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W.P.(MD)No.2048 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.02.2023

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P.(MD)No.2048 of 2020

and

W.M.P(MD)Nos.1716, 1717, 1718, 1720 and 1721 of 2020

Dr.P.Palavesakumar

... Petitioner

v.

- 1.The State of Tamil Nadu,
Rep. By its Principal Secretary,
Health and Family Welfare Department,
Fort St. George, Secretariat, Chennai – 600 009.
- 2.The Director of Indian Medicine and Homeopathy,
Arignar Anna Hospital Complex, Arumbakkam, Chennai.
- 3.Medical Services Recruitment Board (MRB),
Rep. By its Member Secretary, 7th Floor, DMS Building,
359, Anna Salai, Teynampet, Chennai – 600 006.
- 4.The Joint Director of CBI (South),
College Road, Suba Road Avenue,
Thousand Lights, Chennai – 600 006.
- 5.C.Mariyappan,
Government Rural Siddha Dispensary,
Periyathanda, Salem.

... Respondents



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Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records on the file of the 3rd respondent in connection with the impugned provisional selection list issued by him in notification No.6/MRB/2017, dated 16.11.2017 and the consequential rejection order passed by him in his proceedings in Pro.No.1674/MRB/S2/2017 dated 21.11.2019 and quash the both as unconstitutional and illegal and thereby direct the 4th respondent to conduct investigation in regard to the selection and appointment made to the post of Assistant Medical Officer (Siddha) and file his respect before this Court and thereby direct the 3rd Respondent to prepare the fresh selection list based on merit and communal reservation by following G.O.Ms.No.55 P & AR Department dated 08.04.2020 and as per the judgment of the Hon'ble Apex Court rendered in Rajeshkumar Daria Vs Rajasthan Public Service Commission (2007 (8) SCC 785) and thereafter consider the petitioner's case for appointment to the post of Assistant Medical Officer (Siddha) with all service and monetary benefits.

For Petitioner : Mr.A.D.Ganesamoorthi

For Respondents : Mr.A.K.Manikkam,
Special Government Pleader for R1 & R2.

: Mr.Veera Kathiravan,
Additional Advocate General,
assisted by Mr.T.S.Mohamed Mohideen,
Standing Counsel for R3.



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ORDER

Heard the learned counsel on either side.

2.The writ petitioner is holding MD (Siddha) degree. He belongs to a Scheduled Caste. He is also differently abled. He applied for the post of Assistant Medical Officer (Siddha) in response to the notification dated 02.08.2017 issued by Medical Services Recruitment Board, Chennai. He obtained 57/100 in the written examination. However, he was not selected.

3.Challenging the provisional selection list, the petitioner filed W.P. (MD)No.21528 of 2017. However, at the time of final hearing of the case, he restricted his relief. The writ petition was disposed of on 20.08.2019 with a direction to the respondents to consider his claim subject to the availability of vacancy. The third respondent rejected the petitioner's request by holding that the selection was properly done. Questioning the rejection order dated 21.11.2019 as well as the provisional selection list, he filed this writ petition.

4.The respondents 2 and 3 filed counter affidavit and additional counter affidavit controverting the petitioner's claim. The learned Additional Advocate General assisted by the Standing counsel for the Board took me through their contents and submitted that no interference is warranted.



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5.The first issue that calls for consideration is whether the Board correctly applied the reservation policy. A mere look at the selection list shows that the meritorious scheduled caste candidates instead of being appointed against open category vacancies were appointed as against reserved vacancies. This can be very easily demonstrated. For instance, Dr.S.Magudapathi had secured 79.50 marks. He was appointed against the reserved vacancy. A candidate who secured only 72.50 marks has been appointed against open category vacancy. Nothing can be more illegal. The selection procedure runs counter to what has been laid down by the Hon'ble Supreme Court of India in **Anil Kumar Gupta V. State of Uttar Pradesh (1995) 5 SCC 173** and **Rajesh Kumar Daria V. RPSC (2007) 8 SCC 785**. In the writ petitions (W.P.(MD)Nos.1934 and 2037 of 2020) filed by Dr.P.Mujeetha Bai and Dr.M.Suganthi, both of whom belong to Scheduled Caste and who also took part in the very same selection process, I held that 12 out of 15 candidates appointed against reserved vacancies meant for scheduled castes ought to have been appointed against general vacancies. If the selection list had been ordered to be revised, 12 open category candidates would have had to face exit. However, such a course of action was not adopted for more than one reason. The writ petitioners had already challenged the selection list but confined their relief to seeking consideration of their claims subject to availability of vacancies as on 20.08.2019. By the



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time, the writ petitions filed by the said two candidates were taken up for disposal, more than three years had elapsed. It would have been inequitable to terminate the services of selected candidates for the mistake committed by the Board. I therefore directed that the said two candidates can be accommodated against existing general vacancies.

