

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.15386 of 2013 (O&M)
Date of Decision: 17.1.2017

Hawa Singh and others

... Petitioners

Versus

State of Haryana and others

... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. D.S. Patwalia, Sr. Advocate,
with Mr. Gaurav Rana, Advocate,
for the petitioners.

Ms. Shruti Jain Goyal, AAG, Haryana.

Mr. Puneet Bali, Sr. Advocate,
with Mr. Arun Gupta, Advocate,
for respondents No.4 to 31.

Mr. S.S. Kharb, Advocate,
for respondents No.32 to 36.

RAJIV NARAIN RAINA, J.

1. Twelve petitioners have challenged the selection of respondents No.6 to 31 as Jail Warders. Respondents No.32 to 37 have joined the proceeding by impleadment through an application under 1 Rule 10, CPC which was allowed on May 10, 2016. The added parties are the non-selected candidates questioning with the petitioners, the selection process initiated through public advertisement dated August 01, 2012. The direct recruitment process involved filling up of temporary posts of Warders numbering 1036 Male + 55 Female in the Jails of Haryana State Prison Department whose services, if selected and appointed, would be governed by the provisions of the Punjab Jails Department State Service (Open Class-III Executive) Rules,

1963 read with the Haryana Amendment Rules, 2011 notified on December 20, 2011. The dispute in this case is with regard to the physical standards of the selected candidates. The allegation is that they fall short of the requisite standards. The physical standard for males required minimum height of 5'6" with chest girth 33" (minimum). Vision had to be normal in both eyes. There was a note that physically handicapped are not eligible. Clause-9 of the advertisement laid down the selection procedure which reads:-

"9. SELECTION PROCEDURE

1. The prescribed essential qualifications are the minimum and the mere possession of the same does not entitle a candidate to be called for interview. The Recruitment Committee may shortlist the candidates for interview on the basis of rationale criteria to be adopted by the Committee. The selection committee reserves the right for selection criteria. The decision of the Committee in all matters relating to acceptance or rejection of an application, eligibility / suitability of the candidates, mode of and criteria for selection etc. will be final and binding on the candidates. No inquiry or correspondence will be entertained in this regard.

II. After completion of registration and scrutiny of application forms, candidates found eligible shall be informed by sending Call Letters through post regarding the place, date and time of their Physical Measurement Test, as per physical standard laid down in this advertisement. In addition to the above, information shall also be displayed on the notice board in this office or Superintendent of Police, Commando, Newal (Karnal) and candidates can confirm the place, date and time of their Physical Measurement.

III. After the Physical Measurement, the candidates, category wise, will be called for interview from the merit list. The list of candidates called for interview will be displayed on the notice board of SP/Commando, Newal, Karnal."

2. Clause-12 of the advertisement stipulated that a candidate against whom a criminal case stands registered or is under investigation or pending trial or those who has been convicted by a court of law need not apply. Also persons less in height and chest measurements and with any physical deficiency need not apply. The other conditions of the advertisement do not concern the dispute in this case which relates to pure questions of fact and the disputed height and chest deficiencies of the respondents. Some of them are accused of being colour blind, physically handicapped and with FIRs registered against them. They were selected and appointed as Jail Warders in pursuance to the advertisement and are working for the last about three years.

3. In order to appreciate the controversy raised by the petitioners, a few essential facts may be noticed. Application forms were received from July 31, 2012 to August 30, 2012 in the office of the Superintendent of Police, Commando, (H) Newal, Karnal. Thereafter, the Recruitment Committee with the help of subordinate staff conducted the physical measurements of the candidates. Those candidates who were not found possessing the minimum height and chest standards at the time of measurement were informed on the spot. Fifty three candidates who were declared unfit submitted their appeals to the Chairman of the Recruitment Committee who forwarded them vide letter dated November 21, 2012 to the Director General of Prisons, Haryana to take up the matter with the State Government for appointment of an appellate authority empowered to decide the appeals.

