

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

WP.Nos.18277, 18291, 18297, 23487, 18344, 22536

and 19071 of 2018

COMMON ORDER :

Since common issues arise for consideration in all these matters, they are being disposed of by this common order.

BACKGROUND FACTS

2. The Southern Power Distribution Company of Telangana Limited (S.P.D.C.L.), is a Government of Telangana undertaking and is a power distribution company in the State of Telangana.

3. It had issued a Notification No.01/2018 dt.11.01.2018 for filling up of vacancies of Assistant Engineer (Electrical) and Assistant Engineer (Civil) and also Notification No.2 of 2018 dt.11.01.2018 for filling up vacancies of Junior Accounts Officer in the said Organization.

4. For both these posts, the Notifications indicated that (i) a written examination comprising of 100 marks consisting of 100 multiple choice questions each carrying one mark would be conducted; and (ii) in this examination, there would be Section-A consisting of (80) questions on Core subject and a Section-B consisting of (20) questions on General Awareness and Numerical Ability (para VII).

5. Para (VIII) of the Notifications stated that (i) the selection of candidates for appointment will be 100% on written examination only; (ii) only those candidates who qualify in the Written examination by being ranked high, community-wise and as per spirit of the Presidential Order will be called for verification of original certificates in 1:1 ratio; and the minimum qualifying marks in the written examination for the above selection process would be for 'OCs' – 40%, 'BCs' – 35%, 'SC / ST' – 30% and 'PH' – 30%.

6. The written examinations for Junior Accounts Officer (J.A.O.) post as well as for Assistant Engineer (Electrical) and Assistant Engineer (Civil) were held on 25.03.2018 and results were declared on 26.04.2018.

7. Petitioners in WP.Nos. 18277, 18291, 18297, 23487 of 2018 and respective 3rd respondents in those Writ Petitions had appeared for written examination for the post of Junior Accounts Officer; and petitioners in WP.Nos.18344, 22536 and 19071 of 2018 and 5th respondent in WP.No.19071 of 2018 had appeared for the written examination for the post of Assistant Engineers (Electrical).

8. After the General merit list was notified on 26.04.2018 for both posts of Junior Account Officers and Assistant Engineer (Electrical), the ranks of the petitioners vis-à-vis the private respondents and others who participated in the written examination for the said posts, became known.

9. The said General merit lists indicated that more than one candidate secured the same marks out of total 100 marks.

10. As stated above, the written examination for both posts had two Sections, i.e, Section-A for 80 marks on core subject and Section-B for 20 marks on General awareness and Numerical ability. So, *the S.P.D.C.L prepared the ranking for such candidates by taking the marks obtained in Section-A and giving higher rank to persons who got more marks in that section.*

CONTENTIONS OF PETITIONERS

11. The petitioners in all these cases object to this action on the part of the S.P.D.C.L. and contend that it had not mentioned in the Notifications issued by it that it would, in the event of total marks obtained by candidates are equal, give higher ranking to those candidates who secured more marks in Section-A and lesser ranking to those who secured lesser marks therein; that the service rules governing the appointments to the said posts also do not contain such a provision; that without mentioning in the notifications, it was not open to the S.P.D.C.L. to introduce such a norm after the written test was held; and this would amount to *changing the rules of the game after the game started*, which is impermissible in law.

12. According to petitioners in the event of two or more candidates getting equal marks, it was the practice of S.P.D.C.L. as well as A.P. Transco to prefer the more aged person as compared to the younger

person and this practice was abandoned by S.P.D.C.L. in the instant cases for no valid reason. They contend that petitioners had a legitimate expectation that S.P.D.C.L. would follow the same practice even now and S.P.D.C.L. is estopped from adopting a new procedure without any advance intimation contrary to the above practice.

13. It is also contended that marks obtained in Part-B by candidates are also equally important and they cannot be downplayed by S.P.D.C.L. and an artificial classification amongst the questions cannot be drawn by it by preferring only persons who have secured higher marks in Section-A.

14. It is contended that the A.P. Transco had earlier issued a Notification on 28.12.2017 for filling up several engineering posts including that of Assistant Engineer (Electrical) and it had given preference to older candidates in the event of tie of marks; that the Telangana State Public Service Commission (T.S.P.S.C.) is also following the same practice; also local candidates should be preferred over non-local candidates in the event of a tie of marks since there is no reservation for non-local persons.

