

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.03.2019

C O R A M

THE HONOURABLE Mr. JUSTICE S.M.SUBRAMANIAM

Writ Petition No. 31387 of 2018
and
W.M.P. No. 36573 of 2018

M.Prathap ... Petitioner

Vs.

1.Tamil Nadu Uniformed Services
Recruitment Board
Old Commissioner of Police Office Campus
Pantheon Road
Egmore, Chennai 8.

2.Superintendent of Police
Cuddalore District. ... Respondents

PRAYER Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, to call for the records in Na.Ka.No.A4/555/AR/2018-8 dated 08.11.2018 on the file of the 2nd respondent and quash the same as unsustainable and unconstitutional and consequently direct the 1st respondent to issue order of appointment to the petitioner for the post of Grade II Police Constable, Gr.II-Jail Warder and Fireman.

For Petitioner : Mr.N.Ramesh

For Respondents : Mr.V.Kadhirvelu [For R1]
Special Government Pleader

Mr.A.N.Thambidurai [For R2]
Special Government Pleader

O R D E R

The order of rejection dated 08.11.2018 rejecting the candidature of the writ petitioner for appointing to the post of Grade II Police Constable, Gr-II Jail Warder and Fireman is under challenge in the present writ petition.

2.Pursuant to the recruitment notification issued by the Tamil Nadu Uniformed Services Recruitment Board inviting

applications for appointment to the post of Grade-II Police Constable, the writ petitioner submitted his application dated 15.01.2018. The writ petitioner was successful in the written examination and participated in the Physical Measurement Test and Physical Endurance Tests. The petitioner was successful in the tests conducted by the competent authorities and awaiting for the order of appointment.

3. Under those circumstances, the order impugned has been passed stating that a criminal case was registered against the writ petitioner in Crime No.435 of 2014 under Sections 294(b) and 323 IPC and the petitioner was arrayed as accused No.1. The case is now pending before the Judicial Magistrate-I in STC No.73 of 2016. This apart, it is stated in the impugned order that the writ petitioner has suppressed the fact regarding the registration of a criminal case against him in the application submitted to participate in the process of selection.

4. The learned counsel for the writ petitioner states that the writ petitioner was falsely implicated in the criminal case and therefore, he must be issued with an order of appointment. It is further stated that the writ petitioner was acquitted from the criminal case and therefore, the petitioner was under the impression that the said information need not be provided in the application. It is pertinent to note that the petitioner was acquitted on benefit of doubt on 26.08.2016.

5. The learned Special Government Pleader made a submission that the writ petitioner had suppressed the material fact regarding the registration of a criminal case against him. Though the petitioner was acquitted from the criminal charges, the competent authorities while verifying the character and antecedent found that the writ petitioner is not suitable for appointment to the post of Grade II Police Constable. The case of the writ petitioner was not considered on the two grounds. Firstly, the writ petitioner suppressed the material facts in the application submitted, pursuant to the recruitment notification and secondly, on verification of the character and conduct of the petitioner, the authorities found that the same is not satisfactory. Thus, the order of rejection is in accordance with law and there is no infirmity.

6. With reference to Rule 13(e) of the Tamil Nadu Police Sub-ordinate Services Rules, the qualifications prescribed is as follows:-

"Rule 13 Qualifications:

No person shall be eligible for appointment to the service by direct recruitment unless he satisfies the appointing authority.

- a) that he is of sound health, active habits and free from any bodily effect or infirmity unfitting him for such service;
- b) that his character and antecedents are such as to qualify him for such service;
- c) that such person does not have more than one wife living; or if such person is a woman, that she is not married to any person who has a wife living and
- d) that he does not involved in any criminal case before Police Verification;

Explanation - (1):-

A person who has acquitted or discharged on benefit of doubt or due to the fact that the complainant turned hostile, shall be treated as a person involved in a criminal case.

Explanation-(2):

A person involved in a criminal case at the time of Police Verification and the case yet to be disposed of and subsequently, ended in honourable acquittal or treated as mistake of fact shall be treated as not involved in a criminal case and he can claim right for appointment only by participating in the next recruitment.

As extracted above the Rule 13(e) is very clear. There is no question of any interpretation at all. There is no question of Police authorities sitting on the judgment of the Trial Court relating to the petitioner.

