal by its order dt. 15.5.1989, rejected the application observing that any appointment that may be made by the State Government consequent to the recommendation of the P.S.C., will be subject to the final orders passed by the Tribunal.

3. On 27.12.89 the State Government issued an order reverting the applicant to the post of Lecturer. The applicant again filed an application on 4.1.90 for staying the order of reversion. The Tribunal passed an order on 5.1.90 restraining the respondent state from reverting him to the post of Lecturer until further orders.

4. On 26.6.90 one intervener Smt. Leela Pandey filed application seeking permission to intervene in the case on the ground that she was selected for appointment as Reader in dosh dhatu mal as per P.S.Cs. letter dt.9.1.90 and her name is at Sl.No.1 in the merit list but on account of stay granted by the Tribunal, the applicant appointed on ad hoc basis continues as Reader consequently appointment order was not being issued in her favour. Since the tenure of the applicant was till the appointment of a candidate selected by the P.S.C., he was not entitled to continue as Reader. At any rate she was entitled to appointment order immediately. By order dt. 24.7.90, the permission to intervene was granted to Smt. Leela Pandey. She was directed to file reply on affidavit, if any. On 11.10.93 the intervener filed another application I.A.No.1806/93 for an interim direction to the respondents to extend the validity of select list in respect of Reader (dosh dhatu mal) as desired by the State Government in its letter dt. 30.6.93 (Doc.No.2), alternatively she prayed for a direction to issue appointment letter

to the intervener as Reader (dosh Dhatu mal) in the vacant post of Dr. B.K.Silkari in Ayurvedic College, Jabalpur. No order was passed on the said application.

5. Respondents No.1 and 2 filed return denying that applicant was appointed as demonstrator in Ayurved. He was appointed as demonstrator in Science vide appointment letter (Ann.R/1). This was a Class-III post. Similarly they denied that he was promoted on the post of Lecturer. In fact he was appointed on ad hoc basis which was regularised w.e.f. 28.5.78 vide Annexure P/2. They also denied that the applicant was promoted on the post of Reader. He was merely appointed on ad hoc basis on the said post. The recruitment of the lecturers, readers etc. of Ayurvedic Colleges are governed by M.P. Public Health (Indian System of Medicine Gazetted) Recruitment Rules, 1987. Schedule-II prescribes the promotion quota as 75%. The age limit for appointment by recruitment on the post of Reader is 40 years and not 38 years. They further submitted that the applicant was appointed as Reader subject to the selection by the P.S.C. Therefore, without the selection by P.S.C. his services cannot be regularised on the post of Reader. They denied that the P.S.C. did not invite applications for the post of Reader upto the time when the applicant was within the age limit. The principle of promissory estoppel is not applicable in the present case. The application is liable to be dismissed.

6. The question for decision is whether the applicant has a right to regularisation on the post of Reader. A perusal of order dt. 10.12.79 (Ann. R/II) shows that the State Government appointed the applicant and two others on ad hoc basis as Readers until further orders or until the appointment of a candidate selected by the P.S.C. as Reader whichever is earlier. A condition was imposed on him that he shall make application for appointment as Reader as and when the post is advertised by the P.S.C. The advertisement to fill up the post of reader (dosh dhatu mal) was published in Rojgar Samachar dt. 7.9.86 (Ann.P/4). Since there was no recruitment rules, the P.S.C. prescribed the age limit of the applicants as 38 years as on 1.1.87. The relaxation by 5 years was allowed to the S.C. & S.T. post. However, the P.S.C. vide its letter dt. 6.6.87 (Ann.P/5) informed him rejection of his application since he was overage.

7. The question for consideration is whether the P.S.C. was right in rejecting the applicant's candidature on the ground of over age. There was no Recruitment Rule governing the appointment of the Readers in Ayurvedic Colleges. The age limit of 38 years as on 1.1.87 was prescribed by the P.S.C. of its own. The application submitted by him was not an application from the open market but was an application in compliance with the condition of appointment by a candidate already working as ad hoc Reader. Therefore, his application could not have been subjected to scrutiny as per terms and

conditions of the advertisement. Instead he was governed by the condition of his appointment letter itself. The refusal by the P.S.C. to call him for interview by letter dt. 6.6.1987 (Ann.P-5) was, therefore, illegal and it resulted in denial of opportunity to get himself selected by the P.S.C.

8. In view of the foregoing discussion, it must be held that the applicant fulfilled the condition imposed on him by appointment letter (Ann.R-2) by submitting the application for appointment as Reader. The refusal to call him for interview was an illegality committed by the P.S.C. The applicant cannot be blamed for his non-selection by the P.S.C. On the basis of such non-selection by the P.S.C. alone, the State Govt. could not revert him to his substantive post of Lecturer. The applicant is working as Reader albeit on ad hoc basis since 1979, without any complaint whatsoever. Considering all these, a direction must be issued to the State Government to constitute a Committee in consultation with the P.S.C. within three months of the receipt of this order to screen him for the post of reader (dosh dhatu mal) and if found suitable to treat him Reader (dosh dhatu mal) from such date it may deem proper.

9. The next question for consideration is whether a direction ought to be issued to the State Govt. to issue appointment order in favour of the intervener Dr. (Smt.) Leela Pandey. The P.S.C. selected and put her name at Sl.No.1 in the merit list. By letter dt. 30.6.93 (Doc.No.2) the Under Secretary, Public Health & Family Welfare Department addressed a Memo to Secretary P.S.C. Indore requesting him to extend the validity of the select list. There is no material on record to show whether the request was acceded to or refused. Since she was duly selected and was placed at Sl.No.1 in the select list and one post of Reader in doshdhatumal has already fallen vacant she cannot be denied the appointment on account of the delay which was not occasioned by her. She cannot be made to suffer for the mistake committed either by the P.S.C. or by the State Government. Therefore, a direction must be issued to the State Govt. to issue promotion order to her within one month of the receipt of this order, if necessary by extending the validity of the select list and by relaxing the age bar etc. if any. She will be assigned seniority on the post of Reader without any monitory benefit from the same date on which the State Govt. would have issued the appointment letter to her in the normal course in the year 1990, had there been no stay order by the Tribunal. The second post is lying vacant in Ayurvedic College, Jabalpur in consequence of superannuation of the Reader in doshdhatumal.

10. The applications filed by the applicant and the intervener are allowed to the extent indicated above. No order as to costs.

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MADHYA PRADESH ADMINISTRATIVE TRIBUNAL, BHOPAL BENCH
Original Application No.502/98
D.D. 22.6.1999
Hon'ble Vice Chairman N.S.Sethi &
Hon'ble Member (J) Mr. K.K.Shrivastava

Ritesh Kumar Sharma ... Applicant
Vs.
State of Madhya P\radesh & Anr. ... Respondents

Eligibility:

Whether Condition No.4 in the advertisement that candidates who have passed higher secondary or graduate degree from any School or College in M.P. are only eligible is valid? – No

The applicant was born and studied upto 5th class in Mandhya Pradesh and prosecuted his further studies elsewhere and applied for the State Service Examinations 1998-99 for appointment in various services – The application was rejected on the ground that he did not satisfy Condition No.4 – As per interim order passed in this application he was permitted to participate in the examination subject to the result of the case – Tribunal held that the condition offends Articles 14 and 16 of the Constitution and also Rule 5 of the Madhya Pradesh Civil Services (General Conditions of Services) Rules 1961 and quashed Condition No.4 and rejection of applicant's candidature with a direction to publish the result of the applicant.

ORDER

The following order of the Bench was passed by the Hon'ble Vice Chairman, Shri N.S.Sethi.

Madhya Pradesh Public Service Commission – respondent No.2 had issued an advertisement on 9th April 1998, copy placed at Annexure-A2, inviting applications for the State Civil Services Examination 1998-99 for appointment in various services under the State Government respondent No.1. The applicant had applied for admission to the examination in response to this advertisement. However, his candidature was rejected by respondent No.2 vide its letter dated 17.6.1998 a copy placed at Annexure A1. The applicant was informed that only such applicants can be considered for admission to the examination who have either passed the Higher Secondary or the Graduate degree from any school or college in Madhya Pradesh in accordance with condition No.4 of the advertisement notice which has been incorporated in accordance with the orders of the Government contained in their circular letter No.C-3-25/97/3/1 dated 2.12.1997. Aggrieved by this rejection of his candidature the present application was made by the applicant and by way of interim relief it was directed that the applicant shall be permitted to participate in the full examination, but his result shall not be declared pending the disposal of this petition. Accordingly the applicant was allowed to take the examination by respondent No.2.

2. The applicant's contention is that he was born at Sagar on 11.9.1974 and that he studied in Madhya Pradesh upto VI class. However, since his father was a Police Officer he was transferred out of State and therefore, he could not prosecute his studies in Madhya Pradesh but had to pursue his studies outside Madhya Pradesh. He passed the All India Secondary School Examination, that is the X class from the Central School Agartala in the year 1989, the Central Board of Secondary Education Examination of the XII class from Delhi Public School in Delhi in 1991 and thereafter he graduated from the Delhi University in the year 1994. He has, therefore, contended that he has right to secure public employment in Madhya Pradesh and if he is not allowed to do so he would suffer irreparable loss and further that the direction of the State Government contained in the aforesaid circular dated 2.12.1997 – copy placed at Annexure-A7, is unfair, illegal and against the principles of natural justice. It is also aggrieved by him that the order placed at Annexure-A1 of the Public Service Commission rejecting his candidature is arbitrary, illegal and violative of Articles 14, 16 and 21 of the Constitution. He has, therefore, prayed that the impugned order dated 17.6.1998 (Annexure-A1) be quashed and that the respondents be directed to permit him to participate in the examination. The applicant has also made a contention which is not based on record that the advertisement notice does not contain a condition that a candidate should have passed the Higher Secondary examination or obtained the Graduate Degree from school/college in Madhya Pradesh and that the condition relating to observance of the direction contained in Government letter dated 2.12.1997 (Annexure-A7) was not mentioned in the advertisement and therefore, the respondent No.2 cannot back track and reject his candidature. A perusal of the advertisement shows clearly that the said condition was incorporated and a reference was also made to Government order dated 2.12.1997. The applicant has apparently mis-read condition No.4 of the advertisement notice. Therefore, the only objection which remains to be considered is whether he has a right to serve in the State and whether the candidature has been rejected in an unfair and illegal manner and whether the impugned order is arbitrary and violative of the constitutional provisions.

3. No return has been filed by the respondent State although sufficient time and opportunity was granted to it. Respondent No.2 has filed the return, the refrain of which is that it has acted strictly in accordance with the directions of the State Government contained to their letter dated 2.12.1997 (Annexure A7) and also in accordance with condition No.4 of the advertisement notice. According to this respondent the condition No.4 has been uniformally applied to all similarly situated candidates.

4. Condition No.4 of the advertisement notice based upon Government Circular dated 2.12.1997 creates a differentiation between two sets of candidates – one category being of those candidates who

have passed their Higher Secondary Examination or the Graduate Degree examination from any school or college located in Madhya Pradesh and the other being of those who have passed the said examinations from institutions located outside the State. It does not per-se lay down that candidates who are not residents of Madhya Pradesh shall not be entitled to take the examination. The advertisement thus does not bar candidates who are not residents of Madhya Pradesh from taking the examination. This is also clear from the note below the table containing the List of Centres which lays down that candidates who are residents of Madhya Pradesh alone may indicate the choice of the centre for taking the examination and that those who are not residents shall leave the centre number blank. The full note for facility of reference is reproduced below:

"Omitted as the matter is in Hindi"

Quite clearly there is no intention to bar the candidates who are not Mool Niwasi (bonafide residents) from participating in the examination. We might also observe that no order/direction of the State Government has been brought to our notice which has the effect of debarring candidates who are not Mool Niwasi from seeking public employment in the State. In fact no such order/direction could conceivably be passed by the State Government looking to the constitutional provisions particularly those contained in Article 16 of the Constitution.

5. The differentiation which has been made discriminates between candidates who have passed the examinations which have already been mentioned above from institutions within the State and from institutions outside the State. The issue to be determined is whether this differentiation/discrimination is reasonable or not and whether such classification offends any provision of the Constitution. Here we may mention that the State Government having not filed any return, which would have indicated the objective of the said differentiation/classification made by it the Tribunal is unable to appreciate and determine whether the said differentiation/classification has any nexus with the objective sought to be achieved. It was necessary for the Government to have enlightened the Tribunal as to what objective it was seeking to achieve in making the differentiation/classification. That having not been done it can be said that the action of the State Government was arbitrary, no reason having been shown for issue of the direction/orders leading to the said differentiation. Ex-facie too the Government order/direction contained in its circular dated 2.12.1997 (Annexure-A7) is unreasonable and based upon unintelligible differentiation/criteria. The examples given in the subsequent paragraphs also support this view.

6. Candidates who belong to Madhya Pradesh, that is to say those who can be termed to be Mool Niwasis, have quite clearly a right to secure public employment under the State Government. Many such candidates who can afford to do so secure admission in good schools and colleges outside the State in places like Delhi because the standard and quality of education imparted at such institutions is better than that in the institutions of Madhya Pradesh. If such candidates who pass the Higher Secondary as well as the Graduate Degree examination from outside Madhya Pradesh they would be denied the opportunity for securing employment under the Government in terms of the Government Instructions contained in Annexure-A7. In other words the bonafide residents of the State would be denied opportunity of securing employment within the State which cannot be said to be reasonable under any circumstances. A bonafide resident who does not go outside the State for study would be eligible for appointment under the Government but a bonafide resident who goes outside the State to prosecute his studies would not entitled to secure such employment. Clearly this discrimination is wholly unreasonable.

7. We may now take the case of a candidate belongs to an aboriginal scheduled tribe of Madhya Pradesh or a candidate belonging to scheduled caste of Madhya Pradesh whose father has secured employment under the Government of India on account of the application of the reservation orders and who has remained posted throughout his career outside Madhya Pradesh and, therefore, his children have received their education in institutions outside Madhya Pradesh and passed their Higher Secondary and Graduate Degree examinations from institutions in other States. The children of such Government of India officer would thus be denied the benefit of securing employment within the State of their origin. There is absolutely no reason why such candidates should be precluded from securing employment within the State of their origin. The differentiation, therefore, is clearly arbitrary and unreasonable. We might also mention that in many good Colleges/Universities outside the State, as for example the Delhi University, reservation for students belonging to the Scheduled Tribes and Scheduled Castes candidates exists. Many of these reserved seats would be filled up by candidates belonging to the reserved scheduled categories from outside the State of Delhi. Therefore, if students belonging to scheduled tribes and scheduled castes of Madhya Pradesh are able to secure admission against the said reserved quota and thus pass the examinations from outside Madhya Pradesh they too would be denied the benefit of securing employment within their own State, which would be clearly unjustified and it would amount to denial of the concession provided to them by the Constitution of appointment on reserved posts within Madhya Pradesh.

8. In continuation of what we have stated in the preceding paragraph we would further like to observe that in terms of the Constitution (Scheduled Castes) Order 1960 and the Constitution (Scheduled Tribe) Order 1950 the castes, races or tribes or tribal communities or parts or groups within such castes and tribes as are specified in the different parts of the Schedule to the respective Orders are in relation to the States to which the parts of the Schedule respectively relate are deemed to be Scheduled Castes or Scheduled Tribes so far as regards members thereof who are residents of the localities specified in relation to them in the respective parts of the Schedules. For facility of reference clause 2 of the Constitution (Scheduled Castes) Order 1950, which is similar to Clause 2 of the Constitution (Scheduled Tribes) Order 1950 is reproduced below:

> "2. Subject to the provisions of this Order, the castes, races or tribes of parts of or groups within, castes or tribe, specified in Parts I to XIX of the Schedule to this Order shall, in relation to the States to which those parts respectively relate, be deemed to be Scheduled Castes so far as regards members thereof resident in the localities specified in relation to them in those parts of that Schedule".

A reading of the above clause conveys that the castes, races or tribes etc. are deemed to be Scheduled Castes in relation to the States only in which they are residents. In other words they are not deemed to be Scheduled Castes if they are residents in some other State. It follows from this that although candidates from such castes would be eligible for appointment to posts under the Government of India they would be eligible for appointment to posts under the Government of that State in relation to which they are Scheduled Castes. Same interpretation would hold good for the Scheduled Tribes. In other words a person who may be a Scheduled Tribe or a Scheduled Caste in one State can seek employment under the State Government in the State in relation to which he has been declared a Scheduled Caste or Scheduled Tribe and not in any other State in relation to which his caste or community has not been declared to be a scheduled caste or scheduled tribe. In view of this position if the ward of a Government of India officer who is a Scheduled Caste or Scheduled Tribe in relation to Madhya Pradesh has received his education outside the State and passed the Higher Secondary/ Graduate Degree examination from an institution outside Madhya Pradesh then he would not be entitled to obtain the benefit of reservation in the State in which he has received his education and passed examinations from institutions in that State. Thus such a ward would neither be entitled to employment under the State Government of the State in which he has received his education nor would he be entitled to seek employment under the Government of Madhya Pradesh, on account of the Government direction dated 2.12.1997 (Annexure-A7). This would be a most unreasonable

dispensation for him and would amount to the denial of a benefit made available to him by the Constitution.

9. We may also take the case of wards of officers belonging to the All India Services as also of State Civil Services. Many such officers are themselves bonafide residents of Madhya Pradesh. Due to the exigency of administration many of these officers are posted outside Madhya Pradesh often for long tenures. Therefore, naturally the children of such officers would receive their education in institutions outside Madhya Pradesh and thus they might have passed the Higher Secondary as well as the Graduate Degree examinations from institutions outside Madhya Pradesh. Such wards of officers would also be barred from taking up Government employment in the State because of the said Government instructions dated 2.12.1997. These officers would be such who would have spent a major part of their service career serving the State of Madhya Pradesh often in backward tracts. It is entirely unreasonable to prevent their wards from being able to take up employment under the Government within the State. We can see no justification for this denial of opportunity to them. The present applicant's case is of this category.

10. Restricting the competition to only those candidates who have passed their Higher Secondary or Graduate Degree examinations from institutions in Madhya Pradesh is also not in the larger public interest. As has already been pointed out above many bright students go outside the State to study in good institutions. Denying the opportunity of employment to them within Madhya Pradesh has the effect of penalising merit and encouraging mediocrity which can be certainly not in the interest of the State.

11. We might also mention that nowadays apart from there being open Universities there are Universities which offer correspondence courses. Thus students residing within Madhya Pradesh can avail of the facility of correspondence courses and obtain Bachelor's Degree from such Universities which are offering correspondence courses or from open Universities. If the degree is obtained from a University which is outside Madhya Pradesh it would be deemed that he has not obtained the said Degree from an institution within the State and, therefore, such student would be debarred from seeking employment under the State Government provided he has not passed the Higher Secondary examination from a school within Madhya Pradesh. We do not see how such a student who may be a bonafide resident of the State can be deprived of the opportunity of making employment under the State Govt. Conversely there might be students who are not residents of Madhya Pradesh and who might have even not stepped into Madhya Pradesh, who might obtain a Degree through a

correspondence course from a University in Madhya Pradesh and such students would, therefore, be entitled to seek employment under the Government of Madhya Pradesh. This discrimination is so obviously invidious that it requires no further comments.

12. Article 14 of the Constitution lays down the general rule of equality. It provides that the State shall not deny to any person equality before the law or the equal protection of loss within the territory of India. The differentiation which has been made above between two sets of candidates is clearly not a reasonable classification. The condition No.4 of the advertisement and the Government order dated 2.12.1997 on which it is based clearly seek to bring about a discrimination which is entirely unjustified and, therefore, they offend Article 14 of the Constitution.

13. Article 16, which is an instance of the application of the general rule of equality laid down under Article 14 and is a species thereof provides for equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. For facility of reference clauses (1), (2) and (3) of this Article are reproduced below:

> "16. (1) There shall be equality of opportunity for all citizens in matter relating to employment or appointment to any office under the State.
>
> (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
>
> (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an officer under the Government of, or any local or other authority within, a State or Union territory, any requirement as to "residence within that State or Union territory, prior to such employment or appointment."

As seen from the above all citizens of the State are guaranteed equality of opportunity in the matter of employment or appointment to any office under the State. Therefore, quite clearly those candidates who have not passed examinations in question from institutions within Madhya Pradesh cannot be denied the opportunity of employment/appointment under the State Government and therefore the said condition No.4 of the advertisement and the Government Order dated 2.12.1997 offend this equality provision of the Constitution. Clause (2) also provides that no citizen shall only on the ground of residence be ineligible for or be discriminated against in respect of any employment or office under the State. The set of candidates who have passed the examinations in question from institutions out of Madhya Pradesh would naturally have resided at places outside Madhya Pradesh because the course

of study requires them to be at the places where they are pursuing their studies. Therefore, quite clearly indirectly because they reside outside the State the said condition and Government order seek to exclude them from obtaining employment within the State. Thus resulting in discrimination on the ground of residence.

14. While under clause (2) of Article 16 residence in a State cannot be a ground for discrimination in the matter of employment under the State, clause (3) makes an exception to this provision. Under this clause the parliament is empowered to make a law prescribing residence in a particular State to be a requirement for employment within the State. Thus residence within the State prior to seeking employment/appointment under the State cannot be made a ground for considering a person eligible for appointment under the State unless the Parliament has passed a law prohibiting such employment/ appointment. It is only the Parliament which can make a law by which residence within the State prior to employment/appointment can be made compulsory or accessory for seeking employment/ appointment under the State. No such law has been shown to have been passed by the Parliament. It is thus clear that residence within the State is not a pre-requisite for appointment under the State Government. Therefore, the State Government cannot impose any condition which lays down that only a local candidate would be employed or that a candidate who is not a local cannot be given employment. Such condition would be violative of Article 16. Therefore, neither the Public Service Commission nor the State Government could impose the condition that candidates who have passed the examinations in question from institutions outside Madhya Pradesh are not eligible for applying for the State Civil Services Examination and that only local candidates, that is to say, candidates who have passed the said examinations from institutions within Madhya Pradesh would be considered eligible for appointment under the Government.

15. We would also like to observe that the advertisement notice in condition No.10 lays down the minimum qualifications. The minimum qualification is that the candidate should possess a Degree from any recognised University. Such recognised University can be from outside Madhya Pradesh also. Thus possession of a Degree from a University outside Madhya Pradesh could be no bar. However condition No.4 contradicts this position and derecognises the Degrees obtained after regular course of study from Universities located outside Madhya Pradesh, which is quite clearly impermissible.

16. Before we close we would also like to refer to rule 5 of the Madhya Pradesh Civil Services (General Conditions of Services) Rules 1961 which lays down eligibility for appointment to a service

or post under the State Government. This rule lays down that a citizen of India or a subject of Sikkim or a person of India origin who has migrated from Pakistan with intention of permanently settling down in India or a subject of Nepal or of Portugese or French territory in India shall be eligible for appointment. This rule shows clearly that any citizen of India is entitled to appointment to the service or post under the State Government. The prohibition placed on candidates who have passed their Higher Secondary or Graduate Degree examinations from institutions outside Madhya Pradesh whether they are bonafide residents of Madhya Pradesh or not, is clearly violative of this rule. All such candidates who have passed the said examinations from institutions outside Madhya Pradesh and who are citizens of India are eligible for appointment to service/posts under the State Government. The applicant in the present case is clearly a citizen of India and, therefore, he is entitled to be considered for appointment to the service or post under the State Govt. The rejection of his candidature is, therefore dehors the said rule.

17. In view of the above discussion it is clear that condition No.4 of the advertisement notice as well as Government order dated 2.12.1997 (Annexure A7) are clearly arbitrary, unreasonable and discriminatory and violative of the equality provisions of Articles 14 and 16 of the Constitution and hence they cannot be sustained. Therefore, they are both quashed and consequently the impugned rejection of the applicant's candidature vide letter dated 17.6.1998 of respondent No.2 (Annexure-A1) is also quashed. Since the applicant has already taken the examination as per the interim direction of the Tribunal his result may now be declared and based on such result further action as per the rules shall now be taken by the respondents.

18. Public Service Commission has issued another advertisement for conducting the State Civil Services Examinations for the next year 1999-2000 incorporating the same offending condition. This condition too is quashed.

19. The respondents shall bear their own cost and shall pay those of the applicant amounting to Rs.1,500/-.

Ordered accordingly.

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HIGH COURT OF MADHYA PRADESH, INDORE BENC, INDORE
WRIT PETITION NO.666/98
D.D. 27.3.2000
Hon'ble Mr. Justice N.K.Jain

Mahmood Ali Siddiqui ... Petitioner
Vs.
State of M.P. & Anr,. ... Respondents

Recruitment:

The petitioner was a candidate under OBC for Entrance Examination held in 1996-97 for 96 posts of Civil Judges Class-II – After selection the petitioner was placed at Sl.No.7 in the waiting list – As 4 candidates in the waiting list were given appointment 4 selected OBC candidates were treated as general merit candidates – The petitioner assailed the selection on the ground that revaluation of second paper ordered by the Commission was contrary to the Rule and 7 selected OBC candidates secured more marks than the last person selected in the general category – High Court overruled the first objection regarding revaluation as the same was done in consultation with the High Court – Regarding the second objection although 7 selected candidates under OBC secured more marks than the last candidate selected under GM category only 4 were selected under GM category the other 3 did not qualify on account of their age consequently High Court dismissed the writ petition.

Held:

Revaluation was justified as some of the candidates while writing model order/judgment in second paper either mentioned their names at the end or gave some other description thereby making their identity possible. It was in these circumstances and in consultation of the High Court revaluation was ordered.

Further held:

A person belonging to reserved category can be selected as a general candidate only when he fulfills all the conditions necessary for such selection, that is to say, he should not only secure requisite marks in the competitive examination but also fulfill other eligibility conditions prescribed under G.M. category.

ORDER

By this petition under Article 226/277 of the Constitution of India the petitioner calls in question the selections made by the respondents for appointments to the posts of Civil Judge, Class II, and also seeks direction for his appointment on one such post.

2. Petitioner Mahmood Ali Siddiqui appeared in the entrance examinations held in 1996-97 for the 96 posts of Civil Judges, Class II. He offered his candidature as a candidate belonging to Other Backward Classes. After written and oral examination the petitioner was placed at Serial No.7 of the

waiting list in O.B.C. category. First 4 candidates of the said waiting list have since been given appointments, as 4 selected candidates of O.B.C. category were treated to have been selected in general category on the basis of their merit.

3. The petitioner has firstly assailed the entire selection on the ground that revaluation of the second paper of the candidates was ordered by the Public Service Commission contrary to the Rule thus vitiating the entire process of selection. The petitioner further seeks his appointment to the post of Civil Judge, Class II on the ground that 7 selected candidates of the O.B.C. category had secured more marks than the last person selected in the general category and therefore, all those candidates should have been treated as candidates selected in general category and these 7 vacancies should be filled from the waiting list which includes the petitioner at Serial Number 7.

4. Respondent No.2 – The M.P. Public Service Commission alone has filed return in oppugnation of the petitioner, while the respondent No.1 – State of M.P. has merely adopted the return filed by the former. It is submitted that revaluation of the second paper was ordered in the peculiar circumstances as some of the candidates while writing model order/judgment in answer to the second paper either mentioned their names at the end or gave some other description thereby making their identity possible. It was in these circumstances and in consultation of the High Court that revaluation of the answer books of second paper was ordered. It is further pointed out that the controversy projected on this count stands resolved by a decision of this Court passed at the main sent in W.P.No.2204/1997 (Sandeep Krishnan Tiwari & Anr. Vs. State of M.P. & Ors) decided on 17.3.99. As regards the second ground, it is submitted that although 7 selected candidates in O.B.C. category had secured more marks than the last candidate selected in general category, only 4 of them were absorbed in general category leaving the 3 in the reserved category itself as those 3 candidates did not qualify for being selected in general category on account of their age. These3 candidates have sought relaxation in the matter of age which was available only to the candidates belonging to SC/ST and O.B.C.

5. I have heard Shri D.R.Upadhyay, learned counsel for the petitioner and Shri Prakash Verma, Government Advocate and Shri V.P.Khare, counsel for respondents.

6. As regards the first ground regarding revaluation, it is conceded by learned counsel for both the parties that the mater stands concluded by another decision of this Court in Sandeep Krishnan (supra). In fact the revaluations were made by the P.S.C. in consultation with the High Court. In

Sandeep (supra) this court has taken into consideration all the facts and circumstances which necessitated the said revaluation and held that the revaluation was justified and that the Commission has taken all necessary care by concealing the identify of candidates before subjecting the answer books of all candidates to a fresh process of valuation. In the instant case also, therefore, the petitioner is not entitled to call in question the said revaluation undertaken by the Commission.

7. As regards the second ground which is the main ground taken by the petitioner seeking his selection for the said post, the relevant provision of law is incorporated in Sec.4(4) of the Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, 1994 (for short, 'the act') and which thus reads as follows:

> "4.(4) If a person belonging to any of the categories mentioned in sub-section (2) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under sub section (2). [emphasis supplied]

8. A careful analysis of sub-section (4) above would reveal that for the purpose of this sub-section, a candidate belonging to the reserved categories must get selected on the basis of merit in an open competition with general candidates. A person can be selected as a general candidate only when he fulfills all the conditions necessary for such a selection, that is to say, he should not only secure requisite marks in the competitive examination but should also fulfill other eligibility conditions prescribed for such candidate. Annexure P/1 is the advertisement published by the P.S.C. inviting applications for the said entrance examination. This advertisement amongst other things provides for the age limit which was 33 years as on 01.01.1996 for the candidates. However, under para 5 age relaxation of 5 years was made for the candidates belonging to SC/ST and OBC categories. Many other relaxations were also granted for these candidates. Obviously, a person seeking any such relaxation which was not available to a candidate of general category could not have competed in the open competition with general candidates, notwithstanding the marks obtained by him. Before any such person can be qualified for such open competition with general candidates, he must fulfill all the conditions prescribed for the candidates of general category.

9. In the instant case, it is made clear by respondent No.2 through an affidavit of Shri Himmat Singh Choudhary, Dy, Controller (Exams) that only 7 candidates, as described in AnnexureR-2/3,

had secured requisite marks obtained by the last selected candidates in general category. However, only the candidates at Serial Number 1 to 4 were otherwise qualified for being selected as general candidates while the remaining 3 (at Sl.No.4 to 6) could not be treated as candidates of general category as they have sought relaxation in he matter of their age which as available only to the candidates of reserved categories. The respondents were, therefore, right in not declaring 3 seats vacant in the O.B.C. category as against these later 3 candidates (at Sl.No.5 to 7) and the petitioner who was at Sl.No.7 in the waiting list could not have been selected against any such vacancy.

10. For what I have said above, this petition must fail and is accordingly dismissed but without any order as to costs.

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.4559 OF 2006
(Arising out of SLP(C) Nos.26013-26014 of 2004)
D.D. 19.10.2006
Hon'ble Mr. Justice S.B.Sinha & Hon'ble Mr. Justice Dalveer Bhandari

Ku.Rashmi Mishra ... Appellant
Vs.
Madhya Pradesh P.S.C. & Ors. ... Respondents

Recruitment:

Desirability of conducting both written test and oral interview:

Selection to 17 posts of Assistant Registrar Class-II Gazetted posts in the State University was carried out by the Commission by holding screening test for short listing the candidates and selecting the candidates on the basis of viva-voce test – The appellant aggrieved by her non selection filed writ petition before High Court making only respondents 3 and 4 who were among 17 selected candidates as parties – Writ petition was dismissed on the ground that the appellant having participated in the selection process knowing fully well the conditions of advertisement could not question the selection process – In the appeal among others alleged that the Rules were ultra vires as no selection could be made only on the basis of interview ignoring the marks obtained in the written examination and/or academic qualification - Per contra it was contended as the viva voce test was the only criterion fixed for selection in terms of the statutory rules no illegality can be said to have been committed – The Supreme Court in view of the fact that all the selected candidates were not impleaded as parties dismissed the appeal with direction to the State Government to consider the desirability of amending the rules suitably so that charges of favouritism or nepotism by the members of the Constitutional Authority is not called in question.

Held:

The post of Assistant Registrar in the Universities was not of such nature which would answer the requirements of the tests laid down by this Court at certain times. The post requires no professional experience. What was required to be seen was academic qualification; experience and other abilities of the candidate. Whereas the ability of communication and other skills may have to be judged through interview, experience of the candidate as also the marks obtained by him in the written examination could not have been ignored. It is not that the Commission was not called upon to hold a written examination. The Rules enabled the Commission to do so. Such a written examination in fact was held. However, the same was held only for the purpose of short-listing the candidates and not for any other purpose. It was not a fair exercise of power. The marks obtained by the candidates in the said written examination should have been taken into consideration. Evidently, the Commission did not do so. For the reasons stated hereinbefore, we would direct the State of Madhya Pradesh therefore to consider the desirability of amending the Rules suitably so that such charges of favoritism or nepotism by the members of the constitutional authority in future is not called in question.

Cases referred:

1. (1981) 1 SCC 722 - Ajay Hasia vs. Khalid Mujib Sehravardi
2. (1984) 4 SCC 251 - Prabodh Verma & Ors. vs. State of Uttar Pradesh & Ors.
3. (1985) 4 SCC 417- Ashok Kumar Yadav & Ors. etc. vs. State of Haryana & Ors.
4. (1987) Supp. SCC 401 - State of U.P. etc. vs. Rafiquddin & Ors.
5. (1991) 3 SCC 368 : AIR 1991 SCC 1607 - Munindra Kumar & Ors. vs. Rajiv Govil & Ors.
6. (1991) 4 SCC 555 - Sardara Singh & Ors. vs. State of Punjab & Ors.
7. (2001) 6 SCC 380 - All India SC & ST Employees Assn. & Anr. vs. A. Arthur Jeen & Ors.
8. (2003) 2 SCC 132 - Jaswinder Singh & Ors. vs. State of Jammu & Kashmir & Ors
9. (2003) 9 SCC 401 - Vijay Syal & Anr. Vs. State of Punjab & Ors
10. 2006 (5) SCALE 107 - Indu Shekhar Singh & Ors. vs. State of U.P. & Ors.
11. (2006) 6 SCC 395 - K.H.Siraj vs. High Court of Kerala & Ors.

JUDGMENT

S.B.Sinha,J.

Leave granted.

The principal question raised before us in this appeal is the validity/legality of the selection process involved in selecting Assistant Registrars, Class II gazetted post.

Appellant is holder of a Post Graduate degree. She had also done B.Ed. and was having 7 years' teaching experience. The 1st respondent-Public Service Commission issued an advertisement on or about 24.7.2003 for recruitment to the post of Assistant Registrar in the State University of Madhya Pradesh. The Commission was called upon by the State to fill up 17 posts, the essential qualifications wherefore are stated to be as under:

> "C. Essential Qualification: The postgraduate degree from any recognised University in minimum of the II Class or its equivalent degree.
>
> Requirement: The work experience on the post of Teaching/ Administrative post."

It was stated that the essential qualifications stipulated in the advertisement were the minimum.

The State of Madhya Pradesh, in exercise of its power conferred upon it by sub-Section (2) of Section 15-A of the Madhya Pradesh Vishwavidyalaya Adhiniyam, 1973 made Rules known as Madhya Pradesh State University Service Rules, 1982 (for short, 'the 1982 Rules') Rules, 5 and 8(ii) which are relevant for our purpose read as under:

> "Method of recruitment.- (1) Without prejudice to the provisions of Rule 7, recruitment to the service after the commencement of these rules, shall be by the following methods, namely:-
>
> a) by direct recruitment,
>
> b) by promotion of persons, holding a lower post which may or may not comprise of Service, to a higher post comprising the Service, and
>
> c) by deputation from the State Government or any organization other than the Universities as the Kuladhipati may deem fit,
>
> (2) The number of persons recruited by various methods under sub-rule (1) shall be in accordance with the percentage shown in Schedule I.
>
> (3) Notwithstanding anything to the contrary contained in sub-rules(1) and (2), if in the opinion of the Kuladhipati, the exigencies of Service so require, he may, in consultation with the Commission, adopt such methods of recruitment to the service, other than those prescribed in sub-rule (1) as he may, by an order issued in this behalf, specify."
>
> "8. Conditions of eligibility of direct recruits.- In order to be eligible for direct recruitment to the Service a candidate must satisfy the following conditions, namely:-
>
> (i) .....
>
> (ii) A candidate who is a retrenched Government or University employee shall be allowed to deduct from his age the period of all temporary service previously rendered by him upto a maximum limit of 7 years even if it represents more than one spell provided that the resultant age does not exceed the upper age limit by more than three years."
>
> Rule 11 provides for mode of direct recruitment.
>
> Rule 12 of the Rules is as under:
>
> "12. List of candidates recommended by the Commission.- (1) The Commission shall forward to the Kuladhipati a list arranged in order of merit of the suitable candidates who have qualified by such standards as the Commission may determine and of the candidates belonging to the Scheduled Castes and Scheduled Tribes who, though not quality by that standard, are declared by the Commission to be suitable for appointment to the Service with due regard to the maintenance of efficiency of administration. The list shall be published for general information.
>
> (2) Subject to the provisions of these rules, candidates will be considered for appointment to the available vacancies in the order in which their names appear in the list.
>
> (3) The inclusion of a candidate's name in the list shall confer no right to appointment unless Kuladhipati is satisfied, after such enquiry as may be considered necessary, that the candidate is suitable in all respects for appointment to the service."

Pursuant to or in furtherance of the said advertisement, 6158 candidates filed applications. The Commission conducted a preliminary examination on 23.11.2003. 4767 candidates appeared therein. 55 candidates were short-listed, having been found to be eligible for appearing at the viva voce test. Interviews were held between the period 9.2.2004 and 11.2.2004. Whereas 17 persons including Respondent Nos.3 and 4 herein were selected, Appellant was not.

She filed a writ petition before the Madhya Pradesh High Court, which was registered as Writ Petition No.2665 of 2004. All the selected candidates were not impleaded as parties therein. Only Respondent Nos.3 and 4, against whom allegations were made to the effect that although they were inexperienced and were having inferior academic qualification, were selected being influential persons were impleaded, stating:

> "That it would be pertinent to mention here that the husband of respondent No.3, is a Deputy Collector and is presently posted as S.D.M. Ujjain. He is having high political link and is related to influential personality. Inspite of having no experience, much less any teaching or administrative experience, she has been adorned with the selection on the post of Assistant Registrar. Similarly respondent No.4 and other selected candidates, who lack any teaching experience, having been selected, whereas the petitioner who satisfied all the requisite qualifications, for the aforesaid post, has not been selected."

The aforesaid respondents were said to have been impleaded in a representative capacity purportedly because Appellant was not having the addresses of the candidates who were selected. The learned Single Judge of the High Court, by reason of the impugned judgment, did not find any merit in the writ petition and dismissed the same opining that Appellant having participated in the selection process knowing fully well the conditions of advertisement and having not been selected in the interviews, could not question the selection process.

Mr. S.B.Sanyal, the learned Senior Counsel appearing on behalf of the appellant, inter alia, submitted:

i) 1982 Rules were ultra vires as no selection could be made only on the basis of interview ignoring the marks obtained in the written examination and/or academic qualification and experience;

ii) Selection entirely on viva voce tests may be permissible in respect of the post which requires professional experience and not for the teachers of the Universities wherefore academic qualification as also the experience are relevant factors. Strong reliance, in this behalf, has been placed on Ajay Hasia vs. Khalid Mujib Sehravardi [(1981) 1 SCC 722] and Ashok Kumar Yadav & Ors. etc. vs. State of Haryana & Ors. etc. [(1985) 4 SCC 417]; and

iii) Having regard to the academic qualification and experience held by Appellant, she had a legitimate expectation of being appointed.

Mr.S.K.Gambhir, the learned Senior Counsel appearing on behalf of the Madhya Pradesh Service Commission, on the other hand, contended that –

i) As the viva voce test was the only criteria fixed for selection of Assistant Registrar in terms of the statutory rules, no illegality can be said to have been committed;

ii) Appellant could have challenged the vires of the Rules at the threshold, but, having taken part in the selection process, could not be permitted to question the same, having not been selected by the Public Service Commission;

iii) The selected candidates having not been impleaded as parties, the writ petition was not maintainable. Reliance in this behalf has been placed on Prabodh Verma & Ors. vs. State of Uttar Pradesh & Ors. [(1984) 4 SCC 251].

It is not in dispute that all the 17 selected candidates were not impleaded as parties. Respondent Nos.3 and 4, although, purported to have been impleaded as parties, the same, as noticed hereinbefore, was done on a different premise. Allegations of favoritism against them having been made, indisputably they were necessary parties. In the writ petition, although, the appellant contended that they were being impleaded in their representative capacity, admittedly no step had been taken in terms of Order 1 Rule 8 of the Code of Civil Procedure or the principles analogous thereto.

The High Court did not go into the question as to whether any favoritism or nepotism had been shown in favour of the respondent Nos.3 and 4 by the members of the Selection Committee. Notices having been issued and the respondents having filed their responses before the High Court, we may presume that the contention in regard to favoritism or nepotism allegedly shown by the Selection Committee in favour of respondent Nos.3 and 4 had not been pressed.

In the aforementioned situation, all the seventeen selected candidates were necessary parties in the writ petition. The number of selected candidates was not large. There was no difficulty for Appellant to implead them as parties in the said proceeding. The result of the writ petition could have affected the appointees. They were, thus, necessary and/or in any event proper parties.

In Prabodh Verma (supra) this Court held:

> "The first defect was that of non-joinder of necessary parties. The only respondents to the Sangh's petition were the State of Uttar Pradesh and its concerned officers. Those who were vitally concerned, namely, the reserve pool teachers, were not made parties – not even by joining some of them in a representative capacity, considering that their number was too large for all of them to be joined individually as respondents. The matter, therefore, came to be decided in their absence. A High Court ought not to decide a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents in a representative capacity if their number is too large, and, therefore, the Allahabad High Court ought not to have proceeded to hear and dispose of the Sangh's writ petition without insisting upon the reserve pool teachers being made respondents to that writ petition, or at least some of them being made respondents in a representative capacity, and had the petitioners refused to do so, ought to have dismissed that petition for non-joinder of necessary parties."

{See also All India SC & ST Employees Assn. & Anr. etc. vs. A. Arthur Jeen & Ors. etc. [(2001) 6 SCC 380] and Indu Shekhar Singh & Ors. vs. State of U.P. & Ors. [2006 (5) SCALE 107]}

Furthermore, the validity of 1982 Rules was not in question in the writ petition. What was in question was only the selection process. In the absence of any prayer made in the writ petition in that behalf and/or grounds for such a declaration having not been set out, evidently the High Court could not have gone thereinto. We are, therefore, are not in a position to declare the said Rules as ultra vires as was urged by Mr. Sanyal. We, however, cannot refrain ourselves from observing that the said Rules apparently do not satisfy the requirements of the law as laid down by this Court. Interview, indisputably, is one of the relevant factors for selection. This Court, however, had noticed that nepotism or favoritism in making selection cannot be ruled out and as such, categorically laid down that a low percentage of the total marks only should be fixed for interview.

In Ajay Hasia (supra), it was held:

> "The second ground of challenge questioned the validity of viva voce examination as a permissible test for selection of candidates for admissions to a college. The contention of the petitioners under this ground of challenge was that viva voce examination does not afford a proper criterion for assessment of the suitability of the candidates for admission and it is a highly subjective and impressionistic test where the result is likely to be influenced by many uncertain and imponderable factors such as predilections and prejudices of the interviewers, his attitudes and approaches, his pre-conceived notions and idiosyncrasies and it is also capable of abuse because it leaves scope for discrimination, manipulation and nepotism which can remain undetected under the cover of an interview and moreover it is not possible to assess the capacity and calibre of a candidate in the course of an

interview lasting only for a few minutes and, therefore, selections made oil the basis of oral interview must be regarded as arbitrary and hence violative of Article 14. Now this criticism cannot be said to be wholly unfounded and it reflects a point of view which has certainly some validity.

The Court, upon noticing the criticism of the reputed authors in this behalf, observed:

"..... the oral interview method continues to be very much in vogue as a supplementary test for assessing the suitability of candidates wherever test of personal traits is considered essential. Its relevance as a test for determining suitability based on personal characteristics has been recognised in a number of decisions of this Court which are binding upon us."

In regard to the criterion to be fixed for interview, it was stated:

"..... Now there can be no doubt that, having regard to the drawbacks and deficiencies in the oral interview test and the conditions prevailing in the country, particularly when there is deterioration in moral values and corruption and nepotism are very much on the increase, allocation of a high percentage of marks for the oral interview as compared to the marks allocated for the written test, cannot be accepted by the Court as free from the vice of arbitrariness. It may be pointed out that even in Peeriakaruppan's case (supra), where 75 marks out of a total of 275 marks were allocated for the oral interview, this Court observed that the marks allocated for interview were on the high side. This Court also observed in Miss Nishi Maghu case (1980) 4 SCC 95: "Reserving 50 marks for interview out of a total of 150... does seem excessive, especially when the time spent was not more than 4 minutes on each candidate". There can be no doubt that allocating 33 1/3 per cent of the total marks for oral interview is plainly arbitrary and unreasonable. It is significant to note that even for selection of candidates for the Indian Administrative Service, the Indian Foreign Service and the Indian Police Service, where the personality of the candidate and his personal characteristics and traits are extremely relevant for the purpose of selection, the marks allocated for oral interview are 250 as against 1800 marks for the written examination, constituting only 12.2 percent of the total marks taken into consideration for the purpose of making the selection. We must, therefore, regard the allocation of as high a percentage as 33 1/3 of the total marks for the oral interview as infecting the admission procedure with the vice of arbitrariness and selection of candidates made on the basis of such admission procedure cannot be sustained."

In Ashok Kumar Yadav (supra), while stating that interview is must for professional experience, this Court opined:

"It is now admitted on all hands that while a written examination assesses the candidate's knowledge and intellectual ability, a viva voce test seeks to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantages over the viva voce test, there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity. Some of these qualities can be evaluated, perhaps with some degree of

error, by viva voce test, much depending on the constitution of the interview board."

However, it was observed:

> "..... There cannot be any hard and fast rule regarding the precise weight to be given to the viva voce test as against the written examination. It must vary from service to service according to the requirement of the service, the minimum qualification prescribed, the age group from which the selection is to be made, the body to which the task of holding the viva voce test is proposed to be entrusted and a host of other factors. It is essentially a matter for determination by experts."

In State of U.P. etc. vs. Rafiquddin & Ors. etc. [1987) Supp. SCC 401], this Court was considering selection of Judicial Officers. While doing so, it noticed Ashok Kumar Yadav (supra) opining:

> "..... The enacting clause of Rule 19 provided guidance for the Commission in preparing the list of approved candidates on the basis of the aggregate marks obtained by a candidate in the written as well as in viva voce test. Clause (2) of the proviso to Rule 19 did not no doubt expressly lay down that the minimum marks for the viva voce had to be prescribed but the language used therein clearly showed that the Commission alone had the power to prescribe minimum marks in viva voce test for judging the suitability of a candidate for the service. ..... The viva voce test is a well recognised method of judging the suitability of a candidate for appointment to public services and this method had almost universally been followed in making selection for appointment to public services. Where selection is made on the basis of written as well as viva voce test, the final result is determined on the basis of the aggregate marks. If any minimum marks either in the written test or in viva voce are fixed to determine the suitability of a candidate the same has to be respected."

{See also Jaswinder Singh & Ors. vs. State of Jammu & Kashmir & Ors. [(2003) 2 SCC 132], Vijay Syal & Anr. Vs. State of Punjab & Ors. [(2003) 9 SCC 401] and K.H.Siraj vs. High Court of Kerala & Ors. [(2006) 6 SCC 395].}

In Sardara Singh & Ors. vs. State of Punjab & Ors. [(1991) 4 SCC 555], this court opined that in the selection of Patwaris, the ratio in Ashok Kumar Yadav (supra) cannot have application, holding:

> "It is then contended that the written test, conducted by the previous Service Selection Board, was abandoned and only oral interviews were conducted. The selection, therefore, is illegal. Normally it may be desirable to conduct written test and in particular of handwriting which is vital for a Patwari whose primary duty is to record clearly entries in revenue records followed by oral interview. The Rules do not mandate to have both. Options were given either to conduct written test or viva voce or both. In this case the Committee adopted (sic opted) for viva voce as a method of select the candidates which cannot be said to be illegal."

Unfortunately, the effect of the Ashok Kumar Yadav (supra) had not been considered therein in great details.

We are, however, not oblivious of a decision of this Court in Munindra Kumar & Ors. vs. Rajiv Govil & Ors. [(1991) 3 SCC 368 : AIR 1991 SCC 1607], when this Court refused to exercise its discretionary jurisdiction in directing creation of posts and/or granting relief to the appellants therein on equitable grounds despite quashing the Rules in question, but stated:

> "..... The last candidate out of the 25 selected candidates in general category has secured 134.5 marks. Out of the 25 candidates selected in the general category, 5 candidates have secured lesser marks than Rajeev Govil in written test, 9 candidates below Vivek Aggarwal and 2 below Gyanendra Bahadur Srivastava. A perusal of the mark-sheet also shows that 50 candidates are such who have not been selected instead (sic inspite) of having secured 87.5 marks or above in written test, 79 candidates who have secured above 85 marks, and more than 100 candidates who have secured more than 81 marks in the written test. Even if we were inclined to give a further chance of interview and group discussion by keeping 10 percent and 5 percent marks respectively for interview and group discussion, in all fairness it would be necessary to give chance to all such candidates who have secured higher marks in the written test in comparison to the respondents-writ petitioners. We have already taken the view that we do not consider it just and proper to set aside the selections already made. In these circumstances even if we were inclined to give direction to the Board to create three more posts and give chance to all the candidates securing equal or higher marks in the written examination than the writ petitioners, there was a remote chance of the writ petitioners being selected. In our view such exercise would be in futility, taking in view the chance of success of the writ petitioners.
>
> In the result, we allow these appeals in part and quash the rule made by the U.P. State Electricity Board keeping 40 marks for interview and 40 marks for group discussion being arbitrary. We direct that in future the marks for interview and group discussion shall not be kept exceeding 10 percent and 5 percent of the total marks, respectively. The selection already made by the Board for the pots of Assistant Engineers (Civil) shall not be disturbed." (Emphasis supplied)

It is unfortunate that the respective State Governments had not noticed the decisions of this Court.

A statutory rule, it is trite, must not only be, in consonance with the legislative intent, but also must satisfy the constitutional requirements contained in Articles 14 and 16 of the Constitution of India. Our Constitution professes equality. Equality clauses contained in Articles 14, 15 and 16 of the Constitution of India are heart and soul of our Constitution. A constitutional authority, although, would be presumed to act fairly, this Court, while laying down the norms on which such statutory authorities must function keeping in view the possibility of showing nepotism or favoritism in favour of one candidate or the

other, laid down the same having regard to the doctrine of reasonableness and with a view to refrain the constitutional and statutory authorities from acting arbitrarily. The sole purpose of issuing such directions by this Court had been to uphold the doctrine of equality enshrined in our Constitution. We have noticed hereinbefore that this Court has not set down any fixed rules. It had advocated flexibility. But the rule of flexibility was directed to be applied having regard to the nature of post as also the duties and functions of the incumbents thereof.

The post of Assistant Registrar in the Universities was not of such nature which would answer the requirements of the tests laid down by this Court at certain times. The post requires no professional experience. What was required to be seen was academic qualification; experience and other abilities of the candidate. Whereas the ability of communication and other skills may have to be judged through interview, experience of the candidate as also the marks obtained by him in the written examination could not have been ignored. It is not that the Commission was not called upon the hold a written examination. The Rules enabled the Commission to do so. Such a written examination in fact was held. However, the same was held only for the purpose of short-listing the candidates and not for any other purpose. It was not a fair exercise of power. The marks obtained by the candidates in the said written examination should have been taken into consideration. Evidently, the Commission did not do so. For the reasons stated hereinbefore, we would direct the State of Madhya Pradesh therefore to consider the desirability of amending the Rules suitably so that such charges of favoritism or nepotism by the members of the constitutional authority in future is not called in question.

We would, at the cost of repetition, would state that although for one reason or the other, the High Court had not addressed itself on this question, but, the very fact that such allegations had been made is a sufficient ground for the State or the Commission to take appropriate steps for amending the Rules for the said purpose.

In the instant case, however, as all the selected candidates were not impleaded as parties in the writ petition, no relief can be granted to the appellant.

The appeal is dismissed with the aforementioned observations and directions. No costs.

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MAHARASHTRA PUBLIC SERVICE COMMISSION

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELATE SIDE
Writ Petition No.1734 of 1987
D.D. 6.12.1987
Hon'ble Mr. R.A.Jahagirdar & Hon'ble Mr.Bagga, JJ

B**abanrao H.Abhad**	**...**	**Petitioner**
Vs.		
Chairman, Maharashtra P.S.C. & Ors.	**...**	**Respondents**
And:		
M.K.Patil	**..**	**Intervener**

Recruitment:

Marks for viva-voce:

Petition filed challenging awarding of 20% marks for viva-voce test by Maharashtra P.S.C. – Bombay High Court following the decision in Ashok Kumar Yadav V. State of Haryana – AIR 1987 S.C. 454 has held that awarding of 20% for viva voce test in non technical service examination is high amounting to arbitrariness and consequently allowed the petition partly directing Maharashtra P.S.C. not to assign more than 12.2% of the total number of marks in any examination for viva voce test – High Court has however declined to reopen the results of 1985 and 1986 examinations and to declare the results afresh on the basis of viva-voce carried 12.2% of the total marks considering the fact that many selected candidates have been appointed long back.

Case referred:

AIR 1987 Supreme Court, 454 - Ashok Kumar Yadav V. State of Haryana

ORAL JUDGMENT (Per Jahagirdar J.)

1. This petition seeks to challenge the method adopted by the Maharashtra Public Service Commission, hereinafter referred to as "the MPSC", in allotting on high a percentage as 20 for the viva voce test in the examinations conducted by it. The challenge is based upon a judgment of the Supreme Court in Ashok Kumar Yadav V. State of Haryana, AIR 1987 Supreme Court, 454. Before we proceed to notice the guidance given by the Supreme Court in Ashok Kumar's case it should be briefly noted that the petitioner though an Advocate by profession claims to be a social worker. He says that he is giving free coaching to the candidates appearing for the examinations which are conducted for filling different posts under the Government of Maharashtra. These examinations are conducted by the MPSC. The Chairman and Secretary of the MPSC have been added as respondent Nos.1 and 2 respectively in this petition. The State of Maharashtra is the third respondent.

2. Though the petitioner himself has no direct nexus with the cause of action which is now espoused in this petition, the petition has been admitted as, probably, an exercise in the interest of public and, therefore, we are, without going into the details of the locus standing of the petitioner, disposing of this petitioner on merits. It is also necessary to add that one Mr. M.K.Patil has been added as an intervener in this petition on an application made by him purportedly on behalf of 50 persons who had appeared in the examinations conducted by the MPSC in the years 1985 and 1986 but who failed according to them because of the high percentage of marks allotted in the Viva voce test. The application was made for being joined as an intervener. We are not sure whether the application is maintainable under the rules of the Appellate side of this Court. At best those candidates could have been joined as respondents in this petition. Mr. M.K.Patil has appeared before us in person. He cannot be taken to be the representative of all the candidates who appeared for the examinations conducted in the years 1985 and 1986 because no order under Order 1 Rule 10 of the cope of Civil Procedure has been passed in the Civil Application, which he presented. However, the Division bench which was earlier seized of this matter noticed that the list of the 50 candidates who failed in the examinations conducted in the years 1985 and 1986 signed by those candidates was furnished before them by the fourth respondent. This is only to point out that the fourth respondent cannot claim any relief in this petition in favour of himself apart from resisting, if anything, the claim on behalf of the petitioner. However, keeping aside this technical aspect, we have heard the grievance of the fourth respondent, as will be noticed in the course of this judgment.

3. In Ashok Kumar's case (supra), the system of the Haryana Public Service Commissioner which allotted 22% of the total marks of an examination for the viva voce test was challenged. After examining the rule of equality which is enshrined in Article 14 of the Constitution and after noticing that any arbitrary action results in the infraction of that rule, which was laid down, among other 8 things, in Ajay Hasia V. Khalid Mujib, AIR 1981 Supreme Court 487, the Supreme Court held that the allocation of 22.2% of the total marks for the viva voce test in the case of the general candidates was excessive and amounted to an arbitrariness which would suffer the vice of the contravention of Article 14 of the Constitution. Though the Supreme Court noted that normally it would not itself venture into the examination of the propriety of allotting a particular percentage of marks for the viva voce test, it noticed that an expert body called the Kothari Committee had gone into this question and had made certain recommendations which ultimately resulted in the Union Public Service Commission itself allotting 12.2% of the total marks for the Viva voce test. This was found as a sufficiently safe percentage to be

adopted by all Public Service Commissions while holding examination. In paragraph 29 of the judgment the Supreme Court has stated as follows:-

> "The percentage of marks allocated for the viva voce test by the Union Public Service Commission in case of selections to the Indian Administrative Services and other allied services is 12.2 and that has been found to be fair and just, examination and the viva voce test".

Recommended that the same percentage of marks should be assigned to viva voce test by the Haryana Public Service Commission, the Supreme Court proceeded to state as follows:-

> "We would suggest that this percentage should also be adopted by the Public Service Commissions in other States, because it is desirable that there should be uniformity in the selection process throughout the country and the practice followed by the Union Public Service Commission should be taken as a guise for the State Public Service Commissions to adopt and follow".

4. That MPSC allots as a rule 20% of the total marks for the Viva Voce test for the State Service Examinations (non-technical). In the case of examinations for Police Sub Inspectors and Forest Officers, the percentage of marks allotted for the viva voce test is 16.6.

5. Mr.Prafulla B.Shah, the learned Advocate appearing in support of the petition, naturally relied upon the judgment of the Supreme Court in Ashok Kumar's case and has canvassed the view that the high percentage of marks assigned by the MPSC for the viva voce test is demonstrably arbitrary and suffers from the same vice from which the percentage that was fixed by the Haryana Public Service Commission was found to suffer by the Supreme Court. In the light of the discussion which the Supreme Court has made on this question in the judgment in Ashok Kumar's case, we have to accept the criticism of Mr.Shah in this regard. It has also been suggested by Mr. Shah, and with justification, that in the examination held at State level, probably greater number of rural people appear for the examinations and this is one of the additional reasons as to why the high percentage of marks allotted to the viva voce test should be held to be arbitrary. Following the judgment of the Supreme Court in Ashok Kumar's case, therefore, we will have to hold that the percentage of marks assigned by the MPSC at 20 for the viva voce test in the non technical State Service examinations is high amounting to an arbitrariness.

6. An affidavit has been filed in reply to this petition by the Under Secretary to Government, Maharashtra Public Service Commission. We must record our appreciation of the very reasonable

stand taken by the MPSC in this affidavit in reply. The MPSC is aware of the Judgment of the Supreme Court in Ashok Kumar's case. The reasons as to why the MPSC has assigned 20% of the total marks to the viva voce test have been mentioned in this affidavit. In the first place it has been stated that the upper age limit for the Union Public Service Commission examination, which was noticed by the Supreme Court in Ashok Kumar's case, is 26 years while the upper age limit for admission to the State Services examination held by the MPSC is 28 years. This fact has been mentioned with a view to show that in the case of candidates who are older in age a higher percentage of marks for the viva voce test is permissible even noticing the test laid down by the Supreme Court. Mr. Gokhale appearing for the respondents has pointed out that in paragraph 29 of the judgment of the Supreme Court in Ashok Kumar's case the Supreme Court noticed that a higher percentage of marks had been assigned for the viva voce test in the case of ex-service officers. Elsewhere in the said judgment it has been noticed that a higher percentage of marks for the viva voce test for people of advanced age and who have some experience is permissible.

7. However, in the instant case, we are reluctant to accept that the difference between the age of 26 years, which is the limit for admission to the Union Public Service Commission's examinations, and the age of 28 years, which is the age limit for admission to the examinations conducted by the MPSC, is not sufficiently wide as to warrant a higher percentage of marks being assigned to the viva voce test. It has also been stated in the affidavit that for the examinations conducted by the MPSC people who are already employed are greater in number than the people who are fresh graduates. If this is so a higher percentage of marks for the viva voce test is justified according to Mr.Gokhale. Here also we are not satisfied that the ground urged in support of the practice adopted by the MPSC is sufficiently strong. In the affidavit itself the proportion of working candidates to the total number, of fresh candidates appearing for the examinations has not been mentioned. Mr.Gokhale, on taking instructions from an officer in the Court, suggested that the percentage of working people who appear for the examinations is as high as 60. Assuming that this is so, we find that this is a further reason as to why the assignment of 20% of marks for the viva voce test is unjustified. If persons who are not working constitute 40% of the total number of candidates who appear for the examinations conducted by the MPSC, assignment of test of the total marks for the viva voce test would be discriminatory as against them whereas the reduction of the said percentage from 20% to 12.2% as recommended by the Supreme Court, would not act to the detriment of either of the grounds.

8. In paragraph 6 of the affidavit in reply it has also been urged on behalf of the MPSC that the posts covered by the UPSC examinations and the MPSC examinations are different in kind. The former are in urban areas while the latter are in the rural areas in the State. It is, therefore, stated that knowledge of rural conditions and problems will be a predominant factor among the qualities to be assessed at the viva voce test. According to the MPSC, if candidates are selected giving weightage merely to their performance at the written test, they may turn out to be total misliusco for the posts in the rural area.

9. We are not satisfied that there is any substance in the charge of arbitrariness in fixing a high percentage of marks for the viva voce test. This is too wide an assertion to be accepted as a sufficiently strong argument in support of fixing a high percentage of marks to viva voce test.

10. Mr. Gokhale also argued that if excessive weightage is given to the performance in the written test, the adverse affects of the variable factors in the optional papers remain uncorrected. On the basis of the past experience, according to the MPSC, these adverse affects are neutralized by the marks of the viva voce test. It is impossible to accept even this assertion made on behalf of the MPSC, because there is nothing to indicate as to the total effect of what the MPSC calls the "variable factors" in the optional papers. It is true that the viva voce test is in fact cant to neutralize the adverse effects of what the MPSC alls the "variable factors" in the optional papers. The question is not whether there should be viva voce test, the question is whether as high as 20% of the total marks should be assigned to the said test. This has not been demonstrated to be necessary by the affidavit in reply.

11. It has been mentioned in the affidavit in reply that the MPSC has taken up the question of bringing uniformity in the patterns of question papers of the written test so that the effect of variable factors will be reduced. This in our opinion, is the correct approach to the question. It has also been mentioned that the whole question is under the examination of the MPSC.

12. Considering what has been stated in the affidavit in reply and after hearing Mr.Gokhale for the respodnent, we are satisfied that in the light of what has been stated by the Supreme Court in Ashok Kumar's case the high percentage of marks namely 20% of the total marks, assigned by the MPSC in the examinations conducted by it for the non technical in the examinations conducted by it for the non technical service and 16.6% for the examinations for Police Sub Inspectors and Range Forest Officers are arbitrary and are not supportable in the light of the law laid down by the Supreme Court. Since the

Supreme Court itself has recommended. After noticing that the Union Public Service Commission has fixed 12.2% of the total marks for the viva voce test for the all India Examinations conducted by it, that the same percentage should be adopted by the different State Public Service Commissioner in India, we have no hesitation in directing that the MPSC shall not fix a percentage of marks higher than 12.2% for the viva voce test in the examinations conducted by it.

13. Mr. Shah has reiterated that results of the examinations conducted in the years 1985 and 1986 should be reopened and the MPSC should be directed to declare the results afresh on the basis that the viva voce test carried 12.2% of the total marks. This is also the demand of the fourth respondent whom we have heard. The affidavit in reply has suggested that if this Court finds that a lower percentage of marks should be assigned to the viva voce test than decision should be made prospective. After hearing all the parties in this connection and being also aware of the order passed by previous Division Bench in Civil Application No.3257 of 1987 that further examinations and results and appointments shall be subject to the result of the writ petition, we are of the opinion that the direction which we propose to give below shall be implemented prospectively and not retrospectively. This is for the simple reason that we are disposing of this petition in December 1987. It is not desirable that the results of the examinations conducted in the years 1985 and 1986 should be disturbed at this stage. Several people must have appeared for the said examinations on the understanding that 20% of the total marks had been assigned to the viva voce test. The results have been declared and, probably, many people must have been appointed to the posts and some may be awaiting their appointments on the basis of the said examinations. The persons who were aggrieved by the results of those examinations are not the petitioners in this petition. Secondly, the persons who have succeeded in the said examinations of 1985 and 1986 have not been made parties, either individually or in their representative capacity. It would, therefore, be manifestly unjust to reopen the results of the examinations conducted in the years 1985 and 1986.

14. In the result, the petition partly succeeds. We direct that the Maharashtra Public Service Commission shall not assign more than 12.2% of the total number of marks in any examinations for the viva voce test, being called the oral test or personality test. These directions shall be implemented hereafter.

15. There will be no order as to costs in this petition.

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IN THE HIGH C0URT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition No.3656 of 2006
D.D. 26.7.2006
Hon'ble Mr. V.G.Palshikar, Acg C.J. & Hon'ble Mr.V.M.Kanade, Judge

Yogesh V Athavle and Anr. ... Petitioners
Vs.
Maharashtra P.S.C. & Ors. ... Respondents

Recruitment:

Without making selected candidates as parties writ petition seeking quashing of select list not maintainable

Unsuccessful candidates for recruitment to the post of Civil Judge Junior Division and Judicial Magistrate First Class in the State of Maharashtra have among other things sought for production of original answer sheets and to give bifurcation of marks allotted to candidates in the written examination and interviews and for constitution of Enquiry Committee consisting of a retired Judge and one representative of the candidates to look into the aspects – The High Court has dismissed the petition holding that there is no right for the candidates for calling for original answer sheets – There cannot be any hard and fast rule regarding the precise weight to be given to the viva voce test and it can vary according to the need of the post to be filled in – There is no need whatsoever for constitution of a Committee – Consequently, the High Court has dismissed the writ petition.

Held:

It is the basic principle of law that when the appointment of any person is questioned, that person is a necessary party. The petitioners, who appeared for the selection for the Civil Judge's post, are not aware of this basic principle of law. Having not made any of the persons party, even though the list is annexed to the petition, the prayer for quashing the list deserves to be rejected.

Case referred:

(1985) 4 SCC 417 - Ashok Kumar Yadav and Others vs. State of Haryana and Others

ORDER

This petition is filed by the unsuccessful candidates who could not be qualified and be selected for the post of Civil Judge Junior Division and Judicial Magistrate First Class in the State of Maharashtra.

By this petition following prayers are made:

"A) Issue a Writ of Mandamus, or any other appropriate writ, order or direction in the nature of Mandamus, to the respondents calling for the record of the entire selection process conducted in pursuance of the Notification dated 25.2.2005; and

B) Issue a Writ of Mandamus, or any other appropriate writ, order or direction in the nature of Mandamus, to MPSC to produce the original answer sheets of the petitioners before this Hon'ble Court and supply the copies thereof to the petitioners.

C) Issue a Writ of Mandamus, or any other appropriate writ, order or direction in the nature of Mandamus directing the MPSC to give the bifurcation of marks allotted to the candidates in written examination and interview and personality test.

D) Issue a direction for constitution of Enquiry Committee consisting of a retired Judge of this Hon'ble Court; and at least one representative of the candidates to look into the following aspects:

1. To see whether the marks allotted to the candidates in the answer sheets are the same as those reflected in the mark sheet.

2. To enquire into the charges of arbitrary allotment of marks in the interviews.

3. To enquire into the charges of tampering with the mark sheets and draw up a fresh list of candidates selected for interview in the light of the findings of the said enquiry.

E) Issue a Writ of Prohibition or any other appropriate writ, order or direction in the nature of Prohibition, restraining the respondents from making final appointments of any of the candidates selected in pursuance of Notification dated 25.2.2005; and

Ea) Issue a writ of mandamus or any other appropriate writ, order or directions in the nature of mandamus to quash and set aside the list of recommended candidates dated 18.12.2005 prepared by the MPSC for selection to the post of Civil Judge, (J.D.) and Judicial Magistrate (F.C.)

Eb) Issue a writ of mandamus or any other appropriate writ, order or directions in the nature of mandamus to quash and set aside the impugned letter dated 18.05.2006 and Notification dated 23.5.2006.

F) Cost of this petition be paid by the respondents.

G) Such further or other order(s) as this Hon'ble Court may deem fit and proper"

2. The first prayer prays for a writ calling for the record of the entire selection process. The averments supporting this prayer are vague and do not make out any case for calling for such record. Apart from the fact that the petitioners have not made out any case, in law it deserves to be rejected.

3. By the second prayer the petitioners claimed production of original answer sheets of the petitioners and supply copies thereof to them. There is no such right in the petitioners and it is obviously a fishing inquiry.

4. The next prayer is for directing the MPSC to give bifurcation of marks allotted to the candidates in the written examination and interviews. For this prayer reliance is placed on the judgment of the Supreme Court in the case of Ashok Kumar Yadav and Others vs. State of Haryana and Others, reported in (1985) 4 SCC 417. In that judgment itself the Supreme Court has clearly observed that there cannot be any hard and fast rule regarding the precise weight to be given to the viva voce test

and it can vary according to the need of the post to be filled in. Therefore the Supreme Court has suggested that uniformity of marks be allotted to viva voce examination. By and large these suggestions have been accepted by various Public Service Commissions. The requirement for viva voce for recruitment to Civil Judge (J.D.) and Judicial Magistrate, (F.C.) is obviously higher. Answers to written questions will not be enough or adequate to bring to light the qualities of an individual, which are necessary for being a Civil Judge. The guidelines provided by the Supreme Court are precisely for such reasons. Consequentially this prayer also deserves to be rejected.

5. By prayer (D) the petitioners seek constitution of an enquiry committee consisting of a retired Judge of this Court and one representative of the candidates to look into the aspects stated. Apart from the fact that the prayer is baseless, there is no need whatsoever for constitution of such a committee. No instances have been quoted of magnitude which would require constitution of such a committee.

6. Then a writ of prohibition is sought restraining the respondents from making final appointments. This prayer does not survive as the appointments have already been made.

7. By amendment prayers were added seeking quashing of the select list and the notification by which it was published. It is the basic principle of law that when the appointment of any person is questioned, that person is a necessary party. The petitioners, who appeared for the selection for the Civil Judge's post, are not aware of this basic principle of law. Having not made any of the persons party, even though the list is annexed to the petition, this prayer also, therefore, deserves to be rejected.

In the result, therefore, petition fails and the same is dismissed.

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO.1737 OF 2006
D.D. 01.08.2006
Hon'ble Mr. F.I. Rebello and Smt. V.K.Tahilramani, JJ

Aditi Ravindra Tapale & Ors. ... Petitioners
Vs.
Maharashtra P.S.C. ... Respondent

Examination:

Violation of Instructions to Candidates:

In Maharashtra P.S.C. Main Examination held in the year 2005 clear instructions were given forbidding the candidates from writing the names, seat number etc., on the answer sheets except at the space indicated – The candidature of the petitioners was cancelled for violating this instruction – High Court considering that opportunity of being heard was given before cancelling the candidature dismissed the writ petition.

Held:

The Commission is discharging its constitutional function while conducting examinations for the State Service Selection. The instructions have been framed by it so as to maintain strict standards and confidentiality regarding the identity of the examinees. The instructions must be followed in their letter and spirit.

ORDER

P.C. (per Smt. V.K.Tahilramani, J.):

1. Petitioners who had appeared for the Maharashtra Public Service Commission (main) Examination in the year 2005, have filed this petition under Article 226 of the Constitution of India challenging the orders cancelling each of the petitioners' candidature.

2. The 1st petitioner No.1 Aditi Ravindra Tapale wrote her compulsory English subject paper on 11.2.2005 at H.V.Desai College centre at Pune and her Seat No. was PN005635. the petitioner No.2 Patil Bharati Vitthal wrote a paper of Geography subject on 15.2.2005 at Vivekanand Arts and Commerce College, Aurangabad centre. Her Seat No. was AU000078 and the 3rd petitioner Madne Monika Suresh wrote her compulsory English subject at Sub-centre at Pergusson College, Pune and her Set No. was PN-005222. Each one of them was issued show cause Notice dated 21.4.2006 and each of them has submitted replies to the said show cause notice. By taking into consideration the replies to the show cause notice, the impugned orders came to be passed cancelling the candidature of each of the petitioners for the said exams.

3. As per show cause notice, the petitioner No.1 had written her own address in answer to the Question No.2-A relating to letter writing in the subject of compulsory English. The Petitioner No.1 in her reply has stated that she wrote address by mistake and due to pressure of examination. She further submitted that the mistake was inadvertent and unintended. Thus, it is admitted by the petitioner No.1 that she had indeed written the address on her answer paper. In such case, we do not find any reason to hold that the Respondent was in any way at fault in rejecting the explanation of the petitioner No.1. It was also contended on behalf of petitioner No.1 that the English Compulsory examination paper did not set out any instructions forbidding the examinees from writing her address on the lines of instructions contained in the subject of Marathi (Compulsory) paper. This defence does not appeal to us for the simple reason that clause 16 of the Admission Card issued to the examinees states as under:

> Candidates should carefully fill in the entries on the front page of the answer sheet. (Candidates) should write their seat number at the specified place in the right side half portion on the front page of the answer sheet; for example, if number is M.B 000132 then it should be indicated (mentioned) as MB 000 132. Except at the specified place on the answer sheet, the candidate should not mention his/her name, seat number or make any identifying mark any where or in the answer sheet and graph paper. Moreover, if a report or a letter writing is asked to be written, then at such place the candidate should not put their signature or initial but instead should write A B C only; moreover, if it is required to cancel the answers, they should only strike out the line on such answers, signature should not be made at such place.

4. The above instructions are clear and unambiguous that the examinees were clearly forbidden from writing the names, seat number or any identifying mark on the answer sheets except at the place indicated. In addition, it is stated in the said clause that while writing letter or precis writing (Ahwal), the examinees were forbidden from signing or initialing and they were asked to write only ABC.

5. So far as the other two petitioners are concerned, they were found guilty of writing their seat numbers on the maps annexed to the answer sheets. In reply to the show cause notice, they admitted that they committed mistake but it was by inadvertence and there was no ill intention. However, we are not impressed by this plea. It was submitted before us that petitioners Nos.2 and 3 wrote their seat numbers on the maps annexed to the main paper by way of precaution as they apprehended that as the map was annexed to the answer sheet by thread, it may be misplaced in which case, it would be difficult to ascertain which candidate had answered the said map. In our view, this defence is equally frivolous and it is by way of an after thought, hence, the same is hereby rejected.

6. The Commission is discharging its constitutional function while conducting examinations for the State Service Selection. The instructions have been framed by it so as to maintain strict standards and confidentiality regarding the identity of the examinees. The instructions must be followed in their letter and spirit. The petitioners were given an opportunity to submit their defence on the show cause notices and thus, the principles of natural justice have been followed while issuing the impugned orders. In any case, none of the petitioners have been debarred from appearing in future for the M.P.S.C. examinations and the cancellation of their candidatures is only for the examination held in the year 2005 and it cannot be said that the order is shockingly disproportionate. Hence, no case is made out for interference with the impugned orders.

7. In the result the petition fails and is hereby rejected summarily.

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MANIPUR PUBLIC SERVICE COMMISSION

MANIPUR INFORMATION COMMISSION, IMPHAL
Appeal No.59 of 2007
D.D. 6.11.2007
Sri. R.K.Angousana Singh, State Chief Information Commissioner. Manipur

Smt. Atom Niroda Devi ... Appellant
Vs.
Joint Secretary, M.P.S.C. & Anr. ... Respondents

Information under R.T.I. Act:

The appellant has sought among others certified copy of marks sheet, statement of marks etc., under R.T.I. Act from the Commission – Commission has claimed exemption from supply of marks sheet under Section 8(1)(d) of R.T.I. Act – Information Commission after considering the case has directed to furnish the information sought within 15 days.

Held:

The disclosure of the information will not harm any third party as the result of the competition has been already announced. Hence, exemption claimed under Section 8(1)(d) is not applicable.

FACTS

This is an application filed by Smt. Atom Niroda Devi, Roll No.6332 in MCSCCE, 2005 W/O Y.Priyananda Singh, Quarter No.C-5, Commando Complex, Minuthong, P.O. & P.S.Imphal, on the failure to furnish the information sought by her under the R.T.I. Act 2005. The above appellant has submitted an application to the M.P.S.C. Manipur, on 17 July 2007 under R.T.I. Act 2005 for furnishing the following information.

"(a) a certified copy of my mark sheet stating the marks that I scored in each of my Optional paper (Political Science and International Relationship, and Manipuri Literature), General Studies paper, essay etc, separately in the written examination;

(b) a certified copy of my marks sheet for Viva-voce specifically stating the marks awarded to me by each of the Examiners/Chairman and 5A(five) members/and the manner in which my total mark is calculated;

(c) a certified copy of the Rules and Regulations, if any, for assessing or giving marks in the Viva-voce and the factors and characteristics which are taken into consideration while assessing the candidates in the Viva-voce;

(d) a certified copy of the statement of marks of all the successful candidates with the marks obtained by them in the written examination and viva-voce that was displayed on the notice board of the M.P.S.C. Office.

(e) a certified copy of the statement of comparison between myself with at least 2 (two) successful candidate preferably who had taken the same Optional papers giving separately the marks obtained in each of the Optional subjects, General Studies, essay and the marks assessed according to the factors and characteristics (specially stating them) separately; and

(f) a copy of the Rules and Regulations/procedures to be followed for applying for re-evaluation, if any, if not why there is no procedure or Rules and Regulations established for the same."

2. Having not received any response from the S.P.I.O. within the stipulated time, the petitioner filed a petition to this Commission on 18th August 2007, which was taken up as a complaint under Section 18 of the R.T.I. Act 2005. The comments have ben called from the respondents, giving ten days time vide letter no. appeal cse no 59 of 2007 dated the 20th August, 2007. the S.P.I.O./ M.P.S.C. in his letter No.7/20/200-MPSC(DR))(Pt) dated 24th August 2007 stated "that in compliance with the interim direction dated 30.07.2007 passed by the Hon'ble Gauhati High Court in Writ Petition (C) No.564 of 2007 (S.Pratibimba Singh and others –vs- the State of Manipur and others), the answer scripts of all candidates appeared in the MCSCCE (Main), 2005 and also the Interview sheets in respect of the Personality test/Viva-voce have been kept under sealed cover. At present, any attempt to open the sealed cover will amount to the violation of the direction of the Hon'ble High Court. Therefore, the Commission may consider the petition of Smt. Atom Niroda Devi, Roll No.6332 after obtaining a final verdict from the court relating to the Writ Petition mentioned above."

3. On 29th August 2007, the complainant has submitted a rejoinder stating that the information sought at (c), (d) and (f) as mentioned at Para no 1 be provided as these do not violate the order 30.7.2007 of the Hon'ble High Court, the information at (a), (b) and (e) may be provided as soon as the disposal of the W.P.(C) No 564 of 2007 of the vacation of the interim order dated 30.7.2007 whichever is earlier.

4. In his affidavit dated 3rd October 2007, the respondent no.1 has submitted that the information as demanded in (a) of Para 1 has been furnished as Annexure R/1, which is inclusive of the viva-voce marks secured by the appellant, which had been supplied to all the successful candidates. Regarding the viva-voce marks, it is usually done by all the members of the day of interview on consensus approach/conclusion then and there to enter marks so arrived at/on among the members in favour of every candidate who had been interviewed. And the present appellant secured 105 marks and the same is entered in her marks sheet. There is no other formality or separate mark sheet system for every member of the interview. It has been assured that the relevant interview sheet signed by all the members relating to her case and the cases of other who appeared on that day during that particular shift i.e. "Morning Shift" will be available to her at any moment after the sealing of the Hon'ble High Court is lifted.

5. In para 14 and 15 of the above affidavit it has been stated the certified copy of the Rules and Regulations mentioned and demanded at (c) of Para 1, will be available from the Government Press and if the appellant wanted she can do so on payment of Rs.2 per page from the office of M.P.S.C.

6. The respondent no 1 has claimed exemption from supplying marks sheets of other candidates and more under sub section (d) of Section 8 of the R.T.I. Act in response to the demand of the appellant at (d) and (e) of para 1. Further, in respect of the information at (f) of para 1, the respondents have submitted that there is no such rule and Regulations for re-evaluation, or reassessment and such and as such M.P.S.C. cannot supply anything which is not in existence.

7. In her written application dated 14th September 2007 the appellant still insisted on the information at (b), (d) and also reasons for not having information at (f),

8. After due notice to the parties the hearing of the case was held on 25.9.2007, 3.10.2007, 9.10.2007, 16.10.2007 and 27.10.2007 in which the parties were present along with their Ld counsels. Regarding the information demanded by appellant at (a) Para 1, there is no dispute as the information had been supplied to her, a copy of which is also annexed as R1 in the Affidavit dated 3.10.2007 of the respondents. In connection with the information at (b) Para 1, the required information has been furnished at Paras no.10, 11, 12 and 13 of the affidavit dated 3rd October 2007 of the respondents. Regarding the information sought at (c) in Para 1, the respondents had indicated the notification after the lapse of the stipulated period of thirty days, therefore, the information has to be supplied free of charge under Section 7(6) of the R.T.I. Act 2005.

9. In respect of the information at (d) and (e), of Para 1, which are reproduced below-

> "(d) a certified copy of the statement of marks of all the successful candidates with the marks obtained by them in the written examination and Viva-voce that was displayed on the notice board of the M.P.S.C. Office.
>
> (e) a certified copy of the statement of comparison between myself with at least 2(two) successful candidates preferably who had taken the same Optional papers giving separately the marks obtained in each of the Optional subjects, General Studies, essay and the marks assessed according to the factors and characteristics (specially stating them) separately;"

The Commission does not agree to the contention of the respondents that it falls under the exemption clauses as provided at sub section (d) of Section 8 of the Act which is as follows:

"(d) information including commercial confidence, trade secret or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information."

The disclosure of the information mentioned above will not harm any third party, as the result of the competition had been already announced, over and above it had been brought to the public notice by displaying on the notice Board of M.P.S.C. In respect of (e) the information can be provided by furnishing the marks sheets of two successful candidates offering same optional subject with that of the appellant. No extra effort for the preparation of comparative statement may be necessary.

10. As regards, the information (f) at Para 1, the respondent has already submitted that there is no such Rules and Regulations and the Ld Counsel of the respondents also contended that there is no need for giving any reason for unavailability of such Rules and Regulations. The Commission is of the view that no reason for nonexistence of such Rules and Regulation be given, however a certificate stating to the effect that such Rules and Regulations do not exist by the S.P.I.O. will be sufficient.

11. It is a fact that the S.P.I.O./M.P.S.C. has neither furnished the information nor responded to the application of the appellant within the stipulated time as provided under the provisions of Section 7(1) of the R.T.I. Act 2005.

DECISION

In the result stated above, the Commission orders that (i) the information sought by the present petitioner which is more fully described at (c), (d) and (f) of Para 1 above should be provided to her within a week from the date of issue of this order, and (ii) the information (b) and (e) of Para 1, should be furnished to the appellant within fifteen days from the receipt of the relevant records, all free of cost.

(iii) The appellant can approach this Commission again in case of any grievance within three weeks from the date of order.

Announced in open.

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MANIPUR INFORMATION COMMISSION, IMPHAL
Appeal No.72 of 2007
D.D. 5.12.2007
Sri. R.K.Angousana Singh, State Chief Information Commissioner. Manipur

Smt. Irom Jamini Devi ... Appellant
Vs.
The Joint Secretary, Manipur PSC & Anr. ... Respondents

Information under R.T.I. Act:

The appellant's application to the Commission for furnishing copies of her daughter's answer script in Zoology (Optional-II) has not been considered – Commission has sought exemption under 8(1)(e) of R.T.I. Act on the ground that there is fiduciary relationship and also under Section 8(1)(j) of the Act on the ground that the answer script is a personal information – Information Commission has overruled both the objections and directed to furnish the information free of cost and also issued Show cause notice to the Public Information Officer of the Commission why penalty of Rs.25,000/- should not be imposed for his failure to furnish the information.

Held:

There is no Fiduciary relationship between the Subject Experts and the Commission so far as the examination is concerned.

Further held:

As the candidate has no objection for furnishing the information, information cannot be refused on the ground that the information sought is personal information.

FACTS

> "I, Smt. Irom Jamini Devi mother of Km. Laikangbam Shalini (Roll No.1866) a candidate of Combined Manipur Civil Services Exam. 2005, result declared on 7th July 2007, have the honour to request you to provide one copy of answer script of Zoology (Optional-II), Paper II of Km.L.Shalini (Roll No 1866) to enable me to examine and check the marks given to her answers and also totaling of the marks in that paper. The marks of Zoology (Optional-II), Paper-II recorded in the Mark sheet issued to her by the Manipur Public Service Commission, Imphal is too low and much below her expectation and performance."

2. Having not received any response from the S.P.I.O. within the stipulated time, the petitioner preferred an appeal on 21st August 2007, to the Secretary, M.P.S.C. who is the Appellate Authority, but that appeal also met the same fate. Thereafter, the present appellant preferred this appeal to this Commission on 24th September, 2007 under after the lapse of the prescribed period of thirty days. The comments on the petition of the appellant have been called from the respondents, giving ten days time vide letter No.Appeal Case No.72 of 2007 dated the 27th September, 2007. The S.P.I.O. M.P.S.C. in his letter No.7/20/200-MPSC (DR) (Pt) dated 5th October, 1007 stated "that in pursuance

of the interim order dated 30.7.2007 passed by the Hon'ble Gauhati High Court in Writ Petition (C) No.564 of 2007 (S.Pratibimba Singh and others –vs- the State of Manipur and others), the answer scripts of all the candidates appeared in the MCSCCE (Main), 2005 and the interview sheets had been kept under sealed cover of Manipur Public Service Commission. In addition to that, the Registrar, Gauhati High Court put an additional seal with his signature in all the boxes as directed by the Hon'ble High Court in its order dated 14.9.2007 passed in MC (WP (C) No.193 07 2007) reference W.P.(C) No.564 of 2007. Therefore, MPSC is not in a position to give information desired by the petitioner. The Commission may consider her prayer after obtaining a final verdict from the Court relating to the case mentioned above". After obtaining the comments of the respondents, the case was taken up as an appeal case under Section 19 of the R.T.I. Act 2005. In response to the comments furnished by the S.P.I.O., M.P.S.C., the appellant has submitted a rejoinder dated 8th October 2007 and a copy of the same was made available to the respondents for their objection.

3. On 30.10.2007, the S.P.I.O. has submitted a rejoinder stating that the information sought could not be submitted in the month of July 2007. As M.P.S.C. was fully engaged with the urgent matters relating to Manipur Civil Services Combined Competitive (Main) Examination and the interim order of the Hon'ble High Court, and there was no negligence on the part of the Commission (M.P.S.C.).

4. It is also submitted that furnishing/disclosure of evaluated script is exempted under Section 8(1)(e) of the R.T.I. Act 2005 for the reasons that there is a fiduciary relationship between the subject experts and the Commission so far as the examination is concerned. "Each answer script bears the signature of the examiner and the marks allotted to each question attempted by the candidate(s). Therefore, the Commission is of the view that larger public interest does not warrant the disclosure of such information".

5. It was also contended that the evaluated answer script is a personal information, so the disclosure or furnishing of answer scripts in Zoology paper-II to her mother has no relationship to any public activity or interest and this has been covered under section 8(1)(j) of R.T.I. Act, 2005.

6. On the other hand the appellant charged that there was sufficient time to deal with the matter from 18.7.2007 to 31.7.2007. Since the mother is the well wisher of the daughter, there is no justification for denying the information, moreover the candidate has no objection to the proposal rather she is more interested in the matter as she is not satisfied with the result of the above paper.

7. The first application was filed on 18th July 2007 to the S.P.I.O. and as no response was forthcoming till 20.8.2007, thereafter, another petition as the 1st Appeal was preferred to the Respondent No.2, however, that also remained unattended till the filling of the present appeal to this Commission, which amply shows that M.P.S.C. had not responded during the periods prescribed under the Act. Moreover, the works of R.T.I. or the processings of R.T.I. applications, which are time bound are no less important than that of other works of the Commission (M.P.S.C.)

8. The plea of the S.P.I.O. that the answer script cannot be furnished as per provisions of sub Section 1(e) of Section 8 of the R.T.I. Act 2005; hence, the exemption of this document from furnishing to the petitioner has been claimed. The section 8 of the R.T.I. Act 2005 states

"(1) notwithstanding anything contained in this Act, there shall be no obligation to give any citizen:-

(a) information.....

