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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.06.2019

CORAM:

THE HONOURABLE MR.JUSTICE **S.M.SUBRAMANIAM**

W.P. (MD) No.7813 of 2013

and

M.P. (MD) No.2 of 2013

S.Sivaraman

... Petitioner

Vs

The Superintendent of Police,
Madurai District,
Madurai.

... Respondent

PRAYER: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus to call for the records pertaining to the respondent's order in Na.Ka.P1/19500/2012 dated 24.12.2012 and quash the same and directing the respondent to appoint the petitioner as Second Grade Police Constable within the period stipulated by this Court.

For Petitioner : Mr.A.Haja Mohideen

For Respondent : Mr.C.Ramar
Additional Government Pleader

ORDER

The order of rejection rejecting the claim of the writ petitioner for selection and appointment to the post of Grade-II Police Constable in the selection of the year 2012 is under challenge in the present writ petition.

2.The writ petitioner participated in the process of selection of appointment to the post of Grade-II Police Constable notified during the year 2012. The writ petitioner participated in the process of selection and he was successful in the written examination. He participated in the physical verification test and thereafter endurance test. The petitioner was waiting for the order of appointment. However, he received the impugned order dated 24.12.2012 stating that the writ petitioner was not selected on account of the fact that a criminal case was registered against him by the Uthappanayakkanur police station in Crime No.36 of 2012 under Sections 323, 506(i) of IPC. This apart, the writ petitioner has not informed the pendency of the criminal case at the time of submitting his application. On this ground, the candidature of the writ petitioner was rejected by the Superintendent of Police, Madurai District, Madurai. Challenging the said order, the present



writ petition is filed.

3.The learned counsel for the writ petitioner states that the criminal case ended with an order of acquittal and since the writ petitioner got a clean acquittal from the criminal case, his case is to be considered. Further it is contended that the future prospectus of securing public employment is also in peril as the selection of the writ petitioner had already been rejected by the authorities competent.

4.The learned additional Government Pleader appearing for the respondent opposes the contention by stating that the writ petitioner found ineligible on the ground that he was facing a criminal case during the relevant point of time. That apart, the writ petitioner has suppressed the fact regarding the pendency of the criminal case in his application. Thus, the authority competent found that his character and antecedent are not satisfactory and accordingly rejected the petitioner's application for the post of Grade-II Police Constable.

5.This Court is of the opinion that the pendency of a criminal case during the process of selection, more specifically, to the post of Grade-II Police Constable is a bar for appointment. Even in case where a candidate was acquitted for the criminal charges still the authority competent are empowered to verify the character and conduct of a person. Even as per the Rule 14(b) of Tamil Nadu Special Police Subordinate Service Rules "no person shall be eligible for the appointment to the service by direct recruitment unless he satisfied the appointing authority(iv) that he has not involved in any criminal case before Police Verification".

6.In the present case on hand, at the time of selection, the writ petitioner was facing a criminal case. Even the candidate was subsequently acquitted, would not provide a cause for him to seek appointment as a matter of right. The authority competent has to verify the character and antecedents of a candidate, so as to give appointment.

7.The Full Bench of the Hon'ble High Court of Madhya Pradesh, considered all these aspects elaborately in the case of **Ashutosh Pawar Vs. High Court of and another** 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?"

34. The power of judicial review under Article 226 of the Constitution of India is not that as of 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 MANU/SC/0098/1954 : AIR 1954 SC 440 (T.C. Basappa vs. T. Nagappa and another) 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 vs. Raman and Raman Ltd., MANU/SC/0057/1952 : 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 MANU/SC/0364/1964 : AIR 1965 SC 532 (State of Mysore and another vs. 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



"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.

7 5 . In *Chief Constable of the North Wales Police v. Evans*

MANU/UKHL/0007/1982 : (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)."

In *R. v. Panel on Takeovers and Mergers, exp Datafin plc* MANU/UKWA/0092/1986 : (1987) 1 All ER 564, Sir John Donaldson, M.R.

