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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 7830 OF 2017
WITH
INTERIM APPLICATION NO. 1301 OF 2020
WITH
CIVIL APPLICATION NO. 2035 OF 2019
WITH
INTERIM APPLICATION NO. 1654 OF 2021
WITH
CIVIL APPLICATION NO. 913 OF 2018**

Yogesh Devidas Patil & Ors. .. Petitioners
Versus
Union of India & Anr. .. Respondents

**WITH
WRIT PETITION NO. 13054 OF 2017**

Smt. Dnyaneshwar Somnath Shinde & Ors. .. Petitioners
Versus
Union of India & Ors. .. Respondents

**WITH
WRIT PETITION NO. 13053 OF 2017
WITH
INTERIM APPLICATION ST. NO. 16320 OF 2021**

Abhay Shankarrao Shinde & Ors. .. Petitioners
Versus
Union of India & Ors. .. Respondents

**WITH
WRIT EPTITION NO. 4001 OF 2018**

Shri Jitendra Natthuji Dhanore & ors. .. Petitioners
Versus
Union of India & Ors. .. Respondents

**WITH
WRIT PETITION NO. 6267 OF 2021**

Mahendra Devidas Patil & Ors.	.. Petitioners
Versus	
Union of India & Ors.	.. Respondents

Mr. Vijay Kurlle a/w Mr. Nilesh Ojha and Mr. Mangesh Dongre for Petitioners in WP No.7830/2017 and for Applicants in CAW/2035/2019 and CAW/913/2018.

Mr. Rahul Walia a/w Asmita Pendharkar for petitioners in WP/13053/2017, WP/13054/2017 and WP/4001/2018 and for respondents in IAST/16320/2021.

Mr. Rajeshwar Panchal for petitioners in WP/6267/2021.

Mr. Ashish Rao a/w Mr. H. S. Khokhawala i/by M/s Nankani & Associates for Intervenor/Applicant in IA(St)/16320/2021

Mr. T.J. Pandian a/w Mr. T.C. Subramanian for Respondents-UOI.

**CORAM: DIPANKAR DATTA, CJ &
G. S. KULKARNI, J.**

**RESERVED ON: NOVEMBER 24, 2021
PRONOUNCED ON: FEBRUARY 26, 2022**

JUDGMENT [Per Dipankar Datta, CJ.]:

1. This is a batch of writ petitions, at the instance of 339 petitioners. These petitioners assail a common judgment and order of the Central Administrative Tribunal, Mumbai Bench, Mumbai (hereafter "the Tribunal" for short) dated 10th February, 2017 dismissing several original applications on its file. We propose to dispose of such writ petitions by this common judgment and order.

2. The original applications were instituted by 407 aspirants for public employment. They had participated in the selection process conducted by the Central Railway for appointment on Group 'D' posts, which followed an advertisement dated 2nd July, 2007. Allegedly, they were denied appointment despite being successful in the 'Physical Examination Test' (hereafter "PET" for short), written examination and medical test. The Tribunal, however, did not find any merit in the contentions raised by the original applicants and spurned the challenge by the impugned judgment and order.

3. The question that we are tasked to decide is whether the Central Railway illegally denied appointment to the petitioners, and also as to whether the Tribunal was justified in dismissing the original application.

4. The dispute lies in a narrow compass. The common claim of the original applicants before the Tribunal was that the Central Railway deviated from policy circulars issued by the Railway Board [Circular No. RBE No.121 dated 18th July, 2005, since modified by Circular No. RBE No.37 of 2007 dated 12th March, 2007] governing recruitment on Group 'D' posts. The selection process, they contended, stood vitiated because (i) successful candidates like the original applicants were denied appointment amounting to illegality and arbitrariness; (ii) no merit list of successful candidates was published leaving clear room to suspect nepotism and favouritism; (iii) 6 (six) + 1 (one), that is 7 (seven) panels in all were declared not according to merit but on the basis of roll numbers of the

empaneled candidates, contrary to the aforesaid circulars which required publication of list on the basis of merit; (iv) appointments were offered without respecting the relative merits of the candidates; (v) rules of the game were altered after commencement of the game by introducing cut-off marks which were not mentioned in the employment notice; and (vi) recourse having been taken by the Central Railway to an unfair and non-transparent procedure resulting in appointment of undeserving candidates, the same resulted in exclusion of the original applicants from the zone of consideration for appointment.