6.Though the petitioner's case was also taken up along with the petitions filed by Dr.Mujithabai and Dr.Suganthi, I felt that adopting the same approach would not have provided any relief to him. The reason was simple. The total number of posts to be filled up was 101. 18 posts were earmarked for scheduled caste candidates including SC(A). The petitioner had scored only 57 marks. Even if the entire list is re-worked, the petitioner would still not have made it. More than 15 candidates belonging to SC category had scored more than 57 marks. The erroneous application of the social reservation policy had not caused any prejudice to the writ petitioner.

7.The next question that arises for consideration is whether the recruiting agency correctly applied the special reservation policy meant for differently abled candidates. The answer is in the negative. The Board wrongly applied the special reservation policy also in this case. This is evident from the following particulars furnished by the Board in their counter affidavit:-



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<i>S.No.</i>	<i>Name of the candidate</i>	<i>Communal Category</i>	<i>Marks obtained in the Competitive Examination</i>
01.	<i>Dr.Mariappan.C</i>	<i>MBC</i>	<i>68.00 Marks</i>
02.	<i>Dr.Sumithra S</i>	<i>BC</i>	<i>64.00 Marks</i>
03.	<i>Dr.Eswari N</i>	<i>MBC</i>	<i>59.50 Marks</i>
04.	<i>Dr.Balamurugan P</i>	<i>BC</i>	<i>59.00 Marks</i>
05.	<i>Dr.Ramalingam</i>	<i>MBC</i>	<i>58.00 Marks</i>
06.	<i>Dr.Palavesakumar P</i>	<i>SC</i>	<i>57.00 Marks</i>
07.	<i>Dr.Sudha R</i>	<i>SC</i>	<i>56.00 Marks</i>
08.	<i>Dr.Nithyanantham SS</i>	<i>BC</i>	<i>52.50 Marks</i>

What the Board did was to club all the differently abled candidates in one slot. Since four posts had been earmarked for differently abled candidates, the Board selected the first four meritorious candidates. But this is not the manner in which the special reservation policy should have been applied. In ***K.R.Shanthi v. State of T.N (2012) 7 MLJ 241***, the manner of applying the principle of reservation was explained as follows :

“14.A perusal of the above judgments would keep at least two things beyond any pale of doubt. Firstly, the roster is not vacancy based, but the same is only post based. It identifies the number of posts earmarked for various categories under the vertical reservations and posts left behind for open quota as well as special reservations. Secondly, after so identifying the posts, it should be calculated as to how many vacancies are to be filled up under



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various categories in the current selection. If once the number of vacancies earmarked for each category in the current selection is identified by using the roster, thereafter the roster will have no further role to play in the matter of selection. After identifying the number of vacancies earmarked for various categories, the selection for each category has to be made purely based on merit following the method detailed below:

First Step:

- (i) As against the number of vacancies identified for open quota, irrespective of caste, sex, physically challenged, etc. everyone should be allowed to compete based on merits.
- (ii) The meritorious candidates should be first selected as against the above vacancies under open quota.

Second Step:

- (iii) After completing the first step, moving on to the vertical reservation categories, selection has to be made for each category from amongst the remaining candidates belonging to the particular reserved category (vertical) based on merits.

Third Step:

- (iv) After completing the second step, horizontal reservation which cuts across the vertical reservation has to be verified as to whether the required number of candidates who are otherwise entitled to be appointed under the horizontal reservation have been selected under the vertical reservation.



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(v) On such verification, if it is found that sufficient number of candidates to satisfy the special reservation (horizontal reservation) have not been selected, then required corresponding number of special reservation candidates shall have to be taken and adjusted/accommodated as against social reservation categories by deleting the corresponding number of candidates therefrom.