4. Though there was no provision for appeal in the rules or in the

advertisement the Director General of Prisons, Haryana vide letter dated November 26, 2012 requested the State Government to nominate an appellate authority to decide the appeals of unfit candidates who had preferred appeals. The State Government vide memo dated January 01, 2013 nominated the Director General of Prisons to be the appellate authority to decide the appeals, complaints and the grievances of aggrieved persons received by the recruitment Board. The Director General of Prisons, Haryana delegated his authority to the Additional Director General of Prisons, Haryana to decide the appeals.

5. Of the 53 candidates who submitted appeals there were 20 who complained of incorrect chest measurement. The appeals of 17 candidates were accepted. Similarly, 8 candidates who complained that the height was not measured correctly, 3 of them succeeded in appeal. Two candidates who complained of absence during the measurement physical test, one of whose appeal was accepted. Thereby, a total of 21 candidates as against 53 were declared fit in physical measurements in the re-conduct exercise. The entire proceedings before the appellate authority were videographed. The Superintendent of Police, Commando-cum-Member Selection Board was informed of the decision in appeals that 21 candidates had fallen in the selection list and 1 in the waiting list of general category. One of the petitioners also succeeded in his appeal when he was found eligible in chest measurement. He is left without any grievance. This is petitioner No.10. It was only after this exercise was carried out that the names of 999 candidates on the basis of merit were recommended for appointment and their names were sent to the Government by the Chairman of the Recruitment

Committee vide memo dated April 11, 2013. The selected candidates were put through medical fitness test and police verification procedure and the eligible candidates selected were offered appointments on April 24, 2013. They joined service of the Jail department as Temporary Warders.

6. The grounds of challenge proceed on the prime argument that the condition of appeal was not stipulated in the advertisement or in the rules of service against faulty physical measurement for declaration of eligibility for maintenance of physical standards to be qualified for the next stage of the recruitment process. Some candidates having been rejected for deficiency to meet requisite physical standards, there arose no fresh reasons for re-consideration in appeal which process was not known to law. It is urged that it is not possible for the private respondents to gain in height or improve their vision at the age at what they were. The terms of the advertisement in pursuance to which an appointment is made are binding in nature and could not be departed from by constituting an appellate authority to re-do the exercise. The challenge is also that amongst the selected candidates there were physically handicapped persons and some of them had criminal cases registered against them. Such candidates stand selected for appointment as are ineligible to trample over and above the rights of the petitioners and who are eligible in all respects. The selection is dubbed as sham and an eye-wash and deserves to be invalidated.

7. The petitioners have placed on record a chart showing candidates of SC, BCA and BCB categories, who participated in the selection but are deficient in physical standards etc. but still were selected as Jail Warders. The chart has been placed at Annex P-7. The petitioners

complain that an application for supply of information under the RTI Act was not responded to and neither were the petitioners allowed physical inspection of the record of selection. The access to such information is a matter of right of the party who seeks the same. From denial of information, the petitioners draw an inference in their favour that the entire selection process was marred by the vice of arbitrariness. The ineligible were made eligible by process of re-conduct of physical measurement. A serious and overwhelming doubt is cast on the first physical measurement test indicating that all was not well in the process and there is no better proof than the novel method adopted by the authorities to put candidates again through the mill of the physical measurement test only to qualify some of them and for this reason, the petition deserves to be allowed.

8. The State has put in its written statement to contest the case on merits. It is disclosed that the Recruitment Committee consisted of three senior IPS Officers to be assisted by a senior representative of Prisons Department to be nominated by the Government of Haryana. The Additional Inspector General of Prisons was nominated to assist the Recruitment Committee. The recruitment was well publicized in national newspapers, namely, The Tribune (English), Punjab Kesari (Hindi), Dainik Jagran (Hindi) and Dainik Bhaskar (Hindi).

9. Candidates who were found deficient in minimum height of 5'6" and chest 33" at the time of measurement were informed if they are aggrieved against the decision of the RC they had remedy of filing appeal before the appellate authority to be constituted for the limited purpose.