(b) (c) (d)

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f), (g) (h) (i)"

The "fiduciary relationship" has not been defined in the R.T.I. Act 2005 therefore, we have to reply on the commonly accepted meaning. The fiduciary relationship is the relationship between the trustees and their cestui que trust (the person who possesses the equitable or beneficial right to property, the legal estate of which is vested in a trustee). In short it is a relationship between the trust and the trustee, whereas, the relationship among the persons or officials involved in the answer script is not that of trust and trustee, it is more like engagement on contract basis. Therefore, such relationship cannot be claimed as fiduciary as the examiner is acting in his own way and ingenuity rather than as a trustee.

9. The answer script, it is the soul in such competitions, access to it is crucial, to make a competition transparent and accountable, it is extremely essential to know how the performance of a candidates fair in the scheme of things of the competition, instead of keeping it hidden in a box.

9. A combined reading of Section 2(f), (i) and (j) would indicate that a citizen has the right of access to answer script of any competition if his expectation is not up to his or her satisfaction. The R.T.I. Act 2005 makes a bold attempt to define "information", as explicitly as possible. According to

this, information means any material in any form, including records, documents, memos, e-mails, contracts, reports, papers, samples, models, data material held in any electronic and information relating to any private body which can be accessed by a public authority under any other law for time being in force. It is in the interest of the public that such disclosures of answer scripts are highly warranted, for transparency and accountability in such competitions which are the cynosures of all eyes of many aspiring youths.

10. The relationship between mother and daughter or son are unassailable, and in the instant case the daughter has no objection in providing the answer script to her mother, therefore, the contention of the respondents that such information cannot be given as it is personal information cannot be accepted. The answer scripts on the basis of which competitions are decided in the employment of candidates cannot be termed as personal information. There will be no harm in disclosing such information since the final results of the competition had been announced. However, the Commission is of the view that the identity of the examiners needs to be protected in the interest of public and the examiners; therefore, their identity may not be disclosed.

11. After due notice to the parties the hearing of the case was held on 23.10.2007, 30.10.2007, 6.11.2007 and 24.11.2007, on the last day of hearing (24.11.2007), no body from the side of the respondents turned up despite due notice.

12. It is a fact that the S.P.I.O./M.P.S.C. without any reasonable cause, has neither furnished the information nor responded to the application of the appellant within the stipulate time as provided under the provisions of Section 7(1) of the R.T.I. Act 2005, therefore he is liable to the penalty as prescribed under Section 20 of the R.T.I. Act, 2005.

DECISION

In the result stated above, the Commission orders that (i) the information sought by the present petitioner which is more fully described at Para 1 above, that is a photo copy of the answer script of Zoology (Optional II) Paper II (after concealing the identity or signature of the examiner, in case if it is recorded in that script) be provided to her within fifteen days from the receipt of the relevant records, all free of cost under intimation to this Commission.

(ii) The S.P.I.O. is also informed to submit a show cause within fifteen days from the receipt of this order why the penalty as prescribed under Sec. 20 of the Act which includes a maximum fine of Rs.25000 (Rupees Twenty five thousand only) and recommendation for disciplinary action should not be imposed on him for his failure to furnish the information within the time specified under sub-section (1) of Section 7, without any reasonable cause. In case of his failure to do so, it will be presumed that he has nothing to submit.

(iii) The appellant can approach this Commission again in case of any grievance. Announced in open.

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MIZORAM PUBLIC SERVICE COMMISSION

IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR: TRIPURA: MIZORAM & ARUNACHAL PRADESH)
AIZAWL BENCH ::: AIZAWL
WRIT PETITION (C) No.39 of 1997
D.D. 24.05.2001
Hon'ble Mr. Justice B.B.Deb

Sh. C.Laltlankima ... Petitioner
Vs.
State of Mizoram & Ors. ... Respondents

Promotion:

Petitioner holding the post of Codifier with the pay scale of Rs. 1600 – 2660) which is a feeder post and 4th respondent holding the post of Research Investigator with the pay scale of Rs.1640 – 2900 which is also a feeder post for promotion to the post of Research Officer were considered and the 4th respondent was promoted as he was holding the post of carrying higher scale of pay in view of Office Memorandum which is to the effect that among the persons in the feeder grades even the same grading those in the higher scales of pay will rank senior to those in lower scale of pay – The contention of the petitioner that he was holding the post more in length deserves to be allowed preferential treatment was rejected and writ petition was dismissed.

Held:

Sitting in writ jurisdiction, the Court is concerned to examine the selection making process and not the selection itself.

ORDER

This writ petition pertains to the impugned Notification dated 1.5.1997 by which the authority promoted the private respondent No.4 to the post of Research Officer in the scale of pay of Rs.2375-75-3500/- superseding the seniority of the petitioner and also pertains to relief sought for by the petitioner directing the Govt. respondents to promote the petitioner to the higher post of Research Officer or equivalent post w.e.f. 1.5.1997.

2. The petitioner's case, in short, is that the petitioner on being recommended by the D.P.C. was appointed to the post of Codifier in the Institute of Music & Fine Arts, Mizoram in the pay scale of Rs.425-700/- vide appointment letter No.A.19014/29/83-DTE(EDN)/20-A dated 28.10.1983 while the private respondent No.4 was also appointed as recommended by the D.P.C. to the post of Research Investigator in the office of the Senior Research Officer, Tribal Research Institute in the same scale of pay vide appointment letter No.A19014/9/80-DTE (EDN)/30-A dated 25.2.1984. Both the petitioner as well as the private respondent No.4 had been appointed under the Directorate of Education, Govt.

of Mizoram having the identical pay scale. According to the Recruitment Rules of 1988, which is called "the Mizoram Education & Human Resources Department RRS, 1988" the post of Research Officer (Anthropology) was to be filled by 100% promotion from the feeder post viz. From the incumbents holding the posts of Research Investigator/Translator/Codifier with not less than 8 years service in the Grade. The post of District Research Officer Tribal Research Institute was also to be filled up by promotion from the incumbents holding the posts of Research Investigator/Translator/ Codifier with not less than 8 years service in the Grade. The said Recruitment Rules had been amended in 1995 under the name and style of "the Mizoram Education & Human Resources Department (Group 'B' Gazetted posts) Recruitment Rules, 1995 and under the amended Rule the posts of district Research Officer, Research Officer (Anthropology), Special Officer (District Gazetter) are to be filled up by promotion from the incumbents holding the posts of Research Investigator and Technical Assistant with not less than 5 years regular service in the Grade, Codifier with not les than 8 years regular service in the Grade, Translator with not less than 10 years regular service in the Grade.

The petitioner's further case is that since the petitioner had been holding the post of Codifier and the private respondent No.4 the post of Research Investigator having identical pay scale, the only criteria to get consideration for promotion to the higher post would be the qualifying service. In case of Codifier it is prescribed not less than 8 years, in case of Research Investigator it is prescribed not less tan 5 years and as such the D.P.C. ought to have considered the case of the petitioner allowing the preferential treatment since the petitioner was senior to the private respondent No.4 by one year in the same pay scale and under the same Department. Since both the posts of Research Investigator and Codifier are included in the feeder posts for the purpose of promotion to the higher posts, the incumbent holding the feeder post more in length deserves to be allowed preferential treatment and as such, according to the petitioner, the appointment of the private respondent No.4 to the post of Research Officer is illegal, violative of the law of equality and liable to be quashed, instead the authority be directed to promote the petitioner to the post of Research Officer or equivalent post.

3. The Govt. respondent having file the counter resisted the claim of the petitioner on the ground, inter alia, that the Mizoram Public Service Commission (in short MPSC) did not recommend the name of the petitioner for the post of Research Officer and as such the appointing authority was not in a position to consider the case of the petitioner for the purpose of promotion.

4. The MPSC also furnished a counter contending, inter alia, that it is the settled proposition of law supported by judicial pronouncement that among the persons in the different feeder posts/Grades,

those in the higher pay scale would rank senior to those in the lower scale of pay and as such the MPSC recommended the name of the private respondent No.4 along with others who had been placed in a higher pay scale in comparison to the petitioner though the post held by the petitioner was also included in the feeder posts.

5. Heard the learned counsel for the parties.

6. From the minutes of assessment recorded by the MPSC it appears that there were as many as four candidates scored the over all assessment as "very good". They include the petitioner and the respondent No.4 also as available from Annexure-2 of the counter affidavit filed by the MPSC. From the counter affidavit filed by the MPSC, it appears that the pay scale of Codifier and Research Investigator had been amended and at the relevant time the pay scale of Codifier was 1600-2660 while the pay scale of Research Investigator was Rs.1640-2900/- and thus it is apparent that the pay scale of Research Investigator is a bit higher than the pay scale of Codifier.

7. Mr.Lalsawta, learned counsel representing the MPSC referred Swamy's Compilation "on seniority and promotion" and having referred the guideline prescribed by the Govt. of India, Department of Personnel and Training vide O.M.No.20011/1/88-Est(D) dated 12th December, 1988 submits that while different posts with different pay scales are included in the feeder posts for the purpose of promotion to a higher post the incumbent holding the higher pay scale among the feeder post holders should be treated senior to those holding the lower pay scale in the feeder post. For better appreciation, the aforesaid Office Memorandum dated 12.12.1988 is re-produced below:-

> "The matter has been re-examined in the light of a recent judicial pronouncement and it has been decided that the above instructions may continue to be followed subject to the modification that among the persons in the feeder grades given the same grading, those in the higher scales of pay will rank senior to those in the lower scale of pay."

8. Sitting in writ jurisdiction, the Court is concerned to examine the selection making process and not the selection itself. In this case, the petitioner's case was taken up for consideration. The post of Codifier, the petitioner held and the post of Research Investigator, the private respondent No.4 held both are included in the feeder posts for the purpose of promotion to the higher post of Research Officer and the allied and the bench mark was awarded to the petitioner as well as the respondent No.4 as "very good". The petitioner made no complaint regarding marking of bench mark. Recording

entries in the ACR of the petitioner vice verse the respondent No.4 has not been put under challenge. The only claim of the petitioner is that he was appointed one year before the respondent No.4 in the feeder post and as such his seniority should have been counted and should have been awarded additional marks. On the other hand, from the counter filed by the MPSC having referred to the Govt. of India's instruction dated 12.12.1988, it reveals that while more than one posts are included in the feeder posts for the purpose of promotion, the incumbent holding the feeder post having higher pay scale should be treated as senior to those who holding the feeder post having lower pay scale and in doing so, in my considered opinion, the MPSC committed no illegality or irregularity.

9. It appears from Annexure-III, the Gazette Notification dated 3.4.1990 that the scale of pay of Research Investigator (held by the private respondent No.4) was revised to Rs.1640-2900/- while the pay scale of Codifier (held by the petitioner) was revised to Rs.1600-2660/-.

10. Mr.C.Lalramzauva, learned counsel for the petitioner submits that being aggrieved by the pay anomaly created due to pay revision, the petitioner moved the authority and the matter is pending. Be that as it may, until the parity is done giving the petitioner equal pay scale benefit equivalent to the private respondent No.4, the petitioner cannot claim preferential treatment over the respondent No.4 for the purpose of promotion.

11. Having regard to the aforesaid legal position as discussed, I find the MPSC, respondent No.3 committed no illegality or irregularity in not recommending the name of the petitioner for the purpose of promotion to the higher post of Research Officer and as such the impugned order dated 1.5.97 by which the private respondent No.4 was promoted to the post of Research Officer (Anthropology) cannot be held to be bad or illegal.

12. In that view of the matter, in my considered opinion, the writ petition being devoid of merit is liable to be dismissed and is hereby dismissed with no order as to costs.

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IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR: TRIPURA: MIZORAM & ARUNACHAL PRADESH)
AIZAWL BENCH ::: AIZAWL
W.A. No.8 of 2001
D.D. 27.9.2001
Hon'ble Mr. Chief Justice R.S.Mongia &
Hon'ble Mr. Justice Ranjan Gogoi

Chairman, M.P.S.C. ... Petitioner
Vs.
Sh.P.C.Hmarthuama & 6 Ors. ... Respondents

Selection by Promotion:

Promotion to the post of Divisional Accountant Group-B post carrying pay scale of Rs.2000 – 3200/- from the cadre of Assistant Divisional Accountant – Two writ petitioners and respondents 5 and 6 were among the candidates considered for promotion – Respondents 5 and 6 were promoted on the ground that their bench mark was 'Very Good' as against bench mark of petitioners 'Good' – Petitioners challenged their supersession in W.P.No.123/2000 – Writ Petition was allowed holding that promotion panel has to be prepared in the order of seniority in the feeder cadre irrespective of the bench mark – The Commission challenged the said order in this writ appeal which is dismissed affirming the decision in the writ petition.

Held:

Instruction 3.5(1) is a complete Code in itself governing officers of Groups 'B' and 'C' posts. The authority issuing the instruction specifically did not allow any officer covered under 3.5(1) who might have got the bench mark 'Very Good' to supersede officer of bench mark 'Good' for promotion to the post under Groups 'B' or 'C'.

ORDER

Mongia, C.J:

Whether under the instruction issued by the Department of Personnel and Administrative Reforms (General Service Wing), Government of Mizoram, can an office for promotion to the Group 'B' post with a bench-mark 'Good'? The aforesaid question calls for determination in this appeal which has arisen in the following facts and circumstances of the case.

The two writ petitioners, namely, Shri Hmarthuama and Shri Vanlalnghaka, working as Assistant Divisional Accountant in P & E Sub-Station Division, Bukpui, Serchhip, Mizoram and Chief Engineer, PHE, Aizawl respectively were two of the candidates for consideration for promotion to the post of

Divisional Accountant, A Group 'B' post carrying pay scale of Rs.2000-3200/-. Apart from the writ petitioners, respondent Nos.5 and 6 before the writ court, namely, Shri Lalduhawma and Shri Lalmuansanga Hnamte working as Assistant Divisional Accountant in Maintenance Div-I (P&E), Aizawl and PWD Building Div-II, Aizawl respectively were also candidates for consideration for promotion to the post of Divisional Accountant. In the seniority of the post of Assistant Divisional Accountant, the writ petitioners were placed at Sl.7 and 8 whereas respondent Nos.5 and 6 were at Sl.Nos.13 and 15 respectively. As per procedure for promotion the Public Service Commission is to give a particular bench mark after considering the Annual Confidential Reports of the previous 5 years in case of promotion to the post of Divisional Accountant because minimum 5 years of service is required in their feeder cadre for consideration for promotion to the post of Divisional Accountant. On the basis of the ACRs, bench marks are given which are 'Average', 'Good', 'Very Good' and 'Outstanding'. As per instruction dated 8.9.98 issued by the Department of Personnel and Administrative Reforms (General Service Wing) laying down procedure to be observed by the Departmental Promotion Committee for promotion to Group 'B' post (as also promotion to Group 'C' post) requirement under Clause 3.5(i) minimum bench mark required is 'Good' to be brought on the panel of promotion. Clause 3.5(i) of the instruction dated 3.9.98 reads as under:

> 3.(i) Having regard to the levels of the posts to which promotions are to be made the nature and importance of duties attached to the posts a bench marks grade would be determined for each category of posts for which promotions are to be made by selection method. For all Group 'C' and Group 'B' posts, the bench mark would be 'Good'. All officers whose overall grading is equal to or better than the bench mark should be included in the panel for promotion to the extent of the number of vacancies. They will be arranged in the order of their inter-se-seniority in the lower category without reference to the overall grading obtained by each of them provided that each one of them has an overall grading equal to or better than the bench mark of 'Good'.

There were 4(four) posts of Divisional Accountant which were to be filled up by promotion. Following was the assessment of the ACRs of the Assistant Divisional Accountant who were in the zone of consideration for promotion to the post of Divisional Accountant in the Accounts and Treasuries Department.

Assessment of ACRs of Assistant Divisional Accountants in the zone of Consideration for promotion to the post of Divisional Accountant under Accounts and Treasuries Department

Sl.No.	Name of Officer	94-95	95-6	96-97	97-98	98-99	Overall
1.	Khawmpuithangi	VG	VG	VG	G	VG	V.Good
2.	A.Lianhmingthangi	VG	VG	G	VG	VG	V.Good
3.	P.C.Hmarthuama	G	G	G	VG	VG	Good
4.	Vanlalghaka	G	VG	VG	G	VG	Good
5.	BP Jaisi	G	VG	VG	VG	G	Good
6.	JH Hmingmuana	VG	G	G	G	VG	Good
7.	C.Lalnuntluanga	G	G	G	VG	G	Good
8.	Lalropianga	VG	G	VG	G	G	Good
9.	Lalduhawma	VG	VG	G	VG	Os	V.Good
10.	Zokhuma	VG	VG	G	VG	Os	V.Good
11.	Lalmuansanga Huamte	G	VG	VG	VG	VG	V.Good
12.	Lalhmingliani Pachuau(93-94)	G	VG	VG	VG	VG	V.Good

The writ petitioners' name occurred at Sl.Nos.3 and 4 whereas name of private respondent Nos.5 and 6 occurred at Sl.Nos.9 and 11. The petitioners were not promoted, instead private respondent Nos.5 and 6 were promoted on the ground that their bench mark was 'Very Good' whereas the petitioners had obtained benchmark as 'Good'. This led to the writ petitioners to challenge their supersession by respondent Nos.5 and 6 by filing writ petition (C) No.123/2000.

The learned Single Judge relying on the Clause 3.5(i) of the instruction held that the officers getting bench mark as 'Very Good' cannot supersede officers with bench mark 'Good' as their names in the promotion panel have to be included in order of seniority in the feeder cadre irrespective of the bench mark. The learned Single Judge allowed the writ petition on 25.7.2001 and quashed the promotion of the private respondents.

The Chairman of the Mizoram Public Service Commission has come up in appeal. It may be observed here that the private respondents Nos.5 and 6 in the writ petition have not filed any appeal so far.

We have heard the learned counsel for the parties.

Our analysis of the Clause 3.5(i) of the instruction dated 3.9.98 (supra) is as follows:-

(a) For all Groups 'C' and 'B' posts the minimum bench mark has to be good.

(b) All Officers whose over-all grading is equal to or better than the bench mark. 'Good' or better than 'Good' should be included in he panel for promotion

(c) The number of officers to be included in the panel for promotion is equal to the number of vacancies to be filled up by promotion.

(d) The officers will be arranged in order of inter se seniority in the lower category without reference to the grading obtained by each of them.

From the analysis, it is apparent that the officers who might have bench mark 'Very Good' would be placed in the promotion panel in order of seniority in the feeder cadre and will not be placed above his seniors who might have bench mark 'Good'. In other words, the officer with bench mark 'Very Good' would not supersede the officer who has bench mark 'Good' or above would be strictly in order of their seniority in the feeder cadre. The number of officers in the promotion panel cannot be more than the number of vacancies.

In the present case, the number of vacancies to be filled up by promotion were 4 (four). Therefore, four officers in order of their seniority who had obtained bench mark 'Good' or above had to be included in the panel for promotion which could contain only four names and not more.

The learned counsel for the appellant submitted that supersession by officer who has obtained bench mark 'Very Good' is possible. He can supersede the officer with bench mark 'Good'. It is, according to the learned counsel, permissible under Clause 3.5(ii) of the instruction dated 3.9.98. Clause 3.5(ii) of the instruction is in the following terms:

> "3.5(ii) In respect of all posts which are in the level of Rs.3700-5000 – and above the bench mark should be 'Very Good' and for all posts which are in the level of Rs.2200-4000/- and above but less than 3700-5000/-, the bench mark should be 'Good' and placed in the select panel accordingly upto the number of vacancies, officers with same grading maintaining their inter-se-seniority in the feeder post. Further, supersession of officers with lower grading by those with higher grading shall be permitted in the following manner only. To supersede those graded 'Very Good' officers graded outstanding should have at least 4 (four) of his ACRs graded as "outstanding" including the last ACR when the minimum length of service required at the feeder post and for promotion is 5 (five) years including the last one when the required length of service for promotion at the feeder grade is 7 years and 6 including the last one when the minimum length of service

required of the feeder grade for promotion is 8 years and eight including the last one when the required length of service at the feeder grade is (10) year. The same yardstick will apply for supersession of the officers grade 'Good' by the officers grade 'Very Good'.

(iii) Appointment from the panel list shall be made in the order of names appearing in the panel for promotion."

A bare reading of the aforesaid Clause would go to show that supersession, if any, is possible only for the posts carrying pay scale above Rs.2200-4000 – and not for Group 'C' and Group 'B' posts which carry pay scale less than Rs.2200-4000 – As observed above the pay scale of the post of Divisional Accountant (Group B post) is Rs.2000-3200/-. The learned counsel, faced with the situation submitted that the principles which are embodied in Clause 3.5(ii) of the instruction (supra) were made applicable in the present case and the private respondents, though junior to the writ petitioners as their bench mark was 'Very Good' as compared to the bench mark of the writ petitions which was only 'Good'.

We are of the view that the principles which may be embodied in instruction 3.5(ii) cannot be made applicable to the officers who are governed by instruction 3.5(1). Instruction 3.5(1) is a complete Code in itself government officers of Groups 'B' and 'C' posts. The authority issuing the instruction specifically did not allow any officer covered under 3.5(1) who might have got the bench mark 'Very Good' to supersede officer of bench mark 'Good' for promotion to the post under Groups 'B' or 'C'. The supersession if at all has been permitted only to officers carrying pay scale more than Rs.2200-4000/- covered under Clause 3.5(ii). Clause 3.5(ii) cannot be imported for promotion of the officers governed by Clause 3.5(1) of the instructions.

In view of the above, the first 4 (four) officers in order of their seniority having bench mark 'Good' or above could only be brought in the panel for promotion and arranged in order of seniority irrespective of the bench mark and promotions made accordingly. In view of the above, we find nothing wrong in the judgment of the learned Single Judge whereby he quashed the appointments of the private respondents.

For the foregoing reasons, we find mo merit in this writ appeal, which is hereby dismissed.

Before parting with the judgment we may observe that in this case we are not giving any interpretation of Clause 3.5(ii) of the instructions but only hold that this Clause will not be applicable to officers of Group 'B' and 'C' who are in the pay scale of Rs.2200-4000/-.

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IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR: TRIPURA: MIZORAM & ARUNACHAL PRADESH)
AIZAWL BENCH ::: AIZAWL
WRIT PETITION (C) No.26 of 2002
D.D. 15.05.2002
Hon'bl\e Mr. Justice S.K.Kar

Smt. C.Lalneihkimi & Anr. ... Petitioners
Vs.
The State of Mizoram & Ors. ... Respondents

Promotion:

Held:

In a claim for promotion it is a fundamental principle of law that promotion cannot be claimed as a matter of right and that it is the appropriate authority to consider and promote an officer to next higher grade as per administrative necessity. The right to promotion is not enforceable in a Court of law. In promotion prescribed norms and academic qualification are to be strictly followed.

OPERATIVE PORTION OF JUDGMENT & ORDER

5. I have heard both side and considered the relevant materials placed before this Court by attached annexures. Now, this Court in Pawan Kumar Vs. State of Mizoram 2000(1) SLR (Gauhati) 666 has held in a claim for promotion it is a fundamental principle of law that promotion cannot be claimed as a matter of right and that it is the appropriate authority to consider and promote an officer to next higher grade as per administrative necessity. Thus, right to promotion, the court held, is not enforceable in a court of law.

6. The factual position was some what similar or same in a case before Hon'ble Apex Court in Dr. Prit Singh, Appellant Versus S.K.Mangal & Ors., Respondents reported as 1993 Supp (1) SCC 714. The relevant para of the judgment will speak out for itself the legal proposition in this context. I quote -

> "11. It need not be pointed out that the Degree of Master of Arts is an academic qualification, whereas Degree of Master of Education is a professional qualification. According to us, when the qualifications required "a consistently good academic record with first or high second class Master's Degree in any subject"; (emphasis added) it shall mean an academic qualification like Master of Arts. The said requirement was prescribed with "a consistently good academic record". That Master's Degree shall mean Degree of Master of Arts in any subject, is apparent also from the fact that apart from that degree the candidate was required to possess also "Degree in Education" which will mean B.Ed. or M.Ed. Normally if the expression "Master's Degree" was to include even the master's

degree in Education (M.Ed.) there was no necessity of prescribing the third requirement of a "Degree in Education".

If the claim of the applellant that "Master's Degree" shall include a Degree of Master of Education, is accepted, it will lead to an anomalous position. A person having secured third division in M.A. who cannot be considered by any University even for the post of Lecturer, will become qualified for being appointed as a Principal of any College, if later he secures a high second class marks in M.Ed. Examination by completing a course of one year. It need not be pointed out that the sole object of prescribing qualification that the candidate must have a consistently good academic record with first or high second class Master's Degree for appointment to the post of a Principal, is to select a most suitable person in order to maintain excellence and standard of teaching in the institution apart from administration."

7. Thus, it is reiterated that in promotion prescribed norms and academic qualification are to be strictly followed and that there would be no plea to equate M.Ed. with M.A./M.Sc./M.Com. degrees for such purpose. The petition has been misconceived. For all practical purpose M.Ed. may be superlative in qualitative equation to B.Ed. but cannot be equated with the degrees of M.A./M.Sc./ M.Com. etc.

8. Therefore, I find there is absolutely no merit in the petition which stands dismissed.

9. No costs.

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IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR: TRIPURA: MIZORAM & ARUNACHAL PRADESH)
AIZAWL BENCH ::: AIZAWL
WRIT PETITION (C) No.111 of 2002
D.D. 19.6.2003
Hon'ble Mr. Justice P.G.Agarwal

Sh. R.Sangliankhuma ... Petitioner
Vs.
The Mizoram P.S.C. & Ors. ... Respondents

Selection by Promotion:

Promotion to Grade I-A from Grade-I – State sent the names of 2 persons including the petitioner to the Commission for selection – Commission held the petitioner ineligible and selected the other person who was appointed – In view of Clause 5(2) of Office Memorandum dated 10.12.2002 which provides determining eligibility date the High Court held that when the Service Rules are silent and do not prescribe any crucial date and in view of O.M. the crucial date is 1.4.2002 and as on that date the petitioner had completed 2 years of service in Grade-I of the service - Consequently the High Court allowed the writ petition and set aside the selection and promotion and remitted the matter back to the Commission to make proper selection in accordance with the Rules.

ORDER

1. Heard Mr. C.Lalramzadva, learned counsel for the petitioner and also heard Mr. N.Sailo, learned Government Advocate for the respondents No.2 & 3, Mr. K.V.Tlangmawla MPSC for respondents No.1 and Mr. George Raju for respondent No.4.

2. The matter relates to selection, appointment and promotion to the post of Addl. Secretary in Grade-1-A of the Mizoram Ministerial Service (herein after referred to as the Service, for short). vide Notification dated 3rd August, 2001, the State of Mizoram has upgraded one post of Joint Secretary to Addl. Secretary under the above service and the Mizoram Ministerial Service Rules were amended vide Amendment Rules of 2002 and the post was included in Grade-I-A of schedule 'A'. Thereafter, in the month of July 2002 the State made a requisition to the Mizoram Public Service Commission for selection to fill up the post and forward the names of two persons that of the writ petitioner and respondent No.4. However, the Commission was of the opinion that the writ petitioner is not eligible for promotion and the other eligible candidate respondent No.4 R.K.Singha's name was recommended and he was accordingly promoted.

3. The writ petitioner has challenged the above recommendation and promotion stating inter alia that he has been ousted from consideration on wrong interpretation of the rule. The petitioner was promoted to Grade-I vide order dated 31st August, 1999. Rule 105-A of the rules reads as follows:

> "Grade-I-A: Vacancies in this grade shall be filled up by promotion from amongst the members of the service in Grade-1 who have rendered two years regular service in Grade-I failing which members of the service in Grade-I who have rendered 1(one) year regular service in that grade but have completed 25 years service calculated from the year of entry into Grade IV of the service. The method of recruitment to this grade shall be by selection."

4. The case of the writ petitioner is that, the petitioner had completed more than two years of service in Grade-I when his candidature was provided by the Government and considered by the Mizoram Public Service Commission on 2.9.2002 and on that date, the petitioner had completed almost three years of service in Grade-I. The ground on which the petitioner was ousted from consideration is in para 3 of minutes of the Sub-Committee, which reads as follows:-

> "The Department placed the name of Pu.R.K. Singha and Pu Sangliankhuma for consideration. Certifying that they are the only eligible officers in the zone of consideration. The Department also furnished vigilance clearance in respect of the above officers from Vigilance Department. However, on careful scrutiny of the proposal, it was found that pu R.K.Singha was the only eligible candidate on the date of vacancy, i.e. 3rd August, 2001. The ACRs of the officers were carefully scrutinised and details of the assessment were placed in a separate sheet. On the basis of this, it was decided to recommend Pu R.K.Singha for promotion to Grade I 'A' of the Mizoram Ministerial Service (Additional Secretary) under Department of Personnel & Administrative Reforms (General Service Wing)".

5. The respondents State had filed an affidavit-in-opposition supporting the claim of the writ petitioner. The respondent MPSC has filed an affidavit-in-opposition justifying their decision and the respondent No.4 has filed an affidavit-in-opposition in support of the Commission.

6. The point of consideration is what should be the date on which the requirement of two years service will be calculated. Rule 10(1) quoted above does not provide any specific provision on this count.

7. Learned counsel for the respondent No.4 has referred to the office memorandum dated 10th October, 2002 and it is submitted that the earlier memorandum was also similar, clause 5(2) of the office memorandum reads as follows:

"5.2 Crucial date for determining eligibility: The eligibility date for determining the eligibility of officers for promotion would be the first day of the Financial Year i.e., 1st April.

The crucial date indicated above would be applicable to only such services and posts for which statutory service rules do not prescribe a crucial date".

8. Thus, we find that when the Service Rules were silent or do not prescribe any crucial date, crucial date shall be 1st of April. In the present case, 1st April, 2001 cannot be the crucial date as because on that date, the post of Grade-I 'A' was not in existence, it was created subsequently and the request for selection was made in the month of July 2002 and the selection took place in September, 2002 and hence 1st April, 2002 shall be crucial date fixing the eligibility criteria. Admittedly on that date, the writ petitioner had completed two years of service in Grade 1 of the service.

9. In view of the above, we find that the ouster of the writ petitioner from consideration was not in accordance with law and consequently the selection must go, which we do hereby. The selection dated 2.9.2002 made by the Mizoram Public Service Commission and the subsequent promotion of the respondent R.Singha is hereby set aside and the matter is remitted back to the Mizoram Public Service Commission to make proper selection in accordance with the rules and regulation, considering the case of eligible persons who are within the zone of consideration. Mr. George Raju has submitted that the promotion/appointment of respondent No.4 may not be disturbed and he may be allowed to continue in the post till selection is made by the Mizoram Public Service Commission. The order of selection and promotion must be set aside for non consideration of the case of the petitioner. The State of Mizoram will be, however, at liberty to make any interim arrangement, as it may deem fit and proper.

10. Mr.K.V.Tlangmawia, learned counsel appearing for Mizoram Public Service Commission, prays for four weeks time to process the matter. It is provided that the process may be completed within a period of six week's from today.

11. The writ petition stands allowed. No costs.

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IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR: TRIPURA: MIZORAM & ARUNACHAL PRADESH)
AIZAWL BENCH ::: AIZAWL
WRIT PETITION (C) No.73 of 2002
D.D. 9.12.2003
Hon'ble Mr. Justice S.K.Kar

Smt. Lily Vaikhuma ... Petitioner
Vs.
State of Mizoram & Ors. ... Respondents

Promotion:

The petitioner aggrieved by the promotion of her 2 juniors and seniority list of Under Secretaries to the post of Deputy Secretary – The High Court allowed the writ petition and directed that the claim of petitioner for promotion will be considered by the appropriate authority for the next available vacancy of Deputy Secretary giving all consequential benefits excepting claim of back wages.

Held:

On promotion from a junior grade to a higher or senior grade either from the date of promotion order or from the date of joining, as the case may be, the person so promoted gets encadred in the post to which she/he is promoted. His/her seniority, subject to rules framed or in force for the time being will be determined according to the date of joining the new service.

OPERATIVE PORTION OF JUDGMENT & ORDER (CAV)

6. Coming to the facts of the present case, it is the admitted position that under the relevant rules in force at the particular point of time the petitioner was lawfully promoted on 7.12.88 to Post of Under Secretary (vide Annex.-4) and she continued in the said grade notwithstanding the fact that in the seniority list of the Under Secretaries concerned prepared on 4.9.92, vide notification Memo No.A 23021/2/80-APT(B), her name was not shown at the relevant place in between the Serial No.18 & 19, i.e. below Pu K.Rochhinga and above Pu Laltlana J.Pachuau. But on consideration of her repeated representations the mistake was corrected vide notification dated 11.8.98 vide Memo No.A.23031/1/97-I AR(GSW) (Annx.-16), wherein she has been shown in Serial No.3 in between Sl.No.2 Pu K.Rochinga and Sl.No.4 Pu Laltlana J.Pachuau. She is aggrieved by promotion of her juniors Pu Laltlana J.Pachuau and two others effected vide notification No.A.22012/2/91-P&AR(GSW) dated 28.8.2001 (Annx.-17). She made representation to vindicate her grievances but ultimately the relief sought was refused by passing Inter Departmental note vide I.D.No.A 32028/1/2001-PAR(GSW) dated 18th March, 2002 and hence this writ petition seeking justice.

7. It cannot be gainsaid that on promotion from a junior grade to a higher or senior grade either from the date of promotion order or from the date of joining, as the case may be, the person so promoted gets encadred in the post to which she/he is promoted. His/her seniority, subject to rules framed or in force for the time being will be determined according to the date of joining the new service and accordingly, there is absolutely no question of reverting the person so promoted back to the original cadre from which he or she was promoted. In the instant case the petitioner would remain encadred since date of her promotion to the post of Under Secretary in the ministerial cadre and will be entitled to all service benefits as per the service jurisprudence as given and illustrated by the law quoted before hand.

8. Therefore, the objection raised by the respondents is absolutely without any merit if not misconceived, unwarranted and irrelevant. The law cited beforehand cannot be disputed and no detailed discussion is called for. The rights acquired by the petitioner under the law time being in force cannot be taken away without a just cause and as already settled position cannot be disturbed, 1998 (1) SLR (SC) 461:B.S.Baiwa Vs. State of Punjab.

9. In the result, the petition stands allowed.

10. Inter Departmental Note No.A32018/1/2001-PAR(GSW) dated 18.3.2002, (Annexure-20) is hereby set aside. The corrected inter-se-seniority list vide notification No.A 23031/1/97-1 AR(GSW) dated 11.8.98 (annexre-16) is to be maintained for all practical purpose.

11. It is further directed that the claim of the petitioner for promotion will be considered by the appropriate authority for the next available vacancy of Deputy Secretary in the MMS cadre and if and when otherwise she qualifies with the requirements as per the prevalent rules/law at the material date when her promotion fell due, she will be promoted to that post of Deputy Secretary. When so promoted her notional seniority will be fixed from the date on which her juniors in service were promoted and above them with all consequential benefits excepting claim of back wages; because it is the settled position of law that person who gets notional promotion from back date without having actually worked on that post is not entitled to claim arrears of pay from the date of notional promotion, refer, (1996) 7 SCC 533; State of Haryana V. O.P. Gupta.

12. No costs.

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IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR: TRIPURA: MIZORAM & ARUNACHAL PRADESH)
AIZAWL BENCH ::: AIZAWL
WRIT PETITION (C) No.76 of 2001
D.D. 27.9.2004
Hon'ble Mr. Justice Amitava Roy

Shri Sujit Chandra Das ... Petitioner
Vs.
The State of Mizoram & Ors. ... Respondents

Selection by promotion:

Petitioner was working as Assistant Soil Conservation Officer among others including the 4th respondent were considered by the Commission for promotion to the post of Divisional Soil Conservation Officer as per guidelines contained in Office Memorandum dated 3.9.1998 as per which 'Very Good' is prescribed as bench mark for promotion to the post carrying pay scale of Rs.3700 – 5000 – As the petitioner securing grading of 'Good' only as against the grading 'Very Good' secured by the selected candidates – The Court in view of the fact that in the last selection promotion assessment of the petitioner as 'Good' has remained unassailed and dismissed the writ petition.

ORDER

The petitioner has questioned the legality of the proceedings of the Mizoram Public Service Commission (hereinafter referred to as the Commission) resulting in what he perceives to be an arbitrary denial of his right to be considered for promotion to the post of Divisional Soil Conservation Officer in the department of Soil and Water Conservation, Government of Mizoram. Consequently, the promotion of the respondent No.4, on the basis there of has also been impugned.

2. I have heard Mr.George Raju, learned Counsel for the petitioner, Mr. Sailo, learned State Counsel for the State respondents and Mr. KV Tlangmawia for the Mizoram Public Service Commission.

3. As the primary facts relatable to the controversy are not in dispute it is unnecessary to deal with the factual details. The petitioner, serving as Assistant Soil Conservation Officer in the aforementioned department was eligible to be considered for promotion to the post of Divisional Soil Conservation Officer, in terms of the Mizorm Soil and Water Conservation Department (Group 'A' posts) Recruitment Rules, 1992 (hereafter referred to as the rules). The post is a selection post. The petitioner was admittedly within the zone of consideration by virtue of his seniority and in the selection held on 13.8.01, he along with one Mr. MK Debnath and Mr. BB Nandi were considered by the Commission for promotion to the above mentioned post. Whereas Mr. Debnath is senior to the

petitioner. Mr. Nandi the respondent No.4 is junior to him in service. The Government of Mizoram in the department of Personnel and Administrative Reports (General Service Wing) had evolved a set of guidelines for assessment of the eligible candidates for promotion in Government services. The office memorandum dated 3.9.98, contains the same. As per clause 3.5(ii), the bench mark for promotion to the post carrying pay scale of Rs.3700/- to 5,000/- has been prescribed to be "very good" applicable to the present selection. A reading of the said clause further reveals that the overall grading would depend on a consideration of the ACRs of the preceding five years. From the assessment sheet of selection, produced by the Commission, (Annexure II to its counter) it appears that Mr. Debnath and Mr. Nandi (Private respodnent) were accorded an overall grading of "very good" whereas, the petitioner could secure a grading of "good" only. Whereas the ACRs of Mr. Debnath and Mr. Nandi record a grading of "very good" for all the five years i.e. from 1995-96 to 1999-2000 those of the petitioner reveal that he was accorded a grading of "very good" only for the period 1996-97 and 1997-98. He was shown to have secured "good" during 1999-2000. Having regard to the bench mark prescribed as per the guidelines hereinabove, Mr. Debnath and Mr. Nandi were accordingly promoted by the order dated 7.6.2001. Though at the point of time when the writ petition was filed, the promotion notification had not been issued, in course of the hearing, the learned Counsel for the petitioner has also assailed the same.

4. The gist of the stand of the respondents is that the selection was held strictly in accordance with the guidelines and the petitioner having failed to secure the desired benchmark, he could not be favoured with the promotion.

5. Mr. George, while attacking the proceedings of the Commission, has principally argued that the grading of "good" shown against the name of the petitioner in the assessment sheet for the period 1999-2000, is ex-facie wrong inasmuch for the said period, in the last selection for promotion to the said post held on 31.5.01, he was shown to have acquired a grading of "very good". According to him, therefore, as the comparative assessment is vitiated by an error apparent in the face of records and in contravention of the guidelines mentioned above, the proceedings are liable to be adjudged unsustainable and resultantly the impugned order of promotion is also liable to be set aside.

6. The learned Counsel for the respondents are one in contending that even if the contention of the petitioner with regard to his grading, for the period 1999-2000 is correct, his over all grading of

'Good' is not affected thereby. The learned State Counsel with reference to the records, however, confirmed that the petitioner had secured a grading of "very good" for the period i.e. 1999-2000.

7. Admittedly, the bench mark for promotion to the post in question is "very good". The beneficiaries of the impugned order have secured "very good" gradings in all the five years. Even if, the grading of "very good" to the petitioner for the period 1999-2000 is restored, the over all assessment of his five years ACRs would not result in a grading of "very good" for him. This is as per the guidelines as well which provides that to supersede an Officer graded 'Good', the officer graded 'very good' should have at least four of his ACRs as 'very good' including the last ACR. In the present case the private respondents have secured 'very good' grading in all their five ACRs. The petitioner on the other hand had 'very good' grading only in three years including 99-2000. Logically, therefore, he, does not satisfy the norm prescribed for the promotion and thus cannot be accommodated against either of the two posts filled up by promotion. As the petitioner, apparently, has not been able to make the grade for promotion as prescribed by the guidelines, the anomaly with regard to his grading for the year 1999-2000, in my view, makes no difference so far as his over all assessment for the purpose of promotion is concerned. On a pointed query of this Court, the learned Counsel for the petitioner has fairly admitted that the assessment of the petitioner as "good" held in the selection dated 31.5.2001 (with 'very good' in 99-2000) has remained unassailed till date. In that view of the matter, the said assessment has attained finality. Consequently, the over all grading of the petitioner would remain "good" even if the grading of "very good" is restored for the period 1999-2000.

In view of the above, I do not find any merit in the petition and the same is accordingly dismissed. No costs.

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IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR: TRIPURA: MIZORAM & ARUNACHAL PRADESH)
AIZAWL BENCH ::: AIZAWL
WRIT PETITION (C) No.41 of 2001
D.D. 29.9.2004
Hon'ble Mr. Justice Amitava Roy

R.K.Engmawia ... Petitioner
Vs.
The Secretary to the Govt. of Mizoram & Ors. ... Respondents

Selection by promotion:

The petitioner who has not been considered for promotion to the post of Research Officer has questioned the State respondents' failure to hold selection for promotion every year thus adversely affecting his prospects of promotion – There is no dispute that selections were held in the years 1996, 1999, 2000 and 2001 where the case of the petitioner had been considered in accordance with the relevant guidelines – While acknowledging 2 posts were available to be filled up in the year 1996-97 as recommended by the State Level Co-ordination Committee it was contended that the information in that regard was communicated only in the year 1999 and High Court dismissed the writ petition.

ORDER

Non-consideration of the petitioner's case for promotion to the post of Research Officer under Mizoram Planning, Economic and Statistical Service in terms of the Mizoram Planning, Economics and Statistical Service Rules, 1996 (hereafter referred to as the Rules) is not his grievance. He complains that for the omission on the part of the State respondents to hold selection every year vis-à-vis the vacancies then existing, there has been a clubbing of vacancies as a result where of, he failed to make the grade having made to compete with the junior candidates having better service records. In other words, the petitioner has questioned the State respondents failure to hold selection for promotion every year thus adversely affecting his prospects of promotion.

2. I have heard Dr.Auva, learned Counsel for the petitioner and Mrs. Helen Dawngliani for the State respondents. I have also heard Mr. K.V.Tlangmawia for the Mizoram Public Service Commission (hereafter referred to as the Commission). None has entered appearance on behalf of the private respondents.

3. A few facts relevant for resolving the controversy have to be stated. The case of the petitioner is that he was appointed as Field Assistant in the department of Economics and Statistics in the year

1973 and was eventually promoted to the post of Assistant Research Officer in the pay scale of Rs.2000/- — Rs.3200/- in 1990. In the final seniority list of the Assistant Research Officers/Statistical Officers of the department circulated on 20.10.99, his name appeared at Sl.No.1. In 1996, the aforementioned Rules were framed, providing for appointment by promotion from the post of Assistant Research officer to the post of Research Officer in the Junior Grade of the service. In terms of the Rules, an Assistant Research Officer, who has put in five years of service, was eligible to be considered for such appointment. In the said year, the petitioner was, therefore, eligible for the purpose. It is the petitioner's case that in the said year, there were five vacant posts of Research Officer and though he was considered for promotion, he was not selected. The respondent No(s) 4 and 5, junior to him were, however, selected and promote. According to the petitioner, one more post, on the recommendation of the State Level Co-ordination Committee was included in the cadre of Research Officer in the year 1996 and further another post of the Research Officer created in the department of Health and Family Welfare, Mizoram Government, also remained vacant since 1988. Inspite of the fact that these vacancies, along with other vacancies, existed for being filled up by eligible Assistant Research Officers, no selection was held till the year 1999. In the year 1999, several other persons, junior to the petitioner, were promoted to the vacant post. The petitioner, though considered, was not selected for promotion. The petitioner has complained that persons not eligible for promotion in the year 1997 were recommended for promotion in the year 1999 and as no selection was held in the year 1997, the petitioner, though eligible then, was denied the opportunity of his case being considered for the purpose. Referring to an Office memorandum dated 17.7.96, laying down, inter alia, the procedure to be adopted by the DPC, in a situation where selection could not be held every year, the petitioner has contended that it was incumbent on the State respondents to consider his case separately against the vacancies yearwise instead of clubbing the same to his prejudice.

4. The stand of the State respondents is that in the year 1996, there were three vacancies in the post of Research Officer and the same being referred to the Commission for selection, it drew up a panel of three persons for the existing vacancies and also recommended the names of respondent No(s) 4 and 5 for future vacancies. The name of the petitioner, though considered, was not recommended, as according to the Commission, better candidates, in terms of the prevalent guidelines for selection, were available. The answering respondents denied the creation of the post of Research Officer in terms of the recommendation of the State Level Co-ordination Committee and pleaded that the factum of vacancy in the post of Research Officer in the Health and Family Welfare Department was conveyed to the department only in the year 1999 through a letter dated 1.7.99. According to

them, this post, along with other posts, were referred to the Commission for recommending suitable candidates for promotion in the year 1999. The case of the petitioner was again considered but he was not recommended due to availability of better candidates. The State respondents have taken a stand that the petitioner being eligible his case was considered by the Commission in all the selections held in the years 1996, 1999, 2000 and 2001 but he was not recommended as his over all grading was lower than that of the other candidates.

5. The stand of the Commission, in short, is that in the year 1996, selection was held for three posts of Research Officer and in terms of the Office Memorandum dated 10.3.89, prescribing the guidelines for comparative assessment of the candidates, out of the seven candidates so considered, all except the petitioner, secured a grading of "very good". As the petitioner was graded "good", he was not recommended for promotion. In the year 1999, selection was held by the Commission in which 10 candidates were considered where one was rated "outstanding". Whereas seven others secured a grading of "very good", the petitioner and another were graded as "good". In terms of the Office memorandum date 3.9.98, then in force, five candidates were recommended and the petitioner having a grading of "good" had to be excluded.

6. The learned Counsel for the petitioner, in the background of the above pleadings, has contended that due to the failure of the State respondents in holding the selection every year, there has been no consideration of his case in the eye of law as he had been pitted against his junior Officers with better service records unfairly at a point of time much beyond when the vacancies had arisen. As it was incumbent on the State respondents to hold selection every year, rejection of his candidature on the ground of availability of better candidates in a selection against posts clubbed together has resulted in discrimination and arbitrariness, denying the petitioner the right to be considered for promotion he urged.

7. The learned State Counsel in reply, with reference to the pleaded facts, has submitted that the contention of the petitioner has no factual basis inasmuch as in absence of any vacancy during 1997 and 1999 there was no scope for the State respondents to hold any selection. The petitioner having been considered in all the selections held cannot make any grievance of non-consideration of his case for promotion.

8. The learned counsel for the Commission, while endorsing the arguments of the learned State Counsel, has submitted that the selections were held by the Commission strictly adhering to the guidelines contained in the relevant Govt. memoranda and as the petitioner after due consideration was not recommended for promotion, his grievance is wholly misplaced.

9. As noticed at the outset, the petitioner's objection is with regard to the non-holding of yearly selections for promotion and not one of non-consideration of his case. The focus is mainly on the period 1997 to 1999. It is the petitioner's contention that though two posts, one being recommended by the State Level Co-ordination Committee and the other in the department of Health and Family Welfare, were available to be filled up in the year 1996-97, no selection was held till 1999. While acknowledging the recommendation of the State Level Co-ordination Committee, the State respondents have categorically denied that any such post was eventually created pursuant thereto. With regard to the post in the department of Health and Family Welfare, the State respondents' stand is that necessary information in that regard was communicated to the concerned department only in the year 1999 by a letter dated 1.7.99 which has been annexed as Annexure C7 to their counter. These statements have remained unrebutted. Having regard to the fact that the stand of the State respondents to the above effect is based on records and supported by the solemn affirmation of an authorized Officer, it is not possible to uphold the petitioner's contention in this regard. There is no dispute that selections were held in the year 1996, 1999, 2000 and 2001 where the case of the petitioner had been considered in accordance with the relevant guidelines. The recommendations of the Commission following the selection held on 30.4.96 were forwarded to the Government by a communication dated 2.5.96. A bare perusal of the Minutes of the said selection reveals that against the three vacancies referred to be filled up, the Commission had drawn up a panel of equal number of candidates and had also recommended the names of respondent No(s) 4 and 5 for future vacancies. Under Rule 10(g) of the Rules, the select list would remain valid for a period of one year from the Commission's letter of recommendation. In any case, the promotion of respondents 4 and 5 has not been assailed by the petitioner in the present proceeding.

10. In the above view of the matter, I cannot persuade myself to hold that the petitioner's grievance of being denied the right to be considered for promotion for the failure of the State respondents to hold selection every year is well founded. Needless to say, as the petitioner continues to be eligible to be considered in terms of the Rules and that he has completed about 14 years in the post of the Assistant Research Officer, the State respondent would take all reasonable care to ensure that his case for promotion is considered strictly in terms of the Rules and the relevant guidelines in future as well as without meting out any unfair and unequal treatment to him.

11. With the above observations, this petition stands closed. No costs.

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IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR: TRIPURA: MIZORAM & ARUNACHAL PRADESH)
AIZAWL BENCH ::: AIZAWL
WRIT PETITION (C) No.17 OF 2004
D.D. 01.04.2005
Hon'ble Mr. Justice T.Vaiphei

Sh. Lalkhumtira ... Petitioner
Vs.
The State of Mizoram & Ors. ... Respondents

Disciplinary Proceeding:

Whether acquittal in criminal case pertaining to subject matter of the disciplinary proceeding bars the finding of guilt recorded by the Disciplinary Authority? – No

In two Department inquiries taken up against the petitioner regarding shortage of Rs.2,35,630/- while he was functioning as B.D.O. he was found guilty of penalty of withholding 1/3 of his pension for a period of two years has been imposed – Overruling the objections that two documents which were not mentioned in the charge sheet were relied upon for recording the finding of guilt and fact of acquittal in the criminal case has been overlooked the High Court has dismissed the writ petition.

Held:

It is settled law that the finding of disciplinary authority cannot be interfered with by this Court unless the finding is perverse or based on no evidence and that if there are two possible views on the matter, the view of the disciplinary authority cannot be interfered with.

Case Referred:

1999 (2) SCC 10 - Kuldeep Singh –versus- Commissioner of Police

ORDER

1. This writ petition is directed against the Disciplinary proceeding initiated against the petitioner which culminated in imposing a penalty of withholding 1/3 of his pension admissible to him for a period of two years starting from the month of October, 2002 and against the impugned decision of the Government rejecting his representation for regularization of his service and promotion to MCS Junior Grade.

2. I have heard Mr.A.R.Malhotra, learned counsel appearing for the petitioner. I have also heard Mr. N.Sailo, learned Govt. Advocate appearing for the State respondents.

3. The facts material for disposal of this writ petition are that the petitioner was initially appointed as Non Gazetted Administrative Officer and was subsequently promoted to the Subordinate Civil

Service Group B post. On his promotion, he was posted as Administrative Officer (Gazetted) at Thenzawl vide the notification dated 8.10.1985. While he was serving as Administrative Officer (Gazetted) Kawnpui, Aizawl District in the year 1988, a Disciplinary proceeding (hereinafter called "Thenzawl Case") was initiated against him vide Memorandum No.C.14013/14/88-Pers(B) dated 10.6.1988 for his act of omission or commission while functioning as Administrative Officer (Gazetted) at Thenzawl during the period from 30.10.85 to 8.6.86. The article of charge against him is at Annexure-3 to the writ petition, which is reproduced herein below:

> "Pu Lalkhumtira, Administrative Officer (G) Kawnpui while functioning as Administrative Officer (G) Thenzawl during the period from 30.10.1985 to 8.6.1987 had caused heavy pecuniary loss to the Government to the tune of Rs.13,14,438.97/-.
>
> The said Pu Lalkhumtira, Administrative Officer (G) Kawnpui by his above act exhibited lack of integrity, lack of devotion to duty and conduct which is unbecoming of a Govt. servant and thereby contravening sub-rule (1)(i)(ii) & (iii) of Rule 3 of C.C.S. (Conduct) Rules, 1964".

4. The petitioner submitted his written statement of defence in which he denied the charges framed against him and explained as to how there was no pecuniary loss to the tune of Rs.13,14,438.97 caused to the Government. It may be noted that in connection with his misappropriation case, a criminal case, being G.R. Case No.107/90 U/s 409 IPC was also charged against the petitioner.

5. Another Departmental proceeding (hereinafter called "Aibawk Case") was initiated against the petitioner vide Memorandum No.C.14012/3/93-P&AR (CSW) dated 8.8.94 with the following article of charge:

> "That the said Pu Lalkhumtira, S.Dy.M., Lawngtlai while functioning as B.D.O., Aibawk from 9.12.91 to 30.3.93 misappropriated IRDP Subsidy, JRY and IAY works amounting to Rs.2,35,630/- (Rupees two lakhs thirty five thousand six hundred thirty) only causing heavy pecuniary loss to the Government.
>
> The said Pu lalkhumtira, S.Dy.M., Lawngtlai by his above act exhibited lack of integrity, lack of devotion to duty and conduct unbecoming of Govt. servant and thereby contravening Sub-rule (i), (ii) and (iii) of Rule 3 of C.C.S. (Conduct) Rules, 1964".

6. The petitioner, duly submitted his written statement of defence denying the charge framed against him and explaining the reasons as to why there was a shortage of Rs.2,35,630/- for the period from 9.12.91 to 30.3.93 while he was functioning as BDO, Aibawk.

7. The two departmental enquiries were taken up together with one Inquiry Officer. In the meantime, the petitioner retired from service on attaining the age of superannuation with effect from 31.12.97. Due to the pendency of the departmental enquiries, he was paid a provisional pension in terms of Rule 9(2)(a) of the Central Civil Services (Pension) Rules, 1972 of the said rules till conclusion of the departmental inquiries pending against him. It may also be noted that during the pendency of the impugned departmental proceeding, the criminal case against the petitioner was disposed of by acquitting him by the order dated 10.12.97 by the learned Magistrate, 1st class, Aizawl District, Aizawl. The departmental inquiries were ultimately taken up by Shri.S.R.Choudhury, Commissioner for Departmental enquiry. The Inquiry Officer, after examining the witnesses held that the charges framed against the petitioner in the two Memorandum of charges were proved. Thereafter, a copy of the enquiry report was furnished to the petitioner by the Disciplinary Authority informing him of his right to make a representation against the Inquiry Report within 15 days of the receipt of the Inquiry Report. The Inquiry Report is at Annexure-15 to the writ petition. The petitioner submitted his representation dated 11.4.01 to the respondent No.2. The respondent No.2, after considering the Inquiry Report and the representation of the petitioner, passed the impugned order whereby a penalty of withholding 1/3 of his pension for a period of two years starting from his pension for the month of October, 2002 was imposed upon him. The impugned order is at Annexure-17 to the writ petition. The petitioner, thereafter, made a representation on 21.10.02 to the respondent No.2 requesting him to lift the penalty imposed upon him and to regularize his promotion/service. However, the respondent No.2 rejected the representation of the petitioner on the ground that the departmental proceeding instituted against him had ended with a penalty imposed upon him and his promotion/induction into MCS Junior grade could not be acceded as his case had been placed in a sealed cover. It was under the aforesaid circumstances that this writ petition has been filed.

8. In the course of hearing, Mr.A.R.Malhotra, learned counsel for the petitioner has confined himself to the following submissions:- (1) by taking into account the report in the preliminary enquiries which were not even mentioned in the charge sheet, the entire disciplinary proceedings against the petitioner are vitiated and as such the impugned order imposing the penalty therein cannot be sustained in law; (2) the Inquiry Officer, as well as the Disciplinary Officer have completely overlooked the undisputed fact that the petitioner was acquitted of the criminal case and since the criminal case as well as the departmental proceedings in Thenzawl case are based on identical facts which were sought to be proved by the same witnesses and documents, the petitioner ought to have been exonerated from

the charge in respect of the first Memorandum of charge and (3) since the Inquiry Officer has not taken into account the evidence adduced on behalf of the petitioner, the decision of the Inquiry Officer and the Disciplinary Authority suffered from non-application of mind.

9. Mr. N.Sailo, learned Govt. Advocate, however, contends that the enquiry officer based his conclusion on materials available on record and has duly considered the defence put forward by the petitioner, and since the conclusions have been drawn in a reasonable manner and objectively, such conclusions cannot be interfered with by this court in exercise of its writ jurisdiction. Drawing my attention to Paras 7 and 8 of the Inquiry Reports, the learned counsel for the State respondent vehemently submits that the Inquiry Officer has duly considered the evidence adduced on behalf of the petitioner, and also all the documents relied upon by him to proof his innocent. In so far as the reliance placed by the Inquiry Officer, on the preliminary enquiry report are concerned, the learned counsel for the State respondent points out that these documents were duly exhibited in the course of enquiry in the presence of the petitioner himself, who was given the opportunity to demolish the genuineness or otherwise of the contends thereof by effective cross examination. He also pointed out that the petitioner was defended by a defense assistant namely, Shri R.Sangliankhuma. With respect to the grievance regarding the non consideration of the acquittal of the petitioner from the criminal case, the learned counsel for the State contends that there is no rule of thumb that acquittal of a delinquent official in a criminal trial shall automatically entitle him to exoneration from a departmental proceeding. According to the learned counsel for the State, since there is no merit in this writ petition, the same is liable to be dismissed with costs.

10. From the pleadings of the parties, the first point for determination in this case is whether the departmental proceeding can be said to be vitiated due to the reliance placed by the enquiry officer upon the two preliminary reports in connection with the two departmental proceedings. There is no dispute, nor can there be such a dispute, that the preliminary enquiries in both the Thenzawl Case and Aibawk Case were conducted behind the back of the petitioner and that the reports of these preliminary enquiries were made, the basis for initiating the two departmental enquiries against the petitioner. On going through the Original File relating to the departmental proceeding, it is unmistakably clear that both the preliminary enquiry reports were duly exhibited as exhibit-I in both the departmental enquiries and the enquiring authorities in the said preliminary enquiries were also examined as State witnesses. It is further clear from the record that those documents were exhibited and the authors of these documents were examined in the presence of the petitioner and his defense assistant. The record

further shows that the petitioner did cross examine both the Inquiry Officers of the preliminary enquiries. Therefore, the question of denial of cross examination to him does not arise.

11. Relying on the decision of the Apex Court, Kuldeep Singh –versus- Commissioner of Police reported in 1999 (2) SCC 10, Mr. A.R.Malhotra, learned counsel for the petitioner strenuously argued that, since these two documents were not even mentioned in the charge sheet, the Inquiry Officer has acted illegally in relying upon the said documents for recording the finding of guilt against the petitioner. I have carefully considered the decision cited by the learned counsel for the petitioner. In that case, the Apex Court has categorically held that a document which was not mentioned in the charge sheet could not be relied upon or even referred to by the Disciplinary Authority. There can be no quarrel with the proposition of law laid down by the Apex Court in the aforecited case. Indeed, the law laid down by the Apex Court is binding upon this court. However, having said that in my considered view, the facts of the said case are clearly distinguishable in as much as the Apex Court, therein was not dealing with a case in which the documents relied upon by the Disciplinary Authority was duly exhibited in the enquiry in the presence of the delinquent official with full opportunity available to him for cross examination of the witnesses. In the instant case, in view of my above findings, no prejudice can be said to have been caused to the petitioner when the Disciplinary Authority placed reliance upon exhibited preliminary reports.

12. Natural justice is not un-ruly horse, no lurking land-mine, nor a Judicial cure-all. If fairless is shown by the decision maker to the man proceeded against the form, features and fundamental of such essential processual propriety being conditioned by the facts and circumstances of its situation, no breach of natural justice can be complained of. The unnatural expansion of natural justice without reference to the administrative realities and other facts of a given case can be exasperating. The courts cannot look at law in the abstractor natural justice as a mere arte-fact. Nor can they fit into a rigid mould, the concept of reasonable opportunity. If the totality of circumstances satisfies the court that the party visited with the adverse orders has not suffered from denial of reasonable opportunity, the court will decline to be punctilious or fanatical as if the rules of natural justice where sacred scripture. Whenever a complaint is made before the court, some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of the case. The rule that enquiry must be held in good faith and without bias and not arbitrarily or unreasonably is now included among the principles of natural justice. Viewed against above back

ground in the absence of prejudice caused to the petitioner, I have no hesitation to come to the conclusion that the reliance placed by the Disciplinary Authority upon the said preliminary reports for reaching its findings and conclusions cannot vitiate the disciplinary proceedings against the petitioner.

13. On the question of overlooking the evidence adduced on behalf of the petitioner, the point urged by the learned counsel for the petitioner has also no substance. The Inquiry Reports as well as the proceedings of the Inquiry Officer showed that the Inquiry Officer has taken the pain to discuss all the evidences adduced by the petitioner. In fact, Para 7 & 8 of the Inquiry Report in the case of Thenzawl Case, the Inquiry Officer has reproduced the statement of the petitioner and elaborately dealt with the same in Para 9 of the enquiry reports. It must be reiterated that the petitioner was charged with misappropriating a sum of Rs.13,14,438.97. In his defense statement, the petitioner has clearly admitted the receipt of the aforesaid amount. That being the position, the burden of proof is upon him to show as to how, when, where those amounts were utilized by him in accordance with the Government rules and instructions. The Inquiry Officer rightly observed that the supply matters including the sale proceeds were handled by the Store keeper and that he was only maintaining the Cash Book, and was not acceptable and held that as A.O., the head of the office and as such, the responsibilities for proper functioning of the two wings that is, Supply Wing and Administrative Wing were on his shoulder. The Inquiry Officer also went on to observe that the Store Keeper is a much junior functionary to the A.O., and that as the A.O. and it was, therefore, his responsibilities to keep proper account of the receipt and expenditure and not that of the Store Keeper. The Inquiry Officer has also recorded the finding that the delinquent official after receipt of the charge memo had the opportunity to go to Thenzawl and verify the account before submitting his written reply to the disciplinary authority.

14. The law, regarding judicial review in a disciplinary matter is now well settled. The High Court, while exercising its writ jurisdiction does not reverse the finding of the enquiry authority on the ground that the evidence adduced before it is insufficient. If there is some evidence to reasonably support the conclusion of the Inquiry Officer, it is not the function of the Court to review evidence and to arrive at its own independent finding. The enquiring authority, the sole judge of the fact, so long as there is legal some evidence to substantiate its finding. Adequacy or reliability of evidence is not a matter which can be permitted to be canvassed before the court in writ proceedings. The scope of judicial review in matter of this nature being restricted, the High Court has to consider challenge to the impugned order with a limited degree of scrutiny that was called for. In my considered view, the earlier discussions on the Inquiry Reports clearly show that no part of evidence of the petitioner has been overlooked by the

disciplinary authority. Under the circumstances, the grievance of the petitioner in this behalf is without any foundation.

15. In so far as Aibawk Case is concerned, the contention of the petitioner must also meet the same fate. The case of the defendant is clearly dealt with by the Inquiry Officer at page 16 & 17 of the enquiry report. The Inquiry Officer, after discussing the case of both the petitioner and the State has found that at the time of handing over of the charge by the officer, there was a shortage of Rs.2,52,630/- and that the petitioner could not show any documentary or oral evidence to the effect that he had taken sufficient effort to regularize these expenditure before he left Aibawk on transfer. He also found that the petitioner had nowhere mentioned that he had left any record of such expenditure which he claimed to be incurred with his successor to enable him to pursue the matter. The certificate, that is exhibit D-1, D-2 and D-3 issued by DW-1 to show the minutes of the DPC meeting held in 1993 evidencing some expenditure incurred by the petitioner was missing account was disbelieved by the Inquiry officer on the ground that this certificate were not based on the factual data but on presumption. The Inquiry Officer also held that the statement of the petitioner that the cash was handled by the then Cashier, who also kept the keys and maintained the Cash Book and that he was simply signing the Cash Book, could not be believed. In fact, according to the Inquiry Officer, this circumstance proved that the petitioner was not aware of his responsibilities as DDO. The question then is whether the view taken by the Inquiry Officer can be upset by this court in a writ jurisdiction. It is an equally settled law that the finding of disciplinary authority cannot be interfered with by this court unless the finding is perverse or based on no evidence and that if there are two possible views on the matter, the view of the disciplinary authority cannot be interfered with. The view held by the Inquiry Officer in the instant case is a possible view based on record and cannot be interfered with by this court. Therefore, the contention of the petitioner on this court also fails.

16. The next contention of the learned counsel for the petitioner is that once the petitioner has been acquitted from the criminal case, which is based on the same acts and are to be proved by the same witnesses and documents, the further proceedings of the departmental enquiry and the passing of the impugned order are unwarranted and not tenable in law. It is true that the criminal case relates to Thenzawl Case of the instant proceeding. There can also be no dispute that the fact of the case are identical in nature and that the evidences are also one and the same. However, it must be noted that the criminal case ended in the acquittal of the petitioner on the ground of lack of evidence or default in

prosecution. No prosecution witnesses worth the name were apparently examined in that case to bring on the charges against the petitioner, therefore, it is not surprising that the criminal case ended in his acquittal. However, the same cannot be said about these departmental proceedings. As noticed earlier, in these Departmental proceedings, the evidence are available and produced/exhibited by the State to substantiate the charges leveled against the petitioner. The Inquiry Officer has come to the definite conclusions that the petitioner is guilty of the charges framed against him in connection with Thenzawl Case and Aibawk Case. As observed earlier, the findings of the Inquiry Officer as accepted by the disciplinary authority do not suffer from perversity. In that view of the matter, the acquittal of the petitioner in the criminal case cannot bar the finding of guilt against him recorded by the disciplinary authority. Under the circumstances, I do not find any merit in the contention of the learned counsel for the petitioner in this behalf as well.

17. In the result, this writ petition is devoid of merit and is hereby dismissed. However, on the facts and circumstances of this case, there shall be no order as to costs.

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IN THE SUPREME COURT OF INDIA
CIVIL APPEAL LATE JURISDICTION
CIVIL APPEAL NO.2527 OF 2007
[Arising out of S.L.P (Civil) No.3413 of 2006]
D.D. 15.5.2007
Hon'ble Mr. Justice S.B.Sinha &
Hon'ble Mr. Justice C.K.Thakker

S.B. Bhattacharjee ... Appellant
Vs.
S.D. Majumdar & Ors. ... Respondent

WITH

CIVIL APPEAL NO. 2528-2529 OF 2007
[Arising out of S.L.P. (Civil) No. 12650-12651 of 2006]

Promotion by selection:

The petitioner and the 1st respondent along with 2 others was eligible for promotion for the post of Executive Engineer governed by Mizoram Engineering Service Rules, 2001 – Office Memorandum dated 10.10.2002 lays down procedure to be observed by DPC for assessment of candidates for promotion – On the recommendation of the Commission the 1st respondent has been promoted – In the writ petition filed by the petitioner the High Court held that the consideration for the year 2002-03 (upto 31.3.2003) was made by the Commission was correct in view of Clause 3.4(g) of Office Memorandum and dismissed the Writ Petition – In Writ Appeal the Division Bench held that in view of the plain meaning of Clause 3(g) ACR of 2003-2004 could not have been considered allowed the Writ Appeal and directed to convene review of DPC to consider the case of incumbents including the petitioner and 1st respondent – In this appeal by the petitioner before the Supreme Court the Court has upheld the opinion of the Division Bench and dismissed the appeal.

Held:

In a given case and in the absence of rule the Court might have been justified to hold that the DPC must have taken into consideration the merit and merit only. However, in a case of this nature, where the State lays down the procedures as to how and in what manner the merit and suitability is to be judged, it is obligatory on the part of the Commission to follow the same in its letter and spirit. The case at hand shows that in a situation of this nature it proves to be disastrous to an employee, if any other construction is given.

J U D G M E N T

S.B. SINHA, J :

1. Leave granted.

2. Interpretation of an Office Memorandum dated 10.10.2002 providing for the mode and manner for considering the suitability of candidates for promotion from one post to the other, falls for consideration

in these appeals which arise out of a common judgment and order dated 27.01.2006 passed by a Division Bench of the Gauhati High Court in Writ Appeal No. 5 of 2004 whereby and whereunder the appeal preferred by Respondent No.1 from a judgment and order 29.11.2004 passed by a learned Single Judge of the said High Court in Writ Petition (Civil) No. 44 of 2004, was allowed.

3. A post of Executive Engineer was created on 01.02.2004. For the purpose of filling up the said post, the Departmental Promotion Committee (for short, 'the DPC') held a meeting on 16.03.2004. The DPC indisputably was, inter alia, to consider the Annual Confidential Reports (for short, 'ACRs') of the candidates concerned. Both the appellant and the first respondent along with two others were eligible therefor. Promotion to the said post is governed by the Mizoram Engineering Service Rules, 2001 (for short, 'the Rules). Rule 20 of the said Rules, inter alia, provides for general procedure for promotion, relevant clauses whereof are as under :

> "20. (1) Whether any vacancy or vacancies arise(s) to be filled up by promotion, the Controlling Authority shall furnish to the Commission, the following documents and information :
>
> (d) Annual Confidential Reports of eligible candidates of preceding years as may be required, length of service, duly reviewed and accepted by the authorities concerned.
>
> (e) Details about reservation for member of the service in respect of graduate in Engineering and holders of under graduate diploma in Engineering as provided under sub-rules (3) and (4) of Rule 19.
>
> (f) Clearance from Vigilance Department separately in respect of each, and
>
> (g) Any other documents and information as may be considered necessary by the Commission."

4. State of Mizoram, however, issued an Office Memorandum dated 10.10.2002 laying down the procedures to be observed by the DPC, relevant clauses whereof are as under :

> "3.2 While merit has to be recognised and rewarded, advancement in the officer's career should not be regarded as a matter of course but should be earned by dint of hard work, good conduct and result oriented performance as reflected in the annual confidential reports and based on strict and rigorous selection process.
>
> 3.4 Confidential Rolls are the basic inputs on the basis of which assessment is to be made by each DPC. The evaluation of CRs should be fair, just and non-discriminatory. Hence,
>
> (a) The DPC should consider CRs for equal number of years in respect of all Officers considered for promotion subject to (c) below.
>
> (b) The DPC should assess the suitability of the candidates for promotion on the basis of the their service records and with particular reference to the CR for five preceding years, irrespective of the qualifying service prescribed in the Service Rules/

Recruitment Rules. (If more than one CR has been written in a particular year all the CRs for the relevant years shall be considered together as the CR for one year).

(c) When ACR has not been written by the reporting Officer despite submission of the self-appraisal to the Reporting Officer by the Officers reported upon during the relevant period, the DPC should consider the CR of one preceding year beyond the relevant period.

xxx xxx xxx

(e) The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs, but should make its own assessment on the basis of the entries in the CRs, because it has been noticed that, some time, the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.

(f) If the Reviewing Authority or the Accepting Authority, as the case may be, has overruled the Reporting Officer, or the Reviewing Authority, as the case may be, the remarks of the latter authority should be taken as the final remarks for the purpose of assessment, provided it is apparent from the relevant entries that the higher authority has come to a different assessment consciously after due application of mind. If the assessment of the Reporting Officer, Reviewing Authority and Accepting Authority are complimentary to each other and one does not have the effect of overruling the other, then the remarks should be read together and the final assessment made by the DPC.

(g) ACRs of Officers which became available during the year immediately preceding the vacancy/panel year should be considered by the DPCs even if DPCs are hold later than the year of vacancy. In other words, for the vacancy/panel year, 2001-2002, ACRs upto the year ending 31st March, 2000 are required to be considered irrespective of the date of convening of DPC. However, ACRs upto the year ending 31st March, 2001 will be considered by the DPC if it sits after September of that year even if the vacancy falls within 2001-2002.

xxx xxx xxx

3.5(ii) In respect of all posts which are in the scale of pay of Rs.12000-16500/- and above, the bench-mark shall be "VERY GOOD" and for all the posts which are in the scale of pay of Rs.8000-13500/- and above but less than Rs.12000-16500/- the bench-mark shall be 'GOOD'.

Further, overall grading of officers shall be made in the following manner :

Outstanding	An Officer, who gets at least 3 (three) outstanding reports out of 5 (five), provided that the remaining 2(two) reports should not be less than 'Very Good', will be categorised as 'Outstanding'.
Very Good	An Officer, who gets at least 3 (three) 'Very Good' reports out of 5 (five), provided that the remaining 2 (two) reports should not be less than 'Good' will be categorised as 'Very Good'.
Good	An Officer, who gets at least 3 (three) 'Good' reports out of 5 (five), will be categorised as 'Average'.
Average	An Officer, who gets at least 3 (three) 'Good' reports out of 5 (five),

will be categorised as 'Average'.

An Officer who gets an overall grading of Outstanding will en bloc supersede Officer who gets an overall grading of 'Very Good' regardless of seniority. An Officer who gets an overall grading of 'Very Good' will en bloc supersede Officer who gets an overall grading of 'Good' regardless of seniority.

xxx xxx xxx

3.8 For the purpose of evaluating the merit of the Officers while preparing year-wise panels, scrutiny of the record of service of the Officers should be limited to the records that would have been available had the DPC met at the appropriate time. For instance, for preparing a panel relating to the vacancies of 2001-2002 the latest available records of service of the Officers up-to the period ending March, 2000 as the case may be should be taken into account and not the subsequent one. However, if on the date of the meeting of the DPC, Departmental Proceedings are in progress and under the existing instructions sealed cover procedure is to be followed, such procedure should be observed even if Departmental Proceeding were not in existence in the year to which the vacancy related. The Officer's name should be kept in the sealed cover till the proceedings are finalized."

5. Before we embark upon the rival contentions of the parties, we may notice the assessment of ACRs of the appellant and respondent no.1 respectively from 1997-98, which is as under :

Sl. No.	Name of the Officer	1997-98	98-99	99-00	00-01	01-02	02-03	Overall
1.	S.D.Majumdar	VG	VG	VG	VG	VG	VG	Very Good
2.	...	...	...	...	...	...	...	...
3.	...	...	...	...	...	...	...	...
4.	S.B.Bhattacharjee	VG	Os	VG	VG	Os	Os	Outstanding

6. Indisputably, if the ACR for the year 1997-98 is taken into consideration for the purpose of judging the suitability of the appellant and respondent no. 1 and that of the year 2002-03 is excluded, Respondent No. 1 being senior, would be promoted to the post of Executive Engineer; whereas in the event the ACR for the period 1997-98 is excluded and that of the year 2002-03 is taken into consideration, as the appellant herein would be given overall grading 'outstanding', the case of Respondent No.1 would not be considered at all.

7. The fact that respondent no. 1 is senior to the appellant is not in dispute. As the DPC recommended the candidature of the appellant alone in terms of the extant rules, Respondent No. 1 herein filed a writ petition before the Gauhati High Court on 04.06.2004. During the pendency of the said Writ Petition, the Government of Mizoram itself issued a clarification on or about 13.09.2004, which reads as under :

"In inviting a reference to this Department's O.M. No. A.32012/1/81-APT./Loose dated 10.10.2002 on the above subject, this is to clarify para 3.4 (g) of the said O.M. that if the DPC sits after September of the year 2002, ACRs upto the year ending 31.3.2001 would be taken into consideration by the DPC while consideration the vacancies that arose for the vacancy year 2001-2002."

8. By a judgment and order dated 29.11.2004, a learned Single Judge of the Gauhati High Court dismissed the said writ petition of Respondent No. 1, inter alia, opining that clause (g) of Paragraph 3.4 of the said Office Memorandum must not only be applied having regard to the other provisions thereof, but also the latest ACR i.e. the ACR for the year ending 31.03.2003 should not be excluded from consideration. The clarificatory Office Memorandum dated 10.10.2002, the learned Single Judge opined, should receive such interpretation at the hands of the court which would advance the cause of public service. It was observed :

"6. Before parting with the record, this court must deal with the reliance placed on behalf of the petitioner on an office Memorandum dated 13.9.2004 which office Memorandum has been placed before the court at the hearing. The clarification issued in the office Memorandum dated 30.9.2004 can only be logically and reasonably understood if the year 2002 as recorded therein is understood as the year 2001. In any case as this court has already interpreted and laid down the true meaning of clause (g) of paragraph 3.4 of the office Memorandum dated 10.10.2002, the clarification contained in the office Memorandum dated 13.9.2004 would have little sequence in altering the conclusion already reached."

9. An intra-court appeal having been preferred there against, a Division Bench of the said High Court reversed the said finding of the learned Single Judge, holding that the ACR for the year ending 31.03.2003 could not have been taken into consideration on a plain reading of Clause (g) of paragraph 3.4. Sustenance to the said finding was sought to be obtained from the Office Memorandum dated 16.06.2000 issued by the Government of India, the relevant portion whereof reads as under :

"G.I. Dept. of Per. & Trg. O.M. No. 22011/9/98-Estt. (D) dated the 16th June, 2000

Relevant year upto which ACRs are to be considered.

1. ... ...

2. In regard to operation of the Model Calendar for DPCs, a doubt has been raised by certain quarters as the question of the relevant year upto which ACRs are required to be considered by the DPCs. In this connection, it is once again clarified that only such ACRs should be considered which became available during the year immediately preceding the vacancy/panel years even if DPC are held later than the Schedule prescribed in the Model Calendar. In other words, for the vacancy/panel year 2000-2001, ACRs upto the year 1998-99 are required to be considered irrespective of the date of convening DPC."

10. Although the clarificatory Office Memorandum has been issued by the State of Mizoram itself, apart from the candidate concerned, viz. Shri S.B. Bhattacharjee, the State of Mizoram as also the Mizoram Public Service Commission are before us.

11. Mr. Sunil Gupta, learned Senior Counsel appearing on behalf of the State of Mizoram, Mr. Ranjit Kumar, learned Senior Counsel appearing on behalf of the Mizoram Public Service Commission and Mr. Manoj Goel, learned counsel appearing on behalf of the private appellants in support of the appeals, inter alia, submitted :

(i) The Division Bench of the High Court committed a manifest error in passing the impugned judgment insofar as it failed to take into consideration the fact that the Office Memorandum dated 10.10.2002, if read in its entirety, would lead to only one conclusion that the merit and merit alone should be taken into consideration for promotion to the post of Executive Engineer.

(ii) The words 'preceding five years' in clause (b) of paragraph 3.4 of the office memorandum dated 10.10.2002 would mean preceding five years before the meeting takes place.

(iii) Illustration appended to clause (g) of paragraph 3.4 would clearly suggest that in the event the meeting of the DPC is held after September, it is incumbent upon it to take into consideration the ACRs upto 31.03.2003.

(iv) The expression 'immediately preceding' occurring in Clause (g) of paragraph 3.4 must be given its due meaning, which would bring within its purview the ACRs upto 31.03.2003.

(v) The clarificatory Office Memorandum having been issued while the writ petition was pending, the same being not available to the Public Service Commission, it could not have been taken the same into consideration and in that view of the matter, it cannot be given a retrospective effect and retroactive operation.

(vi) As the clarification lacks precision in regard to the interpretation of the term 'immediately preceding', the same cannot be held to have overridden the first part of clause (g) of paragraph 3.4.

(vii) Illustration, it is trite, shall not give way to the main provision itself.

(viii) Whereas the learned Single Judge has considered the purport of entire rule, the Division Bench failed to do so and, thus, its judgment cannot be sustained.

(ix) The Office Memorandum issued by the Central Government was not relevant. Suitability of a candidate being the sole criteria, it was incumbent upon the DPC to consider the latest ACR so as to arrive at its own satisfaction and particularly when the chance of there being a negative report and/or down gradation of the officer concerned cannot be ruled out.

12. Mr. Shuvodeep Roy, learned Counsel appearing on behalf of Respondent, on the other hand, urged :

(i) The term 'immediately preceding' must be read with the words accompanying the same, namely, 'became available during the preceding the vacancy/panel year'.

(ii) An ACR becomes available for consideration not only when it is written but also when a representation is made in that behalf and reviewed by the Reviewing Authority.

(iii) As the clarificatory office memorandum dated 13.09.2004 is binding on the State, the same would be retrospective in nature.

(iv) Illustration being in nature of the proviso, the effect thereof cannot be ignored.

(v) The learned Single Judge committed a manifest error in substituting one year for consideration of another year and, thus, the judgment of the Division Bench of the High Court cannot be faulted with.

(vi) The Rule itself takes care of a contingency if any departmental proceeding or any criminal proceeding is initiated against the recommendee, in which event, the State would not be powerless to pass appropriate orders, as would appear from Rule 17 of the Rules.

13. Although a person has no fundamental right of promotion in terms of Article 16 of the Constitution of India, he has a fundamental right to be considered therefor. An effective and meaningful consideration is postulated thereby. The terms and conditions of service of an employee including his right to be considered for promotion indisputably are governed by the rules framed under the proviso appended to Article 309 of the Constitution of India.

14. Rule 20, as noticed hereinbefore, provides that if any vacancy or vacancies arise(s) to be filled up by promotion, the Controlling Authority would furnish to the Commission the documents enumerated therein including ACRs of eligible candidates of preceding years, as may be required, length of service, duly reviewed and accepted by the authorities concerned.

15. It has not been denied or disputed before us that in a given case ACRs of an eligible candidate may not be written and, thus, may not be available. If the same is available, a notice in that behalf must be given, in the event, any exigency arises therefor to the affected officer and only upon consideration of the representation made by him, if any, the decision taken in that behalf by the Reviewing Authority shall be final. The ACR by immediate superior, thus, is not final or determinative, as the same would be subject to the decision of the Reviewing Authority.

16. The validity or otherwise of the said Office Memorandum dated 10.10.2002 is not in question. With a view to give effect to the statutory rules governing the field, the State of Mizoram has issued the said Office Memorandum directing that the procedure laid down therein shall be observed by the

DPC. Indisputably, merit and suitability of the candidates concerned are the primary consideration for promotion to a selection post, wherefor the necessary ingredients as envisaged in clause 3.4 of the said Office Memorandum would fall for consideration of the DPC, but it must be borne in mind that clause 3.4 provides for the mode and manner in which the DPC shall consider the same.

17. DPC is required to consider the service records, with particular reference to the ACRs for five preceding years. The ACRs for 'five preceding years' must, therefore, be held to mean 'five preceding years' of ACRs which have attained finality. It, however, does not define how the said 'five preceding years' is to be calculated. Calculation and/or reckoning of 'five preceding years' is provided for in clause (g) of paragraph 3.4.

18. Before, however, we embark upon the construction of clause (g) of paragraph 3.4 of the said Office Memorandum, we may notice that in terms of clause (e) thereof, a minute grading of the ACRs and not overall grading alone would be subject-matter of consideration of the DPC; as it has been stated therein, 'it had been noticed that some time the overall grading in ACR may be inconsistent with the grading under various parameters or attributes'. Each of the parameters or attributes on the basis whereof the ACRs are written and gradation is given would, thus, have to be considered.

19. The Rules indisputably envisage that a person having an overall grading of 'outstanding' shall alone be considered vis-à-vis who do not come within the purview of the gradation of outstanding despite the fact that their service career they might have received overall grading of 'Very Good'.

20. We at this stage may also notice paragraph 3.8 of the said Office Memorandum, which proceeds on the basis that for the purpose of evaluating the merit of the officers, scrutiny of the records of the officers should be limited to the records that would have been available, had the DPC met at the appropriate time. Even in relation thereto, an illustration had been given stating that if a vacancy arises in 2001-02, only the latest records of service of the Officers upto the period ending March 2000, namely, 1999-2000 shall be taken into consideration.

It categorically uses both positive language as also a negative language stating that what would be taken into consideration is only the records ending upto March 2000 and not the subsequent ones.

21. In the aforementioned backdrop of events, interpretation of clause (g) of paragraph 3.4 should be resorted to. The words 'immediately preceding', as noticed hereinbefore, are preceded by the words 'ACRs of the officers which became available during the year'. This constitutes the first part.

The words 'vacancy/panel year' following the words 'the year immediately preceding' must also be duly taken into consideration.

A DPC may be held during the year in which the vacancy arises or later than the year of the vacancy. The Rules intentionally provided for one year gap.

It is only in a case where a controversy may arise in regard to the number of ACRs which would be available, the illustration and/or proviso has been appended to clause 3.4.

22. The Office Memorandum, if read in the context of the rules, takes into consideration the necessity of considering the case of the eligible candidates during the year where vacancy arose. The DPC is expected to meet each year. Only when it is not possible to hold a meeting of the DPC within that year, the illustration would be applicable.

A vacancy must arise in a particular year. If it arose as in the present case in 2003-04 following the illustration contained in clause (g) of paragraph 3.4, ACRs upto the year 31.03.2002 i.e. vacancy year/panel year 2001-02 are required to be taken into consideration irrespective of the date of convening of the DPC. Only when ACRs upto 31.03.2003 were required to be taken into consideration if it sits after September of that year even if the vacancy arose within the year 2001-02.

23. If the opinion of the learned Single Judge is given effect to, then 31.03.2003 becomes 31.03.2004. Indisputably, necessity was felt for a further clarification. It was in the aforementioned premise that a further clarification was issued by the State so as to direct that if the DPC sits after September of the year concerned (in this case 2004), the ACRs upto the year ending 31.03.2003 could be taken into consideration while considering the vacancies which arose in 2003-04. The Division Bench of the High Court, in our opinion, cannot, thus, be held to have committed any error in this behalf.

24. It may be that in a given case, the court can with a view to give effect to the intention of the legislature, may read the statute in a manner compatible therewith, and which would not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. But, however, it is also necessary for us to bear in mind the illustration given by the executive while construing an executive direction and office memorandum by way of executive construction cannot be lost sight of. It is in that sense the doctrine of contemporanea expositio may have to be taken recourse to in appropriate cases, although the same may not be relevant for construction of a model statute passed by a legislature.

In G.P. Singh's 'Principles of Statutory Interpretation, 10th Edn. at p. 319, it is stated :

> "But a uniform and consistent departmental practice arising out of construction placed upon an ambiguous statute by the highest executive officers at or near the time of its enactment and continuing for a long period of time is an admissible aid to the proper construction of the statute by the Court and would not be disregarded except for cogent reasons. The controlling effect of this aid which is known as 'executive construction' would depend upon various factors such as the length of time for which it is followed, the nature of rights and property affected by it, the injustice result from its departure and the approval that it has received in judicial decisions or in legislation.
>
> Relying upon this principle, the Supreme Court in Ajay Gandhi v. B. Singh having regard to the fact that the President of the Income Tax Appellate Tribunal had been from its inception in 1941 exercising the power of transfer of the members of the Tribunal to the places where Benches of the Tribunal were functioning, held construing sections 251(1) and 255(5) of the Income Tax Act that the President under these provisions has the requisite power of transfer and posting of its members. The court observed : "For construction of a statute, it is trite, the actual practice may be taken into consideration."
>
> Contemporary official statements throwing light on the construction of a statute and statutory instruments made under it have been used as contemporanea expositio to interpret not only ancient but even recent statute both in England and India."

25. Clarification was issued by the State of Mizoram not only in the light of the express provisions contained in paragraph 3.8 of the Office Memorandum but also in the light of a similar clarification issued by the Central Government. The Division Bench of the High Court has noticed that the clarificatory memorandum was issued considering the Central Government clarificatory Office Memorandum as a model.

> Reliance placed by Mr. Ranjit Kumar, learned Senior Counsel appearing on behalf of the appellant on a decision of this Court in Shambhu Nath Mehra v. The State of Ajmer [AIR 1956 SC 404], in our opinion, is not opposite. This Court therein was considering interpretation of the word 'especially' contained in Section 106 of the Indian Evidence Act, 1872, which was an exception to Section 101 thereof, vis-à-vis Sections 112 and 113 of the Railways Act. It is in that context this Court observed :"13. We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused. "

If the first part of the statement of law in Shambhu Nath. (supra), in our opinion, is applicable, the illustration in question does not curtail nor extend the ambit. It merely clarifies what otherwise might have been obvious. It introduces the rule by abundant caution although it might not have been necessary keeping in view the purport and object which Rule 20 and paragraph 3.8 seeks to achieve.

26. The clarification issued by the State is not in the teeth of the illustration given in clause (g) of paragraph 3.4 of the Office Memorandum. The clarification having been issued, the same should be taken into consideration by this Court irrespective of the fact as to whether it was available to the Public Service Commission on 16.03.2004 when the DPC held its meeting which, in our opinion, was not of much significance.

