

2024:PHHC:097149-DB

LPA-1335-2024 (O&M)
Date of Decision: 31.07.2024

Dr. Vijender Singh

...Appellant

Vs.

Chief Secretary, State of Haryana and another

...Respondents

**CORAM: HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON'BLE MR. JUSTICE SANJAY VASHISTH**

Present Dr. Deepak Jindal, Advocate for the appellant.

Ms. Tanisha Peshawaria, DAG, Haryana.

SANJEEV PRAKASH SHARMA, J.(Oral)

1. The appellant has preferred the instant appeal assailing the order passed by the learned Single Bench dated 03.04.2024, in CWP-1884-2023, whereby the writ petition filed by the appellant was dismissed.
2. Learned counsel submits that the appellant had competed for the post advertised vide advertisement dated 26.02.2021 under the reserved handicapped category, being visually blind. The appellant cleared the preliminary examination and participated in the written examination. However, he only secured 35.25% marks in the main written examination and was, therefore, disqualified to participate in the *viva-voce* in terms of Clause 9(C) Note – 4, appended to the advertisement which requires that no candidate shall be called for viva-voce/personality test unless he/she obtains at least 45% marks in the aggregate of all written papers and a score of



minimum 33% marks each in Hindi (including Hindi essay) in Devnagri script and English (including English essay) papers (compulsory papers).

3. Learned State counsel referred to circular No.22/106/2018-1GSIII issued by the Government of Haryana, General Administration Department, to submit that the Commission ought to have taken recourse to Clause (Q) (i) which provided that if sufficient number of candidates with benchmark disabilities are not available on the basis of general standard to fill up all the vacancies reserved for them, candidates belonging to this category may be selected on relaxed standard to fill up the remaining vacancies reserved for them provided they are not found unfit for such post or posts. However, this provision shall not be used to allow any relaxation in the eligibility criteria laid down for the issuance of certificate of disability.

4. Learned counsel has further invited attention to a subsequent notification issued by the Personnel Department, Government of Haryana, dated 08.02.2024, which reads as under:-

“In exercise of the powers conferred under the proviso to Article 309 of the Constitution of India, the Governor of Haryana hereby makes the following rules further to amend the Haryana Civil Service (Executive Branch) Rules, 2008, namely:-

1. These rules may be called the Haryana civil Service (Executive Branch) Amendment Rules, 2024.

2. In the Haryana civil service (Executive Branch) Rules, 2008, in rule 11, in sub-rule (1), in clause (iii), in sub-clause (ii), after the words and signs ‘a score of minimum thirty-three percent (33%) marks in English and Hindi language (compulsory papers)’ the following words and signs shall be inserted, namely:-



“However, where sufficient number of candidates being persons with benchmark disabilities are not available, the Commission may lower the said limit of 45% marks upto 35% marks.”

5. Learned counsel submits that the provisions which have been enacted vide notification dated 08.02.2024, should be applied retroactively to the concerned selection process which was underway and the appellant ought to be given a chance to participate in the *viva-voce*.

6. We have considered the submissions and found that the learned Single Judge has considered the condition for clearing the written examination for the purpose of participating in the *viva-voce*, as per the advertisement, was that the candidates must secure 45% marks. It was further observed that once criteria has been framed, the same has to be applied uniformly qua all the candidates and no departure can be made singularly for the appellant or for visually handicapped persons. Keeping in view thereto, the writ petition has been dismissed.

7. We find ourselves in concurrence with the reasoning rendered by the learned Single Judge. Additionally, we notice that the appellant did not challenge condition of Clause 9(C) Note-4 of the advertisement and participated in the selection process without demur. He is, therefore, estopped from challenging the said condition having participated in the selection process accepting the conditions of the advertisement.

8. So far as the general guidelines issued by the Government of Haryana are concerned and Clause Q(i) as noticed above, suffice it to observe that the same are only guidelines which are not be enforceable and have to be left open to the appointing authority for consideration while issuing advertisement.