5. The Central Railway defended its action of not offering appointment to the original applicants by filing reply affidavits and additional affidavits. Although it was not disputed before the Tribunal that the original applicants were successful in clearing the qualifying examinations but the Central Railway claimed that they could not be appointed because, based on the result of the written examination, they were found to have secured less marks than the last appointed candidate in the open, SC, ST and OBC categories. The further claim was that in the midst of the selection process it had been felt appropriate to call 20% candidates, over and above the number of vacancies, at the time of document verification to meet any shortfall, should any successful empanelled candidate be disinclined to accept the offer of appointment; and that the original applicants were called upon to appear for document verification only because they formed part of this group of 20% excess candidates. It was also claimed that the 6412 advertised

vacancies having been filled up by appointing 6171 candidates, what remained were 241 vacancies. Of them, 209 vacancies for ST candidates could not be filled up for want of adequate number of such candidates and 32 cases were pending for verification. While contending that there was no illegality or lack of transparency in the selection process, the Central Railway urged that the original applications be dismissed.

6. The Tribunal not only heard the parties but delved deep into the selection process by calling for the records of selection and by also perusing the same. By a lengthy judgment, it proceeded to uphold the contentions of the Central Railway and thereby dismissed the original applications.

7. In these proceedings before us arising from the common judgment and order dated 10th February, 2017, more or less the same points that were raised before the Tribunal have been raised with additional points that the Tribunal erred in considering the grievances of the petitioners in the proper perspective, failed to apply its mind to the materials on record and returned findings which are unsustainable in law.

8. Mr. Walia, Mr. Ojha, Mr. Kurle and Mr. Panchal, learned counsel appearing for the different set of petitioners and Mr. Pandian have advanced arguments, cited several decisions of the Supreme Court and filed separate written notes of arguments for our consideration.

9. The points which were specifically urged before us are these. First, the petitioners contended that the call letters issued to them for document verification did not ever indicate

that the petitioners formed part of the group of excess 20% candidates who were called to take care of shortfall, if any. The *contra* argument of the Central Railway is nothing but an afterthought. Secondly, it was contended that the petitioners had invoked the machinery of the Right to Information Act, 2005 (hereafter "RTI Act", for short). Pursuant thereto, they were informed that the records of selection had been destroyed and hence was not available for inspection. Surprise was expressed by the learned counsel as to how, prior to termination of proceedings, the records could be destroyed thereby disabling the petitioners to be satisfied that they were given a fair deal. Thirdly, they contended that information derived under the RTI Act revealed 5347 candidates having joined and 1065 vacancies remaining unfilled. It was, accordingly, contended that even if the petitioners were part of the group of excess 20% candidates, they ought to have been appointed. Finally, the Tribunal had referred to and relied on a judgment of the Chattisgarh High Court, upholding the order of the Central Administrative Tribunal, Bilaspur, where too a similar selection process was under challenge and the candidates challenging such process were denied relief. It was brought to our notice that the Supreme Court in its decision in **Dinesh Kumar Kashyap vs. South East Central Railway**¹ reversed the decision of the Chattisgarh High Court and directed appointment to be given to those candidates who were in the group of excess 20 % candidates.

¹ (2019) 12 SCC 798

10. *Per contra*, Mr. Pandian, learned counsel for the Central Railway, contended that there has been no illegality in not offering appointment to the petitioners. According to him, though the petitioners were called for document verification, they did not even form part of the group of excess 20% candidates. Further, those who were called for document verification were never assured that even if there be any shortfall, they would be appointed. Unfortunately, only certain vacancies reserved for the Scheduled Tribe candidates (209) could not be filled up and the petitioners do not claim to belong to such category. It has been heavily stressed upon by him that the petitioners have not been able to demonstrate that any candidate, inferior to them on merit, came to be appointed. Having regard to the same, question of the petitioners being discriminated leading to violation of Articles 14 and 16 of the Constitution does not and cannot arise. The decision in **Dinesh Kumar Kashyap** (supra) was sought to be distinguished by submitting that the concerned Railway had clubbed together vacancies of different recruitment processes, which the Court faulted. That not being the case here, he urged that the ratio of such decision has no application here. He concluded by submitting that since the Tribunal, as the Court of first instance, has looked into the relevant records and returned findings which are not perverse, the writ court ought not to sit in appeal over the judgment of the Tribunal. He, thus, prayed for dismissal of the writ petitions.