(vi) Even while filling up the vacancies in the vertical reservation, if, sufficient number of candidates falling under the horizontal reservation have been appointed, then, there will be no more appointment exclusively under the horizontal reservation.

Caution:

(vii) At any rate, the candidates who were selected as against a post under open quota shall not be adjusted against the reserved quota under vertical reservations."

K.R.Shanthi was approved by the Hon'ble Apex Court in the decision reported in **(2021) 4 SCC 686 (State of T.N. v. K.Shobana)**. In **Saurav Yadhav v. State of U.P (2021) 4 SCC 542**, it was noted that horizontal reservations are interlocking reservations and as a sequel, they had to be calculated concurrently and along with the vertical or social reservation quotas.

8.The recruiting agency ought to have applied the 4% horizontal reservation policy meant for differently abled candidates against each vertical



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category. 4 out of 101 posts had been earmarked for being filled up under this category. It is seen that out of 8 differently abled candidates, 3 of them belonged to MBC category, 3 of them belonged to BC category and only 2 of them belonged to SC category. The petitioner scored more marks than the other SC (PH) candidate Dr.Sudha. Thus, the petitioner was the meritorious differently abled candidate under the SC category. If K.R.Shanthi had been applied, the selected candidate figuring last in the SC category should have made way for the writ petitioner.

9.The respondents 1 to 3 raised quite a few objections for granting relief to the petitioner. The first contention was that as per the communal roster as applicable to SC (PH) candidates, the turn was not meant for those suffering from loco motor disability. To consider this, the relevant statutory provisions must be examined. Section 34 of the Rights of Persons with Disabilities Act, 2016 is as follows:-

"34.Reservation.—(1) Every appropriate Government shall appoint in every Government establishment, not less than four per cent. of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, one per cent. each shall be reserved for persons with benchmark disabilities under clauses (a), (b) and (c) and one per cent. for persons with benchmark



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disabilities under clauses (d) and (e), namely:—

(a) blindness and low vision;

(b) deaf and hard of hearing;

(c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;

(d) autism, intellectual disability, specific learning disability and mental illness;

(e) multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disabilities:

Provided that the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time: Provided further that the appropriate Government, in consultation with the Chief Commissioner or the State Commissioner, as the case may be, may, having regard to the type of work carried out in any Government establishment, by notification and subject to such conditions, if any, as may be specified in such notifications exempt any Government establishment from the provisions of this section.

(2)Where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment



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year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the five categories with the prior approval of the appropriate Government.

(3)The appropriate Government may, by notification, provide for such relaxation of upper age limit for employment of persons with benchmark disability, as it thinks fit.

Section 27 of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016 reads as under:-

"27.Reservation of Appointment._ *Where the special rules lay down that the principle of reservation of appointments shall apply to any service, class or category, selection for appointment thereto shall be made on the following basis:—*

(a) The unit of selection for appointment, for the purpose of this section, shall be two hundred, of which thirty six shall be reserved for the Scheduled Castes including six offered to



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Arunthathiyars on preferential basis amongst the Scheduled Castes, two for the Scheduled Tribes, fifty three for the Backward Classes (other than Backward Class Muslims, Most Backward Classes and Denotified Communities), seven for the Backward Class Muslims, forty for the Most Backward Classes and the Denotified Communities and sixty two shall be filled on the basis of merit: Provided that if even after filling up of the required appointments or posts reserved for Arunthathiyars amongst the Scheduled Castes in Schedule-V, if more number of qualified Arunthathiyars are available, such excess number of candidates of Arunthathiyars shall be entitled to compete with the other Scheduled Castes in the inter-se-merit among them and if any appointment or post reserved for Arunthathiyars remain unfilled for want of adequate number of qualified candidates, it shall be filled up by Scheduled Castes other than Arunthathiyars.

