

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 83 OF 2015**

Mr. Ananthu Jayaramulu,
major of age,
son of Venkata Subhah,
presently posted as 'Ward Attendant'
in the Goa Medical College & Hospital,
Bambolim, Ilhas-Goa,
Resident of House No.500-19-5,
Filomena Housing Colony,
St. Cruz, Ilhas-Goa.

... Petitioner

Versus

1. State of Goa,
Through the Chief Secretary
having his office at the Secretariat
Complex, Porvorim, Bardez-Goa.
2. Dean, Goa Medical College
& Hospital, Bambolim,
Ilhas, Goa.
3. Directorate of Transport,
Government of Goa,
1st Floor, Junta House,
Panaji-Goa.
4. Mr. Jagadish N. Gaunce,
presently posted as Driver
(Light Vehicle) in Casualty
Section of Goa Medical College,
Bambolim, Ilhas-Goa.
5. Mr. Sago Dhavo Yamkar,
presently posted as Watchman,
C/o Goa Medical College,
Bambolim, Ilhas-Goa.

... Respondents

Mr. S.D. Lotlikar, Senior Advocate with Ms. M. Furtado, Advocate for the Petitioner.

Ms. Priyanka Kamat, Additional Government Advocate for the Respondent Nos. 1, 2 and 3.

Mr. Devidas Pangam, Advocate for the Respondent No. 4.

**Coram : F.M. REIS &
C.V. BHADANG JJ.**

Reserved on : 1st December, 2015.

Pronounced on : 25th February, 2016.

JUDGMENT: (Per C.V. Bhadang, J.)

By this petition, the petitioner is challenging the promotion of the respondent no. 4-Mr. Jagadish N. Gaunce, as a Driver (Light Vehicle), Goa Medical College, Bambolim, Goa.

2. The petitioner is working as a Ward Attendant with Goa Medical College and Hospital (GMCH), Bambolim, Goa. On 22.08.2014, a regular vacancy for the post of Driver (Light Vehicle) arose, which was to be filled in by promotion from the feeder cadre of Class-IV employees. According to the petitioner, he is the senior most candidate in the feeder category, after one Francisco Fernandes. In order to fill the said post, a circular dated 22.08.2014 came to be issued

calling for applications for the appointment to the said post from eligible candidates. In response thereto, the petitioner and seven others, who had shown willingness were asked to report the Establishment Section on 25.09.2014 alongwith certain documents for the purpose of conducting a driving test.

3. According to the petitioner, the zone of consideration which was in the ratio of 1:5, only permitted five such candidates being called. It is contended that the respondent no. 4, who was 8th in the seniority, could not have been called or considered for the said post. It is thus contended that the competent Authority acted in breach of the guidelines, while fixing the zone of consideration. It is also contended that the relevant guidelines do not permit a viva-voce. It is also contended that the minutes of the meeting of the Departmental Promotion Committee (DPC) would show that the final grading of all the eight candidates was "Good". Thus, the petitioner being senior to the respondent no. 4 ought to have been promoted. It is thus contended that the promotion of the respondent no. 4 is clearly illegal and is in breach of the guidelines.

4. On behalf of the respondent no. 2, the Director of Administration, GMCH has filed an affidavit in reply. It is contended that the petitioner having participated in the selection process cannot now challenge the same having failed to secure the promotion. It is contended that as per the Recruitment Rules, Group-D employees having passed 4th standard examination and possessing valid driving license were eligible. It is contended that the zone of consideration would not be applicable to the present case, as on the basis of educational and driving qualification, there were eight eligible candidates. It is contended that the DPC was required to form its own procedure and criteria being an expert body. It is contended that there were different feeder cadres, namely, all Class-IV employees including attendants, peons, watchman, ward boys, library attendants entitled to be considered for promotion. Thus, no zone of consideration could be fixed.

5. It is contended that the vacancy for the post of Driver (Light Vehicle) arose on account of retirement of one Shri Rama Lotlikar w.e.f. 30.04.2013. It is contended that the office memorandum dated 31.05.2011, was rescinded by the Government by office memorandum dated 27.06.2012. Thus,

the office memorandum dated 31.05.2011 was not in force, when the present vacancy arose. It is thus contended that the petitioner cannot place reliance on the said office memorandum.

6. It is contended that the zone of consideration was twice the number of the vacancies plus four. In the instant case, there was one vacancy. Thus candidates under the zone of consideration would be six. There were eight candidates, who were called for interview, out of which two remained absent. It is contended that during the selection process, marks were given for viva-voce depending upon the knowledge of the candidate pertaining to the driving Rules and Regulations.

7. It is denied that the procedure adopted by the DPC to bifurcate into practical driving skill and practical experience is contrary to the Recruitment Rules. It is contended that the post of the Driver (Light Vehicle) being a selection post, the same can be only done on merits and not on seniority.