Petitioner No.10 and respondents No.5, 8, 9, 10, 12, 13, 15, 17, 18, 23, 25,

27, 28 & 29 were found ineligible due to less height/chest by the Recruitment Committee. They submitted appeals which were forwarded to the Government. On February 28, 2013 and March 01, 2013, 30 appeals were considered and the appellate authority conducted re-measurement of candidates present for a decision in appeal. Twenty one candidates were found eligible and their names were recommended for appointment.

10. On April 24, 2013 the Jail Department, Haryana offered conditional appointment letters to the selected candidates calling upon them to undergo medical examination by the Chief Medical Officer/Deputy Chief Medical Officer concerned and those who passed the check up joined duty. The State in its reply asserts that candidates who were reported medically unfit or against whom criminal cases were lodged were not allowed to join as Jail Warders. This is how 999 candidates out of 1091 vacancies/posts of Jail Warders (Male and Female) in Prisons Department accepted their offers of appointment and assumed duties on different dates on posting in various Jails in Haryana. The police verification regarding character antecedents etc. and medical examination was conducted by the Jail Department and not by the Recruitment Committee and appointment letter by way of sample is attached as Annex R-4. Similar appointment letters were issued to the selected candidates with their particulars. It has been stipulated in the appointment letter that the appointments are provisional and subject to the condition that in case character antecedents and medical reports are not found correct or satisfactory on verification/examination the appointment shall be liable to be cancelled without any notice and further pay and allowances, if drawn any shall be recoverable from them. The State asserts

that the petitioners were placed in the waiting list in accordance with the merit secured by them. As per settled law the candidate after having rubbed shoulders with others and having unsuccessfully participated in a selection process is estopped to lay a challenge to the selection and therefore the petition is liable to be dismissed. The State has placed on record a comparative chart showing facts and figures of the petitioners and the respondents No.4 to 31 at Annex R-3. The first and second readings of the appellants physical standards have been recorded in the chart.

11. The private respondents No.4 to 31 have filed a separate written statement and have contested the case on the lines of the written statement filed by the State. The petitioners have filed a replication to the written statement filed by the State. Nothing new has been mentioned in the replication except to reiterate what was said in the petition.

12. I have heard Mr. D.S. Patwalia, learned Senior counsel for the petitioners assisted by Mr. Gaurav Rana, learned counsel, Mr. Puneet Bali, learned Senior counsel for respondents No.4 to 31 assisted by Mr. Arun Gupta, learned counsel, Mr. S.S. Kharb for respondents No.32 to 36 and Ms. Shruti Jain Goyal, AAG, Haryana for the State of Haryana.

13. Mr. Patwalia argues that re-opening of the physical measurement test was an illegal and arbitrary act without legal sanction. Neither within the rules of service nor in the advertised terms and conditions of the Employment Notice is there any provision which permits or authorises the Government to re-conduct the test only to make ineligible candidates eligible and thereby bringing them into the zone of selection at the cost of candidates in the waiting list. He dwells on Clause-9 of the

advertisement which prescribes that the decision of the Committee in all matters relating to acceptance or rejection of application, eligibility/suitability of the candidates, mode of and criteria for selection etc. will be final and binding on the candidates. There was an express condition that “No inquiry or correspondence will be entertained in this regard”. He submits that this provision in the advertisement is mandatory in nature and does not empower the State for the constitution of an appellate authority to review the physical measurement test. This decision was completely foreign to the recruitment process. Despite such a categorical provision in the advertisement the authorities have departed therefrom by adopting an abnormal procedure which was not laid down either in the advertisement or in the rules. It is urged on the well settled legal principle that the terms of the recruitment process once advertised are binding and no departure can be made.