The clarification being explanatory and/or clarificatory, in our opinion, will have a retrospective effect.

27. In S.S. Grewal v. State of Punjab and Others [(1993) Supp. (3) SCC 234], this Court stated the law thus :

> "....In this context it may be stated that according to the principles of statutory construction a statute which is explanatory or clarificatory of the earlier enactment is usually held to be retrospective. (See: Craies on Statute Law, 7th Edn., p. 58) It must, therefore, be held that all appointments against vacancies reserved for Scheduled Castes made after May 5, 1975 (after May 14, 1977 insofar as the Service is concerned), have to be made in accordance with the instructions as contained in the letter dated May 5, 1975 as clarified by letter dated April 8, 1980....."

28. Yet again in Commissioner of Income-Tax, Bombay and Others v. Podar Cement Pvt. Ltd. and Others [(1997) 5 SCC 482], this Court referring to a large number of authorities including that of G.P. Singh's Principles of Statutory Interpretation', observed:

> "....An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force, the amending Act also will be part of the existing law."

29. This Court in Allied Motors (P) Ltd. v. Commissioner of Income Tax, Delhi [(1997) 3 SCC 472], observed :

> "13. Therefore, in the well-known words of Judge Learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of R.B. Jodha Mal Kuthiala v. CIT, this Court said that one should apply the rule of reasonable interpretation. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole."
>
> [See also Zile Singh v. State of Haryana and Others [(2004) 8 SCC 1]

30. We should not, however, fail to notice that in S. Sundaram Pillai and Others etc. v. V.R. Pattabiraman and Others etc. [(1985) 1 SCC 591], this Court held :

> "53 . Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is-
>
> "(a) to explain the meaning and intendment of the Act itself,
>
> (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,
>
> (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,
>
> (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and (e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

[See also S.P.S. Balasubramanyam v. Suruttayan alias Andali Padayachi and Others (1992) Supp. (2) SCC 304 and Hardev Motor Transport v. State of M.P. and Others (2006) 8 SCC 613]

In a given case, and in absence of rule, the court might have been justified to hold that the DPC must take into consideration the merit and merit only. However, in a case of this nature, where the State lays down the procedures as to how and in what manner the merit and suitability is to be judged, it was obligatory on the part of the commission to follow the same in its letter and spirit. The case at hands shows that it can in a situation of this nature prove to be disastrous to an employee, if any other construction is given.

31. Respondent No. 1 is senior to the appellant by 16 years. A post was created. It for one reason or the other was sought to be filled up immediately. If the interpretation as accepted by the learned Single Judge is to be given effect to, the case of Respondent No.1 was not to be considered at all by the DPC. The Division Bench of the High Court, therefore, in our opinion, cannot be said to have committed any error warranting interference by this Court. The appeals are, therefore, dismissed. Counsel's fee is quantified at Rs.10,000/-.

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IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR: TRIPURA: MIZORAM & ARUNACHAL PRADESH)
AIZAWL BENCH ::: AIZAWL
WRIT PETITION No.92 OF 2005
D.D. 01.06.2007
Hon'ble Mr. Justice A.B.Pal

Smt. Zochhingpuii ... Petitioner
Vs.
The State of Mizoram & Ors. ... Respondents

Recruitment by absorption:

Whether normal Recruitment Rules are applicable when selection by absorption is made under Special Recruitment Rules? - No

Pursuant to Mizoram Middle Schools and High Schools (Provincialisation) Rules, 1991 (for short 'Provincialisation Rules') the Government created 38 posts of Head Master, 159 posts of Teacher and several other posts for absorption of Teaching and non Teaching staff of the newly provincialised High Schools and Middle Schools by notification dated 23.11.04 – As per request of the Government to the Commission for screening of Head Masters of newly provincialised High Schools for absorption in the Government service the Commission conveyed recommendation for absorption of all the 38 Headmasters of the newly provincialised High Schools into the Government service - 5 petitioners who are working as Teachers in Government Higher Secondary Schools have challenged the said absorption alleging that the same is contrary to regular Recruitment Rules 1997 – High Court holding that the newly created 38 posts were intended only for absorption of 38 Head Masters who constitute a separate class or category of employees and that the regular Recruitment Rules 1997 has limited application only to the extent of testing their suitability by the Commission which has been exactly done, has dismissed the writ petition.

Held:

The State Government has taken a conscious decision for provincialised 38 High Schools and in order to deal with the new situation arising out of such an act a separate set of rules had to be made for absorption of existing headmasters and other employees of such institutions for the reasons that the Normal Recruitment Rules of 1997 relating to recruitment and promotion of teachers and other employees cannot take care of such a situation.

ORDER

All the five petitioners are teachers in Govt. Higher Secondary Schools. They came to be eligible for promotion to the posts of Headmaster/Headmistress, Govt. High School in terms of the Mizoram Education & Human Resources Department (Group 'A' posts) Recruitment Rules, 1997 (for short R.R-1997). The said rules provide that the post of Headmaster/Headmistress of Govt. High School shall be filled up by promotion only from trained graduate assistant headmasters and graduate trained teachers of Govt. High School with not less than five years regular service in the grade in Govt. High

School/Govt. Higher Secondary School. As the petitioners have more than five years regular service as assistant teacher in Govt. High/Higher Secondary School they are aspirants for promotion to the said higher posts.

2. In 1991 the State Government of Mizoram made Mizoram Middle Schools and High Schools (Provincialisation) Rules, 1991 (for short 'Provincialisation Rules') authorising the State Government to provincialise any middle school or high school in Mizoram which were run and maintained mostly with the financial assistance from the State Government. Rule 6(1) of the Provincialisation Rules provides that all existing incumbents, to be appointed in Govt. service consequent upon the provincialisation or the institutions in which they were serving should appear before the Mizoram Public Service Commission (for short MPSC)/Departmental Promotion Committee for assessment of their suitability or otherwise for appointment in the Govt. service. Though Sub-Rule (2) of that rule initially provided that 50% of the posts of Headmaster would be filled in by appointment of existing incumbents of the provincialised schools and remaining 50% by direct recruitment from persons having eight years' teaching experience upon selection by the Public Service Commission/Departmental Promotion Committee, on the basis of written competitive examination, and later by an amendment in 1994 the said provision of direct recruitment was replaced by a provision for promotion fro eligible teachers of Govt. High/Higher Secondary Schools, but in 2002 the provision of quota system was abolished by a further amendment. As a result of such amendment the final position of Rule 6 stands to provide for absorption of all the existing incumbents of the provincialised institutions with the first proviso that upper age limit prescribed in the recruitment rules shall cause no bar to such absorption and the second proviso that the existing headmasters who are not appointed to the posts of Headmasters shall be appointed teachers in their respective provincialised schools and shall be deemed to be employees of the Govt. with effect from the date of provincialisation.

3. On 28th August, 2003 the State Government by a notification provincialised 38 High Schools with effect from 1.9.2003. By another notification dated 23rd November, 2004 the State Government created 38 posts of Headmaster, 159 posts of Teacher and several other posts for absorption of teaching and non teaching staff of the newly provincialised high schools and middle schools with retrospective effect from 1.9.2003. The State Government by a letter dated 24.1.2005 addressed to the Director of School Education conveyed approval of the Government for filling up of 304 posts of newly provincialised 38 High schools and 1285 posts of the newly provincialised 200 Middle Schools

on certain conditions, the first being that the posts of High school headmasters shall be filled by recruitment of the existing incumbents of the erstwhile Deficit Schools through MPSC under Rule 6 of the Mizoram Middle Schools and High Schools (Provincialisation) Rules 1994. The vigilance department by order dated 3.2.2005 issued clearance in favour of existing Headmasters of 38 Deficit High Schools (Provincialised). Therefore, on 9th June 2005 the State Government in the department of Personnel and Administrative Reforms addressed a letter to the MPSC for screening of Headmasters of newly provincialised high schools for their absorption in the Govt. service. It has been provided in the second paragraph of the said letter that screening of Headmasters of newly provincialised high schools for their absorption in the govt. service. It has been provided in the second paragraph of the said letter that screening of Headmasters of the said schools has to be done in accordance with the Mizoram Middle/High Schools (Provincialised) Rules, 1994 and Amendment Rules, 2002. As per Rule 6, the Headmasters are to be absorbed to the posts subject to their suitability for appointment in consonance with relevant recruitment rules as may be determined by the DPC. The MPSC by letter dated 24.8.2005 conveyed recommendation for absorption of all the 38 Headmasters of the newly provincialised High School into the Govt. service, which is subject to fulfillment of the requirement of relevant Rules.

4. At this stage when the said headmasters who have been arrayed as private respondent Nos.6 to 43 were to be absorbed as Headmasters in their respective provincialised schools on the basis of the recommendation of the MPSC, the five petitioners herein have put their challenge such absorption on the following grounds, namely:- (i) the requirement of the Recruitment Rules for promotion to the post of Headmaster in Govt. High Schools is that the incumbent must be Assistant Headmaster or teacher with at least five years service in Govt. High/Higher Secondary School. None of the 38 private respondents rendered any service under Govt. High School or Higher Secondary School and, therefore, are ineligible for appointment to the said posts; (ii) though the Recruitment Rules clearly provides that 90% of the vacant post shall be filled up from the teachers of the Govt. High School/ Govt. Higher Secondary School, none of the petitioners who are eligible for promotion to the said posts by virtue of their having rendered more than five years service have been considered for promotion to the post of Headmasters of the provincialised High Schools; (iii) by an amendment in 2002 the provision of filling up 50% of the posts of Headmasters of the provincialised high school by absorption from the existing incumbents having been abolished the private respondents have lost the right to be absorbed even against 50% of the posts of Headmaster created for the provincialised schools; (iv) the petitioners have acquired vested rights by virtue of their rendering service for more than five years as

teacher in the Govt High School/Govt. Higher Secondary School for promotion against 38 vacant posts of Headmaster created for newly provincialised high schools, which has been taken away illegally and arbitrarily by impugned notification (Annexure-10 to the writ petition) creating 38 posts of Headmaster for absorption of existing incumbents and by another notification (Annexure-11 to the writ Petition) directing to fill up said posts from existing incumbents of the erstwhile Deficit High School. The petitioners have also called into question the communication dated 9th June 2005 (Annexure-13 to the writ petition) by the State Government to the MPSC for screening of Headmasters of the provincialised schools for their absorption in Govt. service.

5. The State and other official respondents Nos.1 to 4 by joint affidavit-in-opposition contested the case contending, inter alia, that absorption of all the employees of the provincialised schools including Headmasters of high schools were made in accordance with the provincialisation rules, not in accordance with the Recruitment Rules of 1997 as the same was a legal necessity following provincialisation of the said schools. For absorbing the Headmasters of the provincialised schools 38 posts in the Govt. service under the Education Department had to be created and in order to test their suitability they were referred to the MPSC for screening and recommendation which is the requirement of the Recruitment Rules of 1997. A provision has also been made that if any of such incumbent headmaster of the provincialised high school is found to be not suitable for appointment as headmaster then such headmaster shall be appointed as teacher in the Govt. service. Since all the incumbents have been found to be suitable by the MPSC for appointment to the newly created posts of Headmaster by way of absorption there has been no illegality in the process and the question of considering the petitioners for such posts did not arise as such absorption has been done not in accordance with the normal provision of the Recruitment Rules but in accordance with the special rules framed for the purpose of absorption of teachers and other employees of the institutions after provincialisation.

6. The MPSC being the 5th respondent herein filed a separate counter affidavit contending inter alia that the proposal of the State Government was to absorb existing headmasters of the provincialise high school in the Govt. service following provincialisation of the said school and, therefore, the Commission conducted a personal interview for screening of all the headmasters in consonance with the provision of the Middle/High Schools (Provincialised) Rules 1994. The MPSC having been satisfied about their suitability recommended them for absorption as Headmasters after a careful assessment of their suitability.

7. The private respondent Nos.6 to 43 in a common affidavit-in-opposition contended inter alia that the recruitment rules of 1997 has no provision for absorption of employees of the provincialised schools. When the State Government decided to provincialise the deficit institutions a separate set of rules for provincialisation of the schools and absorptions of the Headmasters and other employees had to be framed in 1994, which were amended in 2002. It has further been contended that the State Government created 38 posts of Headmaster only for absorption of existing 38 Headmasters of provincialised schools whose services cannot be dispensed with after provincialisation and as the said posts cannot be said to be normal vacant posts, the normal provisions of the Recruitment Rules of 1997 cannot be made relevant for the petitioners to fulfill their aspirations. The scheme of things does not contemplate consideration of any other persons including Assistant Headmasters or teachers for the Govt. High School and Govt. Higher Secondary School.

8. Learned counsel for the petitioners has strenuously argued that though undoubtedly absorption of the private respondents has been made in accordance with the provincialisation rules it cannot be overlooked that there is a clear provision in the said rules that the provision of the normal rules of recruitment to the post of Headmasters have to be followed which has not been done in the case in hand. His second submission is that by abolishing the quota of 50% for the existing headmasters of the provincialised schools by amendment in 2002 the field has been made clear for all eligible candidates who are Assistant Headmasters or Assistant teachers with teaching experience of five years or more in Govt. High School/Higher Secondary School for promotion against the newly created 38 posts of Headmaster. By considering only 38 private respondents against 38 newly created posts of Headmaster the provision of the said rules stood violated as a large number of other eligible candidates has been arbitrarily kept out of consideration. Another argument placed by the learned counsel is that experience as Assistant Teacher in Govt. High School/Govt. Higher Secondary School being an essential requirement for promotion to the post of headmasters none of the private respondents is eligible for the said posts and, therefore, the recommendation of the MPSC is violative of the requirement of the Recruitment Rules of 1997.

9. The learned counsel for the respondent on the other hand advanced joint submission that the provisions of the R.R-1997 cannot be pressed into the situation arising out of the requirement to absorb Headmaster and other employees of the newly provincialised school for which a separate set of rules had to be framed by the State Government. A conjoint reading of the R.R-1997 and the Provincialisation Rules would give the definite impression that the newly created 38 posts of Head master are not intended for any eligible candidates other than those who were holding the posts of

Headmaster in the provincialised schools and, therefore, these posts having been created for a separate and definite category of employees the petitioners contentions that their right under Article 14 and 16 has been violated is totally misconceived.

10. What has emerged from the above facts pleaded and submissions made is that the State Government had taken a conscious decision for provincialised 38 High Schools and in order to deal with the new situation arising out of such an act a separate set of rules had to be made for absorption of existing headmasters and other employees of such institutions for the reasons that the normal Recruitment Rules of 1997 relating to recruitment and promotion of teachers and other employees cannot take care of such a situation. It would be seen from the above that after the amendments and deletion of the proviso relating to quota in the provincialisation rules what has remained in Rule 6 is that all the incumbents of such institutions have to be absorbed and if any of the existing Headmasters is found unsuitable by the MPSC as per assessment under the relevant rules then such Headmaster are to be absorbed as teachers in the Government establishment. Thus, though no quota remains either for existing Headmasters of the provincialised schools or others, sub-rule (1) of Rule 6 remains unaltered providing that all the Headmasters and other employees have to be absorbed. Thus, by clear implication all the 38 posts of headmaster newly created were intended only for absorption of 38 headmasters who constitute a separate class or category of employees and who have a right to be considered for absorption following provincialisation of their institutions. The State Government had acted in consonance with such requirements and, forwarded their names to the MPSC for testing their suitability in accordance with the requirements of the R.R-1997 after all of them had been given vigilance clearance. It would thus appear that the provision of R.R-1997 has limited applications only to the extent of testing their suitability by the MPSC which has been exactly done. As all of them have been found to be suitable by the MPSC in accordance of requirements of suitability contained in the R.R-1997, the private respondents are entitled to be absorbed to the respective posts. The submission that the petitioners being teachers having more than five years service in the Govt. High/Higher Secondary Schools have gained a right to be considered for promotion against newly created 38 posts of Headmasters is, thus, totally misconceived if considered in the premises noticed above.

11. For the reasons and discussions aforementioned this writ petition has no merit and, therefore, the same is dismissed.

No costs.

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IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR: TRIPURA: MIZORAM & ARUNACHAL PRADESH)
AIZAWL BENCH ::: AIZAWL
WRIT PETITION (C) No.24 OF 2006
D.D. 01.06.2007
Hon'ble Mr. Justice A.B.Pal

Shri. V.Sapchhunga ... Petitioner
Vs.
The State of Mizoram & Ors. ... Respondents

Seniority:

Whether restoration of seniority after quashing the penalty imposed in Disciplinary Proceeding when a fresh de-novo exercise for re-determining the entire seniority after inviting objections from the concerned is proper? – YES

4th respondent was senior to the petitioner in the Senior Grade - His position being Sl.No.1 while that of the petitioner at Sl.No.19 – Because of departmental proceedings pending against the 4th respondent the recommendations of DPC were kept in sealed covers – After the Review Petition filed by the 4th respondent for setting aside the penalty was allowed and penalty order was set aside and the 4th respondent was appointed w.e.f. 10.9.2001 as Junior Administrative Grade as per DPC recommendations and consequently his position in the seniority list at Junior Administrative Grade was restored at the top – When the two vacancies in the selection grade came up for consideration only 8 candidates as per DPC procedure were to be within the zone of consideration – If the petitioner being at Sl.No.9 in the seniority list of Administrative Grade stood excluded and only eight officers including 4th respondent were considered and that the 4th respondent was recommended and promoted to the selection grade which has been assailed in the present writ petition and High Court has dismissed as devoid of merits.

Held:

That as the retrospective promotion is not under challenge, the consequent seniority also cannot be assailed and, therefore, the challenge in the writ petition brought against seniority position of the 4th respondent and his promotion to the selection grade has on merit.

ORDER

The petitioner Shri V.Sapchhunga and the 4th respondent, Sri. H.Darzika are the members of the Mizoram Civil Service. Admittedly, the 4th respondent was senior to the petitioner in the Senior Grade, his position being at Sl.No.1 while that of the petitioner at Sl.No.19. The said seniority list was published on 28.8.2001. When a departmental proceeding was pending against the 4th respondent following memorandum of charge dated 8.5.98, the Mizoram Public Service Commission (for short MPSC), the 3rd respondent herein, convened meeting of the Departmental Promotion Committee (DPC) for considering promotion of Senior Grade officers to the next higher grade (Jr. Administrative

Grade) of the said service. The 4th respondent being at the top of the seniority list was also considered for promotion along with others but due to pendency of the disciplinary proceeding his case was kept in sealed cover. The DPC recommended respondent No.4 for promotion to the higher grade with effect from 10.9.2001 which was kept in sealed cover. In March 2002 there was another DPC, which again recommended the petitioner along with others for promotion to the Jr. Administrative Grade but his case was kept in sealed cover. By order dated 15.4.2002 the disciplinary authority after conclusion of the departmental proceeding imposed a penalty of reduction of pay on the said respondent. In the month of May 2002 the case of the said respondent was again considered along with others for promotion but due to pendency of another proceeding against him commenced by a memorandum dated 27.1.2000 the recommendation was again kept in sealed cover. Finally he was promoted to the Jr. Administrative Grade with effect from 23.5.2002. His earlier recommendation for promotion could not be given effect to during the period of penalty. Considering his late arrival in Jr. Administrative Grade he was placed in the seniority list at Sl.No.15. Had there been no penalty, he would have indisputably been promoted to that grade on the basis of the first recommendation with effect from 10.9.2001 and would have found place at the top of the seniority list of Jr. Administrative Grade. The 4th respondent, however, submitted a review petition for setting aside the penalty order dated 15.4.2002 and the said review petition dated 4.8.2003 was finally allowed. As a result the penalty order was set aside and quashed and, therefore, the question of opening the sealed cover regarding his recommendation by the first DPC with effect from 10.9.2001 had arisen. It was accordingly opened and found that he was recommended for promotion with effect from 10.9.2001. The recommendation was thus given effect to, following which he stood promoted with effect from 10.9.2001 and this retrospective promotion restored his position again in the seniority list at the top. Thus, his seniority position at the top of the list in the Senior Grade came to be maintained in the seniority list of Jr. Administrative Grade. With his entry into the seniority list of Jr. Administrative Grade, the position of the petitioner came down from 8 to 9 in the said list. When two vacancies in the selection grade came up for consideration, only eight candidates as per the DPC procedure were to be within the zone of consideration. Thus, the petitioner being a Sl.No.9 stood excluded and, therefore, other eight officers including 4th respondent were considered by the DPC. The said respondent was recommended and promoted to the selection grade which has been assailed in the present writ petition.

2. There is no denial of the fact that the petitioner was much junior to the 4th respondent in the grades below. But with the exclusion of the 4th respondent from promotion to the Jr. Administrative Grade due to pendency of disciplinary proceedings against him the petitioner stole a march and found

a place at Sl.No.8 of the seniority list of Jr. Administrative Grade. The 4th respondent got promoted to that grade only after the penalty period with prospective effect, which brought him down to Sl.No.15 in that list. But the grievance of the petitioner came to stalk when following the quashing an setting aside of the penalty the said respondent was given retrospective promotion pushing him up at the top of the list. The petitioner contends that if the 4th respondent was not given retrospective promotion and consequent seniority, his position would have been maintained at Sl.No.8 and thus he would have been within the zone of consideration for promotion to the post of selection grade. As he was graded outstanding in all his ACRs and all other 7 senior officer were given a lower grade, he would have been definitely promoted superseding others in view of the office memorandum dated 24.1.2005 which indicates that for the vacancy arising before that date the previous procedure dated 10.10.2002 should be followed, as clarified by office memorandum dated 1.6.2005. According to the procedure dated 10.10.2002 an officer graded outstanding would supersede the officers graded very good and an officer graded very good would supersede officers assigned lower grade. The petitioner thus has assailed in the writ petition the notification dated 6.10.2005 whereby the 4th respondent was given seniority above P.C.Lalthlamuana, he 6th respondent herein. He has also assailed notification dated 21.12.2005 promoting respondent Nos.4, 5, 6 and 7 herein to the selection grade with effect from 29.4.2005.

3. The State and other official respondents have contended inter alia that all the four private respondents are admittedly senior to the petitioner in the lower grade and that though the 4th respondent was recommended for promotion to Jr. Administrative Grade with effect from 10.9.2001 by the DPC the same could not be given effect to only because of pendency of disciplinary proceedings and a penalty of reduction of pay on 15.4.2002. However, after the penalty period he could be promoted to that grade only prospectively and thus his position came down to 15 in the seniority list of Jr. Administrative Grade. As his review petition was finally allowed on merit and his penalty was set aside and quashed the respondent concerned had to open the earlier recommendation dated 10.9.2001. Following the retrospective promotion his seniority position was automatically restored at the top of the list and thus when the DPC was considering promotion to the selection grade against two vacancies he along with seven others fell in the zone of consideration. As the retrospective promotion has not been challenged by the petitioner, it is contended, the consequent seniority could also not be assailed and so, very rightly, on the basis of that seniority the said respondents along with others came to be considered for promotion to selection grade which suffers from no illegality. As the petitioner has gone

down to Sl.No.9 and thus did not come within the zone of consideration to the selection grade the question of his marching over the others on the basis of his obtaining high grade in the ACR has no merit.

4. The learned counsel for the petitioner has made strenuous effort to make a point that while restoring seniority of the 4th respondent at the top of the list in the Jr. Administrative Grade it was necessary for the respondent concerned to invite objections from the officers affected thereby. By not doing so, the learned counsel argues, the order impugned assigning the seniority to the 4th respondent suffers from the vice of arbitrariness and unreasonableness.

5. Mr. N.Sailo, learned Addl. Advocate General, Mizoram on the other hand would submit that the petitioner has not specifically challenged retrospective promotion of the respondent No.4 to the Jr. Administrative Grade and, therefore, consequent seniority assigned by him cannot be said to be unreasonable and for that matter a fresh de-novo exercise for re-determining the entire seniority after inviting objections from all concerned is not at all called for.

6. What has distinctly emerged from the above rival submissions is that the petitioner has always been junior to the 4th respondent in the lower grades and that his position was only 19 while that of the said respondent was at 1 in the Senior Grade. Though the said respondent was recommended for promotion with effect from 10.9.2001 the same could not be given effect to only because of pendency of a disciplinary proceeding against him and a consequent prospective penalty. In all subsequent DPCs his case was again and again recommended and kept in sealed cover awaiting disposal of the proceeding and expiry of the period of penalty. When he was given prospective promotion placing him at Sl.No.15 in the seniority list of Jr. Administrative Grade his review petition was under consideration, which finally went in his favour clearing him from all the charges. Once the punishment came to be set aside and quashed the recommendation of the DPC to promote him with effect from 10.9.2001 had to be given effect and thus his retrospective promotion in the Jr. Administrative Grade restored his seniority position. I am not convinced that for such restoration of the earlier seniority position there was any necessity for initiating the procedure which is normally done when seniority of good number of employees is to be determined for the first time after inviting and considering objections. The admitted seniority position of the 4th respondent in the Senior Grade being not in question and his arrival in the Jr. Administrative Grade having been delayed due to pendency of the disciplinary proceeding, it is absolutely not necessary to go back to the same procedure for restoring his seniority

after disposal of the proceeding and his consequent retrospective promotion. As the retrospective promotion is not under challenge, the consequent seniority also cannot be assailed and, therefore, the challenge in the writ petition brought against seniority position of the 4th respondent and his promotion to the selection grade has on merit.

7. For the discussions and reasons made above, this writ petition is found have no merit and, thus, the same is dismissed.

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IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR: TRIPURA: MIZORAM & ARUNACHAL PRADESH)
AIZAWL BENCH ::: AIZAWL
WRIT PETITION (C) No.45 of 2005
D.D. 26.06.2007
Hon'ble Mr. Justice Mutum B.K.Singh

Shri. Sangdingliana & Ors. ... Petitioners
Vs.
State of Mizoram & Ors. ... Respondents

Seniority List:

Whether reasonable opportunity of being heard should be given to other employees before fixation and re-fixation of seniority position? - YES

In the provisional inter-se seniority list dated 7.6.2000 of senior grade Mizoram Civil Services (M.C.S.) Officers 4th respondent was placed at Sl.No.44 above the petitioners – On the objection filed against the seniority list the penalty 'Censor' imposed on the 4th respondent in the disciplinary proceeding as per order dated 3.6.1999 his name was excluded from the final seniority list dated 19.11.2001 – Writ Petition 52 of 2002 filed by the 4th respondent final seniority list was dismissed – However, as per direction of the Court to consider the case of the 4th respondent for promotion the 4th respondent was promoted on regular basis w.e.f. 20.5.2002 as per recommendation of DPC – As per representation of the 4th respondent for rectifying his regular date of promotion as per notification dated 23.3.2005 promotion of 4th respondent to Senior Grade was regularized w.e.f. 29.4.1999 placing the seniority position above the petitioners – The said order has been impugned in this writ petition – High Court following the decision of the Supreme Court in State of M.P. Vs. I.A.Qureshi (1998) 9 SCC 261, has set aside the notification dated 23.3.2005.

Held:

It is true that the fixation and re-fixation of seniority positions of the employees are within the domain of the State Government but such fixation and re-fixation of the seniority position should not be done arbitrarily, whimsically and behind the back and knowledge of the other employees if their seniority positions are affected or likely to be affected by such fixation and re-fixation. Impugned order issued in violation of principles of Natural Justice and such action of the State Government amounts to infraction of legal rights of the petitioners. On this count alone the impugned order cannot stand in judicial scrutiny.

Cases referred:

(1991) 4 SCC 109 - Union of India V. K.V.Jankiraman
(1998) 9 SCC 261 - State of M.P. V. I.A. Qureshi

ORDER

The retrospective service regularization and fixation of seniority of the respondent No.4 in the inter-se seniority list of senior grade of Mizoram Civil Service (in short 'MCS') officers, are the main issues under challenge in the present case.

2. That, on completion of probation period and passing of the departmental examination, the services of the petitioners and respondent No.4 were confirmed to the junior grade of Mizoram Civil Service on different dates during the period from 23.03.1994 to 18.01.1999.

3. That, thereafter, on the recommendation of the Mizoram Public Service Commission (in short 'MPSC') the petitioners, except petitioner No.12, were promoted to the senior grade of MCS, some on regular basis and some on officiating basis but regularized their services with effect from 29.04.1999. The service of the petitioner No.12 was regularized to the senior grade of MCS with effect from 31.03.2000. The respondent No.4 was also given officiating promotion to the senior grade of MCS with effect from 29.04.1999 vide Notification Memo No.A 32013/2/89-PERS(B), dated 09.12.1999 in spite of the fact that the disciplinary proceeding contemplated against him was culminated in the imposition of penalty "censor" vide order dated 03.06.1999 bearing No.A.19014/1/91-PERS(CSW). Hence, the service of the respondent No.4 was not regularized to the senior grade of MCS prior to 20.05.2002.

4. That, a provisional inter-se seniority list of the senior grade MCS officers was published on 07.06.2000 vide Notification Memo No.A 23022/4/97-P&AR(CSW) in which the respondent No.4 was placed above the petitioners at Sl.No.44. However, on objection being filed against the said provisional seniority list, the name of the respondent No.4 was excluded from the final seniority list of the senior grade MCS officers published vide Notification Memo No.A.32022/4/97-P&AR(CSW), dated 19.11.2001. the petitioners were placed at Sl.Nos.43, 44, 45, 46,48, 49, 50, 52, 53, 54, 55 and 56 respectively in the said final seniority list.

5. That, the respondent No.4 challenged the said final seniority list dated 19.11.2001 in W.P.(C) No.52 of 2002 (AB) which was disposed of on 04.02.2004 holding that the name of the respondent No.4 was rightly not included in the final seniority list published for the senior grade MCS officers. However, the Hon'ble Court directed the State Government to consider the case of the respondent No.4 for regular promotion in accordance with law within a period of three months from placing the

said order before the appropriate authority and pass necessary orders. Equipped with the said order of this Court, the State-respondents convened a review DPC on 01.06.2004 and recommended the respondent No.4 for giving regular promotion to the senior grade of MCS against the vacancy available in 2000-2001 and to place his name below on Lalkamlova and just above Sri. Thangchem Zathang. Accordingly, the respondent No.4 was given promotion on regular basis to the senior grade of MCS with effect from 20.05.2002 vide Notification Memo No.A 32013/7/201-P&AR(CSW), dated 17.06.2004 at Annexure-17 to the writ petition.

6. That, the representation of the respondent No.4 for rectifying his date of regular promotion with effect from 29.04.1999 was rejected by the Government on the ground that the said promotion order was issued in accordance with law in vogue vide letter No.A.32013/7/2001/P&AR(CSW), dated 02.09.2004 Annexure-18 to the writ petition. However, on 23.03.2005 the respondent No.2, on the basis of fresh representation submitted by the respondent No.4, issued another Notification bearing Memo No.A 32013/9/201-P&AR(CSW), whereby regularizing the officiating promotion of the respondent No.4 to the senior grade of MCS with effect from 29.04.1999 and placing his seniority position above the petitioners. The said order is impugned in this case and the same is at Annexure-19 to the writ petition.

7. That, the respondent Nos.1 and 2, in their counter affidavit have taken a stand contrary to the Government's earlier view contained in the letter dated 02.09.2004 at Annexure-18 to the writ petition. The respondent Nos.1 and 2, in para No.11 of the affidavit-in-opposition, stated that the impugned order was issued on the basis of the opinion of the law and Judicial Department that the Government had committed certain mistakes in giving officiating promotion to the officers which should have been made permanent with no loss of seniority and that the said opinion was endorsed by the learned Advocate General vide his letter dated 03.04.2005. It appears that the State Government acted blindly without application of mind in the matter in question. The respondent No.4 in his counter affidavit stated that he has been promoted to the senior grade of MCS vide Notification dated 10.12.1999 which was never challenged by any of the petitioners and as such the State Government, after obtaining the view of the Law Department and the legal opinion of the learned Advocate General rightly regularized his promotion with effect from 29.04.1999.

8. That, no promotion order was passed by the State Government on 10.12.1999 as alleged by the respondent No.4. However, indisputedly the respondent No.4 was given officiating promotion to the senior grade MCS officers in 1999 but pursuant to the direction of this court dated 04.02.2004 passed in W.P.(C) No.52 of 2002 and on the recommendation of the review DPC convened on 01.06.2001, the respondent NO.4 has been given promotion to senior grade of MCS on regular basis with effect from 20.05.2002, i.e. the date, other officers recommended by the MPSC were promoted to the senior grade of MCS. The regular promotion order of the respondent No.4 was notified on 17.06.2004 by the Government of Mizoram, Department of Personnel & Administrative Reforms (Civil Service Wings) and in view of the said order the earlier officiating promotion order of the respondent No.4 automatically ceases. The alleged impugned order dated 23.03.2005 has not been issued either in supersession or in partial modification of the respondent's No.4 regular promotion order dated 17.06.2004 at Annexure-17 of the writ petition. On a bare reading of the impugned order, it appears that the said order was issued not in consultation with the MPSC and without giving any opportunity of being heard to the officers affected by the said order. In view of the earlier order dated 17.06.2004 at Annexure-17, the impugned order cannot stand in judicial scrutiny. It is well settled principle of law that the seniority is to be counted from the date of entry in service on regular basis and not from the date of entry in the grade on officiating basis or otherwise.

9. That, it is an admitted fact that the respondent No.4 was facing a departmental inquiry when the MPSC was considering about the suitability of promotion of junior grade MCS Officers to senior grade of MCS and as per the guidelines to be followed by the DPC, the findings of the DPC in respect of the officers against whom the disciplinary proceeding was pending, were to be put under sealed cover. There is also no quarrel that the said departmental inquiry was culminated in imposition of penalty "censor". As per the Government of India's instruction regarding promotion of employees on whom penalty has been imposed vide G.I., MHA, DP&AR OM No.22011/2/78-Estt.(A) dated 16.02.1979 which has been adopted by the Government of Mizoram, it is clear that if any penalty is imposed on a Government servant as a result of disciplinary proceeding, the findings of the sealed cover shall not be acted upon and the case of such officers for promotion may be considered by the next DPC in the normal course and having regard to the penalty imposed on such occasion. In Union of India Vs. K.V.Jankiraman, (1991) 4 SCC 109, the Hon'ble Apex Court held that the findings of the DPC in respect of suitability of the officers against whom disciplinary proceedings is pending shall be kept in a sealed cover and to be opened after the completion of the disciplinary proceedings or/

Court proceedings. If on the conclusion of the disciplinary proceedings or/Court proceedings, the officer concerned is completely exonerated, the sealed cover is to be opened, recommendations of the DPC are to be acted upon and if any penalty is imposed on the officer as a result of the disciplinary proceedings or/if he is found guilty in the proceedings against him the findings of the sealed cover shall not be acted upon. And the case of the officer for promotion shall be considered in the usual course or/usual manner by the next DPC in the normal course. In State of M.P. Vs. I.A. Qureshi, (1998) 9 SCC 261, the Hon'ble Apex Court held that the disciplinary proceedings ended with imposing minor penalty with 'Censor', the proceedings which have been kept in sealed cover cannot be acted upon and the case of such officers will be considered by the next DPC for promotion on prospective basis if there is any vacancy.

10. That, from the ratio of the above decision of the Hon'ble Apex Court as well as the Government of India's instruction regarding the promotion of employees on whom penalty has been imposed, it is crystal clear that the State Government has wrongly and illegally given the officiating promotion to the respondent No.4 to the senior grade of MCS. The State Government, in para No.4 of the affidavit-in-opposition dated 07.08.2002 submitted in connection with the earlier writ petition No.W.P.(C) 52 of 2002 filed by the respondent No.4 (Annexure-20 to the writ petition) stated that the opening of the sealed cover by the MPSC in respect of the petitioner (present respondent No.4) and others and the officiating promotion given thereon by the State-respondent were contrary to the law laid down by the Hon'ble Apex Court and the consolidated instruction contained in paragraph No.17.6.2 of Swamy's Complete Manual on Establishment and Administration. Consequently, such recommendation and the officiating promotion order made thereon were void ab initio, inoperative and unenforceable and as such no right was accrued upon the petitioner (present respondent No.4) thereby. In paragraph No.7 of the same affidavit-in-opposition the State-respondents further stated that the promotion of the present respodnent No.4 to the senior grade from the date on which the present petitioners were given promotion to the senior grade, was null and void, inoperative and the present respondent No.4 had no right for continuance in the said post by virtue of such illegal promotion.

11. That, from the above affidavit-in-opposition filed by State Government in connection with the earlier case, it is evident that the State Government admitted that the officiating promotion given to the present respondent No.4 was illegal, untenable and the respondent No.4 did not acquire any right to continue in the said post by virtue of such illegal promotion. Surprisingly, the State Government in its

counter affidavit filed in the instant case stated that the State Government, on the recommendation of the respondent No.3, haphazardly promoted the respondent No.4 on officiating basis in terms of the recommendation of the respondent No.3 as the department concerned at the relevant time was not aware about the above instruction issued by the Government of India, Department of Personnel and Training relating to the promotion of the person, on whom the penalty has been imposed. And that, the State Government acting upon the advice of the Law Department and the learned Advocate General issued the impugned Notification date 23.03.1995 thereby regularizing the officiating promotion of the respondent No.4 with effect from 29.04.1999 so as to give him seniority in the grade above the petitioners. The only reason shown by the State Government to justify the issuance of the impugned order is that the Government has issued the impugned order on the advice of the Law Department and the learned Advocate General. The Government, of course, was of the view that the officiating promotion given to the respondent No.4 was illegal and void ab initio but on the contrary to its earlier view, issued the impugned order, thereby regularizing such illegal order acting on the advice of the Law and Judicial Department and the learned Advocate General of the State Government, without application of mind. This court is of the considered view that the State Government has committed a glaring error in law in issuing the impugned order dated 23.03.2005. It may not be out of place to say that the unawareness of the correct proposition of law cannot be a ground at all to legalize the act done or purported to have been done contrary to Rules and in violation of law, even on the advice of any authority under the sky. Thus, the stand of the State Government that the respondent No.4 was given officiating promotion to senior grade of MCS as the concerned Department was not aware about the correct proposition of law at the relevant time and that the impugned order was issued on the advice of the Law and Judicial Department and the Advocate General of the State, cannot be accepted at all.

12. That, it is also clear from the recommendation of the review DPC held on 01.06.2004 that the respondent No.4 has been recommended for regular promotion to senior grade of MCS against the vacancy year 2000-2001. It means the service of the respondent No.4 could not have given regularization for any reason whatsoever to the senior grade of MCS with effect from 29.04.1999. The question of regularization of the said officiating promotion of the respondent No.4 to the senior grade of MCS does not arise in the instant case as the respondent No.4 has been given regular promotion to the said grade with effect from 20.05.2002 vide Notification dated 17.04.2004 issued by the Government Mizoram, Department of Personnel and Administrative Reforms (Civil Service Wing). The position being as such, the impugned order is nothing better than the one, which is untenable in law.

13. That, the final seniority list of the senior grade MCS officers was already published on 19.11.2001 and the exclusion of the name of the respondent No.4 from the said final seniority list was upheld by this Court vide judgment and order dated 04.02.2004 passed in W.P.(C) No.52 of 2002. Under the above backdrop, the seniority positions of senior grade MCS officers whose names are in the said final seniority list should not be disturbed without due process of law. It is true that the fixation and re-fixation of seniority positions of the employees are within the domain of the State Government but such fixation and re-fixation of the seniority position should not be done arbitrarily, whimsically and behind the back and knowledge of the other employees if their seniority positions are affected or likely to be affected by such fixation and re-fixation of the seniority position. In the case in hand, the seniority positions of the senior grade MCS officers including the petitioners have been affected by the impugned order which was issued without affording reasonable opportunity of being heard to them. Hence, this Court is of the view that the impugned order was issued in violation of the principle of Natural Justice and such action of the State Government amounts to infraction of legal rights of the petitioners. On this count alone the impugned order cannot stand in judicial scrutiny.

14. That, having regard to the above decisions of the Hon'ble Apex Court and for the reasons discussed hereinabove, this court is of the firm view that the State Government has committed error in law in issuing the impugned Notification bearing No.A 32013/9/2001-P&AR(CSW), dated 23.03.2005 and consequently, the impugned Notification is accordingly set aside.

15. In the result, this writ petition stands disposed of. No costs.

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ORISSA PUBLIC SERVICE COMMISSION

ORISSA ADMINISTRATIVE TRIBUNAL,
CUTTACK BENCH, CUTTACK
O.A. NO.1737 (C) 98 & Connected cases
D.D. 14.12.1998
Hon'ble Shri. C.Narayanaswamy, Vice Chairman &
Hon'ble Shri P.K.Mishra, Member (Judl.)

Kumari Haripriya Dash & Ors. ... Applicants

Vs.

State of Orissa & Anr. ... Respondents

Recruitment:

Reservation:

Public Service Commission initiated recruitment for 400 posts in Civil Services as provided under Orissa Civil Services (Combined Competitive Recruitment Examinations) Rules, 1991 – The Preliminary Examination was a language test in one of the two Indian Languages namely, Hindi and Oriya, which is intended to be a qualifying test - After recruitment process started the rules are amended by omitting Hindi as an Indian Language for the preliminary examination – The Commission published a list of 377 successful candidates which included 22 who had offered the language test in Hindi - The list of 377 candidates included 19 extra candidates for appointment in case if 22 candidates eliminated from the list – the G.A. Department decided to eliminate the so called 19 extra candidates from the list limiting it to 358 to facilitate appointment of 22 candidates who had passed the language test in Hindi – Among others inclusion of the candidate who took the language test in Hindi in the select list challenged on the ground that the amendment of rules were retrospective – High Court considering the nature of the contentions held that all the 144 general candidates included in the select list have to be appointed and inclusion of 22 candidates who had taken language test in Hindi was upheld taking pragmatic view and giving complete justice.

Held:

The Departments concerned are expected to determine the number of posts earmarked for each category in their roster before reporting the vacancies to the G.A. Department. Before allotting a candidate to some service the preference indicated by him and the availability of vacancies earmarked for his category in that service are to be considered. If no such vacancy is available in the service for which he has opted, then he would be allocated to some other service where such a vacancy is available to adjust him according to the roster. If in the process a candidate who has opted for a Class-II service is allotted to a specially declared Gazetted service like O.S.C.S. then he would be eligible to compete for a Class-II service under the proviso to Rule-13 of the Rules.

Cases referred:

AIR 1990 SC 405 - P.Mahindran and others Vs. State of Karnataka and others

AIR 1993 SC 477 - Indra Sawhaney vs. Union of India

ORDER

C.Narayanaswamy, Vice Chairman:

All these applications involve the same issue, namely, operation of the select list prepared by the Orissa Public Service Commission (hereinafter referred to as "the Commission") after conducting the combined competitive recruitment examination for appointment to Orissa Civil Services. Even though the averments put forward by the applicants in all these cases are not identical, yet since they involve the same issues and they claim the same relief these applications were heard analogously and are disposed of by this common order.

2. The said recruitment examination had been the subject of certain litigations in the Orissa High Court and some writ petitions, including Public Interest Litigations, had been filed in the High Court. The list of such cases filed in the High Court together with the decisions taken in those cases was not available to us by any party in spite of our asking for the same. In the course of hearing it was submitted by Mr. S.B.Jena, learned counsel for the applicants in some of the above applications that no litigation is now pending in the High Court. Learned Govt. Counsel was not in a position to confirm whether this was correct or not. However, in the course of hearing the order of the High Court disposing of one writ petition (O.J.C. No.12076/1998) filed by the applicant in O.A.No.1915 (C)/98 was produced for our perusal. This judgment contains the following observations:

> "Considering the submission of the counsel for the parties and in view of the fact that the matters are pending for consideration before the Orissa Administrative Tribunal, we are inclined to direct in the interest of justice by way of interim measure that four posts of General (Women) category be kept reserved till disposal of the cases by the Orissa Administrative Tribunal.
>
> With the aforesaid direction the writ petitions are disposed of. We hope that the Orissa Administrative Tribunal would do well to dispose of the matters as expeditiously as possible so that the State service would not be affected in any manner. In all fairness, all the cases should be disposed of by one Bench to avoid conflicting orders".

3. Taking note of the above direction of the High Court we are disposing of these applications without waiting for further clarification on the above aspect.

4. To get a better appreciation of the relief claimed by the different applicants as well as the stand taken by the respondents it would be worthwhile to take note of the sequence of events and the

undisputed facts. On 30.11.96 the Commission issued Advertisement No.11/96-97 inviting application approximately for 400 posts in the Civil Services. The same was issued in pursuance of two requisitions sent by the G.A. Department (respondent No.1 in all these cases). A copy of this advertisement indicates that there would be reservation for Women, SC, ST, SEBC, Sportsmen and Ex-servicemen. The Orissa Civil Services for which the examination was being conducted were the

(i) Orissa Administrative Service (Class-II),
(ii) Orissa Finance Service (Class-II),
(iii) Orissa Employment Service (Class-II) and
(iv) Orissa Co-operative Service (Class-II)

(in category-I) and (i) Sub-Registrar and (ii) Orissa Settlement and Consolidation Service (in Category-II). Paragraph-2 of the Advertisement mentions that the approximate number of vacancies indicated as 400 with subject to change at the discretion of Government. The break-up of the vacancies indicating the number of posts meant for different services or for different categories for the purpose of reservation, is not given in the Advertisement. The vacancies pertain to the recruitment years 1994, 1995 and 1996. Recruitment to the above services is to be conducted in accordance with the Orissa Civil Services (Combined Competitive Recruitment Examinations) Rules, 1991 (hereinafter referred to as "the Rules"). In accordance with the scheme of examination indicated in Schedule-III of the Rules, the Commission conducted the recruitment in three stages – (i) Preliminary examination for selection to appear in the main examination, (ii) main examination (written test) and (iii) personality test. The preliminary examination was a language test in one of the two Indian Languages, which are indicated as Hindi and Oriya in the Rules and this is intended to be a qualifying test because only these candidates who secured the qualifying marks in that test are eligible to participate in the main written examination. After the recruitment process started, the G.A. Department brought out Notification No.5775 GEN dt. 13.3.97 amending the Rules by omitting Hindi as an Indian Language for the preliminary examination. By virtue of this amendment, only the candidates who passed the language test in Oriya were eligible to take part in the subsequent stages of the examination. This amendment was given retrospective effect and is deemed to have come into force from 1.1.94 which implies that it covers the vacancies of 1994, 1995 and 1996 for which requisitions had been sent to the Commission in November 1996. By the time this amendment was brought out on 13.3.97, the Commission had already processed the applications in accordance with the provisions of the Rules as they stood at the time of advertisement and already issued Admit Cards to the candidates for the preliminary examination. Hence those candidates who passed the language test in Hindi and had received the Admit Cards were allowed to participate in the subsequent written test and personality test and the Commission published a list of 377 successful candidates which include 22 candidates who had offered the language

test in Hindi. In the mean time there was some correspondence between the G.A. Department and the Commission. In August 1997 the GA. Department intimated the Commission that there were 6 anticipated vacancies for the recruitment year 1996 and required them to recommend more names. But since the advertised vacancies were only in respect f the three preceding recruitment years and since the main written examination had already been completed by July, 97 the Commission prepared the select list, taking the number of vacancies as 400 only. A list of 377 candidates was furnished to the G.A. Department by the Commission vide their letter dt. 27.1.98 in which the categorywise break up was given as follows:

	Men	**Women**	**Total**
1. General	97	47	144
2. S.E.B.C.	73	32	105
3. S.C.	48	14	62
4. S.T.	50	11	61
5. Ex-Servicemen	5	-	5
	273	104	377

In this letter the Commission pointed out that the list of 377 candidates enclosed to it included the 22 candidates named in that communication who had taken the language test in Hindi. The names of these candidates and the categories to which they belong together with their positions in the merit list are also given in that letter. Of them one belongs to SC, three belong to ST, three to SEBC and the rest are of General category. In the said letter the Commission also mentioned that the list of 377 candidates included 19 extra candidates for appointment in case 22 candidates were eliminated from the list. Due to acute shortage of S.T. candidates only 19 extra candidates were recommended under other categories excluding S.T. On receipt of this communication, the G.A. Department informed the Commission that after careful consideration, Govt. had decided that even though the amendment to the rules had been given retrospective effect, yet the rights acquired by 22 selected candidates who had appeared in the preliminary examination with Hindi as the language paper cannot be taken away and they are to be considered for appointment. They requested the Commission to furnish the names of those 19 extra candidates who had been sponsored in lieu of the 22 candidates who had offered Hindi as language and were to be eliminated from the list. The Commission thereafter furnished the names of the extra candidates together with their Roll Nos., position in the merit list and the categories to which they belong. Of these 19 candidates, four belong to SEBC and the rest belong to General category. The four SEBC candidates are only men and in the general category there are both men and women.

5. The decision of the G.A. Department to eliminate the so called 19 extra candidates from the list, limiting it to 358, to facilitate appointment of the 22 candidates who had passed the language test

in Hindi has given rise to the cause of action in O.A.Nos.1737(C)/98, 1911 (C)/98, 1914 (C)/98, 1915 (C)/98, 1971 (C)/98 and 2174 (C)/98, a joint application filed by five candidates. Their position in the merit list of 377 candidates is indicated below:

O.A.No.1737(C)/98	Haripriya Dash	138
O.A.No.1911(C)/98	Sucheta Mohapatra	135
O.A.No.1914(C)/98	Namita Mohanty	130
O.A.No.1915(C)/98	Mamatha Mahapatra	136
O.A.No.1971(C)/98	Bijayalaxmi Patsani	144
O.A.No.2174(C)/98	Sidhartha Sankar Pani	150
	Satyajit Das	143
	Rudranarayan Acharya	134
	Archana Patnaik	133
	Ramesh Ch. Panda	131

6. Samikshya Nayak, applicant in O.A. 2919(C)/98 is placed at Sl.No.147 of the list of 377 and is not included in the list of 19 extra candidates.

7. The G.A. Department have filed a detailed counter covering O.A.Nos.1737(C)/98, 1911 (C)/98, O.A.1914(C)/98, 1915 (C)/98 and 1971 (C)/98. They have filed a separate counter in O.A.2174 (C)/98. The Commission has also filed a detailed counter in the first five cases and a separate counter in O.A. 2174 (C)/98. No counter has been filed in O.A. 2919 (C)/98. No private respondents are involved in this case. Hence, on the basis of the detailed replies filed by the G.A. Department and the Commission in the other cases and submissions made at the time of hearing it was decided to dispose of this case also with the consent of he counsel appearing in that case.

8. Rejoinders and written submissions have been filed in the cases in which counter is available and in the course of hearing certain decisions were also cited which have been taken note of. Shorn of unnecessary details, the grievances of the applicants and the relief claimed by them are as follows:-

(i) the applicants in O.A.2174(C)/98 are aggrieved because the Commission allowed the 22 candidates who offered Hindi as the Indian Language in the preliminary examination to participate in the selection and included them in the select list in spite of the Rules having been amended with retrospective effect before the preliminary test was held. They have pointed out that since the preliminary

test was held on 23.3.97 and the Rules had been amended on 13.3.97 they should not have been allowed to appear in the test. They have justified the amendment by saying that Govt. has inherent power to amend the rules with retrospective effect and since all employees of the Govt. of Orissa are required to be proficient in Oriya, there was full justification for the amendment which was in public interest and should have been acted upon. Secondly they have stated that in the select list of 377 candidates published by the Commission they are not shown as extra candidates and they claim that since they have been included in the regular select list they have a right to be appointed. They have further claimed that the reservation for different categories, including SEBC, comes to more than 50% which is not permissible and have alleged that the reserved category had been allowed to encroach upon the posts which should have been utilised for appointing general category candidates. It is also alleged by them that some of the SEBC candidates included in the select list belong to the creamy layer and they got the benefit of reservation by furnishing false certificates. By appointing reserved category candidates in excess of 50%, the law laid down by the Supreme Court in the case of Indra Sawhaney vs. Union of India (AIR 1993 SC 477) would be violated. There is a specific averment in para 6(S) that certain candidates, whose Roll Nos. are mentioned therein, had furnished false certificates to get the benefit of reservation. But they have not impleaded those candidates as respondents to this application. The applicants have put forward a further claim that the 62 vacancies reported to the Commission as the anticipated vacancies of 1997 should also be taken into account for the purpose of appointment. They have prayed for a direction to limit reservation to 50% of the total number of vacancies, to exclude the creamy layer of SEBC from the select list and issue appointment orders in their favour. As an alternative they have put forth another prayer to reappoint them against the vacancies intimated to the Commission in respect of the recruitment year 1997.

(ii) The grievance of the five lady candidates Miss Haripriya Dash in O.A.1737 (C)/98, Sucheta Mohapatra in O.A. 1911 (C)/98, Namita Mohanty in O.A. 1914 (C)/98, Mamata Mohapatra in O.A. 1915 (C)/98, and Bijayalaxmi Patsani in O.A. 1971 (C)/98 also arises on account of including them among the 19 extra candidates and their prayer is to quash the letter of the Commission dt. 10.7.98 in which they have intimated their names along with other as extra candidates. However, the averments on which they attempt to establish their claims are somewhat different from the stand taken by the applicants in O.A. 2174 (C)/98. According to them they have become extra because the women's quota was not correctly determined. There is 30% reservation for women and like all reserved category candidates, the women candidates who occupy high positions in the merit list are to

be appointed on the basis of merit and their names should be excluded for the purpose of reservation. Out of 399 advertised vacancies, 129 posts are earmarked for general category and 36 posts would form the women's quota. According to them those lady candidates who belong to the general category and occupy positions in the merit list upto Sl.No.93 should be excluded and a batch of 36 general category lady candidates from Sl.No.94 onwards should be appointed against the Women's quota. According to them the Commission had adopted a pick and choose method for treating certain candidates as extra candidates and having published the select list, it is no longer available to them to exclude the candidates included in it. They have prayed for appointment by quashing the letter of the Commission dt. 10.7.98 and fixing the Women's quota in the manner indicated above. This point was argued at great length by learned counsel appearing for them.

(iii) The applicant in O.A.2919 (C)/98 is a lady candidate and belongs to the general category. She is placed at Sl.No.147 of the merit list of 377 and is not included in the list of 19 extra candidates. She has also made a grievance of certain candidates being permitted to sit in the preliminary examination and take the language test in Hindi after the amendment was brought out. She also alleges that the reservation for women was not correctly determined. According to her after allowing reservation for SC, ST and SEBC at the rate of 16.25%, 22.50% and 27% respectively making a total of 65.75% in accordance with the G.A. Department Resolution dt. 26.6.96, there remains only 34.25% and according to this ratio 135 post out of the total number of 399 should be treated as unreserved and 1/3rd out of that i.e. 45 posts should have been reserved for women. But in this case 129 posts only are reserved for general category. Even out of 129 posts 43 posts should have been reserved for women belonging to General category. She has further stated that about 10 to 12 vacancies meant for women in SC and ST categories would remain vacant and she should be appointed against one such vacancy. The prayer in this application is that the 22 candidates who opted for Hindi as the Indian Language should not be appointed and the reservation for SC, ST and SEBC which is more than 50% should be quashed. Enhancing the quota of reservation in respect of SEBC from 11.25% to 27% should be quashed as illegal and arbitrary and she should be appointed either by refixing the quota meant for women in the manner indicated by her or by directing the Commission to recommend 62 additional candidates as requisitioned by the G.A. Department.

9. We have carefully gone through the contents of the applications, the replies filed by the G.A. Department and the Commission, the rejoinder and notes of submissions filed by the applicants and heard at length learned counsel for the applicants, learned Standing Counsel and learned counsel for

the Commission. One argument put forward by the applicants is that since the Department had requested the Commission to recommend candidates taking into account 62 anticipated vacancies of 1997, a direction should be issued to the Commission to expand the select list so that they will not be deprived of appointment even after appointing the candidates who passed the language test in Hind. No doubt Rule 14(2) of the Rules prescribes that the select list shall include the number of successful candidates equal to the number of vacancies reported to the Commission and the total number of vacancies reported to the Commission in this selection comes to 462 approximately. But Rule 14(2) is to be read along with Rule 4(2) according to which the Commission shall, on receipt of the vacancy position from the G.A. Department, announce and invite applications from eligible candidates. The Commission had announced and invited applications only for 400 vacancies. Besides the Supreme Court in the case of Surinder Singh vs. State of Punjab (New ATT 1997 (II) SC 422) has observed that appointment over and above the no. of advertised vacancies is not proper. Hence the decision of the Commission to ignore the vacancies reported to them after issue of the advertisement is upheld and cannot be interfered with.

10. The second point urged by the applicants is that inclusion of the candidates who took the language test in Hindi in the select list should be struck down and they should not be appointed as violative of the Rules which stand amended with effect from 1.1.1994. Mr. Naidu, learned counsel for the applicants in O.A.2174 (C)/98 referred to the Apex Court decision in P.Mahindran and others Vs. State of Karnataka and others (AIR 1990 SC 405) to drive home the point that when rules are amended with retrospective effect the selection should be according to the amended provisions. In that case after the selection process had started the relevant recruitment rules were amended, changing the eligibility criteria but the amendment was prospective. The Supreme Court upheld the selection and appointment of the applicants which was in accordance with the unamended rules with the observation that no retrospective effect should be given to any statutory provisions so as to impair or take away an existing right unless the statute either expressly or by necessary implication directs that it should have such retrospective effect (emphasis supplied). He argued that since the amendment in this case is expressly given retrospective effect, the selection should conform to the amended provision. However, the propriety of amending the recruitment rules after the selection process had started and admit cards issued to a large number of candidates was not an issue before the Supreme Court in that case and we doubt whether the above observation can be interpreted to cover such a situation. For taking a pragmatic view and giving complete justice, we have to consider the impact of the amendment.

Applying the amendment to this selection would mean that a good number of candidates who satisfied all the eligibility conditions when they applied for the recruitment examination (which had not been held for three years) had been put through the ordeal of preparation for a tough competitive examination in three stages, passed it and were included in the published select list only to be told later that they were disqualified from the very beginning and cannot be appointed. As the model employer, it is not expected of Govt. to mete out such unfair treatment to job seekers adding to the frustration among educated youth.

11. If the above observation of the Supreme Court is to be taken advantage of for amending the rules in this fashion, it goes without saying that it must be for some very urgent and compelling reasons of public interest. But the reasons for the amendment dt. 13.3.97 are not disclosed to us in the Govt. counter as the Department itself, on second thought, assessed the implications and decided not to deprive the so-called disqualified successful candidates of appointment. In our opinion the Department has acted correctly and justly and their decision deserves to be upheld.

12. The next question which arises is whether the 19 extra candidates would be eliminated from the select list and denied appointment. Strictly speaking they cannot be called extra or surplus since they are included in the published merit list of 377 and this number is well within the no. of advertised vacancies. To the question posed by the Bench why all the 377 candidates cannot be appointed learned Standing Counsel replied that this would lead to general category candidates encroaching upon the quota meant for reserved categories and violation of the O.R.V. Act and the roster. He submitted that the department wants to limit the select list to 358 for adhering to the reservation provisions. As pointed out in paragraph No.4 the categorywise break up of the 400 vacancies has not been given in the advertisement. However, in the course of hearing learned Standing Counsel furnished this break up in respect of the vacancies advertised, the candidates in the merit list of 377 and the candidates in the merit list of 358 as follows:-

	General	**S.C.**	**S.T.**	**SEBC**	**PH**	**Sports**	**Total**
Advertised	M-93	M-40	M-66	M-70	5	1	399
Vacancies	W-36	W-21	W-35	W-32			
	129	**61**	**101**	**102**			
First	M-97	M-48	M-50	M-73	5	1	377
Select list	W-47	W-14	W-11	W-31			
	144	**62**	**61**	**104**			
Second	M-89	M-47	M-50	M-70	5	1	358
Select list	W-40	W-14	W-11	W-31			
	129	**61**	**61**	**101**			

13. In the Mandal Commission Judgment (Indra Sahney Vs. Union of India, AIR 1995 SC 477), the Apex Court laid down the law that the reservation contemplated under Article 16(4) of the Constitution shall not exceed 50%. However, reservation as indicated above exceeds 50%. The percentage of reservation as per the table given above works out as follows:-

	Total No.of posts	**Reserved**	**Unreserved**
Advertised	400	221 (67.75%)	129 (32.25%)
1st Merit list1	377	233 (64.62%)	144 (35.28%)
2nd Merit list	358	229 (64%)	129 (36%)

14. Even though the purpose of limiting the select list to 358 is for adhering to reservation provisions, yet the percentage of reservation for reserved categories remains almost the same for the list of 377 and 358 candidates and in either case is much in excess of 50% being 64% and 64.62%.

15. This excess of reservation is sought to be justified by referring to the Welfare Deptt. Resolution dt. 12.12.94 (Annx.D to the govt. counter in O.A. 2174(C)/98) by which the reservation for SEBC was raised from 11.25% to 27%. Strangely enough, this increase is sought to be justified in that Resolution by referring to the decision of the Apex Court in Indra Sahney's case. The following observations in that judgment have been quoted in support of this decision in the Resolution

> "The reservations contemplated in Clause-(4) of Article 16 should not exceed 50%. While 50 shall be the rule it is necessary not to put out of consideration certain extra ordinary situations inherent in the great diversity of this Country and the people. It might happen that in far flung and remote areas, the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of the conditions peculiar to and characteristics of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out".

16. By no stretch of imagination can Orissa be treated as a far-flung and remote area and the people of this State being out of the mainstream of national life. The Resolution itself is not under challenge before us. But the law of the land as dictated by the Apex Court having over-riding effect over all other statutes, rules and executive instructions, more than 200 of the advertised vacancies cannot be filled up by reserved categories. In other words, all the 144 general candidates included in the select list of 377 have to be appointed. Since, the no. of SC and ST candidates included in that list is within their proportionate representation on the basis of population there is no question of stopping their appointment. In the list of 19 candidates treated as extra and excluded from the merit list of 358, there are only 3 candidates who belong to SEBC. They are at Sl.Nos.227, 229 and 231 of the merit list. Since 200 posts out of the total no. of advertised vacancies are to be earmarked for general category, they too can be appointed either by treating them or the senior most SEBC candidates in the list as belonging to general category. This adjustment will not put them to any disadvantage in future as there is no reservation for SEBC in promotion.

17. To sum up, all the 377 candidates included in the select list published by the Commission shall be appointed subject to verification in to the allegations about certain candidates furnishing false certificates indicated in O.A.2174 (C)/98. Immediate action be taken for the medical examination of those who had not been asked to appear before the Medical Board when it met. Forty unutilised posts meant for S.T. out of the advertised vacancies shall be carried forward in accordance with section 7 of the O.R.V. Act. But before any action is taken to dereserve those posts, the Commission should be asked to conduct a special recruitment examination exclusively for that category as stipulated in Section 9(4) of the O.R.V. Act.

18. Learned Standing Counsel submits that since the candidates are to be allotted to different services and a common roster is not maintained for them it would be difficult to work out reservation for them. The Departments concerned are expected to determine the no. of posts earmarked for each category in their roster before reporting the vacancies to the G.A. Department. Before allotting a candidate to some service the preference indicated by him and the availability of vacancies earmarked for his category in that service are to be considered. If no such vacancy is available in the service for which he has opted, then he would be allocated to some other service where such a vacancy is available to adjust him according to the roster. If in the process a candidate who has opted for a Class-II service is allotted to a specially declared Gazetted service like O.S.C.S. then he would be eligible to compete for a Class-II service in the next recruitment under the proviso to Rule-13 of the Rules.

19. Certain averment have been made in the batch of cases filed by the lady candidates in O.A. 1737(C)/98 etc. and several arguments were advanced by their counsel about the determination for the quota for women. However, the relief claimed by them is that they should not be deleted from the select list and denied appointment. Since this relief has been granted by the directions given in para-17 above, we do not propose to go into those averments and submissions. However, we direct the G.A. Department to re-examine the quota indicated for women in different categories in Rule 4(2) of the Orissa Civil Services (Reservation of vacancies for Women in Public Services) Rules, 1994 in which the SEBC category is left out and revise it suitably, leaving no room for any ambiguity. The G.A. Department is also directed to take up the question of reservation for SEBC with the Welfare Department and ensure that the Resolution dt. 8.12.94 is revised suitably, taking note of the observation in para 16 above.

20. The Original Applications are allowed with the above directions. No costs.

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NOTE:

Confirmed by the High Court in O.J.C. No.10599/1999 D.D. 17.4.2007

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ORISSA HIGH COURT: CUTTACK
W.P. (C) Nos.8871 of 2004 and 2741 of 2005
D.D. 19.5.2005
The Hon'ble Mr. Justice I.M.Quddusi
The Hon'ble Mr. Justice N.Prusty

Bira Kishore Das ... Petitioner
Vs.
State of Orissa .. Opposite Party

Departmental Enquiry under CCA Rules:

Petitioner serving as Treasury Officer signed the objection slips leading to lapse of fund and harassment to the teaching staff of the College – After holding preliminary enquiry in view of the threats to the witnesses and their reluctance to come forward to give evidence detailed enquiry was dispensed with under Rule 18(ii) of the Rules read with 2nd proviso to Article 311(2) of the Constitution of India and passed the order dismissing the petitioner after consulting the Commission – The Administrative Tribunal, Orissa before whom the dismissal order was challenged quashed the order of dismissal and directed to hold enquiry and to keep the petitioner under suspension during enquiry – The petitioner challenged the order keeping him under suspension as he was not under suspension when the dismissal order was passed – High Court while upholding the order quashing the order of dismissal from service has quashed the order directing to keep the petitioner under suspension during enquiry has disposed of the writ petition reserving liberty to the State to initiate disciplinary proceedings against the petitioner and place him under suspension during the pendency of the proceedings.

Held:

It is the discretion of the appointing authority to place a delinquent under suspension during the pendency of the enquiry or not. This power cannot be exercised by the Courts or the Tribunal if there would have been a situation that at the time of passing the dismissal order from service, the petitioner would have been under suspension, then of course the Tribunal could have directed to maintain status before passing the order of dismissal from service.

Further Held:

That a disciplinary Authority is not expected to dispense with disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because of Department's case against the Government servant is weak and must fail. In the facts and circumstances mentioned above, the High Court held that it cannot be said that it was not reasonably practicable to hold enquiry under the Rules against the delinquent.

Case referred:

AIR 1985 SC 1416 - Union of India and another v. Tulsiram Patel

ORDER

I.M.Quddusi, J.

The present writ petitions have been filed against the judgment dated 18.3.2004 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A.No.907 (C) of 2003. The Tribunal while disposing of the O.A. quashed the order of punishment i.e., dismissal from service of Bira Kishore Das petitioner in WPC No.8871 of 2004 and further directed that he shall be deemed to be under suspension from the date he was relieved from his respective post on issue of the dismissal order and a proceeding under Rele-15 of the Orissa Civil Service (Classification, control and Appeal) Rules 1962 (for short 'the Rules') be initiated against him and further ordered that he shall be entitled to subsistence allowance at the prescribed rate from the deemed date of suspension.

2. At the very outset it is necessary to mention here that no departmental proceeding against the delinquent was conducted and the enquiry was dispensed with under Rule 18(ii) of the Rules read with 2nd proviso to Article 311(2) of the Constitution of India.

3. The brief facts of the case are that Bira Kishore Das, the petitioner in WPC No.8871 of 2004 was serving as Treasury Officer in the District Treasury, Cuttack. The preliminary enquiry was conducted by the Additional Secretary, Finance Department on the allegation of the Principal, Sailabala Women's College, Cuttack (for short 'the College') that Sri Das, the Senior Clerk and the Accountant of the District Treasury, Cuttack were not passing the bills submitted by her raising flimsy objections. In the preliminary enquiry the Additional Secretary, Finance Department held that the arrear UGC pay bills submitted by the College duly supported by allotment were initially endorsed with the pass orders, but subsequently, the pass orders were cut and cancelled by Shri Pratap Chandra Khuntia, Senior Clerk, District Treasury, Cuttack and the bills were objected to at the last moment of the financial year 2001-2002 on flimsy ground with an ulterior motive and Shri Harihar Behera, the Accountant of District Treasury, Cuttack as Supervising Officer without verifying the correctness of the objections raised, endorsed the flimsy objection for signature by the District Treasury Officer, namely, Bira Kishore Das. Bira Koshore Das, District Treasury Officer without applying his mind signed the objection slips leading to lapse of fund and harassment to the teaching staff of the College. The Collector, Cuttack (the Drawing and Disbursing Officer) and other lecturers of the College requested to pass the bill and not to object on flimsy grounds and not to harass the senior Readers of the College, but their request were turned down. Bira Koshore Das, District Treasury Officer blindly supported the Senior Clerk and the Accountant did not make use of his role as the Supervising Officer and the final Scrutinising Officer.

4. The Additional Secretary had also reported that the staff and lecturers of the College were so much harassed and fear stricken that they are afraid of further harassment and tearing of the bills, if they give anything further in writing to provide evidence during any enquiry, apprehending organized harassment of the College Teachers by the Government Treasury Staff everywhere in the State.

5. On the preliminary enquiry report of the Additional Secretary, the State Government vide order dated 3.2.2003 hold that the Government is satisfied that it is not reasonably practicable to hold further detailed enquiry in view of the threats to the witnesses and their reluctance to come forward to depose against the delinquents, in the interest of their own community and as such dispensed with detailed further enquiry under Rule 18(ii) of the Rules read with 2nd proviso to Article 311(2) of the Constitution of India and passed the order dismissing Bira Kishore Das (the applicant in the O.A. before the Tribunal) from service. At the time when the order of dismissal from service was passed, Bira Kishore Das was working as Special Officer (AFA) and Manager (Finance & Audit), Tribal Development Co-operative Corporation Ltd., Bhubaneswar. Before that he was posted as OFS-I (Jr. Branch) Special Officer (AFA) in S.C. and S.T. Department, meaning thereby that he was not posted as Treasury Officer at all when the Government held that it was not reasonably practicable to hold a detailed enquiry.

6. Before passing the impugned order of dismissal, Orissa Public Service Commission (for short 'the Commission') was consulted and the Commission had sent its concurrence vide letter No.356 dated 16.1.2003 with the proposal of Government, i.e., dismissal of Sri Das from Government service.

7. The Tribunal upholding its decision taken in the matter of two other employees, i.e. the Senior Clerk and the Accountant who were also dismissed in similar manner and who had filed their O.As. which were decided by the Tribunal by a common order dated 24.7.2003, in the case in hand (WPC No.8871 of 2004) the Tribunal also passed the similar order quashing the order of dismissal directing to hold enquiry and during the pendency of the enquiry to keep the applicant-petitioner Bira Kishore Das under suspension.

8. The applicant before the Tribunal in the O.A., the petitioner in WPC No.8871 of 2004 was not under suspension when the impugned order of dismissal from service was passed. Hence while quashing the dismissal order, it was not proper for the Tribunal to direct that he should be placed under suspension, enquiry should be conducted against him and appropriate action be taken.

It is the discretion of the appointing authority to place a delinquent under suspension during the pendency of the enquiry or not. This power cannot be exercised by the Courts or the Tribunal if there would have been a situation that at the time of passing the dismissal order from service, the petitioner would have been under suspension, then of course the Tribunal could have directed to maintain the status before passing the order of dismissal from service. But when the petitioner was already discharging his duties as Manager (Finance & Audit), Tribal Development Co-operative Corporation Ltd., it was not within the jurisdiction of the Tribunal to direct to place him under suspension during the course of enquiry.

9. It is also a matter of consideration that the delinquent was not at all posted as Treasury Officer and was working in the Tribal Development Co-operative Corporation Ltd. How can it be presumed that the staff and lecturers of the College would be afraid of being further harassment in case they come forward to give evidence. Apart from that, the then Collector who was the Drawing and Disbursing Officer, appears to be one of the witnesses and the objections raised on the bill submitted by the Principal of the College appears to be a documentary evidence in the enquiry. In the case of Union of India and another v. Tulsiram Patel reported in AIR 1985 SC 1416, the constitution Bench of the Apex Court has held that a disciplinary authority is not expected to dispense with disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the court so far as its power of judicial review is concerned and in such a case the court will strike down the order dispensing with the inquiry as also the order imposing penalty. Therefore, in the facts and circumstances mentioned above, it cannot be said that it was not reasonably practicable to hold enquiry under the Rules against the delinquent.

10. In view of the above, the W.P.(C) No.2741 of 2005 is dismissed and W.P.(C) No.8871 of 2004 is allowed in part. The impugned order of the Tribunal by which a direction has been issued that the petitioner shall be deemed to be under suspension from the date he was relieved from the respective post on issue of dismissal order, is quashed. However, the quashing of the impugned order of dismissal from service is upheld. The petitioner shall be reinstated. However, it will be open for the opposite party-State (in WPC No.8871 of 2004) to initiate disciplinary proceedings against the petitioner and place him under suspension during the pendency of the disciplinary proceedings.

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ORISSA HIGH COURT, CUTTACK
W.P. (C) NO.2170 OF 2004
D.D. 13.7.2005
The Hon'ble Mr. Justice B.P.Das &
The Hon'ble Mr. Justice A.K.Samantray

Madhumita Das ... Petitioner
Vs.
State of Orissa & Ors. ... Opposite Parties

Recruitment:

Petitioner a candidate for Orissa Judicial Service Examination Class-II produced copies of all the required certificates except the certificate passing Oria language by the last date 15.1.2004 but gave a undertaking stating that she had already appeared for the said examination on 23.11.2003 and produce the certificate as soon as the same was issued to her – Petitioner's application was rejected on the ground that she had not enclosed the certificate of passing Oria language test as per the advertisement – Petitioner challenged the same and as per interim order was permitted to take the examination and succeeded in the written test and appeared at the viva-voce the result of which was not published – Though the result of Oria language test was published on 9.12.2003 in which the petitioner was passed she was not aware of the same - After receipt of the certificate in the said examination she submitted the same before the Commission on 21.1.2004 – Whether the application submitted by the petitioner before the Commission was valid on the last date fixed for submission of applications – High Court following the decision of the Supreme Court in State of Rajasthan Vs. Hitender Kumar Bhatt – AIR 1998 SC 91 - has held that since the petitioner had not submitted her application complete in all respect by the last date for receipt of applications no infirmity in the action of the Commission in rejecting the application.

Held:

A cut-off date, by which all the requirements relating to qualifications have to be met, cannot be ignored in an individual case. There may be other persons who would have applied had they known that the date of acquiring qualifications was flexible. They may not have applied because they did not possess the requisite qualification on the prescribed date. Relaxing the prescribed requirements in the case of one individual may, therefore, cause injustice to others.

Cases referred:

1993 (I) S.L.R. 379 - Ashok Kumar Sharma v. Chander Shekher
(1994) 2 A.T.T. (S.C.) 423: 1994 AIR SCW 2861 U.P. Public Service Commission, Uttar Pradesh v. Alpana
1997 (II) O.L.R. 263 - Urmila Beura v. Director, Higher Education, Orissa
AIR 1998 SC 91 - State of Rajasthan vs. Hitendra Kumar Bhatt

ORDER

B.P. Das, J.

This writ application has been filed by the petitioner with a prayer to direct the opposite parties to allow her to appear at the Orissa Judicial Service Examination, Class II, conducted in pursuance of Advertisement No.10 of 2003-04 (Annexure 01) and was scheduled to be held on 29.2.2004.

2. The facts, as delineated in the writ petition, in a nutshell are that the petitioner after completing her school career with English back ground ultimately prosecuted her study in Five Years Integrated Bachelor of Laws under Utkal University. On 17.11.2003 the opposite Party-Orissa Public Service Commission ('Commission' hereinafter) issued an advertisement being Advertisement No.10 of 2003-04 under Annexure-1 inviting applications from intending candidates for admission to the competitive examination to be conducted by the Commission for recruitment to the Orissa Judicial Service, Class-II by direct recruitment. The last date for submission of the application in the prescribed form was 15.1.2004. According to the petitioner, she submitted her application in the prescribed form on 12.1.2004 along with the required documents except the certificate of passing Oriya Language Test equivalent to M.E. School standard as, to her knowledge, the result of the Oriya Language Test at which she had appeared on 23.11.2003 was not published by that date, even though the result declaring her to have passed was published on 9.12.2003. The petitioner along with her application submitted an undertaking to the effect that since she had already appeared at the Oriya Second Phase Language Test bearing roll no.OTTC-009 conducted by the Board of Secondary Education, Orissa, on 23.11.03, Oriya language test certificate would be produced, as soon as the same would be issued to her. The application of the petitioner dated 12.1.2004 was rejected by the Commission on 7.2.2004 vide Annexure-6 on the ground that the petitioner had not enclosed the certificate of passing the Oriya Language Test. The petitioner has, therefore, filed this writ application challenging the action of the opposite parties in rejecting her application.

After issuing notice to the opposite parties, this Court passed an interim order on 24.2.2004 directing the Commission to permit the petitioner to take the recruitment test for O.J.S. but not to publish her result without the leave of the Court and it would be subject to result of the writ application.

According to the petitioner, pursuant to the interim order passed by this Court, she appeared and succeeded in the written test and thereafter appeared at the viva voce test the result of which has not been published till date. Learned counsel for the petitioner emphatically submits that the petitioner had appeared at the Oriya Language Test conducted by the Board of Secondary Education, Orissa, and though her result was published on 9.12.2003, she was unaware of the fact that she had passed the Oriya Language Test and with the impression that her result had not been published, she gave an undertaking to furnish the certificate soon after declaration of her result. Now, the petitioner challenges the action of the Commission saying that in view of the undertaking, the Commission should not have

rejected her application. That too, according to the petitioner, by the date she submitted her application, she had already passed the Oriya Language Test. It is further submitted that on receipt of the Oriya Language Test Certificate on 20.1.2004, she submitted the same before the Commission on the next day, i.e., 21.1.2004, and appeared at the Viva Voce test on 23.6.2004.

3. The opposite parties in their counter affidavit have taken a stand that on scrutiny of the petitioner's application, as it was found that the petitioner had not submitted any evidence/document regarding passing of the Oriya Language Test equivalent to M.E. School standard along with her application as stipulated in paragraphs 7(ii), 9(vii) and 10(vii)(g) of the Advertisement, Annexure-1, read with Rule 101(1)(C) of the Orissa Judicial Service Rules, 1994, the Commission had rejected her application.

4. This being the factual matrix, the question that falls for determination is whether the application submitted by the petitioner before the Commission for recruitment to the Orissa Judicial Service, Class-II, was valid on the last date fixed for submission of applications.

In order to appreciate the point at issue, we may quote the relevant parts of the Advertisement (Annexure-1):

"ORISSA PUBLIC SERVICE COMMISSION

Advertisement No.10 of 2003-2004
The last date for receipt of application is 15th January, 2004.
WARNING: Applications received incomplete in any respect are liable to be summarily rejected. No correspondence on that score will be entertained.

xxx xxx xxx
xxx xxx xxx

7. OTHER ELIGIBILITY CONDITIONS

xxx xxx xxx
xxx xxx xxx

v) Only those candidates who fulfill the requisite qualification and experience by the closing date of receipt of applications will be considered eligible.

xxx xxx xxx

9. CERTIFICATES TO BE ATTACHED:
Candidates are required to submit along with their applications, true copies of the following documents duly attested by Gazetted Officer or Notary Public. They must not attach with their applications the original certificates. Only those who will be called to the interview must bring with them the original certificates in support of the attested copies for verification at the time of interview.

xxx xxx xxx

vii) Oriya Test pass certificate from Board of Secondary Education, Orissa in support of passing Oriya language test equivalent to M.E. School standard if not passed H.S.C. or equivalent Examination having Oriya as one of the subjects:

xxx xxx xxx

xxx xxx xxx

10. OTHER CONDITIONS:

xxx xxx xxx

xxx xxx xxx

vii) Candidates are required to take due care to annex with the applications the copies of certificates and other documents as stated above and mention the total number of the annexed documents at the appropriate column of the application form. The documents should be enclosed in the following order:-

xxx xxx xxx

xxx xxx xxx

g) Oriya Test Pass Certificate, if any;

xxx xxx xxx

xxx xxx xxx

(emphasis supplied)

We may now refer to the relevant provisions of Rules 10 and 12 of the Orissa Judicial Service Rules, 1994.

"10. Eligibility of candidates – (1) In order to be eligible for recruitment under Rule 5 a candidate may be of either sex and shall be –

xxx xxx xxx

(c) able to speak, read and write Oriya fluently and must have passed an examination in Oriya language equivalent to that of Middle English School standard.

xxx xxx xxx"

"12. Manner of submitting application - (1) Every candidate shall submit his/her application in his/her own handwriting in the form prescribed by the Commission to the Secretary to the Commission along with the attestation form for verification of character and antecedents, so as to reach him by such date as may be notified by the Commission in this behalf.

Provided that .....

(2).....

(3) Every application shall be accompanied by the following documents, namely:

(i) .....

(ii) certificate from the Board of Secondary Education of Orissa in support of passing Oriya language test equivalent to Middle English School standard.

xxx xxx xxx

xxx xxx xxx

Notes-I. Copies of documents, duly attested by a Gazetted Officer, shall be submitted with the application but the original shall be produced at the time of viva voce test.

II. The Commission may, at their discretion require such additional proof on any of the above matters as they may think fit.

III. The application of a candidate shall be summarily rejected if it is not complete in all respects as specified by the Commission in the application form."

[Emphasis supplied]

5. The argument of Shri B.K. Das, the learned counsel for the opposite parties, is that the application submitted by the petitioner for recruitment to the Orissa Judicial Service, Class-II, being incomplete was liable to be rejected summarily and there was no illegality in the decision of the Commission in rejecting the application of the petitioner. But, according to the learned counsel for the petitioner, on the date on which the application was submitted the petitioner had already possessed the required qualification, i.e., Oriya Language Test equivalent to M.E. School standard, but due to her misfortune she was not aware of publication of her result in the Oriya Language Test for which she had submitted an undertaking along with her application.

In order to fortify his argument, learned counsel for the petitioner, draws our attention to a decision of the Apex Court in Ashok Kumar Sharma v. Chander Shekher, 1993 (I) S.L.R. 379. The learned counsel relying upon the aforesaid decision submits that the petitioner was fully qualified prior to the date of the interview. So, the action of the opposite parties in rejecting the application of the petitioner was wrong. He further refers to a decision of this Court in Urmila Beura v. Director, Higher Education, Orissa, 1997 (II) O.L.R. 263, wherein it was held that if the candidate had already appeared at the particular examination by the time of making application and results were out before the date of interview; it would be deemed that the candidate has acquired requisite qualification.

In the case of Urmila Beura (supra), selection of candidate for appointment to the post of Lecturer in Education in Bhadrak Women's College was challenged on the grounds, firstly, that the appointee did not have the requisite qualification of Master's Degree in Education as on the last day of receipt of applications and, secondly, the appointment was on extraneous consideration, such as, political pressure and influence. But the candidate, who was selected and appointed, was allowed to appear at the interview by the Government Body of the College even though she did not have the requisite qualification on the last date of submission of application whereas the petitioner had the requisite qualification. The facts narrated in the present case are totally different from that of Urmila Beura's case. In the case at hand, the Commission on scrutiny of the application of the petitioner rejected the same summarily as the same was incomplete. It is worthwhile to mention here that in the advertisement, Annexure-1, the candidates were warned that applications received incomplete in any respect are liable to be summarily rejected. The petitioner could only appear at the written test as well as at the viva voce test by virtue of the interim order passed by this Court. In our considered opinion, the interim order of this Court can never confer any right on the petitioner.

Learned counsel for the opposite parties in this regard has drawn our attention of the Apex Court in U.P. Public Service Commission, Uttar Pradesh v. Alpana, (1994) 2 A.T.T. (S.C.) 423: 1994 AIR SCW 2861, wherein the Apex Court referred to its earlier decision in Ashok Kumar Sharma (supra) and ultimately came to hold in paragraph 6 that candidates must have the required qualification by the last date fixed for submission of applications.

In order to appreciate the point involved, it is necessary to state the relevant facts of Alpana's case (supra), which reveal that the U.P. Public Service Commission issue an advertisement inviting applications for appearing at a competitive examination called "the UP. P. Nayayik Seva (Munsif) Examination, 1988" for selection of candidates for appointment to the said post. The qualification for appearing at the examination was that the candidate must have possessed on the last date fixed for receipt of applications a degree of Bachelor of Laws of a University established by law in Uttar Pradesh or any other University of India recognized for that purpose by the Governor which entitled him to practice in court of law or be an Advocate, Vakil or Pleader on the roll of or be entitled to practice in the High Court of Judicature at Allahabad or Courts Subordinate thereto, etc. It was further required that the application would be accompanied by an attested copy of High School and Intermediate Certificates, Bachelor Degree and Law Degree Examination Certificates and Mark sheets of each examination. The last date for receipt of the applications was stated in para 2 of the advertisement to be August 20, 1988.

On a plain reading of the advertisement it became clear that a candidate applying in pursuance of the advertisement had to possess a Degree of Bachelor of Laws on the last date fixed for receipt of applications, i.e., August 20, 1988. Not only that, but it was further provided that the applications would be accompanied by attested copies, inter alia, of the Law Degree Examination Certificate and Mark sheet of such exa1 mination. This requirement could never have been fulfilled by those who had not passed the examination by August 20, 1988.

Admittedly, the respondent in Alphana's case she had appeared at the law degree examination, the result whereof had not been declared till August 20, 1988. As per the advertisement, her application was, therefore, liable to be rejected. It was an undisputed fact that she had applied in pursuance of the advertisement even though she had not passed the law degree examination till August 20, 1988. However, she had mentioned in her application that she had appeared for the law degree examination and was awaiting her result. In the meantime, she successfully cleared the law degree examination, the

result whereof was declared sometime thereafter in October, 1988. Being aware of it, the Public Service Commission allowed her to appear at the examination held on 3rd, 4th and 5th May, 1990 and on her coming out successful in the written examination she expected a call for interview. As she did not receive such call, she made enquiries and learnt that the Public Service Commission had taken the view that since she had not passed the law degree examination on or before August 20, 1988, she was not eligible to be selected for appointment to the post advertised.

Thereupon, she approached the High Court by way of a Writ Petition which was allowed and the Public Service Commission was directed to call her for interview. The Court, however, stated that the Public Service Commission should withhold the result until further orders. Pursuant to the said order, she was interviewed and her result was kept in abeyance. Thereafter, the High Court finally disposed of the matter directing the Public Service Commission to declare her result and if she was successful, to forward her name to the State Govt. for appointment within the time specified. A further direction was given that in the event there was no post available, a supernumerary post should be created for her and appointment made thereon. It was that order of the High Court, which was challenged before the Apex Court in appeal by special leave.

The apex Court held that the aforesaid order of the High Court for creation of a supernumerary post to accommodate the respondent therein could not be supported on any rule or prevalent practice nor could it be supported on equitable considerations. In paragraph 6 of the judgment, the Apex Court further held that –

> "..... In fact there was no occasion for the High Court to interfere with the refusal of the Public Service Commission to interview her in the absence of any specific rule in that behalf. We find it difficult to give recognition to such an approach of the High Court as that would open up a flood of litigation. Many candidates superior to the respondent in merit may not have applied, as the result of the examination was not declared before the last date for receipt of applications. If once such a approach is recognized there would be several applications received from such candidates not eligible to apply and that would not only increase avoidable work of the selecting authorities but would also increase the pressure on such authorities to withhold interviews till the results are declared; thereby causing avoidable administrative difficulties....."

In this regard we may also refer to a decision of the apex Court in the case of State of Rajasthan v. Hitendra Kumar Bhatt, AIR 1998 SC 91, wherein it was held in paragraph 6 as follows:

"Looking to the clear terms of the advertisement which we have referred to above the respondent was not eligible for consideration. It is submitted by the respondent before us that since he has been continued and has now been confirmed we should not disturb his appointment. He has requested that his case should be considered sympathetically. The fact, however, remains that the appellants have taken the correct stand right from the beginning. The respondent's application was not considered and he was not called for an interview. It was on account of interim orders, which were obtained by the respondent that he was given appointment and continued. He was aware that his appointment was subject to the outcome of his petition. One cannot, therefore, take too sympathetic a view of the situation in which the respondent finds himself. A cut-off date, by which all the requirements relating to qualifications have to be met, cannot be ignored in an individual case. There may be other persons who would have applied had they known that the date of acquiring qualifications was flexible. They may not have applied because they did not possess the requisite qualification on the prescribed date. Relaxing the prescribed requirements in the case of one individual may, therefore, cause injustice to others."

6. In view of the aforesaid judicial pronouncements of the apex Court, we are of the considered opinion that neither the ratio of Urmila Beura's case of this Court nor of Ashok Kumar Sharma's case of the Apex Court is applicable to the facts of the present case since the petitioner had not submitted her application complete in all respect by the last date of receipt of applications. We find no infirmity in the action taken by the Commission in rejecting the application of the petitioner and in not calling her for interview.