The petitioner has made himself not eligible for appointed because he had involved in a criminal case in the post.

Further there was no question of honourable acquittal in his case. Thirdly, he had suppressed the material information of his involvement in a criminal case at the time of Police Verification."

7. Considering the judgments of the Hon'ble Supreme Court of India, the Hon'ble Full Bench of the High Court of Madhya Pradesh answered the questions in relation to the selection. In the case of Ashutosh Pawar Vs. High Court of Madhya Pradesh, reported in 2018 1 CTC 353, the Hon'ble Full Bench formulated the following questions for the decision of the Larger Bench.

1. Whether in all cases, where an FIR lodged against a person for minor offences has been quashed on the basis of a compromise arrived at between the parties or a person has been acquitted on account of a compromise between the parties, the character of the person applying for appointment thereafter, has to be treated

as Good and such a person cannot be held ineligible for appointment under the Rules of 1994?

2. Whether the High Court in exercise of its powers under Article 226 of the Constitution of India, can step into the shoes of the Appointing Authority and determine as to whether the person concerned is fit for appointment or whether the High Court on finding that the Authority concerned has wrongly exercised its discretion in holding the candidate to be ineligible should, after quashing the order, remit the matter back to the authority concerned for reconsideration or for fresh consideration as to the eligibility of the person?

3. Whether the High Court while allowing such a petition in exercise of its powers under Article 226 of the Constitution of India can issue a further direction to the authority to appoint the person concerned on the post from the date his batchmates were appointed and to grant him back dated seniority and all other benefits or whether the High Court should simply remit the matter back to the authority for taking a decision in this regard?

4. Whether the high standards of adjudging the good character of a candidate for appointment as a Judicial Officer, which has been adopted and followed by the State under the Rules of 1994 till the decision in the case of Arvind Gurjar (supra) were and are right and proper or whether in view of the decision in the case of Arvind Gurjar (supra), the same should be considered to be relaxed to the extent that in all cases the character of a person should be treated to be good where he has been acquitted for minor offences on the basis of a compromise?

5. Whether the decision in the case of Arvind Gurjar (supra) lays down the correct law?

6. Any other question that may arise for adjudication or decision in the dispute involved in the present petition and which the Larger Bench thinks appropriate to decide?

8. The Hon'ble Full Bench elaborately adjudicated the issues involved in respect of selection and the pendency of criminal case against the candidates and the relevant paragraphs 33 to 45 of the judgment cited supra are extracted hereunder:

33. This brings us to consider the Question Nos. 2 and 3 referred to for the opinion, which read as

under:-

QUESTION Nos. 2 & 3:

"2. Whether the High Court in exercise of its powers under Article 226 of the Constitution of India, can step into the shoes of the Appointing Authority and determine as to whether the person concerned is fit for appointment or whether the High Court on finding that the Authority concerned has wrongly exercised its discretion in holding the candidate to be ineligible should, after quashing the order, remit the matter back to the authority concerned for reconsideration or for fresh consideration as to the eligibility of the person?

3. Whether the High Court while allowing such a petition in exercise of its powers under Article 226 of the Constitution of India can issue a further direction to the authority to appoint the person concerned on the post from the date his batchmates were appointed and to grant him back dated seniority and all other benefits or whether the High Court should simply remit the matter back to the authority for taking a decision in this regard?"

34. The power of judicial review under Article 226 of the Constitution of India is not that of a Court of appeal but to find out whether the decision-making process is in accordance with law and is not arbitrary or irrational. In a Constitution Bench judgment reported as AIR 1954 SC 440 (T.C. Basappa v. T. Nagappa) it was held that the High Court has power to issue writs in a case where subordinate tribunals or bodies or officers act wholly without jurisdiction or in excess of it or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them or there is an error apparent on the face of record but such jurisdiction is not wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned. Relevant extract of the said decision is reproduced as under:-

"(11) In dealing with the powers of the High Court under article 226 of the Constitution this Court has expressed itself in almost similar terms vide - 'Veerappa Pillai v. Raman and Raman Ltd.', AIR 1952 SC 192 at pp. 195-196 (I) and said:

"Such writs as are referred to in article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate Tribunals

or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction, vested in them, or there is an error apparent on the face of the record, and such act, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made."