9. We also take note of notification dated 08.02.2024 and observe that the said notification will only have a prospective effect as it specifically does not mention to be applied on pending selections.

10. In **Tajvir Singh Sodhi and others vs The State of Jammu & Kashmir and others** 2023 (5) Scale 379, the Supreme Court considered the entire law relating to challenges made to selection process and held as under:-

13.1. It is therefore trite that candidates, having taken part in the selection process without any demur or protest, cannot challenge the same after having been declared unsuccessful. The candidates cannot approbate and reprobate at the same time. In other words, simply because the result of the selection process is not palatable to a candidate, he cannot allege that the process of interview was unfair or that there was some lacuna in the process. Therefore, we find that the writ petitioners in these cases, could not have questioned before a Court of law, the rationale behind recasting the selection criteria, as they willingly took part in the selection process even after the criteria had been so recast. Their candidature was not withdrawn in light of the amended criteria. A challenge was thrown against the same only after they had been declared unsuccessful in the selection process, at which stage, the challenge ought not to have been entertained in light of the principle of waiver and acquiescence.

13.2. This Court in Sadananda Halo has noted that the only exception to the rule of waiver is the existence of mala fides on the part of the Selection Board. In the present case, we are unable to find any mala fide or arbitrariness in the selection process and therefore the said exception cannot be invoked.

11. In the present case, there is no allegation of *mala fide*, hence, the writ petition would be not maintainable.

12. In a recent judgment of **Sree Sankaracharya University of Sanskrit and others vs Dr. Manu and another** 2023 (9) Scale 21, the Apex



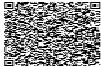
Court was examining whether the direction of two advance increments to Ph.D degree holder could be applied and be given retrospective effect, after having considered the judgments passed by the Apex Court in ***Bihta Cooperative Development Cane Marketing Union Limited vs Bank of Bihar*** AIR 1976 SC 389 and ***Virtual Soft Systems Limited vs Commissioner of Income Tax, Delhi*** (2007) ITR 83, culled out the following principles:-

9.2. From the aforesaid authorities, the following principles could be culled out:

- i) If a statute is curative or merely clarificatory of the previous law, retrospective operation thereof may be permitted.*
- ii) In order for a subsequent order/provision/amendment to be considered as clarificatory of the previous law, the pre-amended law ought to have been vague or ambiguous. It is only when it would be impossible to reasonably interpret a provision unless an amendment is read into it, that the amendment is considered to be a clarification or a declaration of the previous law and therefore applied retrospectively.*
- iii) An explanation/clarification may not expand or alter the scope of the original provision.*
- iv) Merely because a provision is described as a clarification/explanation, the Court is not bound by the said statement in the statute itself, but must proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is a substantive amendment which is intended to change the law and which would apply prospectively.*

13. In ***Dr. Manu and another*** (supra), the Apex Court held as under:-

10.3. Further, merely because the subsequent Government Order has been described as a clarification/explanation or is said to have been issued following a clarification that was sought in that regard, the Court is not bound to accept that the



said order is only clarificatory in nature. On an analysis of the true nature and purport of the subsequent Government Order dated 29th March, 2001, we are of the view that it is not merely clarificatory, but is a substantial amendment which seeks to withdraw the benefit of two advance increments in favour of a certain category of lecturers. The benefit withdrawn was not anticipated under the previously existing scheme. Therefore, such an amendment cannot be given retrospective effect.

14. In view of the above, the order passed by the learned Single Judge does not warrant any interference. The appeal is, accordingly, dismissed.

15. All pending misc. application(s) also stand disposed of.

(SANJEEV PRAKASH SHARMA)
JUDGE

(SANJAY VASHISTH)
JUDGE

31.07.2024
rajesh

- | | | |
|-------------------------------|---|--------|
| 1. Whether speaking/reasoned? | : | Yes/No |
| 2. Whether reportable? | : | Yes/No |