



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: April 08, 2024

+ W.P.(C) 5488/2020

ANIL

..... Petitioner

Through: Mr. Jatin Mongia with Mr. Anatesh Banon, Advs. with petitioner in person.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Ripu Daman Bhardwaj, CGSC with Mr. Kushagra Kumar, Adv. for UOI with Major Partho Katyayan, (Army)

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE SAURABH BANERJEE

V. KAMESWAR RAO, J. (ORAL)

1. This petition has been filed by the petitioner with the following prayers:

"It is, therefore, prayed before this Hon'ble Court to:-

(a) Issue an appropriate writ, order or directions including the Writ of Certiorari to call for the entire records based on which the Respondents have not included the name of the Petitioner in the final merit list of selected candidate for the Exam conducted in 2019 for the post of Sol Clk issued by the Respondents and thereafter quash the result for the post of Sol Clk held in 2019 as illegal;



(b) To direct the Respondents to issue fresh result of final list of the exam conducted for Sol Clk 2019;

(c) Alternatively, direct the Respondents to reserve one seat for the Petitioner against the future vacancy of Sol Clk as and when the vacancy arises and also granting him ante date seniority w.e.f the date when the result for Sol Clk 2019 was declared by the Respondents; and

(d) Issue any other/further direction as this Hon'ble Court may deem fit in the facts and circumstances of the case.”

2. The grievance of the petitioner is that the respondents have selected a candidate who was lower in merit than him in the final merit list of Sol Clk Exam 2019. According to Mr. Jatin Mongia, learned counsel appearing for the petitioner, that the recruitment test was conducted in two phases. Phase I of the recruitment test included Tradesman Aptitude Test and Physical Test.

3. According to him, in order to participate in the Physical Test of Phase-I, qualifying in the Tradesman Aptitude Test was pre-requisite. The petitioner having qualified the Tradesman Aptitude Test was called to participate in the Physical Test in which he qualified with high position with high merit obtaining 76 marks. Thereafter, the medical test was held and he was found fit in all respects.

4. Subsequently, the petitioner was issued admit card for Written Test and he appeared in the Written Test on April 07, 2019. After that no communication was made from the side of the respondents with respect to result. When the petitioner started pursuing his case, to his shock he learnt that he was not selected for the said post. It was only when the petitioner got his answer sheet, he came to know that he had scored 72 marks in Written Test and in total of both phases of



recruitment test, he obtained 148 marks (i.e., 76 Marks in Physical Test and 72 Marks in Written Test), which is more than the marks of 146 secured by the last selectee.

5. According to him, to add insult to injury, the petitioner was told that he had failed in Tradesman Aptitude Test which is not possible as qualifying the same was pre-requisite to participate in the Physical Test of Phase I test, which the petitioner did. He submits that the respondents could not have changed the Rules of the game after the game has started which has culminated in the final result. He contends that the case of the respondents that in the Tradesman Aptitude Test, it is obligatory for a candidate to secure minimum marks of 16 to qualify for the next stage was not prescribed in the advertisement. He also states that till the written examination / declaration of the result, no such representation was made by the respondents to the candidates.

6. On the other hand, Mr. Ripu Daman Bhardwaj, learned CGSC / Major Partho Katyayan appearing for the respondents would submit the following:

“1. The 124 Infantry Battalion (Territorial Army) SIKH is a Territorial Army unit under Territorial Army Group Headquarters, Western Command. As per the sanction b) Territorial Army Directorate vide their letter number 43558/02/GS/TA-3 dated 09 October 2018, total 71 vacancies (Soldier GD- 66. Soldier Clerk (SD)-02, Soldier House Keeper - 01, Soldier Chef Community-OI and Soldier Washennan-01) were allotted to 124 Infantry Battalion (Territorial Army) SIKH for recruitment, to be conducted with effect from 07 January 2019 to 14 January 2019 vide Additional Directorate Gen Territorial Army, General Staff Branch, IHQ of MoD (Army) letter



No 43558/02/GS/TA-3 dated 09 October 2018 (Annexure-I).

2. The Petitioner appeared for Recruitment rally conducted by 124 Infantry Battalion (Territorial Army) SIKH for the vacancy of Soldier (Clerk) on 12 January 2019 at 105 Infantry Battalion (Territorial Army) Rajputana Rifles (Rajputana Rifles Regiment Centre). The said recruitment for the vacancy of soldier (Clerk) was divided into two phases i.e. Phase - I & II. Hence as part of Phase - I of Recruitment rally, the petitioner was subjected to Physical Fitness Tests, Trade Aptitude Test & Medical Examination as per the Standing Operating Procedure on the subject.