15. Sri K. Lakshminarasimha, Sri J. Sudheer, and Smt. M. Radha counsel for petitioners, relied upon the decisions in **K. Manjusree vs. State of Andhra Pradesh and another**¹, **Hemani Malhotra v. High Court of Delhi**², **Rajya Sabha Secretariat and others v. Subhash**

¹ (2008) 3 S.C.C. 512

² (2008) 7 S.C.C. 11

Baloda and others³, State of Orissa and another vs. Mamata Mohanty⁴, and Parmender Kumar and others vs. State of Haryana and others⁵.

EVENTS PENDING THE W.Ps

16. It is not in dispute during the course of hearing of WP.Nos.18277, 18291 and 18297 of 2018 apart from WP.No.18344 of 2018, on 08.06.2018, Sri G. Vidyasagar, Senior Counsel appearing for S.P.D.C.L., had made a submission in Court, which was recorded by the Court, that *the entire merit list would be reviewed in the event of the petitioners succeeding in the Writ Petitions*. The Standing Counsel had also given a tabular statement indicating the persons who are likely to be affected, which was furnished to the petitioners' counsel, who then took steps to implead the said persons as private respondents in some of the Writ Petitions. Prayers in some of the Writ Petitions were also amended.

THE STAND OF THE SPDCL

17. S.P.D.C.L. filed counter-affidavits stating in para no.5 that *during the finalization of the selection process*, it was found that certain candidates have secured same total aggregate marks and *it was decided* that priority would be given to the candidate who had secured higher marks in Section-A / Part –A and General merit list was published on the above basis.

³ (2013) 5 S.C.C. 169

⁴ (2011) 3 S.C.C. 436

⁵ (2012) 1 S.C.C. 177

18. In para no.6 it is stated that *since no criteria has been specified in the notifications, where a candidate secures same aggregate marks, an administrative decision is taken keeping in view procedure adopted by Union Public Service Commission, Indian Engineering Services and E.A.M.C.E.T. Entrance Examination.*

19. It is also stated that wherever written examination comprises of more than one subject / topic, the marks secured in the relevant subjects is taken as the criteria, keeping in view the different marks fixed for different subjects having regard to related importance to the subject and their degree of relevance.

20. It is contended that there is no prescription of considering older candidates in comparison to younger candidates wherever the candidates secured same marks.

21. It is also stated that in the earlier selections for the post of Junior Accounts Officer or other technical posts, written examination did not comprise of different parts like in the instant examination and for the first time the respondents had Sections A and B for the written examination; that rationale for taking the marks acquired in Section A is that for Junior Accounts Officers, that Section had “accounts” subject which is related to the job.

22. Sri G. Vidyasagar, Senior Counsel for S.P.D.C.L. also relied upon the decision in **Yogesh Yadav vs. Union of India and others**⁶.

⁶ (2013) 14 S.C.C. 623

He also relied on para-XI of the notifications and contended that under the said para, the S.P.D.C.L. had reserved its right to alter and modify the terms and conditions laid down in the notification and therefore, the S.P.D.C.L. has got the power to introduce new criteria of giving preference to candidates who secured higher marks in Section-A/Part-A of the written examination for both the vacancies of Junior Accounts Officers and Assistant Engineer (Electrical).

23. Sri K.S. Murthy, counsel for private respondent in WP.No.18277 of 2018 and 23487 of 2018 adopted the stand of the respondent, S.P.D.C.L.

REPLY AFFIDAVIT BY OPETITIONER IN W.P.19071 OF 2018

24. Reply-affidavit was filed by the petitioners in WP.No.19071 of 2018 taking the plea that S.P.D.C.L. cannot change the procedure after the notification and after the results were announced.

25. I have noted the contentions of both sides.

THE CONSIDERATION BY THE COURT

26. From the facts narrated above, it is clear that S.P.D.C.L. had not mentioned in the notification Nos.01/2018 and 02/2018 dt.11-01-2018 that in the event candidates secure same aggregate marks in the written examination, priority would be given to the candidate who had secured higher marks in Section-A of the examination dealing with the core subject. It has also not relied upon any Service rule framed by it empowering it to do so.