11. We have heard the parties at substantial length, considered the materials on record and perused the written notes of arguments.

12. The law laid down by the Supreme Court in relation to disputes raised by unsuccessful candidates aspiring for public service is well-settled. Reference to all the decisions may not be necessary for the purpose of disposal of these writ petitions. However, the salutary principles laid down by the Supreme Court in its several decisions may be usefully condensed into “the ten commandments” for the same to be applied to the facts and circumstances of the present cases. The same are:

- (i) The rule of appointments to public service is that it should be through open invitation and on merits. After the selection process is complete, a merit list or a select list (by whatever name called) has to be prepared. While filling up the vacancies, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted.
- (ii) Inclusion of the name of a candidate in the merit/select list is at best a condition of eligibility for the purpose of appointment. A candidate in the merit/select, list though has no vested right to be appointed, he has a right to be considered for appointment and the State does not have the license of acting in an arbitrary manner. The appointing authority can neither ignore the list nor decline to make appointment on his whims.
- (iii) Despite vacancies still being available for appointment out of the number of vacancies advertised, the successful candidates do not acquire an indefeasible right to be appointed. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the

vacancies. Nonetheless, the decision not to fill up the vacancies has to be taken *bona fide* for appropriate reasons.

- (iv) Selection made by an authority for appointment is not ordinarily open to judicial scrutiny because whether a candidate is fit for a particular post or not, has to be decided by the duly constituted Selection Committee which has the expertise on the subject. Since it lacks the expertise, it is not the function of the Court to hear appeals over the decisions of Selection Committees and to scrutinize the relative merits of candidates.
- (v) Subject to a candidate's prior unawareness of any defect or infirmity in the selection process, such process can be interfered with only on limited grounds, such as a glaring illegality in the procedure vitiating the selection, or patent material irregularity in the constitution of the Selection Committee, or proved *mala fide* affecting the selection, or when an appointment made, based on a selection process, is susceptible to challenge on grounds similar to those for which a writ of *quo warranto* may legitimately issue.
- (vi) Normally, rules following which the selection has commenced cannot be changed/altered but nothing prevents the appointing authority to take measures for screening of candidates, if candidates in numbers apply for employment and the need to restrict the zone of consideration is felt. Similarly, bench marks or cut-off marks for appointment could be set without prejudicing the right of any candidate, not based on considerations that are extraneous but based on reasonable and *bona fide* intention.
- (vii) If a candidate despite being aware of any defect or infirmity in a process of selection appears at the examination for recruitment/interview by taking a calculated chance, and finds the result of such examination/interview not palatable to him, he

cannot turn around and subsequently contend that the process of examination/interview was either defective or unfair.

- (viii) Filling up of vacancies by making appointments over and above the number of vacancies advertised, would be violative of Articles 14 and 16 of the Constitution.
- (ix) Wait-listed candidates have no right of appointment, unless the relevant rules authorize appointment from such list in the given circumstances.
- (x) Appointment of candidates cannot be quashed without the appointees being brought on record as respondents.

13. It is true, as contended by learned counsel for the petitioners, that instead of preparing and publishing merit/select list in terms of Circular No. RBE No.121 dated 18th July, 2005, since modified by Circular No. RBE No.37 of 2007 dated 12th March, 2007, separate panels were declared containing names of successful candidates without indicating their merit position but on the basis of roll numbers. It is further not too clear as to why the petitioners were called for document verification, if they were not within the group of excess 20% candidates called to meet shortfall, if any. According to Mr. Pandian, panels were declared at regular intervals since thousands of appointments were being made and appointments, at one go becoming impossible, had to be made in phases. That could be true but the Central Railway should not have raised false hopes by calling candidates for document verification. Once called, they reasonably believed that they were within the zone of consideration for appointment. Be that as it may, mere call for document verification cannot clinch the

issue in favour of the petitioners. Any and every violation of a circular may not merit an interference unless it is shown that such violation amounts to a glaring illegality vitiating the selection and prejudicing the candidates to no end. That has not been shown with reference to any material on record. Also, even if it were assumed that the Central Railway was proceeding in a manner wholly contrary to law, that did not happen overnight. The panels containing names of successful candidates were declared over a period of time. If the merit list of candidates had not been prepared and published, as required by the circular, and at the same time panel after panel were being declared with the roll numbers of the successful candidates instead of in accordance with their *inter se* merit position, nothing prevented the petitioners to raise a challenge to the procedure adopted by the Central Railway at the appropriate time and seek judicial intervention. We are conscious that the petitioners being mere aspirants for appointments cannot be expected to knock the doors of the Tribunal at each and every stage of the process; however, sight cannot be lost of the fact that the petitioners waited for all the panels to be declared and then approached the Tribunal. It can reasonably be inferred from the facts and circumstances that the petitioners acquiesced in the procedure adopted by the Central Railway and turned around when they were not offered appointment. In our view, the conduct of the petitioners is a relevant circumstance for deciding whether they are entitled to discretionary relief.