8. The respondent no. 4 had filed an affidavit opposing the petition on similar grounds. It is contended that the petitioner having participated in the selection process cannot now challenge the same. It is contended that before filing the writ of mandamus, the petitioner ought to have made a representation to the concerned Authority and the petitioner having failed to do so, is not entitled to seek any relief.

9. It is contended that the duties attached to the post of the Driver (Light Vehicle) are different from the duties performed by Class-IV employees. As such, it is only the eligible candidates having requisite education and professional qualification who could be considered.

10. We have heard, Mr. Lotlikar, the learned Senior Counsel for the petitioner and Ms. Kamat, the learned Additional Government Advocate for the respondent nos. 1, 2 and 3 and Mr. Pangam, the learned Counsel appearing for the respondent no. 4.

11. It is submitted by the learned Sr. Counsel for the

petitioner that the DPC ought to have restricted the consideration to the extent of five candidates as only one post of Driver was available to be filled in. It is contended that as per the applicable guidelines the bench mark fixed was rating of the concerned candidates as "good". It is submitted thus on the basis of the said bench mark the DPC could have classified the candidates as fit or unfit. It is submitted that the criteria was "selection" and once the final rating of all the candidates was "good" the DPC ought to have gone by seniority. It is submitted that admittedly the petitioner being much senior was entitled to be appointed. The learned Senior Counsel also pointed out that the guidelines do not envisage or provide for conducting of viva voce. It is submitted that apart from the conduction of the viva voce being in breach of the applicable guidelines, it also introduces, an element of subjectivity, which has to be avoided. The learned Senior Counsel further submitted that the DPC in the present case applied criteria which were either not permissible as per the guidelines or were not set out in the circular inviting applications. For instance the learned Senior Counsel pointed out that the DPC applied the criteria of the candidate holding a badge, which is neither the requirement in the guidelines nor was part of the circular.

The learned Counsel has placed reliance on the decision of this Court in Writ Petition No.15 of 1998 and others dated 30th September, 1998 in order to submit, that the applicable guidelines do not provide for conduction of a viva-voce.

12. On the contrary it is submitted on behalf of the respondent Nos. 1 to 3 by the learned Additional Government Advocate and the learned Counsel for the respondent No.4 that the petitioner having subjected himself and having taken part in the selection process, has no locus to challenge the same. It is submitted that the petitioner having taken part in the selection process cannot now turn around and is estopped from challenging the same. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in case of **Ramesh Chandra Shah and Ors. Vs. Anil Joshi and others MANU/SC/0317/2013 2013V AD (S.C.)52** and the decision of this Court in **Writ Petition No.59 of 2014 Sidharth S. Prabhu Vs. Village Panchayat of Shiroda and Others dated 10th April, 2014.**

13. It is submitted that this is a case in which the zone of consideration comprised of various cadres of class IV

employees, including, attendants, peons, watchmen, ward boys, library attendants etc. It is thus submitted that it was not possible to fix a zone of consideration as such. The learned Counsel appearing for the respondent no.4 pointed out that the post to which appointment/selection was to be made required a skill which was not otherwise a part of the requirement/ duties attached to the posts in feeder cadre. For instance it is pointed out that driving skill and the consequent professional qualification of holding a driving licence for light motor vehicles was not the requirement in any of the Class IV posts in the feeder cadre. It was in these circumstances that, applications were invited from candidates, having the necessary educational and professional qualification viz: of having passed 4th standard examination and holding a valid driving licence for a light motor vehicles. It is submitted that two out of the eight candidates who had applied / shown willingness had failed to remain present in the subsequent part of the selection process. It is submitted that out of the six candidates the respondent No.4 has rightly been selected / appointed on the basis of merit, he having secured the highest marks as per the assessment of the DPC. It is submitted that thus no exception can be taken to the impugned order and the

petition is liable to be dismissed.

14. We have carefully considered the rival circumstances and submissions made. Indisputably the petitioner was working as an attendant and was appointed on 17th March, 1988. The respondent No.4 was working as a sweeper and his date of appointment is 27th August 2010. The assessment chart produced shows that the other candidates were either working as watchman, library attendant, patient attendant or peon. Be that as it may, it is apparent that the petitioner was appointed in the class IV cadre much before the respondent No.4 came to be appointed as sweeper on 27th August, 2010. Both, the petitioner and the respondent No.4 were having the essential qualification as required by the circular dated 22nd August 2014, which required, educational qualification of having passed 4th standard or equivalent examination and possessing a valid driving licence for a light vehicle.