These passages indicate with sufficient fullness the general principles that govern the exercise of jurisdiction in the matter of granting writs of certiorari under article 226 of the Constitution.

(24).As regards the omission to include hiring charges the High Court has observed that the Tribunal did not record any finding that such hiring was proved. The Tribunal has in fact found that as regards some cars they were hired, while others had been taken on loan, the money value for their use having been paid by the first respondent which is tantamount to saying that he had to pay the hiring charges. The matter has been dealt with in paragraph 29(d) of the Tribunal's order and the entire evidence has been gone through.

We are unable to say that the finding of the Tribunal that the respondent No. 1 had omitted to include in his return of election expenses the dinner and hotel charges is a finding unsupported by any evidence. Reference may be made in this connection to paragraph 29(f) of the Tribunal's order which deals with the matter in detail.

On the whole our opinion is that the so-called apparent errors pointed out by the High Court are neither errors of law nor do they appear on the face of the record. An appellate Court might have on a review of this evidence come to a different conclusion but these are not matters which would justify the issue of a writ of certiorari. In our opinion the judgment of the High Court cannot be supported and this appeal must be allowed. The writ issued by the High Court will therefore be vacated. We make no order as to costs of this appeal."

35. In another Constitution Bench judgment reported as AIR 1965 SC 532 (State of Mysore v. K.N. Chandrasekhara), the question examined was in relation to the appointment to the post of Munsif by the Karnataka Public Service Commission. The Court held that if the High Court was satisfied that the persons, who were occupying the post were appointed contrary to the Rules, the High Court could set aside the proceedings of the Commission and direct preparation of fresh list according to law but could not direct to include the name of the six petitioners only because they applied to the Court. The relevant extract read as under:-

"10. It may at once be observed that the order passed by the High Court cannot in any view of the case be sustained. The High Court could, if it held that the notification issued by the Commission and the appointments made by the State pursuant thereto were made in violation of the statutory rules, quash the list but the High Court could not direct that the names of six persons merely because they had applied for setting aside the list of candidates selected for promotion be incorporated in that list. The direction made by the High Court was in the nature of mandamus. Such a direction could be issued against a person or body to compel the performance of a public duty imposed upon it by law-statutory or common. The Commission is undoubtedly a body constituted pursuant to the provisions of the Constitution and has to exercise powers and perform functions entrusted to it by the Rules framed under Art. 309. But the order which the High Court made was not for compelling performance of its duty imposed upon the Commission by statute or common law. If the High Court came to the conclusion that the proceeding of the Commission was vitiated on account of some irregularity or illegality, it could declare the proceeding void. The High Court however held that the orders including respondents 4 to 13 to the petitions in the list of persons eligible for appointment should be allowed to stand, because the petitioners in the petitions before it did not insist on the issue of a writ of quo warranto. If the High Court was satisfied on an application specifically made in that behalf that the persons who were occupying posts to which they were appointed contrary to the rules governing the appointment and consequently were not competent to occupy the posts, it is difficult to appreciate the ground on which the High Court would be justified in

declining to pass appropriate orders. Either the High Court could set aside the proceeding of the Commission and direct preparation of a fresh list according to law, or the High Court could dismiss the petitions because in its view the list was regularly prepared. But the order passed by the High Court maintaining the inclusion of respondents 4 to 13 in the list and then directing the Commission to include the names of the six petitioners in the list merely because they had applied to the High Court is without authority."

36. In another judgment reported as (1969) 3 SCC 489 (Thakur Birendra Singh v. The State of M.P.), the Court held that the High Court could have quashed the orders but the High Court was not sitting in appeal over the decision of the Board of Revenue. Once the orders complained of are quashed, the matter should have been left at large without any further direction leaving the Revenue Authorities free to take any steps.

37. The scope of power of judicial review has also been examined in a judgment reported as (1994) 6 SCC 651 (Tata Cellular v. Union of India), the Supreme Court held as under:-

"74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

75. In Chief Constable of the North Wales Police v. Evans (1982) 3 All ER 141, 154, Lord Brightman said:

"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

* * *

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC, Ord. 53 in the following terms:

"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of

infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner (p. 1160)."

