

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.660 OF 2017

1. Mr. Pankaj Rane,
age 29 years, Occ: Student,
residing at 15/66, Shubham,
2nd Lane, Khadpabandh,
Ponda Goa.
2. Mr. Belwadi Samiullah Nishat,
age 26 years, Occ: Student,
residing at 116, Vaddem Socorro,
Porvorim, Bardez Goa.
3. Mr. Abhijeet Uddhavrao Nikam,
age 31 years, Occ: Student,
residing at 343, Omkar Karanje Peth
Satara, Maharashtra. ... Petitioners

V e r s u s

1. The Goa Public Service Commission,
through its Chairman/Secretary
having office at EDC Building,
Panaji Goa.
2. The State of Goa,
through its Chief Secretary,
having office at Secretariat,
Porvorim Goa. ... Respondents

Mr. D. Pangam and Mr. P. Sawant, Advocates for the Petitioners.

Mr. P. Faldessai, Additional Government Advocate for the Respondents.

***Coram : N.M. Jamdar &
Nutan D. Sardesai, JJ.***

Date : 21 November 2017.

ORAL JUDGMENT (Per N.M. Jamdar, J)

Rule. Rule made returnable forthwith. Respondents waive service. Taken up for final disposal.

2. The Petitioners, who had applied for an appointment to the post of Junior Scale Officer of the Goa Civil Services, are aggrieved by the action of Respondent No.1-Goa Public Service Commission in not recommending their names to Respondent No.2-Government of Goa-the appointing authority.

3. The Government of Goa, in the exercise of powers conferred under Article 309 of the Constitution of India, in consultation with the Goa Public Service Commission, has framed the Goa Civil Service Rules, 2016. The Rule 2 of Rules of 2016 contains the definition of various phrases employed in the Rules. The Commission is defined as the Goa Public Service Commission. The constitution of service is provided for in Rule 3. It is for the five

grades that are: Senior Administrative Grade; Selection Grade; Junior Administrative Grade; Senior Scale, and Junior Scale. Rule 4 provides for the strength of the service. Rule 6 prescribes the manner of filling the cadre and ex-cadre posts. Rule 9 prescribes the conditions of eligibility for direct recruitment. It specifies that, to be eligible the candidate will have to be a citizen of India, at least 21 years old and not more than 40 years old, with the power to relax the age limit with the prescribed authority. The reservation in the service rules for departmental and promotional committees and other relevant terms and conditions are provided for in the Rules of 2016. The Schedule appended to the Rules specify the nature of the posts and the strength. The relevant rules for the present petition are the Rule 10 and 12, which refer to the competitive examination for direct recruitment.

4. On 18 August 2016, Respondent No.2 – State published a notification No.3/1/2012-PER for recruitment to the post of Junior Scale Officers in the Civil Services of the State. An advertisement was issued in December 2016 inviting applications for the post of Junior Scale Officer in the Personal Department. By the advertisement applications were invited for filling 11 posts, out of them, one post was reserved for Scheduled Tribes, four posts were reserved for Other Backward Class and six posts were unreserved. Pursuant to the advertisement, the Petitioners applied

for the unreserved posts. Around 1866 candidates applied pursuant to the advertisement. As per Rule 10, a screening test was held by the Commission to shortlist the candidates. The result of the screening test was declared by the Commission on 6 March 2017. Out of 1866, seven candidates including three Petitioners were shortlisted. The written test was conducted on 10 April 2017 and 11 April 2017. On 28 April 2017, the result of the written test was declared, and out of seven shortlisted candidates, only four candidates were qualified having passed the written examination with minimum 65% marks. These four candidates included the three Petitioners and one Mr. Vivek Krishna Naik.