7. For the reasons indicated above, we dismiss the writ petition. There shall, however, be no order as to cost.

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HIGH COURT OF ORISSA : CUTTACK
W.P. (C) No.8898 of 2004
D.D. 17.8.2005
The Hon'ble Mr. Justice I.M.Quddusi &
The Hon'ble Mr. Justice N.Prusty

Debasis Rout ... Petitioner
Vs.
Orissa P.S.C. & Anr. ... Opposite Parties

Examination:

The petitioner appeared for Orissa Civil Service Examination opting for Geography and Public Administration as optional subjects – Though the petitioner was called for interview he was not selected - The petitioner has challenged his non selection on the ground that Public Administration papers were evaluated by teachers of Political Science - Court considering the opinion of Head of Department of Utkal University that Professors/Readers/Senior Lecturer of Political Science are competent to evaluate the answer scripts of both papers of Public Administration under the syllabi, Orissa P.S.C. has upheld the stand of the P.S.C. and dismissed the writ petition.

Case referred:

AIR 2004 SC 4116 - Pramod Kumar Srivastava v. Chairman, Bihar Public Service Commission, Patna and Others

ORDER

I.M.Quddusi, J.

This writ petition has been filed against the judgment and order dated 11.8.2004 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack, in O.A.No.1553 (C) of 2004, dismissing the O.A. which was filed by the petitioner.

2. The brief facts of the case are that the petitioner appeared in the Orissa Civil Services Examination, 2000 which was conducted by the Orissa Public Service Commission. The scheme of the examination consists of a preliminary examination and thereafter written examination to be followed by viva-voce/interview of the candidates. The candidates who participated in the preliminary examination and qualified in the same were called for written examination in which the name of the petitioner was also included. The petitioner was called for to the written examination. He had therein opted for two optional subjects, i.e., one was Geography and other was Public Administration. Thereafter he was called for interview but when the final result was published on 31.12.2003 his name did not find place in the merit list. Thereafter he applied, after depositing requisite fees, for providing

a copy of mark sheet which was issued to him and he found therein that he had got less than 50% marks in both the Public Administration papers. However, he secured more than 50% marks in both the papers of general Studies and in both the papers of other optional subjects, that is, Geography and Public Administration. Thereafter, he came to know that the teachers of Political Science subject were engaged for evaluating all the answer sheets of the Public Administration papers by the Orissa Public Service Commission. He filed writ petition in this Court earlier numbered as W.P. (C) No.1407 of 2004 which was not entertained on the ground of not approaching the Orissa Administrative Tribunal. Thereafter he filed the above mentioned O.A. and when the O.A. was dismissed he filed the instant writ petition.

3. The sole ground of challenge is that the answer scripts of the Public Administration subject which were evaluated by the teachers of the Political Science subject are not competent to evaluate the same.

4. In the counter affidavit filed by the Under Secretary, Orissa Public Service Commission on behalf of the Commission it has been mentioned that the syllabus for the O.C.S. (Main) Examination 2000 is broadly of the level of Bachelor's Degree as per the scheme of examination for O.C.S. issued by the Commission. The subject of Political Science is taught in the degree colleges of the State. The lessons relating to Public Administration are taught to the students, who take Political Science as a subject at degree level. The Professors/Readers/Lecturers in Political Science impart teaching in Public Administration to the students. Since the syllabus of the OCS (Main) Examination is of the level of Bachelor's Degree, the Readers/Sr. Lecturers working in the degree colleges are competent to evaluate Public Administration paper as they impart teaching of Public Administration to the students at degree level. Further, it was mentioned therein that the Utkal University only has the Public Administration Department with three faculty members. Since large number of candidates had appeared in Public Administration paper in the OCS (Main) Examination and more than twenty Chief Examiners and Examiners were required for evaluation of he answer scripts, it was not practically possible to get the answer scripts evaluated by the limited faculty members of the Department of Public Administration in Utkal University. Therefore, qualified and experienced Professors/Readers/Sr. Lecturers/Lecturers working in Universities and Government Colleges in Political Science, who are teaching Public Administration, were engaged as examiners to evaluate the answer scripts in Public Administration. It was further pointed out that in the earlier examination held in the year 1997 also Professors/Readers/ Sr. Lecturers belonging to discipline of Political Science had evaluated the answer scripts concerning Public Administration.

5. In the rejoinder affidavit it has been stated that the Public Administration taught at the bachelor level degree in Utkal University is only 10% of the syllabus prescribed for Public Administration in the Orissa Civil Services Examination. Therefore, it is incorrect on the part of the Orissa Public Service Commission to say that syllabus for Orissa Civil Service main examination for Public Administration paper is at the level of Bachelor Degree. Further, it has been mentioned that in the University the Department of Political Science and the Department of Public Administration are two separate and distinct Departments. The syllabus of the Utkal University has also been annexed with the rejoinder affidavit to show that the Public Administration taught at the Bachelor level degree in Utkal University is also only 10% of the syllabi prescribed for Public Administration in the Orissa Civil Services Examination.

6. A supplementary affidavit was also filed on behalf of opposite party no.1 in which mainly it has been stated that the Public Administration as a separate subject for award of degree at Graduate or Post Graduate level has not yet been introduced in most of the Colleges and Universities. This is also the state of affairs on the subject, Public Administration for whole of India. A Post Graduate in Political Science is competent to teach Public Administration and evaluate answer scripts in Public Administration. In the circumstances, the experienced Professors/Readers/Sr. Lecturers of Political Science, who have studied Public Administration at their B.A. (Hons.) and Post Graduate level of Political Science and are imparting teaching, are competent to evaluate the answer scripts of Public Administration subject under the syllabus of OCS Examination prescribed by the Orissa Public Service Commission. The names and designations of the experienced examiners who had evaluated the answer scripts relating to the subject Public Administration of the petitioner has been indicated separately in a sealed cover for perusal of this Court as the selection and appointment of examiners is strictly a confidential matter. It has further been mentioned that as many as 1726 candidates who opted for Public Administration as optional papers, had appeared in the OCS (Main) Examination 2000. Out of them, 108 candidates had been invited to appear in the interview. Finally, 50 candidates were recommended for appointment.

7. This Court has perused the documents which were kept in sealed cover. Firstly, the members of those examiners who had evaluated the answer scripts of the petitioner, we have seen that Paper-I was evaluated by the Reader in Political Science who had 34 years teaching experience. Answer scripts relating to Paper-II of the petitioner were evaluated by Readers and Heads of Department in

Political Science of the colleges who had 30 years teaching experience. Further an opinion dated 12th May, 2005 of the Heads of Department of Public Administration, Utkal University, Dr. Bijoyini Mohanty addressed to the Secretary, Orissa Public Service Commission was produced according to which Professors/Readers/Sr. Lecturers of Political Science are competent to evaluate the answer scripts of both the papers of Public Administration subject (Paper I-Administrative Theory, Paper II-Indian Administration) under the syllabi of Orissa Public Service Commission. Dr. Mohanty has mentioned the ground of his opinion as under:

1. The topics prescribed in the syllabi are in the curriculum of B.A. (Hons.) and Post Graduate levels of Political Science.

2. Separate subject of Public Administration is not yet introduced in most of the Colleges and Universities of Orissa. This is also the state of affairs on the subject for whole of India.

3. It is still being considered that a Post Graduate in Political Science is competent to teach Public Administration and evaluate answer scripts in Public Administration.

8. In view of the above mentioned facts and circumstances, this Court has no doubt in its mind that the answer scripts of Paper I of Public Administration of the petitioner were evaluated by the Reader in Political Science who had 34 years teaching experience and Paper II was evaluated by the Reader & Head of Department in Political Science who had 30 years teaching experience. The petitioner has although mentioned in his rejoinder affidavit that the Public Administration as a paper under the Political Science faculty is only 10% of the syllabus prescribed by Orissa Public Service Commission for optional papers of Public Administration and for this purpose he has annexed the syllabus of Utkal University of Bachelor of Arts studies. The courses shown therein under Political Science (Honours) Pre-Degree course carries Paper III in respect of Public Administration but this syllabus is of no help to the petitioner because all the reasons that the Readers of the subject of Political Science having 30 to 34 years teaching experience who had evaluated the answer scripts of Paper I and Paper II of the petitioner did not study only up to the level of Bachelor of Arts but also of their Post Graduate in Political science and as such it cannot be said that they are not competent to evaluate the answer script of the subject of Public Administration subjects of the levels of B.A. (Honours) and Post Graduate. The petitioner has shown only the syllabus of Pre-Degree course of Political

Science which is not sufficient for the purpose to see the competency of the Readers of Political Science subject. There is no allegation on the part of the petitioner that the syllabi of the Orissa Public Service Commission of Public Administration subject, that is, Administration Theory and Indian Administration are not included in the syllabi of Post Graduate course in Political Science subject. Therefore, it cannot be said that the Reader in Political Science Department having 30 to 34 years of teaching experience are not competent to evaluate the answer scripts of Public Administration subjects under the syllabi of Orissa Public Service Commission. There is also no discrimination in evaluation of the answer scripts of the candidates of Public Administration subject and, therefore, it cannot be said that there is violation of Articles 14 or 16 of the Constitution of India also. Learned counsel for the Orissa Public Service Commission has relied upon a case of Pramod Kumar Srivastava v. Chairman, Bihar Public Service Commission, Patna and Others reported in AIR 2004 SC 4116 in which the Hon'ble Apex Court has laid down that it is absolutely necessary that a uniform standard is applied in examining the answer books of all the candidates. The examination in question is a competitive examination where the comparative merit of a candidate has to be judged. In the instant matter all the answer scripts of the subject of Public Administration Paper I and II of Orissa Civil Service (Main) Examination 2000 were evaluated by the Professors/Readers/Senior Lecturers of Political Science subject and as such it cannot be said that there was no uniform standard in evaluating the answer scripts in the examination.

9. In view of the above discussion, this Court is of the view that the writ petition devoid of merits and, therefore, the same is dismissed. No order as to costs.

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ORISSA ADMINISTRATIVE TRIBUNAL, BHUBANESWAR
O.A. NO.249/2004
D.D. 21.9.2005
Hon'ble Mr. H.P. Das, Vice-Chairman &
Hon'ble Mr. G.C.De, Chairman

Jayant Kumar Das ... Applicant
Vs.
State of Orissa & Ors. ... Respondents

Departmental Enquiry:

The applicant challenged the order of punishment passed by the Government with endorsement by order of Governor – Objection raised as to maintainability of the application before Administrative Tribunal under Section 20(1) of the Administrative Tribunals Act as the applicant has not availed an appeal before Governor provided under Rule 22(2) of CCA Rules – As the order with endorsement by order of the Governor as per the rules of transaction of business made under Article 166 of the Constitution such an endorsement cannot be construed to be an application of mind by the Governor himself. The provision of Section 20 of the Act being mandatory the Tribunal has disposed of the application as not maintainable.

Held:

Before approaching the Tribunal all the remedies available to the applicant under the relevant service rules as to the redressal of his grievance have to be exhausted. The provision of Section 20 of the Administrative Tribunals Act is mandatory. In view of Section 22(3) of the Administrative Tribunals Act appeal and memorial are not identical and submission of memorial to the Governor shall not be deemed to be one of the remedies which are available.

ORDER

The application is taken for hearing on admission. The applicant Sri. Jayant Kumar Das has challenged the order of punishment imposed upon him by an order dated 29.7.2003 issued under the signature of Commissioner-cum-Secretary to Government (Annexure 10 to the present application). The concluding part of the order is as follows:

> "Now, therefore, Government after careful consideration of all relevant documents and in consultation with the O.P.S.C. Cuttack (copy of letter No.2326 dt: 4.4.2003 enclosed) have been pleased to impose following penalty on the delinquent Officer, Sri. Das.
>
> 1) The period of suspension be treated as such.
>
> By order of Governor
> Sd/- Aurobindo Behera
> 29.7.2003
> Commissioner-cum-Secretary
> to Government."

2. At the very outset a question was raised as to whether the present application can be entertained by this Tribunal violating the provision of Section 20 of the Administrative Tribunals Act, 1985. In Section 20 the hearing is "Applications not to be admitted unless other remedies exhausted". Then Section 20(1) indicates that the Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of all the remedies available to him under the relevant service rules as to redressal of grievances.

3. Admittedly the applicant is a State Government employee Class-II. The disciplinary proceeding started against him was conducted in terms of the provisions of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962. Part VI includes the provisions of appeals and in Rule 21 it is clarified that no appeal shall lie against any order made by the Governor. But Rule 22(2) clarified that a member of an Orissa Civil Service, Class I, or an Orissa Civil Service, Class-II, against whom an order imposing any of the penalties specified in rule 13 is made by an authority other than the Governor may appeal against such order to the Governor. Mr. Sahoo appearing on behalf of the applicant contended that the order in Annexure-10 is to be treated as an order passed by the Governor inasmuch as there is an endorsement that it was passed "by order of the Governor". So be concluded that there was no remedy available to the present applicant for filling any appeal within the meaning of Rule 21 hereinabove mentioned. So the entire question centres round the point as to whether such an order issued by any authority with the endorsement "by order of the Governor" is to be treated as an order of Governor or otherwise.

4. Chapter II Part IV of the Constitution of India deals with the Executive. Under Article 154 the executive power of the State shall be vested in the Governor and it is clarified that such power is to be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. In the same Chapter conduct of Government business is indicated from Article 166 onwards. It is clarified by Article 166(1) that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor. In the same Article a provision is also made that the Governor shall make rules for the more convenient transaction of the business of the Government of the State and for allocation of the business. Actually on the basis of such power such allocation of business among the executives has been made and officers of different category are vested with the power of signing orders with the endorsement "By the order of the Governor". So looking at the order with such an endorsement cannot be construed to be an application of mind by the Governor himself or to be construed as an order passed by the Governor. In fact, the passing of any order, as

is one in this case, is to be construed as an order passed by the Government which is indicated hereinabove and also noted in the last part of Annexure-10 that Government after careful consideration passed that order. So from this point of view it can be safely concluded that the order in Annexure-10 was passed by the Government and not by the Governor. That being the position, under Rule 22 an appeal can be filed before the Governor against the order passed by the State Government i.e. disciplinary authority. So without further clarification it can be said that the order included in Annexure-10 is appealable order and the appellate authority is the Governor.

5. Accordingly it is concluded that before filing of this application before this Tribunal the applicant did not avail of all the remedies available to him under the relevant service rules as to the redressal of his grievance. The provision of Section 20 of the Administrative Tribunal Act being mandatory it is not possible to entertain the present application for consideration without completion of the appellate procedure. It is needless to mention that appeal and memorial are not identical terms. Section 22(3) of the Administrative Tribunals Act clarifies this position and it is indicated that submission of memorial to the Governor shall not be deemed to be one of the remedies which are available.

6. After a careful scrutiny of materials on record we are of the view that Section 20 of the Administrative Tribunals Act 1985 is a bar in entertaining the present application and as such we deem it proper not to admit the application for hearing by this Bench.

7. Mr. Sahoo has tried to argue that when this matter is pending for the last one and half year before this Bench this Bench can easily dispose of the matter specially when the State Government already used their counter. It is indicated hereinabove that Section 20 i a complete bar for entertaining such an application. Moreover this Bench cannot take the role of an authority especially when there is a statutory bar. The earlier method of application of the provision of Article 226 of the constitution cannot be applicable here keeping in view the bar imposed by Section 20 of the Act. Accordingly without making any comment into the merits of the case we do not admit this application for the reasons indicated hereinabove. Since the matter was pending before this Tribunal from 20.2.2004 the period taken in pursuing this matter is to be excluded for counting the period of limitation for filing of appeal.

8. As regards the release of pensionary benefits after excluding the period of suspension as indicated in the penalty, we are of the view that when the application has not been admitted, we should not pass any order and it would be open for the appellate authority to consider this aspect.

With these comments we dispose of this application.

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ORISSA ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK
O.A. NO.994 (C) OF 2003
D.D. 7.7.2006
Hon'ble Mr. S.J.Ahmed, Member, Judi &
Hon'ble Mr. G.C.Mandal, Member (Admn.)

Rushi Guman Singh ... Applicant
Vs.
State of Orissa & Ors. ... Respondents

Disciplinary Inquiry:

Disciplinary Inquiry was held against the applicant who was working as Soil Conservation Officer, Puri, under Rule-15 of Oria Civil Services (CC&A) Rules 1962 – Inquiry Officer submitted report exonerating the applicant of all the charges – Disagreeing with the said finding of the said Inquiry Officer after setting out the grounds as per order dated 5.2.2002 proposing to impose the punishment of dismissal from service and called upon the applicant to submit representation against the said findings and decision within 30 days – After considering the representation of the petitioner and consulting the Public Service Commission the Disciplinary Authority imposed the penalty of removal from service and treating the period of suspension as such as per the advice tendered by the Public Service Commission – Rejecting the contention of the petitioner that the procedure laid down under Rule 15(10) of the CCA Rules has not been following and that the Disciplinary Authority is biased etc., has held that the order against the petitioner has been passed in conformity with the rules after giving opportunity to the petitioner and that the punishment awarded is based on cogent and convincing reasons and consequently dismissed the original application.

ORDER

S.J. Ahmed, Member (Judicial):

Challenge in this Original Application (O.A.) under Section 19 of the Administrative Tribunals Act, 1985 is to the disciplinary proceeding drawn up against the applicant and the orders issuing show cause notice (Anx.4) and removing him from service and treating the period of suspension as such (Annexure-6).

2. The background facts giving rise to the filing of this O.A. are these:

A Major Penalty proceeding under Rule-15 of the O.C.S. (CC&A) Rules, 1962 (for short 'C.C.A. Rules') was drawn up against the applicant on the charges for gross negligence, dereliction in Govt. duty, serious administrative improprieties etc. in the matter of appointment of seventeen employees in the office of the Assistant Soil Conservation Officer (A.S.C.O.) Khurda which post he was holding at the relevant time vide annexure-1 order dated 27.7.1998. The charges as in statement of imputation (Anx.1/1) run as follows:

"That you Sri Rushi Guman Singh while acting as Soil Conservation Officer, Puri and Asst. Soil Conservation Officer, Khurda have committed the following irregularities and acts of omissions and commissions. Charge No.1: During your incumbency as A.S.C.O. Khurda you have appointed Sri Sanjaya Kumar Patra an outsider in the post of "Bhumirakhyaka" vide order No.4315 dt: 1.9.95 for a period of 44 days and subsequently vide order no.5586 dt. 1.11.95, Sri. Patra was adjusted against the post of "Mistry" in the scale of Rs.775/- Rs.2025/- until further order.

Charge No.2: An outsider Sri. Santosh Kumar Panda vide order no.3827 dt. 20.7.95 was appointed for 44 days as F.M.D., again appointed as P.W.D. for 44 days vide order No.4443, dt. 5.9.95. Subsequently, vide order No.5995 dt. 4.12.1996 Sri. Panda F.M.D., was allowed to continue until further orders.

Charge No.3: Sri. Biswajit Pradhan, an outsider was appointed for a period of 89 days as F.M.D. vide order no.2110 dated 2.6.92, subsequently, reappointed for 89 days in the same post vide order no.3340 dt. 2.9.92, again reappointed in the same post for 89 days vide order no.3691 dt. 28.9.92. Finally, Sri Pradhan was appointed as F.M.D. vide order no.4404 dt. 27.11.92 until further orders.

Charge No.4: Sri Manmath Hayak, an outsider was appointed as "Bhumirakhyaka" for 44 days vide order no.3556 dt. 3.7.95. Subsequently, vide order No.5590 dt. 1.11.95, Sri. Nayak was adjusted in the post of "Khallai" until further orders.

Charge No.5: Sri Santosh Kumar, an outsider was appointed as "Bhumirakhyaka" for 44 days vide order No.3294 dt. 19.6.95, again appointed for 44 days as "Bhumirakhyaka" vide order no.4091, dt. 3.8.95. Subsequently, he was allowed to continue vide order no.5998 dt. 4.12.1996 as "Bhumirakhyaka" until further orders.

Charge No.6: As Soil conservation Officer, Puri you have appointed Sri. Prasanna Kumar Biswal an outsider as "Grafter" vide order No.3139, dt. 1.11.96 for a period of one year. Subsequently, vide order no.3242 dt. 15.9.97 Sri Biswal was allowed to continue as "Grafter" until further orders.

Charge No.7: As S.C.O., Puri you have appointed Sri. Kalandi Jana, as peon for 89 days vide order no.2900 dt. 1.10.94, vide order no.3550 dt. 27.12.96 Sri Jana was allowed to continue until further orders.

Charge No.8: As Soil Conservation Officer, Puri, you have appointed Miss J.Urmila Devi an outsider as F.M.D. for 44 days vide order no.915 dt. 5.3.97. Subsequently, vide order no.2416 dt. 8.7.97 Miss devi was allowed to continue as F.M.D. until further orders.

Charge No.9: As A.S.C.O., Khurda, you had appointed Sri. S.K.Chhotray as F.M.D. vide order No.1408 dt. 4.5.94 for 44 days, subsequently reappointed vide order no.1949 dt. 18.6.94 for 44 days, again reappointed for 44 days vide order no.2202 dt. 2.8.94. Subsequently, Sri Chhotray was sanctioned annual increment raising his pay from Rs.800/- Rs.815/- per month w.e.f. 1.8.95 as F.M.D. vide order no.1657, dt. 22.6.96. Similarly, Sri. Hemanta Kumar, who was appointed by you as F.M.D. for a period of 44 days vide order no.3894 dt. 18.7.1995 was sanctioned annual increment rising from Rs.800/- to 815/- as F.M.D. w.e.f. 1.7.96 vide order no.2347 dt. 24.8.96. These orders prove that, these two employees were regularised without adopting the procedure of recruitment and violation of ORV Act and Rules.

None of the above appointments for Charge No.1 to 9 was issued after due observance of prescribed procedure. No advertisement was made in Newspaper. No sponsorship of the Local Employment Exchange was called for, no written or viva voce test was conducted to find out the suitable candidates for appointments. All these appointments have been made in violation of prescribed procedure of Government and ORV Roster Points.

Charge No.10: The following five outsiders were appointed as F.M.D. against the vacant post JSCO (except sl.No.5) vide Soil Conservation Officer, Puri Order No.2663 dt. 1.8.97 under "Rehabilitation Assistant Scheme".

1. Sri Dukhishyam Gumansingh
2. Sri. Manoranjan Mohapatra
3. Sri. Amit Ku.Harichandan
4. Sri. Prasanta Ku.Chhotray
5. Sri. Abakash Pradhan

Inquiry by the Director of Soil Conservation reveal that, none of these five employees deserve any appointments under Rehabilitation Assistance Scheme as none of their family members ever worked in the Soil Conservation Organisation. Hence their appointments under Rehabilitation Assistance Scheme was found to be quite illegal and misuse of your official power.

Charge No.11: As per ORV Act/Rules every office is supposed to maintain ORV Roster Register for different cadres. Inquiry by Director of Soil Conservation reveal that in the office of ASCO, Khurda such a Register was never maintained. This amounts to violation of prescribed procedure under ORV Act/Rules.

Charge No.12: On promotion to the rank of S.C.O. you joined as such at Puri on 1.7.96. You are kept in Addl. Charge of the Office of ASCO, Khurda. One Sri. Deepak Mohanty was posted by Government in Agriculture vide Order No.28093, dt. 23.8.96 as A.S.C.O. Khurda and Sri. Mohanty assumed charge on 10.10.96 (A.N.). Immediately after joining of an Officer you should have relinquished additional charge. But instead you continued to function as ASCO, Khurda from 18.10.96 to 4.12.96 when you handed over addl. Charge of ASCO, Khurda to Sri. Mohanty by such acts you have disobeyed the orders of Govt., created dislocation in smooth functiong in the office of ASCO Khurda.

Charge No.13: During the period of your unauthorised holding the post of ASCO, Khurda for the period from 18.10.96 to 4.12.96 you have issued advance to different Range Officers as mentioned below. The total value of such advance comes to Rs.17,98,306/- (Rupees seventeen lakhs ninety eight thousand and three hundred six only). Similarly, during the above period you have made payment to two different private suppliers amounting to Rs.3,07,078/- (Rupees three lakhs seven thousand and seventy eight only.)

Statement showing advances given to different Range Officers and payment made towards purchase

Name of the Cash Book	**Date of Advance**	**Amount advanced**	**Name of the Range Officer**
1. General	29.10.96	Rs. 2,500/-	Sri. R.K.Dash
Cash Book	31.10.96	Rs. 25,000/-	Smita Mishra
	19.11.96	Rs. 21,407/-	D.C.Rout
		Rs. 11,960/-	S.C.Das
		Rs. 60,067/-	
2. JRV Cash Book	31.10.96	Rs. 7,900/-	G.R.Acharya
		Rs. 30,000/-	G.K.Rath
	30.11.96	Rs. 5,000/-	S.C.Das
		Rs. 42,900/-	

3. NWOPRA Cash	18.10.96	Rs. 20,000/-	S.K.Mahapatra
Book		Rs. 10,000/-	S.P.Kar
		Rs. 52,429/-	B.G.Rout
	29.10.96	Rs. 17,000/-	R.K.Das
	31.10.96	Rs. 28,600/-	G.K.Acharya
	19.11.96	Rs. 15,000/-	G.K.Rath
			Rs. 1,43,539/-
4. Land Reclamation	28.11.96	Rs. 70,000/-	G.K.Rath
Cash Book	29.11.97	Rs. 40,000/-	-do-
	4.12.96	Rs.14,32,000/-	United Puri-Nimapra Central Coop. Bank, Puri
		Rs.15,51,000/-	
	G. Total	Rs.17,98,306/-	

Cash payment made towards purchases:

25.11.96	Rs.1,47,975/-	M/s. Baba Kapileswar,
26.11.96	Rs. 35,775/-	Dev. Pharmacy, Puri towards
27.11.96	Rs. 5,250/-	cost of mineral mixture etc.
27.11.96	Rs.1,09,950/-	
30.11.96	Rs. 8,128/-	M/s. Polychem India, Puri towards cost of Polythene
Total	Rs.3,07,078/-	bags etc.

Your above transactions to such a huge extent is therefore treated to be illegal and unauthorised. You are therefore charged for

1) violation of prescribed procedure of recruitment
2) violation of ORV Act/Rules
3) Misuse of official powers
4) Unauthorised Government transactions
5) Violation of Rehabilitation Assistant Rules."

3. In pursuance of Annexure-1, the applicant filed written statement of defence (Annexure-2) denying the charges and praying to drop the proceeding. The disciplinary authority (Government without considering his reply decided to conduct inquiry, appointed C.D.I. and Ex-Officio Additional Secretary to the Government in G.A. Department to enquire into the alleged charges. The C.D.I.

conducted enquiry and submitted his report (Annexure-3) recommending for exonerating the applicant from all charges and treating the period of suspension as on duty. The Government differed with the findings of the Inquiring Officer giving brief reasons and issued Annexure-4 notice dated 5.2.2002 calling upon the applicant to make representation as he may wish to make within thirty days from the date of receipt of the notice. The applicant on receipt of the said notice (Ann.4) gave reply (Ann.5) challenging the same (notice) on the ground of violation of the principles of natural justice and the provision made in Rule 15(10)(i)(a) and 1(6) of the C.C.A. Rules. Further, it is stated that no valid reason has been assigned in the notice to find the applicant guilty of the charges and as such the said notice under Anx.4 needs to be quashed. Such notice is also not tenable as the disciplinary authority had already made up his mind to punish the applicant by dismissing him from service as reflected in Anx. 4 on the silly grounds that the finding of the Inquiring Officer is not tenable.

4. The applicant has averred that the disciplinary authority (respondent no.1) without considering his stand taken in his representation finalised the proceeding and awarded punishment of removal from service and treating the period of suspension as such vide Annxure-4 dated 14.2.2003. This order is also under challenge mainly on the ground that no second show cause notice was issued giving opportunity to have his say on the proposed penalty, that the said order is arbitrary, illegal, unreasonable and has been passed in breach of the principle of natural justice.

5. In reply, the respondent no.1 has stated that the facts mentioned in the written statement of defence (Anx.2) were duly considered and on such consideration the C.D.I. was appointed to conduct enquiry and submit report on the charges framed against the applicant. The C.D.I. submitted the Inquiry Report. The respondent no.1 on considering the said report and evidence on record decided to differ from the said findings of the Inquiring Officer as it was found to be without proper application of mind and appreciation of the materials placed before him (I.C) and to impose punishment of dismissal from Govt. Service and treating the period of suspension as such. The said decision was communicated to the applicant along with reasons for disagreement from the findings of the I.D. (C.D.I.) with the copy of inquiry report calling upon him to submit his representation if any against the findings and the decision of the disciplinary authority (Respondent No.1) vide Annexure-A/1 date 4.2.2002 Annx.4 in the O.A.). In response to the said notice the applicant submitted his representation. The disciplinary authority after thorough examination of the same found no merit therein and decided to impose the punishment of 'Dismissal from Service' and treated the period of suspension as such. Thereafter the

C.F.S.E. was moved with all relevant records and also representation of the applicant to offer their advice. The O.P.S.C. communicated their advice. The disciplinary authority on considering the record of enquiry, evidence on record and the advice tendered by the O.P.S.C. imposed punishment of removal from service and treating the period of suspension as such vide Anx.6. The applicant as stated in the counter, was given reasonable opportunity in all stages till the finalisation of the proceeding to defend himself. The respondent no.1 thus denied all other allegations made in the O.A. and claimed for the dismissal of the O.A.

6. The respondent No.4 (O.P.S.C.) also filed counter stating therein that the Commission after going through the charges, the report of the Inquiring Officer (I.O), the views of the disciplinary authority differing from the report of I.O. and all other materials submitted by the disciplinary authority (Respondent No.1) advised the said authority that 'removal from service would meet the requirement of the case' and communicated the same vide O.P.S.C. letter No.621/P.S.C. dated 25.1.2003. The O.P.S.C. thus justified its action communicated to the Govt. by the aforesaid letter.

7. We have heard Shri Ashok Mohanty, the Senior Advocate and Shri D.R.Pattanaik, the learned Counsel appearing for the applicant and Shri Jagannath Patnaik, Senior Advocate and Shri B.K.Dash, the learned Counsel for the respondent nos.1 and 4 respectively and carefully perused the O.A., counters, the documents annexed thereto and the written notes of submission filed on behalf of the parties.

8. Before adverting to the arguments advanced on behalf of the parties, we feel it necessary to discuss some of the relevant admitted facts having bearing on the ultimate decision in the case. Undisputedly, a disciplinary proceeding was initiated against the applicant under Rule-15 of the C.C.A. Rules with the service of charge memo as mentioned in this order vide Annexure-1 dated 27.8.1998. The applicant was placed under suspension in contemplation of a disciplinary proceeding with effect from 13.6.1998 and was reinstated in service on 21.7.1999. He submitted his written statement of defence (Anx.2) denying the said charges. The respondent no.1 (disciplinary authority) decided to hold enquiry and appointed the C.D.I. (Commission of Departmental Inquiry) for the said purpose. The said I.O. after conducting enquiry submitted report (Annexure-3) finding the applicant not guilty of the charges and recommended to exonerate him and to treat the period of suspension as on duty. The respondent No.I disagreed with the said findings of the I.O. and issued the order under Annexure-4 dated 5.2.2002 which runs as follows:

"Whereas a disciplinary proceeding under rule 15 of the OCS (C.C.A.) Rules, 1962 was initiated against Sri Rushi Gumansingh, Ex-Soil Conservation Officer, Puri and Ex-Asst, Soil Conservation Officer, Khurda in Agriculture Department Proceeding No.20450/ Ag. Dated 27.7.1998 for committing (1) violation of prescribed procedure of recruitment (2) violation of ORV Act/Rules (3) misuse of official powers (4) unauthorised Govt. transactions (5) violation of Rehabilitation Assistance Rules.

And whereas Sri. Rushi Guman Singh received the charges on 29.7.98 and submitted his written statement of defence dated 10.1.99 in which he did not admit the said charges framed against him.

And whereas it was considered necessary to appoint as Inquiring Officer to acquire into the charges and accordingly in pursuance of Rule 15(4) of the OCS (C.C.A) Rules, 1962, the C.D.I. Orissa was appointed as the Inquiring Officer in Agriculture Department Office order No.15371/Ag. Dt:27.5.99 for this purpose.

And whereas the C.D.I. Orissa in his enquiry report and findings submitted vide his letter No.353/CDI dt. 31.3.2000 found that the charges have not been substantiated and accordingly recommended to summarily exonerate him from the charges.

And whereas on careful consideration of the enquiry report and findings of the C.D.I., Orissa and the evidence on record, Disciplinary Authority have decided to differ from the said findings of the I.O. as the said are found to be based on the pleas/statements of delinquent and without proper application of mind and to finalise the disciplinary proceeding against Sri. Rushi Gumansingh by imposing the punishment of "dismissal from service" and to treat the period of suspension as such on the following grounds:

i) The D.O. has admitted in his written statement of defence that all the appointments have been made by him. He has taken the plea that the appointments were made on ad hoc basis with the knowledge and approval of the Director of Soil Conservation and in exigencies of public service. But on perusal of the records it is seen that the appointments have been made "until further orders" and no such approval of Director, Soil Conservation accorded for the purpose. Besides no such records are available which would go to show that the appointments have been made in exigencies of public service.

ii) As regards appointment of 5 persons under Rehabilitation Assistance Scheme, the D.O. has indicated in his written statement of defence that the appointments were made in compliance to the decision taken in the High level meeting dt. 21.3.97. But on perusal of records it is seen that no such decision has been taken for giving appointment to these 5 persons. The proceeding of such meeting was not made available during the course of enquiry.

iii) The D.O. has further admitted that the Roster Register prescribed under ORV Act & Rules has not been maintained in his office. He has taken the plea that since such register is not maintained from the inception he alone cannot be held responsible. But it is the duty of the D.O. to prepare the Roster Register as per the provisions of CRV Act and Rules.

iv) The D.O. had continued to function as ASCO, Khurda from 18.10.96 to 4.12.96 unauthorisedly disobeying the orders of the Government and made unauthorised cash transaction violating the financial procedures.

Now therefore, the said, Sri. Rushi Gumansingh, Ex-Soil Conservation Officer, Puri, Ex-

ASCO, Khurda is called upon to submit any representation as he may wish to make against the above findings and decision of the disciplinary authority within thirty days from the date of the receipt of this notice failing which further action as deemed proper shall be taken to decide the case according to rules.

A copy of the enquiry report of the C.D.I. containing his findings therein is enclosed herewith."

9. Mr. Ashok Mohanty, Senior Advocate appearing for the applicant in challenging the order extracted above seriously contended that the said order under Anx.4 is not in conformity with the procedure laid down in Rule 15(10) of the C.C.A. Rules and as such, the said order cannot be sustained. The learned Counsel also contended that the said order clearly indicates the intention of the disciplinary authority who had made up his mind to impose punishment of dismissal from service and on this ground alone, the said order (Anx.4) and the order removing the applicant from service (Anx.6) are liable to be set aside. Mr.Jagannath Patnaik, Senior Advocate appearing for the respondent no.1 strongly opposed to the said argument and submitted that the procedure envisaged in Rule 15(10) of the C.C.A. Rules has been meticulously followed and there is no infirmity in the orders (Annxure-4 and 6) impugned in this case. The above contentions need careful and cautious examination.

10. As stated earlier the disciplinary proceeding was drawn up against the applicant with the service of charge memo vide Annexure-1 for imposing penalty. In that case the procedure prescribed in rule 1 of the C.C.A. Rules i.e. holding a regular enquiry, should be adopted and completed. The object of prescribing the rules for holding disciplinary proceeding is to protect the charge sheeted employees from arbitrary and capricious exercise of power by the disciplinary authority. The rules are intended to safeguard the rights of such employees and to comply with the principle of natural justice. Therefore, in interpreting such beneficial provisions contained in Rule-15(10) of the C.C.A. Rules, the Court/Tribunals have to accept the interpretation which will advance the object of the said rule rather than to defeat it and also interpret in the manner which will protect the rights of those charge sheeted employees. Before we proceed to consider the contentions raised, we feel that it would be appropriate to mention Rule-15(10) of the C.C.A. Rules as amended as they are relevant for our purpose which is as follows:

"Rule-15(10)(i)(a) – If the Inquiring Officer is not the disciplinary authority, the disciplinary authority shall furnish to the delinquent Govt. Servant a copy of the report of the Inquiring Officer and give him a notice by registered post or otherwise calling upon him to submit within a period of fifteen days such representation as he may wish to make against findings of the Inquiring Authority.

(b) On receipt of the representation referred to in sub-clause (a) the disciplinary authority having regard to the findings on the charges is of the opinion that any of the penalties specified in clauses (vi) to (ix) of Rule-13 should be imposed, he shall furnish to the delinquent Govt. Servant a statement of its findings along with brief reasons for disagreement if any, with the findings of the inquiring officer and give him a notice by Registered Post or otherwise stating the penalty proposed to be imposed on him and calling upon him to submit within a specified time such representation as he may wish to make against the proposed penalty.

Provided that in every case in which it is necessary to consult the Commission under the provision of the Constitution of India and the Orissa Public Service Commission (Limitation of Functions) Regulation, 1989 the record of Inquiry together with a copy of the notice given under sub-clause (a) and the representation, if any, received within the specified time in response to such notice shall be forwarded by the disciplinary authority to the Commission for its advice.

(c) On receipt of the advice from the Commission the disciplinary authority shall consider the representation, if any, made by the Government Servant and the advice given by the Commission and shall pass appropriate order in the case.

(d) In any case in which it is not necessary to consult Orissa Public Service Commission, the disciplinary authority shall consider the representation if any, made by the Govt. servant in response to the notice under sub-clause (b) and as appropriate order in the case."

11. In the instant case the disciplinary authority disagreed with the findings of the C.D.I. (Inquiry Officer) which were favourable to the applicant and acted under Rule 15(10)(i)(b) of the C.C.A. Rules by furnishing him (applicant) a statement of its findings along with brief reasons for disagreement with the findings of the C.D.I. as at Annexure-3 (Inquiry Report) vide Annexure-4 which we have quoted in this order. By the said notice (Anx.4) the applicant was called upon to make representation against the decision to dismiss him from service. Anx.4 clearly shows that the disciplinary authority recorded its own reasons for disagreement with the findings of the C.D.I. admittedly favourable to the applicant. The purpose of the show cause notice in case of disagreement as in Anx.4 was to enable the applicant to show that the disciplinary authority is persuaded not to disagree with the conclusions reached by the Inquiring Authority (C.D.I.) for the reasons given in the Inquiry Report or he may furnish additional reasons in support of the findings of the Inquiring Authority. In such a case it was not necessary for the applicant to be afforded a further opportunity of hearing as no such fresh opportunity is contemplated by Rule 15(10)(i)(b) nor can such a requirement be deduced from the principle of natural justice. Thus, the disciplinary authority had given opportunity to the applicant stating the brief reasons for disagreement when the findings in his favour was proposed to be over turned to represent before final findings on the charges were recorded and punishment imposed after obtaining the advice of the O.P.S.C.

12. The learned counsel for the applicant has drawn our attention to annexure-4 notice and vehemently contended that the Disciplinary Authority (Respondent No.1) had made up its mind to award punishment for dismissal from service and as such the said notice (Anx.4) as well as the punishment imposed vide Annexure-6cannot be sustained. Annexure-4 indicates that the disciplinary authority after careful consideration of the enquiry report and the findings of the C.D.I. and evidence on record decided to differ from the said findings of the I.O. and to finalise the proceeding by imposing the punishment of "dismissal from service" and to treat the period of suspension as such (underlining is ours). Thereafter the disciplinary authority proceeded to give reasons for disagreement with the findings of the Inquiry Officer (C.D.I.) and called upon the applicant to make representation against its findings and decision. The applicant submitted his representation (Annx.5) challenging the said notice and reiterating his stand taken in his written statement of defence on the basis of the findings of the C.D.I.

13. It may not be out of place to mention here that Rule 15(10)(i)(b) of the C.C.A. Rules contemplates that notice is to be given stating the penalty proposed to be imposed and not decision to be taken in this regard. Annexure-4 notice as stated above, speaks of the decision of the disciplinary authority regarding the punishment imposed. In fact the disciplinary authority after obtaining the representation (Anx.5) of the applicant and advice of the O.P.S.C. for removing him from service, agreed with the advice of the O.P.S.C. and finalised the proceeding vide Annexure-6 by removing the applicant from service and treating the period of suspension as such. The disciplinary authority in the circumstances stated above cannot be said to have been biased as alleged by the applicant. Rather, it is evident that the applicant has been given a fair deal and no prejudice is caused to him as the disciplinary authority has not stuck to its decision of imposing the punishment of dismissal from service as mentioned in the notice (Anx.4). Therefore, the question of bias, prejudice, mala fide and unfairness does not arise. The disciplinary authority, in our considered opinion, recorded its tentative reasons for disagreement with the findings of the C.D.I. as stated in Annexure-4 and gave to the applicant an opportunity to represent against it before recording the findings after receipt of the representation. Regard being had to the said facts and circumstances, to hold that the notice (Anx.4) was issued in conformity with the Rules and the contention raised on behalf of the applicant. Challenging the said notice falls to the ground.

14. The learned Counsel for the applicant also urged that the disciplinary authority has gone wrong and misdirected himself in punishing the applicant without considering the findings of the C.D.I. (Inquiry Officer), the stand taken in the written statement of defence and his representation (Anx.5) pursuant to

notice (Anx.4). In this connection, we are constrained to point out that the Charge Nos.1 to 9 relate to appointment to 10 outsiders in different posts on ad hoc basis without due observance of due procedure as mentioned below charge no.9. Charge No.10 relates to appointment of five outsiders as F.M.D. against the vacant post of J.S.C.O. except sl.no.5, Abaksh Pradhan vide Applicant's order dated 1.8.1997 under Rehabilitation Assistance Scheme. Charge No.11 relates to non-maintenance of O.R.V. Roster Register in the office of the A.S.C.O., Khurda. The applicant has admitted to have given appointment to those outsiders on ad hoc basis and under Rehabilitation Assistance Scheme (R.A.S.). He also admitted that the Roster Register prescribed under the O.R.V. Act and Rules never maintained in his office and as D.O. he cannot alone be held responsible for such lapses. He had explained that the appointments were given at the instruction and approval of the then Director of Soil Conservation and appointments given were objected at any time and rather the services of some of the appointees were regularised subsequently by the then Director. It is also explained that appointments under R.A.S. were given in compliance of the decision taken at the Chief Minister's Level on 27.3.1997. The disciplinary authority was not inclined to accept the said plea of the applicant. The disciplinary authority on considering the above plea of the applicant held that the appointments were made without obtaining the approval of the Director, Soil Conservation for the purpose, that no records are available to show that the appointments were made in exigency of public service and following the procedure prescribed under law, that no such decision was taken in high level meeting for appointing five persons and proceeding of the meeting was not made available during the course of enquiry by the C.D.I., that it was the bounden duty of the D.O. to prepare and maintain Roster Register and that he disobeyed the orders of the Government and made unauthorised cash transactions and continued to function as A.S.C.O., Khurda from 19.10.1996 to 4.12.1996 even after the joining of his successor on 18.10.1996. On such conclusion and basing upon the advice of the O.P.S.C. the disciplinary authority removed the applicant from service and treated the period of his suspension as such vide Annexure-6 dated 14.2.2003. The punishment awarded seems to be based on cogent and convincing reasons.

15. It is pertinent to mention here that the Tribunal cannot sit in appeal against the findings recorded in the Proceeding and also cannot re-appreciate the evidence for itself. It is not shown that the findings are not supported by evidence or conclusion on the very face of it is arbitrary or capricious for setting aside the said findings and order imposing punishment. Looking to the facts of the present case and the charge of grave misconduct and after hearing the learned counsel for the parties and for the

foregoing reasons, we are not inclined to interfere with the order of punishment imposed Vide Annexure-6. Similarly, the charge framed under Annexure-I and the notice issued vide Annexure-4 also cannot be said to be illegal, arbitrary and unreasonable. On such conclusion, the applicant is not entitled to any relief claimed in this O.A.

16. In the result, the Original Application fails and the same is hereby dismissed in the circumstances without cost.

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ORISSA HIGH COURT : CUTTACK
W.P. (C) No.3205 of 2004
D.D. 28.3.2007
Hon'ble Chief Justice Mr.A.K.Ganguly &
Hon'ble Mr. Justice N.Prusty

Upendra Sethi ... Petitioner
Vs.
State of Orissa & Anr. ... Opposite parties

Recruitment:

Age Relaxation:

The petitioner who entered service as Junior Engineer acquiring B.E. in Engineering (A.M.I.E.) while in service applied for the post of Junior Engineer in response to the advertisement of the Public Service Commission under the relevant recruitment rules which provides for relaxation of age of 10 years in respect of Graduate Engineers who are already in panel – Petitioner's application was rejected as overaged – His application before the Administrative Tribunal was rejected in this writ petition against the said order it was contended that in view of second proviso to Clause-9 of the relevant rules age limit should be relaxed in respect of candidates who have entered service as Junior Engineers and subsequently acquired the qualification – A letter from the concerned Department to the effect that the Government has been pleased to relax in full the maximum age limit in respect of candidates who have entered Government service as Junior Engineers and acquired the qualification subsequently – High Court while considering that the Government has authority to make full relaxation of maximum age limit under second proviso of Rule 9(a) of the Rules should have made the relaxation at the time of submission of requisition to the Commission and not after the closure of date of receipt of applications and during the course of interview, dismissed the writ petition.

Held:

Cutoff date for ascertaining eligibility prescribed in the advertisement cannot be relaxed on a sympathetic view and all the requirements relating to qualification are to be met cannot be ignored in individual cases.

Case referred:

1. 1979 (1) S.L.R. 710 - Swaran Lata v. Union of India and others
2. AIR 1992 Supreme Court 80 - Ashok alias Somanna Gowda & Anr. v. State of Karnataka & Ors.
3. AIR 1998 Supreme Court 91 - State of Rajasthan v. Hitendra Kumar Bhatt
4. (2006) 8 Supreme Court Cases 330 - A.P. Public Service Commission v. P.Chandra Mouleesware Reddy and others

ORDER

Chief Justice:

This writ petition has been filed challenging the order of the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in Original Application No.2612 (C) of 2003. By the said judgment the Tribunal has dismissed the Original Application.

2. The material facts of the case are that the applicant before the Tribunal (the petitioner before us) entered the service as Junior Engineer and while continuing as such he acquired Bachelor Degree in Engineering (A.M.I.E.). In view of the resolution of the Government taken in the year 1996 he was promoted to the rank of Assistant Engineer on ad hoc basis in the scale of pay of Rs.2000-3500/- for a period of one year or till receipt of recommendation of the O.P.S.C. whichever is earlier. While the petitioner was continuing as such, the O.P.S.C. published an advertisement No.3 of 2002-2003 for special recruitment of Assistant Engineer (Civil/Mechanical) in Class-II of Assistant Engineering Service under the Department of Water Resources, Orissa. The vacancy position shown in the advertisement was 409 and the applicant applied for the said post. Subsequently the applicant came to know from the local daily that the O.P.S.C. has issued notice for interview of the candidates from 26.02.2003 onwards. In this connection, a particular clause in the advertisement, which is relevant, is referred to. In the said advertisement there was an age bar under clause-3 of the advertisement. The said clause 3 is setout below:-

> "A candidate must be under 37 years and above 21 years of age on the 1st August, 2002 i.e. he/she must not have been born earlier than the 2nd August, 1965 and not later than the 1st August, 1981:
>
> Provided that the upper age limit may be relaxed up to 10 years in respect of Graduate Engineers who are already in panel as per the Water Resources Department Resolution No.470, dated the 4th January 2002."

3. Much after the aforesaid advertisement was issued; representation was made by the petitioner to the State Government in the Water Resources Department for granting exemption. On the basis of such representation made by the petitioner, the Water Resources Department granted exemption to the following effect:-

> "After careful consideration of their representations Government have been pleased to relax in full the maximum age limit in respect of the candidates who have entered into government service as Junior Engineers within the prescribed age limit but without graduate

qualification prescribed under clause (d) of aforesaid rules and have subsequently acquired the same while serving as such.

You may verify the appointment orders of such candidates as Junior Engineers, their educational qualification certificates and allow them to appear in special recruitment drive for recruitment to the post of Assistant Engineers (Civil & Mechanical).

4. Despite the aforesaid relaxation by the State Government, O.P.S.C. was not allowing the petitioner to appear in the interview since the applicant does not satisfy the eligibility condition about age as mentioned in Advertisement. The petitioner went before the Tribunal challenging the action of the O.P.S.C. and the Tribunal by an interim order allowed the petitioner to appear in the interview but made it clear that the result of such interview shall not be published.

5. When the matter finally came up before the Tribunal for hearing, the Tribunal by judgment and order, under challenge, was pleased to reject the contention of the applicants about publishing the result. The Tribunal found that the O.A. filed by them was without merit and disposed of the same without any direction upon the O.P.S.C. to publish the result. The said decision has been challenged before this Court.

6. Learned counsel for the petitioner submitted that the relevant statutory Rules, namely, Orissa Service of Engineers Rules, 1941 contains clause 9 relating to age. Under clause-9, the second proviso is to the following effect:-

"Provided further that the maximum age limit may be fully relaxed in respect of candidates who have entered State Government service as Junior Engineers within the prescribed age limit be without the qualification prescribed under clause (d) of rule 9 and have subsequently acquired the same while serving as such".

7. Learned counsel submitted that in view of the second proviso to Clause-9, age limit should be relaxed in respect of candidates who have entered State Government Service as Junior Engineers within the prescribed age limit without the qualification prescribed in sub-clause (d) of Clause-9, but subsequently acquired the same. Learned counsel further submits that since the petitioner's case is covered by the second proviso to Clause-9, the petitioner is qualified for being appointed to the said post for which selection was held and the O.P.S.C. should be directed by this Court to publish the result of interview since the petitioner participated in the said interview.

8. In support of such contention learned counsel for the petitioner relied on two decisions of the Hon'ble Supreme Court. The first decision was rendered in the case of Ashok alias Somanna Gowda

and another v. State of Karnataka and others reported in AIR 1992 Supreme Court 80. Learned counsel submitted that the Tribunal rejected the petitioner's case inter alia on the ground that if the condition about age in the advertisement is now relaxed, that will operate unjustly against many other persons who have not applied in view of the stipulation about age in the advertisement. In the case of Ashok alias Somanna Gowda and another, according to the petitioner, a different view was taken. We cannot accept the contention of the petitioner.

9. In the case of Ashok alias Somanna Gowda, interview marks were kept at 33.3% of the total marks and the Apex Court held that if 15% marks were kept for interview, the petitioners would have qualified. In view of such finding, the Apex Court granted relief to the petitioners. As the counsel for the State objected on the ground that if that criteria is followed relief can be granted to others, the Apex Court repelled that contention holding that nobody else applied and the selections were held in 1987.

10. That decision does not apply. In Ashok Gouda (supra) the Apex Court found that allotting 33.3% for interview is not legally sustainable. But here the stipulation about age is not bad in law. Apart from that, by the fact of relief being granted to the petitioner in Ashok Gowda (supra) no one can be said to have been prevented from applying pursuant to the advertisement. But here if eligibility condition of age is relaxed now, many persons who could have applied, if the relaxation was available to them will be excluded. Therefore, the ratio in the said case cannot be applied in the present situation.

11. The other case, which was cited by the learned counsel,, was also on a different factual basis. That decision was rendered in the case of A.P. Public Service Commission v. P.Chandra Mouleesware Reddy and others reported in (2006) 8 Supreme Court Cases 330. In that case A.P.P.S.C. advertised 19 posts for recruitment and in response there to the parties applied and appeared in the written test and were interviewed. At that stage the Government directed the Commission to fill up only 10 posts. Later on the State Government in its affidavit admitted that its direction to the Commission about 10 vacancies instead of 19 was based on a mistake of fact. In that situation the Tribunal held that the State having admitted its mistake the applicants were entitled to the relief prayed for. But in the instant case the facts situation are different. Here, no mistake has been admitted by the State and in fact there is no mistake. Here advertisement has been made on one basis and the parties have applied on the basis of such advertisement and interview has been held and selection was completed. Now the

petitioner wants that eligibility condition of age should be changed in their favour. Here the case stands on a totally different footing.

In this case, the stand of the O.P.S.C. in an affidavit filed before us is that after consideration of the letter of the Government dated 29.8.2003 for relaxation of age on the representation of the applicant on the same date, the Commission took a view that under the second proviso of Rule 9(a) the Government have authority to make full relaxation of maximum age limit but the said relaxation should have been made by the State Government at the time of submission of requisition to the O.P.S.C. In that case relaxation would have been incorporated in the advertisement. Everybody would have had the opportunity to take the benefit of the said relaxation. But if the Government gives the relaxation after closure of date of receipt of applications and during the course of interview, there are bound to be the candidates, who did not apply by the due date when the relaxation was not there. So, if accepting the said relaxation condition the petitioner's candidature is accepted, that will operate unfairly to others who might have applied had the relaxation about age was there.

12. That stand of the O.P.S.C. was rightly appreciated by the Tribunal while rejecting the petitioner's application. We also found that the said stand of O.P.S.C. is based on Articles 14 and 16 of the Constitution. Reference in this connection may be made to the judgment of the Hon'ble Supreme Court in the case of Swaram Lata v. Union of India and others reported in 1979 (1) S.L.R. 710. In that case the Hon'ble Supreme Court was very clear in holding that no relaxation regarding qualification can be made when an advertisement has been issued inviting applications. The Hon'ble Supreme Court categorically held that if relaxation has to be made, there is a duty cast to re-advertise the post (see paragraph 67). In the instant case the advertisement did not contain a relaxation clause and therefore relaxing the condition in the advertisement at a stage when selection process was going on will be in contravention of the principle of Articles 14 and 16 of the Constitution of India.

13. Similar view has been expressed by the Supreme Court in the case of State of Rajasthan v. Hitendra Kumar Bhatt reported in AIR 1998 Supreme Court 91. In that case also Supreme Court made it clear that cut off date for ascertaining eligibility as prescribed in the advertisement cannot be relaxed on a sympathetic view. In paragraph 6 of the judgment, Hon'ble Supreme Court has specifically observed that cut off date by which all the requirements relating to qualification are to be met cannot be ignored in individual cases. The Hon'ble Supreme Court cautioned by saying if that is done, there

may be other persons, who might have applied if they knew that eligibility conditions are flexible. Relaxing the prescribed requirement in the case of an individual will cause injustice to others.

14. The Division Bench of this Court in the case of Dr. Sudipta Pattanaik v. State of Orissa and others reported in 100 (2005) CLT 426 has taken the same view. In the said judgment one of us was a party. Paragraph 22 of the said judgment made it is very clear that the eligibility criteria mentioned in the advertisement cannot be changed after the applications pursuant to the advertisement, were filed.

15. For the reasons aforesaid it is difficult for us to take a view different from the one taken by the Tribunal. The Tribunal has not taken any view with which this Court can interfere in exercise of its power of judicial review.

We affirm the view of the Tribunal.

In view of the aforesaid reasons, the writ petition is dismissed. There is no order as to costs.

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PUNJAB PUBLIC SERVICE COMMISSION

IN THE HIGH COUR OF PUNJAB AND HARYANA, CHANDIGARH
C.W.P. No.8346 of 2005
D.D. 29.1.2007
Hon'ble Mr. Justice M.M.Kumar & Hon'ble Mr. Justice Rajesh Bindal

Nirmal Singh ... Petitioner
Vs.
State of Punjab & Anr. ... Respondents

Selection by Promotion:

Petitioner working as Executive Engineer in Punjab Electrical Inspectorate challenged advertisement for direct recruitment to the post of Chief Electrical Inspector without considering his claim for promotion – The petitioner's claim for promotion under the relevant rules was rejected on the ground that he does not possess Degree in Electrical Engineering prescribed as per 1992 Rules – Petitioner appointed as Assistant Electrical Inspector was promoted as Executive Engineer as per 1939 Rules which did not contain any prescription of Degree qualification for promotion as Executive Engineer – 1992 Rules which repealed 1939 Rules prescribe degree qualification for promotion to the post of Executive Engineer and for further promotion to the post of Chief Electrical Inspector prescribed experience of working as Executive Engineer for a minimum period of 10 years – Only in the event of non availability of a suitable candidate appointment can be made by direct recruitment - When the High Court informed of the fact that when the petitioner was promoted to the post of Executive Engineer under 1939 Rules which did not prescribe degree qualification for promotion as Executive Engineer and as the petitioner fulfilled the requirement of experience held that the petitioner was entitled to be considered for the post of Chief Electrical Engineering by promotion and consequently directed to consider the case of the petitioner for promotion to the post of Chief Electrical Engineer w.e.f 28.3.2004 till the date of superannuation on 31.10.2006 and to give all benefits after refixation etc.

Held:

Perusal of Rule 8 read with Appendix B of 1992 of the Rules shows that promotion to the post of Chief Electrical Inspector is to be made from amongst Executive Engineers who have an experience of working as such for a minimum period of 10 years. It is obvious that no requirement of degree in Electrical Engineering is prescribed under Rule 8 read with Appendix B. It is only in case of direct recruitment that the requirement of degree has been prescribed. The mode of direct recruitment could be resorted to only if no suitable candidate is available for appointment by promotion.

ORDER

M.M.Kumar, J.

This petition, filed under Article 226 of the Constitution, prays for quashing advertisement dated 29.1.2005 (P-8). It has further been prayed that a direction be issued to the respondents to consider the case of the petitioner for promotion to the post of Chief Electrical Inspector in terms of the Punjab Electrical Inspectorate (Class-I) Service Rules, 1992 (for brevity, 'the 1992 Rules') along with

consequential benefits. The primary grievance of the petitioner is that he had been working on the post of Executive Engineer, is senior-most in the cadre and fulfilled all the conditions for promotion as Chief Electrical Inspector, yet, he was ignored for promotion by following the method of direct recruitment without first considering his claim for promotion blatantly infringing the 1992 Rules.

Brief facts may first be noticed. The petitioner was appointed as Assistant Electrical Inspector in the Department of Power (Energy Branch) on 23.12.1979. He was promoted as Executive Engineer on 23.8.1991. It is appropriate to mention that his promotion was made under the then prevailing Rules known as the Punjab Service of Engineers (Electricity Branch) Recruitment Rules, 1939 (for brevity, 'the 1939 Rules'). The 1939 Rules did not postulate any requirement of possessing degree qualification for promotion as Executive Engineer. However, the 1939 Rules were repealed and replaced by the 1992 Rules. According to Rule 8 read with Appendix 'B' of the 1992 Rules, it has been provided that an Assistant Electrical Inspector must possess degree qualification in Electrical Engineering for promotion to the post of Executive Engineer. For further promotion to the post of Chief Electrical Inspector, Rule 8 read with Appendix 'B' provides that an Executive Engineer who has an experience of working as such for a minimum period of 10 years is eligible to be considered for promotion to that post. The mode of promotion to the post of Chief Electrical Inspector is 100 per cent by promotion. It is only in the event of non-availability of a suitable candidate that appointment could be made by direct recruitment.

The petitioner who had been working on the post of Executive Engineer since 1991, was not being considered for promotion. The respondent department resorted to the mode of appointment by bringing another person on deputation in preference to the petitioner. The petitioner approached this Court by filing Civil Writ Petition No.14320 of 2003, seeking the relief that the respondent department could not resort to the mode of deputation for filling up the post of Chief Electrical Inspector in preference to the petitioner who was fully eligible. On 9.3.2004, a Division Bench of this Court disposed of the writ petition along with another petition by passing the following order:-

> "In the result, the writ petitions are allowed. Order Annexure P2 is declared illegal. However, in large public interest, we do not consider it proper to quash that order, more so because in reply to the Court's query, Ms. Kusumjit Sidhu stated that fresh exercise for making recruitment in accordance with the 1992 Rules will be initiated at the earliest. In our opinion, ends of justice would be met it respondent No.1 is directed to make fresh

recruitment in accordance with the 1992 Rules within a maximum period of six months. Ordered accordingly.

While disposing of the writ petitions in the manner indicated above, we make it clear that we have not expressed any opinion on the eligibility and entitlement of the petitioners to be appointed as Chief Electrical Inspector by promotion and/or by direct recruitment and the competent authority shall make recruitment strictly in accordance with the 1992 Rules."

Accordingly, the meeting of Departmental Promotion Committee (for short, 'the DPC') was held on 23.8.2004. The case of the petitioner for promotion to the post of Chief Electrical Inspector was considered and rejected for the reason that he did not hold a degree in Electrical Engineering as contemplated by the 1992 Rules. However, the petitioner was given current duty charge of the post of Chief Electrical Inspector on 15.3.2005 (Annexures P-7 & P-7/A). The respondents have issued an advertisement on 29.1.2005 (P-8) for filling up of the post by direct recruitment on the ground that the aforementioned mode of appointment would be permissible as no one within the department was available for promotion. The petitioner has again approached this Court asserting that his case for promotion to the post of Chief Electrical Inspector could not be rejected by the DPC on 23.8.2004 as he is fully eligible and it has been prayed as a consequential relief that advertisement dated 29.1.2005 (P-8) is liable to be quashed.

After hearing learned counsel for the parties we are of the considered view that the instant petition deserves to be allowed. For promotion to the post of Executive Engineer, there was no requirement of degree qualification provided by the 1939 Rules and admittedly the petitioner was promoted on 23.8.1991 as Executive Engineer under the 1939 Rules, which was much before the promulgation of the 1992 Rules. The petitioner was eligible and fulfilled all the requirements of the 1939 Rules for promotion as Executive Engineer and accordingly was promoted. There is no dispute in that respect and introducing the requirement of degree qualification in Electrical Engineering for promotion to the post of Executive Engineer in respect of the petitioner would result into retrospective operation of the 1992 Rules, which is neither contemplated by the Rules expressly or by necessary intendment nor it could be the case of the respondents. For all intents and purposes the petitioner is Executive Engineer within the meaning of Rule 8 read with Appendix 'B' of the 1992 Rules. Moreover, Rule 19 of the 1992 Rules provides for repeal and savings of 1939 Rules, which postulate that the 1939 Rules, in so far as those were applicable to the member of the Service, were to be repealed with the saving proviso that any order issued or any action taken under the 1939 Rules is deemed to have been issued or taken under

the provisions of the 1992 Rules. Therefore, the promotion order of the petitioner, dated 23.8.1991, promoting him as Executive Engineer, has to be construed to be issued under the 1992 Rules.

The only question is as to whether the petitioner satisfies the requirement of Rule 8 read with Appendix 'B' of the 1992 Rules for promotion to the post of Chief Electrical Engineer. Rule 8 with relevant extract of Appendix 'B' of the 1992 Rules, reads as under:-

> "8. Method of appointment and qualifications.- (1) The appointment to the service shall be made in the manner as specified in Appendix 'B' to these rules:-
>
> Provided that if no suitable candidate is available for appointment to a post in the service by promotion or by direct appointment, as the case may be, such a post shall be filled in by transfer of a person holding identical or similar post in a State Government or Government of India.
>
> (2) No person shall be appointed to any post in the Service unless he possesses the qualification and experience specified against that post in appendix 'B' to these rules.
>
> (3) All promotions to a post in the Service shall be made by selection on the basis of merit-cum-seniority in accordance with the provisions of the Punjab Service (Appointment by Promotion) Rules, 1962, and no person shall be entitled to claim as a matter of right promotion to such post on the basis of seniority alone.
>
> (4) No person shall be recruited to any post in the Service by direct appointment unless he possesses knowledge of Punjabi language of Matriculation standard or its equivalent or possess test of Punjabi language of Matriculation standard to be held by such authority as may be specified by the Government of Punjab in this behalf from time to time.
>
> Provided that in the case of a person who does not possess the knowledge of Punjabi language of Matriculation standard or its equivalent at the time of appointment, his appointment to the Service may be made subject to the conditions that he shall acquire the aforesaid qualification within a period of six months from the date of appointment failing which his services shall be liable to be terminated without any notice."

"APPENDIX 'B'
(See Rule 8)

Sl. No.	Designation of Post	Percentage for appointment by			Qualification for appointment by	
		Promotion	Direct appointment	Transfer	Promotion	Direct appointment
1	2	3	4	5	6	7
1	Chief Electrical Inspector	Hundred percent	If no suitable candidate is available for appointment by promotion	-	From amongst the Executive Engineers who have an experience of working as such for a minimum period of ten years	(a) Should possess a Degree in Electrical Engineering from a recognised University; and (b) Should have been regularly engaged for a minimum period of fifteen years in the practice of electrical engineering out of which not less than seven years must have been spent in an electrical or mechanical sengineering workshop, or in general or transmission or distribution of electricity or in the administration of the Indian Electricity Act, 1910 and the rules made thereunder in a position of responsibility.
2	Executive Engineer	Hundred per cent	If no suitable candidate is available for appointment by promotion	-	From amongst the Assistant Electrical Inspectors working under the control of the Chief Electrical Inspector who are degree holder and having an experience of working as such for a minimum period of eight years.	(a) Should possess a Degree in Electrical Engineering from a recognised University; and (b) Should have been regularly engaged for a minimum period of right years in the practice of electrical engineering out of which not less than two years must have been spent in an electrical or mechanical engineering workshop, or in general or transmission or distribution of electricity or in the administration of the Indian Electricity Act, 1910 and the rules made thereunder in a position of responsibility.

A perusal of Rule 8 read with Appendix 'B' of the 1992 Rules shows that promotion to the post of Chief Electrical Inspector is to be made from amongst the Executive Engineer who have an experience of working as such for a minimum period of 10 years. It is obvious that no requirement of degree in Electrical Engineering has been laid down in Rule 8 read with Appendix 'B'. It is only in case of direct recruitment that the requirement of degree has been laid down. The mode of direct recruitment could be resorted to only if no suitable candidate is available for appointment by promotion. The stand of the respondents that even for promotion as Chief Electrical Inspector from the post of Executive Engineer a degree of Electrical Engineering is mandatory is unsustainable in the eyes of law as Rule 8 and Appendix 'B' of the 1992 Rules does not provide for a degree. Therefore, we find that the approach adopted by the DPC is in violation of the 1992 Rules, which completely prejudiced the right of the petitioner to be considered for promotion and, thus, violates Articles 14 and 16(1) of the Constitution. Accordingly, the writ petition merits acceptance.

In view of the above, the writ petition succeeds. The advertisement, dated 29.1.2005 (P-8) for filling up the post by direct recruitment, issued on the presumption that no candidate for promotion to the post of Chief Electrical Inspector is eligible, is hereby quashed. We further direct the respondents to consider the case of the petitioner afresh for promotion to the post of Chief Electrical Inspector with effect from 28.3.2004 when the DPC had met first. In case, the petitioner is found suitable on merit then he would become entitled to all the benefits w.e.f. 28.3.2004 including the arrears of salary till the date of his superannuation on 31.10.2006. He shall also be entitled to all consequential benefits of re-fixation of pension and other retiral benefits. Let the needful be done within a period of three months from the date a certified copy of this order is received by the respondents.

The writ petition stands disposed of in the above terms.

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
C.W.P. No.10053 OF 2007
D.D. 10.7.2007
Hon'ble Mr.Justice J.S.Khehar & Hon'ble Mr. Justice M.M.S.Bedi

Gaurav Singh ... Petitioner
Vs.
State of Punjab and Others ... Respondents

Recruitment:

Whether the State Government can withdraw its requisition to fill up the posts after the posts are advertised for recruitment? - Yes

Punjab P.S.C. issued advertisement for recruitment to 14 posts of Deputy Superintendent of Police – The State Government withdrew its requisition as per communication dated 28.6.2007 – Accordingly, a Press Note was issued by P.S.C. stating that selection process had been stopped – The petitioner challenged the said action stating that no reason was given – High Court dismissed the writ petition holding that withdrawing its requisition is within the exclusive domain of the State Government.

Held:

It is open to the State Government to decide whether or not to fill up the vacancies available with it and it is an issue which falls in its exclusive domain.

ORDER

J.S.Khehar, J.

The Punjab Public Service Commission had issued advertisements for filling up 14 posts of Deputy Superintendent of Police. The State Government through its communication dated June 28, 2007 has withdrawn its requisition to fill up the said posts. Accordingly, a press note has been issued by the Punjab Public Service Commission intimating the candidates that the process of selection had been stopped. It is this action of the respondents which is subject matter of challenge at the hands of the petitioner.

The solitary contention of the learned counsel for the petitioner is that some reason ought to have been given before the State Government and/or the Punjab Public Service Commission took a decision not to go ahead with the process of selection. It is also the contention of the learned counsel for the petitioner that if the earlier advertisements issued by the respondents under which the petitioner was an applicant are withdrawn, the petitioner would be rendered overage and would be ineligible in any further process of selection.

It is not possible for us to accept the aforesaid submissions advanced by the learned counsel for the petitioner. It is open to the State Government to decide whether or not to fill up the vacancies available with it, as of now, the State Government has taken a decision on June 28, 2007 not to fill up the 14 posts of Deputy Superintendent of Police for which applications were earlier invited by withdrawing the requisitions made therefor from the Punjab Service Commission. We find no infirmity in the aforesaid determination at the hand of the State Government on an issue which falls in its exclusive domain.

In view of the above, we find no merit in this petition and the same is accordingly dismissed.

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RAJASTHAN PUBLIC SERVICE COMMISSION

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR
D.B. CIVIL SPECIAL APPEAL (WRIT) NO.923/2006
D.D. 24.01.2008
Hon'ble Mr. Justice R.M.Lodha &
Hon'ble Mr. Justice Raghuvendra S.Rathore

Smt. Shashi Kala Dadhich ... Appellant
Vs.
Rajasthan P.S.C. & Anr. ... Respondents

Age relaxation:

Recruitment to the post of lecturer in Hindi – Earlier advertisement dated 20.1.1997 was cancelled for some reasons – After a gap of 4 years the same posts were re-advertised on 8.6.2001 – Petitioner's application was rejected as overaged – Petitioner contended that he was within the prescribed age when the posts were advertised earlier and therefore he was entitled to age relaxation for the period the posts remained vacant and no selection process was undertaken – High Court in view of the C&R Rules which govern the recruitment which do not contain the provision that the candidates who were eligible in a particular year but were rendered ineligible in the subsequent years were to be treated as eligible irrespective of age requirement in case no examination was held in the particular year in which they were eligible, dismissed the appeal following the decision of the Supreme Court in the case of Anand Kanwar.

Held:

The eligibility of a candidate has to be determined on the basis of the terms and conditions of the advertisement in response to which the candidate applies.

ORDER

ORAL ORDER (PER R.M.LODHA, J.)

The contention of Mr. Rajendra Soni, the counsel for the appellant is that initially vide advertisement dated 20.1.1997, the posts of lecturer in Hindi were advertised to be filled. However, the said advertisement was cancelled due to financial crisis or otherwise and then after a gap of 4 years, the same posts were re-advertised on 8.6.2001 and amended corrigendum was issued on 23.1.2002 and, therefore, the petitioner who was within prescribed age in the year 1997 is entitled to age relaxation for the period the posts remained vacant and no selection process was undertaken. He would urge that a legal right came to be vested in the petitioner in the year 1997 and that could not have been divested because of inaction or otherwise on the part of the respondents in not filling the vacant posts in that year. The counsel would submit that the action of the respondents in cancelling the candidature of the petitioner was arbitrary and violative of Articles 14 & 16 of the Constitution of India. He

strongly placed reliance upon the decision of the Division Bench of this Court in the case of Prakash Chand Versus State of Rajasthan & Another [1990 (2) RLR page 1] and a Single Judge decision in the case of Dr. Banshi Lal Jakhar Versus State of Rajasthan [2007 (2) CDR 1106].

2. Mr. S.N.Kumawat, counsel for the respondent No.1 (RPSC) relied upon the judgment of the Supreme Court dated February 8, 1995 in Civil Appeal No.52/1993, Rajasthan Public Service Commission Versus Smt. Anand Kanwar & Others.

3. We may first notice the decision of this Court in the case of Prakash Chand, particularly, paragraphs 21, 22 and 23 thereof, upon which reliance has been placed by the counsel for the appellant. Paragraphs 21, 22 and 23 read thus:

> "21. We find that in the Rajasthan State and Subordinate Service (Direct Recruitment by Combined Competitive Examinations) Rules, 1962 there is a special provision regarding the age. The candidates who are eligible in a particular year, but are rendered ineligible in he subsequent years, they are treated as eligible to appear in the examination irrespective of age requirement in case no examination is held in the particular year in which they were eligible. It would be appropriate to quote proviso (9) to Rule 11(B) of these Rules:
>
> "11 B. Age-Notwithstanding anything contained regarding age limit in any of the Service Rules governing direct recruitment through the agency of the Commission to the posts in the State Service and in the Subordinate Services mentioned in Schedule I and in Schedule II respectively, a candidate for direct recruitment to the posts to be filled in by Combined Competitive Examinations conducted by the Commission under these Rules must have attained the age of 21 years and must not have attained the age of 28 years on the first day of January next following the last date fixed for receipt of applications;
>
> Provided:
>
> (1) to (8) .....
>
> (9) If a candidate would have been entitled in respect of his age to appear at the examination in any year in which no such examination was held, he shall be deemed to be entitled in respect of his age to appear at the next following examination."
>
> We also notice that in the Rajasthan Judicial Service Rules, 1955 also similar provision is contained in proviso (1) to Rule 10. This proviso is also reproduced for ready reference:
>
> "10. Age: A candidate for recruitment to the service may not have attained the age of 35 years on the first day of January next following the date of commencement of the examination by the Commission for recruitment to the Service:
>
> Provided:
>
> (i) That barring the first examination to be held under the provisions of these Rules, if a candidate would have been entitled in respect of his age to appear at an examination in any year in which no such examination was held, he shall be deemed to be entitled in respect of his age to appear at the next following examination."

22. Thus, under the Rules of 1962, for the posts included in the Rajasthan Administrative Service, Rajasthan Police Service, Rajasthan Accounts Service, Rajasthan Cooperative Service, Rajasthan Employment Exchange Service, Rajasthan State Insurance Service, Rajasthan Commercial Taxes Services, Rajasthan Subordinate Devsthan Service, Rajasthan Subordinate Cooperative Service, R.T.S. Service, Rajasthan Commercial Taxes Subordinate Service, Rajasthan Food and Civil Supplies Subordinate Service and the various posts under the Rajasthan Subordinate Service (Recruitment and other Service Conditions) Rules, 1960 as well as under the Rajasthan Judicial Service Rules, 1955, a candidate is not denied consideration for direct recruitment on the ground of age limitation if he was within the age limit in a year in which the examination was not held. These provisions contained in the rules of 1962 as well as the rules of 1955 are intended to protect the rights of the persons against the failure of the competent authorities to hold selection for direct recruitment yearwise. The Rules of 1962 and the Rules of 1955 give benefit of relaxation in upper age limit, if examination is not held in a particular year. Even this is not necessary that there must have existed vacancies in that particular year. If the competent authority makes determination of vacancies for direct recruitment quota on yearly basis and fill them up regularly in the year in which the vacancies occur, no such difficulty could arise. However, in practice we find that the Rajasthan Public Service Commission as well as other appointing authorities are having multifarious functions to perform. The R.P.S.C. is required to make recruitment for over 50 services apart from consultative functions in the matter of framing of service rules and disciplinary actions in respect of the gazetted officers. It is more or less impossible for the RPSC to make regular selection yearwise. That leads to a situation where large number of eligible candidates are rendered ineligible on account of their having become over-age merely because in the particular year when they were eligible, recruitment is not made by he Competitive body or Commission or other authority. We do not find any justification as to why a provision like one contained in Rule 11B of 1962 Rules or Rule 10 of 1955 Rules has not been made in other Rules. This would have eliminated wholly unnecessary litigation of this nature.

23. However, once we have held that there is an obligation to make yearwise determination of vacancies for direct recruitment as well as promotion, the competent authority cannot avoid this responsibility by sheer inaction or omission and failure on the part of the competent authority cannot be used as a basis for denying eligibility to those who are eligible in a particular year but becomes ineligible on account of absence of determination of vacancies on yearly basis. So far as the promotion quota posts are concerned, all problems regarding eligibility etc. are solved in view of the provisions contained in Rule 9(2) of 1974 Rules and Rule 10(2) of 1989 Rules. For direct recruitment quota, we have to take notice of rule 9(1) and particularly, Clause (c) of 1974 Rules and Rule 10(1)(c) of 1989 Rules. We are of the view that the vacancies for direct recruitment must also be determined on yearly basis and efforts should be made to fill those vacancies during the course of the year. After determination of vacancies, the same shall be advertised immediately or within reasonable time, so that the candidates who are eligible, can apply. The process of selection may be completed at a subsequent point of time. In that event, the disputes relating to eligibility with reference to age and qualifications would be obviated. For the subsequent years, the same very process can be repeated. After the vacancies of different years are advertised the process of selection shall be held separately and panel shall be drawn separately, so that the charge of clubbing the vacancies may also not be

levelled against the appointing authority. If, on account of administrative difficulties, vacancies for direct recruitment cannot be filled in for a particular year, the candidates who are within the age limit with reference to the vacancies of a particular year must be treated as eligible even if the selection is held subsequently.

4. The Division Bench with reference to the provisions contained in Rajasthan Police Subordinate Service Rules, 1974 (particularly Rule 9 thereof) and Rajasthan Police Subordinate Service Rules, 1989 (particularly Rule 10 thereof) held that these rules provide for yearwise determination of vacancies and regular recruitment by the prescribed mode against yearly determined vacancies insofar as direct recruitment was concerned. The Division Bench referred to the Rajasthan State & Subordinate Service (Direct Recruitment by Combined Competitive Examinations) Rules, 1962 that provide that candidates who are eligible in a particular year, but are rendered ineligible in the subsequent years, they are to be treated as eligible to appear in the examination irrespective of age requirement in case no examination was held in the particular year in which they were eligible. The Bench noticed some of the service rules like Rajasthan Administrative Service, Rajasthan Police Service, Rajasthan Accounts Service, Rajasthan Cooperative Service, Rajasthan Employment Exchange Service, Rajasthan State Insurance Service, Rajasthan Commercial Taxes Services, Rajasthan Subordinate Devsthan Service, Rajasthan Subordinate Cooperative Service, R.T.S. Service, Rajasthan Commercial Taxes Subordinate Service, Rajasthan Food and Civil Supplies Subordinate Service and Rajasthan Judicial Service, where a candidate is not denied consideration for direct recruitment on the ground of age limitation, if he was within the age limit in the year in which the examination was not held.

5. The direct recruitment to the posts of lecturer in Hindi, admittedly, is being made under Rajasthan Educational Service Rules, 1970 (for short, 'Rules of 1970'). The counsel for the appellant did not dispute that the Rules of 1970 do not have a provision that the candidates who were eligible in a particular year but were rendered ineligible in the subsequent years, they were to be treated as eligible to appear in the examination irrespective of age requirement in case no examination was held in the particular year in which they were eligible. We are afraid, for want of any provision in the Rules of 1970, the decision of the Division Bench in the case of Prakash Chand cannot be applied to the present fact situation.

6. We may now refer to the judgment of the Supreme Court in the case of Anand Kanwar. That was a case where Anand Kanwar applied for the post of Senior Teacher in the year 1989 pursuant to the advertisement. At that time she had already crossed the age of 40. She appeared in the preliminary

examination conducted by the Rajasthan Public Service Commission (for short, "Commission") but at the time of viva-voce she was told that she was not eligible being overage and her candidature was cancelled. Upon challenge of the cancellation of her candidature before this Court, the Division Bench held that the last advertisement was issued in the year 1983 and thereafter the advertisement was issued in the year 1989 i.e., after a lapse of about 6 years. If year wise vacancies were not determined and if the advertisement was issued to fill the vacancies of six years by one advertisement, then the person's candidature cannot be rejected on that ground. The Division Bench held that competent authority cannot avoid the responsibility by sheer inaction or omission and failure on the part of the competent authority cannot be used as a basis for denying eligibility to those who were eligible in a particular year but became ineligible on account of absence of determination of vacancies. The consideration of the matter by the Division Bench was held by the Supreme Court bordering on perversity. The Supreme Court held thus:

> "It is settled proposition of law that the eligibility of a candidate has to be determined on the basis of the terms and conditions of the advertisement in response to which the candidate applies. There is nothing on the record to show that the State Government was in any manner negligent or at fault in not making the direct recruitment during the period 1983-89. Be that as it may, the High Court was not justified in taking the clock back to the period when unfilled vacancies were existing and holding that since the respondent was eligible on the date when vacancies fell vacant. She continues to be so till the time the vacancies are filled. Due to inaction on the part of the State Government in not filling the posts year-wise, the respondent cannot get a right to participate in the selection despite being over-aged."

7. In the light of the authoritative pronouncement of the Supreme Court as afore-noticed, we find no merit in the contentions of the counsel for the appellant. The appellant is not entitled to age relaxation as claimed by her.

8. The appeal has to be dismissed and is dismissed accordingly.

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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT JAIPUR
DB CIVIL SPECIAL APPEAL (WRIT) NO.108/2007
IN
SB CIVIL WRIT PETITION NO.4186/2004
D.D. 12.02.2008
Hon'ble Mr. Justice R.M.Lodha &
Hon'ble Mr. Justice Raghuvendra S.Rathore

Rajasthan P.S.C. ... Appellant
Vs.
Satish Chand Goyal & Anr. ... Respondent

Recruitment:

Reserve list:

Recruitment to the post of Head Master in Secondary School – Rules provide for preparing reserve list to the extent of 50% of the advertised posts at the time of preparing the list – Reserve list is meant for unfilled advertised vacancies if the requisition is received within 6 months from the date original list was forwarded – Main list was prepared on 17.1.2004 - Requisition for filling up unfilled posts was received on 16.7.2004 - Requisition for 5 names was forwarded on 24.6.2004 and until 16.7.2004 there was no requisition – Further requisition was sent on 16.7.2004 - Life of reserve list being 6 months Writ Appeal was allowed quashing the order of single Judge directing to send the name of the petitioner appearing at Sl.no.7 in the reserve list.

Held:

Reserve list should be operated within 6 months of the preparation of the original list.

ORDER

The appeal is admitted. Mr. J.M.Saxena waives service for respondent No.1. Mr. B.L.Avasthi, Additional Government Counsel appears for respondent No.2. Looking to the controversy involved in the appeal, we dispose of the appeal at this stage itself.

2. The following facts are not disputed:

(i) Rajasthan Public Service Commission (for short, 'RPSC'), after receipt of requisition from the State Government for appointment for 529 posts of Head Master (Secondary School) in Secondary Education Department under the Rajasthan Education Service Rules, 1970 issued an advertisement on 7.3.2002.

(ii) Pursuant to the aforesaid advertisement dated 7.3.2002, the last date for submission of the application forms was 3.5.2002.

(iii) RPSC received 16962 application forms including that of the present respondent No.1 whose roll no. was 305359.

(iv) The screening test was conducted by the RPSC on 23.2.2003.

(v) RPSC declared the result of the screening test on 31.8.2003.

(vi) The respondent No.1 was declared successful in the screening test.

(vii) The interviews were held for the period from 17.10.2003 to 14.11.2003 and 10.12.2003 to 17.12.2003 of the candidates who were successful in the screening test. The select list of 517 candidates was prepared and then forwarded to the State Government by the RPSC on 17.1.2004; 12 posts were kept vacant because of pendency of few writ petitions.

(viii) The name of the present respondent No.1 did not find place in the main select list which was prepared on the basis of merit and sent to the State Government. However, his name was at Sr.No.7 in the reserve list of merit prepared by the RPSC.

(ix) The State Government called for five names from the reserve list on 24.6.2004 and the RPSC, accordingly, recommended five names.

3. The present respondent No.1 (original writ petitioner) filed a writ petition before this court praying therein that the respondents therein be directed to give appointment to him on the post of Head Master, Secondary School, Department of Education, Government of Rajasthan pursuant to the advertisement dated 7.3.2002. He also prayed that the respondents therein be directed to disclose the reasons as to how and why seven vacancies relating to general category have been kept vacant by the RPSC.

4. The State Government as well as RPSC filed their response in opposition to the writ petition. Inter-alia, the stand of RPSC in their written response was that they sent the main select list on 517 candidates to the State Government on 17.1.2004; out of which the State Government issued appointment letters to 500 candidates and thereafter requisition of five candidates was received by the Commission on 24.6.2004 for which five names were forwarded from the reserve list. The life of reserve list expired on 16.7.2004 and could not remain operative thereafter. The RPSC also explained that although 529 posts were advertised, they recommended the names of 517 candidates to the State Government only because of pendency of writ petitions. It was contended that since 50 writ petitions were still pending, the decision was kept to keep vacant 8 posts until the decision of the writ petitions.

5. The Single Judge after hearing the parties by a very brief order disposed of the writ petition thus:

> "In the reply, the respondents have stated that 21 candidates, out of the general category, who were offered appointment have not joined. According to them, 21 posts out of general category are available. Petitioner's name is appearing at serial no.7 in the reserve list.
>
> Respondents are directed to operate the reserve list to the extent of availability of fall out vacancies. If there is any procedural requirement, for seeking names of those candidates for filling up the posts, from Rajasthan Public Service Commission, the respondents may do that also."

6. The controversy in this appeal centers around the construction of Rule 20 of the Rajasthan Education Service Rules, 1970 (for short, 'the Rules of 1970').

7. Rule 20 of the Rules of 1970 reads thus:

> "20. Recommendations of the Commission:- The Commission shall prepare a list of the candidates, whom they consider suitable for appointment to the posts concerned, arranged in order of merit and forward the same to the appointing authority.
>
> Provided that the Commission may also to the extent of 50% of the advertised vacancies, keep names of suitable candidates may, on requisition, be recommended in the order of merit to the appointing authority within 6 months from the date on which the original list is forwarded by the Commission to appointing authority."

8. In the case of Dr. Kalpana Kumari Meena vs. State of Rajasthan and others [D.B. Civil Special Appeal (Writ) No.1052/2007] decided on 30.1.2008, the Division Bench considered Rule 20 of the Rajasthan Medical Service (Collegiate Branch) Rules, 1962 which is exactly identical to Rule 20 of the Rules of 1970. Rule 20 of the Rajasthan Medical Service (Collegiate Branch) Rules, 1962 is as follows:

> "20. Recommendations of the Commission:- The Commission shall prepare a list of the candidates whom they consider suitable for appointment to the posts concerned arranged in order of merit and forward the same to Government.
>
> Provided that the Commission may to the extent of 50% of the advertised vacancies, keep names of suitable candidates on the reserve list. The names of such candidates may on requisition, be recommended in the order of merit to Government within 6 months from the date on which the original list is forwarded by the Commission to Government."

9. While dealing with Rule 20 of the Rajasthan Medical Service (Collegiate Branch) Rules, 1962, the Division Bench held in paragraph 7 of the order thus:

> "7. As per Rule 20, the Commission is required to prepare a list of the candidates found suitable for appointment to the posts concerned arranged in the order of merit and forward the same to the Government. While preparing the list, it is open to the Commission to prepare a reserve list of suitable candidates to the extent of 50% of the advertised vacancies. Upon receipt of the requisition from the State Government, the Commission is required to recommend in the order of merit to the Government within six months from the date on which the original list has been forwarded. The reserve list talked of in Rule 20 is meant for the purpose of unfilled advertised vacancies if the requisition is received within six months from the date the original list was forwarded. Rule 20 does not operate in the case of requisition for additional posts. Admittedly, since in the present case all the three advertised posts were filled, Rule 20, too, is not breached by the Commission by not responding to the requisition dated 18.08.2005 and 01.09.2005. The action of the Commission cannot be said to be legally flawed."

10. Rule 20 of the Rules of 1970 also requires the RPSC to prepare a list of the candidates found suitable for appointment to the posts concerned arranged in the order of merit and for being forwarded to the state government. While preparing the list, the RPSC may prepare a reserve list of suitable candidates to the extent of 50% of the advertised vacancies. If the RPSC receives a requisition from the state government within six months from the date on which the original list was forwarded, it is required of the RPSC to recommend the names in order of merit to the government accordingly. The reserve list talked of in Rule 20 of the Rules of 1970 is meant for unfilled advertised vacancies if the requisition is received within six months from the date the original list was forwarded. In the present case, the RPSC forwarded the select list to the State Government on 17.1.2004. Thereafter, the requisition of five names was received by the RPSC from the State Government and these five names were forwarded on 24.6.2004. Thereafter until 16.7.2004 there was no requisition received by the RPSC from the state government. The life of the reserve list came to an end on 16.7.2004 and thereafter it could not operate. In this view of the matter, the view of the Single Judge directing the RPSC to operate the reserve list to the extent of availability of fall out vacancies after six month cannot be sustained.