[(b) Out of the total number of appointments referred to in clause (a), in the case of appointment made by direct recruitment, one per cent each shall be reserved for persons with benchmark disabilities under categories (i), (ii) and (iii) and one per cent for persons with benchmark disabilities under categories (iv) and (v) both taken together, namely:-

(i) blindness and low vision;

(ii) deaf and hard of hearing;



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(iii) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;

(iv) autism, intellectual disability, specific learning disability and mental

(v) multiple disabilities from amongst persons under categories (i) to (iv) including deaf -blindness in the posts identified for each disabilities;

and the appointment shall be made in the turn and in the order of rotation specified in Schedule–VI;

(bb) Reservation for persons with benchmark disabilities shall be made in respect of posts identified by the Government in each department, under section 33 of the Rights of Persons with Disabilities Act, 2016;

(bbb) Where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, such vacancy shall be filled up by appointment of a person, other than a person with disability:"

Schedule VI contains tables indicating the turns vis-a-vis rotation reserved for the persons with particular bench mark disabilities. The learned standing counsel for the Board contended that the turn earmarked during the present rotation is not meant for a person with loco motor disability. This argument is unacceptable. Section 34 of Central Act 49 of 2016 must be understood and



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applied in the light of Section 33 of the Act. Section 27 (bb) of Tamil Nadu Act 14 of 2016 refers to Section 33 of the 2016 Central Act. If a particular post has not been identified as can be held by a person with a particular disability, Schedule VI of the Tamil Nadu Act will become inapplicable to the said category. It is true that out of the five categories of disability, one percent each has been reserved for categories (i), (ii) and (iii) and one percent for categories (iv) and (v) both taken together. If for the post in question, category (iii) alone has been identified as suitable, that does not mean PH reservation will be reduced to one percent. The statutory mandate is that 4% horizontal reservation should be made for differently abled candidates. For the post of Assistant Medical Officer (Siddha), candidates having loco motor disability alone appear to be suitable. The other categories appear to have been left out. G.O (Ms) No.13 Welfare of Differently Abled Persons Department dated 02.03.2016 permits a person with disability in one leg to be suitable. The petitioner has disability in lower part of his left limb. He therefore fulfils the statutory requirements.

10.In fact, the proviso to Section 34 (2) is to that effect. It states that if the nature of vacancies in an establishment is such that a given category of persons cannot be employed, the vacancies may be interchanged among the five categories. But a qualification has been added. It talks about the prior



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approval of the appropriate government. I take judicial notice of the fact that even though Section 33 and Section 34 talk about identification of posts and issuance of instructions for reservation in promotion, various governments have not been nimble-footed. The Hon'ble Supreme Court in more than one case had prodded them and nudged them by imposing time-limits. Though the proviso employs the expression "prior approval", it must be understood as directory under certain circumstances. There are five categories of disabilities. For the post of Doctor, the (iii) category alone has been identified as suitable. My attention has not been drawn to any approval given by the government in this regard. If the aforesaid requirement is taken as mandatory, then, the 4% reservation will tickle down to one percent. That would amount to defeating the very object of the statute. That is why, I reject the argument of the learned standing counsel that a candidate having loco motor disability cannot be appointed against the present turn.

11.The learned standing counsel also argued that since the petitioner had scored only 57 marks, he cannot be selected. He probably had Article 335 of the Constitution of India in mind. Article 335 originally read as follows :

"335.Claims of Scheduled Castes and Scheduled Tribes to services and posts.-The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken



into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.”

But vide 82nd Amendment, the following proviso was added :

“Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters or promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.”

I hold that the authority is not obliged to keep lowering the standards of evaluation or relax the qualifying marks till they find a candidate. Only in water scarce regions, the bore well is deepened till it reaches the water table. Such an approach need not always be adopted to the point of sacrificing the merit principle. The proviso cannot be applied to the extent of obliterating the main provision. However, in the case on hand, a differently abled BC candidate who scored 59 marks has been selected. I therefore hold that the petitioner who belongs to differently abled SC category having scored 57 marks should also be deemed to have passed muster.



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12. Now comes what I may colloquially call as anti-climax. The Government of Tamil Nadu is following 200 point roster (G.O Ms.No.55 P&AR Department dated 08.04.2010). G.O Ms.No.21 Welfare of Differently Abled Persons Department dated 30.05.2017 was issued so as to bring the provisions of Tamil Nadu Act 14 of 2016 in line with the provisions of Central Act 49 of 2016. Schedule VI deals with reservation for persons with benchmark disabilities. The Schedule begins thus "*the following turns indicated against the rotation shall be reserved for persons with benchmark disabilities*". There are several vertical columns : 1)General Turn 2)General Turn Women 3)Backward Classes (other than BC Muslims) 4)Backward Classes (other than BC Muslims) Women 5)Backward Classes Muslims 6)Backward Classes Muslims Women 7)Most Backward Classes and Denotified Communities 8) Most Backward Classes and Denotified Communities Women 9)Scheduled Castes 10)Scheduled Castes Women 11)Scheduled Castes (Arunthathiyars on preferential basis) 12) Scheduled Castes (Arunthathiyars on preferential basis) Women 13)Scheduled Tribes 14)Scheduled Tribes Women. Rotation and turns have been mentioned for each social reservation category and for each disability. I gratefully acknowledge the assistance rendered by Shri.R.Parthiban, P.A (G) to District Collector, Madurai and Shri.A.Ramanathan, Assistant Director of Employment, Madurai in this regard. They demonstrated as to how the 200 point roster is worked in the first rotation. The reservation