"An application for judicial review is not an appeal." In *Lonrho plc v. Secretary of State for Trade and Industry* MANU/UKHL/0039/1989 : (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. In *Amin v. Entry Clearance Officer*, MANU/UKHL/0040/1983 : (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 . In *R. v. Panel on Take-overs and Mergers, ex p Guinness plc* MANU/UKWA/0092/1986 : (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* MANU/UKHL/0008/1991 : (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 MANU/SC/4463/2007 : (2008) 1 SCC 683 (*Aravali Golf Club vs.*



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* MANU/SC/4993/2006 : (2007) 1 SCC 408; and *S.C. Chandra v. State of Jharkhand* MANU/SC/3501/2007 : (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 vs. State of M.P. and others) 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 MANU/SC/0732/1994 : (1994) 4 SCC 448 (State of Haryana vs. 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. of India v. Asha Ramchandra Ambekar* MANU/SC/0453/1994 : (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 MANU/SC/3729/2008 : (2008) 8 SCC 475 (*General Manager, State Bank of India and others vs. 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 MANU/SC/1149/2013 : (2014) 3 SCC 767 (*Ganapath Singh Gangaram Singh Rajput vs. Gulbarga University represented by its Registrar and others*) 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. Even, recently the Hon'ble Supreme Court in the case of **State of Madhya Pradesh and others Vs Abhijit Singh Pawar** in the decision reported in **2018 (6) CTC 659** held as follows:

"15. In the present case, as on the date when the respondent had applied, a criminal case was pending against him. Compromise was entered into only after an Affidavit disclosing such pendency was filed. On the issue of compounding of offences and the effect of acquittal under Section 320(8) of Cr.P.C., the law declared by this Court in **Mehar Singh** (supra), specially in paragraphs 34 and 35 completely concludes the issue. Even after the disclosure is made by a Candidate, the Employer would be well within his rights to consider the antecedents and the suitability of the Candidate. While so considering, the Employer can certainly take into



account the job profile for which the selection is undertaken, the severity of the charges levelled against the candidate and whether the acquittal in question was an honourable acquittal or was merely on the ground of benefit of doubt or as a result of composition.

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17. We must observe at this stage that there is nothing on record to suggest that the decision taken by the concerned Authorities in rejecting the candidature of the respondent was in any way actuated by mala fides or suffered on any other count. The decision on the question of suitability of the respondent, in our considered view, was absolutely correct and did not call for any interference. We therefore, allow this Appeal, set aside the decisions rendered by the Single Judge as well as by the Division Bench and dismiss Writ Petition No. 9412 of 2013 preferred by the Respondent. No costs."

10. The Hon'ble Apex Court categorically ruled that the employer can certainly take into account the job profile, for which the selection is undertaken, the severity of the charges levelled against the candidate and whether the acquittal in question was an honourable acquittal or was merely on the ground of benefit of doubt or as a result of composition.

11. The Three Judges Bench of the Hon'ble Supreme Court of India in the case cited supra held that the decision on the question of suitability of the respondent, in our considered view, was absolutely correct and did not call for any interference. The assessment of suitability and character and antecedents is a prerogative of the competent authority and the course of the assessment ended in arena as well as the character and antecedents, unless such an exercise is done in a capricious manner.

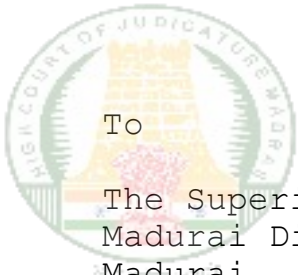
12. This being the legal principles to be followed, this Court is of the opinion that the non selection of the writ petitioner for appointment to the post of Grade-II Police Constable was on the ground of the pendency of the criminal case as well as he has suppressed the fact regarding the pendency of the criminal case at the time of submitting the application. There is no infirmity in rejecting the candidature of the writ petitioner.

13. With this observation, this writ petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar()

// True Copy //



To

The Superintendent of Police,
Madurai District,
Madurai.

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+1CC TO MR.A.HAJA, Advocate Sr. No.68015

+1CC TO THE SPECIAL GOVERNMENT PLEADER SR.No. 67885

W.P. (MD) No.7813 of 2013

and

M.P. (MD) No.2 of 2013

10.06.2019

(CO)

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