27. Para-XI of the notifications states:

“Para-XI: TSSPDCL’s decision to be final:

The decision of TSSPDCL in all aspects and all respects pertaining to the application and its acceptance or rejection as the case may be, conduct of examination and at all consequent stages culminating in the selection or otherwise of any candidate shall be final in all respects. TSSPDCL reserves its right to alter and modify terms and conditions laid down in the notification for conducting the various stages upto selection duly intimating details thereof to all concerned as warranted by any unforeseen circumstances arising during the course of this process, or as deemed necessary by TSSPDCL at any stage.”(emphasis supplied)

28. Though much reliance has been placed by Sri G.Vidyasagar, learned Senior counsel for respondents on the above provision, I am of the opinion that there is no absolute discretion conferred on the S.P.D.C.L. to make changes in regard to ‘the basis of selection’ as it pleases. Any such power would be violative of Article 14 of the Constitution of India.

29. Also, the later part of the said para permits alterations/modifications laid down in the notification for conducting various stages *up to selection*, that too after intimating details thereof to all concerned, as warranted by any unforeseen circumstances arising during the course of process of recruitment.

30. When such modification is permitted *upto* the stage of selection only i.e. *before* the holding of the written examination, and not thereafter. Moreover, it is not as if a possibility of two or more

candidates appearing for the written examination being conducted by the S.P.D.C.L. for selection to the above posts getting same aggregate marks was an event which was unforeseeable by it.

31. The last portion of para-XI though seems to suggest that there is power to alter or modify as deemed necessary by S.P.D.C.L. at any stage, but as already stated by me, such a broad power would be clearly arbitrary and violative of Article 14 of the Constitution of India.

32. Therefore I do not agree with the contention of the learned Senior Counsel for S.P.D.C.L. that it has a free hand to change the terms and conditions as per its whims and fancies at any stage.

33. The statement in the counter-affidavit at para-5 that *during the finalization of the selection process*, it was discovered that certain candidates had secured same total aggregate marks and so it was decided that priority would be given to the candidates who had secured higher marks in Section-A/Part-A, clearly indicates that *after* the written examination was held and when the results of the examination were being awaited, the respondents had changed the rules of the game i.e. the criteria for selection.

34. The Counter affidavit is silent as to who took the said decision in S.P.D.C.L. and evidence in the form of an order containing the said decision has not been filed.

35. In **K.Manjusree** (1 supra), selection to posts of District and Sessions Judges (Grade-II) in the A.P.State Higher Judicial Service pursuant to the advertisement dt.28-05-2004 governed by the A.P. Stage Higher Judicial Service Rules, 1958 was done by the High Court of Andhra Pradesh. There were resolutions passed by the Full Court on 24-07-2001 and 21-02-2002 prescribing criteria for selection of candidates according to which there were 75 marks for written examination and 25 marks for interview. It was decided by another resolution dt.30-11-2004 that existing criterion would be followed but while holding written examination, 100 marks were prescribed instead of 75. The High Court (on the administrative side) made two changes after written examination and interviews were over. First, marks for written examination were proportionately scaled down so as to maintain ratio between written examination and interview as 3:1 (75:25) instead of 4:1 (100:25). This was done because original criterion prescribed 75:25 ratio. Secondly, *it introduced minimum qualifying marks for interview* also. This resulted in reshuffling of the selection list. A 3 Judge Bench of the Supreme Court upheld the scaling down of the written examination marks to $\frac{3}{4}$ of what was secured by the candidates with reference to a maximum of 100 marks, so that the ratio of 3:1 could be maintained. However it held that the resolutions dt.24-07-2001 and 21-02-2002 provided qualifying marks for written examination only, but not for interview and introduction of requirement of minimum marks for interview, after the entire selection process (consisting of written examination and interview)

was completed, would amount to *changing the rules of the game after the game was played* which is impermissible. It followed the judgments in **P.K.Ramachandra Iyer Vs. Union of India**⁷, **Umesh Chandra Shukla Vs. Union of India**⁸ and **Durgacharan Misra Vs. State of Orissa**⁹. Quoting its decision in **Maharashtra SRTC Vs. Rajendra Bhimrao Mandve**¹⁰ where it had held that rules of the game i.e. criteria for selection, cannot be altered by authorities concerned in the middle or after the process of selection has commenced, it held that the position in **K.Manjusree** (1 supra) was much more serious inasmuch as not only the rules of the game were changed, but they were changed *after the game had been played and the results of the game were being awaited*, and that it was unacceptable and impermissible.

36. This judgment was followed in **Hemani Malhotra** (2 supra), In that case, it was held that prescription of minimum marks for viva voce after the written test for recruitment to a post in Delhi Higher Judicial Service was not permissible. The Supreme Court declared:

“15. There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and viva voce, but if minimum marks are not prescribed for viva voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of

⁷ (1984) 2 SCC 141

⁸ (1985) 3 SCC 721

⁹ (1987) 4 SCC 646

¹⁰ (2001) 10 SCC 51

the opinion that prescription of minimum marks by the respondent at viva voce test was illegal.”