5. The interviews of all four candidates were held on 24 May 2017. On 24 May 2017, the Commission declared the name of Mr. Vivek Krishna Naik as the only successful candidate for the six unreserved posts. Since the Petitioners, who had qualified for the interviews out of 1866 candidates, were aggrieved by their non-inclusion, they made series of representations to the Chairman of the Commission, the Chief Secretary of the State and the Chief Minister. The Petitioners also sought for information under the Right to Information Act to disclose the marks secured by the respective candidates. The Deputy Secretary to the Public Information Office dismissed the Appeal No. RTI/GPSC/50/2017 filed by the Petitioners seeking information under the Right to

Information Act. Thereafter the Commission issued an advertisement No.7/2017 on 21 July 2017 inviting fresh applications for ten posts of Junior Scale Officer of Goa Civil Service. Realising that their representations are not going to be accepted and the posts are likely to be filled up by fresh recruitment process, the Petitioners filed the present petition challenging the action of Commission and the State Government. A reply is filed by the Secretary of the Commission contesting the Petition. According to the Commission, a decision was taken by the Commission in the meeting dated 16 May 2017 to provide for cutoff marks for passing the interview, which the petitioners failed to clear. A rejoinder is filed by the Petitioners. By an interim order dated 2 August 2017, further recruitment was stayed.

6. We have heard Mr. D. Pangam, learned counsel for the Petitioners and Mr. P. Faldessai, learned Additional Government Advocate for the Respondents.

7. The main contention advanced by Mr. D. Pangam, the learned counsel for the Petitioners, is that Respondent No.1- Commission has no power to amend the Rules framed under Article 309 of the Constitution of India by the State and cannot amend the Rules to incorporate the criterion not contemplated under the Rules. The second argument is that Rules themselves

state that there should not be any minimum qualifying marks for interview and what is to be considered is the amalgamated marks of written test and the oral interview. He contends that, once the process has gone beyond the written examination, there is no power to change the Rules and introduce a new criterion. Reliance is placed on the decisions of the Apex Court in the cases of *P. K. Ramachandra Iyer and others v Union of India and others*¹, *Durgacharan Misra v State of Orissa and others*², and *Hemani Malhotra v High Court of Delhi*³. It is contended that the Commission has only to select the candidates as per the Rules. Thereafter send the nomination to the State to take necessary action of appointment. That being the limited role of the Commission, the Commission cannot unilaterally amend the Rules.

8. On behalf of the Respondents, it is contended by Mr. Faldessai, the learned Additional Government Advocate that the Rules give power to the Commission to select candidates to ensure that any suitable candidates are selected to the public services. The oral interview is one of the methods to assess the suitability of the candidate. A conscious decision was taken by the Commission on 16 May 2017 that the candidate has to secure 65% marks in the oral interview, that is 26 marks, to qualify. This decision was taken

1 (1984) 2 SCC 141

2 (1987) 4 SCC 646

3 (2008) 7 SCC 11

to select the possible candidates. Relying on the decision of *Yogesh Yadav v Union of India and others*,⁴, it was contended that it is permissible to introduce a benchmark to ensure that best and suitable candidates are selected. It was also contended by Mr. Faldessai, that to decide the correctness of the decisions relied upon by the Petitioners, the issue is referred to the larger bench by the Bench of two learned Judges in the case of *Sivanandan C.T. & Ors v High Court of Kerala and others*⁵.

9. As far as the factual position is concerned, there is not much dispute. Petitioners had applied pursuant to the advertisement issued in December 2016 and that they have passed the screening test and the written examination. It is also an admitted position that around 1866 candidates had applied, out of which seven were selected after the screening test and out of seven only four were found to be qualified after the written examination. It is also an admitted position that the Rules and the Advertisement do not contain any express stipulation that there will be minimum qualifying marks to be obtained at the time of interview. It is admitted position that the decision to introduce the minimum qualifying marks for the interview was taken for the first time for this recruitment process, in a meeting on 16 May 2017. Further, it is admitted that in a subsequent advertisement issued on 21 July

⁴ (2013)14 SCC 623

⁵ 2017 SCC OnLine SC 1326

2017 for the post of Junior Scale Officer, a specific condition of minimum 50% marks at oral interview has been provided. With this admitted position, we will now examine the Rules framed and the law governing the powers of the Commission.

