

16.08.2024
Item No.06
Court No.11
Avijit Mitra

**WP.CT 118 of 2024
with
IA No. CAN 1 of 2024**

In re: An application under Article 226 of the Constitution of India;

And

**Abdul Shazid
- versus -
Union of India & ors.**

Mr. Shyamal Mukherjee,
Mr. Susanta Kumar Gangopadhyay,
Mr. Subhas Ray,
Ms. Subhasree Banerjee
...for the petitioner
Mr. Pinaki Ranjan Chakraborti,
Mr. Sujit Mitra
...for the respondent no.1
Mr. Shatadru Chakraborty,
Mr. Dibesh Dwivedi
...for the respondent nos. 2 to 5

Questioning the justifiability of the order dated 17th July, 2023 passed by the learned Tribunal in the original application (in short, OA), being OA 970 of 2019, the present writ petition has been instituted. By that order, the OA was disposed of with following directions:

“Accordingly, we dispose of this O.A. with a direction to the respondent authorities that whenever there is a proposal to conduct such examination pursuant to the aforesaid cancellation, due weightage is to be given to candidates like the applicant herein. This should be only a one time measure and is being granted on the ground that the issue of overage should not come in the way of selection of a candidate.”

To better appreciate the issues involved in the writ petition, the essential facts must be noted.

In 2017, the respondents initiated a selection process to fill the post of Watchman. Further that objective, an advertisement dated 16th September 2017 was published, inviting applications from eligible candidates. The selection process had two components: i) a written test with a total of 50 marks, and ii) a Trade Test/Skill Test, also worth 50 marks. The Trade Test/Skill Test consisted of two parts: a 100-meter race to be completed within 16 seconds and a 1.6 km race to be completed within 7 minutes, each carrying 25 marks.

The petitioner participated in the selection process and secured 29 marks in the written test. He completed the 100-meter race in 15.69 seconds and the 1.6 km race in 6.54 minutes. Therefore, it appears that the petitioner completed both races within the stipulated times.

Subsequently, the entire selection process was scrapped due to administrative reasons. Upon inquiry, the petitioner learnt that, due to rainfall, both races were conducted on the road. The experts, who were engaged to organise the races, altered the time limits and distances for the events and awarded marks on a pro-rata basis. Specifically, time-limit of the 100-meter race was changed, ranging from less than 13 seconds to 18 seconds, and the 1.6 km race was reduced to 1.5 km with a new time limit of 6 minutes. These changes were made without the approval of the competent authority.

However, ultimately the respondents determined that the alteration to the distance and time-limit of the races were

improper and accordingly the entire selection process was cancelled/scrapped.

Given the situation, the petitioner approached the learned Tribunal with OA 970 of 2019 challenging the respondents' action in cancelling the selection process. While the OA was pending, a vacancy notice *vide*. dated 14th March, 2024 was issued inviting online applications from eligible candidates for the post, with the submission period from 15th March, 2024 to 15th April, 2024. In the vacancy notice, it was stated that candidates who had previously applied in response to the notice published on 26.09.2017 need not apply again, as their earlier applications would be considered if they met the conditions of the original notice. However, the petitioner challenged this new notification by preferring a miscellaneous application, being MA 204 of 2020.

Records reveal that both the original and miscellaneous applications were heard together. As noticed previously, by passing the order dated 17th July, 2023, the learned Tribunal denied the petitioner's request to cancel the fresh selection process and to consider his appointment to the post, noting that the petitioner had not pursued the miscellaneous application diligently. However, ultimately, the respondents were directed to consider the candidatures of the candidates like the petitioner in the fresh selection process without raising the issue of their being over-aged. Aggrieved by the order dated July 17, 2023, the petitioner has instituted this writ petition.

Mr. Mukherjee, learned advocate for the petitioner, submits that the petitioner emerged to be the sole successful

candidate in the earlier selection process. He argues that the earlier selection process was cancelled because the experts altered the race times and distances and introduced a revised marking system without proper approval. He argues that the petitioner should not be made to suffer due to these unauthorized changes and procedural issues for which he was not at fault.

He submits that, although the Tribunal, by its order challenged in this writ petition, has directed the respondents to consider the petitioner's candidature without raising the issue of his age, the order is ineffective. He explains that if the petitioner is now required to participate in the Trade/Skill Test, which includes a 100-meter race and 1.6 kms. race, it will be nearly impossible for him to compete effectively against the new entrants.

Mr. Mukherjee asserts that in the earlier selection process, the petitioner proved himself to be entitled to the appointment. He argues that, due to faults on the part of the respondents, the petitioner should not be deprived of his legitimate claim. He expresses concern that if the issue is relegated to the respondents, it may not lead to a satisfactory resolution. Therefore, he prays for a specific direction upon the respondents to appoint the petitioner to the post.