14. He relies on the Supreme Court decision in Bedanga Talukdar v. Saifudaullah Khan and others, 2012 (4) SCT 406 to contend that even if power of relaxation is provided in the rules it must still be mentioned in the advertisement. In the absence of such constituent power in the rules of service, it could still not be provided in the advertisement. However, the power of relaxation, if exercised has to be given due publicity. This would be necessary to ensure that those candidates, who become eligible due to the relaxation, are afforded an equal opportunity to apply and compete. Relaxation of any condition in the advertisement without due publication would be contrary to the mandate of equality contained in Articles 14 & 16 of the Constitution of India. On facts, the Supreme Court held that the High

Court of Guwahati committed an error in directing that the condition with regard to the submission of the disability certificate either along with the application form or before appearing in the preliminary examination could be relaxed in the case of the first respondent. Such a course the Supreme Court held would not be permissible as it would violate the mandate of Articles 14 & 16 of the Constitution of India. Mr. Patwalia would refer to Paras.28 to 31 to fortify his contention. They are reproduced:-

“28. We have considered the entire matter in detail. In our opinion, it is too well settled to need any further reiteration that all appointments to public office have to be made in conformity with [Article 14](#) of the Constitution of India. In other words, there must be no arbitrariness resulting from any undue favour being shown to any candidate. Therefore, the selection process has to be conducted strictly in accordance with the stipulated selection procedure. Consequently, when a particular schedule is mentioned in an advertisement, the same has to be scrupulously maintained. There can not be any relaxation in the terms and conditions of the advertisement unless such a power is specifically reserved. Such a power could be reserved in the relevant Statutory Rules. Even if power of relaxation is provided in the rules, it must still be mentioned in the advertisement. In the absence of such power in the Rules, it could still be provided in the advertisement. However, the power of relaxation, if exercised has to be given due publicity. This would be necessary to ensure that those candidates who become eligible due to the relaxation, are afforded an equal opportunity to apply and compete. Relaxation of any condition in advertisement without due publication would be contrary to the mandate of quality contained in Articles 14 and 16 of the Constitution of India.

29. A perusal of the advertisement in this case will clearly show that there was no power of relaxation. In our opinion, the High Court committed an error in directing that the condition with regard to the submission of the disability

certificate either along with the application form or before appearing in the preliminary examination could be relaxed in the case of respondent No. 1. Such a course would not be permissible as it would violate the mandate of Articles 14 and 16 of the Constitution of India.

30. In our opinion, the High Court was in error in concluding that the respondent No.3 had not treated the condition with regard to the submission of the certificate along with the application or before appearing in the preliminary examination, as mandatory. The aforesaid finding, in our opinion, is contrary to the record. In its resolution dated 21st May, 2010, the Commission has recorded the following conclusions:-

"Though Shri S. Khan had mentioned in his letter dated 10.12.2009 that he was resubmitting the Identity Card with regard to Locomotor Disability he, in fact, had submitted the documentary proof of his Locomotor Disability for the first time to the office of the A.P.S.C. through his above letter dated 10.12.2009. However, after receiving the Identity Card the matter was placed before the full Commission to decide whether the Commission can act on an essential document not submitted earlier as per terms of advertisement but submitted after completion of entire process of selection.

The Commission while examining the matter in details observed that Shri S. Khan was treated as General candidate all along in the examination process and was not treated as Physically Handicapped with Locomotor Disability. Prior to taking decision on Shri S. Khan it was also looked into by the Commission, whether any other candidate's any essential document relating to right/benefits etc. not furnished with the application or at the time of interview but submitted after interview was accepted or not. From the record, it was found that prior to Shri S. Khan's case, one Smt. Anima Baishya had submitted an application before the Chairperson on 26.2.2009 claiming herself to be a S.C. candidate for the first time. But her claim for

treating herself as a S.C. candidate was not entertained on the grounds that she applied as a General candidate and the caste certificate in support of her claim as S.C. candidate was furnished long after completion of examination process."

