

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

**WPA 19711 of 2015
With
CAN 4 of 2024**

**Priyam Sarkar
-Vs-
Union of India & Ors.**

For the Petitioner	: Mr. Surendra Kumar Sharma
For the Respondents	: Mr. Samarjit Roychowdhury Mr. Tapan Bhanja
Heard on	: 01.08.2024
Judgment on	: 13.11.2024

Ananya Bandyopadhyay, J.:-

1. Through the instant writ petition, the petitioner multifariously challenged the process and effect of appointment to the post of Soldier (GD) Category held on 30th November, 2014 for recruitment under Unit HQ Quota, the publication of results consequently declaring the petitioner to be an unsuccessful candidate despite being eligible in his estimation.
2. The petitioner's father, an EME Ex-serviceman being No.8026065 under 56 APO was superannuated on 28.02.2003. Subsequently, the petitioner appeared for the Common Entrance Examination for the post of Soldier (GD)

Category held on 30th November, 2014 for recruitment under Unit HQ Quota bearing Roll No.3EM/WB/GD/301114/1073, however, he was not selected.

3. A reply to an application filed on 09th January, 2015 under the Right to Information Act, inter alia, informed the petitioner the following answers to his respective queries on 21st of January, 2015:-

<i>(i)</i>	<i>The number of vacancies for recruitment under Unit HQ Quota</i>	<i>72</i>
<i>(ii)</i>	<i>The zone of consideration, i.e., the number of the last selected candidate</i>	<i>152</i>
<i>(iii)</i>	<i>The number of the petitioner's written test examination</i>	<i>41/100 (total marks obtained) 142/200</i>
<i>(iv)</i>	<i>The date of formation of the Recruitment Board</i>	<i>06th Dec 2014 (Merit Board)"</i>

4. Apparently the petitioner scored 142 marks out of 200 marks. The petitioner addressed a 'notice demanding justice' expressing his grievance against the refusal of selection, since he had scored 71 per cent marks in average fairly qualifying him to the post as aforesaid. The recruitment board did not select the petitioner on ground of poor score/limited vacancies contrary to the principle of natural justice and detriment of the petitioner.
5. The petitioner received a reply on 25th February, 2015 vide Memo No.20204/Est-III the Unit HQ Quota Enrolment of 3 EME Centre which inter alia stated while the petitioner was successful in the written test, his name did not appear in the merit list produced by the system due to limited

vacancies and there was no provision to favour the petitioner with out-of-turn selection.

6. The petitioner moved the Armed Forces Tribunal, Kolkata Bench by filing O.A. No.27 of 2015 and vide order dated 8th May, 2015, the Learned Tribunal opined inter alia the examination for recruitment was not based on statutory rules and therefore, the Tribunal was not empowered to adjudicate the dispute and allowed the petitioner to approach higher authorities for redressal. The petitioner filed an application for review before the Learned Tribunal in R.A. No.5 of 2015 which was dismissed by the Learned Tribunal vide an order dated 19th June, 2015 observing the issue to be extending beyond the ambit of 'service matters' and 'service conditions' as the petitioner had not been enrolled in the army.

7. The Learned Advocate representing the petitioner submitted as follows:-

- (i) The respondent authorities in the reply to the Right to Information Act intimated there were 72 vacancies which was not declared earlier in the advertisement contrary to settled principles of law, which mandated vacancies to be declared at the time of advertisement. Moreover, as per policy rules, number of quotas was irrelevant for the purpose of recruitment under Unit Headquarter Quota. The whole procedure was opted for providing maximum benefits to serving personnel, ex-servicemen and their dependents.
- (ii) The petitioner did not fall under Priority 3, because his father was still alive and the petitioner was not his adopted son. His father was not a battle casualty. The respondent authorities misinterpreted the

provisions of the policy rules or Guidelines for Aid Memories for EME Ex-Servicemen.

(iii) In the advertisement being 20302/EST-III dated 13/9/2014 the term "Unit Headquarter Quota" implied difference from the term "Under Unit Headquarter Quota"

(iv) The OMR Sheet was not supplied citing a bar under Section 10 of the Right to Information Act.

(v) The petitioner had scored below the cut-off marks and the extent of cut-off marks was not mentioned in the advertisement published against the recruitment rally, nor the number of vacancies was mentioned in the aforesaid advertisement.

(vi) The respondents vide letter dated 25th February, 2015, informed the Learned Advocate for the writ petitioner as follows:-

"Your client Mr. Priyam Sarkar, S/o Shri Ratan Sarkar has passed the written entrance exam held on 30 Nov 14 for the recruitment in Soldier (GD) category. However, his name does not come in merit list produced by the system due to limited vacancies. Further, it is once again informed that no provision exists for out-of turn selection of your client."

