SUPREME COURT OF INDIA

Pitta Naveen Kumar and Others

Vs

Raja Narasaiah Zangiti and Others

Appeal (Civil) 4121 of 2006 (Arising Out of Slp (Civil) No.6789 of 2006) With Civil Appeal Nos. 4131, 4130 & 4132 of 2006 (Arising Out of Slp (Civil) Nos.6516, 7016 & 8275 of 2006)

(S. B. Sinha and Dalveer Bhandari, JJ)

14.09.2006

JUDGMENT

S. B. SINHA, J.

Leave granted in the S.L.Ps.

The State of Andhra Pradesh notified 301 vacancies by a notification bearing No. 21 of 2003 dated 21.11.2003 in respect of the following six categories of Group 1 services:

(i) Deputy Collectors in A.P. Civil Service (Executive Branch)

(ii) Commercial Tax officers in A.P. Commercial Tax Service

(iii) Deputy Superintendent of Police (Category-2) in A.P. Police Service

(iv) Regional Transport Officers in the A.P. Transport Service

(v) Assistant Prohibition and Excise Superintendents in A.P. Excise Service

(vi) Mandal Parishad Development Officer in A.P. Panchayat Raj Rural Development Service.

For filling up of the vacancies so notified, the Andhra Pradesh Public Service Commission (for short "the Commission") issued a notification on or about 21.11.2003 inviting applications from candidates eligible therefor. The salient features of the recruitment process are as under:

(i) Recruitment was to be made to vacancies notified only.

(ii) Recruitment was to be processed as per the notification and GOMs No. 570 dated 31.12.1997 and instructions issued by the State from time to time.

(iii) The candidates were to possess the essential qualifications specified therefor as on the date of notification.

(iv) The minimum and maximum age specified for the post were to be reckoned as on 1.7.2003.

(v) The applicants were to be subjected to a Screening Test (Objective Type) for admission in the Main (Written) Exam. The candidates who obtained the minimum qualifying marks in the written examination were to be called for interview in the ratio 1:2 with reference to the number of vacancies.

Procedure for filling up of the vacancies was laid down in GOMs No. 570 dated 31.12.1997 in terms whereof the number of candidates to be admitted to the written examination was to be 50 times the total number of vacancies available at the material time. On or about 10.12.2003, 18 more vacancies were notified, totalling 319 vacancies. 1, 52, 000 candidates including the Appellants herein submitted their applications in response to the said notification. Yet again, 32 posts were declared vacant on or about 1.1.2004.

A Preliminary Examination was conducted by the Commission on 28.3.2004.

Thereafter an Original Application was filed before the Andhra Pradesh Administrative Tribunal by some candidates being OA No. 1708 of 2004 inter alia for a declaration that notification of vacancies in nine categories of posts only instead and place of twenty categories in Group I services was illegal. By an interim order dated 16.4.2004, it was directed:

"Having regard to these facts and circumstances of the case, there shall be a direction to the

respondents to compute and calculate the vacancies pertaining to various categories of posts under Group I services and notifying the same to the APPSC pending disposal of the OA."

A notification was issued being GOMs No. 164 on 6.7.2004 fixing 1.7.1999, instead of 1.7.2003 as originally stipulated, as the relevant date for fixing the upper age limit for candidates eligible to appear at the examination.

The Commission thereafter issued a supplemental notification being No. 6 of 2004 on 7.8.2004 inviting applications for filling up of 170 additional vacancies stipulating:

(i) The candidates who were eligible but failed to appear in response to notification No. 21 dated 13.11.2003 may apply in response to supplementary notification.

(ii) The candidates who had appeared in the screening test held on 28.3.2004 in response to notification No. 21 of 2003 should not apply again.

A second preliminary test thereafter was held on 10.10.2004 for about 51, 768 candidates who had applied in response to the said supplemental examination. The Commission upon holding the said preliminary test released a list of 28, 865 candidates stating that the marks obtained by the last candidate admitted into the main examination was 66% which was arrived at in terms of the ratio of 1:2 stipulated in the rules of selection. The said list was prepared with reference to 524 notified vacancies as on 7.8.2004 which included 223 vacancies notified after the issue of the initial notification for 301 vacancies on 21.11.2003 and upon taking into account the results of both the preliminary tests held on 28.3.2004 and 10.10.2004. Questioning inter alia the said action on the part of the Commission, some candidates who had not been admitted into the Main Examination filed an original application before the Tribunal which was numbered as OA No. 26 of 2005 praying for the following directions to the Respondents:

(i) To compute the correct number of vacancies and notify the same before the main examination;

(ii) to declare that the petitioners therein are entitled to be called for the main examination after correctly computing the number of vacancies in the ratio of 1:50 (i.e. as per GOMs No. 520).