31. In the face of such conclusions, we have little hesitation in concluding that the conclusion recorded by the High Court is contrary to the facts and materials on the record. It is settled law that there can be no relaxation in the terms and conditions contained in the advertisement unless the power of relaxation is duly reserved in the relevant rules and/or in the advertisement. Even if there is a power of relaxation in the rules, the same would still have to be specifically indicated in the advertisement. In the present case, no such rule has been brought to our notice. In such circumstances, the High Court could not have issued the impugned direction to consider the claim of respondent No.1 on the basis of identity card submitted after the selection process was over, with the publication of the select list."

15. The learned Senior counsel also relies on the Supreme Court decision in District Collector and Chairman Vizianagaram (Social Welfare Residential School Society v. M. Tripura Sundari Devi, (1990) 3 SCC 655.

This was a case involving appointment to Grade-I and Grade-II Teacher post where respondent did not possess the requisite qualification. On discovery of flaw during scrutiny the original certificates at the time of joining the defect came to the notice of the authorities which refused the candidate from joining the post. The action in not allowing the candidate to join was held justified on the reasoning that when advertisement mentioned the 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. There is public and third party interest involved. The

aggrieved persons are all those who had similar or even better qualifications than the appointee 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. The Supreme Court held that no Court should be a party to the perpetuation of a fraudulent practice. The Tribunal had lost sight of this fact in directing appointment then the order was set aside.

16. Per contra, Mr. Puneet Bali, learned Senior counsel appearing for the private respondents has placed strong reliance on the judgment of the Supreme Court in Vikas Pratap Singh and others v. State of Chhattisgarh and others, (2013) 14 SCC 494 to counter the contention of Mr. Patwalia that Government was not empowered to order a fresh physical measurement test and review the recordings in the first test by opening channel of appeals even though the decision was final and binding on the candidates.

17. An argument was raised before the Supreme Court in *Vikas Pratap Singh* that the decision of the respondent Board to re-evaluate the answer scripts in the absence of any statutory provision for the same and subsequent publication of a revised merit list cancelling the appointment of the appellants is arbitrary and has caused prejudice to the appellants. It was further submitted that Clause 14 of the Rules provided for procedure to be adopted in respect of erroneous objective questions is of a wider ambit and includes exigencies such as model answers to examination questions being incorrect and, therefore, the respondent-Board instead of directing re-evaluation of answer scripts ought to have acted in compliance of the said

statutory provision. The argument based on Clause 14 did not impress the Supreme Court being an inclusive provision and thus providing ample room for inclusion of similar irregularities that may occur in conduct of competitive examinations. The Supreme Court held it to be settled law that if irregularities in evaluation could be noticed and corrected specifically and undeserving selected candidates identified and in their place deserving candidates be included in the select list, then no illegality would be said to have crept in the process of re-evaluation. The Board identified the irregularities which had crept in the evaluation procedure and corrected the same by employing the method of re-evaluation in respect of eight questions, answers to which were incorrect and by deletion of eight incorrect questions and allotment of their marks on pro-rata basis. The said decision cannot be characterized as arbitrary. The Supreme Court held that undue prejudice indeed would have been caused had there been re-evaluation of subjective answers, which was not the case. The Supreme Court held in paras.19 and 20 as follows:-

“19. In view of the aforesaid, we are of the considered opinion that in the facts and circumstances of the case the decision of re-evaluation by the respondent Board was a valid decision which could not be said to have caused any prejudice, whatsoever, either to the appellants or to the candidates selected in the revised merit list and therefore, we do not find any infirmity in the judgment and order passed by the High Court to to the aforesaid extent.

20. It is brought to our notice that in view of the interim orders passed by the learned Single Judge the appellants have now completed their training and have been in service for more than three years. Therefore the only question which survives for our consideration and decision is whether after having undergone training and assumed

charge at their place of posting the 26 appellants be ousted from service on the basis of cancellation of their appointment qua the revised merit list.”

18. Despite the correction ordered the Supreme Court saved the appointments since the mistake was committed by the Board in the matter of evaluation of answer scripts and the appellants were not to blame since they had been appointed and undergoing training, albeit wrongly, the Supreme Court ordered to place them at the bottom of the revised merit list.