8. The Learned Advocate representing the petitioner relied on the following decisions of the Hon'ble Supreme Court:-

(i) In **Sureshkumar Lalitkumar Patel and others Versus State of Gujarat and Others [2023 SCC Online SC 167]**, at para No.23 of the said judgment held as follows:-

"23.....Likewise, the rules do not fix any cut-off marks. An advertisement, made pursuant to a notification, binds the parties. It has got all the trappings of a statutory prescription, unless it becomes contrary to either a rule or an Act. A change, if any, can only be brought forth by way of an amendment and nothing else. Such an amendment even if it is permissible can be tested on the touchstone of Article 14 of the Constitution of India. It cannot be introduced to give an entry to a special reservation, in a case where a right becomes accrued to a candidate, under a policy decision reduced in the form of an advertisement, to be considered for a post in the absence of any eligible candidate from the horizontal category."

(ii) In **N.T. Devin Katti V. Karnataka Public Service Commission (1990) 3 SCC 157 :-**

"11. There is yet another aspect of the question. Where advertisement is issued inviting applications for direct recruitment to a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing rules or government orders, and if it further indicates the extent of reservations in favour of various categories, the selection of candidates in such a case must be made in accordance with the then existing rules and government orders. Candidates who apply, and undergo written or viva voce test acquire vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystallises on the date of publication of advertisement, however he has no absolute right in the matter....".

The Hon'ble Supreme Court went a step further and made it clear as follows:-

"Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right of selection, but if he is eligible and is otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire a vested right of being considered for selection in accordance with the rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of rules during the pendency of selection unless the amended rules are retrospective in nature".

(iii) In **Tamil Nadu Computer Science B.Ed. Graduate Teachers Welfare Society (1) V. Higher Secondary School Computer Teachers Association (2009) 14 SCC 517**, the following was held:-

"33. We, however, cannot hold that subsequent decision of the Government thereby changing qualifying norms by reducing the minimum qualifying marks from 50% to 35% after the holding of the examination and at the time when the result of the examination was to be announced and thereby changing the said criteria at the verge of and towards the end of the game as justified, for we find the same as arbitrary and unjustified. This Court in Hemani Malhotra V. High Court of Delhi [(2008) 7 SCC 11: (2008) 2 SCC (L& S) 203] has held that in recruitment process changing rules of the game during selection process or when it is over are not permissible."

9. The Learned Advocate representing the petitioner concluded his submissions citing the acts and conduct of the respondents in the instant case to be arbitrary in nature and contrary to the spirit of Article 14 of the Constitution of India, which ensured equality amongst all and the writ petition should be allowed.

10. The Learned Advocate representing the respondent submitted as follows: -

- (i) This Court could not entertain the said petition as the respondents belonged to the territory beyond the jurisdiction of this Court.
- (ii) An advertisement for Recruitment Rally through Unit Headquarters Quota for wards of war Widows/widows/Ex- Servicemen / Service personnel was advertised in employment News (English), the Hitavada dated September 16, 2014 and New Bharat (Hindi) dated September 16, 2014. The Recruitment demanded for Unit headquarters Quota for 3 EME Centre, Bhopal was 72.
- (iii) The petitioner belonged to Priority 3 category (own Regiment/ Corps) (Serving/ Ex-Servicemen).
- (iv) The Cut off marks of Recruitment Rally held between October 13, 2014 and November 30, 2014 was 152 for Priority III(three) category to which the petitioner belonged. As per policy in vogue, cut off marks in a recruitment rally was arrived on the basis of merit list prepared by Board of Officers, considering the results of candidates appearing in the subject rally taking into account marks scored by candidates in Physical Fitness Test (PFT) and Common Entrance Examination (CEE). However, this information was not incorporated in the recruitment notice.
- (v) A total of 905 candidates in Soldier (GD) category participated in the said recruitment rally, out of which 98 candidates were rejected initially due to wrong documentation. Remaining 807 candidates participated in Soldier (GD) category out of which 549 candidates appeared at the CEE in respect of EME Centre, Bhopal.

