



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 25.01.2021

CORAM

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

AND

THE HONOURABLE MRS.JUSTICE S.ANANTHI

W.A. (MD)No.898 of 2020

and

C.M.P. (MD)No.4919 of 2020

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1.Union of India,
Rep. by its Secretary,
Ministry of Defence (Production and Supply),
Defence Head Quarters Post,
South Block,
New Delhi - 110 011.

2.The Chairman,
Ordinance Factory,
10A, S.K.Bose Road,
Calcutta - 700 001.

3.The General Manager,
Cordite Factory,
Aruvankadu,
The Nilgiris,
Nilgiris District,
Tamil Nadu State.

... Appellants /
Respondents 1 to 3

Vs.

1.A.Saravanakumar
2.N.Esakkiraja

... 1st Respondent/Petitioner
... 2nd Respondent /
4th Respondent

Prayer : Appeal filed under Clause 15 of the Letters Patent against the order passed by this Court in W.P.(MD)No.4645 of 2019, dated 09.01.2020.

Prayer : Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records pertaining to the impugned provisional selection list for the post of Chemical Process Worker published vide his Notification dated 19.06.2017 and the consequential impugned order of posting made by the 3rd respondent vide his proceedings dated 08.02.2018 and quash both as illegal and unconstitutional and thereby direct the respondents 1 to 3 prepare fresh selection list as per Rule of Reservation by fixing cut off marks based on communal categories and thereby appoint the petitioner in the post of Chemical Process Worker either under the category of Scheduled Cast Community



(General) based on the marks secured by the petitioner in the Written Examination within the time limit that may be stipulated by this Hon'ble Court with all service and monetary benefits.

For Appellants

: Mr.P.Subbiah

For R1

: Mr.AL.Kannan

for Mr.VR.Shanmuganathan

for Mr.B.Saravanan

J U D G M E N T

(Judgment of the Court was delivered by M.M.SUNDRESH, J.)

This Writ Appeal has been preferred by the appellants aggrieved over the order of the learned Single Judge in allowing the Writ Petition by directing them to give an appointment to the first respondent/writ petitioner.

2.In the year 2015, the third appellant issued an advertisement calling for application from the eligible candidates for various posts. For the Scheduled Caste category, 30 posts have been earmarked and the first respondent/writ petitioner is one among the candidates applied for the said post.

3.The Circular issued by the Defence Ministry on 09.05.2016, states that in line with the amendment to Section 22 of the Trade Apprentices Act, it has been decided to amend the existing policy of recruitment of industrial employees from Ex-Trade Apprentices of Ordnance Factories to the extent as under:-

'Provision of granting five extra marks to Ex-Trade Apprentices in the final merit list of the written examination conducted for a total of 100 marks may be included.'

This was done in tune with the amendment made to the Apprentices [Amendment] Act, dated 08.12.2014. The following is the amendment to Sub-Section 1 to Section 22:-

'12. In Section 22 of the principal Act, for sub-section (1), the following sub-section shall be substituted, namely;-

'(1) Every employer shall formulate its own policy for recruiting any apprentice who has completed the period of apprenticeship training in his establishment.'

The Director General of Ordnance Factories issued another Notification, dated 02.06.2016, clarifying the Circular referred to supra, thereby stating that in case the recruitment process has already begun, adequate advertisement will have to be made while giving additional marks for the Apprentices. The aforesaid Proceeding, dated 02.06.2016, is extracted hereunder:-

'All the Ordnance & Ordnance Equipment Factories have already been directed to follow MoD ID No.50(41)/2016-D (Estt/NG), dated 09.05.2016, wherein MoD has decided to grant five extra marks to Ex-Trade Apprentices of Ordnance Factories



in the final merit list of the written examination conducted for total 100 marks in all future recruitments for the post of Tradesman/Semi-skilled.

In this connection, it is further intimated that the above policy is applicable to all the written tests/examinations pertaining to direct recruitment in Tradesman/Semi-skilled held after the date of publication of the above referred circular i.e., 16.05.2016. In case the advertisement has already been published, the above provision of granting five extra marks to Ex-Trade Apprentices of Ordnance Factories must be given wide publicity through Website and places of public notice of the factories. Also, the above policy/provision along with other existing selection criteria must be incorporated in all future advertisements in connection with direct recruitment for the post of Tradesman/Semi-skilled.''