11. Seen thus, the order of the Single Judge dated 11.9.2006 has to be set aside and is set aside.

12. The appeal, accordingly, allowed with no order as to costs.

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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR
S.B. CIVIL WRIT PETITION NO.1257/2005 & CONNECTED CASES
D.D. 04.03.2008
Hon'ble Mr. Justice Munishwar Nath Bhandari

Ms. Shilpa Badala & Ors. ... Petitioners
Vs.
The State & Anr. ... Respondents

Reservation:

3% Reservation for PH candidates:

Recruitment to the post of Teacher Grade-III – Initially number of posts advertised was 25712 which was increased to 33936 – Petitioner as unsuccessful candidate alleged that reservation to the extent of 3% for PH persons was not provided – Respondents denied and contended that initially 753 posts were reserved which was increased to 831 after the number of posts was increased – According to the respondents appointment in excess of the quota was made under disabled category – High Court rejected the contention of the petitioner that the posts under PH category should be filled irrespective of castes by distinguishing the decision in Mahesh Gupta & Ors. vs. Yashwan Kumar Ahirwar & Ors. (2007) 2 SCC (L&S) 965 in view of later decision in Rajesh Kumar Daria v. RPSC & Ors. (2007) 8 SCC 785 and consequently dismissed the writ petitions.

Held:

There is difference between vertical and horizontal reservation, reservation in favour of disabled candidates is horizontal reservation and as per the decision in Rajesh Kumar Daria the position of candidates getting horizontal reservation is to be determined in their own category.

Cases referred:

1. (1995) 5 SCC 173 - Anil Kumar Gupta v. State of U.P.
2. (2007) 2 SCC (L&S) 965 - Mahesh Gupta & Others v. Yashwant Kumar Ahirwar & Others
3. (2007) 8 SCC 785 - Rajesh Kumar Daria v. RPSC & Others

ORDER

All these writ petitions involve common question of law, thus, are heard and decided by the common judgment.

By all these writ petitions, a direction against the respondent is sought for providing 3% reservation quota for physically disabled persons as, according to petitioners, reservation to the extent of 3% is not given while filling up the post of Teacher Grade III.

Learned counsel for the petitioners submit that pursuant to the advertisement issued by the respondent – R.P.S.C. calling for the applications for appointment on the post of Teacher Grade III, all the petitioner submitted their applications. Referring to advertisement dated 02.06.2004, it is stated that a separate bifurcation of the posts meant for disabled category was made but then after issuance of the advertisement, respondents increased posts from 25712 to 33936, but while increasing the posts, reservation to the extent of 3%, in favour of the disabled persons, is not provided.

Learned counsel for the respondents, on the other hand, submit that they had advertised 25712 posts and reservation in favour of the disabled category persons was also determined, which was then made to satisfy the 3% quota meant for disabled category, inasmuch as, originally, in the advertisement, 753 posts were reserved for the disabled category, but, then same was increased to 831 posts and appointments were given to that extent.

So far as increase of 6257 posts at later stage is concerned, it is stated that those were backlog vacancies or Scheduled Caste (SC) and Scheduled Tribe (ST) candidates, hence, in all those backlog vacancies, reservation or disabled candidates could not be provided and, otherwise, stating the facts, it is submitted that as against 831 posts meant for disabled category, in fact, 952 appointments have already been given. Thus, the appointment of the disabled category candidate has been made in excess to the quota and assuming that even total reservation is to be provided on 33963 posts, then also, so far as back log reserved posts are concerned, i.e., 6257, no General Caste candidate, belonging to disabled category, can seek benefit of appointment, because, it is already held that reservation to disabled category is a horizontal reservation. In other words, if a candidate, belonging to General Caste is falling in disabled category, then he will get 3% reservation from and amongst the seats meant for general category and likewise and if a candidate belongs to other category like SC and ST, then the disable person of SC and ST category will get the reservation on the posts meant for that category like SC and ST. Therefore, taking note of above situation, it is submitted that so far as the present petitioners are concerned, none of them are coming close to the cutoff marks provide for disabled category candidates within their category, therefore, entire exercise as required to be made has otherwise become academic in nature. Referring to the situation in regard to the reserved caste candidate, like SC & ST, it has been stated that cut off marks in their category to the disabled person is 114 and 104 respectively and, out of all these writ petitions, only writ petition, bearing No.1723/2005 involves one Omprakash to SC category, but he has already been given appointment, being a blind. Then, comes

a candidate in writ petition No.1788/2005, belonging to SC category, but then, the said candidate has obtained only 90 marks as against cut off marks of 114 and the same is position in regard to writ petition No.2270/2005, where out of two candidates, one Chenaram has secured only 78 marks as against cutoff marks of 114. According to the learned counsel for the State, even all those candidates are considered against backlog vacancies of 6257, then also, looking to the very low percentage of marks and many other meritorious persons in between, petitioners are not entitled for any relief thus the issue remains academic only.

Learned counsel for the petitioner has made a reference to the judgment of the Apex Court in the case of Mahesh Gupta & Others v. Yashwant Kumar Ahirwar & Others, (2007) 2 SCC (L&S) 965, wherein it is held that category of physically handicapped person to be taken as separate category, therefore, their posts should be filled, irrespective of the caste. In the aforesaid judgment, the issue was pertaining to special consideration for disabled persons as the State Government has drawn a Special recruitment drive for filling up reserved posts of SC and ST candidates and therein, a person belonging to General category, but suffering from disability was selected. The issue therein, therefore, was decided by the Hon'ble Apex Court in facts of that case and otherwise after considering the Circular dated 29.03.1993. Thus, the vacant posts were ordered to be filled up from and amongst two categories one from SC and another from ST, and for other physically handicapped candidates, a direction was given that handicapped persons were not to be further classified as belonging to SC and ST or general category candidate. The three Judges of the Supreme Court in Rajesh Kumar Daria v. RPSC & Others, (2007) 8 SCC 785, held that there is different between vertical and horizontal reservation and held that reservation in favour of the disabled candidates is horizontal reservation and as per the judgment of the Supreme Court in the case of Rajesh Kumar Daria (supra), the position of candidates getting horizontal reservation is to be determined in their own category and difference between horizontal and vertical reservation has been narrated.

In the case of Rajesh Kumar Daria, the Hon'ble Apex Court had even made a reference of Constitution Bench in the case of Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 and also in the case of Anil Kumar Gupta v. State of U.P., reported in (1995) 5 SCC 173. In paras 6 to 9 of Rajesh Kumar Daria's case, the Hon'ble Apex Court has elaborately discussed the matter and for ready reference, those paras are quoted hereunder:

"6. Before examining whether the reservation provision relating to women, had been correctly applied it will be advantageous to refer to the nature of horizontal reservation and the manner of its application. In Indra Sawhney vs. Union of India [1992 Suppl.(3) SCC 217], the principle of horizontal reservation was explained thus (SCC pp.735-36, Para 812):

"All reservations are not of the same nature. There are two types of reservations which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes [(under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped (under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations – what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category, he will be placed in that quota by making necessary adjustments; Similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains – and should remain – the same."

7. A provision for women made under Article 15(3), in respect of employment, is a special reservation as contrasted from the social reservation under Article 16(4). The method of implementing special reservation, which is a horizontal reservation, cutting across vertical reservations, was explained by this Court in Anil Kumar Gupta vs. State of U.P. 2[1995 (5) SCC 173] thus (SCC p.185, para 18):

"The proper and correct course is to first fill up the Open Competition quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied – in case it is an overall horizontal reservation – no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalized horizontal reservation, then the process of verification and adjustment/accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen percent in favour of special categories, overall, may be satisfied or may not be satisfied.)

8. We may also refer to two related aspects before considering the facts of this case. The first is about the description of horizontal reservation. For example, if there are 200 vacancies and 15% is the vertical reservation for SC and 30% is the horizontal reservation for women, the proper description of the number of posts reserved for SC, should be: "For SC: 30 posts, of which 9 posts are for women". We find that many a time this is wrongly described thus: "For SC : 21 posts for men and 9 posts for women, in all 30 posts". Obviously, there is, and there can be, no reservation category of 'male' or 'men'.

9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective backward class. Therefore, if the number of SC candidates, who by their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [vide – Indra Sawhney, R.K.Sabharwal vs. State of Punjab, Union of India vs. Virpal Singh Chauvan and Ritesh R.Sah v. Dr. Y.L.Yamul. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for scheduled castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example:

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two women candidates, then the next two SC women candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. [But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidates on the ground that 'SC-women' have been selected in excess of the prescribed internal quota of four.]"

In view of the judgment in the case of Rajesh Kumar Daria, it become otherwise clear that the reservation in favour of disabled category is the horizontal reservation, thus it is to be provided as indicated in the aforesaid judgment, more so when the said issue was otherwise being decided by the Constitution Bench of the Hon'ble Apex Court in the case of Indra Sawhney in paras 735 and 736. In

view of the above, for backlog reserved post, candidates belonging to general caste with disability cannot claim appointment. Thus, in the present matter, other than the vacancies belonging to backlog reserved post, reservations in favour of disabled persons have already been provided beyond 3% as total posts determined for reservation for disabled persons was 831, but, then, 952 candidates have already been given appointment from and amongst disabled persons. Hence, the grievance of the petitioners is otherwise also not sustainable, apart from the fact that they are not even close to the merit list.

In view of the discussion made above, since the respondents had already filled up 952 vacancies from and amongst disabled category candidate which includes disabled category candidate belonging to General and Other Backward Classes (OBC) candidates to the extent of their quota. So far as SC and ST candidates are concerned, out of many writ petitions, only two writ petitions, involve such candidates. In the aforesaid two writ petitions, since percentage of marks of the petitioners are quite low and there are many more meritorious candidates in between, who are above the petitioners thus, there is no chance of appointment for them.

In view of the above, I do not find merit in the writ petitions, thus all the writ petitions are dismissed accordingly with no order as to costs.

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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
JAIPUR BENCH
CIVIL WRIT PETITION NO.4005/2008 & CONNECTED CASES
D.D. 08.08.2008
Hon'ble Mr. Justice Ajay Rastogi

Ramraj Tada & Ors. ... Petitioners
Vs.
State & Ors. ... Respondents

Qualification:

Equivalence:

Recruitment to the post of Primary and Upper Primary Teachers by direct recruitment – State Government issued Circular to the effect that Senior Secondary (Vocational) is not equivalent to Senior Secondary (Academic) and applicants possessing the said qualification were not eligible for the post of Primary School Teachers – Applicants holding qualification of Senior Secondary (Vocational) were not considered to be eligible – Considering the decision in Kailash Chandra Harijan Vs. State 2006 (4) WLC 337 and the amendment made to the rules pursuant to the said decision and NCTE Regulations which have overriding effect held that candidates holding Senior Secondary (Vocational) were eligible and accordingly writ petitions were allowed.

Held:

NCTE being expert body created under NCTE Act which alone can prescribe standard of education particularly teachers education and the State Government is under obligation to frame its rules in conformity with the qualifications for teachers in Educational Institutions.

Cases referred:

1. 2006 (4) WLC 337 - Kailash Chandra Harijan vs. State
2. 2006 (6) RDD 3458 - Panna Lal Joshi Vs. State
3. 2001 (10) JT (SC) 178 - Sunita Sharma Vs. State

ORDER

Since all the petitions involve identical issues, hence are being disposed of together.

Question arising for consideration is as to whether persons holding qualification of Sr. Secondary (Vocation) from recognized Board of Education can be considered to be ineligible in absence of holding Bridge Course certificate for the purpose of their appointment of Primary/Upper Primary School teachers after amendment being made in R.266 (3) of Rajasthan Panchayati Raj Rules, 1996, vide notification dt. 28.06.2006.

Necessary fact relevant for adjudication being almost common, are being taken note of CWP-7024/2007. Advertisement was issued by Rajasthan Public Service Commission ("PSC") on 30.10.2006 inviting application for appointment of Primary & Upper Primary Teachers. Petitioner (Radhey Shyam Raidas) qualified Senior Secondary (Vocational), B.A., M.A. & Diploma in Education (two years) course from Bhopal (MP) as alleged to be equivalent to BSTC duly recognized by Rajasthan Government. Claiming himself eligible, he applied for the post in question in pursuance of advertisement dt: 30.10.06; and appeared in written examination and his name stood at merit No.9917, so was called for counseling at Govt. TT College, Ajmer on 03/09/07 vide letter dt: 21/08/07 (Ann.1) – in pursuance whereof, appeared in course of counseling but the authority refused to consider on the premise that he is holding qualification of Sr. Secondary (Voc.) and even in other cases also, the PSC rejected such applicants communicating that since they have not passed Bridge Course certificate along with Sr. Secondary (Voc.); as such are not eligible for the post advertised on 30.10.2006.

Before examining dispute any further, it would be proper to take not of Scheme of Rule, 1996 – relevant for the purpose. Service conditions of Teachers consisting recruitment in primary schools in rural area were initially governed by Rajasthan Panchyat Samiti & Zila Parishad Act, 1959 ("Act, 1959") and Service Rules, 1959 framed thereunder, while Teachers in Primary Schools in urban areas had a different cadre. The Act, 1959 was replaced by Rajasthan Panchayati Raj Act, 1994 ("Act, 1994") and its S.89 provides constitution of Rajasthan Panchayat Samiti & Zila Parishad Services which originally comprised of amongst others, Primary School Teachers as stated in clause (iii) of sub-section (2) of S.89.

An amendment was made in regard to qualification the post of Primary School Teacher vide notification dt:07/05/98. Amendment relevant for the purpose runs ad infra:

> "Government of Rajasthan
>
> Rural Dev. & Panchayat Raj Department
>
> (3) Primary School Teacher (100% by direct recruitment.
>
> (i) Senior Secondary under new (10+2) or Higher Secondary under old scheme from Rajasthan Board of Secondary Educations or equivalent and secondary school certificate from Rajasthan Board of Secondary Education or equivalent with 5 subjects, 3 of them shall be Mathematics, English & Hindi.

(ii) B.S.T.C. Course."

After amendment made on 07.05.98 (supra), at the same time, recruitment was processed while taking note of precedence laid down by this Court examining qualification of Senior Secondary (Academic) & Senior Secondary (Vocational); State Government issued circular dt. 19.08.98 directing all Chief Executive Officers of Zila Parishad based on earlier decision of this Court as clarification holding that Senior Secondary (Voc.) is not equivalent to Senior Secondary Academic) and are not eligible for primary school teachers.

Based on Circular issued by State Government, those who applied for appointment to the post of Primary School Teachers pursuant to advertisement issued in June, 1998 for vacancy of 1998-99, applicants holding qualification of Sr. Secondary (Vocational) were not considered to be eligible for primary school teachers.

However, by Rajasthan Panchayati Raj (Amendment) Act, 2000, Cl.(iii) was amended substituting "primary & upper primary schools' in place of 'primary school Teachers'. Sub-section (1) of S.89 was amended by Rajasthan Panchayati Raj (Amendment) Act, 2004, inserting a proviso providing for selection for the post specified in cl.(iii) of sub-section (2) viz., Primary & Upper Primary School Teachers as originally provided in sub-section (1). That apart, a new sub-section (6A) was inserted providing for appointment of primary & upper primary school teachers by direct recruitment in accordance with rules made in that behalf by State Government out of persons selected by PSC. S.89 of Act, 1994 reads ad infra:

> "89. Constitution of Rajasthan Panchayat Samiti & Zila Parishad Service.- There shall be constituted for the State Service designated as, the Rajasthan Panchayat Samiti & Zila Parishad Service and hereafter in this section referred to as the Service and recruitment thereto shall be made district-wise.
>
> Provided that the selection for the post specified in clause (iii) of sub-section (2) shall be made at the State level.
>
> (2) The service may be divided into different categories, each category being divided into different grades, and shall consist of -
>
> (i) to (ii) xxx xxx
>
> (iii) primary and upper primary school teachers
>
> (iv) xxx
>
> (3) to (6) xxx

(6A) Appointment by direct recruitment on the posts specified in clause (iii) of sub-section (2) shall be made by Panchayat Samiti or Zila Parishad, as the case may be, in accordance with the rules made in this behalf by the State Government, from out of the persons selected for the posts by the Rajasthan Public Service Commission in accordance with rules made by the State Government in this behalf."

Provided that in case of the posts reserved for widows and divorcee, women, selection shall be made in such manner and by such Screening Committee as may be prescribed by the State Government."

Correspondingly, Rules-1996 was amended vide notification dt. 28.02.04 and among other amendments, R.266 providing for educational qualification for recruitment on various posts adding qualification of B.Ed (shown in italic part below) as an alternate qualification of BSTC – as originally provided. R.266 duly amended reads ad infra:

"266. Academic qualifications.

A recruit must possess minimum qualification as under:

(1) to (2) xxxx

(3) Primary School Teacher (100% by direct recruitment)

(i) Senior Secondary under new (10+2) scheme or Higher Secondary under old scheme from Rajasthan Board of Secondary Education or equivalent & secondary school certificate from Rajasthan Board of Secondary Education or equivalent with 5 subjects, 3 of them shall be mathematics, English and Hindi.

(i) B.S.T.C./B.Ed.

Provided that for appointment of widow and divorce woman on the posts of teacher, required qualification of BSTC/B.Ed shall be relaxed, if they are competent otherwise and they submit a bond to the effect that they will obtain the qualification of B.S.T.C./ B.Ed., with a period of three years. They shall be entitled to receive leave for study to get B.S.T.C./B.Ed., qualification soon after their appointment."

By amendment in S.89(2)(iii) of Panchayati Raj Act, primary and upper primary schools were clubbed as one category while at the same time, by amendment in R.266 of Rules, 1996, B.Ed. was brought at par with BSTC as requisite qualification for appointment in upper primary schools, whereas upper primary school, comprises of two sections – primary section consisting of Class I to V and middle section consisting of Class VI to VIII, which is called upper primary school. But, by upgrading the school adding classes VI to VIII, it becomes upper primary school, and there is clear distinction between primary & upper primary levels.

However, a question arose as to what will be effect of qualification laid down U/r 266 of Rules, 1996 if it is not in conformity with recruitment of teachers as laid down by NCTE in its Regulations, 2001, which was examined by Division bench in Kailash Chandra Harijan vs. State [2006 (4) WLC 337].

In fact, after the judgment of this Court in Kailash C.Harijan vs. State (supra), State Government made amendment vide notification dt. 28.06.06 in exercise of powers conferred by S.102 read with S.89 of Act, 1994 in Rule 266 substituting Cl.(3) by following:

Primary & Upper Primary School Teacher (100% by direct recruitment.	
(a) General Education Level – (i) Primary	i) Senior secondary school certificate or Intermediate or its equivalent; and ii) Diploma or certificate in basic teachers training of a duration of not less than two years OR Bachelor of Elementary Education (B.El.Ed.)
Level – (ii) Upper Primary (Middle School Section)	(i) Senior Secondary School Certificate or Intermediate or its equivalent; and (ii) Diploma or certificate in basic teachers training of a duration of not less than two years OR Bachelor of Elementary Education (B.El.Ed.) OR Graduate with Bachelor of Education (B.Ed.) or its equivalent
(b) Special Education Level – (i) Primary	(i) Senior Secondary School Certificate or intermediate or its equivalent; and (ii) One year/Two years Diploma in Special Education (DSE) i.e. in visual impairment/hearing impairment/mentally challenged/neurological condition duly recognized by the Rehabilitation Council of India. (iii) Candidates shall be eligible only on registration in the Rehabilitation Council of India.
Level - (ii) Upper Primary (Middle School Section)	(i) Senior Secondary School Certificate or intermediate or its equivalent; and (ii) One year/Two years Diploma in Special Education (DSE) i.e. in visual impairment/hearing impairment/mentally challenged/neurological condition duly recognized by the Rehabilitation Council of India. OR Graduate with B.Ed in Special Education, i.e. in visual impairment hearing impairment/mentally challenged neurological condition duly recognized by Rehabilitation Council of India. (iii) Candidates shall be eligible only on registration in the Rehabilitation Council of India.

Amendment quoted (supra) in fact was in conformity with the recruitment qualifications for Teachers in educational institution mentioned in S.2 of NCTE Regulations, 2001. After amendment was made (supra), State Government issued advertisement dt. 30.10.06 for holding selections for primary and upper Primary Teachers through PSC, in which petitioners herein appeared in written examination but the PSC has finally rejected their candidature on the premise that as they have not passed out their Senior Secondary (Vo.) with Bridge Course; as such are not eligible for the post of primary & Upper Primary School Teacher in pursuance to advertisement dt. 30.10.06, giving rise to instant petitions.

Counsel for petitioner submits that after the amendment made in Cl.(3) of R.266 or Rules, 1996, no distinction has been made between Senior Secondary whether academic or vocational; and despite judgement of this Court rendered while examining amendment in recruitment qualifications dt. 07.05.98 and clarification made vide Circular dt. 19.08.98 issued by State Government, if at all, Rules making authority intended to eliminate those holding Senior Secondary (Voc.) for appointment as Primary/ Upper Primary School Teacher, certainly it could have been taken note of while making amendment in Cl.(3) of R.266 of Rules, 1996 while issuing notification dt. 28.06.06; as such decision taken by the PSC rejecting their candidature out rightly without there being any directives from State Government or from NCTE, which regulates recruitment qualification for appointment as Teachers in educational institutions as mentioned in S.2 of its Regulations, 2001; is uncalled for and violative of Art.14 of the Constitution.

Counsel further submits that those who are holders of Sr. Secondary School Certificate irrespective of stream whether academic or vocational, both are eligible to undertake diploma or certificate in Basic School Teacher Training or elementary Teachers Training, which is under control & regulated by the State Government having no such pre-condition that Sr. Secondary (Academic) alone will be considered to be eligible; and that apart, there is no distinction between academic or vocational for holding higher qualification viz., Under-graduate/Bachelor degree of Education from a recognized University.

Counsel further submits that most of petitioners herein did their under graduate degree course from University established by law and did their B.Ed., and in such circumstances, how far Senior Secondary (Voc.) can still be considered as disqualification under existing scheme of Rules, 1996 holding them ineligible in terms of amendment made vide notification dt. 28.06.06 particularly when there are no directives/Circular/guidelines issued from NCTE more so, when amendment has been made U/r 266(3) of Rules, 1996 in consonance with NCTE Regulations, 2001.

Respondent State & the PSC have filed reply to some of petitions. It is sorry to say that State Government is not even aware of the amendment made vide notification dt. 28.06.06 and it appears that in the reply to some of petitions, reference has been made to the pre-amended situation, existing prior to notification dt. 28.06.06. However, only objection raised by State Government in its reply is that Senior Secondary (Voc.) is not equivalent to Senior Secondary (Academic) and, therefore, petitioners are not eligible for consideration for appointment as Teachers. Same stand has been taken by the PSC. Counsel submits that as regards Sr. Secondary (Voc. & Academic), this Court has examined the issue and finally upheld that Sr. Secondary (Academic) is not equivalent to Sr. Secondary (Voc.); as such holders of Sr. Secondary (Voc.) are not eligible for appointment as Primary School Teachers, now called as Primary & Upper Primary School Teachers after amendment dt. 28.06.06; as such no error has been committed in rejecting candidatures of such applicants.

Counsel further submits that even if applicants acquired higher education with B.Ed., as they are lacking qualification of Senior Secondary (Academic), still they cannot be considered to be eligible in terms of advertisement.

I have heard counsel for the parties and with their assistance, examined material on record. National Council for Teaching Education is parent statutory body being established under NCTE Act, 1993 having fixed norms & qualifications, with a view to achieving planned & co-ordinate development, regulation & proper maintenance of norms & standards in Teacher Education system.

However, vide Cl.(d) of S.12 of NCTE Act, the NCTE has laid down guidelines in respect of minimum qualifications for a Teacher in schools or in recognized institutions S.32 of NCTE Act confers power upon the Council to make regulations not inconsistent with the Act & Rules made thereunder to carry out its provisions and in particular to provide for – U/Cl.(d)(i) of sub-section (2) – "norms, guidelines & standards in respect of minimum qualifications for a Teacher U/Cl.(d) of S.12. But, as provided in Reg.4 of Regulations framed under NCTE Act, the States are supposed to modify/ frame recruitment rules in conformity with qualification prescribed in Schedule. Reg. 4 runs ad infra:

> "The existing recruitment rules may be modified within a period of three years so as to bring them in conformity with the qualifications prescribed in the Schedules. Meanwhile the teachers appointed as per existing recruitment qualifications, subsequent to the issue of these Regulations, will be required to acquire qualifications as prescribed in the Schedules."

NCTE framed regulations viz., NCTE (Determination of Minimum qualifications for recruitment of Teachers in Schools) Regulations, 2001 laying down minimum qualifications for recruitment of teachers in all formal schools established, run or aided or recognized by Central or State Government and other authorities for imparting education at elementary (primary & upper primary/middle school), secondary & senior secondary stages.

NCTE alone is competent to fix minimum qualification for appointment for imparting education covered under NCTE Act and it being expert body, its function is to maintain standard of education in relation to teachers' education, and the State Government is under obligation to lay down qualification in conformity with qualification prescribed by NCTE and its Regulations, 2001 and according to the recruitment qualifications for Teachers in educational institutions laid down by NCTE – in its consonance, State Government after judgment in Kailash Harijan vs. State (supra) made amendment U/r 266 (3) of Rules, 1996 vide its notification dt. 28.06.06.

As regards binding effect of NCTE Regulations, 2001, it has been examined by this Court observing that qualifications fixed by State Government U/r 266 of Rules, 1996, which governs appointment of Primary/Upper Primary School Teachers can in no manner be made in contrary to the NCTE Regulations. -

> "25. ..... The binding nature of the NCTE Regulations cannot be doubted. After the 42nd Amendment in the Constitution the power to legislate on professional and technical institutions and determination of standards of education therein can be treated to entries 65 & 66 of List 1 of the 7th Schedule to the Constitution. (See decision in Union of India V. Shah Goverdhan L. Kabra Teachers College, JT 2002 (8) SC 269). By the 42nd amendment the subject of 'education including Universities' which figures at Entry 11 in List II was deleted and substituted as Entry 25 in List III but subject to provision of entries 63, 64, 65 and 66 of List I. By virtue of re-allocation of power the States also have power to legislate on education, regulate the establishment and maintenance of education institutions but in exercise of the power cannot make rules contrary to standards prescribed under the Central legislation. ..."
>
> ".... We have therefore, no doubt in our mind that the qualifications fixed by the State under rule 266 of the Panchayat Raj Rules cannot govern appointment of teachers in primary/primary section of upper primary schools teachers to the extent it is contrary to the Regulations of the NCTE and the observations relied upon by the learned Advocate General lend no support to his argument."

As per qualifications mentioned in First Schedule to NCTE Regulations, apart from basic academic qualification of senior secondary school certificate or intermediate or its equivalent, those having

professional qualifications of diploma or certificate in Basic Teachers Training of a duration of not less than two years or Bachelor of elementary Education alone are eligible for recruitment in primary schools.

It has further been examined that at the level of upper primary school teacher, holder of degree of graduation with B.Ed or its equivalence has also been made eligible, which certainly applies to Special education for primary & upper primary School Teachers also irrespective of the fact that applicants are qualified of Senior Secondary (Academic/vocational) if brought at par with qualification of Teacher – B.Ed, as well, there will be no justification atleast to make them ineligible from participation in process of selection for the posts of Upper Primary School Teacher.

It is true that word, "or" has been used in Cl.(3) of upper primary middle school section but at the same time, Senior Secondary School or intermediate or its equivalent or graduation are the minimum qualifications. A conjoint reading of Cl.(3) (a) (i) and (ii) dealing with General education Level at (i) primary & (ii) Upper Primary (middle School Section), or at the same time, (b) Special Education level (i) Primary & (ii) Upper Primary (Middle School Section), those who are graduate with Bachelor of Education or its equivalent or have qualified in Diploma or certificate in basic teachers training of a duration of not less than two years or Bachelor of Elementary Education in no manner can be considered to be ineligible for upper primary school Teachers.

It is not the case of respondents that the NCTE being statutory expert body constituted and having fixed norms & qualification for recruitment of Teachers in educational institution under Cl.(d) S.12 of the Act and Regulations 2001, has ever issued any circular/directives to the State Govt. or to recruiting agency in making distinction amongst applicants having qualification of Senior Secondary (Academic/ Vocational) as condition of their eligibility for recruitment to the posts in question.

If parent authority (NCTE) has not made any distinction between two streams (Academic/ Vocational), State Government or its recruiting agency is not competent enough to make distinction between Senior Secondary (Academic/Vocational) of its own and take decision that holders of Senior Secondary (Vocational) are not eligible. To be more specific, once State Government has made amendment vide notification dt. 28.06.06 in conformity with the recruitment qualifications issued by NCTE under its Regulations, 2001 after this Court has upheld vide judgment in Kailash Chand Harijan Vs. State (supra) that State Government is under obligation to lay down qualifications in conformity

with NCTE regulations and in absence of any guidelines or Circular issued by NCTE very decision which State Government has now taken in holding Senior Secondary (Vocational) to be ineligible in the facts of instant case is not legally sustainable.

This Court in State Vs. M.K.Jhajharia (supra) vide judgment dt. 07.05.1999, has taken note of certain earlier judgments wherein it had been observed that Senior Secondary (Academic) is not equivalent to Senior Secondary (Vocational) and also observed ad infra:

> "(24) ..... That is, by the impugned circular dated 19.08.98, the prescribed qualification is not sought to be altered or amended. But it is only intended to clarify the position in the larger public interest having regard to the judgments of this Court on the issue. Hence it cannot be said that the impugned Circular is either violative of Art. 14 & 16 of the Constitution of India or arbitrary. On the other hand, it is consistent with pronouncements of the Division Bench of this Court referred to above. In our opinion, with all respect, the learned Single Judge was not right in quashing the impugned Circular dt. 19.08.98. Hence we are unable to sustain the common judgment under appeals."

However, at the same time, this Court further examined in latter judgment in Panna Lal Joshi Vs. State (2006 (6) RDD 3458) based on the decision of Supreme Court in Sunita Sharma Vs. State (2001 (10) JT (SC) 178) holding that Senior Secondary (Vocational) examination as equivalent to the Senior Secondary (Academic) examination. Counsel for parties at the Bar submits that earlier decisions were not considered in latter decision of Division Bench of this Court in Panna Lal Joshi Vs. State (supra).

Be that as it may, in instant case judgment referred to by either of the parties are of no assistance for the reason that the issue examined by this Court in earlier decision (supra) were in relation to qualifications laid down by State U/r 266 of Rules, 1996 prior to taking note of qualifications laid down by NCTE Regulations, 2001 and the State Government took its decision making out distinction between Sr., Secondary (Academic/Vocational). However, once it has been held by this Court in Kailash Harijan Vs. State (supra) observing that it is the NCTE being expert body created under NCTE Act, 1993, which along holds to maintain standard of education particularly teaching education and the State Government is under obligation to frame its Rules in conformity with qualifications for Teachers in educational institutions, according to which State Government has made amendment U/r 266 of Rules, 1996 vide notification dt. 28.06.06 and thus, in the absence of guidelines/directives of the NCTE, making distinction between qualification of Senior Secondary (Academic/Vocational) atleast after amendment dt. 28.06.06 holding Senior Secondary (Vocational) to be ineligible, deserves rejection.

It has been brought to the notice of this Court that there is no such Bridge course available or conducted by Board of Secondary Education, Rajasthan or by State Government. As noticed at one

point of time, when judgments were pronounced by this Court as per qualification laid down by State Government for primary school teachers holding Senior Secondary (Voc.) are not eligible, bridge course was introduced as one time measure and those who did their Bridge course, they were appointed by State Government. However, there is no such provision of bridge course being prevalent which can be acquired by Senior Secondary (Voc.) at this stage.

As observed (supra), it looses its legal sanctity also after amendment made under R.266 of Rules, 1996, vide notification dt. 28.06.06 when appointments are made through open selection while holding written examination through the PSC where every one gets an opportunity to compete on the face to open recruitment test. This can be a reason for which parent authority (NCTE) has not made any distinction between qualification acquired of Senior Secondary (Academic/Vocational) and considered Senior Secondary School certificate or intermediate or its equivalent as eligible for participation in process of selection for appointment as Primary/Upper Primary School Teachers.

In the facts of instant case, this Court is of the opinion that since NCTE alone holds competence and in absence of guidelines or directives from NCTE, decision impugned taken by respondents in denying consideration to such candidates holding Senior Secondary (Voc.) as ineligible in no manner can be said to be in consonance with existing Scheme of Rules, 1996 particularly in terms of amendment dt. 28.06.06 and such action of the respondent deserves to be set aside.

Consequently, all the petitions succeed and are hereby allowed. The decision taken by respondents holding petitioners ineligible on the premise of their qualification of Senior Secondary (Vocational) without Bridge Course, is hereby quashed and set side. Respondents are directed to consider petitioners who hold qualification of Senior Secondary (Vocational) as eligible for the posts of Primary/Upper Primary School Teachers and consider their candidatures for appointment based on their participation having taken place in pursuance of advertisement dt. 30.10.06 and if their names find place in order of merit in respective category, they may be considered and if found suitable, be appointed, however, they will be entitled for seniority, notional fixation etc, and all other service benefits but will not be entitled for salary for the intervening period during which hey did not actually work.

All exercise be completed to comply with directions (supra) within three months from today. No order as to costs.

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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
JAIPUR BENCH
S.B. Civil Writ Petition No.6397/2006
D.D. 20.02.2009
HON'BLE MR.JUSTICE AJAY RASTOGI

Rajesh Kumar Yadav ... Petitioners
Vs.
State of Rajasthan & Ors. ... Respondents

Recruitment:

Preparation of select list – Criteria for determining the inter-se merit:

Recruitment to the post of Primary Teachers – The petitioner OBC candidate secured 130 marks in the competitive examination but not included in the select list – The last OBC candidate selected secured same marks as the petitioner – But applying the criteria adopted by the Commission as the last candidate selected secured 1st division as against 2nd division secured by petitioner in B.Ed. which is one of the essential qualifications preference was given to him and consequently writ petition was dismissed.

The criteria adopted by the Commission are as follows:

(i) When two or more candidates having secured equal mark then preference is given to the candidate who is more/elder in age;

(ii) When marks and age is equal then preference is given to the candidate whose academic qualification is higher;

(iii) When marks, age and higher academic qualification are same then preference is given to the candidate whose marks are more in Senior Secondary and Graduation course.

ORDER

The instant writ petition has been filed by the petitioner with the grievance that despite he being placed in merit against the vacancies which were reserved for OBC (male) in pursuance to the advertisement issued by the respondent-Rajasthan Public Service Commission dated 2.6.2004 for the post of Primary and Upper Primary School Teachers, he has not been given appointment.

The petitioner being eligible, submitted his application for the post of Primary and Upper Primary School Teacher which is included in the schedule appended to the Rajasthan Panchayati Raj Rules, 1996, duly advertised by the respondent-Commission vide advertisement dated 2.6.2004. The petitioner appeared in the written examination and secured 130 marks and was declared successful. The date of birth of the petitioner is 1.7.1979 and according to the marks which were secured in open written examination read with criteria adopted by the Commission to prepare the inter se merit of the applicants who secured similar marks, the petitioner could not finally succeed to get appointment on the post of

Upper Primary Teacher in pursuance to the advertisement dated 2.6.2004 (Annexure-1). The petitioner tried to find out about the number of posts which remained vacant by submitting application under Right to Information Act in pursuance of which, he was informed vide letter dated 7.8.2006 (Annexure-6) about the available vacancies in OBC category, i.e. 4 in OBC Male category and 2 in OBC Female category.

Counsel for petitioner submits that he was higher in merit vis-à-vis the last person who was selected and considered for appointment and their inter se merit list has not been prepared by the respondent-Commission strictly in accordance with the criteria which has been laid down and averred in Para-5 of the reply. Counsel further submits that if both the applicants are holding similar qualification, the third and last criteria was required to be adopted to determine the *inter se* merit and the applicant who secured higher marks in Sr. Secondary & Graduation was to be considered for appointment which was not noticed by the respondent while preparing their inter se merit.

Counsel further submits that as per information made available to him under the Right to Information Act, vacancies were still left out and the petitioner can still be considered for appointment on the basis of his selection without disturbing the person who was last selected in the category of OBC (male).

Respondent-Commission has filed reply to the writ petition and in Para-5, it has been averred that the Full Commission in its meeting laid down the norms finally approved to determine inter se merit of such applicants who secured equal marks.

This court directed the Commission to file an affidavit pointing out the criteria which was adopted by them particularly regarding the case of the petitioner determining inter se merit vis-à-vis the last candidate in OBC (male) category duly selected and whose name was recommended to the State Government for appointment and so also to clarify about the vacancies, if any available in reference to the advertisement in question. In response thereto, an additional affidavit has been filed by the Commission in which it has been deposed that after completion of selection process in reference to advertisement dt.2.6.2004 (Ann.1), all left out vacancies were taken note of in later advertisement dated 30.10.2006 and selection process in reference to the October, 2006 advertisement has also been completed and no vacancy is available which could be considered as a left out vacancy available in reference to the advertisement issued in June, 2004. It has also been deposed that since academic qualifications of the petitioner and of the last selected applicant in OBC category were common at all

stages from Secondary to Post Graduation, but the last applicant secured 1st Division in B.Ed. whereas the petitioner is IInd Division B.Ed. and as per their criteria which the Commission adopted, prepared their inter se merit. It was further submitted that their *inter se* merit is strictly in consonance with the decision of the Full Commission and which has been finally affirmed by this court.

I have considered the submissions made and with their assistance, examined material on record. Before examining controversy, it will be appropriate to refer the criteria adopted by the Commission. The same is quoted as under:-

i) When two or more candidates having secured equal marks then preference is given to the candidate who is more/elder in age;

ii) When marks and age is equal then preference is given to the candidate whose academic qualification is higher;

iii) When marks, age and higher academic qualification are same then preference is given to the candidate whose marks are more in Senior Secondary and Graduation course.

It is relevant to mention here that it has also been informed that the criteria, as referred above, has been finally upheld by the Division Bench of this court.

As per statement made available for perusal of this court, both the two persons, petitioner & last selected applicant in OBC category, secured 130 marks, their date of birth is 1.7.1979 and both were first division in Secondary, Senior Secondary & second division at the stage of graduation. Both are post-graduates & B.Ed. which is one of essential qualifications. But in B.Ed., the last selected applicant is Ist Divisioner whereas the petitioner indisputably is IInd Divisioner and on this premise, respondent-Commission determined their inter se merit.

According to the criteria quoted (supra), adopted by respondent Commission, if applicants secured equal marks, their inter se merit is to be determined as per their date of birth and if the date of birth is also common, then applicant having higher academic qualifications is to be considered and if that is also same then the third step of giving preference to the applicant having secured higher marks in Sr. Secondary & Graduation, is to be followed in descending order as per criteria noticed supra.

In instant matter, when date of birth was common and both the applicants were holding post graduate qualification and their division was also common, respondent-commission took their percentage in B.Ed which is a pre-requisite condition of eligibility for the post in question and since other applicant

secured first division in B.Ed., while petitioner secured second division, took note thereof while determining their inter se merit. This Court does not find any apparent error or illegality in their decision in placing applicant above petitioner while determining inter-se merit and that was certainly in consonance with criteria (supra) approved by this Court.

At the same time, it is relevant to mention that applicant with whom petitioner has a grievance, is not a party before this Court and in his absence, no opinion even otherwise could have been expressed as it may cause prejudice to him.

It is true that it is certainly a heart burning for a person like petitioner that after having been selected, persons who secured equal marks and almost equally placed at all stages, have been given appointment. This Court has full sympathy with the petitioner but when there are limited number of vacancies, some rational criteria has to be adopted and since there were no vacancies left out in regard to process of selection of year 2004 impugned herein, as averred by respondents that left out vacancies were taken note of in subsequent advertisement issued in October, 2006 – process of selection whereof has also been finalised by now. It also goes without saying that mere selection does not confer any right to seek appointment and if no person lower in merit has been recommended & appointed by Government, it cannot be said that right of petitioner U/Art. 14 & 16 of the Constitution in any manner has been infringed.

Consequently, writ petition fails and is hereby is dismissed. No order as to costs.

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TAMIL NADU PUBLIC SERVICE COMMISSION

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Writ Petition No.38986 of 2002
D.D. 17.11.2005
The Hon'ble Mr. Justice P.Sathasivam &
The Hon'ble Mr. Justice S. K. Krishnan

The Tamil Nadu P.S.C. ... Petitioner
Vs
C.Munusamy & Ors. .. Respondents

Reservation:

The 1st respondent was one of the candidates for 4 vacancies in the subject Mathematics as indicated in the notification as against 5 posts under Backward Community category including the two vacancies reserved for women out of 15 posts notified for recruitment – As the 1st respondent stood 4th in the ranking list he was not selected – The Tribunal as per its order directed the petitioner to give appointment as District Educational Officer in any of the existing vacancies – The Commission has challenged the same in this writ petition – High Court has upheld the selection process carried out by the Commission and set aside the order of the Tribunal.

ORDER

P. Sathasivam, J.,

Aggrieved by the order of the Tamil Nadu Adminsitrative Tribunal, Chennai dated 11-07-2002 made in O.A.No.7099 of 1996, Tamil Nadu Public Service Commission has filed the above Writ Petition to quash the same on various grounds.

2. The first respondent herein has claimed appointment to the post of District Educational Officer in the selection conducted by the Tamil Nadu Public Service Commission during 1996. It is the claim of the first respondent that he has secured 212 marks. According to him, the procedure announced was that selection is based on the subject wise and the reservation and rotation system were also followed, however, such procedure was not followed in his case in the selection. Candidates should be selected for the subject Mathematics. Among the candidates in Backward Class community, he is the highest scorer next to Backward Class (Women). It is also his claim that if the rotation system was adopted, as announced in the notification, as he is No.2 candidate in mathematics and belongs to B.C, since he has secured the higher marks, he would have been selected. It is also his grievance that instead of following the same, the hghest scorer in the B.C (Women) has been selected and given posting apart from 2 M.B.Cs., and one S.C. He is No.2 among the candidates whose subject is mathematics. The Tribunal after referring to the stand of the Tamil Nadu Public Service Commission in their reply affidavit and finding that as per Clause 9 of the Notification, the selection is subject to rule of reservation only, has changed the system of selection and directed the applicant (first respondent

herein) be given appointment as District Educational Officer in any one of the existing vacancies within a period of three months from the date of its order and also observed that if no vacancy, he shall be given appointment in the vacancy that arises in future. Questioning the same, the Tamil Nadu Public Service Commission has filed the above writ petition.

3. Heard Mr. R.Sureshkumar, learned counsel for the petitioner; Mr. V.R.Rajasekaran, learned counsel for first respondent and Ms. V.Velumani, learned Additional Government Pleader for second and third respondents.

4. The only point for consideration in this Writ Petition is, whether the positive direction issued by the Tamil Nadu Administrative Tribunal selecting the applicant/ first respondent herein as District Educational Officer is sustainable or not?

5. It is seen that the Tamil Nadu Public Service Commission ("Commission" in short) based on the estimate of vacancies furnished by the Government in Education, Science and Technology Department, in its Notification dated 12-07-1995, invited applications from the candidates for appointment against 15 vacancies in the post of District Educational Officer/Inspectress of Girls Schools in the Tamil Nadu School Educational Service to be made by direct recruitment. As per the Notification, 12 candidates have to be selected among the Open Market and 3 from among the teachers employed in the recognised Aided Secondary Schools, as detailed below:

Subject	From Open Market	From among the Teachers employed in recognised aided Secondary Schools	Total
Maths	4	...	4
Physics	4	...	4
Psychology	3	...	3
Chemistry	1	...	1
English	...	2	2
Philosophy	...	1	1
Total	**12**	**3**	**15**

6. The method of appointment to the post of District Educational Officer and the qualification prescribed therefor in the annexure which is to be read with rule 6(i) of the Special Rules (Tamil Nadu School Educational Service) governing the post of District Educational Officer is as follows:

Name of the category	Method of Recruitment	Qualification
District Educational Officer, Inspectress of Girls Schools, Inspectress of Anglo Indian Schools, Assistant Director of School Education (Librarian) and Readers in the State Council of Educational Government and Research & Training, Madras.	Direct Recruitment (otherwise than from among teachers employed in recognised aided secondary schools)	i) Master Degree of any University in the State or a degree of equivalent standard in such subject or language as may be specified by the State
(1)	(2)	(3)
		ii) Should have studied Tamil Under Part I or Part II of their intermediate or Pre-University course or H.S.C.
	Direct recruitment from among teachers employed in recognised aided Secondary Schools	i) A Master's degree of any University in the State or a degree of equivalent standard in such subject or language as may be specified by the State Government. ii) Should have studied Tamil under Part I or Part II of their intermediate or PUC or HSC and iii) Teaching experience for a period of not less than 12 years in a recognised school after acquiring the degree of B.T. or equivalent qualification.
	Promotion and Transfer	i)A degree of any University in the State or a degree of equivalent standard and i) Teaching experience in a training or Secondary School for a period of not less than two years.

7. Rule 3 of the Special Rules governing the said post reads as under:

"3. Reservation of appointment. The rule of reservation of appointments (General

Rule 22) shall apply to appointments by direct recruitment to all the categories in the service, the appointments to each category being treated as one unit."

8. It is clear from the above details, one who intends for the post of District Educational Officer, he should be a Post graduate in the subject or language as specified by the Government. It also shows that the Rule of Reservation of appointments applies to the appointments to be made by direct recruitment to all the categories of post in the service and the appointment to each category of posts is being treated as one Unit. The particulars furnished further show the total number of vacancies in all the subjects were taken together and they were distributed among the various community categories in the roster relating to the recruitment. The details also show that while doing so, excepting one carried forward vacancy which relates to the MBC/DC category, according to the roster relating to the recruitment, the remaining 14 vacancies were to be filled up as follow:

1. MBC/DC
2. OC (GT)
3. BC (W)
4. OC (GT)
5. BC
6. SC
7. MBC/DC
8. OC (GT)
9. BC
10. OC (GT) (W)
11. MBC/DC (W)
12. BC
13. SC (W)
14. BC (W)

9. The Notification further shows that distribution of the said 15 vacancies (including one MBC/DC backlog vacancy) thus arrived at in the following manner:

SC	2	(including one vacancy reserved for women)
MBC/DC	4	(including one Backlog vacancy and one vacancy reserved for Women)
BC	5	(including 2 vacancies reserved for women)
Open Competition	4	(including one vacancy reserved for women)
Total	**15**	

10. The details furnished in the Notification make it clear that selection for recruitment to the post had been made based on the marks obtained by the candidates in the Main Written Examination and Oral Test taken together. It is the stand of the petitioner-Commission that among the 15 vacancies,

one vacancy relates to the subject – Philosophy and the same had to be filled up by the service candidates (ie) from among the teachers employed in the recognised aided Secondary Schools. Since no candidate with the Philosophy qualification had appeared for the post from among the teacher candidates for recruitment against the one vacancy in the subject Philosophy, which was to be filled up by the teacher candidate, the 15 vacancies announced for this recruitment was reduced to 14 at the time of drawing the list of candidates selected for admission to the Oral Test. Consequently, a BC (W) vacancy which was to be filled up according to the roster was not taken up for filling up the same.

11. In order to understand the steps taken by the Commission in making selection based on rule of reservation as well as subject wise, the following roster furnished by the Commission is relevant:-

TAMIL NADU PUBLIC SERVICE COMMISSION

ROSTER FOR THE POST OF DISTRICT EDUCATIONAL OFFICER/ INSPECTRESS OF GIRLS' SCHOOL IN THE TAMIL NADU SCHOOL EDUCATIONAL SERVICE, 1992-96

VACANCIES

GT	- 4 (1W)	MATHS	- 4
BC	- 4 (1W)	PHYSICS	- 4
MBC/DC	- 4 (1W)	PSYCHOLOGY	- 3
SCH	- 2 (1W)	CHEMISTRY	- 1
ST	- 0 (0W)	ENGLISH	- 2

Sl.No	CATEGORY	MARKS	ROLL NO.	NAME	SUBJECT
	BACKLOG VACANCY				
1	MBC/DC	197.50	330001	THIRU R.PITCHAI	MATHS
	1ST ROTATION				
2	15TH MBC/DC	195.00	330782	THIRU RAMESWARA MURUGAN VC	MATHS
3	16TH GT	225.00	330223	THIRU KANNAPPAN S (BC)	CHEMISTRY
4	17TH BC (W)	223.50	330469	TMT RAJARAJESWARI V	MATHS
5	18TH GT	221.50	330311	THIRU KARMEGAM S (BC)	PHYSICS
6	19TH BC	196.50	330217	TMT. UMA D	PHYSICS
7	20TH SC	162.50	330747	THIRU PALANISAMY M	PHYSICS
8	21ST MBC/DC	183.50	330677	THIRU KARUPPASAMY A	PHYSICS

9	22ND GT	205.50	330697	THIRURAJENDRANCM	ENGLISH
10	23RD BC	186.50	330070	THIRURAJENDRAND	PSYCHOLOGY
11	24TH GT (W)	172.50	330089	SELVILATHAN (BC)	PSYCHOLOGY
12	25TH MBC/DC(2	139.00	330122	TMT.RANJINIDEVID	PSYCHOLOGY
13	26TH BC	171.50	330145	THIRUAROCKIASAMYC	ENGLISH
14	27TH SC(W)	125.00	330066	USHARANIC	MATHS

In the affidavit, the Secretary of the Commission has explained that after the Oral test, based on the marks obtained by the candidates in the Main Written Examination and in the Oral Test taken together, a ranking list was prepared and from the said ranking list candidates were considered for selection for appointment based on their ranking position therein, and also having regard to the rule of reservation of appointments and the post graduate degree possessed by the candidates in the subject/language for considering them for appointment in such subject/language in which vacancies were announced. In addition, since two of the vacancies which relate to the language-English and to be filled up by the service candidates (i.e.) Teachers working in the Government aided secondary schools, the same was also taken into account. It is seen that while making actual selection, apart from merit and rule of reservation of appointments, Post graduate degree possessed by the candidates in the subjects/language for considering them in the vacancies pertaining to the said subject were to be considered. The Secretary has also informed that taking into consideration of all these factors, 14 candidates were selected from the ranking list according to the turns found in the roster and accommodated therein.

12. It is further seen that the first respondent herein, namely, C.Munusamy as one among the candidates who had applied to the Commission for this recruitment and selected for admission to the Oral Test. He belongs to Backward Class community and possesses M.Sc., degree in Maths and M.Ed., degree. He opted the subject-Psychology as optional subject for answering the Main Written Examination. He secured 212 marks both in the Main written Examination and in the Oral Test taken together. It is also demonstrated that based on the ranking obtained by him and having regard to the rule of reservation of appointments and also with reference to the vacancy position in the subject-Maths, the subject in which he has obtained the Masters degree, he did not reach his turn for selection for appointment to the post of District Educational Officer in the Tamil Nadu Educational Service. The counsel for the Commission has explained and demonstrated that while making selection, after selecting a candidate for the MBC/DC backlog vacancy, who was a Maths candidate and the higher mark holder among the MBC/DC category, another MBC/DC candidate who stood second among

the MBC/DC candidates in the ranking list who was also a Maths candidate was selected against one of the remaining 13 vacancies. It is also explained that since he too was qualified in the subject Maths, one of the remaining 3 vacancies in the subject Maths was filled up by selecting him. Thereafter, according to the Commission, against the Open Competition turn, a BC candidate who qualified in the subject-Chemistry was selected on the basis of merit. In the next turn reserved for BC (W), a BC (W) candidate who was also qualified in the subject Maths was selected. In the next vacancy reserved for Open Competition, a BC candidate who was qualified in the subject Physics was selected. It is highlighted that though in the next turn which relates to BC (General) category could have been filled up by selecting the first respondent, who was qualified in the subject Maths, in view of the fact that a turn reserved for SC (W) was available in the roster and the same had to be filled up by SC (W) candidate and two SC(W) candidates with the qualification in Maths alone were available and one among the two candidates who had secured higher marks had to be selected in that turn failing which, the turn reserved for SC (W) candidate would not have been filled up and would have had to be passed over and carried forward to the next recruitment. As rightly pointed out, the same could not be done when the candidates in the particular category were available, and the same was filled up by a SC (W) Maths candidate passing over the first respondent herein. Though Mr. V.R.Rajasekaran, learned counsel for the contesting first respondent, vehemently contended that though he (first respondent) –C.Munuswamy- a B.C. candidate scored more marks, namely, 212 which is higher than the selected candidate in Sl.No.6, namely, Tmt.Uma, D (BC)-whose mark is 196.50, in view of the above said reasons, namely, that one SC(W) candidate has to be filled up and 2 SC (W) candidates with qualifications in Maths alone were available, and one among the two candidates who had secured higher marks had to be selected in that turn, we are of the view that the course adopted by the Commission is in consonance with the notification and also constitutional mandate of rule of reservation. We are satisfied that the selection was made strictly according to the ranking position of the candidates in the ranking list and also having regard to the rule of reservation of appointments. To make it clear that in the course of selection, a SC (W) candidate for whom a vacancy in the respective turn is available for selection, the first respondent herein, had to be left without selection. It is not in dispute that all the four vacancies in the subject Maths were filled up as indicated in the chart, and the first respondent who stood fourth in the ranking list and qualified in the said subject (Maths) happened to be not selected and he as passed over.

13. The scheme as notified by the Commission proceeds that while making subject-wise selection

based on the marks obtained by the candidates in the Written Examination and in the Oral test put together and also duly following the rule of reservation of appointments, if the vacancies in the particular subject are exhausted, subsequent candidates who are qualified in the said subject were passed over though they have secured higher marks and the next candidates in the ranking list who are qualified in the other subjects were selected against the vacancies in the respective subject. As rightly pointed out by the Commission, the said course is unavoidable while making selection for the recruitment of the special nature.

14. As rightly pointed out by the learned counsel for the petitioner/Commission, when a vacancy reserved for SC (W) category was available in the roster, the same had to be filled up by among the two candidates available in that category in the ranking list and they also possessed the qualification in the subject-Maths. As said earlier, failure to select a candidate against the said turn when candidates in that particular category were available would have resulted in serious violation and in the event if the first respondent had been selected, the said turn, viz., SC (W) - Sl.No.14 would have been left unfilled and the same would have amounted to violation of the provision of the Constitutional right and that was the reason the first respondent herein was not selected for appointment. We are satisfied that the first respondent herein was not selected due to the accommodation given to a SC candidate (Maths). Though he was aware of the same, the first respondent has not impleaded the said SC (Maths) candidate in the Original Application filed before the Administrative Tribunal. We are satisfied that the selection made by the Commission is not erroneous as recorded by the Tribunal. In other words, the Commission had adopted the best method of selection and it is brought to our notice that all the selected candidates are working for nearly 7 years. If the order of the Tribunal is allowed to stand, it will certainly hamper the selection already made by the Commission and the selection for the subsequent recruitment for the same post. The Secretary of the Commission has also brought to our notice that there is no vacancy available in the post of District Educational Officer since all the 14 vacancies were already filled up. It is also brought to our notice that the next selection for the post of District Educational Officer was already over and the results declared in October, 2000. The Tribunal without considering all the relevant materials and without assigning reasons, has passed a cryptic order, directing the petitioner to select the first respondent

herein for appointment to the post of District Education Officer which cannot be sustained. Though learned counsel for the first respondent has contended that the subject-wise selection/reservation is

not being strictly followed and it varies year to year, we are concerned with the Notification of the Tamil Nadu Public Service Commission dated 12-7-95. Hence, there is no merit in the said contention.

15. Under these circumstances, the impugned order dated 11-07-2002, passed by the Tamil Nadu Administrative Tribunal in O.A. No.7099 of 96 is quashed and the Writ Petition is allowed. No costs.

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2006 Writ L.R. 598

IN THE HIGH COURT OF JUDICATURE AT MADRAS

W.P. No.6621/2005 & Connected cases

D.D. 31.03.2006

Hon'ble P.Sathasivam,J., and Hon'ble J.A.K.Sampathkumar, J.

T.V.Saravanan ... Petitioner

Vs.

Secretary to Govt & Ors. ... Respondents

Recruitment:

Whether number of posts advertised can be modified? - Yes

38 posts of Motor Vehicles Inspector Grade-II were advertised for direct recruitment for the year 1999-2000 – After the written examination the Commission requested the Government to confirm the 38 vacancies advertised – The Government in view of recommendation of Staff Expenditure Reforms Committee informed the Commission that recruitment for 20 posts was sufficient – The Commission restricted the selection to 20 posts instead of 38 posts advertised – In view of Instruction No.21(a) in the instructions to candidates to the effect that the number of posts advertised is only approximate and is liable to modification with reference to the vacancy position at any time or at the time of the actual recruitment – In view of this instruction High Court has upheld the decision of the Commission to restrict selection to 20 posts as against 38 advertised and consequently dismissed the writ petitions.

Held:

The existence of vacancies does not give legal right to a candidate in select list to be appointed to the post. It is open to the Government to decide how many appointments shall be made and the mere fact that the candidate's name appears in the list does not entitle him to be appointed. Only thing to be seen is that the decision not to fill up the vacancies has to be taken bonafide for appropriate reasons and not arbitrarily.

Cases referred:

1. AIR 1973 SC 2216 - State of Haryana v. Subash Chander

2. AIR 1984 SC 1850 - Jatinder Kumar v. State of Punjab

3. AIR 1991 SC 1612 - Shankarsan Dash vs. Union of India

4. AIR 1992 SC 749 - P.K.Jaiswal v. Debi Mukherjee

5. (1993) 1 SCC 154) - Chandigarh v. Dilbagh Singh

6. (2003) 5 SCC 437 - Union of India v. International Trading Co.

ORDER

Aggrieved by the proceedings of the Secretary, Tamil Nadu Public Service Commission, Chennai, published in the News Paper 'Dhina Thanthi', dated 07.07.2004, relating the result of selection to the post of Motor Vehicles Inspector Grade-II and the consequential proceeding of the second respondent – Transport Commissioner, Chepauk, Chennai, dated 01.02.2005, the petitioners have filed the above Writ Petitions to quash the same and issue direction to respondents-2 and 3 to select 38 persons from among the candidates selected for the post of Motor Vehicles Inspector, Grade-II, in the Tamil Nadu Motor Transport Subordinate Service 1999-2000.

2. Since the issue raised in all these Writ Petitions is one and the same, viz., questioning the decision of the Government in confining the selection with only 20 persons to the post of Motor Vehicles Inspector Grade-II when advertisement made was for recruitment against 38 vacancies, the Writ Petitions are being disposed of by the following common order.

3. For the purpose of convenience, we shall refer the case of the petitioner in Writ Petition No.6621 of 2005.

According to him, the third respondent/Tamil Nadu Public Service Commission issued advertisement to fill up 38 posts of Motor Vehicles Inspector Grade-II in the Tamil Nadu Transport Subordinate Service. The advertisement was given in the Newspaper on 31.07.1999. Pursuant to the same, he applied to the third respondent. Selection to the said post was made on the basis of written test and oral interview. The petitioner obtained higher marks than the cut off marks in the written examination and he was called for the interview by the third respondent. The interview took place on 09.06.2004. The third respondent published the marks obtained by each candidate in the Written Test as well as oral interview in the Newspaper on 07.07.2004. Thereafter, the second respondent, by his proceedings dated 01.02.2005, appointed 16 persons as Motor Vehicles Inspector Grade-II. On coming to

know the same, the petitioner made enquiries and also requested the third respondent to recruit persons as per the Notification dated 31.07.1999. In the said Notification, it was specifically mentioned that the vacant posts were 38. The selection was completed by the third respondent on 09.06.2004 and this was published on 07.07.2004. Since there was no proper response and no other remedy filed W.P.No.6621 of 2005.

4. A common counter affidavit has been filed on behalf of the Secretary, Home (Transport) Department and Transport Commissioner, wherein, it is stated that the Tamil Nadu Public Service Commission (TNPSC), in its Notification dated 22-07-1999, had invited Applications for 38 posts of Motor Vehicles Inspector Grade-II in the Tamil Nadu Transport Subordinate Service for selection under direct recruitment for the year 1999-2000. The written examination was conducted by the TNPSC on 13.11.1999 and 14.11.1999. At that time, the Commission requested the Government to expeditiously confirm the said 38 vacancies so as to enable the Commission to proceed with the selection process. The request of the Commission was examined in the light of the recommendations of the Staff Expenditure Reforms Committee, which has been constituted to study the pattern with reference to work load and it was concluded that recruiting 20 Motor Vehicles Inspectors Gr.II would be sufficient and that selection to the remaining 18 posts can be considered after final orders are passed on the Staff Expenditure Reforms Committee's Report. As per the instructions issued in letter No.82592/Tr.II/02-8, Home Department, dated 06.01.2004, the Commission restricted the selection to 20 posts. Accordingly, the Service Commission recruited 20 candidates for the post of Motor Vehicles Inspector Grade-II for the year 1999-2000 (instead of 38 posts as already advertised) and the approved list was furnished to the Transport Commissioner, under intimation to the Government. The petitioners failed to note Instruction No.21(a) of the Commission's Instructions to candidates, which reads that the number of vacancies advertised by the Commission is only approximate and is liable to modification with reference to the vacancy position at any time or at the time of the actual recruitment. Similar request made by the petitioner in W.P.No.16851 of 2002 was negatived by the Tamil Nadu Administrative Tribunal in O.A.No.1266 of 2004.

5. The Tamil Nadu Public Service Commission/third respondent has also filed a separate but identical counter affidavit, stating that the selection of candidates for admission to oral test was made for 20 vacancies as requested by the Government instead of 38 vacancies already advertised in the Commission's Notification dated 22.07.1999. The Commission also relied on instruction No.21(a)

of the Commission's Instructions to the candidates. Regarding the delay, it is stated that as per paragraph 4(b)(i) of the Notification for the said post, the candidates, who apply for the post, should posses the required experience in addition to the educational qualification prescribed. The Commission has to verify the details of experience furnished by the candidates in consultation with the Transport Commissioner, Chennai, ie., whether the experience certificates furnished by the candidates are genuine and whether the experience claimed by the candidates are as per the specifications notified etc. Only after ascertaining the above factors, the Commission will accept the candidature. According to the Commission, this scrutiny process will consume a considerable time. Further, consequent on the ban order on direct recruitment issued by the Government in G.O.Ms.No.212/Personnel and Administrative Reforms (P) Department, dated 29.11.2001, the Secretary to the Government, Personnel and Administrative Reforms Department, was requested to confirm the vacancies already furnished with Secretaries sto the Administrative Departments concerned. In reply, the Government (Home Department), in their letter dated 06.01.2004, requested the Commission to arrange to select 20 candidates for the year 1999-2000 in the said post (instead of 38 as already advertised) and to send the approval list to the Transport Commissioner, under intimation to Government. Accordingly, selection of candidates for admission to oral test was made for 20 vacancies as requested by the Government instead of 38 vacancies as already advertised. It is further stated that the above administrative actions are part of the recruitment process and the same cannot be construed as delay. The Commission can proceed with the selection process only after ensuring all the aspects pertaining to recruitment.

6. We heard Mr.R.Gandhi, learned Senior Counsel and Mr.K.Venkatramani & Mr.S.Kadarkarai, learned counsel, appearing for the respective Writ Petitioners; Mr.D.Krishnakumar, learned Special Government Pleader for the State as well as Mr.R.Sureshkumar, learned counsel for the Tamil Nadu Public Service Commission.

7. Mr.R.Gandhi, learned Senior Counsel and Mr.K.Venkatramani & Mr.S.Kadarkarai, learned counsel raised the only contention that having notified in the advertisement the number of candidates to be recruited as 38, there is no justification for reducing the same to 20 especially when vacancy in the post of Motor Vehicles Inspector Grade-II is on increase year to year. They further contended that in view of the fact that the petitioners participated in the written examination and some of them were successful, the third respondent ought to have selected all the 38 persons as called for and that the

respondents are not justified in reducing the same to 20. In other words, according to them, on the principles of legitimate expectation, the respondents ought to have considered the case of the petitioners and selected 38 person as called for.

8. On the other hand, Mr.D.Krishnakumar, learned Special Government Pleader and Mr.R.Sureshkumar, learned counsel for the TNPSC submitted that there is no question of legitimate expectation. According to them, the Government, only after taking note of several aspects including the recommendations of the Staff Expenditure Reforms Committee, decided to recruit only 20 persons in the first phase, making it clear that selection to the remaining 18 posts can be considered after final orders are passed on the report of the Staff Expenditure Reforms Committee, hence, they are fully justified in filling up 20 posts. Thus, according to them, there is no merit in the claim made by the petitioners and they pray for dismissal of the Writ Petitions.

9. We have carefully considered the rival contentions and the materials placed.

10. There is no dispute that in the Advertisement the TNPSC called for applications for fill up 38 vacancies in the post of Motor Vehicles Inspector Grade-II in the Tamil Nadu Motor Transport Subordinate Service 1999-2000. However, before completion of the selection, the Service Commission, in order to ensure speedy selection, requested the Government to confirm as to whether the said 38 vacancies are to be frilled up advertised. In the counter affidavit filed by the Deputy Secretary to Government, Home Department, it is explained that the request of the Commission was examined in the light of the recommendations of the Staff Expenditure Reforms Committee, which has been constituted to study the staff pattern with reference to the work load and consequently it was concluded that recruitment to 20 Motor Vehicles Inspectors Grade-II in the first phase would be sufficient and that selection to the remaining 18 posts can be considered after final orders are passed on the Staff Expenditure Reforms Committee's Report. It is brought to our notice that, as per the instructions issued in letter No.82592/Tr.II/02-8 Home Department dated 06.01.2004, the Commission restricted the selection to 20 posts. Based on the above instruction, the Service Commission recruited 20 candidates for the post of Motor Vehicles Inspector Grade-II for the year 1999-2000 instead of 38 posts as advertised earlier.

11. As rightly pointed out by the learned counsel appearing for the respondents, the Commission, in Instruction No.21(a), has specifically stated as follows:-

> "The number of vacancies advertised by the Commission is only approximate and is liable to modification with reference to the vacancy position at any time or at the time of the actual recruitment."

It is also brought to our notice in the form of counter affidavit by the Home (Transport) Department that though written examination was conducted by the TNPSC on 13.11.1999 and 14.11.1999 pursuant to the Commission's Notification dated 22.07.1999, the Commission requested the Government to confirm as to whether selection is to made to fill up all the 38 vacancies as notified. It is further seen that the request of the Commission had been examined by the Government in the light of the recommendations of the Staff Expenditure Reforms Committee, which was constituted to study the staff pattern with reference to workload. It is on the report of the said Committee, the Government concluded that recruiting 20 Motor Vehicles Inspector Grade-II in the first phase would be sufficient and that the remaining 18 posts can be considered after final orders are passed on the report of the Committee. The said instruction was communicated by the Home Department in their letter dated 06.10.2004. Based on the same, the Commission restricted the selection to 20 posts.

12. We have already referred to the Commission's Instructions to the candidates, which make it clear that the number of vacancies advertised is only approximate and the same is liable to modification with reference to the vacancy position at any time or at the time of the actual recruitment.

13. Mr.R.Gandhi, learned Senior Counsel, vehemently contended that in view of the fact that more accidents are taking place every day, it cannot be claimed by the Government that the need to recruit more Motor Vehicles Inspectors Grade-II does not arise. According to him, the vacancy position of the subsequent years clearly shows the necessity to recruit more Motor Vehicles Inspectors grade-II. In such circumstances, according to him, the petitioners, who wrote the examination pursuant to the Notification, ought to have been considered. He further contended that reduction of the number of posts by the Government is not warranted.

14. In the light of the above factual position, let us consider,

(a) Whether the petitioners have established 'legitimate expectation'

(b) Whether the Government have power to alter/reduce the number of posts to be filled up; and

(c) The role of the Tamil Nadu Public Service Commission in such event.

15. In the decision reported in AIR 1973 SC 2216 (State of Haryana v. Subash Chander), while considering similar contentions in respect of appointment of Subordinate Judges, Their Lordships of the Supreme Court have held as follows:

> "8. ..... One fails to see how the existence of vacancies gives a legal right to a candidate to be is finally closed, it cannot be called as discrimination. The relevant passage is extracted hereunder,
>
> " 7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. ...."

It is clear from the above decision that the candidate could not, as of right, claim that he should have been selected, when his name could not be included before the process of final selection was closed. It is also clear that unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. Their Lordships have held that the decision not fill up the vacancies has to be taken bona fide for appropriate reasons.

17. In Union Territory of Chandigarh v. Dilbagh Singh (1993) 1 SCC 154), while considering similar question, the Supreme Court, in para No.12 of the decision has concluded as follows:-

> "If we have regard to the above enunciation that a candidate who finds a place in the select list as a candidate selected for appointment to a civil post, does not acquire an indefeasible right to be appointed in such post in the absence of any specific rule entitling him for such appointment and he could be aggrieved by his non-appointment only when the Administration does so either arbitrarily or for no bona fide reasons, it follows as a necessary concomitant that such candidate even if has a legitimate expectation of being appointed in such posts due to his name finding a place in the select list of candidates, cannot claim to have a right to be heard before such select list is cancelled for bona fide and valid reasons and not arbitrarily. ....."

It is made clear in the above referred decision that the selectees not entitled to an opportunity of hearing before cancellation as even though they have legitimate expectation but they have no indefeasible right to be appointed in the absence of any rule to that effect.

18. In the decision reported in AIR 1992 SC 749 (P.K.Jaiswal v. Debi Mukherjee), Their Lordships of the Supreme Court, while dealing with an identical issue, held as follows:-

> "5. ..... If the Government is at a given point of time considering the question of amending the recruitment rules with a view to providing for promotion to the post in question, the Government can before an advertisement is issued by the Commission and the process of selection is under way request the Commission to withdraw the same till it decides on the question of amending the rules. The decision of the Government to withdraw the requisition sent to the Commission in November 1989 before the issuance of the advertisement does not interfere with any vested right of selection because that stage had yet not reached. In the instant case, that is exactly what happened. Therefore, before the appellant acquired a right to be considered for selection the Government had already intimated that it was examining the question of amending the recruitment rules with a view to providing for appointment by promotion to the post in question. Once this decision was communicated to the Commission before it had set the process of selection in motion by issuing an advertisement, it was not open to the Commission to insist that it will go ahead with the selection process as the extant rule provided for promotion by direct recruitment and the Government could amend the recruitment rules retrospectively, if it so desired, with a view to providing for appointment by promotion. Such an exercise by the Commission would be in exercise in futility, waste of public time and money and hardship to candidates who seek appointment. Whether to provide for promotion as a mode of appointment to the post in question is a matter of policy left to the Government to decide and if it desired that the selection process should be held in abeyance till the question was examined and a final decision was taken thereon, it was not open to the Commission to ignore the communication of the Government in that behalf and proceed to set the selection process in motion. ....."

Thus, it is clear that when the Government seeks to withdraw the Notification issued by the Commission for various reasons, the Commission cannot insist on going ahead with the selection.

19. In Union of India v. International Trading Co. ((2003) 5 SCC 437), while considering the terms 'legitimate expectation' and 'promissory estoppel', the Supreme Court has held as follows:-

> "23. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the

> circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country. ..."

20. In AIR 1984 SC 1850 (Jatinder Kumar v. State of Punjab), three Judges Bench of the Hon'ble Supreme Court has held that the Government is free to decide how many appointments will be made even after Notification by the Commission.

21. The above principles make it clear that the State, while filling up the vacancies, has to act bona fide and not arbitrarily. Even if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates do not acquire any indefeasible right to be appointed against the existing vacancies. Though Notification amounts to an invitation to qualified candidates, the decision make it clear that on their selection they do not acquire any right to the post. It is also clear that unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it cannot be claimed that the State has licence to act in an arbitrary manner. As pointed out by the Constitution Bench of the Supreme Court in the decision reported in AIR 1991 SC 1612 (cited supra), the decision not to fill up the vacancies has to be taken bona fide for appropriate reasons.

22. In these cases, we have already pointed out that though initially the Government requested the TNPSC to take action for filling up 38 vacancies in the post of Motor Vehicles Inspector Grade-II, subsequently, when the Commission asked for clarification, the Government, after taking note of recommendations of the Staff Expenditure Reforms Committee, which was constituted to study the staff pattern with reference to the work load, decided to recruit 20 Motor Vehicles Inspectors Grade-II at the first instance, making it clear that selection to the remaining 18 posts can be considered after thorough scrutiny of the report of the Committee.

23. It cannot be contended that there is no bona fide action on the part of the Government. We have already pointed out that even after selection, unless the Government accepts and approves the list, the persons, whose names find place, cannot have a vested right. Likewise, the Commission though notified large number of vacancies to be filled up, it is bound by the direction/instruction of the Government for restriction of the number of posts. The only condition, as clear from the decisions of the Hon'ble Supreme Court, is that the action of the Government should be bona fide one and not arbitrary. We are satisfied that the conclusion of the Government for selection only to the extent of 20

posts, based on the recommendation of the Staff Expenditure Reforms Committee, is a bona fide one and the same cannot be characterised as arbitrary. In a matter of employment, it is the Government, who is the authority to decide, particularly the number of persons required for the posts available, taking note of various aspects including work load, need, financial position etc. In such circumstances, we are satisfied that the decision of the Government in confining the selection with only 20 persons to the post of Motor Vehicles Inspector Grade-II is a bona fide one and there is no error in their decision. Thus, we are unable to accept the contention raised by the learned counsel for the petitioners.

24. In these circumstances, we do not find any error or infirmity in the impugned proceedings. Consequently, all the Writ Petitions fail and they are accordingly dismissed. No costs. Connected Miscellaneous Petitions are also dismissed.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS
Writ Petition No.32383/2005 & Connected cases
D.D. 12.6.2006
The Hon'ble Mr. Justice P.Sathasivam &
The Hon'ble Mr. Justice J.A.K.Sampathkumar

M.R.Thirunthaiyan & Ors. ... Petitioners
Vs.
The Secretary, Tamil Nadu PSC & Ors. ... Respondents

Examination: Defects in the Application :

Whether instructions to candidates in the notification/application form are mandatory? – Yes

Petitioners were candidates for recruitment to the posts of Assistant Surgeon – Information brochure was supplied to the candidates along with the application forms with illustration as to how the applications are to be filled up etc. – Out of 7123 applications received 1306 were rejected as defective for one or other reason – Petitioners among others contended that the mistakes were bonafide mistakes no chance or opportunity given to the petitioners to rectify the defect, that the mistakes are only an irregularity which can be rectified at any stage of recruitment etc. – High Court examining the whole aspect in the light of the decision on the point held that the instructions are mandatory and required to be complied with strictly and consequently, dismissed the writ petitions.

Held:

First of all as rightly pointed out if request for rectifying the defects is permitted, the selection schedule and the process of examinations cannot be adhered to. Hence the argument of the petitioners ought to have been given an opportunity to rectify the mistake in the application form cannot be accepted.

Cases referred:

1. AIR 1983 SC 580 = 1983 (96) LW 172 S.N. - Punjab Engineering College, Chandigarh vs. Sanjay Gulati
2. 1986 WLR 207 – Rathnaswamy, Dr.A. Vs. Director Medical Education
3. AIR 1990 S.C. 958 - M/s G.J.Fernandez vs. State of Karnataka
4. AIR 1991 S.C. 1579 - M/s. Poddar Steel Corporation Vs. M/s Ganesh Engineering Works
5. 1994 (4) Recent Services Judgments 289 – Raj Singh vs. Maharshi Dayanand University
6. 1994 WLR 624 – Nithiyan P. and S.P.Prasanna vs. State of Tamil Nadu
7. 1997 (3) RSJ 475:AIR 1998 Punj & Har. 18 – Rahul Prabhaar vs. Punjab Technical Univerity, Jalandhar
8. AIR 1999 Punjab & Haryana 319 (FB) – Indu Gupta vs. Director, Sports Punjab, Chandigarh
9. 2001 (2) SCC 451 - W.B. State Electricity Board vs. Patel Engineering Co.
10. 2001 (6) SCC 46 - Rajsekhar Godoi vs. State of Assam
11. 2005 WLR 697 – Dr.M.Ashiq Nihmathullah vs. The Government of Tamil Nadu & Ors.
12. 2006(2) TNLJ 52 (Civil) – G.Pakkiaraj vs. The Secretary, Tamil Nadu Public Service Commission & Anr.

ORDER

P.Sathasivam, J.

A simple, but important question having far reaching consequences in the field of education and employment arises for consideration in this batch of writ petitions.

2. Since the issue raised in these writ petitions is one and the same, they are being disposed of by the following common order.

3. For convenience, we shall refer the case of the petitioner in W.P. No.32895 of 2005.

(a) According to the petitioner i.e., Dr. M.Vennila, she passed out M.B.B.S. degree in the year 2005 in Tamil Nadu Dr. M.G.R. Medical University. She got her name registered in the Tamil Nadu Medical Council, Chennai on 2.5.2005. The Tamil Nadu Public Service Commission, the respondent in the writ petition issued Notification on 1.7.2005 for filling up the post of Assistant Surgeon (General/ Specialty) in the Tamil Nadu Medical Service for the year 2003-04. The respondent also issued an advertisement in the Newspapers for the said direct recruitment for filling up 1295 posts of Assistant Surgeon (General) and 530 posts in 23 different specialties. The advertisement was published in leading Newspapers on 4th to 6th July, 2005. On the basis of the said advertisement, the petitioner, Dr. M.Vennila applied for the post of Assistant Surgeon (General) along with prescribed fee and other documents in time. She properly filled up all the columns of application form as instructed by the respondent in the information brochure and signed all the relevant places as indicated by the respondent. The last date for receipt of duly filled in application form was 4.8.2005 and she sent the application well in time.

(b) The procedure for selection of candidates includes written examination and oral test in the shape of interview. The respondent scheduled the date for written examination as 16.10.2005. But, she received the impugned communication from the respondent dated 23.9.2005 rejecting her application on the ground that she did not sign the declaration in the application form. As per the general instructions, the column No.24 of the application form required the petitioner to fill up the details regarding "previous/present employment." In the sub-column 24(a) the petitioner was required to fill up the details of "previous appearance in oral tests". Since she misunderstood that the declaration

column found in the application form was only for office use, she did not sign the same. She filled up the application correctly providing necessary information as asked for and enclosed the requisite fee and copies of relevant documents as required by the respondent. The application is complete in every aspect and the approach of the respondent that she did not sign the application form is not correct. The rejection of her application form by the respondent is arbitrary and not sustainable.

(c) Similar averments have been made in all the writ petitions.

4. According to the respondent, namely, Tamil Nadu Public Service Commission, by Notification dated 1.7.2005 applications were invited from candidates for direct recruitment to the post of Assistant Surgeon (General/Specialty) in the Tamil Nadu Medical Service for the year 2003-2004. The last date prescribed for receipt of filled in application in the office of Tamil Nadu Public Service Commission was 4.8.2005 and the same was mentioned in the notification issued by the Commission. In response to the notification, 7123 candidates applied to the Commission and out of 7123 candidates, initially a total number of 5317 candidates were found eligible to take up the examination for recruitment and the applications of 1306 candidates were found defective for one or other reasons and accordingly, they were rejected.

5. Paragraph 17 of the Commission's Instructions, etc. to candidates, which was supplied to all candidates along with the application form makes it clear that the filled up applications must reach the Controller of Examinations on or before the prescribed date and applications received after that date or applications which are not signed or application which are not in the proper form or not correctly filled up or in respect of which the prescribed certificates and documents are not received on or before that date and applications or which do not otherwise fulfill the terms of instructions found in the "notification/advertisement" will be considered defective and will be summarily rejected. Further, the Commission has also enclosed "Information Brochure" along with the application form. The illustrations as to how the applications are to be filled up are also given. The language used and the columns given in the application are clear and there is no ambiguity in the columns of application regarding the places at which the applicant has to subscribe his/her signature.

6. The signature connotes the authenticity of the person who certifies as well as the accuracy and correctness of the particulars provided and furnished by him. As such, the non-signing by the applicant at page 2 of the application has made the particulars furnished by the applicant unauthenticated and could not be considered as a valid application. Not even a single candidate who had failed to sign in

the application form and who had failed to produce the essential documents were allowed to write the written examinations held on 16.10.2005 suo motu, except the candidates who had obtained interim orders from the Court. The petitioners are supposed to go through the Notification, Instructions, etc., to candidates, Information Brochure and OMR application form properly in order to ensure whether the particulars and information that are required to be furnished in the OMR application are duly furnished and see that the documents are enclosed with the application form as per the requirements. Even in the space "For Office Use Only" there is a blank space, which alone is intended to be utilized by the Office and the same has sufficiently been started from 'declaration' which is intended to be signed by the candidates. Had the petitioner gone through the declaration at page-2 of the application carefully, no confusion would have arisen. It is the duty of the petitioner to verify the filled in application before submitting the same to the Commission and the petitioner cannot expect that the omissions would be got rectified by any means.

7. In the light of the above pleadings, we heard learned counsel for the petitioners and learned Advocate General for the respondent.

8. The main contentions raised on behalf of the petitioners are as follows:

1. All columns are duly filled up and only in declaration column, candidates did not sign due to ambiguous formatting of the application form and on this ground the applications cannot be rejected;
2. The failure to sign column 24 would not affect in any way, since the applicants signed all other places.
3. Tamil Nadu Public Service Commission (TNPSC) permitted some candidates to rectify certain defects and failed to treat the petitioners on par with them.
4. The reason for rejection of applications is flimsy, unjust and arbitrary and it is only an irregularity which can be rectified at any stage of recruitment.
5. The respondent had not given a chance or opportunity to the petitioners to rectify the defect.
6. It is only a bona fide mistake.

9. Learned Advocate General met all the points and submitted that paragaph-17 of the Commission's Instructions, etc., to Candidates makes it clear that the applications which are not signed in the proper form or which are not correctly filled up or not enclosed with prescribed certificates and documents will be considered defective and will be summarily rejected. He also contended that the Information Brochure supplied to all the candidates along with the application form gives all the

details as to how the columns in the application are to be filled up. He further contended that a model form duly filled up has also been enclosed with the application to all the candidates and that the details mentioned in the notification/advertisement and instructions found in the form of Information Brochure are mandatory. According to him, the application without signature of the applicant has no effect at all and it lacks authenticity and accordingly, the respondent is justified in rejecting the applications of the petitioners.

10. We have perused the relevant materials and considered the rival contentions.

11. The application forms issued by the TNPSC, the respondent herein, contained two pages. The top portion, the candidates are specifically requested to read carefully the brochure before filling up the application form. The same has been mentioned both in English as well as in vernacular language (Tamil). As per the application, the applicant has to fill up all the details regarding name, examination particulars, date of birth, religion, community, educational qualification, main subject, code etc. In the first page itself the candidate has to affix recent passport size photograph and sign at the bottom of the affixed photograph. In the second page, the candidate has to fill up details of fee paid, age concession, claim for fee exemption, subject chosen for examination, post preference, particulars of previous/present employment and previous appearance for oral test etc. Thereafter, that is, after column 24, the applicant has to sign. At the end of the application six declarations have been printed in English and Tamil language and at the end, i.e. after declaration, the applicant has to sign. In other words, altogether the applicant has to sign in three places one at the first page and in two at the second page.

12. It is not in dispute that in paragraph 17 of the Commission's Instructions etc. to Candidates, necessary instructions have been given and the applicants are also informed that failure to fulfill all the columns will render the applications summarily rejected. Column 17 of Commission's Instructions etc. to Candidates reads as under:

> "17. Application must reach the Controller of Examinations on or before the prescribed date. Applications received after that date or applications which are not signed or applications which are not in the proper form or which are not correctly and completely filled or in respect of which the prescribed certificates and documents are not received on or before that date and application which do not otherwise fulfill the terms of these instructions and the "Notification/Advertisement" will be considered defective and will be summarily rejected.

> The filling in of the application form correctly and completely and sending with it all the documents as required in the Commission's "Notification/Advertisement" and "Instructions, etc., to Candidates" form part of the test for selection. Failure in this regard will entail summary rejection of the application."

As said earlier, the said instructions have been furnished in Tamil language also.

13. In addition to the same, all the candidates were supplied specimen application form duly filled up. A perusal of the filled in specimen form makes it clear that whether and in how many places the applicant has to sign. Apart from this, we also verified all the columns in the application form. We are satisfied that the language used and the columns given in the application form are very clear and there is no ambiguity in the columns of application regarding the places where the applicant has to subscribe his/her signature.

14. As rightly pointed out by the learned Advocate General, the insistence upon signature under each and every page has its own significance. Signature connotes the authenticity of the person who certifies as well as the accuracy and correctness of the particulars provided and furnished by him. In such circumstances, we are of the view that non-signing by the applicants at page 2 of the application form has rendered the particulars furnished by them unauthenticated and the application could not be considered as a valid application. The respondent is fully justified in arriving at a conclusion that the particulars furnished by the petitioners without signature are construed as being not authenticated.

15. As rightly pointed out, the filled in application must be in order and intact in all aspects and before filling up the application form, the applicants are supposed to go through the Notification, Instructions, etc., to candidates, Information Brochure and OMR application form properly in order to ensure that the particulars and information which are required to be furnished are duly furnished and to see that the documents are enclosed along with the application form as per requirements.

16. Now, let us consider whether the requirements as stated in the Notification/ Information Brochure are to be strictly complied with or not and in other words, whether they are mandatory?

17. Learned Counsel appearing for the petitioners referred to two decision of the Supreme Court viz., (i) M/s G.J.Fernandez vs. State of Karnataka (AIR 1990 S.C. 958); and (ii) M/s. Poddar Steel Corporation Vs. M/s Ganesh Engineering Works (AIR 1991 S.C. 1579) and contended that failure to sign below the Column-24 and below the declaration column is curable. In view of the above

submission, we verified the factual position in the above referred two decisions. It is not in dispute that both the decisions relate to submission of Tender Forms. On going through the factual details and the ratio laid down therein, in view of the specific details furnished in the Information Brochure and Notification issued by the Tamil Nadu Public Service Commission, we are satisfied that the same are not helpful to the petitioners. As a matter of fact, in the latter decision, viz., AIR 1991 SC 1579 (cited supra), the defect that was pointed by the Government Agency was that though the earnest money under the terms of tender notice was permitted to be deposited only by cash or by demand draft drawn on the State Bank of India, the payment of earnest money was sent by way of certified cheque of Union Bank of India and in that situation, the Supreme Court after pointing out that the payment of earnest money by certified cheque of Union Bank of India, drawn on its own Branch could be treated as sufficient compliance of the terms. Their lordships have also held that it could not be said that the authority inviting the tenders could not waive the literal compliance of such a condition and accept the tender especially when it was in its interest not to reject the bid which was the highest. In our case, in all these writ petitions, the petitioners have not signed the applications, some in two places and others below the declaration. In such circumstances, as said earlier, the decisions relied on by the learned counsel for the petitioners are not helpful to their stand.