15. Under the office memorandum dated 31st May 2011 the Government of Goa had adopted the office memorandum dated 8th February, 2002 which pertained to the procedure to

be observed by the Departmental Promotion Committees (DPCs) which specifically provided that there shall be no supersession in the case of selection. The OM dated 8th February, 2002 contains the revised guidelines in this regard. As per the revised guidelines the mode of promotion which is stipulated in guideline No.3.1 envisages that the earlier distinction between "selection by merit" and "selection cum seniority", was dispensed with and the mode of promotion in all such cases was rechristened as "selection" only. It further provided that the element of selectivity shall be determined with reference to the relevant bench mark. In so far as the post of driver, with which we are presently concerned, the bench mark prescribed was "good".

16. Clause 3.2 of the OM further provides that the DPC shall determine the merit of those being assessed for promotion with reference to the prescribed bench mark and accordingly grade the officers as "fit" or "unfit" only. Only those who are graded "fit" (ie., who meet the prescribed bench mark) by the DPC shall be included and arranged in the select panel in "the order of their inter se seniority in the feeder cadre".

17. It is thus clear that as per these guidelines the bench mark for the present post was good and on the basis of the same the candidates could only be rated as 'fit' or 'unfit' and once a candidate had reached the bench mark seniority was to prevail, in as much as there was no supercession which was envisaged.

18. On behalf of the respondents reliance is placed on the office memorandum dated 27th June 2012 by which the earlier OM dated 31st May 2011 stands withdrawn, and consequently, OM dated 14th December, 1995 is restored. Undoubtedly the OM dated 27th June 2012 would show that the OM dated 14th December 1995 stands restored, however, in our considered view the same would be inconsequential for the purpose of the present dispute. It would be necessary to make a brief reference to the OM dated 14th December, 1995 which provides for the guidelines of Departmental Promotion Committees. Clause 5 of the guidelines provides that each departmental committee should decide its own procedure, for objective assessment of the suitability of the candidates. No interview should be held unless it has been specifically

provided for in the recruitment rules for the posts / service. Wherever promotions are to be made by the method of selection by DPC, where the Government decides that an interview should form part of the selection process, necessary provision should be made in the recruitment rules.

19. It can thus be seen that in case of "selection" unless and until the relevant recruitment rules provided for holding of an interview / viva-voce, the same was not permissible.

20. It would now be necessary to refer to Clause 6.3.1, (i) & (iv) which is relevant for the purpose reads thus:

(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 mark grade would be determined for each category of posts for which promotions are to be made by selection method. For all Group 'C', Group 'B' and Group 'A' posts upto (and excluding) the level of Rs.3700-5000 excepting promotions for induction to Group 'A' posts or services from lower groups, 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'.

Wherever promotions are made for induction to Group 'A' posts or services from lower groups, the bench mark would continue to be 'Good'. However, officers graded as 'Outstanding' would rank an block senior to those who are graded as 'Very Good' and officers graded as 'Very Good' would rank on bloc senior to those who are graded as '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.

(ii)

(iii)

(iv) Where sufficient number of officers with the required benchmark grade are not available within the zone of consideration, officers with the required benchmark will be placed on the panel and for the unfilled vacancies, the appointing authority should hold a fresh D.P. C by considering the required number of officers beyond the original zone of consideration".

(v)

21. It can thus be seen that although as per the aforesaid clause the candidate's graded as "very good" were to rank enblock senior to those graded as "good", the same would be inconsequential in the present case, in as much as all the candidates were finally rated as "good".

22. The Government of Goa in exercise of the powers conferred by the proviso to Article 309 of the Constitution has framed Government of Goa, group 'C', nonprocedural, non-gazetted Common Post Recruitment Rules 2005 (Rules of 2005 for short) and as per Rule 3 thereof the method of recruitment to the posts as set out in column 1 of the schedule annexed to the rules, the age limit, qualifications and other matters connected there with shall be as specified in column 5 to 13 of the said schedule. A perusal of the schedule shows that the post of light vehicle driver is mentioned, as one of the posts to which the rules apply and the note in column 1 thereof prescribes that the promotees as well as direct recruitees will have to undergo practical driving tests conducted by DSC / DPC before selection. It further provides that Inspector from the Directorate of Transport will be associated with the DPC as an expert. Column 5 of the said schedule shows that the appointment is by selection. Column 11 thereof shows, one of the modes of appointment as promotion from group 'D' employees of the department with 4th standard pass or equivalent, and possessing driving licence for light vehicles. It can thus be seen that except for holding of a practical driving test, conducted by the DSC / DPC in which an expert from the

Directorate of Transport is to be associated, the relevant rules do not envisage holding of any viva-voce.

23. A perusal of the minutes of the meeting of the DPC show that all the eight candidates had obtained the final grading as "good".

24. The assessment chart shows that the confidential reports for the year 2010-2011, 2011-2012 and 2012-2013 were considered and the final grading in respect of all the candidates is good and they were rated as "fit".