4.The first respondent/writ petitioner obtained 40 marks while few others though got lesser marks, got selected by the addition of five extra marks to Ex-Trade Apprentice.

5.The learned Single Judge allowed the Writ Petition *inter alia* holding that the above said approach cannot be sustained in the eye of law and a number of vacancies being available, the first respondent/writ petitioner will have to be accommodated as otherwise, he would have got the selection. There is no difficulty with respect to the consequential test, which is merely the process of verification as even submitted by the learned counsel appearing for the appellants before us, for which, no mark is awarded.

6.The learned counsel appearing for the appellants submitted that the Writ Petition is not maintainable as the first respondent/writ petitioner ought to have approached the Central Administrative Tribunal. The Circular and Notification prohibit the entitlement of the first respondent/writ petitioner. The persons who have been selected and those who have secured higher marks, but not selected, were not impleaded as party respondents.

7.The learned counsel appearing for the first respondent/writ petitioner submitted that admittedly, the amendment and the implementation of the same were after the Notification. It is also not in dispute that the first respondent/writ petitioner has got higher marks than the others, who have got selected by addition of five extra marks towards being Ex-Trade Apprentices. Therefore, the Writ Petition will have to be dismissed.

8.In this connection, useful reference can be made to the judgment of the Hon'ble Apex Court in **Secretary, A.P. Public Service Commission Vs. B.Swapna and others** reported in **2005 (4) SCC 154**, wherein at Paragraphs 13 to 18, it has been held as follows:-



'13. The legal position so far as the case of existing vacancies, notified vacancies and future vacancies has been set out by this Court in several decisions. In Prem Singh and Ors. v. Haryana State Electricity Board and Ors. (1996 (4) SCC 319), in paragraphs 25 and 26 it was laid down as follows:

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"25. From the above discussion of the case-law it becomes clear that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of more posts than advertised is challenged the court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case.

26. In the present case, as against the 62 advertised posts the Board made appointments on 138 posts. The selection process was started for 62 clear vacancies and at that time anticipated vacancies were not taken into account. Therefore, strictly speaking, the Board was not justified in making more than 62 appointments pursuant to the advertisement published on 2-11-1991 and the selection process which followed thereafter. But as the Board could have taken into account not only the actual vacancies but also vacancies which were likely to arise because of retirement etc. by the time the selection process was completed it would not be just and equitable to invalidate all the appointments made on posts in excess of 62. However, the appointments which were made against future vacancies - in this case on posts which were newly created - must be regarded as invalid. As stated earlier, after the selection process had started 13 posts had become vacant because of retirement and 12 because of deaths. The vacancies which were likely to arise as a result of retirement could have been

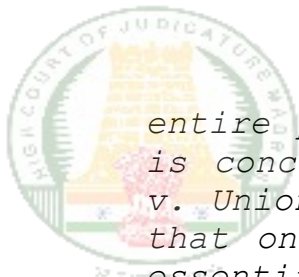


reasonably anticipated by the Board. The Board through oversight had not taken them into consideration while a requisition was made for filling up 62 posts. Even with respect to the appointments made against vacancies which arose because of deaths, a lenient view can be taken and on consideration of expediency and equity they need not be quashed. Therefore, in view of the special facts and circumstances of this case we do not think it proper to invalidate the appointments made on those 25 additional posts. But the appointments made by the Board on posts beyond 87 are held invalid. Though the High Court was right in the view it has taken, we modify its order to the aforesaid extent. These appeals are allowed accordingly. No order as to costs."

The view was recently re-iterated in *State of Jammu and Kashmir and Ors. v. Sanjeev Kumar and Ors.* (2005 (4) SCC 148 : 2005 (2) Supreme 303).