An interim order was passed therein by the Tribunal on 6.1.2005 reducing the cut-off marks for appearing in the main examination from 66% to 61% on the premise "so that some opportunity is given to some more candidates to appear for main examination as some more posts are there not notified have to be considered."

An application for vacating the said interim order was filed by the candidates aggrieved thereby whereupon by an order dated 9.4.2005 it was directed:

"it would be just and proper to direct the APPSC not to declare the result of the candidates who have been permitted to appear for group 1 main examination in terms of the interim orders of this Tribunal, pending further orders in the OAs."

The State of Andhra Pradesh, however, issued a Government Order bearing GOMs No. 200 dated 30th April, 2005 purported to be terms of the directions of the Andhra Pradesh Administration Tribunal, the relevant portion whereof reads as under:

"In the circumstances, after careful consideration Government direct the Andhra Pradesh Public Service Commission to reduce the qualifying marks from 66 to 61 to allow more candidates for the main examination for recruitment to Group I Services with reference to the Notification No. 21/2003 and Supplemental Notification No. 6/2004 in relaxation of the orders issued in the G.O. first read above."

The legality of the said Government Order came to be questioned by some of the parties herein in OA Nos. 3960 of 2005 and 5548 of 2005. During pendency of the said original applications before the Tribunal, the Main Written Examination was conducted by the Commission in the month of May/June, 2005. Original Applications were dismissed by the Tribunal and consequently interim order dated 6.1.2005 stood vacated having regard to the decision of this Court in Union Public Service Commission v. Gaurav Dwivedi and Others [(1999) 5 SCC 180] stating:

(i) The Tribunal had no jurisdiction to interfere with the percentage of marks fixed by the Commission as cut off marks for enabling the candidates to appear for main examination. Interim order dated 6.1.2005 and consequential GOMs No. 200 issued by the Government has the effect of interfering with the cut-off marks prescribed by the Commission which the Tribunal cannot do.

(ii) The interim order dated 6.1.2005 and GOMs has the effect of allowing 23, 000 candidates who were otherwise ineligible to appear in the examination thereby causing prejudice to the candidates who were initially selected.

The Tribunal by reason of its order dated 30.1.2006 directed the Respondents to finalise the process of selection in accordance with GOMs No. 570 dated 30.12.1997 for 543 posts instead of 524 posts and complete the entire process of selection within three months.

The State of Andhra Pradesh or the Commission did not question the correctness or otherwise of the said judgment. Respondent Nos. 1 to 3, however, filed a writ petition before the High Court. Some other writ petitions were also filed inter alia questioning GOMs No. 164 dated 6.7.2004 and GOMs No. 133 of 23.3.2005.

The High Court by reason of its impugned judgment reversed the judgment and order of the Tribunal opining:

(i) There is nothing sacrosanct in GOMs No. 570 dated 30.12.1997 which stipulated the ratio of 1:50 between the number of vacancies and the number of candidates to be admitted to the main written examination;

(ii) Interim order dated 6.1.2005 of the Tribunal directing a cut off mark lower than the one arrived at in accordance with the ratio prescribed under GOMs No. 570 was fixed for the reason that if eventually more number of posts in Group 1 are to be filled up, fixing lower cut off mark would satisfy the requirement of the ratio prescribed under GOMs No. 570.

(iii) GOMs No. 200 was a result of decision of the government independent of the interim order. The tenor of language of the said GOMs is not conclusive.

(iv) GOMs No. 200 is merely a logical extension to the decision to issue second notification to fill up 223 posts.

(v) The contesting candidates cannot oppose issuance of GOMs No. 200 which enable more number of candidates to appear in the main examination as the number of candidates to be finally called depended on the accident/ chance of how many candidates could secure the cut off mark.