19. The power to correct a mistake is inherent in the authorities in making the record error free.

20. On the question of relief, Mr. Bali relies on a decision of the Delhi High Court in Sunita Devi v. Union of India and others, 2015 SCC OnLine Del 7916 and particularly because the decision relied on *Vikas Pratap Singh* case (Supra). The High Court observed in paragraph 11 of the report as follows:-

“11. It is not unusual for Courts to be confronted with situations where justice competes with the letter of the law. The letter of the law proclaims that a person appointed erroneously on a post must not be allowed to reap the benefit of the wrongful appointment jeopardizing the interests of the meritorious and the worthy candidates. The letter of the law also proclaims that right to be promoted is not a vested right; the only right is to be given a fair and equal opportunity to be promoted. The spirit of justice which dwells in the body of service law proclaims that if a candidate has not obtained employment by fraud, mischief, misrepresentation or as a result of a mala-fide exercise of power by some body, such factors which enhance equity must be factored and relief molded to further the cause of justice.”

21. This judgment is relied on by Mr. Bali to meet the contention

based on Clause 9 of the advertisement, that even though the result of the test was final and binding on the authorities still the Government has power to correct its mistake occurring in the first physical measurement test. Clause 9 only postulates that the decision of the Committee will be final and binding on the candidates. This is where the observations of the Delhi High Court are useful where justice competes with the letter of the law. Correction of an error when discovered or pointed out becomes the pious duty of the selecting authority to remove to maintain purity in public record. A physical measurement test is one of the conditions prescribed in the criteria adopted.

22. The Selection Committee in the present case had reserved to itself the right to formulate the selection criteria. If something was remiss in the management of the selection criteria it is open to correction by the manager of selection. In any event, anthropometric measurements are pure questions of fact and can be determined accurately with the help of equipment such as chest measuring tapes and stadiometers with quality assurance. Therefore, no question of law is involved in this petition, the criteria not being under challenge, nor could be by candidates whose names are in the waiting list while the others have joined the band wagon litigation through impleadment. The State has explained categorically that no physically disabled person has been appointed and none with criminal antecedents have come to service. They have spelled out the names of two persons who disqualified themselves in the background check on of whom was Sharif Khan whose appointment order has been withdrawn as mentioned in Annex P-7. All the appointed candidates were reported

medically fit by the CMOs/Deputy CMOs concerned. The police verification of Bajrang Lal-respondent No.11 mentioned in Annex P-6 was reported by the SP Bhiwani that he had no criminal case registered against him. These averments have been made in Para.9 of the preliminary submissions and further in reply to ground (ii) and (iii). The State has annexed the list of candidates at R-3 which supports its stand by documentary evidence which I have no reason to disbelieve. There is no specific reply to para.9 of the preliminary submissions in the replication filed by the petitioners and, therefore, I have no reason not to rely on the averments made in the written statement or discard them. The burden of pointing out errors and omissions in measurements was on the petitioners to discharge which they have failed to overcome.

23. I find that there is also no rebuttal of statements made in subparagraphs (ii) and (iii) of para.12. The overall onus of proof was on the petitioners to discharge by pleading specific facts and bringing relevant material on record to establish their claim to the hilt and to the satisfaction of the Court. The petitioners have miserably failed to discharge the onus which was on them to point out any fatal defects and therefore, I would be loathe to interfere in the present selection matter involving a thousand appointments. Moreover, the selected candidates are working for the last three years and their rights have settled there being nothing palpably wrong in the procedure adopted including by exercising appellate powers in public interest to remove the wheat from the chaff.

24. Accordingly, I find no merit in this case and would dismiss it for the reasons recorded above. The synopses filed by the petitioners and the

respondents together with the case law cited which have been duly considered are retained on record; to be of assistance in the event the order is appealed against.

(RAJIV NARAIN RAINA)
JUDGE

17.01.2017
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Whether speaking/reasoned	Yes
Whether reportable	Yes