14. The High Court has committed an error in holding that the amended rule was operative. As has been fairly conceded by learned counsel for the applicant-respondent No.1 it was un-amended rule which was applicable. Once a process of selection starts, the prescribed selection criteria cannot be changed. The logic behind the same is based on fair play. A person who did not apply because a certain criteria e.g. minimum percentage of marks can make a legitimate grievance, in case the same is lowered, that he could have applied because he possessed the said percentage. Rules regarding qualification for appointment if amended during continuance of the process of selection do not affect the same. That is because every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the Statute or in the Rules showing the intention to affect existing rights the rule must be held to be prospective. If the Rule is expressed in a language which is fairly capable of either interpretation it ought to be considered as prospective only. (See *P. Mahendran and Ors. v. State of Karnataka and Ors. etc.* (1990 (1) SCC 411) and *Gopal Krushna Rath v. M.A.A. Baig (dead) by Lrs. and Ors.* (1999 (1) SCC 544)).

15. Another aspect which this Court has highlighted is scope for relaxation of norms. Although the Court must look with respect upon the performance of duties by experts in the respective fields, it cannot abdicate its functions of ushering in a society based on rule of law. Once it is most satisfactorily established that the Selection Committee did not have the power to relax essential qualification, the



entire process of selection so far as the selected candidate is concerned gets vitiated. In *P.K. Ramchandra Iyer and Ors. v. Union of India and Ors.* (1984 (2) SCC 141) this Court held that once it is established that there is no power to relax essential qualification, the entire process of selection of the candidate was in contravention of the established norms prescribed by advertisement. The power to relax must be clearly spelt out and cannot otherwise be exercised.

16. In *State of U.P. v. Rafiquddin and Ors.* (1987 (Supp) SCC 401), it was inter alia, held as follows:

"30. Before we close we would like to refer certain aspects which came to our notice during the hearing of the case relating to the functioning of the Public Service Commission, selection of candidates and their appointment to the Judicial Service. We were distressed to find that the Public Service Commission has been changing the norms fixed by it for considering the suitability of candidates at the behest of the State Government after the declaration of results. We have noticed that while making selection for appointment to the U.P. Judicial Service the Commission had initially fixed 40 per cent aggregate marks and minimum 35 per cent marks for viva voce test and on that basis it had recommended list of 46 candidates only. Later on at the instance of the State Government it reduced the standard of 40 per cent marks in aggregate to 35 per cent and on that basis it forwarded a list of 33 candidates to the government for appointment to the service. Again at the behest of the State Government and with a view to implement the decision of the high level committee consisting of Chief Justice, Chief Minister and the Chairman of the Commission forwarded names of 37 candidates in 1974 ignoring the norms fixed by it for judging the suitability of candidates. The Commission is an independent expert body. It has to act in an independent manner in making the selection on the prescribed norms. It may consult the State Government and the High Court in prescribing the norms for judging the suitability of candidates if no norms are prescribed in the Rules. Once the Commission determines the norms and makes selection on the conclusion of the competitive examination and submits list of the suitable candidates to the government it should not reopen the selection by lowering down the norms at the instance of the Government. If the practice of revising the result of competitive examination by changing norms is followed there will be confusion and the people will lose faith in



the institution of Public Service Commission and the authenticity of selection."

17. In Maharashtra State Road Transport Corpn. and Ors. v. Rajendra Bhimrao Mandve and Ors. (2001 (10) SCC 51), it was held as under:

"It has been repeatedly held by this Court that the rules of the game, meaning thereby, that the criteria for selection cannot be altered by the authorities concerned in the middle or after the process of selection has commenced. Therefore, the decision of the High Court, to the extent it pronounced upon the invalidity of the circular orders dated 24.6.1996, does not merit acceptance in our hand and the same are set aside."

18. In Dr. Krushna Chandra Sahu and Ors. v. State of Orissa and Ors. (1995 (6) SCC 1), it was held as under:

"34. The Selection Committee does not even have the inherent jurisdiction to lay down the norms for selection nor can such power be assumed by necessary implication. In P.K. Ramachandra Iyer v. Union of India (1984 (2) SCC 141) it was observed: (SCC pp.180-81, para 44)

"By necessary inference, there was no such power in the ASRB to add to the required qualifications. If such power is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reason that such deviation from the rules is likely to cause irreparable and irreversible harm."