10. As stated earlier, Rules 10 and 12 of the Rules 2016 are germane to the present controversy. They are reproduced for ready reference as under:

“10. Competitive examination for direct recruitment.- (1) The Competitive Examination for direct recruitment shall comprise a written examination and an Oral Interview. The Competitive Examination shall be conducted by the Commission, in the manner notified by the Government, from time to time:

Provided whenever the Goa Public Service Commission is of opinion of conducting screening test required for shortlisting of candidates, the same should be conducted by the Commission in a manner decided by the Commission from time to time.

(2) Whenever Competitive written examination for the direct recruitment to the Junior Scale post of service is conducted by the Commission, the results of such written examination shall be declared by the Commission by displaying the same prominently on the notice board and

website of the Commission.

(3) The minimum passing percentage for competitive written examination shall be 65 percent of the total marks, the passing percentage for candidates belonging to Scheduled Castes and Scheduled Tribes shall be minimum 55 percent of the total marks and Other Backward Class; Differently Abled Persons and for Children of Freedom Fighters, it shall be minimum 60 percent of the total marks.

(4) The Commission shall invite five times the number of candidates as against the number of vacancies advertised, for the oral interview purely on merit with due regard to the policy on reservation. In case there are more candidates securing the same number of marks as the last candidate, all such candidates shall also be called for the oral interview.

(5) Marks to be allotted for written examination and oral interview shall be notified in advance in the advertisement inviting applications by the Commission.

(6) Such oral interview shall be conducted under CCTV surveillance or videography and the proceedings thereof shall also be video-recorded and such recording shall form a permanent record of the Commission.

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12. List of successful candidates.- *(1) The Commission shall forward to the*

Government a select list, arranged in the order of merit of the candidates which shall be determined in accordance with the aggregate marks obtained by each candidate at the competitive written examination and oral interview.

Provided that if two or more candidates have secured equal number of marks in the aggregate, their order of merit shall be in the order of the marks secured by the candidates in the written examination and if the candidates have secured equal marks in the written examination then order of merit shall be as per their date of birth and if in case the date of birth is also the same then the candidate possessing higher educational qualifications will be placed higher in the merit list.

(2) The Commission while drawing the list of selected candidates shall restrict the select list of candidates to the extent of declared number of vacancies.

(3) The select list drawn by the Commission shall be valied for a period of one year from the date of receipt of the same by the Government.

(4) The Commission shall, in addition to the select list, also prepare a separate wait list up to 10% of the vacancies based on the merit of the candidates in their respective category:

Provided further that the candidates from the wait list may be recommended to

the Government only on requisition being made by the Government if the candidates recommended earlier are unable to accept the offer of appointment for any reason. Such wait list shall not be operative for any additional number of posts, other than those advertised. The wait list shall lapse on the declaration of the date of a subsequent examination for the same category or after a period of one year from the date of preparation of such wait list, whichever is earlier.”

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11. Rules 10 and 12, which are reproduced herein above, lay down that for competitive examination and direct recruitment there shall be written examination and an oral interview. The competitive examination is to be conducted by the Commission. The Commission is empowered to conduct a screening test for shortlisting the candidates. Thereafter, a competitive written examination is to be held by the Commission and the result declared is to be published prominently on the notice board. The Rule contemplates that the minimum passing percentage of 65% in the written examination. The Commission is required to invite five-time of the number of candidates as against the vacancy advertised. The interviews are to be conducted purely on merit, the marks allotted in written examination and oral interviews are to be amalgamated. Rule 11 gives finality to the decision of the Commission regarding the eligibility of the candidates for admission to the services. As per Rule 12, the Commission has to

forward the select list arranged in the order of merit to the Government. The names of the candidates are to be arranged as per the merit, which has to be determined following aggregate marks obtained both at the written examination and oral interview. The select list has to be restricted to the members with reference to the declared number of vacancies, and a waiting list is also contemplated.