18. The learned counsel for the petitioners referred to the decision of a learned single Judge of this Court in the case of G.Packkiaraj vs. The Secretary, Tamil Nadu Public Service Commission, Government Estate, Chennai and another (2006 (2) TNLJ 52 (Civil). It is a writ petition relating to rejection of an application of the petitioner, G.Packkiaraj, who applied for the post of Assistant Public Prosecutor Grade-II. The application was rejected, since he did not sign the application. According to the petitioner, he did sign at the bottom of the application as well as Column 15 where the applicant has to affix his photograph and sign underneath the photograph. But in the application form, there is one other place, i.e. at the end of Column 24 where the signature of the applicant was required to be made. In that particular column, the petitioner failed to put his signature. It was on that ground, the application of the petitioner came to be rejected inasmuch as, as per the instructions issued to the candidates, applications which are not signed would be summarily rejected. It was contended before the learned Judge that the petitioner was totally misled by the application which was issued in a single sheet, which required the signature of the applicant in more than one place and when it required the signature of the applicant at the end of the application form, which was just below the "Declaration part", the non-signing by the petitioner below the column-24 was not deliberate and was only due to

inadvertence and therefore, the meritorious claim of the applicant should not be thrown out on account of such minuscule mistake. On behalf of the Commission, very same objection was raised, viz., that the Instructions to the Candidates were specific to the effect that the applications without signature would be summarily rejected. It was informed before the learned Judge that the petitioner was permitted to write the examinations as a special case, subject to the outcome of the writ petition. It was further informed before the learned Judge that the petitioner was successful in the written examinations and also attended viva-voce and the respondents found that he secured the required minimum marks for attending the oral test. His result was kept in a sealed cover and the same was opened before the learned Judge who noted that the petitioner secured 216.50 marks in the written test out of 400 and in the oral test he secured 30 out of 60 marks and in all, the petitioner secured 246.50 marks. In the circumstances, the learned Judge came to the conclusion that the petitioner is a meritorious candidate, that too belonging to Scheduled Caste and arrived at a conclusion that "minuscule mistake committed by the petitioner should not loom large in order to deprive of his very valuable right". It is not in dispute that there also the notification of the Commission made it clear that all columns are to be filled up and the applicants are to sign at all the places indicated therein. In spite of the specific instructions, the petitioner therein has not signed at a place where he has to sign in the application form. The academic excellence of the petitioner might have influenced the mind of the learned Judge to out-weigh his mistake in not filling up the relevant column. However, the conditions stated in the Notification as well as in Information Brochure are not only mandatory and also binding on the candidate as well as the Commission/State Government. We will give our reasons as to the mandatory nature in the latter paragraphs. We have already mentioned that the petitioner therein was not only successful in written test but also in viva-voce and secured pass mark and he belongs to Scheduled Caste, and therefore, the learned Judge issued a direction to the Commission to entertain his application and issued further direction to declare him as successful in the examinations. We are unable to accept the view expressed by the learned Judge. In view of the academic excellence and of the fact that the petitioner was successful in the written examination as well as vivo-voce, the conclusion arrived at by the learned Judge should be confined to the case before him and the same cannot be cited as a precedent for other cases. In fact, in respect of rejection of the applications applied for the very same post of Assistant Surgeon, another learned Judge by orders dated 05.10.2005 and 07.10.2005, dismissed Writ Petition Nos.32270 and 32548 of 2005 respectively. Though the orders of the learned Judge are very brief, we are in agreement with the conclusion arrived at by him.

19. The principle that the prospectus is binding on all persons concerned has been laid by the Supreme Court in Punjab Engineering College, Chandigarh vs. Sanjay Gulati (AIR 1983 SC 580 = 1983 (96) LW 172 S.N.). Following the same, a Division Bench of this Court has also observed in Rathnaswamy, Dr. A. Vs. Director of Medical Education (1986 WLR 207) that the rules and norms of the prospectus are to be strictly and solemnly adhered to. The same view is also taken by another Division Bench of this Court in Nithiyan P. and S.P. Prasanna vs. State of Tamil Nadu (1994 WLR 624). The same principle is reiterated in the case of Dr. M.Ashiq Nihmathullah vs. The Government of Tamil Nadu and others reported in 2005 WLR 697. It is clear that the prospectus is a piece of information and it is binding on the candidates as well as on the State including the machinery appointed by it for identifying the candidates for selection and admission.

20. Learned Advocate General relied on the following two decisions of the Supreme Court, (i) W.B. State Electricity Board vs. Patel Engineering Co. (2001 (2) SCC 451); and (ii) Rajsekhar Godoi vs. State of Assam (2001 (6) SCC 46) in support of his stand. It is true that both the decisions relate to Government contracts and submission of tenders. The following observation made in 2001 (2) SCC 451 (cited supra) is relevant.

> "23. The mistakes/errors in question, it is stated are unintentional and occurred due to the fault of computer termed as "a repetitive systematic computer typographical transmission failure". It is difficult to accept this contention. A mistake may be unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake. Here the mistakes may be unintentional but it was not beyond the control of respondents 1 to 4 to correct the same before submission of the bid. Had they been vigilant in checking the bid documents before their submission, the mistakes would have been avoided. Further, correction of such mistakes after one and a half months of opening of the bids will also be violative of clauses 24.1, 24.3 and 29.1 of the ITB."

In para 31 their Lordships have held,

> "31. ..... It is equally in public interest to adhere to the rules and conditions subject to which bids are invited. ...."

After laying down the law, though the bid of respondents 1 to 4 therein is the lowest of bids offered, in view of the fact that there is inconsistency between the particulars given in the annexure and the total bid amount, their Lordships refused to issue direction to consider their bid along with the other bids. It is clear that though bid of the respondents 1 to 4 therein is less by 40 crores and 60 crores than that of respondents 11 and 10 respectively, in view of the defect in complying with the conditions, the Supreme

Court refused to issue direction for acceptance of the lowest bid of respondents 1 to 4. In other words, it makes it clear that it is in public interest to adhere to rules and conditions and there cannot be any laxity in compliance with the same.

21. In the second decision, viz., 2001 (6) SCC 46 (cited supra), though it also relates to submission of tenders, the principle laid down is helpful to the stand taken by the Tamil Nadu Public Service Commission. The respondent No.4, in respect of column whether the tenderer is capable of financing his business himself, namely, details of source, cash in hand, bank balance, security, assets etc., has made a bald statement that she would receive financial assistance from her father and also from her sister and sister's husband. No documents or even affidavits or any other particulars were furnished along with the tender which she submitted. There is no indication as to whether she had any cash in hand or bank balance. In the absence of specific materials regarding finance, nature of business, cash in hand, bank balance, security, assets etc., the Supreme Court has concluded that the need for furnishing particulars in the tender form obviously is to enable the authorities concerned to scrutinize the tender to determine financial capability of the tenderer. Taking note of Clause 10 of the Tender conditions (which is imperative) their Lordships have concluded that,

> "10. This clearly shows that it was imperative for a tenderer to furnish full information as required so that the same could be verified by the deputy Commissioner or any other authorized person "before settlement of shop of the tenderer" (emphasis added). In the present case, such an opportunity was clearly denied to the authorities when respondent 4 had not furnished the requisite particulars along with her tender.
>
> 11. We are therefore, of the opinion that as the tender itself of respondent 4 was liable to be rejected because of lack of particulars as stated hereinabove, no further question arises. ....."

It is clear from the above decisions that it is imperative for either a candidate or a tenderer or a person concerned to furnish full information as required in order to verify the same by the authority concerned. In the case on hand though particulars have been furnished, as pointed out earlier, in the absence of proper authentication by the persons concerned by affixing their signatures, their applications are liable to be rejected.

22. Learned Advocate General has also placed reliance on the Full Bench decision of Punjab and Haryana High Court in the case of Indu Gupta Vs. Director, Sports Punjab, Chandigarh reported in AIR 1999 Punjab and Haryana 319 (FB). In the case before the Full Bench, the petitioner applied for

admission to B.Tech. course. She claimed the benefit of reservation under Sports category. She could not get the gradation certificate countersigned by the Director of Sports, Punjab, and so she was not considered for admission under reserved category for sports personnel. The argument advanced by the counsel representing the petitioner is that gradation certificate, based on her performance in the sports meet is only evidencing the existence of fact entitling her to the benefit of reservation and so the condition that gradation certificate should be sent along with the application form for admission is only a formality and candidate may produce the gradation certificate at the time of admission. In support of the contention, the petitioner relied on the observation made by a learned single Judge in Civil Writ Petition No.117 of 1995 decided on September 8, 1995 and the reasons given by the learned single judge were approved by a Division Bench in L.P.A. filed against that judgment by the Punjabi University, Patiala. However, in Civil Writ Petition Nos.9211 of 1997 decided on August 26, 1997, and 12093 of 1997 decided on august 28, 1997, the other Division benches took the view that application for admission should have been enclosed with a copy of the gradation certificate and that the candidate who produced the gradation certificate after the submission of the application is not entitled to the benefit of reservation as a sport person. In view of the divergent view the matter was referred to Full Bench for consideration. It is seen from the factual details presented before the Full Bench that admission in the participating institutions of Punjab Technical University, Jalandhar had to be made as per the terms and conditions contained the admission brochure/application form issued for the year 1997. In the application form it was specifically stated that all particulars required must be filed in and attested photo copies of the certificates in support of the claim made by the candidates must be attached with the application form Clause 3.8 makes it clear that the application complete in all respects should reach the Co-ordinator CET-1997, Punjab Technical University, Jalandhar by 5.00 p.m. on June 25, 1997. It is also specifically stated that the application not submitted in the prescribed application form or not filled by the candidate's own handwriting or not supported by attested photocopies of the documents or incomplete application in any other manner or received after the due date/time will be rejected. The above mentioned terms and conditions contained in the brochure have been issued by Notification of the Punjab Government dated 30th January, 1997. The terms and conditions regarding eligibility, reservation, allocation of seats, gradation certificate, and public declaration are binding on the candidates as well as the party issuing the said brochure for the period in question. In para 9, their Lordships by referring the earlier Full Bench decision in the case of Raj Singh vs. Maharshi Dayanad University (1994 (4) Recent Services Judgments, 289), disapproved the liberal construction of the terms and conditions of the brochure and specified the need for their strict adherence to avoid unnecessary prejudice to the candidates or the authority during

the course of admission. In the same paragraph, by referring the Division Bench decision in the case of Madhvika Khurana (minor) vs. M.D. University in Civil Writ Petition No.15367 of 1991, their Lordships observed that the students seeking admission to the professional courses are even otherwise matured enough and supposed to understand the full implication of filling the admission form and compliance with the instructions contained in the brochure. In paragraph 10 their Lordships noticed another Full bench decision (Rahul Prabhakar vs. Punjab Technical University, Jalandhar (1997 (3) RSJ 475: AIR 1996 Punj & Har. 18), wherein it is stated that,

> "A Full Bench of this Court in Amardeep Singh Sahota vs. State of Punjab (1993 (4) serv LR 673) had to consider the scope and binding force of the provisions contained in the prospectus. The Bench took the view that the prospectus issued for admission to a course, has the force of law and it was not open to alteration. In Raj Singh vs. Maharshi Dayanand University (1994 (4) R.S.J. 289) another Full Bench of this Court took the iew that a candidate will have to be taken to be bound by the information supplied in the admission form and cannot be allowed to take a stand that suits him at a given time. The Full Bench approved the view expressed in earlier Full Bench that eligibility for admission to a course has to be seen according to the prospectus issued before the Entrance Examination that that the admission has to be made on the basis of instructions given in the prospectus, having the force of law. Again Full Bench of this Court in Schin Gaur vs. Punjab University (1996 (1) RSJ 1 AIR 1996 Punj & Har 109) took the view that there has to be a cut off date provided for admission and the same cannot be changed afterwards. These views expressed by earlier Full Benches have been followed in CWP No.6756 of 1996 by the three of us constituting another Full Bench. Thus, it is settled law that the provisions contained in the information brochure for the Common Entrance Test 1997 have the force of law and have to be strictly complied with. No modification can be made by the court in exercise of powers under Article 226 of the Constitution of India. Whenever a notification calling for applications, fixes date and time within which applications are to be received whether sent through post or by any other mode that time schedule has to be complied with in letter and spirit. If the application has not reached the co-ordinator or the competent authority as the case may be the same cannot be considered as having been filed in terms of the provisions contained in the prospectus or Information Brochure. Applications filed in violation of the terms of the brochure have only to be rejected."

23. Regarding the effect of Information Brochure, the Full Bench has concluded that,

> "11. The cumulative effect of the above well enunciated principles of law is that the terms and conditions of the brochure where they used pre-emptory language cannot be held to be merely declaratory. They have to be and must necessarily to be treated as mandatory. Their compliance would be essential otherwise the basic principle of fairness in such highly competitive entrance examinations would stand frustrated. Vesting of discretion in an individual in such matters, to waive or dilute the stipulated conditions of the brochure would per se introduce the element of discrimination, arbitrariness and unfairness. Such unrestricted discretion in contravention to the terms of the brochure would decimate the very intent behind the terms and conditions of the brochure, more particularly, where the cut off date itself has been provided in the brochure. The brochure has the force of law. Submission of applications complete in all respects is a sine qua non

to the valid acceptance and consideration of an application for allotment of seats in accordance with the terms prescribed in the brochure."

"13. Repeated affirmation of the principle by different Full Benches of this Court while relying upon the judgments of the Hon'ble Apex Court, unambiguously contains the dictum that the brochure declared before the entrance test has the force of law, strict adherence to its terms and conditions is of paramount consideration and terms and conditions including the cut off date cannot be relaxed unless such power is specifically provided to a given authority by use of unambiguous language. ....."

Finally, their Lordships have concluded,

"16. In view of the above discussion the only unassailable and veritable view is that a candidate to such entrance test, in view of the terms and conditions of the brochure, afore-referred, is obliged to submit all the certificates required to annex along with the application and submit the same complete in all respects before the cut off date. In default thereto, no obligation is imposed upon the authorities concerned to entertain such application or to grant seat to that candidate."

24. We have already referred to various terms and conditions mentioned in the application form prescribed by Punjab Technical University, Jalandhar, which are similar to Clause 17 of Instruction to Candidates, etc., and Information Brochure issued by the Tamil Nadu Public Service Commission. It has been repeatedly affirmed by almost all the Full Benches of the Punjab and Haryana High Court that the Information brochure has the force of law and has to be strictly complied with. We are in respectful agreement with the said view.

25. In the earlier part of our order, we have extracted relevant provision, viz., Instructions etc., to Candidates as well as the Information Brochure of the Tamil Nadu Public Service Commission, we hold that the terms and conditions of Instructions etc. to Candidates and Information Brochure have the force of law and have to be strictly complied with. We are also of the view that no modification/ relaxation can be made by the Court in exercise of powers under Article 226 of the Constitution of India and application filed in violation of the Instructions, etc. to Candidates and the terms of the Information Brochure is liable to be rejected. We are also of the view that strict adherence to the terms and conditions is paramount consideration and the same cannot be relaxed unless such power is specifically provided to a named authority by the use of clear language. As said at the beginning of our order, since similar violations are happening in the cases relating to admission of students to various courses, we have dealt with the issue exhaustively. We make it clear that the above principles are applicable not only to applications calling for employment, but also to the cases relating to the admission of students to various courses. We are constrained to make this observation to prevent avoidable prejudice to other applicants at large.

26. It is also contended that the respondent has permitted some of the candidates to rectify certain defects and failed to treat the petitioners on par with them. With regard to the said claim, in para 17 of the counter affidavit, the Tamil Nadu Public Service Commission has specifically explained that on receipt of rejection memos and on non-receipt of hall tickets, many representations were sent to the Commission's office, praying to permit the applicants to take up written examinations relating to the recruitment for the posts of Assistant Surgeon. It is further stated that on re-scrutiny of the rejected applications of the candidates, it was found that 725 candidates had not enclosed the format (meant exclusively for Assistant Surgeon) and the Commission decided to reconsider and admit those 725 candidates who failed to enclose such format in a separate sheet and whose applications were otherwise in order with a direction to produce that format at the time of Oral Test, since the format is meant exclusively for recruitment to the post of Assistant Surgeon. In para 11 of the counter affidavit, it is specifically stated that not even a single candidate who had failed to sign the application form and who had failed to produce the essential documents were admitted to write the examinations held on 16.10.2005 suo motu, except the candidates who had obtained interim orders from the Court. It is further explained that rejection order passed even in respect of 323 candidates whose applications were rejected initially for want of format referred to above, were not reconsidered for admission as they had either failed to produce Medical Registration Certificate or not paid the fee, or were over aged, etc., besides their failure to send the format in question.

27. Yet, another argument was made to the effect that inasmuch as failure to sign below the columns 24 as well as below the declaration is a bona fide mistake and instead of rejecting the applications, the Commission ought to have afforded one more opportunity to the petitioners to rectify the same. While meeting the above contention, learned Advocate General submitted that in the absence of any specific Rule or Rules of provision in the Instructions etc. to Candidates or clause in Information Brochure, the applicants cannot be permitted to rectify the defect. First of all, as rightly pointed out, if it is permitted, the selection schedule and the process of examinations cannot be adhered to. Hence, the argument that the petitioners ought to have been given an opportunity to rectify the mistake in the application form cannot be accepted.

28. Secondly, if there is an enabling provision for representation for rectification, the petitioners may be justified in making such request. For example, Order IV Rule 9 of Madras High Court Appellate Side Rules enables the Registry to return the papers if the same are not in conformity with

the enactment or Rules applicable to it for correction and representation. Sub-clause (1) of Rule 9 makes it clear that evry proceeding which is not instituted in conformity with the provisions of the Code (CPC), or of the Appellate Side Rules or any special enactment or of the Rules applicable to it, shall be retuned to the party or the practitioner concerned for correction and representation. The Rule further makes it clear that the same shall be represented after compliance with all the defects pointed out within 10 days after the notification of the defect. It is not in dispute that there is no similar statutory Rule or Clause in the Notification or Information Brochure. Accordingly, we reject the same contention also.

Before winding up, it is to be noted that the Notification for calling for applications for the posts of Assistant Surgeon (General & Speciality) Tamil Nadu Medical Services for the year 2003-2004 was notified on 01.07.2005. The last date for receipt of application by the Government was 04.08.2005. It is brought to our notice that number of candidates applied for the post were 7123 out of which 5317 candidates were found eligible to take up the examinations and 1806 candidates were found ineligible and 1192 were found unsigned and applications, the petitioners challenged the same in these writ petitions. Though it is pointed out that some of the persons who wrote the examinations on the orders of the Court were successful, in view of our discussion and ultimate conclusion, we are not inclined to show any leniency or indulgence to those who unsigned the applications merely because they were permitted to write written examinations. It is not in dispute that the applicants are highly qualified medical practitioners and after successful in their course, they registered their names in the Medical council of India. We have already referred to various instructions mentioned in the Notification as well as in Information brochure. In addition to the same, every application form was enclosed with duly filled up specimen form to enable the applicant to fill up all the columns wherever required, which include signature in the places indicated. In such circumstances, we do not find any merit in the contentions raised by the learned counsel for the petitioners or error or infirmity in the impugned order of the respondent. Consequently, all the writ petitions fail and are accordingly dismissed. No costs.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS
WRIT PETITION NOS.14169/2008 & CONNECTED CASES
D.D. 14.07.2008
The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

V. Mohankumar & Ors. ... Petitioners
Vs.
The Chairman, Tamil Nadu P.S.C & Ors. ... Respondents

Recruitment:

Whether recruitment on contract basis can be resorted to by issuing Executive Order when regular recruitment process through P.S.C. under Statutory Rule is under way on the ground that there is delay in the process? – No

P.S.C. initiated recruitment to 49 posts of Motor Vehicles Inspector pursuant to notification issued in February 2007 – Written test was held on 29.7.2007 for Preliminary Examination – In the meantime, the Government issued G.O. dated 6.3.2008 for appointment of 65 Motor Vehicles Inspector Grade-II on contract basis till regular recruitment process was completed prescribing a pass in B.E. in Automobile Engineering as against Diploma in Mechanical Engineering prescribed for the post under the Rules – Petitioners challenged this recruitment process on contract basis on the ground that it is contrary to Section 213 of Motor Vehicles Act and notification issued by Central Government prescribing minimum qualification and also in violation of Rule 10 of Tamil Nadu State and Sub-ordinate Service Rules 1955, particularly with regard to prescription of qualification – High Court allowed the writ petitions and quashed the recruitment on contract basis observing that the action to fill up the posts on contract basis amounts to back door entry in public employment.

Held:

Pending finalization of selection by Tamil Nadu P.S.C. without reference to the Rules if persons are appointed on contract basis there is possibility of seeking regularization of their services by asking for relaxation of recruitment rules. Hence it amounts to back door entry in public employment.

Further held:

By a harmonious reading of Rules 10(a)(i)(1) and 11, extracted above, it could be safely concluded that even under Rule 11, only a qualified person who can be appointed in the permanent post, can be appointed on contract basis and unqualified persons, who cannot compete for the regular selection, cannot be permitted to apply for the post, merely because their appointment is on the basis of the agreement/contract. If the interpretation given by respondents 2 and 3 are accepted, the recruitment rules can be ignored and unqualified persons can be appointed on contract basis in the sanctioned vacancies, which will be in contravention of the statutory rules framed under Article 309 of the Constitution of India.

The Supreme Court has deprecated the practice of resorting to recruitment on contract basis in contravention of Statutory Rules in (1) Secretary, State of Karnataka vs. Umadevi (2006) 4 SCC 1, (2) Keshav Chandra Joshi v. Union of India – AIR 1991 SC 284 and (3) Ram Ganesh Tripathi & Ors. v. State of U.P. & Ors. – AIR 1997 SC 1446.

Cases referred:

1. AIR 1991 SC 284 - Keshav Chandra Joshi v. Union of India
2. AIR 1997 SC 1446 - Ram Ganesh Tripathi & Ors. v. State of U.P. & Ors.
3. (2005) 3 MLJ 538 - M.Saravanakumar v. The Secretary, to Government, Education Department, Chennai
4. (2006) 4 SCC 1 - Secretary, State of Karnataka v. Umadevi
5. (2007) 2 SCC 491 - Punjab Water Supply and Sewerage Board v. Ranjodh Singh

COMMON ORDER

This batch of 58 cases are filed challenging in entirety the G.O.Ms.No.324 Home Department, dated 6.3.2008 or in part of the said Government order by the petitioners, seeking further direction to consider the name of the petitioners for selection to the post of Motor Vehicle Inspectors Grade-II on contract basis as per section 10(a)(i) of the Tamil Nadu State and Subordinate Service Rules, 1955.

2. As the issue involved in all the writ petitions are one and the same, all the 58 writ petitions are disposed of by this common order. For the sake of convenience, W.P.No.14169 of 2008 is taken as lead case and the parties in this common order are referred accordingly.

3. The case of petitioners are that they have completed Diploma in Mechanical Engineering and gained experience of more than one year in the Government approved and reputed Automobile Workshops and they are having valid driving licence for driving Motor vehicles, Heavy Goods Vehicles and Heavy Passenger Motor Vehicles. The Tamil Nadu Public Service Commission issued notification in advertisement No.107 for filling up 49 vacancies estimated in February, 2007, pursuant to which the petitioners herein applied for the above said posts, as according to them, they are all qualified candidates. Written test was conducted on 29.7.2007 by the TNPSC for preliminary selection and the petitioners are awaiting for results.

4. In the meanwhile, the Government issued G.O.Ms.No.324, Home Department, dated 6.3.2008 and invited applications for appointment of 65 Motor Vehicle Inspectors Grade-II on contract basis till the regular recruitment process is completed by the TNPSC. In the said Government Order, the respondents prescribed the qualification as pass in B.E. degree in Automobile Engineering or related branches of Engineering. It is further stated that the said appointments will be initially for a period of one year from the date of joining or till the date of the regularly appointed candidates join duty and the contract may be extended further at the discretion of the Contract Appointment Committee/

Government, depending upon the performance and need. The further condition prescribed are that the persons to be appointed shall adhere to the working hours assigned to the regular Motor Vehicle Inspectors and discharge all other duties and responsibilities assigned to the post. The post of Contract Motor Vehicle Inspector Grade-II shall carry consolidated pay of Rs.8,000/- per month. Since the post involve heavy money transaction, production of bank guarantee or suitable security to the tune of Rs.5,00,000/- (Rupees Five Lakhs) is also insisted. It is further stated that the performance of the candidates will be assessed on quarterly basis.

5. Pursuant to the said Government Order, the Transport Commissioner issued further instructions on 13.4.2008 wherein minimum age of 21 and upper age limit of 32 is prescribed and for BC, MBC, SC & ST candidates, relaxation of five years upto 37 years is also given. It is also prescribed that the candidate must also possess experience of six months after obtaining Heavy Motor Vehicle licence. The total seats are distributed based on reservation norms. The Government also invited applications through advertisement dated 13.4.2008.

6. The said orders of the respondents are challenged in this batch of 58 writ petitions either in toto or some of the clauses on the ground that the notification is contrary to Section 213 of the Motor Vehicles Act, 1988, and the notification issued by the Central Government prescribing minimum qualification through S.O.443(E) dated 12.8.1989. The said notification is also in violation of Rule 10(a)(i) of the Tamil Nadu State and Subordinate Service Rules, 1955, particularly with regard to the prescription of qualification and by permitting the respondents to proceed with the impugned selection, petitioners' right to get selected based on the Diploma qualification and one year experience certificate, will be affected. It is further stated that directing to produce bank guarantee/security for a sum of Rs.5 lakhs is arbitrary and the said condition deprives the rights of several qualified candidates and it is in violation of Articles 14 and 16 of the Constitution of India. The right of the BC, MBC, SC and ST candidates are affected as Rule 12(d) of the Tamil Nadu State and Subordinate Service Rules, 1955, enables the said candidates to apply without reference to age restriction.

7. The Special Commissioner and Transport Commissioner, Chepauk, Chennai-5, filed counter affidavit wherein it is contended as follows:

(a) The Motor Vehicle Inspectors Grade-II post is coming within the purview of the TNPSC. The transport department of the Government is periodically sending proposal

for filling up of vacancies through TNPSC. The estimate of vacancies for the years from 2000 to 2008 (from 1.5.2000 to 30.4.2008) are 122 and out of this, only 8 appointment pertaining to 2000-2001 was made through the TNPSC during September, 2007. The subsequent request of the Government to fill up the vacancies numbering 49 was notified by the Government in February, 2007. For 49 vacancies, till date the selection process is not completed and at present out of 139 sanctioned posts of Motor Vehicle Inspectors Grade-II, 91 posts amounting to nearly 66% are lying vacant.

(b) The TNPSC is likely to take not less than 8 to 10 months to complete the selection process and to meet the immediate requirements, the Government thought fit to appoint Motor Vehicle Inspectors Grade-II on contract basis, pending selection by the TNPSC. The Grade-II Motor Vehicle Inspector post is the feeder category post for other higher level technical cadres and therefore it is impossible to complete the day to day works in the department. Since the post is coming within the purview of the TNPSC and the TNPSC is taking time due to their internal lengthy procedures, alternative and expeditious measures are to be found out and therefore the Government had to explore the possibility of filling up of these 65 vacancies on contract basis. The selected candidates may have to attend to the following important items of works:

a) Conduct of driving tests and issue of driving licences;

b) Inspection of vehicles for registration, for issue/renewal of

Fitness Certificates;

c) Inspection of vehicles involved in accidents; and

d) To enforce the provisions of the Motor Vehicles Act & Rules so as to detect the irregularities resulting incollection of fine/tax/compounding fee due to the Government and also to curb other irregularities.

Pointing out the said urgency, the respondents are justifying the issuance of the impugned orders.

(c) Insofar as the contention that the Government has no power to appoint Motor Vehicle Inspectors Grade-II on contract basis, according to the respondents, Rule 11 of the Tamil Nadu State and Subordinate Service Rules, 1955, empowers the Government to make such contract appointments. Rule 10(a)(i) of the Tamil Nadu State and Subordinate Service Rules, 1955, also empowers the respondents to call for a list from the employment exchange and make temporary appointment. Following the said rules, application from eligible candidates were called for by fixing last date as 30.4.2008 through advertisement in prominent newspapers like 'The Hindu, The Indian Express, Dina Thandhi and Dinakaran' and 419 applications were received upto 30.4.2008 by 5.45 p.m.

(d) Regarding prescription of educational qualification is concerned it is stated that Motor Vehicle Inspectors Grade-II require persons with higher qualification due to moderanisation of industry, due to the change in the circumstances like manufacturing of hi-tech vehicles, etc., the department has to fully equip itself to meet the challenges of the present situation. It is also contemplating to acquire latest technologies such as introduction of smart-card system, high security number plates, various E-Governance measures in collection of taxes, fees and other administrative matters and the present officers are

unable to cope up with the said challenges due to lesser educational qualification. Therefore the Government prescribed a pass in B.E.(Automobile Engineering) or related branch of Engineering for contract appointments.

(e) Insofar as the direction to produce security/bank guarantee of Rs.5 lakhs from the selected candidates it is stated that the selected candidates shall have to handle huge amount of cash while checking vehicles, collecting taxes/fine/ compounding fees, etc. The said amount will have to be remitted to the Government account either on the same day or on the next day and some times, due to intervening holidays, the amount collected could not be remitted immediately and due to the said facts, there is possibility of misappropriation of amounts so collected and if it happens, the loss could be compensated from the security to be furnished, as no other action could be taken against the selected persons, who are holding temporary posts for a period of one year for whom service rules are not applicable.

(f) Insofar as not prescribing the minimum experience is concerned, it is stated that to verify the genuineness of the experience certificate it will take enormous time, which will cause unnecessary delay in appointment. Pointing out the above reasoning the impugned order is sought to be justified by the respondents.

8. Heard Mr.N.R.Chandran, learned Senior Counsel, Mr.K.Venkataramani, learned Senior Counsel, Mr.A.Kalaiselvan, Mr.N.Subramaniyan, Mr.D.Krishnakumar, Mr.K.Rajkumar, Mr.R.Govindasamy, Mr.S.Xavier Felix, Mr.V.Venkatasamy, Mr.S.Mani, Mr.P.R.Dinesh Kumar, Mr.S.Doraisamy, Mr.V.Harikrishnan and Mr.S.P.B.Dhuraishamy, learned counsels on behalf of the petitioners and Mr.A.Arul, learned Standing Counsel for the TNPSC/1st respondent and Mr.P.S.Raman, learned Additional Advocate General, for the State of Tamil Nadu/respondents 2 and 3.

9. The learned Senior Counsels and other counsels appearing for the petitioners submitted that the impugned order is contrary to Section 213 of the Motor Vehicles Act, 1988, as well as to the notification issued under the Central Motor Vehicles Rules, wherein Diploma in Mechanical Engineering and working experience of at least one year with possession of driving licence to drive Motor Vehicles, Heavy Goods Vehicle and Heavy Passenger Motor Vehicles are prescribed. It is further contended that under Rule 10(a)(i) of the Tamil Nadu State and Subordinate Service Rules, 1955, only qualified persons with prescribed qualification under the recruitment rules can be appointed temporarily, if there is undue delay in selecting persons regularly. The notification issued is contrary to the recruitment rules and therefore the proposed appointments cannot be treated as under Rule 10(a)(i). In the TNPSC notification issued for selecting candidates for the very same post, there is no age limit fixed for B.C., MBC, SC and ST candidates in terms of Rule 12(d) of the Tamil Nadu State and Subordinate Service Rules, 1955, and in the impugned orders only five years relaxation i.e, up to the age of 37 is given to

such categories of candidates and therefore the rights of the said candidates are affected. The learned counsels also pointed out that in the Government order, no minimum or upper age limit is fixed, whereas the Transport Commissioner in his order dated 13.4.2008 prescribed minimum age as 21 and upper age as 32 years and with relaxation 37 years of age to the said categories of the candidates and the said action of the Transport Commissioner is contrary to the Government Order and therefore the same is illegal. Mr.N.R.Chandran, learned Senior Counsel submitted that Rule 11 of the Tamil Nadu State and Subordinate Service Rules, 1955, cannot be applied for appointments and appointments are to be made only under Rule 10(a)(i) and conditions of service alone can be fixed by agreement. The learned Senior Counsel further submitted that even if there is urgency, since the notification issued by the TNPSC is of the year 2007 and written test also having been conducted, directions could be issued to the TNPSC to complete the selection process within a given time, so that the contractual appointments through the impugned order can be avoided.

10. The learned Additional Advocate General appearing for the respondents 2 and 3 submitted that even though notification was issued through the TNPSC for selection of 49 Motor Vehicle Inspectors Grade-II and written test was conducted on 29.7.2007, there is delay in completion of the selection process and there are 91 vacancies available for the post as on date and to cope up with the work as stated in the counter affidavit, the impugned procedure is prescribed by the Government under Rule 11 of the Tamil Nadu State and Subordinate Service Rules, 1955, for recruiting 65 Motor Vehicle Inspectors Grade-II/Examiners, and the Government is vested with such power under Rule 11 and therefore there is no illegality in the said Government Order. The learned Additional Advocate General also submitted that a degree in Mechanical Engineering was prescribed as the qualification due to the nature of the work they have to perform even though the recruitment rules are yet to be amended and by virtue of the said prescription of the qualification, higher qualified persons are ordered to be selected than the prescribed qualification mentioned in the recruitment rules. Insofar as the fixing of minimum age of 21 by the Transport Commissioner is concerned, the Government order nowhere prescribed the said minimum age or upper age and therefore the Transport Commissioner is not right in fixing the minimum age. With regard to the condition that the selected candidates must produce bank guarantee or suitable security to the tune of Rs.5 lakhs, the same is insisted on the basis of the duties to be performed by the selected candidates including handling of huge amounts and as no disciplinary control is vested with the department, the said bank guarantee or suitable security is insisted upon to realise

the amount collected, if there is non-remittance or misappropriation and the same cannot be treated as unreasonable. The learned Additional Advocate General further submitted that the selected candidate will not get any vested right by virtue of their selection and they will be permitted to continue to work only till the regularly selected candidates, by the TNPSC in accordance with the recruitment rules, assume office/join duty.

11. The learned counsel appearing for the TNPSC/first respondent on instructions submitted that the TNPSC will be in a position to publish the written test results conducted on 29.7.2007 within one month and thereafter final selection could be completed. According to the learned counsel, the delay in completing the selection is only on the part of the Transport Commissioner in completing the verification of the experience certificates with regard to the experience of the candidates and immediately on receipt of the report of the genuineness of the said certificates from the Transport Commissioner, final selection would be made. The learned counsel also submitted that except the 49 vacancies which are notified in the year 2007, no other vacancy position was intimated by the respondents 2 and 3 to the TNPSC for issuing notification inviting applications and therefore there is no delay on the part of the first respondent in conducting selections.

12. I have considered the rival submissions made by the respective counsels for the petitioners and the respective counsels for the respondents.

13. From the narration of above facts and the arguments advanced on behalf of the petitioners as well as respondents, the following issues arise for consideration in these cases.

1) Whether candidates can be appointed on contract basis in violation of the qualifications prescribed in the Motor Vehicles Act, 1988, and the recruitment rules viz., Tamil Nadu Transport Subordinate Service Rules ?
2) Whether the respondents 2 and 3 are justified in passing the impugned order invoking Rule 11 of the Tamil Nadu State and Subordinate Service Rules, 1955 ?
3) Whether the respondents 2 and 3 are justified in prescribing Rs.5 lakhs as bank guarantee or security from the selected candidates for their engagement as Contract Motor Vehicle Inspectors Grade-II?
4) Whether the respondents 2 and 3 are justified in issuing the impugned order when Tamil Nadu Public Service Commission has notified 49 vacancies and recruitment process is in progress ?
5) Whether the action of the respondents 2 and 3 amounts to encouraging back door entry in public employment ?

14. The qualification prescribed for the post of Motor Vehicle Inspectors Grade-II under Motor Vehicles Act, 1988, in section 213 reads as follows:

213. Appointment of motor vehicles officers.- (1) The State Government may, for the purpose of carrying into effect the provisions of this Act, establish a Motor Vehicles Department and appoint as officers thereof such persons as it thinks fit.

(2) Every such officer shall be deemed to be a public servant within the meaning of the Indian Penal Code (45 of 1860).

(3) The State Government may make rules to regulate the discharge by officers of the Motor Vehicles Department of their functions and in particular and without prejudice to the generality of the foregoing power to prescribe the uniform to be worn by them, the authorities to which they shall be subordinate, the duties to be performed by them, the powers (including the powers exercisable by police officers under this Act) to be exercised by them, and the conditions governing the exercise of such powers.

(4) The Central Government may, having regard to the objects of the Act, by notification in the Official Gazette, prescribe the minimum qualifications which the said officers or any class thereof shall possess for being appointed as such.

(5) In addition to the powers that may be conferred on any officer of the Motor Vehicles Department under sub-section (3), such officer as may be empowered by the State Government in this behalf shall also have the power to,-

(a) make such examination and inquiry as he thinks fit in order to ascertain whether the provisions of this Act and the rules made thereunder are being observed;

(b) with such assistance, if any, as he thinks fit, enter, inspect and search any premises which is in the occupation of a person who, he has reason to believe, has committed an offence under this Act or in which a motor vehicle in respect of which such offence has been committed is kept:

Provided that,-

(i) any such search without a warrant shall be made only by an officer of the rank of a Gazetted Officer;

(ii) Where the offence is punishable with fine only the search shall not be made after sunset and before sunrise;

(iii) where the search is made without a warrant, the Gazetted Officer concerned shall record in writing the grounds for not obtaining a warrant and report to his immediate superior that such search has been made;

(c) examine any person and require the production of any register or other document maintained in pursuance of this Act, and take on the spot or otherwise statements of any person which he may consider necessary for carrying out the purposes of this Act;

(d) seize or take copies of any registers or documents or portions thereof as he may consider relevant in respect of an offence under this Act which he has reason to believe has been committed;

(e) launch prosecutions in respect of any offence under this Act and to take a bond for ensuring the attendance of the offender before any Court;

(f) exercise such other powers as may be prescribed:

Provided that no person shall be compelled under this sub-section to answer any question or make any statement tending to incriminate himself.

(6) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall, so far as may be, apply to any search or seizure under this section as they apply to any search or seizure under the authority of any warrant issued under section 94 of the Code." (Emphasis supplied)

The Central Government, bearing in mind the duties to be performed by the Motor Vehicle Inspectors and the powers conferred under Section 213(A) prescribed the minimum qualification for the class of officers consisting of the category of Inspector of Motor Vehicles or Assistant Inspector of Motor Vehicles as follows:

"Qualifications.

(1) Minimum general educational qualification of a pass in X standard; and

(2) A diploma in Automobile Engineering (3 year course) or a diploma in Mechanical Engineering awarded by the State Board of Technical Education (3-year course); and

(3) working experience of at least one year in a reputed automobile workshop which undertakes repairs of both light motor vehicles, heavy goods vehicles and heavy passenger motor vehicles fitted with petrol and diesel engine; and

(4) must hold a driving licence authorising him to drive motor cycle, heavy goods vehicles and heavy passenger motor vehicles."

The statutory rule viz., Tamil Nadu Transport Subordinate Service Rules which came into force from 1981 enables only direct recruitment of Motor Vehicle Inspectors Grade-II. Rule 5 prescribes the educational qualification/experience and the age qualification which reads as follows:

"5. Qualifications- (a) Age - (i) No person shall be eligible for appointment to category-2 by direct recruitment, unless he possesses the qualifications specified below, namely:-

(1) Must have completed 21 years of age;

(2) Must not have completed 32 years of age:

Provided that a person belonging to the Scheduled Caste/Scheduled Tribe shall be eligible for appointment by direct recruitment by category 2 if he has not completed 37 years of age.

Provided further that the minimum age limit of 21 years prescribed above shall apply also to the candidate belonging to scheduled caste, scheduled tribes and Backward classes.

i. The age limit prescribed in this rule shall be reckoned so far as direct recruits are concerned with reference to the first day of July of the year in which the selection for appointment is made;

ii. Other Qualifications: No person shall be eligible for appointment to the category specified in column (1) by the method specified in column (2) of the table below unless he possess the qualifications specified in the corresponding entries in the column (3) thereof:-

TABLE

Sl. No	Category (1)	Method (2)	Qualifications 3)
1.	Motor Vehicles Inspectors Grade-I	Promotion	(i) Must be an approved probationer in the post specified in category 2, and ii) Must have served for a total period of not less four years in the post specified in category 2 out of which not less than one year should be in the flying squad or in the checking squad. Provided that this rule shall not apply to appointments by promotion made prior to the 1st January, 1988.
2.	Motor Vehicles Inspectors Grade-II	Direct Recruitment	i) Minimum General Educational Qualification prescribed in the Schedule to the General Rules for the Tamil Nadu State and Subordinate Service. ii) A Diploma in Automobile Engineering (3 years) or a diploma in Mechanical Engineering (3 years) awarded by the State Board of Technical Education and Training, Tamil Nadu. iii) Experience of having worked for a period of not less than one year, both on vehicles fitted with petrol engines and vehicles fitted with diesel engines on a full time basis in an Automobile Workshop which undertakes repairs of light motor vehicles, heavy goods vehicles and heavy senger motor vehicles." iv) Must hold a driving licence authorising him to drive motor cycle, heavy goods vehicle and heavy passenger motor vehicles and must have experience in driving heavy transport vehicles for a period of not less than "six months". Provided that, other things being equal preference shall be given to those who possess Post Graduate Diploma in Automobile Engineering awarded by the State Board of Technical Education and Training, Tamil Nadu.

Explanation: 'Automobile Workshop' for the purpose of entry (iii) above means,

a) An Automobile Workshop owned by the Government or the State Transport Corporation; or

b) and Automobile Workshop recognized or approved or certified by the Transport Commissioner or the Director, Motor Vehicles Maintenance Department for carrying out all kinds of repairs."

15. Following the above said statutory rules and on the basis of intimation given by the Government, the TNPSC issued advertisement No.107 for filling up 49 posts of Motor Vehicle Inspectors Grade-II in February, 2007, fixing the last date as 23.5.2007 and the scale of pay was notified as Rs.5500-175-9000. In the said notification the age qualification is also stated as between 21 to 32 years as on 1.7.2007. Age relaxation is given to BC, MBC, SC & ST candidates is given in terms of Rule 12(d) of the Tamil Nadu State and Subordinate Service Rules, 1955. One experience certificate is also required to be produced apart from driving licence. Preference is also given to those who possess Diploma in Automobile Engineering, awarded by the State Board of Technical Education and Training, Tamil Nadu. The written test was proposed to be conducted on 29.7.2007 and the same was also conducted and results are awaited.

16. Thus, it is evident that the respondents 2 and 3 are also following the qualifications prescribed under the statutory recruitment rule as well as the Motor Vehicles Act, 1988. For the post of Motor Vehicle Inspectors Grade-II B.E. degree is not the prescribed qualification however the same is prescribed as the only qualification in the impugned order for selection to the Motor Vehicle Inspectors Grade-II on contract basis. Thus, the Diploma holders, who are having one year experience with driving licence and who are eligible to be appointed as Motor Vehicle Inspectors, Grade-II as per the recruitment rules are prevented from applying for the very same post now sought to be filled up on contract basis. The legitimate expectation of such candidates are very much affected due to the enhancement of the qualification fixed in the impugned order that too without amending the rules. At this juncture, it is to be noted that for regular and permanent appointment of Motor Vehicle Inspectors Grade-II, Diploma Holders are found eligible. However, for the appointment to the very same post

on contract basis, they are found ineligible. The said prescription of qualification by the respondents 2 and 3 is unreasonable and also to be treated as inconsistent and it will create an anomalous situation as the Diploma holders will be in a position to replace the Degree holders on their selection through TNPSC.

17. Insofar as the contention that Rule 11 of the Tamil Nadu State and Subordinate Service Rules, 1955, empowers the Government to appoint persons on contract basis, as rightly contended by the learned counsels for the petitioners, the contract appointments can be made even for a specific period only from among the qualified persons. The respondents cannot contend that merely because they have got power to appoint persons on contract basis, dehors the rules they are entitled to fix higher qualification, thereby denying the right of the qualified candidates to compete. For proper appreciation, Rule 11 of the Tamil Nadu State and Subordinate Service Rules, 1955, is extracted hereunder:

> "11. Appointment by agreements. (1) When in the opinion of State Government Special provisions inconsistent with any of these rules or of any other rules made under the proviso to article 309 of the Constitution of India or continuing by Article 313 of that Constitution (hereinafter referred to in this rule as the said rules) are required in respect of conditions of service, pay and allowances, pension, discipline and conduct with reference to any particular post, or any of them, it shall be open to the State Government to make an appointment to such post otherwise than in accordance with these rules or the said rules and to provide by agreement with the person so appointed for any of the matters in respect of which in the opinion of the State Government special provisions are required to be made and to the extent to which such provisions are made in the agreement, nothing in these rules or the said rules shall apply to any person so appointed in respect of any matter for which provision is made in the agreement:
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> Provided that in every agreement, made in exercise of the powers conferred by this rule it shall further be provided that in respect of any matter in respect of which no provision has been made in the agreement the provisions of these rules or of the said rules shall apply.
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> (2) A person appointed under sub-rule (1) shall not be regarded as a member of the service in which the post to which he is appointed is included and shall not be entitled by reason only of such appointment to any preferential claim to any other appointment in that or any other service."

Rule 10(a)(i)(1) of the very same Rules enables the respondents to make temporary appointments due to public interest owing to an emergency, if there is undue delay in making appointments in accordance with the rules. Person, who possesses the qualification prescribed for the post alone can be appointed. The said Rule 10(a)(i)(1) reads thus,

> "10. Temporary appointments:-a(i)(1) where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in a post borne on

the cadre of a service, class or category and there would be undue delay in making such appointment in accordance with these rules and the Special Rules, the appointing authority may temporarily appoint a person, who possesses the qualifications prescribed for the post otherwise than in accordance with the said rules.

Provided that no appointment by direct recruitment under this clause shall be made of any person other than the one sponsored by the Tamil Nadu Public Service Commission from its regular or reserve list of successful candidates to any of the posts within the purview of the Tamil Nadu Public Service Commission.

Provided further that the reserve list of successful candidates shall be in force until the regular list of successful candidates is drawn up subsequently; and that candidates shall be allotted from such reserve list for the vacancies in the place of those who have not joined duty.

Provided also that appointment by direct recruitment under this clause (1) in respect of posts within the purview of Tamil Nadu Public Service Commission shall be made, only where new posts with new qualifications are created temporarily and where the Tamil Nadu Public Service Commission does not have a regular or reserve list of successful candidates for sponsoring." (Emphasis supplied)

Thus, it is clear that qualified persons according to the recruitment rules can be appointed even temporarily to meet the emergent situation warranting immediate appointment and they shall be replaced by regularly selected candidates.

18. By a harmonious reading of Rules 10(a)(i)(1) and 11, extracted above, it could be safely concluded that even under Rule 11, only a qualified person who can be appointed in the permanent post, can be appointed on contract basis and unqualified persons, who cannot compete for the regular selection, cannot be permitted to apply for the post, merely because their appointment is on the basis of the agreement/contract. If the interpretation given by the respondents 2 and 3 are accepted, the recruitment rules can be ignored and unqualified persons can be appointed on contract basis in the sanctioned vacancies, which will be in contravention of the statutory rules framed under Article 309 of the Constitution of India. It is the consistent case of the respondents that as and when regular candidates are appointed through TNPSC, the persons to be appointed on contract basis shall vacate their seats. Therefore the said stand of the respondents is also unreasonable and liable to be rejected.

19. (a) The Honourable Supreme Court considered the validity of appointment made dehors to the rules in the decision reported in (2006) 4 SCC 1 (Secretary, State of Karnataka v. Umadevi). In paragraphs 11 and 12 the Supreme Court held thus:

"11. ..... the equality clause represented by Article 14 of the Constitution, Article 16 has specifically provided for equality of opportunity in matters of public employment. Buttressing these fundamental rights, Article 309 provides that subject to the provisions of the Constitution, Acts of the legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of a State. In view of the interpretation placed on Article 12 of the Constitution by this Court, obviously, these principles also govern the instrumentalities that come within the purview of Article 12 of the Constitution. With a view to make the procedure for selection fair, the Constitution by Article 315 has also created a Public Service Commission for the Union and the Public Service Commissions for the States. Article 320 deals with the functions of the Public Service Commissions and mandates consultation with the Commission on all matters relating to methods of recruitment to civil services and for civil posts and other related matters. As a part of the affirmative action recognised by Article 16 of the Constitution, Article 335 provides for special consideration in the matter of claims of the members of the Scheduled Castes and Scheduled Tribes for employment. The States have made Acts, rules or regulations for implementing the above constitutional guarantees and any recruitment to the service in the State or in the Union is governed by such Acts, rules and regulations. The Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein.

12. In spite of this scheme, there may be occasions when the sovereign State or its instrumentalities will have to employ persons, in posts which are temporary, on daily wages, as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts that are sanctioned and that are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed permanently. This right of the Union or of the State Government cannot but be recognised and there is nothing in the Constitution which prohibits such engaging of persons temporarily or on daily wages, to meet the needs of the situation. But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment. Nor can a court say that the Union or the State Governments do not have the right to engage persons in various capacities for a duration or until the work in a particular project is completed. Once this right of the Government is recognised and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinarily not proper for the Courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have been engaged without following a due process of selection as envisaged by the constitutional scheme." (Emphasis Supplied)

(b) A Division Bench of this Court in the decision reported in (2005) 3 MLJ 538 (M.Saravanakumar v. The Secretary, to Government, Education Department, Chennai) considered the question of appointing Guest Lecturers in various Government Colleges in the State of Tamil Nadu, who were appointed dehors the recruitment rules for years together. In paragraphs 31 to 33 the Division Bench held as follows:

> "31. However, before parting with these cases we wish to observe that it was not proper for the State Government to keep making appointments of guest lecturers year after year since the year 2000. This is demeaning to the lecturers who are treated almost like casual or daily wage employees, and are given remuneration on an hourly basis and that too without even giving them any formal appointment order. What interest in their work will such teachers take, and what commitment will they have ? There is no security of tenure for such teachers. Also, they are paid a paltry sum upto a maximum of Rs.4,000 per month. Is this the way to treat the gurus of our youth ? Even a peon in government service often gets more than Rs.4,000 per month. Should our teachers be treated worse than peons?
>
> 32. It is also not in the interest of the students or the public to appoint guest lecturers on a large scale, because teachers who are given such appointments are not likely to take much interest in their work. They will not be able to work with a free mind and will feel all the time that there is a Damocle Sword hanging over their heads. Surely the students in Tamil Nadu deserve good teachers. Good education is of paramount importance for the progress of society in the modern age.
>
> 33. We fail to understand why for the past 5 years no regular recruitment has been made through the teachers recruitment board, and instead this policy of appointing guest lecturers has been continued year after year. The teachers are the gurus of society, and they must be given proper respect, proper status, and a secure job, so that they can function with a free mind and take interest in their work. This policy of making appointments of guest lecturers is not conducive to this end, and must now be revoked."

(c) Whether the Government can issue directions to make contract appointment by issuing Government Order under Article 162 of the Constitution of India was also considered by the Supreme Court in the decision reported in (2007) 2 SCC 491(Punjab Water Supply and Sewerage Board v. Ranjodh Singh). In the said judgment it is held that a scheme issued under Article 162 cannot prevail over the statutory rules framed under Article 309 of the Constitution of India. The policy decision adopted by the State Government under Article 162 would be illegal and without jurisdiction if it is contrary to the statutory rule framed under Article 309 of the Constitution of India.

20. In the impugned order, the respondents 2 and 3 have imposed a further condition that the selected candidates must give a bank guarantee or security worth Rs.5 lakhs. By imposing the said condition, the qualified candidates, without means to give bank guarantee or security worth Rs.5 lakhs, are prevented from participating in the selection for public employment and the said action of the respondents is arbitrary and violative of Articles 14 and 16 of the Constitution of India. By imposing the said condition, the respondents are restricting the choice of participants/applicants, and only affluent class of candidates can apply and the same is impermissible as it is violative of Article 14 and 16 of the Constitution of India. Even assuming that the impugned order is sustained by permitting

the respondents to select B.E. Degree Holders for appointment on contract basis, only the B.E. Degree holders having sufficient means can apply and participate in the selection process. Therefore, such a condition imposed in the impugned order is arbitrary and unsustainable. Similar method adopted to impose ban on appointment and make massive appointment on the above basis dehors to the rules and then resorting to regularise such appointments by issuing Government Orders, was considered illegal by the Honourable Supreme Court in the decision reported in AIR 1991 SC 284 = 1992 Supp (1) SCC 272 (Keshav Chandra Joshi v. Union of India), which was followed by the Supreme Court in the subsequent decision reported in AIR 1995 SC 586 = 1995 (Supp) 1 SCC 572. In paragraphs 21 and 22, the Supreme Court held as follows:

> "21. It was reiterated in Keshav Chandra Joshi case and it is common experience that it is a vicious circle that initially Governments impose ban on recruitment and make massive ad hoc appointments dehors the rules giving a go-by to make recruitment in accordance with the rules and then resort to regularisation of such appointments exercising the power under Article 320(3) proviso or Article 162 to make them the members of the service. This practice not only violates the mandates of Articles 14 and 16 but also denies to all eligible candidates, their legitimate right to apply for and stand for selection and get selected. In State of Orissa v. Sukanti Mohapatra and J & K Public Service Commission v. Dr Narinder Mohan it was held that appointments made in violation of recruitment rules violate Articles 14 and 16. Therefore, as stated earlier, the Administrative Tribunal has rightly expressed unhappiness on the exercise of the power by the State Government by resorting to proviso to clause (3) of Article 320 to make massive departure to make recruitment in accordance with the Rules. We agree with Shri Guru Raja Rao, the learned counsel for PSC candidates that the PSCs must be made more functional and its efficacy be streamlined appointing people of eminence, experience and competence with undoubted integrity to recruit the candidates in accordance with rules for appointment to the posts and back-door entry by nepotism be put an end. Free play of exercise of the power under proviso to clause (3) of Article 320 would undermine the efficacy of constitutional institution i.e. PSCs. Be that as it may, we have to consider whether the regularisation of the service of the temporary appointees is in accordance with the special rules and the rules vis-à-vis condition (iii) of the Order under GOMs No. 413, dated 29-8-1983.
>
> 22. In R.N. Nanjundappa v. T. Thimmiah, placitum C & D, dealing with the contention that Article 309 speaks of rules for appointment and general conditions of service, held that regularisation of appointment in exercise of executive power process notwithstanding any rule, cannot be a form or kind of appointment and if it is in infraction of the rules and if it has effect of the violation of the rules or the Constitution, illegality cannot be regularised. If it does not violate the law, it would be permissible. Otherwise the rule itself gets criticised on the ground that it is in violation of Articles 14 and 16(1)."

21. Insofar as the contention that to meet the emergent situation the impugned selection procedure is resorted also has no basis since as already stated, the TNPSC as early as in February, 2007, called

for applications for selecting 49 Motor Vehicle Inspectors Grade-II for which written test was also conducted on 29.7.2007 itself and according to the learned counsel for the TNPSC, the first respondent TNPSC will be in a position to publish the results within a period of one month and that the delay in completing the selection process is on the part of the third respondent in not furnishing the report regarding the genuineness of the experience certificates produced by the applicants. The said delay on the part of the third respondent cannot be a sufficient reason to select the candidates on contract basis when regular selection for the very same post is under progress. It is also to be noted that for filling up the remaining vacancies so far no intimation is given by the respondents 2 and 3 to the TNPSC for notifying the vacancies. If really the respondents have taken effective steps and still there is delay on the part of the first respondent to complete the process of selection then only the contract appointment/temporary appointment to meet the emergent situation can be resorted to. The TNPSC, having been created under Article 320 of the Constitution of India, is also having a constitutional obligation to complete the selection without delay. It is unfortunate that even after over 11½ months, the TNPSC/first respondent has not chosen to publish the written test results. The selection process is not completed in spite of the expiry of about 17 months from the date of notification issued for selection of Motor Vehicle Inspectors Grade-II.

22. Finally, the learned counsels for the petitioners vehemently argued that permitting the respondents 2 and 3 to appoint the Motor Vehicle Inspectors Grade-II on contract basis, may lead to appointment through back door to public employment. Admittedly Motor Vehicle Inspectors Grade-II post is a public office/employment. If, pending finalisation of selection by the TNPSC without reference to the rules, persons are appointed on contract basis, there is possibility of seeking regularisation of their services by asking for relaxation of the recruitment rules. Hence I am of the view that by permitting the respondents 2 and 3 to fill up the posts of Motor Vehicle Inspectors Grade-II on contract basis, it may amount to encouraging back door entry in public employment. The said entry through back door method in public employment is condemned by the Supreme Court and this Court in very many decisions.

23. In Ram Ganesh Tripathi and Others v. State of U.P. and others, reported in AIR 1997 SC 1446 = (1997) 1 SCC 621, the Supreme Court observed that bye-passing the process of selection, regularisation of adhoc employees are not permissible. In Punjab Water Supply and Sewerage Board v. Ranjodh Singh, reported in (2007) 2 SCC 491, the Supreme Court held thus,

> "..... the State may have some control with regard to recruitment of employees to local bodies, but such control must be exercised by State strictly in terms of provisions of the Act. The statutory bodies are bound to apply the rules and regulation laid down under the statutory rule. Neither the statutory body could refuse to fulfill such conditional data nor could the State issue any direction contrary to or inconsistent with the constitutional principles adumbrated under Article 14 and 16 of the Constitution. Even a scheme issued under Article 162 of the Constitution would not prevail over statutory rules. In the aforesaid case of Punjab Water Supply & Sewerage Board (supra), the Supreme Court also noticed that the High Court did not issue a writ of mandamus on arriving at a finding that the respondent had a legal right in relation to their claim for regularisation, which it was not obligated to do. The Court proceeded to issue the direction only on the basis of the purported policy decision and failed to notice that any departmental letter or executive instruction cannot prevail over the statutory rule and constitutional provisions. The Supreme Court held that any appointment, thus, made without following the procedure would be ultra vires."

24. In the light of the above findings, I am of the view that the impugned order proposing to select and appoint Motor Vehicle Inspectors Grade-II on contract basis when regular selection process through TNPSC is in progress, is impermissible and the impugned Government Order and the circular issued by the Transport Commissioner/third respondent herein, are liable to be set aside and accordingly set aside.

25. In view of the order passed above setting aside the impugned order in toto, the respondents 2 and 3 are not entitled to proceed with selection process. Since there is urgency in the selection of Motor Vehicle Inspectors, Grade-II, the TNPSC is directed to publish the written test results held on 29.7.2007, before 29.7.2008 and complete the selection process and submit the list of selected candidates to the second respondent on or before 30.9.2008.

The writ petitions are disposed of with the above directions. No costs. Connected miscellaneous petitions are closed.

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TRIPURA PUBLIC SERVICE COMMISSION

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR: MIZORAM: TRIPURA & ARUNACHAL PRADESH)
AGARTALA BENCH
Writ Appeal No.78 of 2006 & connected cases
D.D. 25.7.2007
The Hon'ble Mr. Justice I.A.Ansari &
The Hon'ble Mr. Justice A.B.Pal

Sri. Prasun Chakraborthy & Ors. ... Appellants
Vs.
The State of Tripura & Ors. ... Respondents

Selection:

17 posts of Assistant Professor in various disciplines – 9 under UR (unreserved), 3 under SC and 5 under ST advertised without classifying the posts subjectwise – 9 posts under UR, 3 candidates under SC and 1 candidate under ST selected 4 posts under ST left unfilled for want of candidates – Petitioner under UR applied for the post of Assistant Professor in Electrical Engineering and also applied for the post of Assistant Professor in Computer Science and Engineering – Petitioner not considered for the post of Assistant Professor in Electrical Engineering as he does not possess the required qualification – Only 9 posts out of 17 posts being available for general category petitioner who stood at 16th position could not be selected - Petitioner contended that single post of Computer Science and Engineering should have been treated as UR category and selected him against the said post – His Writ Petition allowed quashing the entire selection process with a direction to undertake a fresh exercise after determining and advertising the posts in different disciplines categorywise – In Appeal selection upheld with modification that the candidates at 8th and 9th position of the merit list ought to have been selected under UR instead of candidates at 13th and 15th position.

Held:

As posts advertised not classified subjectwise single post Computer Science and Engineering cannot be treated as UR as claimed.

Wednesbury Test explained: Interference by the Court is not permissible unless one or more of the following conditions are satisfied viz., the order is contrary to law, or irrelevant factors have been considered, or relevant factors have not been considered, or the decision is one that no reasonable person would have taken.

Cases referred:

1. (1981) 1 SCC 722 - Ajay Hasia vs. Khalid Mujib Sehravardi
2. (1981) 4 SCC 159 - Lila Dhar vrs. State of Rajasthan
3. (1991) 3 SCC 91 - G.B.Mahajan vrs. Jalgaon Municipal Council
4. (2001) 2 SCC 41 - Tata Iron & Steel Co. Ltd. Vrs. Union of India
5. (2002) 6 SCC 127 - Chandra Praksh Tiwari Vrs. Shakuntala Shukla,

JUDGMENT

A.B.Pal, J.

The judgment dated 4.12.2006 in W.P. (C) No.309 of 2005 rendered by a learned Single Judge of this court is under challenge in these four writ appeals, which we propose to dispose of by this common judgment.

One of the four appellants is Shri Diptendru Bhattacharjee, the writ petitioner himself, his appeal being W.A. 80 of 2006. Other appeals were respondents in the said writ petition.

2. CHALLENGES IN THE WRIT PETITION:-

The Section procedure adopted by the Tripura Public Service Commission (herein after referred to as 'the Commission') as well as selection of 13 private respondents (respondents No.6 to 18 in the said writ petition who are appellants in W.A. 78 of 2006) for direct appointment to the posts of Assistant Professor in various disciplines of the Tripura Engineering College were assailed in the said writ petition on various grounds, the principal contention being that reservation of posts for Scheduled Tribes and Scheduled Castes done by the Commission after the selection and the oral test adopted as the only method of selection for appointment to the said posts are violative of Articles 14 and 16 of the Constitution. The learned Single Judge allowed the writ petition setting aside and quashing the entire selection and appointment of 13 private respondents with direction to undertake a fresh exercise after determining and advertising which and how many of the advertised posts in different disciplines would be reserved for Scheduled Tribes and Scheduled Castes.

3. CONCLUSIONS OF THE LEARNED SINGLE JUDGE:-

The conclusions arrived at by the learned Single Judge are –

(i) The selection process followed by the Commission in pursuant to the Advertisement No.2/2004 dated 1.3.2004 is not fair and the same is vitiated. The Government as well as the Commission ought to have notified which of the advertised posts would be considered as open category posts and which of the posts would be considered as reserved category posts and should have conducted the selection only after making known to all concerned the position as aforesaid. The failure to notify the same and taking a decision on reservation of specific posts only after the selection was complete have resulted in adoption of a procedure, which is not in consonance with the principle of fairness and appears to be discriminatory;

(ii) The contention that the writ petitioner having participated in the selection process cannot be permitted to challenge the selection process is not acceptable for the reason that the petitioner was not made aware at the time of advertisement or when called for participation in the selection process as well as at the time when the selection was made that the post of Assistant Professor in the discipline of Computer Science and Engineering would be reserved category post;

(iii) Though normally a writ petitioner being a candidate of his chosen discipline is not entitled to challenge the selection of candidates in disciplines where the petitioner does not have the qualification to apply and is ineligible to be considered for appointment, in the instant case if the selection of private respondents No.6 to 18 is allowed to go unchallenged, it would mean that the remaining four posts, which have been kept vacant would be treated as reserved for Scheduled Tribes category candidates and it would be difficult for the Court to grant any relief to the petitioner;

(iv) Having permitted the petitioner to participate in the selection process where he was the only candidate in his chosen discipline (Computer Science and Engineering), the Commission would not be fair to deny appointment to the petitioner after the selection is over on the ground that the said post is a reserved category post.

3. FACTS IN BRIEF:-

In order to understand the controversy, we may notice the factual matrix in a very short compass:

The writ petitioner Shri Diptendu Bhattacharjee (appellant in W.A.No.80 of 2006) is a Lecturer in Selection grade in Electrical Engineering in the Tripura Engineering College. He obtained 70.11% marks in Madhyamik Examination, 75.7% in H.S. (+2 Stage) Examination, 69.03% marks in B.E. (Electronics) Examination and 85.3% marks in M.E. Tel.E. in Computer Engineering specialization with Gold Medal for securing First Class First position in the last mentioned examination. He was appointed to the post of Lecturer in 1991 in Electrical Engineering Department of the Tripura Engineering College after selection by the Commission and in due course he moved to the Selection Grade w.e.f. 9.9.2002.

The Commission published an advertisement No.2/2004 dated 1.3.2004 inviting applications for direct appointment to 17 temporary posts of Assistant Professor for Tripura Engineering College in following disciplines:-

(a) Civil Engineering	-	4 (four)
(b) Mechanical Engineering	-	4 (four)
(c) Electrical Engineering	-	4 (four)
(d) Computer Science & Engineering	-	1 (one)

(e) Economics	-	1 (one)
(f) Mathematics	-	1 (one)
(g) Physics	-	1 (one)
(h) Chemistry	-	1 (one)

Essential qualifications for the posts have also been indicated in the advertisement. The petitioner applied for the post of Assistant Professor in Electrical Engineering. He also filed another application for the post of Assistant Professor in Computer Science and Engineering. But, he was not found eligible for the post of Assistant Professor in Electrical Engineering. He was called for interview only for the post of Assistant Professor in Computer Science and Engineering. The other applicants for the said post were not found eligible and, therefore, he remained the sole candidate in the field for the said post. In the advertisement conspicuously there was no mention, which post and in which discipline would be for the reserved categories. As a result, the applicants had no idea whether the posts applied for in their chosen disciplines would be in general category or reserved categories. Though the petitioner felt aggrieved for refusing him to face interview for the post of Assistant Professor (Electrical Engineering), he had the impression that the post of Assistant Professor in Computer Science and Engineering being a single post would not fall in any reserved category and he being the lone candidate would be selected for and appointed to the said post in consideration of his brilliant academic record, teaching experience in the said Engineering College and his performance in the interview where he had answered correctly all the questions. But to his stock and surprise he came to know that he could not secure any position among the first nine candidates selected from UR category and the post of Assistant Professor, Computer Science and Engineering had been left vacant along with other three vacant posts which came to be automatically reserved or available only for Scheduled Tribes.

4. GRIEVANCES OF THE PETITIONER:-

The grievances of the petitioner as projected in the writ petition are as follows:-

(i) He has been denied to be interviewed for the post of Assistant Professor (Electrical Engineering) illegally and arbitrarily;

(ii) The post of Assistant Professor (Computer Science and Engineering) being a single post cannot be kept for reserved category being violative of the principles of reservation;

(iii) The oral interview only for 100 marks for selection of such important posts like Assistant Professors of the Engineering College is legally unsustainable inasmuch as the same being purely subjective test, element of arbitrariness is bound to be present;

(iv) Though private respondents No.13, 15 and 17 have no teaching experience in any Engineering College, they have been selected for the posts of Assistant Professor in their chosen disciplines in violation of the provisions contained in the Recruitment Rules for the said post;

(v) Respondents No.11, 12, 14 and 16, who have been selected for the posts of Assistant Professor are much junior to him in the grade of Lecturer in the said Engineering College. His performance in the interview for the post of Assistant Professor (Computer Science and Engineering) cannot be comparable with the performance of others in other disciplines as there cannot be any uniform method or criteria for deciding the merits of the persons interviewed belonging to different disciplines.

He made representations to the Secretary and Commissioner of the Higher Education of the State Government on 10.5.2005 and 6.6.2005, which, however, could evoke no favourable response. In the writ petition, he prayed for setting aside and quashing the entire selection process and directing the respondents to make disciplinewise reservation.

5. CONTENTION OF THE STATE GOVERNMENT:-

The State and its other official respondents, the Commission and the private respondents No.6 to 18 in the writ petition contested the claim by filing separate counter-affidavits. The contention, inter alia of the State and its other official respondents is that the Recruitment Rules for the post of Assistant Professor showing total strength to be 18 have not shown their distribution among different disciplines as that would depend on necessity of the institution from time to time. Out of 18 posts of Assistant Professors, 17 were vacant for which requisition was sent to the Commission indicating that 5 posts would be reserved for Scheduled Tribes and 3 posts for Scheduled Castes without indicating reservation against any particular discipline. It is contended that the department is not aware anything about the procedure for selection of suitable candidates adopted by the Commission. As the reservation roster position was duly verified and it was found that 8 posts out of 17 would be in the reserved category, there remained only 9 posts for the general category and it was not considered necessary to earmark any particular post for the reserved category. Admitting that the representations dated 10.5.2005 and 6.6.2005 were received from the petitioner, the challenge advanced therein being confined to the selection process only adopted by the Commission, the State or other official respondents of the State have no comment to offer or decision to make.

6. STAND OF THE COMMISSION:-

The Commission being at the center of the challenge contended, inter alia, that there was no indication in the requisition received from the State Government about any particular post of any particular discipline to be kept for the reserved category and in view of the clear provision in the Recruitment Rules and the requisition indicating requirement of different disciplines, the advertisement inviting application for 17 posts was published with only indication that out of 17 posts, 5 posts would be reserved for Scheduled Tribes, 3 for Scheduled Castes. Thus only 9 posts would be available for selection from the open market. The only clarification, which was considered by Commission necessary, for the State Government to make was with regard to the candidates from Industries/Profession who may not have teaching experience or Ph.D. Degree. Thus, there was nothing wrong in the advertisement issued by the Commission, which was quite consistent with the Recruitment Rules as well as the requisition received from the State respondents and which has not been put under challenge in the writ petition. As regards the grievance of the petitioner that he was not found eligible for the post of Assistant Professor (Electrical Engineering), the contention of the Commission is that the petitioner has no basic education qualification in Electrical Engineering. Though he is possessing B.E. in Electronics and M.E. Tel.E. in Computer Engineering, the requirement for the said post as per the advertisement is Ph.D. Degree with First Class at Bachelor's or Master's level in the appropriate branch of Engineering/ Technology with three years experience in teaching or First Class Degree at Master's level in appropriate Branch of Engineering/Technology with five years experience in teaching/Industry. He was, however, found to be the only candidate eligible for the post of Assistant Professor (Computer Science and Engineering) among four applicants, but as he secured the marks, which placed him much below 9 UR candidates in the merit list and as there were only 9 posts out of 17 available for general category, he could not be selected for the post of Assistant Professor (Computer Science and Engineering). It is the specific contention of the Commission that the said post has never been earmarked for any reserved category before or after the selection process and that only for non-availability of any candidate within 9 successful general candidates selected on merit for the said discipline, the post had to be left vacant. As there was only one candidate belonging to Scheduled Tribes category, who was found eligible and suitable for the post of Assistant Professor in Civil Engineering, four posts out of 17 had to be left vacant due to non-availability of Scheduled Tribes candidates. Thus, there has been no discrimination in the process of selection and the Commission has not done anything towards reservation of any particular post, much less for the post of Assistant Professors (Computer Science and Engineering). It

is just happened that four posts could not be filled up the reason being non-availability of eligible persons belonging to Scheduled Tribes community.

7. DEFENCE TAKEN BY PRIVATE RESPONDENTS:-

In their joint counter affidavit, the private respondents No.6 to 18 of the writ petition, who have been selected and appointed to the 13 posts of Assistant Professors in different disciplines contended, inter alia, that purely on the basis of their merit and eligibility, they have been selected and appointed. Of them all the 9 UR candidates recommended for appointment have secured higher marks than the petitioner and for that reason alone he cannot question their selection and appointment in the disciplines for none of which the petitioner was an applicant. It is their specific contention that as their selection and appointment remained within the number of posts advertised for UR category and the posts against which they have been appointed have never been declared to be reserved, their selection and appointment have nothing to be interfered with by the Court.

8. We have heard the learned counsel for the parties.

9. MERIT OF THE CLAIM OF ELIGIBILITY FOR THE POST IN ELECTRICAL ENGINEERING:-

Having set out the rival contentions and noticed the decisions and conclusions of the learned Single Judge above, we may now, before adverting to the principal contention, deal with the peripheral questions, the first being the grievance regarding eligibility of the petitioner for the post of Assistant Professor (Electrical Engineering) for which he was not found eligible. It is seen that the essential qualification for the said post, as stated in the advertisement noticed above, is just as provided in the Recruitment Rules for the post of Assistant Professors. As he neither possessed Ph.D. Degree with Ist Class at Bachelor's or Master's level in Electrical Engineering or Ist Class Degree at Master's level in the said discipline, we are of the considered view that the Commission has rightly found the petitioner not eligible for the post of Assistant Professor (Electrical Engineering) if strictly gone by the educational qualifications and other qualifications provided in the Recruitment Rules.

10. SINGLE POST RESERVATION:-

The other contention advanced is regarding the post of Assistant Professor (Computer Science and Engineering) for which the petitioner was found to be the only eligible candidate and according to

him, the same being a single post, cannot be kept for any reserved category. On this issue, learned Single Judge held thus:

> "If the said post was a reserved post naturally the eligibility of the petitioner to participate in the selection process would have been absent. Having thus permitted the petitioner to participate in he selection process where he was the lone candidate in his chosen discipline, the Commission would not be fair to deny appointment to the petitioner after the selection is made on he ground that the said post is a reserved post by basing their decision with reference to the common merit list prepared by the Commission."

This, in our view, has not been correctly dealt with and decided by the learned Single Judge in view of the provisions contained in the Recruitment Rules which do not say which particular post shall be reserved for Scheduled Tribes or Scheduled Castes. It has been correctly argued by Mr. S.Deb, learned senior counsel appearing for the respondent Commission that the petitioner could not be selected for appointment to the post of Assistant Professor (Computer Science and Engineering) not because the post was reserved for Scheduled Tribes or Scheduled Castes, but because the petitioner could not come within first 9 persons in the merit list for appointment against a post available for general category. The first and foremost condition of appointment of any person to any of the 17 posts advertised is that if he is of general category, he must be one of the first 9 candidates selected on merit and only thereafter, he could be accommodated against the discipline of his choice if vacancy remains after accommodating candidates, if any, above him in the same discipline. Thus, the view that the post of Assistant Professor (Computer Science and Engineering) had been kept for reserved category illegally and arbitrarily only after the selection process and because of such reservation the petitioner could not be appointed to that post is, in our view, totally misconceived and, therefore, unsustainable in law. It is quite evident from the consistent stand of the State and the Commission that neither the post of Assistant Professor (Computer Science and Engineering) nor any other post has ever been specifically earmarked for any reserved category. Out of 17 posts advertised, 9 were available for general category, 5 for Scheduled Tribes and 3 for Scheduled Castes, as per provision in the Recruitment Rules, as correctly reflected in the advertisement published. There being no ambiguity about this position, more so neither the recruitment rules nor the advertisement having been put under challenge by the petitioner, the only acceptable view to be taken is that no post was reserved before or after the selection and it just happened that because of non-availability of four ST candidates, four posts remained vacant, one of which happened to be the post of Assistant Professor (Computer Science and Engineering).

Mr. Deb has sought to emphasize that if the petitioner could secure a position among the first 9 UR candidates in the merit list, he would certainly have been appointed to the post of Assistant Professor (Computer Science and Engineering). But he secured only 16th position in the common merit list and 13th among the UR candidates. Because of his failure to secure such a position and because of selection of more suitable candidates for 9 UR posts, all above him in the merit list, the post of his choice along with 3 others remained vacant, Mr. Deb submits. We would see later how this submission lacks merit when given closer scrutiny.

11. RESERVATION AFTER SELECTION:-

It would be seen from the judgment impugned that the learned Single Judge allowed the writ petition only on the ground that the respondents did not act with fairness by not disclosing the posts which would be reserved for Scheduled Tribes and Scheduled Castes. In public employment it is of utmost importance that the entire selection process is transparent and known to the participants well before commencement of the process and if the petitioner could know that the post for which he was found eligible was earmarked for the reserved category, he would not have participated in the selection process. Learned Single Judge has proceeded from these premises for taking the view that by deciding to reserve some posts including the post of Assistant Professor (Computer Science and Engineering) only after the selection process was over, the entire selection process has become vitiated. According to the learned Single Judge, it is the duty of the State respondents to declare the posts, which would be earmarked for the reserved category in order to enable the prospecting candidates belonging to the general category to decide before taking the plunge. Thus, reservation of posts after selection being the main reason for setting aside and quashing the entire selection process, which has been called into question in the present three appeals (W.A.78/06, 79/06 and 17/07) by the State, Commission and the private respondents, it would not have been necessary for us to enter into any other controversy but for the appeal filed by the petitioner-appellant (W.A.80/06), who has impugned the same judgment on the following grounds:-

(a) Viva voce cannot be the sole method of selection;

(b) Reservation should be disciplinewise;

(c) The petitioner has been arbitrarily denied a call for interview for the post of Assistant Professor (Electrical Engineering).

12. METHOD OF SELECTION AND DISCIPLINEWISE RESERVATION:-

We have already dealt with and answered the third issue regarding eligibility of the petitioner for the post of Assistant Professor in Electrical Engineering and we have seen that he has indisputably no basic degree in Electrical Engineering, which is a mandatory requirement as per the Recruitment Rules and as such he has been correctly found not eligible for the same. The question whether viva voce test can be the sole method of selection or whether disciplinewise reservation or earmarking of reserved post before the selection process commenced is required by law, we shall presently address them in the light of the legal position settled by the Apex Court in a line of decisions.

13. REASON FOR THE ORAL TEST AS THE ONLY METHOD:-

In the case on hand, the Commission has adopted viva voce test only for 100 marks to test suitability of the candidates and the reason for the same, as has been pleaded by the Commission in the counter-affidavit, is that only 19 candidates were in the field for 17 posts and, therefore, no written test was considered necessary. We are not convinced. We do not consider it correct that number of candidates only should determine the method of selection. The post of Assistant Professor in the Engineering College is not only a Gazetted Post but undoubtedly to be regarded as a high public office. In Ajay Hasia vs. Khalid Mujib Sehravardi, reported in (1981) 1 SCC 722, the Apex Court observed as follows:-

> "Oral interview test is undoubtedly not a very satisfactory test for assessing and evaluating the capacity and caliber of candidates, but in the absence of any better test for measuring personal characteristics and traits, the oral interview test must, at the present stage, be regarded as not irrational or irrelevant though it is subjective and based on first impression, its result is influenced by many uncertain factors and it is capable of abuse". [Emphasis ours)

We pause here for a moment to remind ourselves that this observation is about measuring personal characteristics and traits only by oral interview. In our case, there is no specific contention that the test for 100 marks was only for measuring personality and character by oral test. Normally, such high marks should not be only for evaluating personality and character, it ought to be for assessing depth of knowledge and command in the subjects concerned as well.

Though, however, the above observation was made in the context of admission of students in Regional Engineering College, Srinagar, the Apex Court brought into its observation the matter of public employment also in the following words:-

> "We would, however, like to point out that in the matter of admission to College or even in the matter of public employment, the oral interview test as presently held should not be relied upon as an exclusive test, but it may be resorted to only as an additional or supplementary test and, moreover, great care must be taken to see that persons who are appointed to conduct the oral interview test are men of high integrity, caliber and qualification."

But as the marks allocated for oral interview in the said admission test was 33 1/3 percent of the oral marks, it was held that such oral test was unreasonable and arbitrary. The final view of the Apex Court in Ajay Hasia (supra) was that allocation of more than 15% of the marks for the oral interview would be arbitrary and unreasonable and the same is liable to be struck down as constitutionally invalid.

14. VALIDITY OF ORAL TEST:-

The above view has, however, been departed from in Lila Dhar vrs. State of Rajasthan, reported in (1981) 4 SCC 159, particularly in respect of public employment. In para 6 and 9 of the said judgment, the Apex Court held that the ratio laid down in Ajay Haria (supra) is per incuriam and cannot be applied in cases of public employment. The relevant part of para 6 on this point reads as follows:-

> "On the other hand, in the case of services to which recruitment has necessarily to be made from persons of mature personality, interview test may be the only way, subject to basic and essential academic and professional requirements being satisfied. To subject such persons to a written examination may yield unfruitful and negative results, apart from its being an act of cruelty to those persons."

In para 9, the Apex Court further observed –

> "The words "or even in the matter of public employment" occurring in the first extracted passage and the reference to the marks allocated for the interview test in the Indian Administrative Service Examination were not intended to lay down any wide, general rule that the same principle that applied in the matter of admission to colleges also applied in the matter of recruitment to public services. The observation relating to public employment was per incuriam since the matter did not fall for the consideration of the Court in that case."

15. NECESSITY OF COMMON SYLLABUS, GUIDELINE OR UNIFORM CRITERIA:-

The Apex Court thus settled that in the matter of public employment an oral test can be the sole method for assessing the quality and suitability of the persons interviewed. But it is to be noticed that in the present case not only written examination was dispensed with but the marks allocated for oral

interview was as high as 100 and again, admittedly, there has been no guideline or common criteria for subjecting the candidates of different disciplines through same test. The petitioner – appellant has raised a very important question regarding the method adopted for testing suitability of 19 candidates for 17 posts of different disciplines. As no common syllabus was formulated and made available to the candidates in Ajay Hasia (supra), the Supreme Court observed that one of the most prolific sources of error in the oral test has been the failure on the part of examiners to understand the nature of evidence and to discriminate between that which was relevant, material and reliable and that which was not. It also must be remembered that the best oral interview provides opportunity for analysis of only a very small part of a person's total behaviour. Generalizations from a single interview regarding an individual's total personality pattern have been proved repeatedly to be wrong. Though inspite of all criticism, the oral interview method is very much in vogue, but according to the Apex Court in Ajay Hasia (supra) the same should be a supplementary test only for assessing the suitability of candidates. In "Public Administration in theory and practice", a book my M.P. Sharma, a passage relevant to the question has been quoted in Ajay Hasia (supra), the relevant part of which reads:-

> "Different interviewers have their own notions of good personality. For some, it consists more in attractive physical appearance and dress rather than anything else, and with them the breezy and shiny type candidate scores highly while the rough uncut diamonds may go unappreciated. The atmosphere of the interview is artificial and prevents some candidates from appearing at their best. Its duration is short, the few questions of the hit-or-miss type, which are put, may fail to reveal the real worth of the candidate."

Though oral interview method, in public employment as the only test cannot per se be legally invalid in view of the decision of the Supreme Court in Lila Dhar (supra), it has to be observed in the case on hand that in the absence of any common syllabus or criteria for assessing suitability of candidate of different disciplines, the oral interview method as the only test has every possibility of suffering from uncertainty, subjectivity and other unseen vices. We are of the considered view that in such oral interview for selection of persons for different disciplines like Civil Engineering, Mechanical Engineering, Computer Science and Engineering, Mathematics, Physics, Chemistry and Economics, it is absolutely necessary to formulate a common syllabus in the event a common selection is intended without any written test.

16. DISCIPLINEWISE SELECTION WHEN DESIREABLE:-

It would be seen from records that for 4 posts of Assistant Professors in Civil Engineering, there were only 5 applicants. Similarly for 4 posts in Mechanical Engineering, there were only 4 applicants

and for 4 posts of Electrical Engineering, there were also 4 applicants. It is desirable that candidates should be selected for a particular discipline only from the applicants of that discipline if knowledge and command of the candidates in the particular subject are considered to be necessary elements in the suitability test. If, however, personality test is intended to be the only criteria without any test in the subject concerned, then only a common selection test for candidates of different disciplines is feasible and for that also a common syllabus or guideline is of utmost importance to prevent subjectivity or uncertainty or personal notions of the interviewers.

17. ESTOPPEL BY CONDUCT:-

Mr. Deb, learned counsel for the respondents-appellants (Commission) has strongly argued that the petitioner-appellant cannot question the selection process after himself participating in the same, being barred by the principle of estoppel by conduct. It is true a person after participating in the selection process cannot question its validity only because he has been unsuccessful. Certainly he cannot question the composition of the Committee taking the interview or the marks allocated to him. The Supreme Court in Chandra Praksh Tiwari Vrs. Shakuntala Shukla, reported in (2002) 6 SCC 127 observed that estoppel by conduct can only be said to be available when there is a precise and unambiguous representation and it is on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or status. The three basic elements of the doctrine of estoppel have been referred to in Tata Iron & Steel Co. Ltd. Vrs. Union of India [(2001) 2 SCC 41]. The relevant observation appearing in para 20 is gainfully quoted below:-

> "20. Estoppel by conduct in modern times stands elucidated with the decisions of the English Courts in Pickard v. Sears and its gradual elaboration until placement of its true principles by the Privy Council in the case of Sarat Chunder Dey V. Gopal Chunder Laha whereas earlier Lord Esher in the case of Seton Laing Co. V. Lafone evolved three basic elements of the doctrine of estoppel to wit:
>
> 'Firstly, where a man makes a fraudulent misrepresentation and another man acts upon it to its true detriment: Secondly, another may be where a man makes false statement negligently though without fraud and another person acts upon it: And thirdly, there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel."

The petitioner-appellant has not challenged composition of the interview board or has not questioned the marks allotted to him. He has raised a general question regarding correctness of the selection process, i.e. oral test as the only method for selection in important public office like Assistant Professor. Such controversy is still stalking in the legal corridor. We do not think the principle of estoppel by conduct stands in the way of revisiting the issue.

18. WHETHER ORAL TEST VITIATES THE SELECTION PROCESS:-

It would be seen thus that the petitioner in the case on hand has neither alleged anything against composition of the Selection Committee nor the marks allocated to him in the oral test which placed him much below 9 UR candidates. He has also not alleged any personal bias or mala fide in the selection process. What he has sought to question is correctness of the oral interview method as the sole test for assessing suitability of candidates of different disciplines. We have already held that if the selection is confined to personality test only, then also it is desirable that a common syllabus or guideline is formulated for uniformity in the process. If, however, suitability of the candidates with regard to their knowledge in respective subject or discipline is also an element of test then separate test for separate discipline is desirable. But in view of the decision of the Supreme Court in Lila Dhar (supra) and the fact that despite of the criticism, the oral interview methods continues to be very much in vogue, we are not inclined to invalidate the selection process, more so for the reason that no malafide or personal bias has been alleged.

19. RESERVATION BY THE COMMISSION AFTER SELECTION:-

The next important question, which confronts us now, relates to recommendation part of the selection process, particularly its consistency with the stand taken by the Commission. Learned Single Judge observed that the Commission itself reserved certain posts only after the selection process was over. Though we have noticed above that neither the State Government nor the Commission have declared any particular post for any reserved category either before or after the selection and it just happened that 4 posts out of 17 remained unfilled due to non-availability of Scheduled Tribes candidates and one of the 4 posts happened to be the post of Assistant Professor, Computer Science and Engineering, a closer look to the practical scenario seems to give a different picture. The principal contention of the Commission is that as only 9 posts were available for the UR category, the petitioner-appellant was required to secure a position within 9 for recommendation by the Commission for appointment to the post of his discipline. As he has got only 16th position in order of merit securing 56 marks only, he being a candidate of general category could not be recommended for appointment though the post of Assistant Professor (Computer Science and Engineering) is a single post and not earmarked for any reserved category.

20. The incongruity of the above stand would be apparent from a closer look of the merit list and the recommendations made. The overall merit list of the qualified candidates for the post of Assistant Professors, Tripura Engineering College shows the names of 19 candidates, their age, category, subjects, marks obtained and recommendation of the Commission. For better appreciation, the same is extracted below:-

"OVERALL MERIT LIST OF QUALIFIED CANDIDATES FOR THE POST OF ASSISTANT PROFESSOR, TRIPURA ENGINEERING COLLEGE

Sl. No.	Roll No.	Name	Age as on 01.03.2004	Cate-gory	Subject	Marks obtained	Remarks
1.	12	Sri. Prasun Chakraborty	41-03-26	UR	Mech.Engg.	69	Recommended
2.	21	Sri Richi Prasad Sharma	42-09-23	UR	Civil Engg.	68	Recommended
3.	11	Sri Arup Kr. Das Choudhry	41-02-3	UR	Elec.Engg.	68	Recommended
4.	12	Sri Rup Narayan Ray	40-06-18	UR	Elec.Engg.	67	Recommended
5.	6	Sri. Sekhar Datta	40-03-28	UR	Mech.Engg.	67	Recommended
6.	18	Sri Manish Pal	33-02-12	UR	Civil Engg.	67	Recommended
7	23	Sri Sujit Kr.Pal	40-06-03	UR	Civil Engg.	66	
8.	11	Dr.Swapan Bhownik	39-01-09	UR	Mech.Engg.	65	
9.	13	Sri Ardhendu Saha	37-09-26	UR	Elec.Engg.	65	
10.	9	Sri Ajoy Das	31-09-22	SC	Mech.Engg.	65	Recommended
11.	2	Dr.Debasish Bhattacharjee	42-07-03	UR	Math	59	Recommended
12.	3	Sri Priya Nath Das	32-11-28	SC	Elec.Engg.	59	Recommended
13.	2	Dr.(Smti) Aparna Nath	40-0-22	UR	Physics	58	Recommended
14.	7	Sri Ratul Das	33-02-0	SC	Civil Engg.	58	Recommended
15.	1	Dr. Saroj Kr. Das	41-0-0	UR	Chemistry	57	Recommended
16.	4	Sri Diptendu Bhattacharya	37-3-7	UR	Comp.Science & Engg.	56	
17.	3	Dr.Amitabha Saha	36-01-16	UR	Chemistry	55	
18.	4	Dr. Asis Mitra	40-4-27	UR	Chemistry	53	
19.	11	Smti Rama Debbarma	31-10-11	ST	Civil Engg.	51	Recommended

It would appear from the above list that only first six candidates in the merit list belonging to UR category have been recommended by the Commission, 2 for Mechanical Engineering, 2 for Civil Engineering and 2 for Electrical Engineering. It would further appear that Shri Sujit Kr. Pal in the 7th position secured 66 marks belonging to Civil Engineering has not been recommended as obviously

there is no vacancy after recommending 2 from UR in second and sixth positions, one from Scheduled Tribes in 19th position and one from Scheduled Castes in 14th position. Thus, though he has scored 7th position in the merit list, he could not be recommended for want of vacancy. But same is not the case with Dr. Swapan Bhowmik and Shri Ardhendu Saha, who are in 8th and 9th position in the merit list belonging to Mechanical Engineering and Electrical engineering respectively. Dr. Swapan Bhowmik secured 65 marks with 8th position, but has not been recommended though there exists one vacancy in the said discipline after recommending two candidates from UR (serial No.1 and 6) and one from Scheduled Castes (serial No.10). Similarly, Shri Ardhendu Saha in 9th position securing 65 marks has not been recommended for Electrical Engineering though there remains one vacancy after recommending two from UR (serial No.3 and 4) and one from SC (serial No.12).