37. In **Rajyasabha Secretariat and others** (3 supra), advertisement was issued by the appellant for appointment of Security Assistants Grade-II in Lok Sabha and Rajya Sabha Secretariat specifying additional qualifications of NCC/Sports and Computer proficiency as desirable. Call letter issued to candidates called for interview specifically directed them to bring such certificate to interview and further stated that credit therefor would be given only if certificates were recognized by AICTE or DOEACC. The Court held that there was a clear intimation to candidates that credit was to be given to those certificates as a part of the interview and the respondents cannot make any grievance that they were taken by surprise by giving of 7 out of 25 marks for such certificates to the successful candidates and the process was therefore not arbitrary. It held that there was no departure from the advertised requirements. It reiterated the principle in **Manjusree** (1 Supra) and **Hemani Malhotra** (2 Supra), but on the facts of that case it held that the said principle did not apply.

38. This principle was further reinforced by another 3 Judge Bench of the Supreme Court in **Parmender Kumar** (5 supra), where the Court held that once results of a selection to Post Graduate Medical courses in regard to seats reserved for Doctors belonging to Haryana Civil Medical Services had been declared and a select list had been prepared, it was not open to the State Government to alter the terms

and conditions just a day before the counseling was to begin, so as to deny the candidates who had already been selected an opportunity of admission.

39. Sri G.Vidyasagar, learned Senior Counsel for respondents however placed reliance on the decision in **Yogesh Yadav** (6 supra) wherein the Supreme Court upheld the action of the Competition Commission of India in fixing benchmark of 70 marks and 65 marks out of 100 marks for unreserved and reserved category candidates respectively for recruitment to the post of Deputy Director (Law), though there was no such stipulation in the advertisement. He sought to contend that the action of the S.P.D.C.L. in the instant case amounts to merely prescribing a benchmark as in **Yogesh Yadav** (6 supra). I am unable to agree with the said submission. Prescribing a method to choose among different candidates who obtained same aggregate marks in the written examination is totally different from prescribing a benchmark for selection for all candidates. Therefore the said decision is inapplicable to the instant case.

40. I therefore hold that the action of the S.P.D.C.L. in giving priority to candidates who had secured higher marks in Section-A/Part-A in the written examination held for the posts of Junior Accounts Officer and Assistant Engineer (Electrical) after the written examination was held, without indicating the same in the notifications issued by it amounts to changing the rules of the game, after the game

was played, i.e after the written examination was held, is impermissible.

41. It is the contention of the petitioners that in the earlier selections for posts of Junior Accounts Officer or other technical posts, wherever the marks are equal only a person who was older in age was selected. It is also their contention that in organizations like TRANSCO and Telangana State Public Service Commission Recruitments the same principle was being applied.

42. In the counter-affidavit it is stated by S.P.D.C.L. that in such written examinations, there were no Section-A and B as in the instant case and that in certain other organizations like UPSC and EAMCET, this procedure of giving priority to persons who get higher marks in the relevant subject is preferred, where more candidates get same aggregate marks.

43. In my opinion, the stand of the S.P.D.C.L. does not appear to be reasonable because persons of younger age would have more opportunities than persons older to them. Also, having given preference to older candidates when there was a tie in aggregate marks in previous written examinations for recruitment, it cannot make a deviation (on the pretext that in earlier exams there were no separate parts) and defeat the legitimate expectation of the petitioners, that too after the written examination was held. So the SPDCL is directed to review the General merit List by preferring the older candidates to the

younger candidates in the event of a tie in the aggregate marks and issue appointment orders on the said basis to qualified candidates.

44. Therefore the Writ Petitions are allowed and the S.P.D.C.L. is directed to review the General merit lists of selected candidates notified by it by giving priority to older candidates where more than one candidate secured same aggregate marks in the written examination conducted by it pursuant to the notification Nos.01/2018 and 02/2018 dt.11-01-2018 issued by it for posts of Junior Accounts Officer and Assistant Engineer (Electrical) and appoint persons who qualify for selection on the said basis only. This exercise shall be done within four (04) weeks from the date of receipt of copy of this order. No costs.

45. As a sequel, miscellaneous applications pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 11-12-2018

Ndr/Vsv