12. The Advertisement, pursuant to which the Petitioners applied, specified the conditions and stipulation contained in the Rules. The Advertisement reproduced the methodology provided in Rule 10 and putting the candidates to notice that they have to go through the screening test and thereafter written examination and oral interview. The minimum passing percentage of competitive examination was also stipulated in the advertisement.

13. An affidavit in reply filed by the Secretary of the Commission. The affidavit gives reason as to why the names of the Petitioners were not sent, even though there were four shortlisted candidates for the interview and the posts were six. The Secretary has stated that it was decided by the Commission in the meeting dated 16 May 2017 that the candidate has to secure at least 26 marks in the oral interview to be selected. Pursuant to this decision, the Petitioners were not found eligible, and therefore their names

were not recommended. The Secretary has placed on record the marks of all four candidates. Vivek Krishna Naik, the recommended candidate, secured 173.5 marks in written test and 29.9 marks in oral interview totaling to 203.4. The Petitioner No.1 secured 170.5 marks in the written test and 15.4 marks in oral interview totaling to 185.9. The Petitioner No.2 secured 164.5 marks in the written test and was given 15.8 marks in oral interview totaling to 180.3. The Petitioner No.3 secured 166.5 marks in the written examination and in oral interview 16.9 marks totaling to 183.4. If the decision of the Respondent No.1-Commission in the meeting dated 16 May 2017 is to be considered, then the Petitioners have not secured 26 marks to qualify for the oral interview. The main question is whether the Respondent No.1-Commission can introduce such a qualifying criteria, that too at such a stage.

14. Before we consider the powers of the Commission, we deal with the contention raised by Mr. P. Faldessai, that the successful candidate i.e. Mr. Vivek Krishna Naik has not been joined as party Respondent, and therefore it is to be presumed that the Petitioners have accepted the correctness of the procedure and therefore their challenge should not be entertained. As rightly pointed out by Mr. Pangam, that there is no need of the Petitioners to join the successful candidate, because assuming the

decision of the Commission taken in the meeting dated 16 May 2017 is set aside and combined marks in written test and oral interview are to be considered, the said candidate Mr. Vivek Krishna Naik would have more marks than the Petitioners. Secondly, it is to be noted that when the advertisement was issued, it was for 11 posts, out of which six posts were unreserved, the category in which four candidates fall. As per the Rules of 2016, the Commission has to send the select list with reference to the number of vacancies, and if the criterion of qualifying in the interview is removed, then there is no impediment to send the list of all four candidates including Mr. Vivek Krishna Naik who would be high on the list. Therefore, the contention of Mr. Pangam, that the outcome of this petition does not affect the candidate whose name is already nominated, is correct, and therefore we are not inclined to dismiss the petition only on the ground of not joining Mr. Vivek Krishna Naik as party Respondent. Similarly, there is no merit in the contention that since Mr. Naik is not joined as a party Respondent, the Petitioners deemed to have accepted the procedure.

15. Turning now to the position of law as to whether the Respondent No.1-Commission can introduce a qualifying criterion which is not present in the Rules, that too after the written examination is conducted and before the interview, and further

when it is not so stated in the advertisement.

16. First in the line of the decision governing the issue is the case of *P. K. Ramachandra Iyer*. A group of writ petitions, review petitions, civil appeals and special leave petitions came up for consideration before the bench of two learned Judges of the Apex Court. A common question of law was raised in these petitions. One of the issues that were raised by the Petitioners therein was regarding the Rules governing the appointment to the posts in the Indian Council of Agricultural Research. Rules constituted the Agricultural Scientists Recruitment Board. The Board prescribed minimum 40 marks for being qualified for *viva voce* test. The Petitioners had contended before the Apex Court that the Board had no such powers when the Rules did not specify any such minimum marks. The Apex Court upheld the contention and held that the further qualification of obtaining minimum marks did not find place in Rules 13 and 14. The Court held that the action of the Board amounted to amending the Rules and there were no powers for the Board to add to the required qualifications. The Apex Court laid down that if such power is claimed, it has to be explicit and cannot be read by implication, for the obvious reason that such a deviation from the rules is likely to cause irreparable and irreversible harm. The Apex Court held that the action taken by the Board was impermissible, contrary to Rules and

the merit list prepared in contravention of the Rules could not be sustained. The Apex Court directed the Board to prepare a merit list in respect of those candidates who were called for *viva voce* test but not included in the merit list, on the basis of the aggregate marks, after holding that provided for such cut-off minimum marks at the time of interview was illegal.