35. Similarly, in Umesh Chandra Shukla v. Union of India (1985 (3) SCC 721) it was observed that the Selection Committee does not possess any inherent power to lay down its own standards in addition to what is prescribed under the Rules. Both these decisions were followed in Durgacharan Misra v. State of Orissa (1987 (4) SCC 646) and the limitations of the Selection Committee were pointed out that it had no jurisdiction to prescribe the minimum marks which a candidate had to secure at the viva voce.

36. It may be pointed out that rule-making function under Article 309 is legislative and not executive as was laid down by this Court in B.S. Yadav v. State of Haryana (1980 Supp SCC 524). For this reason also, the Selection Committee or the Selection Board cannot be held to have jurisdiction to lay down any standard or basis for selection as it would amount to



legislating a rule of selection." ''

9. Similarly, in **K.Manjusree Vs. State of Andhra Pradesh and another** reported in **2008 (3) SCC 512**, at Paragraph 32, it has been held as follows:-

''32. In *Maharashtra State Road Transport Corporation v. Rajendra Bhimrao Mandve* [2001 (10) SCC 51], this Court observed that 'the rules of the game, meaning thereby, that the criteria for selection cannot be altered by the authorities concerned in the middle or after the process of selection has commenced.' In this case the position is much more serious. Here, 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. That is unacceptable and impermissible.''

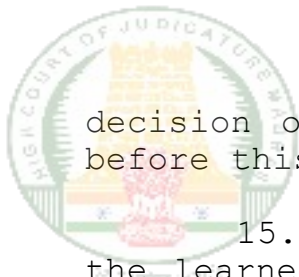
10. Thus, in the light of the above said pronouncements, a mere clarification after the publication of the proposed change, followed by a mention in the instruction given in the written instructions *per se* would not cure the defect. Therefore, the first respondent/writ petitioner is entitled to claim the benefit based on the decision, which was prevailing at the time of notification.

11. Having considered the submissions made, we are of the view that on the core issue the first respondent/writ petitioner will have to succeed though the learned Single Judge may not be correct in directing the appellants to give the appointment, that would come only after the remaining part with respect to the test is satisfied, though it may be procedural in nature.

12. As stated, the Rules of the game are sought to be changed after the play has started. Secondly, there is no need to implead either those who have got selected or the others, who would have got higher marks than the first respondent/writ petitioner. We are not on the Public Interest Litigation and the rights of the parties are not affected. Certainly, the first respondent/writ petitioner if selected after the test, will have to be placed before the others. There is no difficulty on that.

13. The learned counsel appearing for the first respondent/writ petitioner also does not stick on the point that he should be placed above the others. On the contrary, what he wants is an employment under the Scheduled Caste Category.

14. On the question of invoking the jurisdiction of the Central Administrative Tribunal, we do not wish to non-suit the first respondent/writ petitioner at this stage after the learned Single Judge has exercised her power under Article 226 of the Constitution of India and a decision has been rendered on merits. Secondly, we are purely on a question of law and in any case, the



decision of the Central Administrative Tribunal can be challenged before this Court.

15. In such view of the matter, while upholding the order of the learned Single Judge, we set aside the direction issued by the learned Single Judge to give an appointment to the first respondent/writ petitioner. The appellants are hereby directed to undertake the exercise of test to be conducted for the first respondent/writ petitioner and if all other compliances are made, appropriate orders are to be issued, giving appointment to the first respondent/writ petitioner. The entire exercise will have to be done within a period of eight weeks from the date of receipt of a copy of this judgment.

16. This Writ Appeal is disposed of accordingly. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CSIII)

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Sub Assistant Registrar (CS)

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+1 CC to M/s.B.SARAVANAN, Advocate (SR-2457[F] dated 29/01/2021)

+1 CC to M/s.P.SUBBIAH, Advocate (SR-2118[F] dated 27/01/2021)

W.A. (MD) No. 898 of 2020
25.01.2021

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