The reason is obviously to keep two vacancies reserved for Scheduled Tribes in the said two disciplines. Again, Dr. Debashis Bhattacharjee (UR) at serial No.11 of the merit list has been recommended for appointment to the post of Assistant Professor, Mathematics. As one Scheduled Castes candidate (Shri Ajoy Das) has scored 10th position in the common merit list, Dr. Bhattacharjee would move up from 11th to 10th position of UR candidates. Again, as 7th position holder (UR) could not be recommended for want of vacancy, Dr. Bhattacharjee moves up further and comes for one of the nine vacancies for general category. Therefore, there is nothing wrong in his selection. Curiously enough, the Commission has recommended Dr. (Smti) Aparna Nath (UR) at serial No.13 and Dr. Saroj Kr.Das at Serial No.15 of the merit list for the posts of Physics and Chemistry. As there is no reservation against any particular post, the question that would spring up and loom large why the Commission refused to recommend Dr. Swapan Bhowmik and Shri Ardhendu Saha, who secured 8th and 9th position and though there exists vacancy in their respective discipline? Why, instead, the Commission has recommended two others of general category whose position are much below, at 13th and 15th of the merit list? Thus the argument of the Commission that the petitioner-appellant could not be recommended only because he could not secure a position in the merit list of first 9 UR candidates is totally wrong and baseless and misplaced.

21. WEDNESBURY TEST:-

It is thus evident that though the Recruitment Rules for the posts have not earmarked any particular post in any discipline for any reserved category, which is the consistent stand of the State and the

Commission and proceeding therefrom it can be said that the first 9 UR candidates in the merit list are entitled to be recommended for appointment against the posts of their respective disciplines, subject, however, to availability of vacancies, Dr. Swapan Bhowmik and Shri Ardhendu Saha have not been recommended by the Commission for undisclosed reason inspite of availability of vacancies. The undisclosed but obvious reason must be that the Commission arbitrarily and uncalled for decided to earmark and keep aside one post in Mechanical Engineering and another in Electrical Engineering as reserved for Scheduled Tribes only. This, in our considered view, cannot be the business of the Commission. It has gone beyond its bounds. The question is whether such discretion exercised by the Commission is at all conferred by or consistent with the law and whether the same can stand Wednesbury test particularly when neither the Recruitment Rules contemplate nor the State Government required the Commission to do the same. For applying the Wednesbury principle, it can be said that interference by the Court is not permissible unless one or more of the following conditions are satisfied viz., the order is contrary to law, or irrelevant factors have been considered, or relevant factors have not been considered, or the decision is one that no reasonable person would have taken. In G.B.Mahajan vrs. Jalgaon Municipal Council [(1991) 3 SCC 91], the pertaining question was who is a 'reasonable man'. It has been pointed out in the said judgment that the test of a 'reasonable man' or the "man on the Clapham omnibus" as known in the law of torts is not applicable in case of Wednesbury unreasonableness. Hence, in condemning unreasonable administrative action, the Court enquires whether the decision is one which a reasonable body could have reached. In other words, the Court allows some latitude for the range of differing opinions which may fall within the bounds of reasonableness. Thus where no reasonable person can find the decision reasonable, Wednesbury permits the Court to interfere with the decision.

22. RECOMMENDATION OF THE COMMISSION FAILS WEDNESBURY TEST:-

It is well settled and needs no dilation that the duty of the Commission is only to recommend names after selection for the advertised posts. It can never be the duty of the Commission to decide even by implication which post should be earmarked for any reserved category, a function exclusively within the domain of the State Government, more particularly the Education Department and the institution concerned, to be performed in accordance with the recruitment rules and other relevant laws. As the Recruitment Rules do not provide that any particular post shall be earmarked for any reserved category, the concerned respondent or the authority of the institution could decide the question after receiving

the merit list from the Commission on the basis of the requirement, necessity and priority with due regard to the merit position of the candidates. The decision as to which four posts should remain vacant for non-availability of four Scheduled Tribes candidates should not have been taken by the Commission. It acted unreasonably and arbitrarily by not recommending 8th and 9th position holders and instead recommending persons at 13th and 15th of the merit list. The decision of the Commission thus fails Wednesbury test leaving the Court to interfere with the same, which we are inclined to do.

23. SUBMISSION ON FATE OF THE PRIVATE APPELLANTS:-

At this juncture, Mr. S.Talapatra, learned senior Counsel appearing for the private respondents has placed a submission that in the event of setting aside and quashing of the selection and appointment of the private appellants, they would be simply thrown out of employment for the reason that the lower posts earlier held by them, which had fallen vacant following their appointment to the posts of Assistant Professor, have already been filled up. That apart, the interest of the institution would also greatly suffer as there would be almost no teacher in the grade of Assistant Professor in such an eventuality.

These extraneous circumstances or resultant consequences cannot have any relevance to the issues which precisely are correctness and legality of the selection process and the recommendations made by the Commission we are called upon to decide. Our inquiry thus stands restricted to the correctness of the findings of the learned Single Judge with regard to the aforesaid issues in the facts situation of the case and the legal positions noticed above.

24. SUBMISSION ON ROSTER MECHANISM:-

Mr. Talapatra advanced another submission that if the hundred point roster, which starts from roster point 3 in the present case, is pressed into service in a different way by first accommodating all selected candidates of a particular stream against the allotted slots for UR category in the roster, then irrespective of the merit position, Dr.(Smti) Aparna Nath and Dr. Saroj Kr.Das can be accommodated leaving two vacancies in the stream of Electrical and Mechanical Engineering as those vacancies would fall in the slots of the roster reserved for Scheduled Tribes.

We are unable to understand and appreciate this submission at all. What we understand is that the roster mechanism is not a law by itself, but is only a means to achieve the reservation target. By no

ingenious application of the roster the claim of the persons who have secured positions in the merit list within the range of vacancies available for general category can be defeated. There is absolutely no problem about the reservation of posts in the present imbroglio. Out of 3 posts for Scheduled Castes, 3 candidates have been recommended and out of 5 posts for Scheduled Tribes, one has been recommended. In such a situation, what the law of reservation requires is that 4 posts out of 17 are to be left vacant for that category, no matter in whatever discipline such vacancies may fall. Thus, application of the roster mechanism in whatever way, the State and Commission may intend to do, there is no escape from recommending and appointing 9 candidates of UR category as per the merit list.

For the reasons aforementioned, the submissions of Mr. Talapatra merit no consideration.

25. The upshot of the above discussion may now be summed up thus:

(i) The selection process of oral test for 100 marks though not a satisfactory method, the same need not be interfered with in view of the decision of the Supreme Court in Lila Dhar (supra) and there being no allegation of bias by the petitioner with regard to the selection and the marks allocated to him. We, however, hasten to add that if personality traits as well as depth of knowledge of the candidates in the subject concerned are to be assessed, it is desirable that selection should be separately done for every discipline in accordance with a syllabus to be formulated. If personality traits only are to be assessed by an oral test for the candidates of all disciplines, then also a common syllabus, without any reference to any particular subject, is required to be formulated for the purpose of such test. The reason is that, as pointed out by the Apex Court in Ajay Hasia (supra), oral test is undoubtedly not a very satisfactory test, as there remains every possibility of subjectivity and persons notions of the interviewers about personality tainting the selection. Though there is no such allegation of personal bias from the petitioner, we have made the above observation as a note of caution;

(ii) As the selection process and the merit list (other than the recommendation part) on the basis of the marks assigned stand the scrutiny of rule of subjectivity and personal bias, the next question confronting the same is whether by not declaring or indicating the posts to be reserved for Scheduled Castes and Scheduled Tribes before the oral test, the entire selection process stood vitiated for the reasons explained by the learned Single Judge? As we have noticed above, the Recruitment Rules for the said posts have no provision to reserve any particular post of any particular discipline for the Scheduled Tribes or Scheduled Castes. Consistent with the said Rules, the advertisement in question also has not indicated reservation against any particular post. Instead, the only indication given in the

advertisement is that out of 17 posts advertised, 5 shall be reserved for Scheduled Tribes and 3 for Scheduled Castes. The intention is obvious. In view of non-availability of sufficient number of suitable candidates from the reserved categories, it is always difficult to say if any post in a particular discipline is reserved for a particular reserved category, whether suitable candidate from that category would at all be available. In the event of non-availability of such candidate, the said particular discipline may suffer indefinitely. The percentage of reservation fixed by the relevant Act being the target to achieve in the public employment, it was perhaps considered necessary to provide some flexibility in the Recruitment Rules to enable the Commission to select suitable candidates from the reserved category for the post of any discipline advertised. Be that as it may, as the Recruitment Rules and the advertisement in question have not been assailed in the present proceedings, we are unable to subscribe to the view of the learned Single Judge that only for failure to earmark particular post for a reserved category before the test, the entire selection process stood vitiated. We are, therefore, of the view that on this ground also the selection process and the merit list call for no interference. Here also we intend to add that it is always desirable to indicate in the advertisement, whenever issued, the posts and the number of posts in the disciplines which are to be reserved depending on necessity, priority and interest of the institution which may vary from year to year.

(iii) As regards the consistent stand of the State Government as well as the Commission that there being no reservation against any particular post and only 9 posts out of 17 being available for the general category candidates, the petitioner could not be appointed as he stood at 16th position in the merit list, we quite understand and appreciate this stand only when it comes to the claim of the petitioner to be recommended against the single post of Assistant Professor in Computer Science and Engineering. Accepting this stand, we reject the contention of the petitioner that the said post being a single post cannot come within the reservation net. But we fail to understand why the Commission did not recommend the candidates (UR) at 8th and 9th position of the merit list though vacancy exists in their respective discipline. In its pleading the Commission could not satisfactorily show any justifiable reason for the same. This leaves no doubt in our mind that the Commission has by implication reserved two vacancies in the electrical and Mechanical Engineering for the Scheduled Tribes community, which the Commission has no legal sanction to do. Thus, the decision of the Commission not to recommend the selected candidates of general category at 8th and 9th position of the merit list is wrong, arbitrary, illegal, capricious and unsustainable in law. If the selection process and the merit list are to survive, both the selected candidates aforementioned, have to be recommended as otherwise the consistent plea of the State and the Commission that the petitioner-appellant could not be recommended for

appointment because of his poor performance in the interview and failure to come within the first 9 UR candidates would turn to be a ruse only;

(iv) There would thus be 9 candidates of general category (1 to 6, 8, 9 and 11) entitled for appointment to the posts of Assistant Professor in their respective discipline and, therefore, no more candidate of general category can be appointed, there remaining no vacancy. The Commission has recommended 3 candidates from Scheduled Castes category and only 1 candidate from Scheduled Tribes. Thus there must remain four vacant posts for Scheduled Tribes, which would inevitably fall in the disciplines of Economics, Chemistry, Physics and Computer Science and Engineering. It would be seen that the single post each in Economics, Computer Science and Engineering have been left vacant, but the single post of Assistant Professor each in Physics and Chemistry have been recommended for appointment by Dr.(Smti) Aparna Nath and Dr. Saroj Kr.Das at serial No.13 and 15 of the merit list. Obviously, if the two more reserved posts for Scheduled Tribes are to be left vacant, the aforesaid two posts in Physics and Chemistry cannot be filled up. Thus, Dr.(Smti) Nath and Dr.Das having been already appointed against those posts in violation of the rules, the question about their fate in the event of treating those posts vacant has to be decided by the State Government only. It may, however, be observed that if their appointments are intended to be protected in the interest of the institution, the State Government may either dereserve the said posts for the time being or create ex-cadre posts in the respective subjects leaving unfilled the said two cadre posts in the respective discipline, which may be carried forward for the Scheduled Tribes community. Thus, there would remain 4 vacancies for the said community in the cadre service if the above two candidates are accommodated against ex-cadre posts;

(v) The petitioner appellant being placed at 16th position of the merit list, cannot claim recommendation for appointment to the discipline of his choice and, therefore, his challenge to the selection process on the ground that the post being a single post cannot be treated as reserve, is not tenable in law. The post is not reserved and has never been declared reserved. It being vacant has just fallen in the share of Scheduled Tribes.

26. For the reasons and discussions aforementioned, the three appeals (W.A.78/06, 79/06 and 17/07), subject to what we have observed above, are found to have merit and the same are accordingly allowed. The appeal by the petitioner-appellant (W.A.80/06) as well as his writ petition [W.P. (C) 309 of 2005] having no merit stand dismissed. For the same reason, the judgment of the learned Single Judge, impugned herein, is set aside and quashed. It is provided that the selection process and

the merit list (excluding the recommendation part) are valid. The Commission shall recommend Dr. Swapan Bhowmik and Shri Ardhendu Saha for appointment to the posts of Assistant Professor in Mechanical Engineering and Electrical Engineering respectively. The State respondents shall decide about the fate of Dr.(Smti) Aparna Nath and Dr. Saroj Kr.Das either by dereserving the posts or by creating ex-cadre posts to accommodate them in the light of our observation made above. The State Government shall also be at liberty to decide about the petitioner-appellant, Diptendu Bhattacharjee, on the basis of the merit list, if interest of the institution so demand for filling up of the post of Assistant Professor in Computer Science and Engineering, which can also be done in the same way, either by dereservation or by creation of ex-cadre post.

27. Having regard to the facts and circumstances of the case, there shall be no order as to cost.

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UTTAR PRADESH PUBLIC SERVICE COMMISSION

AIR 2007 Supreme Court 950
IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISIDCTION
WRIT PETITION (CIVIL) 165 OF 2005
[With W.P. (C) Nos.172, 409, 466 and 467 of 2005]
D.D. 09.01.2007
Hon'ble Chief Justice of India Sri. Y.K.Sabharwal,
Hon'ble Mr. Justice C.K.Thakker &
Hon'ble Mr. Justice R.V.Raveendran

Sanjay Singh & Anr. ... Petitioners
Vs.
U.P. Public Service Commission,
Allahabad & Anr. ... Respondents

Examination:

Whether scaling of marks is contrary to the Rules? – Yes.

P.S.C. conducted examination for filling 347 posts of Civil Judge (Junior Division) – Preliminary Examination was of objective type – Main Examination was of descriptive type which consisted of 5 papers each carrying 200 marks – The marks assigned by the Examiners in the Main Examination were subjected to statistical scaling and the result of written examination based on scaled marks were declared – Final results were declared based on aggregate of scaled marks in the Main Examination and the interview marks – On the recommendation of the Commission appointments were made – Unsuccessful candidates challenging the statistical scaling system adopted by the Commission in the writ petition before Supreme Court on the ground that it was contrary to Uttar Pradesh Judicial Service Rules and which resulted in meritorious students being ignored and less meritorious candidates being awarded higher marks and selected – Seeking for a direction to the Commission to adopt the system of scaling and to declare the result on the basis of actual marks obtained and to declare the decision of the Supreme Court in Uttar Pradesh Vs. Subhash Chandra Dixit 2003 (12) SCC 701 upholding the system of scaling adopted by the Commission does not lay down the correct law – Supreme Court after considering the decision in Dixit's case and examining the scaling system adopted by the Commission held that the scaling of marks is contrary to the Rules and the scaling system adopted is arbitrary and irrational and consequently allowed the writ petition in part granting reliefs to the petitioners and overruling the decision in Dixit's case [2003 (12) SCC 701].

Held:

As the field is occupied by Rule 20(3) and Note (i) of Appendix-II of Judicial Service Rules, they will prevail over the general provision in Rule 51 of PSC Procedure Rules which enables the Commission to adopt any method, device or formula to eliminate variation in the marks. It is not possible to read the proviso to Rule 51 or words to that effect into Rule 20(3) or Note (i) of Appendix-II of Judicial Service Rules. It is well settled that courts will not add words to a statute or read into the statute words not in it.

Further held:

The marks assigned by the examiner are not necessarily the marks finally awarded to a candidate.

If there is any error in the marks awarded by the examiner it can always be corrected by the Commission and the corrected marks will be 'the final marks awarded to the candidate'. Where the Commission is of the view that there is 'examiner variability' in the marks (due to strict or liberal assessment of answer scripts) or improper assessment on account of erratic or careless marking by an examiner, they can be corrected appropriately by moderation. The moderation is either by adding (in the case of strict examiners) or deducting (in the case of liberal examiners) a particular number of marks which has been decided with reference to principles of moderation applied. If there is erratic or careless marking, then moderation is by fresh valuation by another examiner. Therefore, the marks assigned by the examiner as moderated will be the marks finally awarded to the candidates or marks obtained by the candidates. Moderation, it has to be held, is inherent in the evaluation of answer scripts in any large scale examination, where there are more than one examiner.

Further held:

'Valuation' is a process which does not end on marks being awarded by an Examiner. Award of marks by the Examiner is only one stage of the process of valuation. Moderation when employed by the examining authority becomes part of the process of valuation and the marks awarded on moderation become the final marks of the candidate. In fact Rule 20(3) specifically refers to the 'marks finally awarded to each candidate in the written examination', thereby implying that the marks awarded by the examiner can be altered by moderation.

Further held:

But the question is whether the raw marks which are converted into scaled scores on an artificial scale which assumed variables (assumed mean marks and assumed standard deviation) can be considered as 'marks finally awarded' or 'marks obtained'. Scaled scores are not marks awarded to a candidate in a written examination, but a figure arrived at for the purpose of being placed on a common scale. It can vary with reference to two arbitrarily fixed variables, namely 'Assumed Mean' and 'Assumed Standard Mean'. We have dealt with this aspect in greater detail while dealing with question (iii). For the reasons given while considering question (iii), we hold that 'scaled scores' or 'scaled marks' cannot be considered to be 'marks awarded to a candidate in the written examination'. Therefore, scaling violates Rule 20(3) and Note (i) of Appendix-II of Judicial Service Rules.

Further held:

Inevitably therefore, even when experienced examiners receive equal batches of answer scripts, there is difference in average marks and the range of marks awarded, thereby affecting the merit of individual candidates. This apart, there is 'Hawk-Dove' effect. Some examiners are liberal in valuation and tend to award more marks. Some examiners are strict and tend to give less marks. Some may be moderate and balanced in awarding marks. Even among those who are liberal or those who are strict, there may be variance in the degree of strictness or liberality. This means that if the same answer-script is given to different examiners, there is all likelihood of different marks being assigned. If a very well written answer-script goes to a strict examiner and a mediocre answer-script goes to a liberal examiner, the mediocre answer-script may be awarded more marks than the excellent answer-script. In other words, there is 'reduced valuation' by a strict examiner and 'enhanced valuation' by a liberal examiner. This is known as 'examiner variability' or 'Hawk-Dove effect'. Therefore, there is a need to evolve a procedure to ensure uniformity inter se the Examiners so that the effect of 'examiner subjectivity' or 'examiner variability' is minimised. The procedure adopted to reduce examiner subjectivity or variability is known as moderation.

[NOTE: As the decision in Dixit's case (2003) 12 SCC 701 is overruled by this judgment the same is not incorporated in this Compilation)

Cases referred:

1987 (1) Guj.LR 157 - Kamlesh Haribhai Goradia vs. Union of India
1988 (4) SCC 59 - State of U.P. v. Renusagar Power Co. Ltd.
1992 Supp. 1 SCC 323 - Union of India v. Deoki Nandan Aggarwal
1994 (1) Raj.LR 533 - Muhesh Kumar Khandelwal vs. State of Rajasthan
1996 (9) SCC 709 - Tata Iron & Steel Co. Ltd. v. Union of India
2000 (4) SCC 640 - State of Bihar v. Bal Mukund Sah
2002 (4) SCC 388 - Rupa Ashok Hurra v. Ashok Hurra
2002 (7) SCC 273 - Union of India v. Hansoli Devi
2003 (4) SCC 289 - Federation of Railway Officers Association v. Union of India
2003 (12) SCC 701 - U.P. Public Service Commission v. Subhash Chandra Dixit
2005 (12) SCC 688 - K. Channegowda vs. Karnataka Public Service Commission 2005

JUDGMENT:

RAVEENDRAN, J.

These petitions under Article 32 of the Constitution of India have been filed by the unsuccessful candidates who appeared in the examinations conducted by the Uttar Pradesh Public Service Commission ('Commission' for short) for recruitment to the posts of Civil Judge (Junior Division).

2. On the request of the Allahabad High Court, to conduct the examination for filling 347 posts of Civil Judge (Junior Division), the Commission issued an advertisement in the Employment News dated 28.11.2003. As many as 51524 candidates appeared for the "U.P. Judicial Service Civil Judge, (Junior Division) Preliminary Examination, 2003" conducted by the Commission on 21.3.2004. The preliminary examination was of 'objective' type consisting of two papers - General Knowledge and Law. The result was declared on 30.6.2004 and 6046 candidates were declared qualified to appear for the "U.P. Civil Judge (Junior Division) Examination (Main), 2003" which was of 'descriptive' (conventional) type. The Main examination consisted of five papers (each carrying 200 marks) - General Knowledge, Language, Law I, II and III - and was held between 5th and 7th October, 2004. The number of candidates who took the said examination was 5748.

3. The answer scripts relating to each subject were distributed to several examiners for valuation, as it was not possible to get the large number evaluated by a single examiner. The number of examiners, to whom the answer-scripts were distributed for valuation, were as follows : General Knowledge -

18, Language - 14, Law-I - 11, Law-II - 10, and Law-III - 14. The marks assigned by the examiners were subjected to 'statistical scaling' and the results of written examination based on such scaled marks, were declared on 7.3.2005. Thereafter, 1290 candidates were interviewed between 14.4.2005 and 26.4.2005. After such interview, the Commission declared the final results of the examination on 1.5.2005 based on the aggregate of 'scaled marks' in the written (Main) examination and the marks awarded in the interview. On the recommendations made by Commission, appointments were made to 347 posts of Civil Judge, Junior Division.

4. The petitioners, who were unsuccessful, are aggrieved. They contend that the statistical scaling system adopted by the Commission is illegal as it is contrary to the Uttar Pradesh Judicial Service Rules, 2001. They also contend that conversion of their raw marks into scaled marks, is illegal as it was done by applying an arbitrary, irrational and inappropriate scaling formula. It is submitted that the Commission's exercise of subjecting the marks secured by the candidates to scaling, has resulted in meritorious students being ignored, and less meritorious students being awarded higher marks and selected, thereby violating the fundamental rights of the candidates.

4.1) W.P. [C] No.165/2005 was filed on 5.4.2005 even before the final results were declared, praying (i) for a direction to the Commission not to adopt the system of scaling and to declare the results of the Main Examination on the basis of actual marks obtained by the candidates; and (ii) for a direction that the petition be heard by a Bench of three or more Judges as the decision of a Bench of two Judges of this Court in U.P. Public Service

Commission v. Subhash Chandra Dixit [2003 (12) SCC 701] upholding the system of scaling adopted by the Commission does not lay down the correct law.

4.2) The other petitions were filed after declaration of the final results, in effect, for the following reliefs : (a) for quashing the results of the U.P. Civil Judge (Junior Division) Main Examination-2003 declared on 7.3.2005 and the final results declared on 1.5.2005 on the basis of scaled marks and direct the Commission to declare the results on the basis of actual marks secured by the candidates; (b) to direct an inquiry by an independent agency into the irregularities committed by the Commission in the said examination; (c) for a declaration that the use of 'statistical scaling' in regard to the examinations for the subordinate judiciary is unconstitutional; and (d) to reconsider the law laid down in Subhash Chandra Dixit (supra).

5. The respondents raised the threshold bar of maintainability. It is submitted that this Court in S. C. Dixit (supra), has rejected identical grounds of attack and upheld the statistical scaling method adopted by the Commission in the examination conducted in 2000. It is contended that the prayers in these petitions under Article 32, in effect, seek setting aside or review of the decision in S. C. Dixit, and that is impermissible. Reliance is placed on the Constitution Bench decision of this Court in Rupa Ashok Hurra v. Ashok Hurra [2002 (4) SCC 388], to contend that a writ petition under Article 32 would not lie to challenge any judgment of this Court or that of a High Court, as superior courts are not 'State' within the meaning of Article 12 and their judgments cannot be termed as violative of fundamental rights. It is also pointed out that Review Petition (Civil) No. 162/2004 and Curative Petition No.43/ 2004 filed in respect of S. C. Dixit (supra) were rejected on 04.2.2004 and 6.10.2004 respectively.

6. In regard to merits, the Commission contended that the 'statistical scaling' method adopted in regard to Civil Judge (Junior Division) Examination is legal, scientific and sound and its policy to apply statistical scaling to marks of written examination, was based on experts' opinion as also the experience gained in conducting several examinations. It is submitted that under the proviso to Rule 50 of the U.P. Public Service

Commission (Procedure and Conduct of Business) Rules, 1976, it is entitled to adopt any formula or method or device to eliminate variation in marks; that it found variation in the marks awarded by different examiners on account of a phenomenon known as 'examiner variability' and to eliminate it, statistical scaling was introduced. It is further submitted that matters relating to the conduct of Examination, evaluation of answer-scripts, application of methods to bring in uniformity in evaluation are matters of policy involving technical and scientific decisions based on expert opinion; that courts are not equipped to pronounce upon such matters and, therefore, should not interfere in the absence of manifest arbitrariness or mala fides; and that, at all events, in the absence of an opinion by a body of experts in the field of statistics certifying that the system of scaling adopted by the Commission is unsound and irrational, there should be no interference. Lastly, it is submitted that if the court, for any reason, should hold that the existing scaling system should be substituted, that should be done prospectively.

7. On the contentions urged, the following questions arise for our consideration :

Whether the writ petitions are not maintainable ?

Whether 'scaling' of marks is contrary to or prohibited by the relevant rules ?

Whether the 'scaling system' adopted by the Commission is arbitrary and irrational, and whether the decision in S. C. Dixit (supra) approving the 'scaling system' requires reconsideration?

If the statistical scaling system is found to be illegal or irrational or unsound, whether the selections already made, which are the subject-matter of these petitions, should be interfered with?

Re : Question (i) :

8. It is true that a judgment of this Court cannot be challenged in a petition under Article 32. It can, however, be reviewed under Article 137 or in exceptional circumstances reconsidered in exercise of inherent power, on a curative petition (See Rupa Ashok Hurra). It is equally true that a final judgment of a High Court can be challenged only by an appeal under Articles 132 to 134 or by obtaining 'special leave' under Article 136 and not by a petition under Article 32. But that is not the issue here.

9. In regard to decisions of civil courts in suits governed by Civil Procedure Code or appeals therefrom, the term 'judgment' refers to the grounds of a decree or order, 'decree' refers to the formal expression of an adjudication in a suit and 'order' refers to formal expression of any decision of a civil court which is not a decree. In regard to the decisions of High Court and Supreme Court in writ jurisdiction, the term 'judgment' is normally used to refer to the 'judgment and order', that is the grounds for the decision and the formal expression of the decision. The petitioners do not seek to upset the 'order' part of the judgment in S. C. Dixit (supra) which decided the validity of UP Civil Judge (Junior Division), Examination, 2000, held under the UP Nyayik Sewa Niyamawali 1951. The grievance of the petitioners is in regard to the UP Civil Judge (Junior Division) Examination, 2003, held under the UP Judicial Service Rules 2001. They, however, contend that the ratio decidendi of the decision in S.C. Dixit upholding the Commission's system of scaling of marks in written examination, requires reconsideration. Therefore, these petitions are neither for 'review' nor for 'setting aside' or 'questioning' the decision in S.C. Dixit. Therefore, the bar, referred to in Rupa Ashok Hurra, will not apply.

10. The contention of Commission also overlooks the fundamental difference between challenge to the final order forming part of the judgment and challenge to the ratio decidendi of the judgment. Broadly speaking, every judgment of superior courts has three segments, namely, (i) the facts and the

point at issue; (ii) the reasons for the decision; and (iii) the final order containing the decision. The reasons for the decision or the ratio decidendi is not the final order containing the decision. In fact, in a judgment of this Court, though the ratio decidendi may point to a particular result, the decision (final order relating to relief) may be different and not a natural consequence of the ratio decidendi of the judgment. This may happen either on account of any subsequent event or the need to mould the relief to do complete justice in the matter. It is the ratio decidendi of a judgment and not the final order in the judgment, which forms a precedent. The term

'judgment' and 'decision' are used, rather loosely, to refer to the entire judgment or the final order or the ratio decidendi of a judgment. Rupa Ashok Hurra (supra) is of course, an authority for the proposition that a petition under Article 32 would not be maintainable to challenge or set aside or quash the final order contained in a judgment of this Court. It does not lay down a proposition that the ratio decidendi of any earlier decision cannot be examined or differed in another case. Where violation of a fundamental right of a citizen is alleged in a petition under Article 32, it cannot be dismissed, as not maintainable, merely because it seeks to distinguish or challenge the ratio decidendi of an earlier judgment, except where it is between the same parties and in respect of the same cause of action. Where a legal issue raised in a petition under Article 32 is covered by a decision of this Court, the Court may dismiss the petition following the ratio decidendi of the earlier decision. Such dismissal is not on the ground of 'maintainability' but on the ground that the issue raised is not tenable, in view of the law laid down in the earlier decision. But if the court is satisfied that the issue raised in the later petition requires consideration and in that context the earlier decision requires re-examination, the court can certainly proceed to examine the matter (or refer the matter to a larger Bench, if the earlier decision is not of a smaller Bench). When the issue is re-examined and a view is taken different from the one taken earlier, a new ratio is laid down. When the ratio decidendi of the earlier decision undergoes such change, the final order of the earlier decision as applicable to the parties to the earlier decision, is in no way altered or disturbed. Therefore, the contention that a writ petition under Article 32 is barred or not maintainable with reference to an issue which is the subject-matter of an earlier decision, is rejected.

Re : Question (ii) :

11. Article 234 of the Constitution requires appointments to the Judicial Service of a State (other than District Judges) to be made by the Governor of the State in accordance with the Rules made by him in that behalf, after consultation with the State Public Service Commission and with the High Court

exercising jurisdiction in relation to such State. The UP Judicial Service Rules, 2001 (for short 'Judicial Service Rules') were made by the Governor of Uttar Pradesh in exercise of powers conferred by Article 234 and Article 309 of the Constitution, in consultation with the Commission and the Allahabad High Court, to regulate the recruitment and appointment to Uttar Pradesh Judicial Service. The Judicial Service Rules replaced the 'Uttar Pradesh Nyayik Sewa Niyamawali, 1951' which was in force earlier. The Judicial Service Rules were amended by the Uttar Pradesh Judicial Service (Amendment) Rules, 2003.

11.1) Rule 7 of the Judicial Service Rules provides that recruitment to the post of Civil Judge (Junior Division) shall be by direct recruitment on the basis of a competitive examination conducted by Commission. Part V of the said rules lays down the procedure for recruitment to Judicial Service. Rule 16 provides for competitive examination and Rule 19 deals with the syllabus. The said rules are extracted below :

> "16. Competitive Examination - The examination may be conducted at such time and on such dates as may be notified by the Commission and shall consist of –
>
> (a) a written examination in such legal and allied subject including procedure, as may be included in the Syllabus prescribed under rule 19, unless the same is otherwise modified by the Governor in consultation with the court and the Commission;
>
> (b) an examination to test the knowledge of the candidates in Hindi, English and Urdu;
>
> (c] an interview for assessing merit of the candidate giving due regard to his ability, character, personality, physique and genera suitability for appointment to the service.
>
> 19. Syllabus - The syllabus and the rules relating to the competitive examination shall be such as given in the Appendix II, provided that the syllabus and rules may be amended by the Governor in consultation with the Commission and Court."

Appendix II to the Rules contains the syllabus for the competitive examination. It enumerates the details of the five subjects for the written examination and the number of marks carried by each subject (200 each). It also provides for a Personality Test (interview) to find out the suitability of the candidates (carrying 100 marks). Note (i) to Appendix-II provides that "the marks obtained in the interview will be added to the marks obtained in the written papers and the candidate's place will depend on the aggregate of both".

12. Sub-Rule (1) of Rule 20 of the Judicial Service Rules requires the Commission to prepare the result of the written examination and thereafter, invite such number of candidates, who in the opinion of the commission have secured minimum marks as may be fixed. Sub-Rule (2) provides for participation of a sitting Judge in the interview of candidates. Sub-rule (3) provides that the Commission shall

prepare a final list of selected candidates in order of their proficiency as disclosed by aggregates of marks finally awarded to each candidate in the written examination and the interview. The proviso thereto provides that if two or more candidates obtain equal marks in the aggregate, the name of the candidate who is elder in age shall be placed higher and where two or more candidates of equal age obtain equal marks in the aggregate, the name of the candidate who has obtained higher marks in the written examination shall be placed higher. Rule 21 provides that the Governor shall on receipt of the list of candidates submitted by the Commission under Rule 20(3) make appointment on the posts of Civil Judge (Junior Division) in the order in which their names are given in the list provided. Thus the Judicial Service Rules constitute a complete code in itself in regard to recruitment to Judicial Service. It is also evident that the marks finally awarded to each candidate in the written examination and interview are crucial both for appointment as also for purposes of inter se seniority.

13. The petitioners point out that the Judicial Service Rules do not provide for substituting the actual marks obtained by a candidate by scaled marks. It is contended that the words "marks obtained in the written papers" in Note (i) of Appendix II clearly indicate that the actual marks obtained in the written examination alone should be taken into account and not any moderated or scaled marks; that in the absence of any provision for scaling in the Judicial Service Rules, the Commission had no authority to substitute the actual marks by 'scaled marks'; and that the places/ranks of the candidates should be determined strictly on the basis of the aggregate of the actual marks obtained in the main written examination plus the marks obtained in interview.

14. The Commission contends that the manner of conducting examination by the Commission, even in regard to recruitment to Judicial Service, is governed by the Uttar Pradesh Public Service Commission (Procedure and Conduct of Business) Rules, 1976 (for short 'PSC Procedure Rules') made by the Commission in exercise of the power conferred by the UP State Public Service Commission (Regulation of Procedure and Conduct of Business) Act, 1974. Rule 26 provides for preparation of a panel of Examiners or constitution of a Committee for the purpose of holding examination in each subject. Rule 28 provides that the question papers set by the examiners shall be placed before the Commission to ensure conformity with the required standard of examination and the Commission may moderate the question papers or constitute a Committee to perform the work of moderation. Rule 30 provides for advertisement of vacancies for which selections are to be made and scrutiny of applications received. Rule 33 provides for the determination of place, dates and time of examination and the centres for examination. Rule 34 provides for the list of persons suitable to be appointed as invigilators and appointment of invigilators. Rule 37 provides for fictitious roll numbers (code numbers) to be allotted to each candidate before the answer books are dispatched to the examiners for assessment.

Rule 38 provides that the number of answer books to be sent to each examiner shall be fixed by the Commission. Rule 44 requires the Secretary of the Commission to take steps for tabulation of marks obtained by each candidate as soon as the answer-scripts are received after valuation, after scrutiny of scripts, removal of discrepancies and corrections. Rule 45 provides for random checking of the tabulation to ensure correctness and accuracy of tabulation. Rule 47 provides that the original roll numbers of candidates shall thereafter be restored to the answer-scripts and for issue of interview letters. Rule 49 authorizes the Commission to decide the number of candidates to be called for interview to appear before a Board on any day. Rule 50 provides that the interview marks awarded shall be kept in safe custody. Rule 51 provides that mark-sheets shall be opened on the last day of interview and immediately thereafter the marks of interview/personality test shall be added to the marks obtained by the candidates in the written examination, and thereafter on the basis of the total so obtained, the merit list shall be prepared and placed before the Commission for final declaration of the result. The proviso to Rule 51 provides that the Commission with a view to eliminate variations in the ranks awarded to candidates at any time at any examination or interview, adopt any method, device or formula which they consider proper for the purpose. The Commission contends that having regard to the proviso to Rule 51 which specifically enables them to adopt any method, device or formula to eliminate variations in the marks awarded to any at any examination, they are entitled to adopt the scaling system to eliminate variations in marks.

15. The petitioners point out that the PSC Procedure Rules were not made in consultation with the High Court. On the other hand, the Judicial Service Rules, 2001 which came into effect from 1.7.2000, were made in consultation with both Commission and the High Court. It is, therefore, submitted that the Judicial Service Rules alone will regulate and govern the recruitment of Civil Judges (Junior Division) including examinations and interviews and the proviso to Rule 51 of PSC Procedure Rules will not apply to recruitment of Civil Judges. Reliance is placed on the decisions of this Court in State of Bihar v. Bal Mukund Sah [2000 (4) SCC 640], Union of India v. Hansoli Devi [2002 (7) SCC 273] and Union of India v. Deoki Nandan Aggarwal [1992 Supp. 1 SCC 323] in regard to interpretation of the Rules.

16. This question was considered briefly by this Court in S. C. Dixit wherein it was held that the PSC Procedure Rules made in exercise of power under the U.P. State Public Service Commission (Regulation of Procedure and Conduct of Business) Act, 1974 give the guidelines for any examination to be held by the Commission and therefore, all the provisions of the said Rules will be applicable to an examination for recruitment to judicial service also.

17. It is no doubt true that Judicial Service Rules govern the recruitment to Judicial Service, having been made in exercise of power under Article 234, in consultation with both the commission and the High Court. It also provides what examinations should be conducted and the maximum marks for each subject in the examination. But the Judicial Service Rules entrust the function of conducting examinations to the Commission. The Judicial Service Rules do not prescribe the manner and procedure for holding the examination and valuation of answer-scripts and award of the final marks and declaration of the results. Therefore, it is for the Commission to regulate the manner in which it will conduct the examination and value the answer scripts, subject, however, to the provisions of the Judicial Service Rules. If the Commission has made Rules to regulate the procedure and conduct of the examination, they will naturally apply to any examination conducted by it for recruitment to any service, including the judicial service. But where the Judicial Service Rules make a specific provision in regard to any aspect of examination, such provision will prevail, and the provision of PSC Procedure Rules, to the extent it is inconsistent with the Judicial Service Rules, will be inapplicable. Further, if both the Rules have made provision in regard to a particular matter, the PSC Procedure Rules will yield to the Judicial Service Rules.

18. The manner in which the list of candidates as per merit should be prepared is provided both in the Judicial Service Rules and the PSC Procedure Rules. Relevant portion of Rule 20(3) and Note (i) of Appendix-II of the Judicial Service Rules and Rule 51 of the PSC Procedure Rules providing for the aggregation of marks and preparation of the merit list, are extracted below :-

Judicial Service Rules	PSC Procedure Rules
Rule 20(3). The Commission then shall prepare a final list of selected candidates in order of their proficiency as disclosed by aggregate of marks finally awarded to each candidate in the written examination and the interview. Note (i) of Appendix-II. Marks obtained in the interview will be added to the marks obtained in the written papers and the candidates place will depend on the aggregate of the both.	Rule 51. The marks sheets so obtained shall be opened on the last day of interview and immediately thereafter the marks of interview/personality test shall be added to the marks obtained by the candidates in the written examination. Thereafter on the basis of the totals so obtained the merit list shall be prepared and place before the Commission for final declaration of the result. Provided that the Commission may, with a view to eliminating variation in the marks awarded to candidates at any examination or interview, adopt the method, device or formula which they consider proper for the purpose. (different emphasis supplied)

As the field is occupied by Rule 20(3) and Note (i) of Appendix-II of Judicial Service Rules, they will prevail over the general provision in Rule 51 of PSC Procedure Rules.

19. Rule 20(3) provides that the final list of selected candidates in order of their proficiency as disclosed by the aggregate of 'marks finally awarded to each candidate in the written examination and the interview". Note (i) to Appendix II of the Judicial Service Rules provides that the "marks obtained in the interview" will be added to "the marks obtained in the written papers" and that the candidate's place will depend on the aggregate of both. Though Judicial Service Rules refers to 'marks finally awarded', the said Rules do not contain a provision similar to the proviso to Rule 51 of PSC Procedure Rules, enabling the Commission to adopt any method, device or formula to eliminate variation in the marks. It is not possible to read the proviso to Rule 51 or words to that effect into Rule 20(3) or Note (i) of Appendix-II of Judicial Service Rules. It is well settled that courts will not add words to a statute or read into the statute words not in it. Even if the courts come to the conclusion that there is any omission in the words used, it cannot make up the deficiency, where the wording as it exists is clear and unambiguous. While the courts can adopt a construction which will carry out the obvious intention of the legislative or rule making authority, it cannot set at naught the legislative intent clearly expressed in a statute or the rules. Therefore, Rule 20(3) and Note (i) of Appendix-II has to be read as they are without the addition of the proviso to Rule 51 of PSC Procedure Rules. If so, what can be taken into account for preparing final list of selected candidates, are 'marks finally awarded to a candidate' in the written examination and the interview. The marks assigned by the examiner are not necessarily the marks finally awarded to a candidate. If there is any error in the marks awarded by the examiner it can always be corrected by the Commission and the corrected marks will be 'the final marks awarded to the candidate'. Where the Commission is of the view that there is 'examiner variability' in the marks (due to strict or liberal assessment of answer scripts) or improper assessment on account of erratic or careless marking by an examiner, they can be corrected appropriately by moderation. The moderation is either by adding (in the case of strict examiners) or deducting (in the case of liberal examiners) a particular number of marks which has been decided with reference to principles of moderation applied. If there is erratic or careless marking, then moderation is by fresh valuation by another examiner. Therefore, the marks assigned by the examiner as moderated will be the marks finally awarded to the candidates or marks obtained by the candidates. Moderation, it has to be held, is inherent in the evaluation of answer scripts in any large scale examination, where there are more than one examiner.

20. We cannot accept the contention of the petitioner that the words "marks awarded" or "marks obtained in the written papers" refers only to the actual marks awarded by the examiner. 'Valuation' is

a process which does not end on marks being awarded by an Examiner. Award of marks by the Examiner is only one stage of the process of valuation. Moderation when employed by the examining authority, becomes part of the process of valuation and the marks awarded on moderation become the final marks of the candidate. In fact Rule 20(3) specifically refers to the 'marks finally awarded to each candidate in the written examination', thereby implying that the marks awarded by the examiner can be altered by moderation.

21. But the question is whether the raw marks which are converted into scaled scores on an artificial scale which assumed variables (assumed mean marks and assumed standard deviation) can be considered as 'marks finally awarded' or 'marks obtained'. Scaled scores are not marks awarded to a candidate in a written examination, but a figure arrived at for the purpose of being placed on a common scale. It can vary with reference to two arbitrarily fixed variables, namely 'Assumed Mean' and 'Assumed Standard Mean'. We have dealt with this aspect in greater detail while dealing with question (iii). For the reasons given while considering question (iii), we hold that 'scaled scores' or 'scaled marks' cannot be considered to be 'marks awarded to a candidate in the written examination'. Therefore, scaling violates Rule 20(3) and Note (i) of Appendix-II of Judicial Service Rules.

22. Rule 20 of Judicial Service Rules requires the Commission to call for interview such number of candidates, who in its opinion have secured the minimum marks fixed by it. Because of application of scaling system by the Commission, it has not been possible for the Commission to fix such minimum marks either for individual subjects or for the aggregate. In the absence of minimum marks, several candidates who secured less than 30% in a subject have been selected. We note below by way of illustration, the particulars of some candidates who have been selected in spite of securing less than 20% in a subject:

Sl. No.	Roll No.	Subject	Actual Marks (in %)	Scaled Marks	Rank in Selection
1.	012610	Language	8%	79	225
2.	032373	Language	8%	79	290
3.	002454	Language	11%	79	196
4.	008097	Language	13%	89	85
5.	017808	Law-I	13%	76	317
6.	010139	Language	14%	85	333
7.	012721	Law-I	15%	100	172
8.	002831	Language	16%	89	263
9.	004998	Language	17%	91	161

Thus scaling system adopted by the Commission, contravenes Rule 20(3) also.

Re : Question (iii) :

23. When a large number of candidates appear for an examination, it is necessary to have uniformity and consistency in valuation of the answer scripts. Where the number of candidates taking the examination are limited and only one examiner (preferably the paper-setter himself) evaluates the answer-scripts, it is to be assumed that there will be uniformity in the valuation. But where a large number of candidates take the examination, it will not be possible to get all the answer-scripts evaluated by the same examiner. It, therefore, becomes necessary to distribute the answer-scripts among several examiners for valuation with the paper-setter (or other senior person) acting as the Head Examiner. When more than one examiner evaluate the answer-scripts relating to a subject, the subjectivity of the respective examiner will creep into the marks awarded by him to the answer scripts allotted to him for valuation. Each examiner will apply his own yardstick to assess the answer-scripts. Inevitably therefore, even when experienced examiners receive equal batches of answer scripts, there is difference in average marks and the range of marks awarded, thereby affecting the merit of individual candidates. This apart, there is 'Hawk-Dove' effect. Some examiners are liberal in valuation and tend to award more marks. Some examiners are strict and tend to give less marks. Some may be moderate and balanced in awarding marks. Even among those who are liberal or those who are strict, there may be variance in the degree of strictness or liberality. This means that if the same answer-script is given to different examiners, there is all likelihood of different marks being assigned. If a very well written answer-script goes to a strict examiner and a mediocre answer-script goes to a liberal examiner, the mediocre answer-script may be awarded more marks than the excellent answer-script. In other words, there is 'reduced valuation' by a strict examiner and 'enhanced valuation' by a liberal examiner. This is known as 'examiner variability' or 'Hawk-Dove effect'. Therefore, there is a need to evolve a procedure to ensure uniformity inter se the Examiners so that the effect of 'examiner subjectivity' or 'examiner variability' is minimised. The procedure adopted to reduce examiner subjectivity or variability is known as moderation. The classic method of moderation is as follows :

> The paper-setter of the subject normally acts as the Head Examiner for the subject. He is selected from amongst senior academicians/scholars/senior civil servants/Judges. Where the case of a large number of candidates, more than one examiner is appointed and each of them is allotted around 300 answer-scripts for valuation.

To achieve uniformity in valuation, where more than one examiner is involved, a meeting of the Head Examiner with all the examiners is held soon after the examination. They discuss thoroughly the question paper, the possible answers and the weightage to be given to various aspects of the answers. They also carry out a sample valuation in the light of their discussions. The sample valuation of scripts by each of them is reviewed by the Head Examiner and variations in assigning marks are further discussed. After such discussions, a consensus is arrived at in regard to the norms of valuation to be adopted. On that basis, the examiners are required to complete the valuation of answer scripts. But this by itself, does not bring about uniformity of assessment inter se the examiners. In spite of the norms agreed, many examiners tend to deviate from the expected or agreed norms, as their caution is overtaken by their propensity for strictness or liberality or erraticism or carelessness during the course of valuation. Therefore, certain further corrective steps become necessary.

After the valuation is completed by the examiners, the Head Examiner conducts a random sample survey of the corrected answer scripts to verify whether the norms evolved in the meetings of examiner have actually been followed by the examiners. The process of random sampling usually consists of scrutiny of some top level answer scripts and some answer books selected at random from the batches of answer scripts valued by each examiner. The top level answer books of each examiner are revalued by the Head Examiner who carries out such corrections or alterations in the award of marks as he, in his judgment, considers best, to achieve uniformity. (For this purpose, if necessary certain statistics like distribution of candidates in various marks ranges, the average percentage of marks, the highest and lowest award of marks etc. may also be prepared in respect of the valuation of each examiner.)

After ascertaining or assessing the standards adopted by each examiner, the Head Examiner may confirm the award of marks without any change if the examiner has followed the agreed norms, or suggest upward or downward moderation, the quantum of moderation varying according to the degree of liberality or strictness in marking. In regard to the top level answer books revalued by the Head Examiner, his award of marks is accepted as final. As regards the other answer books below the top level, to achieve maximum measure of uniformity inter se the examiners, the awards are moderated as per the recommendations made by the Head Examiner.

If in the opinion of the Head Examiner there has been erratic or careless marking by any examiner, for which it is not feasible to have any standard moderation, the answer scripts valued by such examiner are revalued either by the Head Examiner or any other Examiner who is found to have followed the agreed norms.

Where the number of candidates are very large and the examiners are numerous, it may be difficult for one Head Examiner to assess the work of all the Examiners. In such a situation, one more level of Examiners is introduced. For every ten or twenty examiners, there will be a Head Examiner who checks the random samples as above. The work of the Head Examiners, in turn, is checked by a Chief Examiner to ensure proper results.

The above procedure of 'moderation' would bring in considerable uniformity and consistency. It should be noted that absolute uniformity or consistency in valuation is impossible to achieve where there are several examiners and the effort is only to achieve maximum uniformity.

24. In the Judicial Service Examination, the candidates were required to take the examination in respect of the all five subjects and the candidates did not have any option in regard to the subjects. In such a situation, moderation appears to be an ideal solution. But there are examinations which have a competitive situation where candidates have the option of selecting one or few among a variety of heterogeneous subjects and the number of students taking different options also vary and it becomes necessary to prepare a common merit list in respect of such candidates. Let us assume that some candidates take Mathematics as an optional subject and some take English as the optional subject. It is well-recognised that a mark of 70 out of 100 in mathematics does not mean the same thing as 70 out of 100 in English. In English 70 out of 100 may indicate to an outstanding student whereas in Mathematics, 70 out of 100 may merely indicate an average student. Some optional subjects may be very easy, when compared to others, resulting in wide disparity in the marks secured by equally capable students. In such a situation, candidates who have opted for the easier subjects may steal an advantage over those who opted for difficult subjects. There is another possibility. The paper setters in regard to some optional subjects may set questions which are comparatively easier to answer when compared some paper setters in other subjects who set tougher questions difficult to answer. This may happens when for example, in a Civil Service examination, where Physics and Chemistry are optional papers, examiner 'A' sets a paper in Physics appropriate to a degree level and examiner 'B' sets a paper in Chemistry appropriate for matriculate level. In view of these peculiarities, there is a need to bring the assessment or valuation to a common scale so that the inter se merit of candidates, who have opted for different subjects, can be ascertained. The moderation procedure referred to in the earlier para will solve only the problem of examiner variability, where the examiners are many, but valuation of answer scripts is in respect of a single subject. Moderation is no answer where the problem is to find inter se merit across several subjects, that is, where candidates take examination in different subjects. To solve the problem of inter se merit across different subjects, statistical experts have evolved a method known as scaling, that is creation of scaled score. Scaling places the scores from different tests or test forms on to a common scale. There are different methods of statistical scoring. Standard score method, linear standard score method, normalized equipercentile method are some of the recognized methods for scaling.

25. A. Edwin Harper Jr. & V Vidya Sagar Misra in their publication "Research on Examinations in India" have tried to explain and define scaling. We may usefully borrow the same. A degree 'Fahrenheit' is different from a degree 'Centigrade'. Though both express temperature in degrees, the 'degree' is

different for the two scales. What is 40 Degrees in Centigrade scale is 104 Degrees in Fahrenheit scale. Similarly, when marks are assigned to answer-scripts in different papers, say by Examiner 'A' in Geometry and Examiner 'B' in History, the meaning or value of the 'mark' is different. Scaling is the process which brings the mark awarded by Examiner 'A' in regard to Geometry scale and the mark awarded by Examiner 'B' in regard to History scale, to a common scale. Scaling is the exercise of putting the marks which are the results of different scales adopted in different subjects by different examiners into a common scale so as to permit comparison of inter se merit. By this exercise, the raw marks awarded by the examiner in different subjects is converted to a 'score' on a common scale by applying a statistical formula. The 'raw marks' when converted to a common scale are known as the 'scaled marks'. Scaling process, whereby raw marks in different subjects are adjusted to a common scale, is a recognized method of ensuring uniformity inter se among the candidates who have taken examinations in different subjects, as, for example, the Civil Services Examination.

26. The Union Public Service Commission ('UPSC' for short) conducts the largest number of examinations providing choice of subjects. When assessing inter se merit, it takes recourse to scaling only in civil service preliminary examination where candidates have the choice to opt for any one paper out of 23 optional papers and where the question papers are of objective type and the answer scripts are evaluated by computerized/scanners. In regard to compulsory papers which are of descriptive (conventional) type, valuation is done manually and scaling is not resorted to. Like UPSC, most examining authorities appear to take the view that moderation is the appropriate method to bring about uniformity in valuation where several examiners manually evaluate answer-scripts of descriptive/ conventional type question papers in regard to same subject; and that scaling should be resorted only where a common merit list has to be prepared in regard to candidates who have taken examination of different subjects, in pursuance of an option given to them.

27. But some Examining Authorities, like the Commission are of the view that scaling can be used, not only where there is a need to find a common base across different subjects (that is bringing the performance in different subjects to a common scale), but also as an alternative to moderation, to reduce examiner variability (that is where different examiners evaluate answer scripts relating to the same subject).

28. Let us now examine the reasons as to why the Commission adopted 'scaling' instead of moderation. The Committee states that the anomalies caused on account of 'examiner variability' was engaging its attention. It found that a candidate's score may depend upon the "chance' factor of

whether his answers script is assessed by a lenient or a strict examiner; and that in an extreme case, while a candidate of a given merit may get a First Class/Division, another student of equal merit may be declared to have failed. Therefore, the Commission constituted a Committee to carry out an in depth study into the matter and suggest appropriate means to ensure that the evaluation was on more equitable basis. The Committee by its Report dated 2.9.1996 suggested statistical scaling system as the remedy and recommended the linear standard score method which operates on the following formula :

$$Z = \text{Assumed mean} + \left[\frac{(X-M) \times \text{Assumed S.D.}}{SD} \right]$$

Z= is the Scaled Score.
X = is the Raw mark.
M = is the mean of Raw Marks of the group/subject.
S.D. is the Standard Deviation of Raw Marks of the group/subject.

The Committee suggested the following 'assumptions' or 'parameters' for applying the formula :

(i) Assumed Mean will be taken as Half of the maximum marks of the group/subject.

(ii) Assumed S.D. will be taken as one-fifth of the assumed mean.

(iii) If scaled score is less than zero after scaling, then candidates will be allotted zero marks in the said group/subject.

(iv) If scaled score after scaling is more than maximum marks, then candidate will be allotted maximum marks in the said group/subject.

29. Ever since then, the Commission has been following the statistical scaling. According to the Commission, the scaling method is rational, scientific and reasonable and would lead to assessment of inter se merit of the candidates in a just and proper manner. The use of the said method was reviewed by an Expert Committee on 31.7.2000 and it was reiterated that the formula and method presently used for scaling can be continued to be used in future also and there was no need to change the same. Thus the scaling is continued.

30. We may at this stage refer to the condition to be fulfilled, for scaling to be effective. For this purpose, we are referring to passages from the Authors/Experts relied on by the Commission itself.

30.1) A. Edwin Harper & Vidya Sagar Misra (in 'Research on Examinations in India) make it clear that scaling will be useful and effective only if the distribution of marks in the batch of answer scripts sent to each examiner is approximately the same as the distribution of marks in the batch of answer scripts sent to every other examiner.

30.2) A similar view is expressed by J.P. Guilford & Benjamin Fruchter (in their treatise 'Fundamental Statistics in Psychology and Education' page 476-477). They say that two conditions are to be satisfied to apply scaling: (i) The population of students from which the distributions of scores arose must be assumed to have equal means and dispersions in all the abilities measured by the different tests; and (ii) the form of distribution, in terms of skew ness and kurtosis, must be very similar from one ability to another. He proceeds to refer to the disadvantages of scaling thus :

> "Unfortunately, we have no ideal scales common to all these tests, with measurements which would tell us about these population parameters. Certain selective features might have brought about a higher mean, a narrower dispersion, and a negatively skewed distribution on the actual continuum of ability measured by one test, and a lower mean, a wider dispersion, and a symmetrical distribution on the continuum of another ability represented by another test. Since we can never know definitely about these features for any given population, in common scaling we often have to proceed on the assumption that actual means, standard deviations, and form of distribution are uniform for all abilities measured. In spite of these limitations, it is almost certain that derived scales provide more nearly comparable scales than do raw scores."

30.3) V. Natarajan & K. Gunasekaran in their treatise 'Scaling Techniques - what, why and how', have warned :

> "If one studies the literature in this field, he can find that there are a number of methods available ranging from simple to complex. Each has its own merits and demerits and can be adopted only under certain conditions or making certain assumptions."

The Authors describe the Linear Standard Score method (which is used by the Commission) thus :

> "Unlike Z-score (Standard score) which has a mean of 'zero' and standard deviation 'one', the linear standard score has some pre-determined mean and standard deviations.
>
> .....the choice of the mean and standard deviations is purely arbitrary. Each has its own advantages and disadvantages and useful for specific purpose only. It may be emphasized here that both the standard scores and linear standard scores retain the shape of the original distribution of raw marks. Therefore, if the original distribution is 'normally' distributed, then any type of Linear Standard Scores will also be 'normally' distributed. Taking the Normal Curve as the model, various points in other scales are plotted. It should be, however, noted that the kind of relationship shown in Figure -2 between normal curve vis-à-vis the other scores are valid only if the raw score distribution can be assumed to approximately normally distributed. (emphasis supplied)

30.4) The Kothari Report, 1976 ('Policy & Selection Methods' published by UPSC) while referring to scaling in regard to papers in different subjects, by using appropriate statistical techniques

as a recognized procedure for improving the reliability of examination as a tool for selection, however cautions that the method should be under continuous review and evaluation, that continuing improvement in the light of experience and new developments, taking into account advancement of knowledge, is essential.

31. The entire basis for applying scaling in regard to marks awarded by different examiners in the same subject is the assumption that all answer scripts have been thoroughly mixed, and that equal number of answer scripts drawn at random and sent to each examiner for valuation will contain answer scripts of candidates with equal distribution of abilities. When the distribution of abilities in each batch is approximately equal, the mean marks and standard deviation of the scaled marks of each batch will be identical. To put it differently, if each examiner is sent 300 answer scripts and each batch of 300 candidates have almost equal number of good, average and poor standard students, they can all be brought to a common scale for comparing their merit inter se. But we find that there is no such broad equal distribution in the examination with which we are concerned. We find from the Tables furnished that the range of marks awarded and the range of deviation have varied enormously from examiner to examiner in the same subject. We extract below these ranges, which demonstrate the wide diversity, in turn indicating that scaling method was inappropriate for bringing uniformity in valuation :

Subject	No.of Examiner	No. of scripts Examined (range)	Mean marks of the examiner (range)	Standard deviation of marks allotted (range)	Minimum marks (awarded by the Examiner)	Maximum marks (awarded by the Examiner)
1. General Knowledge	18	50 to 800	47.4 to 83.91	12.24 to 20.49	10 to 43	84 to 126
2. Language	14	231 to 800	37.51 to 82.43	14.16 to 31.75	0 to 30	105 to 145
3. Law-I	11	300 to 900	30.83 to 56.90	12.45 to 17.85	0 to10	83 to113
4. Law-II	10	200 to 1402	70.57 to 94.40	11.48 to 20.05	0 to 40	113 to 132
5. Law-III	14	150 to 1000	63.14 to 86.74	13.16 to 19.54	0 to 31	99 to 134

32. The formula heavily relies upon the standard deviation among the candidates in a given pool or batch. The standard deviation is a measure of the range and distribution of marks awarded by an examiner. It depends on the set of students in any given pool. If an examiner has a set of extremely good or poor standard candidates and another examiner has a more even set of average candidates, the standard deviation would be high for the first examiner and low for the second examiner, having

regard to the range of distribution of marks. Consequently the scaled marks of a candidate calculated on a formula heavily relying on standard deviation, would be based on the cumulative standard deviation of all the candidates in his pool rather than the strictness or liberality of the examiner. Therefore, standard deviation has only a bearing on ascertaining the range of capabilities of the candidates in a given examination and in no way eliminates the anomalies arising out of the strictness or liberality of the examiner. We may demonstrate the fact that the scaled marks vary with reference to the extent of standard deviation (and has nothing to do with the issue of strictness or liberality of the examiner), from the following examples:

Actual Marks	Average (Mean) Marks	Strict Examiner No.I		Strict Examiner No.II	
		Standard Deviation	Scaled Marks	Standard Deviation	Scaled Marks
0 5 20	50 50 50	15 15 15	33 40 60	25 25 25	60 64 76

Actual Marks	Average (Mean) Marks	Liberal Examiner No.I		Liberal Examiner No.II	
		Standard Deviation	Scaled Marks	Standard Deviation	Scaled Marks
50 120 150	90 90 90	15 15 15	47 140 180	25 25 25	68 124 148

The reason given for introducing scaling is to cure the disparity on account of strictness or liberality of the examiners. But the effect of the scaling formula adopted by Commission is to average the marks of a batch of candidates and convert the raw marks of each candidate in the batch into scaled marks with reference to the average marks of the batch and the standard deviation. The scaling formula therefore, does not address or rectify the effect of strictness or liberality of the examiner. The scaling formula is more suited and appropriate to find a common base and inter se merit, where candidates take examinations in different subjects. As the scaling formula has no nexus or relevance to give a solution to the problem of eliminating the variation or deviation in the standard of valuation of answer scripts by different examiners either on account of strictness or liberality, it has to be concluded that scaling is based on irrelevant considerations and ignores relevant considerations.

33. We will next refer to apparent anomalies which show scaling of marks is arbitrary. The Commission has furnished five Tables relating to the five subjects showing the following particulars : (i)

The number of examiners, (ii) Number of answer scripts allotted to each examiner; (iii) Mean marks of each examiner; (iv) Standard deviation of the marks allotted by each examiner; (v) Minimum raw marks secured by a candidate in the batch of answer-scripts corrected by each examiner; (vi) Maximum raw marks secured by a candidate in the batch of answer-scripts corrected by each examiner. The Commission has also furnished the tabulation of scaled and actual marks of all the candidates. An examination of the particulars furnished discloses several glaring anomalies.

I. Award of high scaled marks to those who secured zero marks :

We find from Table-II (furnished by the Commission) that the answer scripts relating to Language Paper were distributed among 14 examiners. Several candidates whose papers were evaluated by examiners 2, 3, 4, 5, 6, 8, 13, & 14 have secured zero marks. Evidently only those who did not attempt any answer or had absolutely no knowledge of either Hindi or English would have got zero marks. But such candidates who actually secured zero marks have strangely been assigned scaled marks ranging from 36 to 67, depending upon the examiner, in whose pool, they fell. We give below scaled marks obtained by different candidates who secured zero marks with reference to the examiners.

Subject: Language

Examiner No.	Raw Marks of the candidate	Scaled Marks
2	0	(100)+(0-66.58 x20) = 44 --- 23.73
3	0	100+(0-55.29 x20) = 47 --- 20.91
4	0	100+(0-74.88 x20) = 0 (-5 to be taken as zero) --- 14.20
5	0	100+(0-44.48 x20) = 58 --- 20.06
6	0	100+(0-61.52 x20) = 50 --- 24.8
8	0	100+(0-52.86 x20) = 67 --- 31.75
13	0	100+(0-43.11 x 20) = 66 --- 25.50
14	0	100+(0-54.77 x20) = 36 --- 17.02

But unfortunately in the same subject, candidates who secured 32 to 30 marks, assessed by Examiner No.10, got their marks reduced to 31 to 28 on scaling. (Mean being 80.93 and SD being 14.16). The devastating effect of awarding such high scaled marks, that too ranging from 36 to 67, to those who have secured '0' need not be stressed. In fact UPSC has clarified that whenever they follow scaling procedure, no scaling is applied to '0' marks. But the Commission had not applied its mind to this aspect when applying 'scaling'.

II. Equalization of marks of persons who secured very high marks.

The scaling has equalized the different high end marks of candidates, where the mean marks is low. To give a hypothetical example if the mean marks is 70 and the standard deviation is 15, all candidates securing raw marks 145 to 200 will be assigned the equal scaled marks of 200. If the mean marks are 60 and the standard deviation is 15, all candidates securing 135 to 200 will be awarded the scaled marks of 200. Similarly, if the mean marks are 80 and the standard deviation is 20, all candidates securing raw marks between 180 to 200 will be awarded equal scaled marks of 200. In addition to the above hypothetical examples, we may give a concrete example. In regard to Examiner No. 14 in Language Paper, Table-II shows that the highest marks secured is 145. In regard to that examiner, the mean marks is 54.77 and standard deviation is 17.02. By applying the scaling formula, the marks of 145 secured by that candidate becomes 206 which is taken as 200 as per the formula. All candidates who were awarded raw marks of 140 to 145 by Examiner No. 14 in Language paper will be assigned the equal scaled marks of 200. This leads to unequals being treated as equals. In case of candidates securing marks in higher ranges on scaling, there is likelihood of their marks being equalised with those who secured lesser marks thereby losing the benefit of their higher marks and inter se merit.

III. Equalization of marks of persons who secured low marks.

The scaling has also equalized the different low end marks of candidates, where the mean marks is high. To give a hypothetical example, if the mean marks is 95 and the standard deviation is 11, then all candidates securing 40 and below will be awarded only '0'. To give a concrete example, in regard to Examiner No. 7 in Law Paper-II, one candidate has secured 32. In respect of that examiner, the mean marks is 94.4 and standard deviation is 11.48. By applying the scaling formula, the scaled marks of the said candidate who secured 32 becomes '0'. Not only that. Scaled marks of all candidates who were given raw marks of 37 and less by that examiner, becomes '0'. This leads to unequals being treated as equals and candidates who secured marks in the lower ranges (from that examiner) losing out to candidates who performed much worse but were in the pool of other examiners.

IV. Inadequate mixing of answer scripts and improper distribution of answer scripts :

The basic requirement for scaling is that all answer scripts will be mixed thoroughly and that approximately equal number of answer scripts drawn at random will be allotted to each examiner so as to infer equal distribution of ability of candidates in each batch of answer scripts. But that was apparently not done by the Commission. We give below the details of distribution of answer scripts which demonstrate that they were nowhere equal :

General Knowledge Paper (18 Examiners) - The distribution of answer scripts is : 50 papers (2 examiners), 100 (3 examiners), 150 (1 examiner), 200 (2 examiners), 250 (2 examiners), 300 (1 examiner), 350 (1 examiner), 400 (1 examiner), 500 (2 examiners), 648 (1 examiners) and 800 (2 examiners).

Language Paper (14 Examiners) - The distribution of answer scripts is : 231 papers (1 examiner), 300 (5 examiners), 350 (1 examiner), 400 (2 examiners), 450 (3 examiners), 700 (1 examiner), 800 (1 examiner).

Law Paper-I (11 Examiners) - The distribution of answer scripts is : 100 papers (1 examiner), 300 (2 examiners), 400 (2 examiners), 450 (1 examiner), 600 (1 examiner), 700 (1 examiner), 775 (1 examiner), 800 (1 examiner), 900 (1 examiner).

Law paper-II (10 examiners) - The distribution of answer scripts is : 200 papers (1 examiner), 300 (1 examiner), 350 (1 examiner), 450 (1 examiner), 500 (2 examiners), 650 (2 examiners), 700 (1 examiner), 1402 (1 examiner).

Law paper-III (14 examiners) - The distribution of answer scripts is : 150 papers (3 examiners), 200 (1 examiner), 250 (1 examiner), 300 (1 examiner), 350 (2 examiners), 400 (1 examiner), 444 (1 examiner), 500 (1 examiner), 550 (1 examiner), 900 (1 examiner), 1000 (1 examiner).

Very large variation in the number of answer scripts allotted to each examiner has a bearing on the mean marks and the standard deviation. The fact that there was no proper randomization and distribution is also evident from the fact that though approximately equal number appeared in each segment of 10000 from among the roll nos. 1 to 51524, selection is inexplicably high in the first segment of roll nos. 1 to 10000. The particulars of roll number segments and the number of persons who appeared for the main examination from each segment are as follows :

Roll Numbers	No. of Persons
1. 1-10000	1072
2. 10001 to 20000	1115
3. 20001 to 30000	1124
4. 30001 to 40000	1031
5. 40001 to 50000	1112
6. 50001 to 51524	170

If there was proper randomization and distribution leading to equal distribution of the candidate capacity, it would have been expected that the number of selected candidates also would have been proportionate to each segment. But we find that out of 347 candidates selected, as many as 139 candidates fall in first segment alone (within Roll nos. 1 to 10000) and 208 fall in the next five segments put together. Significantly out of the top 150 selected candidates, as many as 68 candidates also fall within Roll nos. 1 to 10000. Be that as it may.

V. **Low raw marks were further lowered (or made into '0') and higher raw marks were further increased due to scaling**

Example : Law Paper-II.
Examiner No. 5 : 33 became 9; and 120 became 146
Examiner No. 6 : All marks between 9 and 1 became 0; and 119 became 139
Examiner No. 7 : All marks between 37 and 1 became 0; and 132 became 165
Examiner No. 9 : 4 became 0; and 122 became 156

In contrast, in some cases all raw marks whether low or high, became higher.

Example : Law Paper-I.

Examiner No. 4 : 1 became 56; and 102 became 177.
Examiner No. 6 : 9 became 66; and 85 became 184.
Examiner No. 9 : 1 became 60; and 107 became 184.
Examiner No. 10 : 9 became 49; and 83 became 156.

The petitioners have referred to certain other absurdities arising from the application of scaling, with reference to the results of 2000 examination which was the subject matter of S.C. Dixit. (For example, it was demonstrated that in some cases, the low marks awarded by liberal examiners had increased and high marks awarded by strict examiners had reduced, thereby achieving the opposite of the goal sought to be achieved — that marks given by liberal examiners should be reduced and marks given by strict examiners should be increased). We however consider it appropriate to rely only on the

anomalies/absurdities demonstrable with reference to the 2003 examination which is the subject matter of these petitions, and do not propose to rely on the anomalies noticed in regard to the 2000 examination.

34. When selections are made on the basis of the marks awarded, and the inter se ranking depends on the marks awarded, treating unequals equally, or giving huge marks to candidates who have secured zero marks in some subjects make the process wholly irrational, virtually bordering on arbitrariness. It is no doubt true that such irrationality may adversely affect only those cases which are at either end of the spectrum, and if they are excluded, by and large the scaling system may be functional. But if the extreme cases are even 20 out of 5000 for each of the subjects, it becomes 100 for 5 subjects, which means that the results of as many as 100 are likely to be affected. It may be more also. In that process, at least 5% to 10% of the vacancies are likely to be filled up by less meritorious candidates. This will lead to considerable heart-burn and dissatisfaction. When the object of the selection process is to try to select the best, and even one mark may make the difference between selection or non-selection, the system of scaling which has the effect of either reducing or increasing the marks in an arbitrary manner will lead to unjust results. This is in addition to the main disadvantage that scaling does not remedy the ill-effects of examiner variability arising out of strictness or liberality in valuation.

35. The illustrations given above with reference to the 2003 examinations clearly demonstrate the arbitrariness and irrationality of scaling, particularly in cases falling at the two ends of the spectrum. We, therefore, hold that scaling system as adopted by the Commission is unsuited for the Civil Judge (Junior Division) Examination.

36. We may now summarize the position regarding scaling thus :

Only certain situations warrant adoption of scaling techniques.

There are number of methods of statistical scaling, some simple and some complex. Each method or system has its merits and demerits and can be adopted only under certain conditions or making certain assumptions.

Scaling will be useful and effective only if the distribution of marks in the batch of answer scripts sent to each examiner is approximately the same as the distribution of marks in the batch of answer scripts sent to every other examiner.

In the Linear Standard Method, there is no guarantee that the range of scores at various levels will yield candidates of comparative ability.

Any scaling method should be under continuous review and evaluation and improvement, if it is to be a reliable tool in the selection process.

> Scaling may, to a limited extent, be successful in eliminating the general variation which exists from examiner to examiner, but not a solution to solve examiner variability arising from the 'hawk-dove' effect (strict/liberal valuation).

The material placed does not disclose that the Commission or its expert committee have kept these factors in view in determining the system of scaling. We have already demonstrated the anomalies/ absurdities arising from the scaling system used. The Commission will have to identify a suitable system of evaluation, if necessary by appointing another Committee of Experts. Till such new system is in place, the Commission may follow the moderation system set out in Para 23 above with appropriate modifications.

37. We may now refer to the decision of this Court in S. C. Dixit. The validity of scaling was considered in paras 31 to 33 of the judgment extracted below :

> "31. There is a vast percentage difference in awarding of marks between each set of examiners and this was sought to be minimized by applying the scaling formula. If scaling method had not been used, only those candidates whose answer-sheets were examined by liberal examiners alone would get selected and the candidates whose answer-sheets were examined by strict examiners would be completely excluded, though the standard of their answers may be to some extent similar. The scaling system was adopted with a view to eliminate the inconsistency in the marking standards of the examiners. The counsel for the respondents could not demonstrate that the adoption of scaling system has in any way caused injustice to any meritorious candidate. If any candidate had secured higher marks in the written examination, even by applying scaling formula, he would still be benefited.
>
> 32. The Division Bench of the High Court observed that the process of scaling was done examiner-wise only and the scaling formula did not take into consideration the average of mean of all the candidates in one particular paper but took the mean of only that group of candidates which has been examined by one single examiner. The counsel for U.P. PSC submitted that the observation made by the High Court is incorrect. The scaling formula was adopted to remove the disparity in the evaluation of 14 examiners who participated in the evaluation of answer-sheets and the details have also been furnished as to how the scaling formula was adopted and applied. Therefore, we do not think that the observation of the Division Bench that the Commission did not take care of varying standards which may have been applied by different examiners but has sought to reduce the variation of the marks awarded by the same examiner to different candidates whose answer-sheets had been examined, is correct. The Division Bench was of the view that as a result of scaling, the marks of the candidates who had secured zero marks were enhanced to 18 and this was illegal and thus affected the selection process. The finding is to be understood to mean as to how the scaling system was applied. 18 marks were given notionally to a candidate who secured zero marks so as to indicate the variation in marks secured by the candidates and to fix the mean marks.

> 33. In that view of the matter, we do not think that the application of scaling formula to the examinations in question was either arbitrary or illegal. The selection of the candidates was done in a better way. Moreover, this formula was adopted by U.P. PSC after an expert study and in such matters, the court cannot sit in judgment and interfere with the same unless it is proved that it was an arbitrary and unreasonable exercise of power and the selection itself was done contrary to the Rules. Ultimately, the agency conducting the examination has to consider as to which method should be preferred and adopted having regard to the myriad situations that may arise before them."

S. C. Dixit, therefore, upheld scaling on two conclusions, namely (i) that the scaling formula was adopted by the Commission after an expert study and in such matters, court will not interfere unless it is proved to be arbitrary and unreasonable; and (ii) the scaling system adopted by the Commission eliminated the inconsistency arising on account of examiner variability (differences due to evaluation by strict examiners and liberal examiners). As scaling was a recognized method to bring raw marks in different subjects to a common scale and as the Commission submitted that they introduced scaling after a scientific study by experts, this Court apparently did not want to interfere. This Court was also being conscious that any new method, when introduced, required corrections and adjustments from time to time and should not be rejected at the threshold as unworkable. But we have found after an examination of the manner in which scaling system has been introduced and the effect thereof on the present examination, that the system is not suitable. We have also concluded that there was no proper or adequate study before introduction of scaling and the scaling system which is primarily intended for preparing a common merit list in regard to candidates who take examinations in different optional subjects, has been inappropriately and mechanically applied to a situation where the need is to eliminate examiner variability on account of strict/liberal valuation. We have found that the scaling system adopted by the Commission leads to irrational results, and does not offer a solution for examiner variability arising from strict/liberal examiners. Therefore, it can be said that neither of the two assumptions made in S.C. Dixit can validly continue to apply to the type of examination with which we are concerned. We are therefore of the view that the approval of the scaling system in S.C. Dixit is no longer valid.

38. Learned counsel for the Commission contended that scaling has been accepted as a standard method of evaluation in the following decisions and therefore it should be approved :-

(i) Kamlesh Haribhai Goradia vs. Union of India [1987 (1) Guj.LR 157], upheld by this Court by order dated 11.3.1987 in SLP (C) No. 14000/1986.

(ii) Muhesh Kumar Khandelwal vs. State of Rajasthan [1994 (1) Raj.LR 533] upheld by this Court by order dated 22.1.1996 in SLP(c) No. 15682-15684 of 1994.

(iii) K. Channegowda vs. Karnataka Public Service Commission [2005(12) SCC 688).

All the three cases related to moderation and not scaling. There are, however, passing references to scaling as one of the methods to achieve common standard of assessment. The fact that scaling is a standard method of assessment, when a common base has to be found for comparative assessment of candidates taking examinations in different optional subjects, is not in dispute. In fact the Commission may continue to adopt the said system of scaling, where a comparative assessment is to be made of candidates having option to take different subjects. The question is whether scaling, in particular, linear standard scaling system as adopted by the Commission, is a suitable process to eliminate 'examiner variability' when different examiners assess the answer scripts relating to the same subject. None of the three decisions is of any assistance to approve the use of method of 'scaling' used by the Commission.

39. Learned counsel for the Commission also referred to several decisions in support of its contention that courts will be slow to interfere with matters affecting policy requiring technical expertise and leave them for decision of experts. (State of U.P. v. Renusagar Power Co. Ltd. - 1988 (4) SCC 59, Tata Iron & Steel Co. Ltd. v. Union of India 1996 (9) SCC 709, Federation of Railway Officers Association v. Union of India 2003 (4) SCC 289). There can be no doubt about the said principle. But manifest arbitrariness and irrationality is an exception to the said principle. Therefore, the said decisions are of no avail.

40. We should, however, record the fair submission on behalf of the Commission that it is not irrevocably committed to any particular system and will adopt a different or better system if the present system is found to be defective.

Re : Point No. (iv).

41. The petitioners have requested that their petitions should be treated as being in public interest and the entire selection process in regard to Civil Judge (Junior Division) Examination, 2003 should be set aside. We are unable to accept the said contention. What has been made out is certain inherent defects of a particular scaling system when applied to the selection process of the Civil Judges (Junior Division) where the problem is one of examiner variability (strict/liberal examiners). Neither mala fides nor any other irregularities in the process of selection is made out. The Commission has acted bona fide in proceeding with the selection and neither the High Court nor the State Government had any grievance in regard to selections. In fact, the scaling system applied had the seal of approval of this Court in regard to the previous selection in S.C. Dixit (supra). The selected candidates have also been

appointed and functioning as Judicial Officers. Further as noticed above, the scaling system adopted by the Commission has led to irrational and arbitrary results only in cases falling at the ends of the spectrum, and by and large did not affect the major portion of the selection. We, therefore, direct that our decision holding that the scaling system adopted by the Commission is unsuited in regard to Civil Judge (Junior Division) Examination and directing moderation, will be prospective in its application and will not affect the selections and appointments already made in pursuance of the 2003 Examination.

42. However, in so far as the petitioners are concerned, we deem it proper to issue the following directions to do complete justice on the facts of the case :

> If the aggregate of raw marks in the written examination and the marks in the interview of any petitioner is less than that of the last selected candidate in the respective category, he will not be entitled to any relief (for example, the petitioners in WP(C) No. 165/2005 belonging to the Category 'BC' have secured raw marks of 361 and 377 respectively in the written examinations, whereas the last five of the selected candidates in that category have secured raw marks of 390, 391, 397, 438 and 428 respectively. Even after adding the interview marks, the marks of the petitioners in W.P. [C] No.165/2005 is less than the marks of the selected candidates).
>
> Where the aggregate of raw marks in the written examination and the interview marks of any petitioner, is more than the aggregate of the raw marks in the written examination and interview marks of the last selected candidate in his category, he shall be considered for appointment in the respective category by counting his appointment against future vacancies. (For example, we find that petitioner Archna Rani, one of the petitioners in WP (C) No. 467/2005 has secured 384 raw marks which is more than the raw marks secured by the last five selected candidates [347, 337, 336, 383 and 335] under the SC category and even after adding the interview marks, her marks are more than the five selected candidates. Hence, she should be considered for appointment). This relief will be available only to such of the petitioners who have approached this Court and the High Court before 31st August, 2005.

43. The petitions are allowed in part accordingly.

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IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD
CIVIL MISC. WRIT PETITION NO.9685 OF 2007
(Under Article 226 of the Constitution of India)
D.D. 15.01.2008
Hon'ble Mr. Justice Dr.B.S.Chauhan &
Hon'ble Mr. Justice Dilip Gupta

Riyaz Khan & Ors. ... Petitioners
Vs.
State of U.P. & Ors. ... Respondents

Examination:

Whether remedial action taken by the Commission regarding the errors in the questions/key answers as per the recommendation of the expert Committee can be accepted? – Yes

There were complaints regarding errors in the questions as well as key answers – The same were referred to Committee of Experts which concluded that five questions were required to be cancelled and the answers of nine questions were to be substituted by the correct answers amongst the options – The recommendation of the Expert Committee were accepted and result was declared afresh on the basis of the rectified answers after cancelling the previous result – High Court observing that the action taken by the Commission cannot be doubted disposed of the writ petition with a direction to consider the allegations regarding acceptance of candidature of some candidates and to pass appropriate orders after hearing the candidates who are likely to be affected.

JUDGMENT

In view of the order passed earlier, Shri Murlidhar Dube, Controller of the Examinations and Shri Arun Prakash, Special Secretary (Law) of the U.P. Public Service Commission are present along with the records. Shri M.A. Qadeer, learned Senior Advocate assisted by Ms. Najma Begum for the Commission and Shri Shailendra for the petitioner have been heard.

The answer books and result sheets have been examined. As per the information gathered from the counter-affidavit filed by the Commission as well as the oral submissions made by learned counsel for the parties, it is evident that on the representations received against the key answers given on the Website, the Commission decided to constitute a Committee of Experts consisting of four Members. The Expert Committee concluded that five questions were required to be cancelled and the answers of nine questions were to be substituted by the correct answers existing amongst the options. These recommendations of the Expert Committee were accepted by the Commission and the Commission declared afresh result on the basis of the rectified answers after cancelling the previous result.

It needs to be mentioned that even after the deletion of five questions, the result was declared afresh treating 150 marks as maximum marks and not 145 marks. According to the Commission, the candidates who had given correct answers to 15 questions, were awarded 16 marks (adding one mark); candidates who had given correct answers to 46 questions were awarded 48 marks (adding two marks); candidates who had given correct answers to 73 questions were awarded 76 marks (adding three marks), candidates who had given correct answers of 102 questions were awarded 106 marks (adding four marks); and the candidates who had given correct answers of 131 questions were given 136 marks (adding five marks). We do not find any ground to interfere on this count as we are of the considered opinion that the decision taken by the Commission is reasonable and correct.

In respect of the answers to the nine questions, the Expert Committee pointed out the correct answers to those nine questions and the answer sheets of the candidates were again checked by feeding the correct key answers and the marks obtained by the candidates have been corrected accordingly.

We do not doubt the bona fides of the Commission in appointing the Committee of Experts and nor do we have any reason to doubt the correctness of the decision taken by the Expert Committee constituted by the Commission.

There are certain allegations of facts in respect of certain candidates as to whether their candidature should have been accepted as has been mentioned in paragraphs 17-A and 17-B of the writ petition. Reply submitted by the respondents in the counter affidavit and supplementary counter affidavit is far from satisfactory and in view thereof, on our request, the officers present in the Court have agreed to re-examine the averments made in these paragraphs of the writ petition and in case the result is likely to be changed, they will hear the candidates who are likely to be affected and shall pass appropriate orders before giving effect to the order.

In view of the above, nothing survives in this petition and the petitions stands disposed accordingly.

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UTTARAKHAND PUBLIC SERVICE COMMISSION

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL
Writ Petition No.144 (S/B) of 2004
D.D.11.06.2004
Hon'ble M.M.Ghildiyal, J. & Hon'ble Rajesh Tandon, J.

Upendra Kumar Gopal ... Petitioners
Vs.
State of Uttaranchal & Ors. ... Respondents

Recruitment:

The petitioner has challenged non declaration of his result for non registration at Employment Exchange – High Court following the decision of the supreme Court in U.P. State Road Transport Corporation and another Vs. U.P.Parivahan Nigam Shishukhs Berozgar Sang and others (1995) 2 SCC 1, has disposed of the petition with a direction to declare the result of the petitioner if the same is withheld on the ground that his name was not sponsored by the Employment Exchange.

Held:

The Supreme Court in the above said case has given guidelines while dealing with the claim of applicants who have successfully completed their apprentice training. The Supreme Court has held that the trainee would not be required to get his name sponsored by the employment exchange.

Case referred:

(1995) 2 SCC 1 - U.P. State Road Transport Corporation & Anr. Vs. U.P.Parivahan Nigam Shishukhs Berozgar Sang & Ors.

ORDER

Heard Sri Subhash Upadhyay, learned counsel for the petitioner, learned Chief Standing Counsel for the respondents No.1 and 3 and Sri. U.K.Uniyal for the respondent no.2.

By the present writ petition the petitioner prays for a writ, order or direction in the nature of mandamus directing the respondents to declare the result of the petitioner as successful candidate ignoring the non-registration of the petitioner at Employment Exchange.

Brief facts of the case are that the petitioner is a diploma engineer and has completed apprentice training from 30.03.1990 to 31.03.1991 at the Provincial Division, P.W.D. Dehradun. After completing of training by the petitioner from the Department, the Department did not provide any job to him. The different provisions of the Apprenticeship Act, 1961 have been interpreted by the Hon'ble Supreme Court expecting that it should be endeavour of every Department to provide job to a candidate, who has obtained training from the respective Department.

This petition may be decided in terms of the judgment of the Apex Court in the case of U.P. State Road Transport Corporation and another Vs. U.P.Parivahan Nigam Shishukhs Berozgar Sang and others (1995) 2 SCC 1, wherein it has been observed as under:-

> "In the background of what has been noted above, we state that the following would be kept in mind while dealing with the claim of the trainees to get employment after successful completion of their training
>
> (5) Other things being equal, a training apprentice should be given preference over direct recruits.
>
> (6) For this a trainee would not be required to get his name sponsored by the employment exchange. The decision of this Court in Union of India Vs. Hargopal AIR 1987 SC 1227, would permit this.
>
> (7) If age bar would come in the way of the trainee, the same would be relaxed in accordance, with what is stated in this regard, if any, in the concerned service rule. If the service rule be silent on this aspect, relaxation to the extent of the period for which the apprentice had undergone training would be given.
>
> (4) The training institute concerned would maintain a list of the persons trained yearwise. The persons trained earlier would be treated as senior to the persons trained later. In between the trained apprentice, preference shall be given to those who are senior.
>
> In so far as the cases at hand are concerned, we find that the Corporation filed an additional affidavit in CA Nos.4347-4354 of 1990 (as desired by the Court) on 20.10.1992 giving position regarding vacancies in the posts of conductors and clerks. If such posts be still vacant, we direct the Corporation to act in accordance with what has been stated above regarding the entitlement of the trainees. We make it clear that while considering the cases of the trainees for giving employment in suitable posts, what has been laid down in the Service Regulations of the Corporation shall be followed, except that the trainees would not be required to appear in any written examination, if any provided by the Regulations. It is the requirement of their names being sponsored by the employment exchange would not be insisted upon. In so far as the age requirement is concerned, the same shall be relaxed as indicted above."

The petitioner has submitted that his result has not been declared by the respondents only on the ground that he was not registered with the employment exchange. The Hon'ble Apex Court U.P. State Road Transport Corporation and another Vs. U.P. Parivahan Nigam Shishukhs Berozgar Sang and others (1995) 2 SCC 1, has given guidelines while dealing with the claim of applicants who have successfully completed their apprentice training. The Apex Court has held that the trainee would not be required to get his name sponsored by the employment exchange.

In clause 6 of the guidelines the Apex Court has held as under:

> "For this a trainee would not be required to get his name sponsored by the employment exchange. The decision of this Court in Union of India Vs. Hargopal AIR 1987 SC 1227, would permit this."

In view of the aforesaid decision of the Hon'ble Supreme Court the respondents authorities are directed to declare the result of the petitioner, if the same is withheld on the ground that his name was not sponsored by the employment exchange.

With this direction, the writ petition is disposed of finally.

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IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL
Civil Misc. Recall Application No.3104 of 2005
In
Writ Petition No.281 of 2004 (S/B)
D.D. 28.07.2005
Hon'ble Cyriac Joseph, C.J. &
Hon'ble M.M.Ghildiyal, J.