17. In the case of *Durgacharan Misra*, a petition was filed in the Supreme Court under Article 32 of the Constitution of India challenging the validity of the list of candidates prepared by the Orissa Public Service Commission. The selection of candidates for subordinate judicial service, governed by the Orissa Judicial Service Rules, 1964, was under consideration. The Rules were framed under the proviso to Articles 309 read with 234 of the Constitution of India. The question that arose for consideration before the Apex Court was whether the minimum marks prescribed by the Public Service Commission at the time of *viva-voce* was justified and whether the select list prepared by the Commission was in accordance with the Rules. The Apex Court analysed the Rules which specified the minimum qualifying marks. The Court took note that the Rules were framed under Article 309 and emphasised that the Public Service Commission which has been constituted under the Rules must therefore faithfully follow the Rules. It must select the candidates in accordance with the Rules and cannot

prescribe additional requirements for selection either as to the eligibility or suitability. It was held that the decision of the Public Service Commission to prescribe the minimum marks to be secured at the *viva voce*, it is, therefore, would be illegal and without any authority. After holding so, the Apex Court directed to re-do the selection list on the basis of the aggregate marks obtained by the candidates in the written examination and interview.

18. In the case of *K. Manjusree v State of Andhra Pradesh and Another*,⁶ the bench of three learned Judges of the Apex Court took a review of the law on the subject. The learned Judges were considering the challenge to the selection process to the posts of District & Sessions Judges (Grade II) in Andhra Pradesh State Higher Judicial Service. In this case, a criterion of minimum marks was introduced at the time of interview. The criterion of minimum marks for interview was never adopted by the Andhra Pradesh High Court earlier for selection of District & Sessions Judges. After the entire selection process of written examination and interview was completed, the minimum marks for interview were introduced. The learned Judges noted the decisions in the case of *Ramachandra Iyer, Umesh Chandra, Durgacharan Misra and Maharashtra SRTC v Rajendra Bhimrao Mandve*⁷ and held that such cause of action would be akin to changing the rules of the game when the game has

⁶ (2008) 3 SCC 512,

⁷ (2001)10 SCC 51

commenced.

19. In view of this legal position settled by the Apex Court, it is clear that the Commission, which is bound by these Goa Civil Service Rules, 2016 framed under Article 309 of the Constitution of India has to carry out the selection process as per the Rules. In the present case, not only there are no minimum qualifying marks for oral interview prescribed in the Rules, but they were not even notified in the advertisement. This is not to say that we are commenting upon the legal position whether they can be so provided in the advertisement if the Rules do not provide. We, however, take a note of the fact that in the subsequent advertisement dated 21 July 2017, the Commission has prescribed 50% qualifying marks. We do not wish to conclude the issue regarding the advertisement dated 21 July 2017 as there is no specific challenge on that count before us. But it needs to be noted that, in the present petition the stand of the Commission is that they had taken a decision on 16 May 2017 prescribing 65% minimum qualifying marks, and in the Advertisement dated 21 July 2017 it is stated as 50%.

20. The stand taken by the Secretary of the Commission in the affidavit is that providing such qualifying marks is solely within the discretion of the Commission. It, therefore, appears that the Commission is under an incorrect impression that it can change

and impose any qualifying marks as per its will any time even though it is not so provided in the Rules. In furtherance of this stand, it is the contention of Mr. Faldessai that the Rules vest power in the Commission to select a suitable candidate and therefore it had taken a decision on 16 May 2017 to prescribe the minimum marks in furtherance of this power. His submission cannot be accepted as the Rules do not contemplate any such minimum qualifying marks. As laid down by the Apex Court in the case of *P. K. Ramachandra Iyer*, the Rules must be explicit in this regard and such powers cannot be assumed by implication.