In rebuttal, Mr. Chakraborty, learned advocate for the respondents Nos. 2 to 5, submits that the authority correctly cancelled the selection process due to the unauthorised changes made by the experts to the mode and manner of the Trade/Skill test, as well as the introduction of a revised marking system. He

further submits that the petitioner will be given an opportunity to participate in the next selection process.

He argues that the learned Tribunal only directed a relaxation of the age limit. The petitioner cannot claim any further benefits, as no indefeasible right was created merely by participating in the selection process. He further argues that the petitioner cannot claim a vested right to appointment to the post. Answering our query, Mr. Chakraborty submits that the vacancies indicated in the earlier notice are still vacant.

Heard the learned advocates appearing for the respective parties and perused the materials on record.

Admittedly, the experts assigned to organize the races altered the times and distances and introduced a revised marking system without obtaining the necessary approval from the competent authority. The respondents cannot deny that the petitioner secured 29 out of 50 in the written test and completed the 100-meter race and the 1.6 km race in 15.69 seconds and 6.54 minutes, respectively. According to the earlier vacancy notice, a candidate was required to complete the races within 16 seconds and 7 minutes, respectively, with 25 marks awarded for each race.

Although a report (Annexure-R/8 to the Affidavit-in-Reply) claims that the earlier vacancy notice specified that 'pro-rata marking would be allowed for taking higher time' but the petitioner has denied this claim and no annexure has been produced to substantiate this assertion.

However, under the revised marking system, the petitioner was awarded 11.50 marks for the 100-meter race and no marks for the 1.6 km race. The earlier vacancy notice did not specify that marks would be awarded on a pro-rata basis according to the timings secured by the candidate. Therefore, the inescapable conclusion is that the petitioner should have been awarded 25 marks for each race, totalling to 50 out of 50 marks for the races, which would lead to a cumulative score of 79 out of 100.

The respondents cannot deny that the experts were engaged by them and, as such, acted as their agents. Therefore, the respondents cannot disown or shirk their liability arising from the acts or misdeeds of their agents. Furthermore, the respondents cannot deny that the petitioner played no role in these irregularities. Instead, he emerged to be a successful candidate in the process.

Indisputably, there are numerous decisions rendered by the Hon'ble Supreme Court which establish that no candidate acquires an indefeasible right to a post merely by appearing in the examination or even by being included in the select list. Nevertheless, the State does not have an unqualified prerogative to refuse an appointment arbitrarily or to disregard the merit of candidates as reflected in the merit list prepared at the end of the selection process. The validity of the State's decision not to make any appointments is subject to judicial review by a competent writ court. If such a direction is found to be arbitrary, appropriate directions can be issued by the court.

Therefore, for the reasons stated above, we are unable to endorse the respondents' action to cancel the earlier selection process initiated in terms of the vacancy notice published on 26.09.2017 and in denying to appoint the petitioner to the post.

As previously noted, the respondents have offered the petitioner a chance to participate in the upcoming selection process. However, we recognize the petitioner's concern that, after a gap of nearly six years, participating in a Trade/Skill Test that includes a 100-meter race and a 1.6-kilometer race will make it nearly impossible for him to compete effectively against newer and relatively younger candidates. Consequently, this opportunity will not provide any real benefit to the petitioner.

The next question is whether it would be appropriate to issue a mandatory direction to the respondents to appoint the petitioner to the post applied for. The act of making an appointment to a post falls squarely within the domain of the administration. Normally, judicial institutions refrain from issuing mandatory directions for appointments to avoid unnecessary interference in administrative functions. However, in appropriate cases, the High Court may issue a writ of Mandamus or an appropriate order or give direction to compel the administration to perform the duties that it should have carried out.

In a decision, reported at AIR 1987 SC 537 (The Comptroller and Auditor General of India, Gian Prakash, New Delhi & another v. K.S. Jaganathan & Anr.), the Hon'ble Supreme Court ruled that the High Courts in India exercising their jurisdiction under Article 226 of the Constitution of India

have power to issue a writ of or in the nature of mandamus or to pass order or give necessary directions where the Government or a public authority has failed to exercise or wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case, a High Court can issue a writ of mandamus or pass order to compel the performance of discretion in proper and lawful manner, and in a proper case, in order to prevent injustice resulting to the concerned parties, it may itself pass an order which the Government or a public authority should have passed.

In this case, the respondents' decision to cancel the entire selection process due to unauthorized changes in the time and distance of races resulted in gross injustice to the petitioner. Moreover, after a gap of nearly 6 years, requiring the petitioner to compete in the 100-meter and 1.6-kilometer races against newer and younger competitors would offer no real advantage to the petitioner. Therefore, we find it appropriate to issue an order to appoint the petitioner to the post.

Consequently, we direct the respondents to appoint the petitioner to the post within six weeks from the date of this order.

To avoid any confusion in the future, it is clarified that the petitioner's period of service will be counted from the date he assumes charge of the post.

With these observations and order, the present writ petition and its connected application are, thus, disposed of.

There shall, however, be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties.

(Partha Sarathi Chatterjee,J.) (Tapabrata Chakraborty, J.)