Km. Neema ... Petitioner
Vs.
State of Uttaranchal & Anr. ... Respondents

Recruitment:

Petitioner under SC category for the post of Console Operator cum Data Entry Assistant appeared for the Pre Examination, Main Examination and also Practical Examination but was not called for interview – The petitioner has filed this writ petition for a direction to call him for interview - On 21.5.2005 when the case came up for hearing as there was no representation for the petitioner recording the submission of the 2nd respondent that the selection process had already been completed and selected candidates appointed writ petition was dismissed as infructuous – In this Miscellaneous Application for recalling that order High Court in view of the fact that the petitioner was not called for interview as she failed to obtain the minimum qualifying marks in the final examination consisting of written test and practical test, dismissed both Miscellaneous Application and Writ Petition.

Held:

In the absence of a proper challenge against the decision of the Public Service Commission to prescribe the minimum qualifying marks for scheduled caste candidates in the main examination, the petitioner cannot successfully challenge the decision of the Public Service Commission not to call her for interview.

ORDER

The applicant is the petitioner in Writ Petition No.281 of 2004 (S/B) which was dismissed by this Court on 21.05.2005 observing that the writ petition has become infructuous. The prayer in this application is for recalling the said order dated 21.05.2005.

We have heard learned counsel for the applicant and the learned counsel for the respondents.

The petitioner belongs to Scheduled Caste. When the Uttaranchal Public Service Commission invited applications for the post of Upper Varg Sahayak (Upper Division Assistant)/Personal Assistant/ Console Operator-Data Entry Assistant, the petitioner submitted application for the post of Console Operator-cum-Data Entry Assistant. Out of the total eight posts, two were reserved for Scheduled Caste, one for Backward Class and the remaining five were to be filled up by general category candidates. The petitioner appeared in the pre-examination and passed. Thereupon, she was allowed

to appear in the main examination held on 06.07.2004 and in the practical examination held on 23.08.2004. However, she was not called for interview. When the petitioner came to know that no scheduled caste candidates were selected, she filed the writ petition praying for the following reliefs:

> "a. Issue a writ, order or direction in the nature of Mandamus commanding the respondents not to complete the selection process for the post of Console Operator cum Data Entry Assistant which is going to be completed on 15.09.2004, during the pendency of the present petition.
>
> b. Issue a writ, order or direction in the nature of Mandamus commanding the respondents to call the petitioner for interview for the post of Console Operator cum Data Entry Assistant.
>
> c. Issue any other order or direction which this Hon'ble Court may deem it fit and proper under the circumstances of the case.
>
> d. Award cost of the petition."

The second respondent filed a counter affidavit on 06.12.2004 stating that though two posts were reserved for scheduled caste, none of the scheduled caste candidates was found suitable for the post and hence none of them was selected for appointment. The selection was to be conducted in three stages, namely, preliminary examination, main examination and interview. Only candidates who qualified in the preliminary examination would be eligible to appear in the main examination and only those who qualified in the main examination would be eligible to be called for interview. For the post of Console Operator cum Data Entry Assistant, the main examination consisted of two parts, namely, written test and computer operation. The petitioner appeared and passed in the preliminary examination and qualified to appear in the main examination. But she did not qualify in the written test of the main examination, even though she qualified in the practical test of computer operation. When the aggregate marks of the written test and practical test were taken into account, the petitioner did not qualify in the main examination by obtaining the minimum qualifying marks fixed for scheduled caste candidates. Hence she was not called for interview. It was further stated in the counter affidavit that none of the scheduled caste candidates was found suitable for the post and hence none of them was selected for appointment.

When the writ petition came up for hearing on 21.05.2005, there was no representation for the petitioner. Mr.B.D.Kandpal, learned counsel for the second respondent submitted that the selection process for the post of Console Operator cum Data Entry Assistant had already been completed and the selected candidates had already been appointed. In view of the above submission, the writ petition was dismissed as infructuous.

It is in the above circumstances that the petitioner has filed this application for recall of the order dated 21.05.2005. According to the learned counsel for the petitioner, the writ petition was wrongly

dismissed as it had not become infructuous. But we do not find any merit in this contention. In the counter affidavit filed on 06.12.2004 itself, it was stated that the final selection had already been made by the Public Service Commission and the names of the selected candidates had been sent to the Government by the Commission. In the rejoinder affidavit filed by the petitioner, the above averment in the counter affidavit was not denied. Even today, learned counsel for the petitioner is not in a position to point out any material to show that the selection process had not been completed and appointment of the selected candidates had not been made before 21.05.2005. Hence, the submission made by Mr. B.D.Kandpal, learned counsel for the second respondent on 21.05.2005 should be deemed to be factually correct. If the statement was factually correct, then only remaining question is whether the writ petition had become infructuous on 21.05.2005.

The main prayer in the writ petition was for a direction to the respondents to call the petitioner for interview for the post of Console Operator cum Data Entry Assistant. The stage of interview was already over and the candidates had already been selected and appointment had been made before 21.05.2005. The petitioner was not called for interview and was not selected as she was not found suitable for the post. The other prayer in the writ petition was for a direction to the respondents not to complete the selection process for the post of Console Operator cum Data Entry Assistant which was going to be completed on 15.09.2004 during the pendency of the writ petition. Obviously, that prayer also had become infructuous on 21.05.2005 as the selection process had already been completed.

Even on merits, the petitioner was not entitled to succeed in the writ petition. The counter affidavit categorically stated that the petitioner was not called for interview and was not selected, on the ground that she was found not suitable for the post in view of the fact that she failed to obtain the minimum qualifying marks in the final examination consisting of written test and practical test. The writ petition did not contain any pleading or prayer assailing the decision of the Public Service Commission prescribing the minimum qualifying marks for the scheduled caste candidates. Even after the counter affidavit was filed, the writ petition was not amended to incorporate any such pleading or prayer. In the absence of a proper challenge against the decision of the Public Service Commission to prescribe the minimum qualifying marks for scheduled caste candidates in the main examination, the petitioner cannot successfully challenge the decision of the Public Service Commission not to call her for interview.

In the above circumstances, we do not find any valid grounds to recall the order dated 21.05.2005.

The application is dismissed.

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IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL
WRIT PETITION NO.446 OF 2006 (S/S)
D.D. 30.3.2006
Hon'ble Justice Rajesh Tandon

Jagadish Chandra Mamgain ... Petitioner
Vs.
State of Uttaranchal & Ors. ... Respondent

Recruitment:

Whether Apprenticeship Trainee is entitled to preference to be considered in terms of the decision in (1995) 2 SCC (1)? - Yes

The petitioner was a candidate for the post of Junior Engineer – His representation for giving the benefit of Apprenticeship Training was not considered - High Court disposed of the writ petition with a direction to decide the representation of the petitioner in terms of the Supreme Court decision mentioned above.

Case referred:

(1995) 2 SCC (1) - U.P. State Road Transport Corporation & Anr. Vs U.P. Parivahan Nigam Shishukhs Berozgar Sangh & Ors.

ORDER

Heard Sri. S.S.Yadav, learned Counsel for the petitioner and Standing Counsel for the respondents. Both the parties have stated that the writ petition may be disposed of at the admission stage.

By means of this writ petition, the petitioner is seeking a writ of certiorari quashing the notification dated 16.5.2004 passed by the respondents and further with a prayer to command the respondents to consider the case of the petitioner according to clause 4 of the observations made by the Hon'ble Apex Court in case of U.P. State Road Transport Corporation and another Vs. U.P. Parivahan Nigam Shishuksh Berojzar Sangh and others.

Brief facts giving rise to the present writ petition are that the petitioner has completed Diploma Course in Civil Engineering from Govt. Polytechnic, Dwarahat, district Almora and after passing the said course he was selected for apprenticeship course and he was selected for apprenticeship course and he was sent for one year training under the Public Works Department, Nainital in Construction Division. It has been further submitted that the petitioner had undergone the training w.e.f. 18.02.1987 to 18.02.1988 and a certificate to this effect was issued to him. In terms of the judgment and order

passed by the Supreme Court the State Government has issued an order directing the heads of all the departments that the apprentice trainees shall be given preference. It has further been submitted that the respondents have issued an advertisement inviting applications from the qualified candidates for appointment on several posts of Junior Engineer including the Rural Engineering Services Department but in the advertisement it has not been mentioned that the candidates who have completed apprentice trainees shall be given preference. Although the petitioner has submitted his application in the prescribed form for consideration on the post of Junior Engineer (Civil) but the benefit of the apprentice training is not being given to him.

It has also been stated that the petitioner has submitted representations to the respondents to the effect that the benefit of apprentice training is not being given to him but the same were un-replied. Therefore, some of the trained diploma Engineers filed writ petition No.44 (S/B) 2002 before this Court which was finally disposed of on 18.07.2003 with the direction to consider the claims of the petitioner and decide his representation in the light of the law laid down by the Apex Court.

In Writ Petition No.44 (S/B) 2003 the Division Bench of this Court has framed the following norms in accordance with the judgment of the Apex Court in the case of U.P. State Road Transport Corporation and another Vs U.P. Parivahan Nigam Shishukhs Berozgar Sangh and others (1995) 2 SCC (1) and has directed for consideration of his representation:

> "In the background of what has been noted above, we state that the following would be kept in mind while dealing with the claim of the trainees to get employment after successful completion of their training:
>
> Other things being equal, a trained apprentice should be given preference over direct recruits.
>
> For this, a trainee would not be required to get his name sponsored by the employment exchange. The decision of this Court in Union of India Vs Hargopal, AIR 1987 SC 1227, would permit this,
>
> If age bar would come in the way of the trainee, the same would be relaxed in accordance, with what is stated in this regard, if any, in the concerned service rule. If the service rule is silent on this aspect, relaxation to the extent of the period for which the apprentice had undergone training would be given.
>
> The training institute concerned would maintain a list of the persons trained earlier would be treated as senior to the persons trained later. In between the trained apprentice, preference shall be given to those who are senior."

However, the petitioner has prayed that in view of the judgment of the Apex Court in the case of U.P. State Road Transport Corporation and another Vs U.P. Parivahan Nigam Shishukhs Berozgar Sangh and others (1995) 2 SCC (1), clause 4 may be complied with in accordance with the order dated 18.07.2003 passed by the Division Bench of this Court.

Learned counsel for the petitioner states that clause 4 of the aforesaid order is important. However, in view of the aforesaid judgment of the Apex Court the norms will be followed while considering the representation made by the petitioner. The relevant paragraph 12 is quoted below:

"That the petitioner on 07.01.2002 and 31.01.2002 submitted representations through registered post to the respondent No.1 and the Chief Secretary, stating therein that in view of several Government order issued in terms of the judgment and orders passed by the Hon'ble Supreme Court and High Court the benefit of apprentice training is not being given to him as such it was prayed that necessary orders in this regard may be passed and the representations of the petitioner are unreplied."

In view of the facts and circumstances, the respondents are directed to decide the representation of the petitioner within a period of six weeks in accordance with the norms framed by the Apex Court as well as the order dated 18.07.2003 passed by the Division Bench of this Court and while disposing of the representation of the petitioner sub clause 4 of the norms shall be followed.

With the aforesaid observations, the writ petition is disposed of. No order as to costs.

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IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL
Writ Petition No.1020 (M/B) of 2006
D.D. 19-08-2006
Hon'ble P.C.Verma, J. & Hon'ble B.S.Verma, J.

Mohammad Nasir ... Petitioner
Vs.
State of Uttaranchal & Ors. ... Respondents

Age limit:

Petitioner was a candidate for Uttaranchal Judicial Services Civil Judge (Junior Division) Pre Examination 2005 – His application was rejected being overaged on 1.1.2006 – In Rule 9 of the relevant rules the candidate should have attained the age of 22 years and must not have attained the age of more than 35 years on the first of January of the year in which the recruitment is to be made – As the petitioner had attained the age of 40 years on 1.1.2005 he was overaged by 4 months and 29 days in the year of recruitment i.e., as on 1.1.2006 – High Court dismissed the writ petition holding that the candidature of the petitioner has been rightly rejected.

ORDER

By means of this writ petition, the petitioner has prayed for writ of certiorari quashing the office memorandum dated 27.7.2006 issued by Respondent No.2 contained in Annexure No.4 whereby the application form of the petitioner for Uttaranchal Judicial Services Civil Judge (Junior Division) (Pre) Examination 2005 has been rejected on the ground of petitioner being overage on the first date of January, 2006.

2. Learned counsel for the petitioner submitted that petitioner is an O.B.C. candidate and requisition for appointment for the aforesaid examination was sent in the year 2005 and according the year of appointment became 2005 and as such he was not over age on 1.1.2005. He referred to definition of the year of Recruitment Rule 3 Clause (1) of Uttaranchal Judicial Service Rules, 2005 (hereinafter will be referred to as the Rules) which reads as under:-

Rule-3 Clause (1):— "Year of recruitment" means a period of twelve months commencing from the first day of 'January' of the calendar year in which the process of recruitment is initiated by the appointing authority,.

3. At the strength of this definition, learned counsel for the petitioner submitted that since the process was started by the appointing authority i.e. the State Government on the recommendation of the High Court who sent a requisition to start the process, therefore, the age is to be reckoned according to this Rule. The definition of year of recruitment is a general one defining the year of recruitment but relevant Rule for age limit is Rule-9 of the Rules, which reads as under:-

> "9. A candidate for direct recruitment to the service must have attained the age of 22 years and must not have attained the age of more than 35 years on the first day of January of the year in which the recruitment is to be made.
>
> Provided that the upper age limit in the case of candidate belonging to Scheduled Castes, Scheduled Tribes, Other Backward Classes and other such category as may be notified by the Government from time to time shall be greater by such number of years as may be prescribed."

4. From a perusal of above, it is clear that Rule 9 of the Rules clearly provides that the candidate must have attained the age of 22 years and must not have attained the age of 35 years on the first day of January of the year in which recruitment is to be made.

5. The recruitment is made when the vacancies are notified and applications are invited. This process was started in the year 2006. According to Rule 9 of the Rules, a candidate must not have attained age of more than 35 years. Since the petitioner's date of birth is 2.8.1965 and after adding 5 years being O.B.C. candidate in 35 years, it becomes 40 years. After adding the said age limit i.e. 40 years to the date of birth of the petitioner, the petitioner had attained the age of 40 years on 1.8.2005, therefore, it is clear that the petitioner is over age by 4 months and 29 days.

6. In view of the above, it is clear that candidature of the petitioner has rightly been rejected. The petition is devoid of merit and is hereby dismissed. No order as to costs.

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WEST BENGAL PUBLIC SERVICE COMMISSION

IN THE WEST BENGAL ADMINISTRATIVE TRIBUNAL
BIKASH BHAVAN, SALT LAKE,
KOLKATA – 700 091
Case No.CCP-105/99
D.D. 1.12.2003

Rampada Maity ... Applicant
Vs.
N.Krishnamurti & Ors. ... Respondents

Contempt Proceeding:

Whether administrative instructions have overriding effect on the Recruitment Rules? -No

The applicant Sri. Pampada Maity, being overaged for the post of Librarian in Government College by 8 months he was not called for interview – Applicant claimed relaxation of age upto 37 years as per Finance Department Memo - The Tribunal as per order dated 17.5.1999 directed respondents 2 and 3 to allow the applicant for interview provided he is otherwise eligible – The Commission holding that the existing upper age limit holds good unless the same is modified by the Government held the applicant ineligible on the ground of overage – In this contempt case filed by the applicant the Tribunal upholding the contention of the Commission that Finance Department Memo produced by the applicant has no overriding effect on the Recruitment Rules dismissed the contempt case.

Held:

It is well settled principle of law that nothing can be imported in the Recruitment Rules except by way of amendment under Article 309 of the Constitution. The P.S.C. cannot unilaterally change the Recruitment Rules unless it is amended by the State Government. The rules made under Article 309 of the Constitution have a statutory force and can be amended by a rule or notification duly made under Article 309.

Cases referred:

1. 1989 (2) SLR 202/page 210 - P.R.Krishnaiah Vs. UOI
2. (2001) 7 SCC 530 - Chhoturam vs. Urvashi Gulati.

ORDER

This CCP arose out of O.A.-3419 of 1999. An order was passed by Shri N.K.Batabyal and Sri. K.M.Mandal on 16.09.1999, Hon'ble Chairman and Member (A) respectively, directing the respondents that any appointment which will be made in pursuance of the interview, will be subject to the result of this case. On 21.12.1999, Ld. Advocate for the alleged Contemnor Respondent, Sri. A.Mitra submitted that show cause is required and he would make his submission on the basis of material on record. Next date was fixed on 08.03.2000. The matter could not be heard thereafter, though several dates went by. It got assigned to First Bench by Hon'ble Chairman on 03.04.2001.

Supplementary affidavit was filed by the applicant on 03.04.2001 and the next date was fixed on 05.07.2001. On that date, Ld. Counsel for the contempt Respondent, P.S.C. and learned Counsel for the contempt petitioner were heard. They were given liberty to file written notes of arguments by 28.09.2001.

In the written notes of argument filed on behalf of alleged contemnor Respondent, it is submitted by the Ld. Advocate that the P.S.C. published an advertisement bearing No.5/98 (E) dated 30.04.1998 inviting applications for the post of a Librarian for Government College. Prescribed essential qualifications as per Recruitment Rules are:- (i) good academic record with high 2nd class or 55% marks in Master/s degree in Library Science or equivalent plus 2nd class Master's degree in a subject other than Library Science from a recognised university; (ii) Knowledge of Indian language other than English and mother tongue. (iii) experience for the post of Librarian in any recognised institution. The age was relaxable beyond 35 years as on 01.01.1998 for well qualified and experienced candidates, as also for persons holding substantive appointment in the Education Department in West Bengal Government. In response to the aforesaid advertisement, Sri.Ramapada Maity applied for the post and on scrutiny, it was found that he was overaged by 8 months and he did not fulfill any of the conditions for relaxation of upper age limit. As such, he was not called for the interview.

The applicant has alleged that he is entitled to relaxation of age upto 37 years as per Finance Department Memo No.3900 F dated 19.5.1998. This Tribunal by an order dated 17.05.1999 in O.A.3419/99 directed respondent nos.2 and 3 to allow the applicant to appear before the interview board on 19.05.1999 or any other adjourned date, for recruitment to the post of Librarian, Govt. Colleges, provided the applicant is otherwise eligible. On receipt of the direction, the Commission again considered the applicant's case and decided that the existing upper age limit would continue to hold good for the purpose of recruitment as per the given advertisement, unless the upper age limit is modified by the State Government. As such, the applicant became otherwise ineligible on the ground of overage. The decision of the P.S.C., in compliance of the order dt. 17.05.1999 of the Tribunal, was duly communicated to the Ld. Advocate of the applicant vide order dt. 30.6.1999 (Annexure-B). The applicant was not satisfied with the decision of the P.S.C. inasmuch as the contemnor Respondents have not challenged the order of the Tribunal in any higher forum. The Tribunal had taken into account the notification/ memorandum of the State Govt. with regard to the raising of the age limit before passing the order to allow the applicant to appear at the interview if he is otherwise eligible. The benefit of raising of age limit upto 37 years as per notification of May 1998 was implicitly available to the applicant in terms of the order passed by the Tribunal.

In response to the clarification sought by us from the P.S.C. as to whether Finance Department Memo No.3900 F dt. 9.5.1998 should have overriding effect on the Recruitment Rules, Ld. Advocate for the P.S.C. submits that the Recruitment Rules are made under proviso to Article 309 of the Constitution. The substantive part of Article 309 indicates that it is for the appropriate legislature to enact laws for regulating the service conditions of Govt. servants. The proviso, however, confers power on the Governor to make rules for regulating such service conditions until provision in that behalf is made under an Act. A direction or notification is issued in exercise of the executive power of the State and if it is contrary to any statutory provision, is without jurisdiction and is a nullity. The Respondents reply on the judgement reported in AIR 1991 SC 1933 in this connection. Moreover, the power conferred by the proviso to Article 309 is of legislative character and it is to be distinguished from a rule making power. Because of their superior juristic character, such rules cannot be altered by administrative instructions. Case of P.R.Krishnaiah Vs. UOI reported in 1989 (2) SLR 202/page 210 is cited in support. It is thus clear that rules made under Article 309 of the Constitution have a statutory force and can be amended only by a rule or notification duly made under Article 309.

It is well settled principle of law that nothing can be imported in the Recruitment Rules except by way of amendment under Article 309 of the Constitution of India. The P.S.C. cannot unilaterally change the Recruitment Rules unless it is amended by the State Government. It is for this reason that the Commission could not consider Finance Department Memo No.3900 F dt. 19.5.1998. There is thus no willful defiance or contumacy to comply with the order of the Tribunal on the part of the P.S.C. In our view, the Commission acted with utmost obedience in complying with the order and judgment of the Tribunal dt. 17.5.1999. We find that the applicant has failed to prove the allegations either in accordance with legal principles or with facts. The order of the Tribunal dt. 17.5.1999 was not a mandate but a direction for consideration only. The P.S.C. having considered the applicant's case, the question of any act or contempt does not arise, vide judgement reported in (2001) 7 SCC 530 Chhoturam vs. Urvashi Gulati.

Thus the contempt case fails on merit and is hereby dismissed.

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NOTE:

The above Tribunal order has been upheld by the High Court as per order dated: 29.3.2007 in W.P.S.T. No.134 of 2004.

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
W.P.S.T. No.134 of 2004
D.D. 29.3.2007
Hon'ble Pranab Kumar Chattopadhyay, J & Hon'ble Arunabha Basu, J.

Rampada Maity ... Petitioner
Vs.
State of West Bengal & Ors. ... Respondents

ORDER

This application has been filed by the petitioner challenging the judgment and order dated 1st December, 2003 passed by the West Bengal State Administrative Tribunal in C.C.P. No.105 of 1999. By the aforesaid impugned judgment and order dated 1st December, 2003, the learned Tribunal dismissed the contempt case filed by the said petitioner.

From the records it appears that the learned Tribunal passed an order on 17th May, 1999 in O.A.No.3419 of 1999 directing the respondent Public Service Commission and its Secretary to allow the petitioner herein to appear before the interview board on 19th May, 1999 or any other adjourned date for recruitment to the post of Librarian, Govt. Colleges along with the candidates whose names have been forwarded by the Employment Exchange.

The relevant portion of the aforesaid impugned order dated 17th May, 1999 passed by the learned Tribunal is set out hereunder:

> "The respondent No.2, 3 is directed to allow the petitioner (2) to appear before the interview board on 19.5.99 or any other adjourned date for recruitment to the post of Librarian, Govt. Colleges along with the candidates whose names have been forwarded by the Employment Exchange provided the petitioner(s) is/are otherwise eligible.
>
> The respondent No.2 & 3 is/are directed to act upon the communication of the Ld. Advocate for the petitioner who will annex a copy of the petition along with the annexures for the convenience of the respondents."

By the aforesaid order the respondent Public Service Commission and its Secretary were directed to act on the basis of the communication of the learned Advocate.

It has been alleged that in spite of communication of the aforesaid order passed by the learned Tribunal on 17th May, 1999 to the Chairman and the Secretary of the Public Service Commission, the

petitioner herein was not allowed by the aforesaid respondents to appear before the interview board. The petitioner thereafter filed a contempt application before the learned Tribunal which was numbered as C.C.P. No.105 of 1999 and was disposed of by the impugned judgment and order dated 1st December, 2003.

It was submitted before the learned Tribunal on behalf of the alleged contemnors at the time of hearing of the contempt application that the petitioner was not allowed to appear before the interview board since the said petitioner crossed the maximum age limit and, therefore, was not otherwise eligible to appear at the said interview. The learned Advocate for the alleged contemnors submits that under the relevant recruitment rules, maximum age of a candidate should not be more than 35 years on the 1st January of the year of advertisement and since the petitioner herein crossed the aforesaid maximum age limit it was not possible on the part of the alleged contemnors to allow the said petitioner to appear at the interview in compliance with the order dated 17th May, 1999 passed by the learned Tribunal.

It is true, in terms of the Recruitment Rules as notified on 7th March, 1989, maximum age limit was prescribed as 35 years on the 1st January of the year of advertisement but the Government of West Bengal subsequently issued another Notification on 19th May, 1998 modifying the provisions of the West Bengal Services (Raising of Age Limit) Rules, 1981 whereby the upper age limit was relaxed.

The said Memorandum of 19th May, 1998 is quoted hereunder:

"

Government of West Bengal
Finance Department
Audit Branch

Calcutta, the 19th May, 1998.

MEMORANDUM

In partial modification of the provisions of the West Bengal Services (Raising of Age Limit) Rules, 1981, published with Finance Department Notification no.10317-F dated 31.12.81, has subsequently amended, the Governor is pleased to order that the upper age limit for direct recruitments to posts/ services as fixed at 30 and 35 years under the rules shall be raised to 32 and 37 years respectively.

This will take immediate effect.

Necessary amendments to the West Bengal Services (Raising of Age Limit) Rules, 1981 will be made in due course.

Sd/- D.Mukhopadhyay,
Special Secretary to the Government
of West Bengal,
Finance Department."

The aforesaid Notification was duly communicated to the Chairman and Secretary of the Public Service Commission on behalf of the petitioner. Surprisingly, the Chairman and Secretary of the Public Service Commission took a peculiar stand in the matter and came to a decision that the earlier Recruitment Rules since framed under Article 309 of the Constitution of India, subsequent modification of the West Bengal Services (Raising of Age Limit) Rules, 1981 pursuant to the Memorandum dated 19th May, 1998 issued by the Govt. of West Bengal cannot be given effect to.

It is not in dispute that by the aforesaid Memorandum dated 19th May, 1998, the West Bengal Services (Raising of Age Limit) Rules, 1981 was specifically amended by relaxing the upper age limit and it has also been mentioned in the said Memorandum that the aforesaid modification would take immediate effect. Unfortunately, the Chairman and Secretary of the Public Service Commission refused to take note of the aforesaid changed circumstances pursuant to the modification of the provisions of the West Bengal Services (Raising of Age Limit) Rules, 1981 as mentioned in the Memorandum dated 19th May, 1998.

The learned Advocate of the Public Service Commission submits before this Court that since the concerned provision of the Recruitment Rules as mentioned in the Notification dated 7th March, 1989 was not modified by the concerned department upon taking note of the aforesaid Memorandum dated 19th May, 1998, no benefit could be granted to the petitioner by relaxing the upper age limit. The learned Advocate of the respondents further submits that the respondent Public Service Commission authorities are not entitled to relax the upper age limit on the basis of the aforesaid modification of the provisions of the West Bengal Services (Raising of Age Limit) Rules, 1981, as mentioned in the Memorandum dated 19th May, 1998 ignoring the relevant provisions of the Recruitment Rules. The Public Service Commission authorities were very much aware of the order passed earlier by the learned Tribunal on 17th May, 1999 whereby the learned Tribunal not only directed the concerned respondent to allow the petitioner to appear before the interview board on 19th May, 1999, but also directed to act on the basis of the communication of the learned Advocate of the petitioner.

The learned Advocate of the petitioner not only communicated the aforesaid order but also communicated the copy of the petition wherein the aforesaid Memorandum dated 19th May, 1998 containing the modification of the provisions of the West Bengal Services (Rising of Age Limit) Rules, 1981 relaxing the upper age limit was annexed and, therefore, the Public Service Commission authorities

should not have altogether ignored the aforesaid Memorandum dated 19th May, 1998 by refusing to relax the upper age limit of the petitioner. The Public Service Commission authorities either should have approached the Tribunal for necessary clarification on account of issuance of the aforesaid Memorandum dated 19th May, 1998 or at least could ask the concerned department to send the proper instruction in view of the subsequent modification of the provisions of the West Bengal Services (Raising of Age Limit) Rules, 1981 relaxing the upper age limit due to the issuance of Memorandum dated 19th May, 1998.

Unfortunately, the Chairman and the Secretary of the Public Service Commission failed and neglected to take appropriate decision in the matter as a result whereof the petitioner suffered serious prejudice. However, considering the entire aspects of the matter we are constrained to hold that in view of the wrong understanding about the implications of the Memorandum dated 19th May, 1998, the said alleged contemnors refused to allow the petitioner to appear at the interview in spite of specific order passed earlier by the learned Tribunal. Since the alleged contemnors were confused by the Recruitment Rules as notified on 7th March, 1989, we are of the opinion that the said alleged contemnors could not realize the implications of the modification of the provisions of the West Bengal Services (Raising of Age Limit) Rules, 1981 as mentioned in the Memorandum dated 19th May, 1998, while proceeding in terms of the order dated 17th May, 1999 passed by the learned Tribunal. In the aforesaid circumstances, we hold that the alleged contemnors did not willfully and deliberately refuse to comply with the earlier directions of the learned Tribunal as mentioned in the order dated 17th May, 1999 and in our opinion, the learned Tribunal in the impugned judgment and order has rightly held that there was no willful defiance on the part of the alleged contemnors to comply with the earlier order dated 17th May, 1999 passed by the learned Tribunal.

For the aforementioned reasons, we approve the decision of the learned Tribunal and affirm the order dated 1st December, 2003 passed in C.C.P. No.105 of 1999.

In the aforesaid circumstances, this application fails being devoid of any merit and the same is, therefore, dismissed.

There will, however, be no order as to cost.

Let urgent xerox certified copy of this order, if applied for, be given to the parties as early as possible.

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IN THE HIGH COURT AT CALCUTTA
CIVIL APPEALLATE JURISDICTION
M.A.T. No.1291 of 2005
F.M.A. 301 of 2006
D.D. 27.9.2006
The Hon'ble Justice P.K. Samanta & The Hon'ble Justice Prasenjit Mandal

Nabendu Mondal & Ors. ... Appellants
Vs.
The State of West Bengal & Ors. ... Respondents

Reservation: Whether an Act providing reservation for SCs & STs can be altered by a notification? - No.

As against 141 posts of Judicial Officer after holding Examination 137 candidates were selected and appointed – 4 posts reserved under ST category left unfilled for want of eligible candidates under the said category – Five writ petitioners belonging to ST/OBC categories challenged the recruitment on grounds among others that proper reservation had not been made as per notification – High Court examining the relevant rules and orders upheld 10% of posts reserved under ST category but held that in view of notification dated 6.11.97 amending the percentage of reservation for OBCs by increasing the same from 5% to 7% held that candidates belonging to OBCs are entitled to two more posts and consequently, directed selection of Appellant No.5 appearing at Sl.No.12 in the merit list and one Anil Kr. Kushwaha appearing at Sl.No.10 after dereserving two posts reserved under ST category which remained unfilled for want of suitable candidates under the said category.

Held:

Although the State Government by issuing notification dated 22.3.1999 made amendment by enhancing percentage of reservation of post for SC candidates from 10% to 25% in view of West Bengal SCs & STs (reservation of vacancies in services and posts) Act 1976, providing reservation of 10% for SCs and 5% for STs which provision cannot be altered by a notification.

ORDER

Prabir Kumar Samanta, J.:-

This appeal involves an interesting issue as to the appointment in the post of judicial officer in West Bengal Civil Service (Judicial).

Five writ petitioners belonging to Scheduled Caste and other backward classes appeared in the West Bengal Civil Service Judicial Examination held by the Public Service Commission, West Bengal for the purpose of recruitment in the post of Judicial Officer in West Bengal Judicial Services. Out of the 5 petitioners 3 belong to the Scheduled Castes and the other two belong to other backward classes.

The Public Service Commission, West Bengal, by an Advertisement No.15/2003 dated 29th November, 2003 invited applications for recruitment to the West Bengal Civil Service Judicial for

filling up of the vacancies notified therein. In the said advertisement vacancies were notified for 141 Judicial Officers, which was the vacancy position for the year of 2003, of which 103 posts were reserved for General categories, 13 posts for Scheduled Caste candidates, 18 posts for Scheduled Tribe candidates and 7 posts for other backward classes.

It is not in dispute that pursuant to such advertisement the examination was duly held and on the basis of the examination conducted by the PSC in all 137 candidates have already been appointed. Four posts of Judicial Officers are still lying vacant.

In the writ petition it has been alleged by the writ petitioners that each of them had qualified in the written test and were accordingly called to appear in the personality test. But they were not ultimately selected for recruitment on the ground that they failed to obtain the requisite marks only in their personality test. Accordingly it has been alleged by them that for the purpose of recruitment to the posts of Judicial Officer importance should be given to the marks obtained in the written test and no one should be refused selection for not obtaining requisite marks in the personality test, in as much as there is every possibility for allotting of marks in the personality test tainted with bias or other extraneous consideration.

Interestingly at the same time it has been averred by the petitioners, who themselves belong to the Scheduled Caste and backward classes that for Judicial Service posts should not have been reserved for Scheduled Caste, and other backward classes in accordance with the West Bengal Scheduled Caste and Scheduled Tribe (Reservation of vacancies in services and posts) Act 1976 as it requires high standard of specialized knowledge in the field of law and any relaxation in the matter of quality for the purpose of selection is bound to impair the administration of justice in the lower Judicial Service. Such averment may have been made under an impression that they had been placed in order of merit along with the general class candidates on the basis of the written examination. But such plea was totally abandoned before the writ court. On the other hand the petitioners pressed their writ petition solely on the ground that they should have been selected in such reserved categories of Scheduled Caste and other backward classes as because proper reservation had not been made by such advertisement as per the latest Notification issued in respect thereof by the State Government.

The petitioner, however, all along contended that they obtained high marks in the written test and as such they were asked to appear in the personality test but were not selected only on the ground that they failed to obtain the requisite marks in the said personality test.

Having regard to the basic thrust of the writ petition whereby the petitioners have sought for relief by the Court in exercise of its extra-ordinary writ jurisdiction for the purpose of their selection in the posts of Judicial Officers on the basis of their comparative merits, I ignore the statements made in the writ petition against such reservation for the candidates belonging to the Scheduled Caste and other backward classes. That I do more so, because the Rule of pleading does not strictly apply in a writ petition. The Court in exercise of its extra-ordinary writ jurisdiction is not bound by mere technicalities of pleadings. It must render justice on the principles of constitutional rights, legal rights, equity and justice and for that purpose it may mould reliefs. It is also worthwhile to note that before the Writ Court, the petitioners in all seriousness had raised grievance that proper reservation had not been made for the purpose of recruitment in the post of Judicial Officers for the Scheduled Castes and other backward classes candidates by the State Government and/or the West Bengal Public Service Commission by issuing such advertisement.

The trial Judge dismissed the aforesaid writ petition only because the petitioners raised such grievances at a stage when the entire selection process was complete and the successful candidates had already been given appointment.

Before delving into the merits of the writ petition I must say that out of the five writ petitioners three are belonging to the Scheduled Caste and their case cannot be considered on the basis of the contention put forward by them that while the Government of West Bengal by its latest Notification had enhanced the reservation for the Scheduled Caste candidates to the extent of 25% of the posts, the Public Service Commission by the aforesaid advertisement reserved only 10% of the vacancies for the Scheduled Caste candidates. So far as the reservation for Scheduled caste candidates is concerned, I am unable to accept such contention of the writ petitioners. Although the State Government by issuing Notification dated 22nd March, 1999 made amendment by enhancing percentage of reservation of posts for Scheduled Caste candidates, but such amendment is not applicable in respect of the West Bengal Civil Service Judicial. Because 3rd proviso to Clause (a) of sub-section (1) of Section 4 of the West Bengal Scheduled Castes and Scheduled Tribes (reservation of vacancies in Services and Posts) Act 1976 clearly stipulates that in respect of the West Bengal Civil Service Judicial, the percentage shall be 10 for Scheduled Castes and 5 for Scheduled Tribes. By a Notification issued by the State Government statutory provision made by way of legislation cannot be altered. Therefore, this writ petition on behalf of the three petitioners belonging to the Scheduled Castes candidates must fail and I accordingly dismiss the appeal on behalf of them.

In this case none of the petitioners belong to the Scheduled Tribes nor any question has been raised in respect of reservation made for Scheduled Tribe candidates by the said advertisement.

But I find substance in the contention of the writ petitioners so far as it relates to the reservation for other backward classes. The State Government by issuing Notification as far back as on 6th November, 1997 had amended the percentage of reservation for other backward classes in services and posts under the Government of West Begnal by increasing the same from 5% to 7%. The advertisement was made by reserving 5% of posts for other backward classes in West Bengal Judicial Service. In this regard it may be noted that the aforesaid West Bengal Commission for Backward Classes Act 1993 (Act of 1 of 1993) has not made any provision like that of the West Bengal Scheduled Castes and Scheduled Tribes (reservation of vacancies in services and posts) Act 1976 by fixing a certain percentage of posts for other backward class candidates in the West Bengal Judicial Service.

In the absence of any such statutory provision and more particularly in view of the provisions of Clause (c) of Section 2 of the West Bengal Act 1 of 1993 whereby the State Government has been authorized to increase the percentage for reservation of posts from time to time by publishing notification in the Official Gazette, I am of the view that for the purpose of recruitment in the posts of judicial officers there was no impediment to reserve 7% of the posts instead of 5% as made for other backward classes. The said Notification dated 6th November, 1997 was very much applicable in the matter of recruitment for services and posts in the West Bengal Judicial Service. But the said advertisement was not made for recruitment in the posts of West Bengal Judicial Service by suitably reserving 7% of the posts for other backward classes.

Although such an advertisement was made by the Public Service Commission on the basis of the instruction given by the Government of West Bengal but that would not in any way make the reservation made therein for the other backward classes sustainable in law.

Proceeding on the basis of the said notification I am of the view that 7% of the posts ought to have been reserved for other backward classes while recruiting judicial officers in the West Bengal Judicial Service. It has also been admitted in course of hearing that proceeding on such basis nine posts instead of seven posts out of 141 posts of judicial officers notified by the said advertisement were required to be reserved for other backward classes.

In a similar situation arising in respect of physically handicapped candidates for which no reservation had been made by the said advertisement for the posts in West Bengal Judicial Service, the Division Bench of this Court has disposed of the appeal, taken out against the order of dismissal of the writ petition filed by the two physically handicapped candidates, by directing appointment in favour of the two physically handicapped candidates included in the select list as 6 posts out of the advertised posts remained vacant till date as because the posts reserved for the Scheduled Tribes had not been filled up. It was so done for the interest of justice instead of setting aside the whole selection process whereupon 135 candidates have already appointed and who have taken charge of their respective posts and in the meantime services have been rendered by them for more than one year.

The learned advocate appearing both for the State Government and the Public Service Commission have taken a fair stand in this case. They have stated that if two more candidates in order of merit from the Select List are appointed then justice would be rendered, instead of appointing the two of the writ petitioners belonging to the other backward classes.

We, therefore, called for the records of the Public Service Commission and have carefully gone through the Select List prepared by it. WE find therefrom that a general standard list of 200 candidates including 5 OBC and 5 SC candidates qualified by general standard was published. Thereafter a relaxed standard list-1 of 45 candidates qualified by relaxed standard for the Scheduled Castes, Scheduled Tribes and other backward classes was also published. Out of the 45 candidates 24 candidates belong to the categories of Scheduled Caste. Rests belong to other Backward Classes.

One Shri Sandip Karmakar belonging to the backward class featuring at serial no.9 in the order of merit in the aforesaid relaxed standard list-1 as above has already been appointed as the last candidate in the category of other backward classes. In the said relaxed standard list-1 the name of Nita Sarkar, the appellant no.5herein appears at serial no.12. But before her one other candidate, namely, Anil Kr. Kushwaha appears at serial no.10. The other backward class candidate in this appeal namely the appellant no.3 herein, namely, Malay Kr. Das appears at serial no.34 in order of merit in the aforesaid relaxed standard list no.1 and before him there are several other candidates in order of merit. Had the 7% of the vacant posts been reserved for other backward classes by following the said notification, then two more candidates in order of merit from the said relaxed standard list-1 would have been appointed. In that case the other appellant namely Moloy Kumar Das would not have been appointed. I am therefore of the view that the other appellant, Moloy Kumar Das, could not be appointed by

ignoring the candidates placed before him in order of merit in the said relaxed standard list-1, only because he has approached this Court and others have not. If for the reasons above, I am to direct appointment for two more candidates, I will do so by selecting two more candidates in order of merit from the said relaxed standard list-1 irrespective of their approaching to this Court for such appointments. As such said Malay Das shall not be entitled to be appointed. As per the decision of the Full Commission taken at its meetings held on 30th May, 1997 and 24th October, 1997, the backward class candidates are required to obtain 30% in total both for the written examination and personality test in order to figure in the merit list. Both the aforesaid candidates as stated above have obtained total aggregate mark of 523 and 521 respectively, which are much more than 38%.

I am, therefore, of the view that, since two more other backward class candidates are entitled to be appointed, such appointment should be made from the backward class candidates appearing in order of merit in the aforesaid relaxed standard list no.1 just after the last backward class candidate appointed in the post. As stated earlier Smt. Nita Sarkar, the Appellant No.5 herein, appears at serial no.12 in order of merit in the aforesaid relaxed standard list no.1 should get an appointment. The other backward class candidate, namely, Anil Kr. Kushwaha appearing at serial no.10 in the aforesaid relaxed standard list no.1 is also entitled to get an appointment even though he is not a party to the writ petition. Because such appointment must necessarily be made strictly in order of merit and not because someone has approached this Court seeking an appointment in the post but not qualified to be appointed in order of merit.

I, therefore, hold that two more candidates in order of merit from the Select List, namely, Anil Kr. Kushwaha at serial No.10 and the appellant no.5, namely, Nita Sarkar at serial no.12 are entitled to be appointed. This I hold for the purpose of maintaining high standard of efficiency required in the judicial service and without putting much importance to the fact that one of them has not joined in this writ petition. Because if proper reservation had been made for the OBC candidates at the first instance, the candidates at serial nos.10 and 12 would have been appointed by this time. Accordingly I direct that these two candidates be offered with the appointment immediately.

It is recorded herewith that till date 137 candidates have been appointed so far including the two candidates appointed as physically handicapped candidates pursuant to the judgment and order of this Court as above out of 141 vacancies notified for the post. Four posts are still lying vacant. Such vacancies are, perhaps for the reasons that the posts reserved for the Scheduled Tribes could not be filled up, as no candidate belonging to the Scheduled Tribe was suitable and/or available for appointment.

I, therefore, also direct that if necessary, the respondents concerned for the purpose of giving appointment to the aforesaid two candidates from the aforesaid list belonging to other backward classes shall de-reserve the posts reserved for the Scheduled Tribe candidates and shall carry forward such reservation for the subsequent recruitment.

I set aside the judgment of the learned Single Judge and allow this appeal with the direction as already made hereinabove, so far as the appeal by appellant no.5 only who is a candidate belonging to the other backward classes is concerned. This appeal by the other appellants herein shall stand dismissed.

I also make it clear that if for any reason said Anil Kumar Kushwaha is not willing to accept the appointment at this stage then the respondents would make an offer to the next candidate in order of merit from the aforesaid relaxed standard list no.1. I, conclude by saying that the respondents shall act in accordance with the directions as above forthwith without making any delay whatsoever in this regard.

A copy of this judgment be immediately forwarded by the Department to the Public Service Commission, West Bengal and a copy of this judgment be immediately placed before the Registrar General, High Court.

Urgent xerox certified copies of this judgment, if applied for, be supplied to the parties as expeditiously as possible

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FOREWORD

It is really a matter of pride and privilege for me to be at the helm of affairs of the Karnataka Public Service Commission while bringing out the III Volume of Compilation of Judgments pertaining to Public Service Commissions. The feeling is one of achieving a hat-trick after bringing out Volumes I & II of Compilation of Judgments. Realising the usefulness and utility of Volumes I & II of Compilation of Judgments, the 11th National Conference of Chairpersons of State Public Service Commissions held on 8th and 9th of January 2009 at Thiruvananthapuram, passed a resolution and entrusted the task of bringing out Volume-III of Compilation of Judgments having a bearing on the role and functioning of the Public Service Commissions to the Karnataka Public Service Commission. I sincerely thank them for reposing faith in Karnataka Public Service Commission.

As in the case of earlier two volumes extreme care has been taken to include in this Compilation judgments covering a wide range of issues of facts as well as law that confront the Public Service Commissions in their role and functioning as Selecting Authorities.

The judgments are arranged in chronological order first pertaining to Union Public Service Commission and then State Public Service Commissions in alphabetical order as indicated in the Index. To facilitate easy and quick reference, Public Service Commission-wise Index and Subject-wise Index are given. Full texts of judgments reported in Law Journals which have all India circulation are not printed but only citation with gist of each judgment is given as in Volumes-I & II of Compilation.

The 11th National Conference of Chairpersons of State Public Service Commissions held on 8th and 9th January 2009 at Thiruvananthapuram, had passed a resolution to constitute a Legal Committee consisting of Chairpersons of 8 State Public Service Commissions as Members to find out the reasons for increase in the number of court cases and to suggest ways and means to reduce the court cases. I am glad to mention that this Legal Committee has submitted its Report which is included under Journal Section of this III Volume of Compilation.

I thank the Chairman of the 11th National Conference of State Public Service Commissions Prof. D.P.Agrawal and my brother/sister Chairpersons of various Public service Commissions for having entrusted the responsibility of bringing out Volume-III of Compilation also. I also thank Union Public Service Commission and various State Public Service Commissions who have assisted the Karnataka Public Service Commission in bringing out this Compilation by sending copies of judgments relating to the functioning of Public Service Commissions.

I thank Prof. D.P.Agrawal, Chairman of Union Public Service Commission and Chairman of 12th National Conference of State Public Service Commission for having graciously agreed and released this book on the occasion of the 12th National Conference held on 20th and 21st February 2010 at the Union Public Service Commission premises, New Delhi.

(GONAL BHIMAPPA)
Chairman,
Karnataka Public Service Commission
Bangalore.

JOURNAL SECTION

REPORT OF THE LEGAL COMMITTEE OF THE NATIONAL CONFERENCE OF CHAIRPERSONS OF STATE PUBLIC SERVICE COMMISSIONS

REPORT OF THE LEGAL COMMITTEE OF THE NATIONAL CONFERENCE OF CHAIRPERSONS OF STATE PUBLIC SERVICE COMMISSIONS

PREAMBLE

India is a Sovereign, Socialist, Secular, Democratic Republic and the Constitution of India aims to secure amongst other things, justice, social, economic and political. A Democratic system of Government could be successful only if the civil servants who carry on the administrative function independently instead of blindly carrying out the orders of their political masters. For the recruitment of such civil servants, the Constitution has provided for creation of autonomous Public Service Commissions for the Union and the States consisting of honest men of high integrity and qualification, so that, it could carry on its functions fairly, independently and impartially. For that purpose the Constitution has given necessary protection to a Chairman or a Member of a Public Service Commission. A Chairman or a Member of a Public Service Commission could be removed from the office only in the manner provided in Article 317(1) of the Constitution, that is, by the "President on the ground of misbehaviour after the Supreme Court, on a reference made to it by the President, has, on enquiry held in accordance with the procedure prescribed in that behalf under Article 145, reported that the Chairman or such a Member, as the case may be, ought to such ground to be removed". In view of the above, the Chairman and Members of a Public Service Commission are required to function independently, impartially, fairly and with considerable responsibility while discharging the functions conferred by the Constitution and a selection made by the Commission could be set aside by courts only when it is established that the selection was made in breach of the rules or it was actuated by extraneous considerations or bias, malice or the like.

The functions of the Public Service Commissions are stated in Articles 320 and 321 of the Constitution. Relevant portions thereof are-

*"320. **Function of Public Service Commissions.**- (1) It shall be the duty of the Union and the State Public Service Commission to conduct examinations for appointment to the services of the Union and the services of the State respectively.*

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(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted, -

(a)on all matters relating to methods of recruitment to civil services and for civil posts;

(b)on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

(c)on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in civil capacity, including memorials or petitions relating to such matters;

(d)on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an India State, in civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;

(e)on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an India State, in a civil capacity, and any question as to the amount of any such award, and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor of the State, may refer to them:

Provided that the President as respects the all India services and also as respects other services and posts in connection with the affairs of the Union and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

(4) Nothing in Clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of Article 16 may be made or as respects the manner in which effect may be given to the provisions of Article 335.

xxx xxx xxx "

"321. ***Power to extend functions of Public Service Commissions.-*** *An Act made by Parliament or, as the case may be, the Legislature of a State may provide for the exercise of additional functions by the Union Public Service Commission or the State Public Service Commission as respects the services of the Union or the State and also as respects the services of any local authority or other body corporate constituted by law or of any public institution."*

Even though the word 'shall' is used in Article 320 the functions stated therein are directory and not mandatory in view of the decision of the Supreme Court in State of U.P. vs. Manbodhan Lal Srivastava (AIR 1957 SC 912) wherein it is observed thus.-

"(11) An examination of the terms of Art. 320 shows that the word "shall" appears in almost every paragraph and every clause or sub-clauses of that article. If it were held that the provisions of Art. 320(3)(c) are mandatory in terms, the other clause or sub-clauses of that article, will have to be equally held to be mandatory.

If they are so held, any appointments made to the public services of the Union or a State, without observing strictly, the terms of these sub-clauses in cl. (3) of Art. 320, would adversely affect the person so appointed to a public service, without any fault on his part and without his having any say in the matter.

This result could not have been contemplated by the makers of the Constitution. Hence, the use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding would be invalid.

On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid. In that connection, the following quotation from Crawford on 'Statutory Construction' – Art. 261 at p. 516, is pertinent:

"The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other....."

The Public Service Commissions are to make selection of candidates for a service or post under the State in accordance with the rules framed under Article 309 of the Constitution or orders, notifications etc., made by the Government in exercise of its executive powers under Article 162 of the Constitution or Article 16(4) etc. Validity of such rules or order etc., is normally questioned only when recruitments are not made in accordance with those rules etc., by persons aggrieved by the selections made by the Commission. Sometimes even if selection of candidates is made in accordance with the relevant rules or orders by the Commission the selection made is challenged on the ground the rules or Government orders governing recruitment are invalid in law. In view of high demand for Government jobs most of the selections made by the Commissions are challenged in courts by aggrieved persons sometimes on relevant or mostly on irrelevant grounds.

The statistics obtained from all the States indicate that there are 17,730 cases pending in different courts of various Public Service Commissions as on 5.9.2009. Of these, Kerala has the maximum number of 5,057 followed by Rajasthan with 2404 cases and Uttar Pradesh with 2376 cases. Small states like Sikkim, Meghalaya, Nagaland and Mizoram have 1, 2, 5 and 7 cases respectively. The

highest number of cases in Kerala may be attributed to the highest percentage of literacy in that State as well as all recruitments to Government posts are made only through Public Service Commission.

Public Service Commissions deliberated and introspected on how to be more transparent and reduce the number of litigations so that the image of the Public Service Commissions is better projected among the public in a National Conference of Chairpersons of Public Service Commissions held on 8th & 9th January, 2009 at Thiruvananthapuram (Kerala). One of the outcomes of this National Conference was the constitution of a Legal Committee of the Public Service Commissions, entrusted with the responsibility of, (1) finding out the reasons for the increase in the number of Court Cases and (2) to suggest ways and means to reduce the Court litigations.

The Legal Committee consisted of the following members: -

1. Sri Gonal Bhimappa	...	Chairman, Karnataka P.S.C.
2. Sri Surjit Kishore Das	...	Chairman, Uttarkhand P.S.C.
3. Thiru AM..Kasivishwanathan	...	Chairman, Tamil Nadu P.S.C
4. Dr.Geeta Basumatary	...	Chairperson, Assam P.S.C
5. Sri. Bharat Bhushan Batra	...	Chairman, Haryana P.S.C
6. Dr.K.V.Salahuddin	...	Chairman, Kerala P.S.C.

According to the directions given by the National Conference, the Legal Committee set itself on the task. The Committee had its first meeting at Nainital, Uttarkhand on 30th May, 2009. It held its second meeting on 25th July, 2009 at Chennai.

The third meeting was at Bangalore on 3rd October 2009 and the last meeting of theLegal Committee was held at Guwuahati,Assam on 5-12-2009 to consider the suggestions made by the Hon'ble Chairpersons and other invitees at the earlier meetings and the statistical figures supplied by different Public Service Commissions.

INTRODUCTION

In the process of implementing the reservation policy of the respective State Governments, there has been confusion because of the change in the policy and issue government notifications from time to time. The formats in which the certificates to be furnished by the candidates have also been undergoing changes from time to time as per notifications of the government. As a result, there are a good number

of cases challenging the application of reservation policy in selecting the candidates by the Public Service Commission. To minimize such litigations, there has to be better coordination between the Public Service Commission and the Government. Public Service Commissions before issuing notifications must check with the Government about the latest policy and accordingly issue notifications/ advertisements. In the advertisement, it shall be clearly mentioned that the reservation shall be provided in accordance with the law existing on the date of the notification.

The other reason for the litigation is incomplete applications or improperly filled up applications. When these applications are rejected, the aggrieved candidates approach the courts of law. It is observed that the courts are not maintaining consistency in their verdict while dismissing the cases or admitting the cases. In such a situation, the Public Service Commission must clearly mention in their advertisements/notifications that incomplete applications or improperly filled in applications or applications not supported by necessary documents will be summarily rejected. In spite of it, if there is litigation, the dispute will have to be taken up to the Apex court and get the law settled. In this process, the Public Service Commission will have to have the freedom of engaging their own Senior Counsel.

The Chairman, Tamil Nadu Public Service Commission, has listed the cases where candidates have approached the Courts on different grounds. Some of these grounds are flimsy and frivolous.

The following are the general grounds on which the action of the Commissions is challenged:

1. Rejection of unsigned application
2. Rejection of late applications
3. Rejection for non-payment of examination fees
4. Rejection for failure to enclose necessary documents, supporting the application. e.g. educational qualification, birth, caste certificates etc.
5. Determining communal status of candidates
6. Wrong questions in the question paper
7. Wrong key answers published by the Commission
8. Pattern of the question papers
9. Questions from outside the syllabus

10. Marking in the answer script disclosing candidates identity
11. Retotalling of marks
12. Revaluation of answer scripts
13. Award of marks for written examination
14. Award of marks for oral test
15. Withholding of results pending production of Reservation/Caste Certificates
16. Challenging the recruitment rules framed by the respective departments
17. Rules regarding reservation in appointments
18. Apportioning of the vacancies for direct appointment and promotions
19. Reducing the vacancies already notified.
20. Operation of the reserve lists drawn for the recruitment

In addition to this, Karnataka Public Service Commission has different grounds on which action is challenged. They are -

1. Equivalence of qualification
2. Experience - whether acquired after basic qualification or gained earlier can be considered
3. Rejecting horizontal reservation claimed by candidates
4. Qualification prescribed for the post in Technical Education Department is Degree/Diploma in Civil Engineering.
5. Withdrawing the posts after issuing recruitment notification
6. Government Order is issued giving clarification about equivalence of qualification after the publication of the recruitment notification pertaining to recruitment to the post of Head Master.

It is likely that similar situations are existing in other State Public Service Commissions also.

The Chairman, Karnataka Public Service Commission, keeping in view the trend of case before the Court, circulated a discussion paper on the subject which inter-alia classified categories of court cases in broad divisions, as enumerated below in the Legal Committee meeting held on 30.5.2009 at

Nainital. This enabled the Committee to focus on these broad categories as reasons/grounds for challenging the action of Public Service Commissions.

The five broad categories, approved by other Chairpersons are:

1. Questioning the validity of the Government Rules, Orders, notifications, etc., relating to recruitment of Civil Servants.

2. Questioning the validity of the notification inviting applications or orders made or action taken by the Commission during the course of selection process.

3. Questioning the correctness of action taken by the Chairman and Members in awarding marks or preparing the select lists.

4. Staff of the Commission challenging the orders relating to their service conditions, and

5. Challenging some action relating to appointment, seniority and the like taken by the Government in relation to persons selected by the Commission subsequent to the selection by the Commission where the Commission is made a formal party.

PROBLEMS FACED BY THE PUBLIC SERVICE COMMISSIONS

In spite of the best efforts made by the Public Service Commission to maintain its integrity, unsuccessful candidates do find faults with its functioning. So the objective of the Public Service Commissions shall be to see how best they could visualize the possible ways the candidates might interpret the rules, notifications, orders and decisions of the Public Service Commission and make these things simple, specific and objective. This will certainly help in reducing the number of litigations. Considering the huge task and responsibility of the Public Service Commissions in its functioning a few litigations are inevitable. In fact they are healthy also. However, the number of cases in different courts is very high which seems to point towards certain flaws in some areas of administration. Strict compliance with the procedure would itself vastly reduce the litigation in many areas. So the main task before all the State Commissions is, to reduce, if not, eliminate, litigation.

The two main grounds for focusing the attention of all Public Service Commissions are, in the first instance, how litigation can be reduced and the second, what additional steps are required to be undertaken by the Commission in order to maintain the reputation. The cost factor for both Commission and the petitioner candidates has to be reduced. The Commissions could think of conducting general orientation programmes or awareness programmes for candidates before they apply for any post. In this electronic era, the same may be conducted through Tele conference.

ANALYSIS OF THE CASES PENDING BEFORE THE COURTS

Sl. No	Name of P.S.C	Cate-gory-l	Cate-gory-2	Cate-gory-3	Cate-gory-4	Cate-gory-5	Total
1.	Andhra Pradesh	---	1029	Nil	02	30	1061
2.	Arunachal Pradesh	01	05	Nil	Nil	09	15
3.	Assam	15	10	01	---	285	311
4.	Bihar	613		---	34	194	841
5.	Chattisgarh	20	84	02	02	36	144
6.	Goa	--	02	---	---	31	33
7.	Gujarath	15	82	36	15	172	320
8.	Harayana	42	30	93	01	29	195
9.	Himachal Pradesh	55	84	44	10	76	269
10.	Karnataka	174	480	05	08	63	730
11.	Kerala	2448	1191	287	58	402	4386
12.	Madhya Pradesh	206	120	63	04	367	760
13.	Maharashtra	328	791	00	00	342	1461
14.	Manipur	00	02	08	00	01	11
15.	Meghalaya	00	00	01	00	01	02
16.	Mizoram	02	00	00	00	05	07
17.	Nagaland	00	05	00	00	00	05
18.	Orissa	253	330	00	07	814	1404
19.	Punjab	25	32	205	18	85	365
20.	Rajasthan	23	71	00	08	25	127
21.	Sikkim	00	01	00	00	00	01
22.	Tamil Nadu	197	510	00	19	175	901
23.	Tripura	03	03	00	00	15	21
24.	Uttarkhand	41	56	00	03	07	107
25.	Uttar Pradesh	337	722	434	196	687	2376
26.	West Bengal	03	07	58	03	00	71
	Total	4,801	5,647	1,237	388	3,851	15,924

Cases pending in different Administrative Tribunals, High Courts and Supreme Court

Category	No.of cases	Percentage
Category-1	4,801	30.15
Category-2	5,647	35.46
Category-3	1,237	7.77
Category-4	388	2.44
Category-5	3,851	24.18
Total	15,924	100.00

If we take pre-examination or application filing stage i.e. by combining Category- 1 and 2, the total works out to 65.61% (30.15 + 35.46).

It is possible to reduce litigation under the first two categories, if the Government of the State and respective Public Service Commissions take due care while issuing the Government Orders, Rules, Notifications and Advertisements. If the cause for litigation is found from the judgments of the Courts, concerted effort can be made to drastically reduce litigation under these categories.

It is felt that based on some of these cases - nature and requisition/relief demanded be taken up as guidelines on which steps could be initiated to eliminate, the ambiguity in the clauses or offending clauses/provisions.

Sample case study of cases under Category-I in Karnataka Public Service Commission:

(questioning the validity of Government Rules, Orders, Notifications, etc. relating to recruitment of civil servants)

The cases are further classified depending on nature of cases as under:

		No. of cases
a) Reservation	..	39
b) Age Relaxation	..	32
c) Rules /Notifications/Orders	..	84
d) Challenging Lower Court Orders	..	09
e) Miscellaneous cases	..	10

a) Reservation: This class contains cases relating to -

1) Women's reservation
2) Reservation for physically handicapped in each of the reserved categories
3) Excess reservation under SC/ST categories
4) Quashing the provision pertaining to reservation for rural and Kannada medium candidates
5) To announce the list of candidates eligible to the main examination by excluding 30% women reservation.
6) Not to have more than 50% reservation - vertical as well as horizontal as per Supreme Court decision - (Anil Kumar Vs State of U.P) (1995) (5) S.C.C 173)
7) Demanding 10% reservation for Ex -Servicemen
8) To declare reservation in favour of Ex-Servicemen as unconstitutional

b) Age relaxation:

1) To grant age relaxation for not conducting examinations every year
2) Relaxation for Central Govt. employees
3) Relaxation of age limit for Ex-MP
4) Relaxation for in service candidates considering the period of Govt. service rendered in different Govt. departments.
5) Relaxing the age for applicants to the posts of Lecturer in History and Education.
6) Age relaxation for rural candidates
7) Quashing of weightage

c) Rules/Orders/Notifications -

1) Quashing the Notification as the qualifications prescribed are not in consonance with C & R Rules.

   For the recruitment to 35 posts of Motor Vehicles Inspector initiated pursuant to notification dated 3.1.1997, the qualification prescribed by the Central Government as per notification dated 12.6.1989 namely, Diploma in Automobile Engineering or Diploma in Mechanical Engineering among others was prescribed. The same was challenged on the ground that the qualification prescribed was not in conformity with C&R Rules, namely, Karnataka General Services (Motor Vehicles Branch) (Recruitment) (Amendment) Rules, 1987 which prescribed only Diploma in Automobile Engineering and not Diploma in Mechanical Engineering.
2) Anthropology is not equivalent to Sociology
3) Prescribing cut off date for acquiring M.Phil to make one-self eligible for Post
4) To direct the Respondents to comply with UGC Regulations of passing of NET Examination.

5) Not to insist on 55% in the qualifying examination relating to recruitment to the post of lecturer

6) To restrict selection and appointment to the post based on certificate issued by Govt. Library Training School.

7) To direct K.P.S.C. to revalue all the answer scripts of Main Examination and to conduct personality test by full Commission in G.P. Recruitment.

8) Re-do the select list keeping 5 % of the total marks assigned for written test for personality test as per the 58th Amendment Rules, 2001 - Cadre and Recruitment Rules.

Under Gazetted Probationers Rules personality test carries 200 marks. In K.C.S. (General Recruitment) (58th Amendment) Rules, 2001 maximum marks for personality test should not exceed 5% of the total marks prescribed for the written test i.e., maximum of 90 marks since the maximum marks prescribed for written test is 1800. G.P. Rules being self-contained rules shall have the effect notwithstanding anything contrary contained in K.C.S. (General Recruitment) Rules.

9) Non-conduct of examination by Public Service Commission as per the syllabus prescribed.

10) Without proper amendment to the Cadre and Recruitment Rules, exempting Ph.D, M.Phil candidate from taking NET or S.L.E.T. examination is illegal.

11) Declaring as ultra vires the Constitution the Karnataka PWD Services Competitive Examination Rules, 2007 pertaining to recruitment of Assistant Executive Engineer.

12) To declare that the applicant is qualified for personality test and to interview him

13) Prescribing minimum marks in Kannada and English paper qualifying for personality test as ultra vires.

14) Selection list published is contrary to Karnataka Civil Services (Recruitment to the post of Stenographers and Typists) Rules, 1983, and be declared as void and quashed.

The applicant an unsuccessful candidate has challenged the select list on the ground that the procedure adopted by the Commission in short-listing candidates in the ratio of 1:2 for verification of documents is not contemplated under the Rules and that there is variation between cutoff marks under GM category prepared for the purpose of short-listing in the ratio of 1:2 and cutoff marks under GM category for preparing the select list.

15) To quash the Govt. Order No. ED 74 DCE 2006 dated: 23.11.2006 and not to proceed with selection process.

By an Executive Order No.ED 74 DCE 2006 dated 23.11.2006 candidates possessing M.Phil or Ph.D. degree have been exempted from passing NET/SLET which is one of the qualifications prescribed for the post of lecturer in Govt. I Grade Colleges.

16) Non inclusion of subject MSW (Master of Social Work) as eligibility for a post is bad in law

17) To consider M.A, Ph.D in Criminology and Forensic Science as equivalent to Military Science and to appoint him

18) To set aside the notification reducing the posts of Motor Vehicles Inspector from 245 to 145.

19) Amendment to the Rules of Technical Education Department as unconstitutional.

20) To direct Respondents to redo selection by keeping 50% posts of lecturer in Biology in P.U. Colleges for candidates with M.Sc. in Zoology

d) Challenging the lower court orders:

1) Requesting the High Court to quash the order passed by K.A.T.

In the recruitment to the post of High School Head Master KAT as per common order dated 5.2.2009 in A.No.5789/2008 and connected cases has upheld the action of the Commission in rejecting the applications of candidates possessing Hindi Shikshak/Hindi Snathak/Hindi B.Ed., holding that in the absence of a notification under Rule 2(1)(h) of General Recruitment Rules declaring the same as equivalent to B.Ed. prescribed for the post of High School Head Master, equivalence declared in case of some other posts cannot be made applicable to the post of Head Master.

2) Stay the order of High Court of Karnataka - appeal to Supreme Court.

Rural weightage provided under Rule 3B of K.C.S. (General Recruitment) Rules, 1977, was quashed as unconstitutional in W.P.No.13157/98 as per order dated 11.11.98 but saved the selection and appointment made with the aid of rural weightage till the date of the order i.e., 11.11.1998. This was challenged in Writ Appeal No.5807/98 which was dismissed as per order dated 26.11.1999. The said order has been challenged before Supreme Court in this S.L.P.

3) Seeking Special Leave to appeal to the Supreme Court.

The petitioner was a candidate for 136 posts of lecturers in different subjects in Govt. Colleges carried out by the Commission pursuant to notification dated 11.3.1980. Classification of vacancies was done by Govt. faculty-wise for the entire cadre of lecturers as a single unit and not subject-wise without considering the roster for individual subjects as per Government notification in force. The petitioner claiming that if classification of vacancies was done subjectwise she would have become eligible for selection against 8 vacancies in Kannada subject and filed an application before KAT. KAT as per order dated 28.5.1987 disposed of the application to the effect that the parties shall be governed by the orders of the Supreme Court in Gayathri's case (SLP 12774/84) wherein it was held that vacancies should be classified subject-wise. Petitioner approached KAT for contempt in Contempt Petition No.446/95 and the same was dismissed. The petitioner approached High Court in W.P.No.8440/07 which was dismissed considering the fact that the petitioner was already aged 53 years and already working as lecturer in Junior College and promoted as Principal. Against that order the petitioner has filed this SLP.

e) Miscellaneous grounds:-

1) Quashing of selection lists

2) Applicant's qualification not considered

3) Transfer of recruitment process of Municipalities to K.P.S.C. is unconstitutional.

4) To permit the applicant to participate in the selection process

5) To consider the post-graduate degree

In the recruitment to the post of lecturer in Political Science in P.U. Colleges applicant possessing M.A. in Public Administration has sought for a direction to consider for selection to the post of lecturer in Political science. Similarly, a candidate possessing post graduate degree in Life Science has sought for a direction to consider it as cognate subject to Biology.

Sample case study of cases under Category-2

(Questioning the validity of the notification inviting applications and action taken by the Commission during the course of selection process)

These cases under this category are further classified under 12 groups:

a)	Reservation	: 34
b)	Age relaxation	: 08
c)	Rules/Orders/Notifications	: 80
d)	Challenging lower court orders	: 20
e)	Revaluation / Re-totalling of marks	: 32
f)	Incomplete applications, no marks card, caste certificate, application not in the prescribed format	: 24
g)	Re-allotment of department, orders/ preference	: 43
h)	Challenging the provisional/ final select list	: 39
i)	Wrong key answers/out of syllabus questions	: 33
j)	Miscellaneous	: 158

a) Reservation:-

1) Reservation for physically handicapped

2) To consider rural reservation

3) To select petitioner under 2A rural quota

4) Considering the rural certificate, the petitioner be considered for the post of Health Inspector under 3-B rural quota

5) To prepare fresh list after excluding rural weightage

6) Demanding 3A reservation

7) Consider the applicant for the post of Asst. Executive Engineer under 2B category

8) Consider the applicant for the post of Asst. Executive Engineer under 2A category

9) Consider the applicant for the post of Asst. Executive Engineer under 3A category

10) Reservation of posts beyond 50% is unconstitutional

b) Age relaxation:-

1) Relaxation of age on the basis of service

In the recruitment to the post of Asst. Executive Engineer the applicant who is over aged under the Recruitment Rules has sought for age relaxation as in--service candidate under K.C.S. (General Recruitment) Rules contending that he has 17 years teaching experience as lecturer in V.I.S.S.J. Polytechnic which has since been taken over by the State of Karnataka.

2) Relaxation of upper age limit, as he was selected under Group-B, but was denied due to subsequent moderation process

c) Rules/Orders/Notifications:-

1) To quash the order cancelling the applicant's candidature and directing him not to apply thereafter for any competitive examinations conducted by Karnataka Public Service Commission.

Applicant's candidature for G.P. 2005 Recruitment was cancelled for examination misconduct - for highlighting the answers contrary to instructions after holding inquiry which he has challenged in this case.

2) Strike down rule 3 of Karnataka Recruitment of Gazetted Probationers (Appointment by Competitive Examination) Rules, 1997 and to select the petitioner on the basis of merit.

3) Questioning the order of K.P.S.C. cancelling the application on the ground of non possession of required educational qualification.

Applicant's application for the post of Veterinary Inspector has been rejected as he possesses

J.O.C. in Dairy and Poultry Science as against the qualification namely, PUC with Biology as one the subjects prescribed for the post.

4) Directing the Commission not fill up the posts

In the recruitment to the posts of Gram Panchayat Secretary Grade- I & II petitioner working as Bill Collector has sought for promotion as Secretary and for a direction not to fill the posts through direct recruitment.

5) Regarding working out the formula for equating grade awarded by Agricultural Universities with percentage of marks awarded by other Universities and to select lecturer in Home Science as per this formula

6) Directing the Commission to conduct personality test for recruiting Asst. Executive Engineer

7) Quash the endorsement dt. 16.09.2008 and to appoint the applicant for the post.

In this recruitment for the post of Junior Engineer (Civil) in the Department of Water Resources the applicant who has claimed reservation under 3A/Rural category has not produced rural certificate in the prescribed form. Hence considered under 3A category, his marks being less than the cutoff marks for interview under 3A category not called for interview. Endorsement issued accordingly.

8) To direct the Commission to consider the applicant for the post of lecturer in Kannada

The applicant being P.U. College lecturer coming within creamy layer concept his claim under 2B category has been cancelled and considered under GM category and his marks being less than the cutoff marks for interview under GM category not interviewed.

9) To allow the applicant to participate in the interview process for the post of Library Assistant

In this case pertaining to recruitment to the post of Library Assistant in the Department of Library the applicant's application has been rejected as he does not possess one year's experience as prescribed under the Rules and an endorsement has been given giving the reason for rejection of his candidature. The Apprenticeship Certificate produced by the applicant for having undergone training as Technician, Vocational Apprentice for one year in the Karnataka Government Secretariat Library has not been accepted as experience prescribed under the Rules.

d) Challenging the order of lower Court:-

1) To stay the order of High Court and to pass suitable orders in favour of petitioner.

[Already referred to under para-c) Rules/Orders/Notifications 3) Seeking Special Leave to appeal to the Supreme Court]

All remaining cases seeking quashing of orders of KAT.

e) Revaluation of answer scripts:

1) Most of the cases pertain to seeking revaluation of answer scripts

2) Wrong translation of questions in Kannada version

3) Getting the answer script valued by third valuer

4) Directing K.P.S.C. to allot 90 marks for viva-voce test, in accordance with Govt. Notification of 2.3.2002

5) To direct the Commission to revalue petitioner's answer script and to allow him to peruse the script.

f) Incomplete marks card, non-inclusion of other certificates etc.

1) Not producing caste certificate

2) To consider rural resident category for the post of Tahsildar

3) Claim of rural reservation cancelled for not submitting in Form-1

4) Cancelling applicant's candidature for producing only driving license without badge to drive.

Applicant a candidate for the post of Motor Vehicles Inspector had no badge to drive heavy passenger vehicle (HPV) as on the last date fixed for receipt of applications and hence held ineligible.

5) Non production of original SSLC marks card at the time of verification resulting in cancellation - challenged

6) Consider the application for Political Science Lecturer under category 2A

The applicant candidate for the post of lecturer in Govt. I Grade Colleges claiming reservation under 2A category, has not produced 2A reservation certificate in the prescribed form. Hence claim of 2A category cancelled and he being overaged under GM category his application has been rejected.

7) Consider the application for Chemistry Lecturer under Category 3B rural

Out of 17 posts of lecturer in Chemistry in Govt. I Grade Colleges only one post has been reserved under 3B/Rural category. The applicant under 3B/Rural/KMS category has not produced rural reservation certificate in the prescribed form and he has also not produced certificate to show that he has studied in Kannada medium from 1st std. to 3rd std., and hence he has been treated under GM/ Others category. As he has secured 60.40% in M.Sc. Chemistry as against cutoff marks of 73.17 under GM/Others category not called for interview.

8) Reserve a post for the applicant under Category 2 B for Kannada Lecturer alleging that 3rd respondent who has secured less marks has been selected under 2B/Rural in excess of rural quota contrary to the decision in Rajesh Kumar Daria (2007) 8 SCC 785 and Government Circular dated 1.9.2008.

g) Reallotment of department/preference:

1) Transfer of petitioner from Judicial Department to Town Planning Department

2) Not to return the petitioner from the post of First Division Assistant in Commercial Tax Department.

3) Not to disturb the applicant by transferring to different departments

4) To retain the services of the applicant till transferred

5) Candidate not allotted to the department of her preference

6) Re-allotment or redoing the selection on the basis of merit/preference

7) Challenging the allotment made by K.P.S.C. to new department – Directorate of Employment and Training

8) Challenging non selection of the applicant for failure to indicate his preference for ear-marked posts/services

In this recruitment for the post of Assistant/FDA in various Government Departments carried out pursuant to notification dated 5.12.2007 the applicant who has claimed reservation under Cat-I/ Rural/KMS by virtue of merit has been selected under GM/W and allotted to the Dept. of Public Instructions. The grievance of the applicant is that ignoring reservation and preference claimed by her she has been allotted to the Dept. of Public Instructions and candidates with lesser merit have been allotted to K.G.S./Excise Dept. to which the applicant has indicated her preference.

h) Challenging the provisional/final select list:

1) To set aside the provisional select list as 6 persons who secured less marks than the applicant have been included.

In Gazetted Probationers 1998 Recruitment as the applicant has not indicated her preference as per rules and instructions contained in the application for the posts of Assistant Chief Auditor, District Marketing Officer, Chief Officer, Asst. Director of Youth Service, Employment Officer, she has not been considered for selection against those posts though eligible for selection and respondents 4 to 9 who have secured less marks than her have been selected against the said posts. The applicant has challenged their selection.

2) Non selection in provisional list

3) To quash the selection of respondents 4 to 6

[Same as in (h)(1). The applicant has not been selected as he has not indicated his preference for the posts against which respondents 4 to 6 have been selected.]

4) To set aside the final select list by quashing the selection of respondents 4 and 10.

5) To set aside the final list to the extent of 11 respondents named therein.

6) To quash the list as some selected candidates have obtained degree certificates from unrecognized University and select the applicant for History Lecturer post.

i) Wrong key answers/out of syllabus questions:

1) Wrong model answers provided

2) Erratic setting of question papers and key answers

3) To provide grace marks for 20 out of syllabus questions

4) Declare ultra vires the release of revised key answers

5) To direct reconduct of Gazetted Probatiohers examination by cancelling the earlier examination, as illegal and violative - September 2008

6) To eliminate the candidates who got selected by virtue of incorrect answer and grace marks given.

j) Regarding Physical standard and efficiency test:

1) To redo the physical efficiency test in recruitment to the post of Sub Inspector of Excise

2) Not qualified in physical standard and efficiency test

Applicant a candidate for recruitment to the post of Sub Inspector of Excise carried by the Commission pursuant to notification dated 31.7.2002. To be eligible for selection to the post of Sub Inspector of Excise a candidate is required to fulfill the physical standard prescribed and also physical efficiency test. Out of 5 events prescribed for physical efficiency test the candidate has qualified in only 2 events and failed to qualify in the remaining 3 events - to be eligible for selection candidate must qualify in 3 events out of 5 events.

k) Miscellaneous matters:

1) For not considering him as rural candidate

2) To award grace marks for mistake in Kannada version question paper

3) To be exonerated from malpractice case

4) Challenging the action of PSC in declaring that he has no required experience

5) Claiming exemption from written examination on the ground that they are working now in the Department – Library Supervisor

6) Regularization of the services

7) To consider the applicants against vacancies now available with Higher Education Department - Part time Lecturers

8) To publish the marks secured at the physical test of all candidates

9) Not to equate M.A in Social Work with M.A Sociology for the post

10) To set aside selection of 4th Respondent as Assistant Commissioner and to allot the post to the applicant retrospectively.

The applicant who has been selected and appointed as Dy.S.P. under Cat--2A in Gazetted Probationers 1999 Recruitment has challenged the selection and appointment of 4th respondent as Assistant Commission under-2A contending that the 4th respondent actually belongs to 3B category and he being next in the order of merit is entitled to be selected as Assistant Commission under 2A category.

11) Challenging the award of grace marks to respondents 3 & 4 and placing them above the applicant, as no such benefit was given to the selection in 2003

12) To declare the result of the applicant

In this case (A.No.1055/2008) pertaining to recruitment to the post of Assistant Engineer in the Department of Water Resources the application of the applicant was rejected as he had not enclosed marks card of Supplementary Examination in Computer Concepts and 'C' Programming. However, in view of his representation he was permitted to appear for compulsory Kannada Examination subject to the decision of the Commission as per hall ticket and his examination result was withheld. Therefore, the applicant has approached KAT for declaring his result.

13) To allow the applicant to appear for the interview - January 2008

14) Direct the PSC that the applicant is fully qualified for personality test so he be called for personality test

15) Applicant being more meritorious than respondents .3, 4, 5 he is entitled for selection

16) To initiate contempt proceedings against respondents for disobedience to the order dated 25.2.2008 in A.No.5134/2007

17) Declare that the disqualification of candidature for the post of Junior Engineer (Civil) and denial of interview is illegal and improper

In this recruitment to the post of Junior Engineer (Civil) in the Dept. of Water Resources the applicant working as S.D.A in Taluk Office, Pandavapura, has not forwarded his application through the Appointing Authority as required under Rule-11 of K.C.S. (General Recruitment) Rules and contrary to the instructions contained in the recruitment notification and information booklet. Hence he has been disqualified.

18) To declare that the applicant is eligible to be appointed to the post of Motor Vehicles Inspector and to appoint him immediately.

19) To select the applicant for the post of Lecturer in Kannada in Govt. First Grade College under 2B/Rural/KMS category.

RESULT OF ANALYSIS:

All the above and many more such cases suggest that either there are lacunae found by the courts in the system which is in operation or that the grounds on which the candidates have approached the courts are frivolous and vexatious.

To plug such cases, the Commissions have to work out modalities to be followed in the process of recruitment. Conducting examinations and recommending the candidates for recruitment to Civil Services, is a paramount constitutional duty. This has to be discharged sincerely, methodically and without doing any injustice to any candidate. Utmost care has to be taken before the process is launched.

SUGGESTIONS:

The Legal Committee has identified the following as the main reasons for increase in Court cases:

a) Defect/ambiguity in recruitment rules

b) Defect in recruitment notifications

c) Incomplete applications

d) Wrong questions

e) Wrong key answers

f) Disparity in valuation

g) Preparation of select list as per reservation policy

Keeping in mind the problems identified in the earlier paragraphs, the following suggestions are submitted for consideration of the National Conference of the Chairpersons of Public Service Commissions.

The problems can be grouped as under:

Group - A

Stage of issuing notification/order/rules of the Government for recruitment.

Group - B

Issuing notification inviting applications for the posts to be filled up.

Group - C

Supply of candidate's data i.e. when the form is filled up by the candidates

Group - D

Conduct of examination - written and oral, question paper preparation, key answers, model answers for descriptive questions, evaluation, moderation or scrutiny, not random but 100%, declaration of results, conduct of viva for eligible candidates.

Group - E

Notifying the list of selected candidates as per the reservation policy

Group - F

Service conditions - promotion, seniority, pay fixation etc.

The responsibility to see that all the norms prescribed under the Rules/Regulations/Orders/Notification are complied with is on the staff. Among the staff, the supervisory staff will have to scrutinize the work done by the subordinates meticulously.

Group – A:

As far as matters mentioned in Group A are concerned though the rules, orders or notifications or circulars, governing the recruitment are issued by the Government it will go a long way if the Public Service Commission gets the same verified for removing any error/ambiguity before initiating recruitment.

Considering the high stakes involved for job seekers, the Govt. Orders etc. governing recruitment must be free from defects. For example, Government Order or notification issued, may be exceeding the authority conferred or there may not be any delegation at all or may be contrary to the Constitution or the law laid down by the Supreme Court. Though the Supreme Court, has time and again, declared that any reservation (vertical) beyond 50% of the posts to be filled up, is void, still we find reservations (vertical) beyond 50% of the posts.

Group – B:

Matters covered by Group B cases also deserve the same meticulous attention. Notifications issued by the Public Service Commission must be constitutionally valid and in consonance with relevant Recruitment Rules. Percentage of reservation, categories of persons to be accommodated for, the eligibility requirement etc. are also to be examined.

Before issuing notifications, there has to be proper scrutiny of the notifications and the reservation positions, qualifications, etc., by a committee preferably headed by a person with adequate legal knowledge.

Group – C:

Candidate is expected to fill up the form and provide all details about him/her so as to find out his/her eligibility to write the examination. Along with the application, a check list be sent. The candidate must check as per the questionnaire prepared and sign at the bottom that all the required columns are filled up correctly. At the end of the application a declaration from the candidate to the effect that he/she is aware that incomplete/improperly filled application will be rejected, can be obtained.

Here the responsibility is solely on the stake holder namely candidate applying, to provide all information.

Group – D:

In respect of situations arising under this group, main accountability is on the examination wing of the Commission. The Commission has to get it done with the assistance of different experts - paper setter, evaluator, scrutinizer and the office staff entrusted with this work.

1. Paper setters must not set questions which are out of syllabus
2. Questions must be clear, specific and unambiguous
3. Key answers must be supported by authentic reference/source
4. Model answers must be precise, concise and there should not be any ambiguity
5. Questions set, key answers or model answers provided by the paper setter must be checked by another expert/experts.
6. Questions outside the syllabus must not be asked
7. Valuers must be objective in assessment
8. Scrutinizers must check/verify that the total is correct, no question or part of it is left unassessed and that the valuation is uniform.
9. Examiners must check the total twice, leaving no scope for any correction.
10. There should be double valuation of the scripts.
11. Maximum marks per paper may be reduced, so as to reduce wide variation between the two examiners.
12. In case of multiple choice question answers, before starting evaluation, the provisional key answers shall be notified on the Website inviting objections from the candidates and after a reasonable time given to the candidates, collect all the objections and refer the same to an expert committee including the paper setter for reviewing it and based on the expert committee's decision, evaluation can be done. This provision will have to be incorporated in the Notification itself at the time of issuing the same.

Group – E:

Litigations can arise when the select list is put up. List must be prepared as per the- i) Notification issued and ii) Reservation of posts, leaving no scope for litigation. This has to be verified by a senior official in the Commission.

Group – F:

Last group relates to cases where serving Govt. servants, aggrieved by denial of seniority or promotion, approach the Court. The task in this category is 'advisory'. The advice so given is not binding on the State Government.

Before giving advice on seniority, promotion, pension, Commission should consult legal experts or even expert in service matters. Moreover, the role of Public Service Commission is advisory in nature. Therefore, if impleaded as a party, it is nominal party. Provisions of Civil Procedure Code require that there should be proper joinder of parties. As per C.P.C. Commission is a necessary/proper party. But when no relief is claimed, the Commission becomes a formal party when the advice is not binding on the Government or Governor, technically there is nothing to defend for the Commission. In such cases the Commission need not contest the cases.

RECOMMENDATIONS:-

In the light of the above observations, Public Service Commissions can take following steps to reduce litigation involving Public Service Commission as respondent before Information Commission, Administrative Tribunal, High Court or Supreme Court.

The Legal Committee of Chairmen of Public Service Commissions recommends to National Conference of Chairpersons of State Public Service Commissions as under:

1. Notifications, orders, rules etc. issued by the State Government governing recruitment should be verified and certified by a legal expert.

2. Notifications issued by the Public Service Commission must be checked by a legal expert to see that it is in order and in compliance with the relevant Laws in matters of reservation, qualification, experience, age limit etc.

These notifications are to be issued only after they are approved by the Legal Advisor and the Legal Cell.

3. Scrutiny of applications received in the Commission's office must be done, keeping in view the legal provisions, under which recruitment is being made.

4. In addition to this, to ensure that the candidate sends all relevant information, documents etc., along with his application, a check list be enclosed, to be checked and signed by the applicant-.

5. Application, after signature, must carry a separate paragraph called an undertaking to the effect that ' If my application is incomplete or I have not furnished the information asked for, with supporting documents, I authorize the Commission to reject my application', with his signature

6. If the candidates are required to write an objective type examination, the model questions be got set by an expert in the subject. The key answers be got checked before the examination by another. In case of wrong/ambiguous questions or question having two correct answers be deleted and replaced by another question/questions.

7. In case of descriptive type examination, questions set are to be cross checked by another, model answers should be given by the paper setter, double valuation and scrutiny by a third subject expert be introduced. In case of variation beyond 15% marks between the two, refer it to a third valuer. Average of the nearest two scores be worked out and awarded to the candidate.

8. Scrutiniser for each subject must check the total and that each question, sub- question is valued, this must also ensure uniformity in the two valuations.

9. While preparing the select list, legal cell must ensure that the list is in accordance with the notification issued keeping in mind the several reservations like women, ex-servicemen, physically challenged etc.

10. An active and vibrant legal cell must be established with a retired District Judge having academic bent of mind/or an advocate with at least 10 years standing in the High Court. The Cell should have assistants qualified in Law or Law Officers having at least 3 years practice in the High Court.

11. Commission staff must be given orientation in the concerned fields of Law and Procedure. This knowledge has to be updated every year or once in two years to know the new legislations or trends or amendments and court decision on the subject.

12. Financial power to engage Standing Counsel for High Court, State Administrative Tribunal and Supreme Court.

13. These Counsel may be requested to appear on behalf of Commission by taking notices in the High Court etc. and oppose/contest at the time of admission itself.

14. Senior Counsel may be engaged in important cases whenever desired, to defend the cases in State Administrative Tribunal/High Court/Supreme Court.

15. A compendium of decided cases may be prepared and kept for future guidance. The cases decided by different courts may be indexed subjectwise etc. This will help the office in eliminating the earlier mistakes. This compendium of cases should include cases decided by different High Courts, Administrative Tribunals and Supreme Court.

Karnataka Public Service Commission has already brought out two volumes of compilation of judgments pertaining to Public Service Commissions. Third volume will be brought out shortly. This task may be entrusted to other Public service Commissions by turn.

16. Orientation Programme for staff of the Commission can have the following syllabus. (Details can be worked later)

A. Constitutional Law:

i) Constitutional provisions relating to U.P.S.C, and State Public Service Commissions

ii) Fundamental Rights with special reference to Articles 14, 15, 16, 32, 226, 309 & 311

iii) Reservations and judicial response under Articles 15(4), 16(4) & Art.335

iv) Gender justice under Article 15(3)

v) Diverse jurisdictions of Supreme Court and High Courts under the Constitution

B. Administrative Law

i) Delegated legislation and judicial control of delegated legislation, doctrine of ultra vires.

ii) Principles of natural justice

iii) Constitutional remedies especially -

a) writ of mandamus

b) writ of certiorari

c) writ of prohibition

d) writ of quo warranto

iv) Administrative and judicial control-

v) Decisions of courts relating to recruitment to services or posts under the State.

C. Right to Information Act

Courses may be conducted in places where offices of Public Service Commissions are situated.

Otherwise National Law School of India University, Bangalore, may be approached to offer orientation or training.

17. Whenever a judgment is delivered by High Court or the Supreme Court, for or against Union Public Service Commission or State Public Service Commission involving substantial question as to the interpretation of the Constitution or rules etc., the concerned Public Service Commission should send a copy of the judgment to the other Public Service Commissions so that the Public Service Commissions are aware of the latest judicial response in the field. This is to enable each one to take precautions to act or function in conformity with the judgment so as to avoid repetition of litigation in future and unnecessary waste of economic resources and human efforts.

CONCLUSION:

The Legal Committee expresses its gratitude to all the Hon'ble Members of the Legal Committee and other invitees, for their contribution and suggestions. Views expressed by all, either oral or written are duly acknowledged and included.

The Legal Committee also thanks the State Public Service Commissions for the co-operation and for giving all the necessary statistics and information.

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