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pans out as follows :

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“Point 25 – blind, Point 37 – Loco motor, Point 71-Deaf and, Point 97 – Autism, Point 124 – Blind, Point 136 – Loco motor, Point 167-Deaf and, & Point 197-Autism.”

A simple arithmetic would show that the 4% reservation applicable to differently abled candidates is scientifically and perfectly fulfilled. Of course, the turns would vary for each rotation. I however face one conceptual difficulty. It is not in sync with what has been laid down by the Hon'ble Supreme Court. K.R.Shanthi “steps” are not marching in tune with the 200 point roster. K.R.Shanthi has been approved by the Hon'ble Apex Court also. As per K.R.Shanthi, to fulfil the needs of horizontal reservation, there might be elimination of the candidates figuring last in the list. If 200 point roster is applied as such, there is no need for elimination of the last candidate in the particular social category list. Because the turn is reserved exclusively for the differently abled candidate of the prescribed type. Secondly, K.R.Shanthi in ringing terms declares that the open category vacancies must be filled up purely on merit irrespective of the category to which candidates may belong. But in the 200 point roster, point-25 comes under “General Turn” category. It means that the post falling against the said vacancy (point-25) though meant



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to be filled purely on merit, stands reserved for a differently abled candidate coming under blind category.

13.Though first rotation fulfills 4% requirement, not all rotations yield a similar result. If the 200 point roster as framed vide G.O Ms. No.21 dated 30.05.2017 is strictly applied, there is every possibility that during certain recruitment drives, even though differently abled candidates are available, they may not be selected because their turn would not have arrived. These are the practical consequences that may ensue. If K.R.Shanthi is applied, then, the statutory object would be fulfilled. When a formula approved and upheld by the Hon'ble Supreme Court is holding the field, the 200 point roster cannot be allowed to be applied in a contra manner. Though the norms issued by the government contemplate that every department must have a roster register, the official respondents were not able to answer my question as to what was the present rotation. Since Section 33 of the Central Act contemplates identification of posts, the roster will have to be tailor made with reference to the particular post as far as the differently abled candidates are concerned.

14.Citing the aforesaid conceptual difficulties, I do not want to deny relief to the petitioner. The approach adopted for Dr.Mujithabai and



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Dr.Suganthi can be adopted for the petitioner also. It is true that many SC candidates have scored above the petitioner but they have not come to the court. There is a saying in Tamil "Only the crying child gets milk". Since the petitioner alone is before me, in view of my finding that as many as 12 meritorious SC candidates ought to have been appointed against OC vacancies, I direct the respondents 1 to 3 to appoint the petitioner as Assistant Medical Officer (Siddha) against the existing general vacancy within a period of four weeks from the date of receipt of copy of this order. The order impugned in the writ petition is set aside.

15.The writ petition is allowed accordingly. No costs. Connected
Consequently, connected miscellaneous petitions are closed.

03.02.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes/ No
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To

- 1.The State of Tamil Nadu, Rep. By its Principal Secretary,
Health and Family Welfare Department, Fort St. George, Secretariat,
Chennai – 600 009.
- 2.The Director of Indian Medicine and Homeopathy,
Arignar Anna Hospital Complex, Arumbakkam, Chennai.
- 3.The Member Secretary, Medical Services Recruitment Board (MRB),
7th Floor, DMS Building, 359, Anna Salai, Teynampet, Chennai – 600 006.
- 4.The Joint Director of CBI (South), College Road, Suba Road Avenue,
Thousand Lights, Chennai – 600 006.



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G.R.SWAMINATHAN, J.

SKM

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