3. The Petitioner appeared for the Physical Fitness tests & Trade Aptitude tests in the presence of Board of Officers (BOO) on 12 January 2019 and followed by Medical examination on 13 January 2019. During the course of Recruitment rally, it was nowhere declared that only candidates qualified for Trade Aptitude test are eligible to appear for Physical Fitness test & vice versa. All the candidates appeared for recruitment rally for Soldier (Tradesmen & Clerk) categories were subjected to trade aptitude & physical fitness tests, as both were mandatory in order to proceed for medical examination. Hence, the petitioner's claim of being declared qualified by the Presiding Officer, Colonel Rohit Khanna is baseless as no result for Trade Aptitude Test was declared during the recruitment rally & all the candidates appeared for Soldier (Trade men & Clerk) categories were subjected to Trade Aptitude & Physical Fitness tests group wise.

4. The topics for trade test for Clerks were allotted impromptu to the appearing candidates and they were evaluated in situ by the Board of Officers (BOO) through written answers and verbal interaction. The answer sheets were not collected as the Board of Officers (800) evaluated the candidates in situ and marked them' in the individual mark sheets. On completion of trade test, all



the candidates were further sent to the second mandatory stage of Recruitment rally i.e. physical fitness tests. Candidates who qualified the physical fitness tests were further called for medical examination on 13 January 2019. The aversion that the petitioner was told that he had qualified the Trade Aptitude Test is false and devoid of merit. No such verbal or written remarks was either expressed or implied to any of the candidate.

5. Since the written exam for recruitment in Territorial Army was being conducted for the first time, unit sent the call letters for written examination i.e. Phase- II of recruitment rally for all the Tradesmen & Clerks categories, irrespective of their performance in Trade Aptitude test. All the candidates who appeared in Tradesmen & Clerks categories clearing the Physical Fitness tests & Medical examination were sent call letters to appear in Phase-II of recruitment rally.

6. It is pertinent to mention here that the conduct of trade test was as per the Standing Operating Procedure (SOP) (copy of Additional Directorate Gen Territorial Army, General Staff Branch, IHQ of MoD (Army) letter No 43558/GS/TA-3(a) dated 16 November 2005 (Annexure-III) on the subject. However, in the absence of explicit instructions by the higher formation vis-a-vis the benchmark for qualifying marks in the trade aptitude test and to provide a fair ground to an the candidates under Tradesmen & Clerks categories, call letters for written examination were sent to all of them (Tradesmen & Clerk) (Annexure-IV).

7. Thereafter during the preparation of final merit list and due clarification on the benchmark the Petitioner was informed about his trade aptitude test marks through the reply given to the RTI filed by him. Petitioner had obtained only 12 out of 50 marks in the Trade Test (Annexure-V) and hence was technically ineligible to appear for written exam. Hence, there was no unfair or vengeant approach towards the petitioner as he has claimed through the instant Writ Petition.



8. *The Petitioner through his RTI application had also sought the breakdown of marks to which he was adequately informed (copy of Territorial Army Group Headquarters eastern Command letter No 6013/4/RTI Cell dated 13 Aug 2019 & even letter No dated 27 Jan 2020 (Annexure-VI). Due to the human error in calculation during the evaluation (by Board of Officers) of answer sheets, the Petitioner had erroneously been informed about marks obtained by him as 56. However on subsequent scrutiny, it was corrected and accordingly informed to him alongwith the copy of answer sheet (Annexure-VII). It is hence, once again highlighted that, despite obtaining 72 marks in Phase-I & 76 marks in Phase-II, the Petitioner was rendered ineligible for the [mal selection as he did not qualify the mandatory Trade Aptitude Test, which is part of Phase-I of recruitment rally.*

9. *It is pertinent to mention that though the unit in the absence of benchmark for trade aptitude test may have issued the call letters for written exam to the Petitioner due to oversight and an error of judgement, the [mal merit list is always the ultimate result which was only declared on completion of Phase-II. Hence, the Petitioner's aversions are out of misguidance and in quate information despite having been provided an equitable ground to appear for the written exam too."*

7. We are not impressed by the submissions made by Mr. Bhardwaj / Major Partho Katyayan for the simple reason that at no point of time till the culmination of the written examination, did the respondents represented that in the Tradesman Aptitude Test, it is obligatory to secure 16 marks out of 50 marks to qualify in the next phase of the test, i.e., Written Test. Though the respondents rely on the SoP in support of their stand but having not put the candidates on notice, till the final stage of examination, and also the fact that the



petitioner was allowed to appear in the subsequent stages of examination / selection process, the impugned action of the respondents cannot be justified.