25. It can thus be seen that as per the applicable rules / guidelines once the candidate had reached the bench mark as "good" and was rated as "fit" there was no further scope for selection on the basis of assessment of merit by conducting of viva voce or otherwise. A perusal of the minutes of the DCP (para 3) would further show that as per the recruitment rules, all the eight group D employees were eligible for the post of driver light vehicle, however, amongst them, only two group 'D' employees viz., the respondent Nos. 4 & 5 were found to be possessing a badge, This aspect of the candidate possessing a

badge was neither a requirement of the relevant rules nor was set out as one of the conditions for consideration, selection and/or short listing, in the circular dated 22nd August, 2014. We thus find that the procedure adopted by the DPC was not in consonance with the applicable rules / guidelines and it is vitiated for more reasons than one.

26. We also find that the stand of the respondent Nos.1 to 3 on the applicability of the zone of consideration is not consistent. In para 12 of the affidavit in reply of Tukaram Sawant it is denied that the zone of consideration would be restricted to five persons in the feeder cadre. It is further contended that zone of consideration, would not be applicable to the present case, since there were eight eligible candidates for the said post. However in para 14 it is contended that the zone of consideration, as per the applicable OM, would be twice the number of vacancies plus 4. Assuming that the number of candidates was required to be restricted to six. However we find that eight candidates were called for the interview. The fact that two candidates remained absent and failed to take part in the subsequent stage of the selection process would be in-consequential, in as much as, the respondent nos.1 to 3

cannot be expected to know that two candidates would eventually remain absent. The zone consideration would not be dependent on the candidates remaining absent. This is not a case in which after finding that the two candidates had remained absent next two candidates, in the order of seniority were called to participate in the selection process. It may not be out of place to mention here that the respondent No.4 was the only candidate appointed in the year 2010 out of the eight candidates and all other seven candidates were appointed prior to the appointment of the respondent No.4. Thus the respondent No.4 would be junior, to the rest of the candidates, in so far as the cadre of the Group 'D' employees is concerned.

27. In so far as the argument based on the stoppel viz., the petitioner having participated in the selection process concerned, we find that this is not a case in which there was a public advertisement as such, incorporating certain qualifications/conditions to which the petitioner had consciously subjected himself. As noticed earlier neither the rules nor the circular dated 28th August, 2014, sets out the manner of selection, so as to invite the principle of estoppel as against the petitioner. We further find that the selection

committee had considered the criteria which were neither provided in the recruitment rules nor set out in the circular viz., of the candidate holding a badge. Thus in our considered view, this is not a case in which the petitioner was put to notice about a particular qualification required and/or the conditions of selection, so as to infer that the petitioner has subjected himself to the same.

28. In the case of **Ramesh Chandra Shah (supra)**, there was an advertisement for appointment to the posts of Physiotherapist, where the selection was made in accordance with the general rules. The respondents before the Hon'ble Supreme Court had challenged the recruitment of the appellants on the ground that the recruitment had to be in accordance with the special rules. In the facts of the case it was found by the Hon'ble Supreme Court that the petitioner having participated in the test knowing fully well that the selection was being made in accordance with the general rules and having taken chance to be declared successful cannot turn around and challenge the selection and its outcome. In our humble view the present case would be clearly distinguishable.

29. Even in the case of **Siddhart S. Prabhu (supra)** a Division Bench of this Court, to which one of us (F.M. Reis, J.) was a party, was concerned with a challenge to the appointment of the post of Clerk in Village Panchayat. The petitioner therein was working as a peon with the respondent village Panchayat. The post of Clerk which was the subject matter of dispute was created with the permission of Director of Panchayat and there was nothing in the order granting permission, about the criteria for filling up the said post viz., whether the post was to be filled in by direct recruitment or by promotion. Eventually when the post was advertised, the petitioner submitted his application and thereafter claimed that the direct recruitment was not permissible and he was entitled for being promoted to the said post. It was in these circumstances, held on the basis of the decision in the case of **Ramesh Chandra (supra)**, that the petitioner was estopped from staking a challenge to the recruitment.

30. This takes us to the relief which can be granted in the present petition. We find that although the impugned selection is required to be quashed and set aside the petitioner cannot justifiably be granted relief of appointment to the post

of driver as the entire selection process itself is found to be vitiated. It would, therefore, be necessary for the concerned competent authority to initiate fresh process of selection in accordance with law.

31. Accordingly rule is made absolute in terms of prayer clause (A) with no order as to costs.

32. Needless to mention that it would be open for the respondent No.2 to initiate fresh selection process for the post of the driver (LMV) in accordance with law.

C.V. BHADANG, J.

F.M. REIS, J.

Ev