- (vi) The merit list was prepared through a MDASS software developed by M/s. Ekklavya Info Systems. As per the merit list prepared by the Board of Officers, 72 candidates of Soldier (GD) category were selected. The writ petitioner, who scored 142 marks appeared at Serial No. 74 of the said list.
- (vii) The cut off marks for selection was 152 and the petitioner scored 142 marks. He scored 100 in his physical test and 42 in the written examination. The marks scored by the last selected candidate was 152. The recruitment procedure was fully automated and governed by the recruitment policy. Candidates were strictly chosen by merit to fill up the vacancy.
- (viii) Vacancies for recruitment were allocated by the Directorate General of Recruiting, 14Q of Ministry of Defence (Army), who had not been a party respondent in the said petition. Candidates securing the highest marks in order of merit were selected. The entire procedure adopted as well as the policy framework left no ground whatsoever for mismanagement as alleged by the petitioner. The merit list was prepared through e MDAAS software developed by M/s. Ekklavya Info Systems and not by the respondents.
- (ix) The details of vacancies were not disclosed nor published in the newspapers or in the advertisement due to classified nature of the information, which was clearly mentioned on TOP & BOTTOM of letter no. 63502/Rtg B (C) dated 29th August, 2014. Moreover, Para 11 of Directorate General of Recruiting, Recruiting B (C), Integrated HQ of

MoD (Army) letter number 63502/Rtg B (C) dated 29 Aug 2014 clearly stated that contents of this letter will not be released to the press or to any unauthorized person.

(x) The writ petition devoid of merits should be dismissed.

11. During pendency of the instant writ petition, an application being CAN No.4 of 2024 had been filed seeking for substitution of the legal heirs and representatives of the petitioner who had expired on 27th April, 2024. The Learned Advocate representing the petitioner referred to paragraph 21, 22 and 23 of the aforesaid CAN application claiming that the applicants seeking for substitution had the right to sue on the death of the petitioner and denial of the same, would subject them to irreparable loss and injury. The aforesaid paragraphs are delineated as follows:-

“21. Your applicants state that arguments have been advanced in the instant case prior to death of the writ petitioner and the respondents have no reason to deny the rights of your writ petitioner.

22. Your applicants state that the writ petitioner has a prima facie case, and as such unless the instant application is allowed and the present applicants, who are the father and the mother of the deceased writ petitioner, are allowed to continue the instant lis, your applicants shall suffer irreparable loss and injury.

23. Your applicants state that your applicants have fair chance to succeed in the instant writ petition and as such unless the instant application for substitution is allowed or setting aside abatement, your applicants shall suffer irreparable loss and injury.”

12. As the petitioner expired, his claim to the appointment no longer existed since the cause of action agitated by him, had been exclusively personal which on his demise would result in the abatement of the instant writ petition. However, whether the right of the applicants to sue survives or not is to be considered primarily.
13. On the death of the petitioner, the right to sue will survive and will be synonymous with the right to seek relief which will exist on the date prior to the death of the petitioner, which can be claimed by the legal representatives or survivors of the petitioner pragmatically. The right to seek such relief by the legal heirs/representatives of the petitioner must be a statutory right vested in the petitioner which can be legally claimed by his or her legal heirs/representatives without an iota of deviation, modification and/or alteration liable to be executed in its exactitude through legal precepts.
14. The petitioner herein could not be granted appointment due to 72 vacancies being exhausted and enhanced cut-off marks compared to his reduced score of 142 out of 200 marks. The petitioner challenged the process of appointment and sought for an appointment to be inducted in the service claiming his eligibility to the post as aforesaid on consideration of his scored marks as the qualifying marks. Since the petitioner in his lifetime was not appointed in the post in the nature of public service, any constitutional or statutory right could not be conferred or granted in his favour. If the petitioner was qualified to be appointed in the post as aforesaid and continued his service prior to his demise, the statutory rights to have bestowed on him could have enabled his legal heirs/representatives to claim

retirement benefits, pensions etc. However, the relief sought in the instant petition for providing appointment to the petitioner could not be granted to his legal heirs/representatives who sought for substitution through an application being CAN No.4 of 2024 as the proposed applicants could not seek similar reliefs as prayed for in the instant writ petition by the petitioner in his lifetime since the right to be employed had been independent and personal, which had not been specifically and particularly vested upon him at the time of filing of the writ petition.

15. The proposed applicants being the parents of the petitioner (since deceased) did not participate in the recruitment process and could not claim the reliefs as enumerated in the writ petition. They did not have the locus standi to agitate the issues substituting the petitioner, since the right of the petitioner was peculiar and personal to him, which did not extend to his estate, or to his vested and secured right to employment, its subsistence and continuation till his death.
16. Indubitably the petitioner (since deceased) neither obtained the status or locus to claim his appointment prior to the disposal of the writ petition, the same under no circumstance be sought for by the survivors or the legal heirs/representatives of the petitioner.
17. In view of the above discussions, the writ petition being WPA 19711 of 2015 got abated and accordingly disposed of. Connected application being CAN 4 of 2024 is also dismissed.
18. There is no order as to costs.

19. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)