8. Though, reliance has been placed by Mr. Bhardwaj on the Signal dated April 29, 2019, to contend that 16 marks are minimum qualifying marks to be secured by a candidate to qualify for the written examination, however, the same is clearly dated post the conduct of the Written Test on April 7, 2019.

9. In this regard, for more clarity, the following dates become relevant; Tradesman Aptitude Test / Physical Test was held on January 12, 2019; Medical Test on January 13, 2019; Written Test on April 7, 2019 and results were declared on May 10, 2019. The fact that the Signal being of the date April 29, 2019, i.e., after completion of final selection process of written examination and also the fact that till that stage, the petitioner was not put to notice, the impugned action of the respondents is not sustainable.

10. The Supreme Court in the case of ***Sushil Kumar Pandey and Others v. High Court of Jharkhand and Another, 2024 SCC OnLine SC 117***, on which reliance has been placed by Mr. Mongia, has in paragraphs 23 and 24, held as under:

“23. So far as the ratio of the decision in the case of K. Manjusree (supra) is concerned, that authority deals with change of the Rules mid-way. In the case before us, in our opinion, if the High Court is permitted to alter the selection criteria after the performance of individual candidates is assessed, that would constitute alteration of the laid down Rules. We refer to paragraphs Nos. 14 and 15 of the judgment of the Constitution Bench in the case



of *Sivanandan C.T. (supra)*, which lays down the principle of law on this point. We reproduce below the said passages from this authority:—

“14. The decision of the High Court to prescribe a cut-off for the viva-voce examination was taken by the Administrative Committee on 27 February 2017 after the viva-voce was conducted between 16 and 24 January 2017. The process which has been adopted by the High Court suffers from several infirmities. Firstly, the decision of the High Court was contrary to Rule 2(c)(iii) which stipulated that the merit list would be drawn up on the basis of the marks obtained in the aggregate in the written examination and the vivavoce; secondly, the scheme which was notified by the High Court on 13 December 2012 clearly specified that there would be no cut off marks in respect of the viva-voce; thirdly, the notification of the High Court dated 30 September 2015 clarified that the process of short listing which would be carried out would be only on the basis of the length of practice of the members of the Bar, should the number of candidates be unduly large; and fourthly, the decision to prescribe cut off marks for the viva-voce was taken much after the viva-voce tests were conducted in the month of January 2017.

15. For the above reasons, we have come to the conclusion that the broader constitutional issue which has been referred in Tej Prakash Pathak (supra) would not merit decision on the facts of the present case. Clearly, the decision which was taken by the High Court was ultra vires Rule 2(c)(iii) as it stands. As a matter of fact, during the course of the hearing we have been apprised of the fact that the Rules have been subsequently amended in 2017 so as to prescribe a cut off of 35% marks in the viva-voce examination which however was not the prevailing legal position when the present process of selection was initiated on 30 September 2015. The



Administrative Committee of the High Court decided to impose a cut off for the viva-voce examination actuated by the bona fide reason of ensuring that candidates with requisite personality assume judicial office. However laudable that approach of the Administrative Committee may have been, such a change would be required to be brought in by a substantive amendment to the Rules which came in much later as noticed above. This is not a case where the rules or the scheme of the High Court were silent. Where the statutory rules are silent, they can be supplemented in a manner consistent with the object and spirit of the Rules by an administrative order.”

24. The ratio of this authority is squarely applicable in the facts of this case. Submission on behalf of the High Court administration that Rule 14 permits them to alter the selection criteria after the selection process is concluded and marks are declared is not proper exposition of the said provision. The said Rule, in our opinion, empowers the High Court administration in specific cases to reassess the suitability and eligibility of a candidate in a special situation by calling for additional documents. The High Court administration cannot take aid of this Rule to take a blanket decision for making departure from the selection criteria specified in the 2001 Rules. The content of Rule 14 has the tenor of a verification process of an individual candidate in assessing the suitability or eligibility.”

11. In view of the aforementioned judgment of the Supreme Court and also in light of the facts of the present case, it must be held that the petitioner having secured 148 marks more than the last selectee, i.e., 146 marks, he could not have been treated as unsuccessful in the selection process. Hence, the petitioner is entitled to the appointment to the post of Sol Clk, i.e., the post concerned. The said appointment shall



be given to the petitioner from the date the last selectee, who secured less marks than the petitioner, was given.

12. The appointment of the petitioner would be on notional basis, i.e., pay of the petitioner shall be fixed on notional basis with no monetary benefits but the petitioner shall be entitled to seniority and eligibility for the next higher post. The relevant orders to this effect shall be issued within eight weeks from today.

13. With the above, the writ petition is disposed of. No costs.

V. KAMESWAR RAO, J

SAURABH BANERJEE, J

APRIL 08, 2024/aky