21. We further note, as rightly pointed out by Mr. Pangam, that the Rules themselves do not contemplate minimum qualifying marks for the oral interview. Rules prescribe that the merit list would include the amalgamated marks at the written examination which would have to be above 65% and the marks in the oral interview. These combined marks make the merit list. In the present case, admittedly, the decision was taken to impose qualifying marks, after the candidates had applied pursuant to the advertisement based on the screening test and also written examination. It is at this stage the qualifying marks were introduced. This is an additional factor in favour of the Petitioners.

22. As regards the decision of the Apex Court in the case of

Yogesh Yadav, relied upon by Mr. Faldessai to contend that it is permissible to fix a benchmark, the case has a completely different factual background. The matter arose for consideration of the learned Apex Court from the appointment to the post of Deputy Director (Law) made in the office of Competition Commission of India. The candidates who qualified for written test and passed in the interview had approached the High Court of Delhi since their names did not appear in the list of candidates finally selected. The learned Single Judge accepted the plea of the Respondents that there was no change in criteria in the selection process and only a benchmark was introduced to shortlist the candidates. The Letter Patent Appeal filed by the candidates failed, and the candidates thereafter approached the Apex Court. In this case, there were no Rules framed under the proviso to Article 309 of the Constitution of India. What the authority had done was shortlisting of the candidates. The Apex Court found that there was no change in the criteria of selection and what was done is only shortlisting by fixing the benchmark to recruit the best candidates on rational and reasonable basis. It is clear from the reading of this decision that it was not a recruitment process based on the Rules framed under Article 309 of the Constitution of India and neither it was through a Public Service Commission. In contrast, under the present Rules, the proviso to Rule 10(1) empowers the Commission to conduct the screening test as required for shortlisting the candidates.

Admittedly, exercising the powers provided under the proviso to Rule 10(1), a screening test was conducted, and out of 1866 candidates, seven candidates were shortlisted. There is no dispute raised by the Petitioners or any person regarding holding of this screening test by the Commission for which it undisputedly it had power. By relying on a decision to uphold the screening test, it cannot be contended that the Commission in the present case also had power to further declare the candidates as ineligible at the time of oral interview.

23. As regards the contention of Mr. Faldessai that the case of *Tej Prakash Pathak v Rajasthan High Court*⁸ the Apex Court has doubted the correctness of *K. Manjusree* and has referred it to the larger bench is concerned, the legal position is clear that in the meanwhile the decision of three learned Judges in the case of *K. Manjusree*, and the other decisions, will continue to bind this court.

24. We note that in the affidavit in reply, not obtaining minimum qualifying marks in oral interview pursuant to the decision in the meeting dated 16 May 2017 is the sole reason not to send the names of the Petitioners to the Respondent-State. No other reason than the qualifying marks at the interview is shown to us.

⁸ (2013) 4 SCC 540

25. In these circumstances, we hold that the action of the Respondent No.1-Commission in not recommending the names of the Petitioners to the post of Junior Scale Officer of the Goa Civil Services on the ground that they have not secured 65% minimum qualifying marks in the oral interview, is illegal and beyond the powers of the Respondent No.1-Commission. The decision taken by Respondent No.1-Commission in the meeting dated 16 May 2017 introducing criteria of 65% minimum qualifying marks at the interview for the post of Junior Scale Officer in the Goa Civil Service, therefore, cannot be sustained and it is quashed and set aside. The Respondent No.1-Commission will take necessary steps as per Rule 12 of the Rules of 2016 on the basis of the consolidated marks of the Petitioners in the written examination and oral interview without attaching any qualifying criteria to the marks obtained at the oral interview. The Respondent No.1-Commission will take necessary steps within eight weeks from the date the order is uploaded to the server.

26. Rule is made absolute in above terms. No order as to costs.

Nutan D. Sardesai, J.

N.M. Jamdar, J.