InR.v.Panel on Takeovers and Mergers, exp Datafin plc (1987) 1 All ER 564, Sir John Donaldson, M.R. commented:

"An application for judicial review is not an appeal." InLonrho plc v. Secretary of State for Trade and Industry (1989) 2 All ER 609, Lord Keith said: "Judicial review is a protection and not a weapon."

It is thus different from an appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. InAmin v. Entry Clearance Officer, (1983) 2 All ER 864, Re, Lord Fraser observed that:

"Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made... Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer."

76. InR.v.Panel on Take-overs and Mergers, exp in Guinness plc (1989) 1 All ER 509, Lord Donaldson, M.R. referred to the judicial review jurisdiction as being supervisory or 'longstop' jurisdiction. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.

77. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,
3. Committed a breach of the rules of natural justice,
4. Reached a decision which no reasonable tribunal would have reached or,
5. Abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) **Illegality:** This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) **Irrationality,** namely, Wednesbury unreasonableness.

(iii) **Procedural impropriety.**

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R.v. Secretary of State for the Home Department, ex Brind* (1991) 1 ACR 696, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

38. The Supreme Court in a judgment reported as (2008) 1 SCC 683 (*Aravali Golf Club v. Chander Hass*) has held that in the name of judicial activism Judges cannot cross their limits and try to take over functions which belong to another organ of the State. The Court held as under:-

"17. Before parting with this case we would like to make some observations about the limits of the powers of the judiciary. We are compelled to make these observations because we are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions. In our opinion this is clearly unconstitutional. In the name

of judicial activism judges cannot cross their limits and try to take over functions which belong to another organ of the State.

18. Judges must exercise judicial restraint and must not encroach into the executive or legislative domain, vide *Indian Drugs & Pharmaceuticals Ltd. v. Workmen* (2007) 1 SCC 408; and *S.C. Chandrav. State of Jharkhand* (2007) 8 SCC 279 (see concurring judgment of M. Katju, J.).

19. Under our Constitution, the legislature, the executive and the judiciary all have their own broad spheres of operation. Ordinarily it is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction.

20. Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like emperors. There is broad separation of powers under the Constitution and each organ of the State—the legislature, the executive and the judiciary—must have respect for the other and must not encroach into each other's domains.

21. The theory of separation of powers first propounded by the French thinker Montesquieu (in his book *The Spirit of Laws*) broadly holds the field in India too. In Chapter XI of his book *The Spirit of Laws* Montesquieu writes:

"When the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public

resolutions, and of trying the causes of individuals."

(Emphasis supplied)

We fully agree with the view expressed above. Montesquieu's warning in the passage above quoted is particularly apt and timely for the Indian judiciary today, since very often it is rightly criticised for "overreach" and encroachment into the domain of the other two organs."

39.A Full Bench of this Court in Writ Appeal No. 581/2017 (Nitin Pathak v. State of M.P.) examined the question as to whether in exercise of power of judicial review the Court can refer the matter to a Court chosen expert or whether the Court itself can act as Court of appeal and make a different view than what has been finalised as the model answer key by the Examining Body. The Bench held as under:-

"32. In respect of the second question, this Court does not and should not act as Court of Appeal in the matter of opinion of experts in academic matters as the power of judicial review is concerned, not with the decision, but with the decision-making process. The Court should not under the guise of preventing the abuse of power be itself guilty of usurping power."

40. In view of the law laid down in above said judgments, there is no doubt that in exercise of power of judicial review under Article 226 of the Constitution of India, this Court only examines the decision-making process and does not substitute itself as a Court of appeal over the reasons recorded by the State Government. We find that the decision of the State Government holding that the petitioner is not suitable, is just, fair and reasonable keeping in view the nature of the post and the duties to be discharged.