14. Next, there is no material to show that the petitioners' merits were ignored by the Central Railway while appointing the 6171 candidates who came to be appointed. Hearing Mr. Walia complain that the Public Information Officer of the Central Railway had informed the petitioners of destruction of the records while responding to their query under the RTI Act, we enquired of Mr. Pandian as to why the records were not preserved. Having heard Mr. Pandian respond, on instructions, that incorrect information had been furnished to the petitioners, we asked him to produce the OMR sheets of only 10 (ten) of the petitioners, roll numbers whereof were to be notified by the petitioners' learned counsel, and to offer inspection to them of such OMR sheets for the purpose of identification that the same were, in fact, their sheets. This was intended to ascertain how far the instructions provided to Mr. Pandian were correct. We were informed in the midst of hearing that upon inspection of the OMR sheets of 10 (ten) of the candidates whose OMR sheets were called for, no anomaly in relation to identity or marks obtained could be detected.

15. Further, we had called upon the petitioners' learned counsel to demonstrate that the petitioners had secured more marks than the last appointed candidate from each category. That too could not be demonstrated. Not having so done, the argument of relative merits being overlooked does not appear to have any substance. This, almost wholly, lends credence to the argument of Mr. Pandian that the petitioners were not subjected to any discrimination.

16. Moving further, we see no reason to hold that the petitioners are entitled to claim an appointment merely because of absence of any indication in the call letters issued to them that they formed part of the excess 20% candidates. Being called for document verification was no guarantee for appointment. The contention so advanced, therefore, does not commend to us to be sound.

17. Much has been argued by the petitioners with reference to cut-off marks. According to them, fixation of such cut-off marks without notifying the candidates amounts to changing the rules of the game after the game had commenced, which is impermissible. We have found absolutely no merit in this argument. Although the panels were not prepared according to merit which, we reiterate, the Central Railway ought to have prepared, the marks obtained by the petitioners have been found to be well below the cut-off marks. The cut-off marks have been determined based on the marks obtained by the last appointed candidate in each category. It is the stage when a meandering game is brought to a halt. It is part of the selection process. If the game is halted because of reasons that are free from doubt or suspicion, one cannot really complain and question why the game has been halted. It is only when the game is halted by extraneous consideration and there is good reason to suspect that the action is neither reasonable nor *bona fide* that scrutiny by the Court would be justified. It being axiomatic that offering appointment to any of the candidates who secured marks less than the last appointed candidate in

each category would be illegal, the argument appears to us to have been made in desperation.

18. It is time to consider the petitioners' contention that 1063 vacancies remain unfilled. We find that an information, received under the RTI Act vide letter dated 4th February, 2021, has been made part of the affidavit in rejoinder of the petitioners in Writ Petition No.7830 of 2017 to the supplementary affidavit dated 24th March, 2021 of the respondents. Based thereon, it has been contended on behalf of the petitioners that only 5347 candidates joined and thus, total 1065 vacancies still remain unfilled. Having looked into the information provided vide letter dated 4th February, 2021, we find that multiple panels were declared on varying dates consisting names of 6147 candidates for the advertised 6412 vacancies. Thus, even as per the said information, the balance is 265 and not 1065. The petitioners are, therefore, not correct in contending that 1065 vacancies remain unfilled. The contention not being based on reliable evidence, which could be trusted, stands rejected.

19. The claim of the Central Railway that 209 of the remaining 241 vacancies, which could not be filled up, were reserved for the ST candidates has not been disputed. That any of the petitioners belong to ST category has also not been shown. Even though they had formed part of the group of 20% excess candidates and a shortfall did occasion, the petitioners cannot legitimately claim appointment on reserved vacancies. Also, the petitioners cannot claim appointment in respect of the 32 vacancies, for, they do not figure within the first 6412 candidates arranged as per *inter se* merit for appointment. The

argument that the petitioners are victims of arbitrariness in State action in the matter of public employment is, thus, misconceived.