41. Even if the High Court finds that the decision of the State Government is suffering from some illegality, the jurisdiction of the High Court in a writ petition under Article 226 of the Constitution of India is to remit the matter to the Authority for reconsideration rather than to substitute the decision of the competent Authority with that of its own. The Supreme Court in a judgment reported as (1994) 4 SCC 448 (State of Haryana v. Naresh Kumar Bali) was examining a question: as to whether there could

be a direction to appoint a candidate, who sought appointment on compassionate ground. The Supreme Court held as under:-

"16. With regard to appointment on compassionate ground we have set out the law in *Life Insurance Corp'n. of India v. Asha Ramchandra Ambekar* (1994) 2 SCC 718. The same principle will clearly apply here. What the High Court failed to note is the post of an Inspector is a promotional post. The issuing a direction to appoint the respondent within three months when direct recruitment is not available, is unsupportable. The High Court could have merely directed consideration of the claim of the respondent in accordance with the rules. It cannot direct appointment. Such a direction does not fall within the scope of mandamus. Judicial review, it has been repeatedly emphasised, is directed against the decision-making process and not against the decision itself; and it is no part of the court's duty to exercise the power of the authorities itself. There is widespread misconception on the scope of interference in judicial review. The exercise of the extraordinary jurisdiction constitutionally conferred on the Apex Court under Article 142(1) of the Constitution can be of no guidance on the scope of Article 226."

42. Again while considering the question of compassionate appointment in a judgment reported as (2008) 8 SCC 475 (*General Manager, State Bank of India v. Anju Jain*), the Supreme Court held that there could not be any direction for appointment or promotion. The relevant para of the said decision is extracted as under:-

"37. Even on second ground, the submission of the Bank is well-founded. As noted earlier, the learned Single Judge issued direction to the Bank to appoint the writ petitioner, widow of the deceased employee within one month. As per settled law, a writ of mandamus can be issued directing the authority to consider the case of the petitioner for an appointment or promotion as the case may be but no direction can be given to appoint or promote a person."

43. Similar view has been expressed in a judgment reported as (2014) 3 SCC 767 (*Ganapath Singh Gangaram Singh Rajput v. Gulbarga University represented by its Registrar*) wherein while dealing with the scope of Writ of Mandamus in the matter of

appointment/recruitment, the Supreme Court held, thus:-

"25. Ordinarily, in a case where the person appointed is found ineligible, this Court after setting aside such appointment, directs for consideration of cases of such of the candidates, who have been found eligible. It is only in exceptional cases that this Court issues mandamus for appointment. The case in hand is not one of those cases where the High Court ought to have issued mandamus for appointment of Shivanand as Lecturer in MCA. Hence, we are of the opinion that the High Court rightly held Ganpat ineligible and quashed his appointment. However, it erred in issuing mandamus for appointment of Shivanand. Accordingly, we uphold the impugned order (Shivanand v. Gulbarga University, Writ Appeal No. 3216 of 2004, order dated 19-11-2009/24-11-2009 (KAR) of the High Court whereby it had set aside the appointment of the appellant herein and direct that the case of the writ petitioner Shivanand and all other candidates be considered in accordance with law. However, we make it clear that the selection already made shall be taken to its logical conclusion."

44. Therefore, the High Court could not issue any direction for appointment of a candidate from the date the other candidates were appointed as such is not the jurisdiction vested in the High Court under Article 226 of the Constitution of India.

45. In view of the above, we find that the judgment of this Court in Arvind Gurjar's case (supra) does not lay down the correct law as the High Court has substituted its decision regarding suitability of a candidate and also issued a direction to appoint the petitioner, therefore, the entire judgment does not lay down correct law and is thus, overruled. The question Nos. 2 and 3 are answered accordingly.

QUESTION No. 6:

(6) Any other question that may arise for adjudication or decision in the dispute involved in the present petition and which the Larger Bench thinks appropriate to decide?

9. In view of the fact that the writ petitioner had suppressed the fact regarding the registration of a criminal case against him in the application submitted at the first

instance and the authorities competent on verification of the character and antecedent of the writ petitioner found not satisfactory, this Court is of the opinion that the writ petitioner is not eligible and suitable for appointment to the post of Grade-II Police Constable and the said decision taken by the competent authorities is in consonance with the legal principles settled by the Constitutional Courts and there is no infirmity in respect of the impugned order passed and accordingly, this writ petition stands dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

may

To

1.Tamil Nadu Uniformed Services
Recruitment Board
Old Commissioner of Police Office Campus
Pantheon Road
Egmore, Chennai 8.

2.The Superintendent of Police
Cuddalore District.

+1 cc to Kr.N.Ramesh, Advocate, Sr.No. 29239
+1 cc to The Government Pleader, Sr.No. 29712

W.P. No. 31387 of 2018

GJII(CO)
CSL/26.04.2019

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