20. Assuming for the sake of argument that merit was compromised and any candidate less meritorious than the petitioners was offered appointment, it was the duty of the petitioners to identify and implead the candidates who obtained appointment albeit undeservingly. None of the so-called undeserving candidates is a respondent and question of interference with the appointments made do not and cannot arise.

21. What remains is, consideration of the decision in **Dinesh Kumar Kashyap** (supra). Significantly, the petitioners by relying upon the said decision are seeking to buttress their claims by referring to the fact that the candidates there, who were included in the group of 20% excess candidates, were directed to be appointed. Once the petitioners rely on such decision, it amounts to an acceptance that they form part of such group of 20% excess candidates. It is then not open to them to contend that the appointees are inferior to them in merit. There is, thus, a fundamental fallacy *qua* placing reliance on such decision.

22. Mr. Pandian is also right that the cited decision is factually distinguishable and does not advance the cause of the petitioners. First, appointments were not made despite large number of vacancies remaining unfilled without any cogent reason for which the Court while allowing the appeal directed appointments to be given to the appellants. The present case

is clearly distinct in the sense that none of the petitioners can lay claim to whatever vacancies remain, as noticed above. Secondly, it was considered by the Court that in other zones appointments had been made from the excess 20% candidates which is not the case here. Thirdly, the Court noticed that simultaneously three processes were in progress which was reflective of the concerned railway's need to fill up the vacant posts. It was held that rights of candidates like the appellants who had appeared in the selection pursuant to the notification of 2010 could not be taken away by the selection processes started much later, and that they cannot be made to suffer for the delays on the part of the concerned railway. Again, the facts here are completely different. A single process of recruitment has been the subject matter of scrutiny and multiple processes were not on simultaneously. Fourthly and finally, the Court brushed aside the argument that the appellants had secured less than the cut-off marks prescribed in the subsequent selection processes by observing that the respondents were comparing apples with oranges. Unfortunately for the petitioners, there is no scope for us to hold apples have been compared with oranges. For the reasons as above, we regret being unable to persuade ourselves to grant relief of appointment based on the decision in **Dinesh Kumar Kashyap** (supra).

23. Having considered all the rival contentions raised at the Bar, we wish to dwell on one other relevant aspect. The petitioners have in unison complained that the selection process was not conducted in accordance with the circulars

issued by the Railway Board. In other words, the process is illegal. There could be some truth in such a complaint. If we were to hold that the complaint of the petitioners is well-founded, the consequence thereof would be to declare the selection process illegal with direction for fresh selection. However, such declaration/direction can never be made without the appointees being on record. The decision of the Supreme Court in **Ranjan Kumar vs. State of Bihar**² stares at our face. The petitioners without arraying the beneficiaries of the so-called illegal selection process, i.e., the several thousand appointees, urge that relief of appointment should be directed notwithstanding their contention of the process suffering from illegality. No one can claim the benefit of an act/action/process which, according to his own case, is illegal. Article 14 guarantees equality before law, but not securing illegal benefits. We find that the challenge in these writ petitions should also be spurned, being hit by the doctrine of approbation and reprobation.

24. Before parting, we wish to place on record our sympathies for the petitioners. They have been engaged in this legal battle expecting public employment for far too long. Such expectation arose because of the peculiar procedure adopted by the Central Railway in publishing panel after panel with names and roll numbers of the successful candidates. Since the recruitment cell of every zonal railway is entrusted with the task of recruitment, more professionalism and a greater degree of transparency in such task is the need of the hour. If indeed the

² (2014) 16 SCC 187

merit list and wait-list were published prior to document verification, much of the anxiety and agony of aspirants like the petitioners may not have arisen. We hope and trust that in future, while conducting recruitment processes, the Central Railway would conduct the selection process with more professionalism and greater transparency, and strictly abide by the terms of the circulars issued by the Railway Board that bind it.

25. In the final analysis, we hold that the writ petitions are devoid of merits for the foregoing reasons and are, accordingly, liable to fail. The judgment and order of the Tribunal under challenge is upheld and the writ petitions are dismissed. No costs.

26. In view of the above order, all pending applications stand disposed of.

(G. S. KULKARNI, J.)

(CHIEF JUSTICE)

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