(vi) The judgment of this Court in Gopal Krushna Rath v. M.A.A. Baig (Dead) By LRs. and Others, [(1999) 1 SCC 544] holding that calling more number of candidates for the interview than permitted under the rules may result in prejudice to those who are entitled to be called in accordance with rules must be read in the context of and in consonance with the judgment in Shankarsan Dash v. Union of India [(1991) 3 SCC 47] wherein it was laid down that no candidate participating in the selection process has any indefeasible and legally enforceable right to be appointed.

These appeals question the said judgment.

Mr. P.P. Rao, learned senior counsel appearing on behalf of the Appellants in Civil Appeal arising out of S.L.P (C) No. 6789 of 2006 submitted:

(i) GOMs No. 200 dated 30.4.2005 having been issued pursuant to the interim order passed by the Tribunal on 6.1.2005; having regard to the fact that the same stood vacated and in any event the original application having been dismissed by the Tribunal, no effect could have been given thereto.

(ii) The High Court committed a serious error in opining that the said GOMs No. 200 was issued pursuant to a conscious decision of the State independent of the said interim order.

(iii) The Tribunal having no jurisdiction to reduce the qualifying marks from 66% to 61% as a result whereof more candidates had appeared in the Main Examination for recruitment to Group 1 service

in relaxation of GOMs No. 570 dated 31.12.1997, the entire selection process was vitiated in law.

(iv) Although, the Appellants did not have any right to be selected, they had acquired a legal right to be considered in terms of the extant rules.

(v) The impugned judgment of the High Court cannot be sustained as the Commission acted in violation thereof.

Mr. L. Nageswara Rao, learned senior counsel appearing on behalf of Appellants in Civil Appeals arising out of S.L.P (C) Nos. 6516, 7016 and 8275 of 2006 supplemented the submissions of Mr. P.P. Rao urging that those candidates who were over-aged on the date of the initial notification could not have been made eligible by reason of a subsequent notification. The candidates, it was urged, who appeared at the preliminary examination and the main written examination had a legitimate expectation that the vacancies which existed on the date of the notification would be filled up in terms of the extant rules and in relation thereto no vacancy arising in future could have been taken into consideration.

Mr. A.K. Ganguli, learned senior counsel appearing on behalf of the Commission, on the other hand, would draw our attention to the fact that some of the Appellants did not pass the preliminary examination. Although two preliminary examinations one, pursuant to the main notification and other pursuant to the supplementary notification, in view of the fact that the same provided for only one opportunity to all the candidates, viz., to appear at the main written examination and, thus, the same cannot be said to be arbitrary or unreasonable. The decision of the State to fill-up all the vacancies cannot be faulted with as the said steps were taken as one time measure. As the impugned GOMs were issued in terms of the proviso to Article 309 of the Constitution of India, the validity of the impugned notifications cannot be questioned as thereby merely the age-bar has been relaxed.

It is not in dispute that, at the material time, examination was to be conducted in terms of the instructions issued by the State of Andhra Pradesh as contained in GOMs No. 570 dated 31.12.1997. The advertisement was also issued by the Commission pursuant to or in furtherance of the said notification, as would appear from Clause 2(a) of the notification No. 21. It was categorically stated:

"The recruitment will be made to the vacancies notified only. There shall be no waiting list as per G.O. Ms. No. 81 and Rule 6 of APPSC Rules. The available break-up of vacancies is given in Annexure I. However, the breakup is subject to variation and confirmation by the Unit Officer, till such time as decided by the Commission and in any case, no cognizance will be taken by the Commission of any vacancies arising or reported after the completion of the selection and recruitment process, or, the last date as decided by the Commission, as far as this Notification is concerned; and any such subsequently arising vacancies will be further dealt with as per G.O. & Rule cited above."

Recruitment to the notified vacancies although was to be considered but the same was not

sacrosanct as the Commission was given liberty to take into consideration the vacancies arising at a later date also. The jurisdiction of the Commission, however, was only restricted to the extent that it could not have taken cognizance of any vacancy arising or reported after the completion of the selection and recruitment process. What was to be considered as a subsequent vacancy, in terms of the said rules, thus, would be such vacancies which arose after completion of the selection and recruitment process or the last date as decided by the Commission.

It is not in dispute that all the candidates who had applied for the said post were having the requisite educational qualifications. In terms of the said advertisement, the selection process was to comprise in three parts, viz.,

(i) a screening test for the purpose of admitting the candidates to the main written examination.

(ii) Holding of main examination for those who would become entitled to be admitted to main written examination and, thus, were to be subjected to the process of selection

(iii) the candidates who obtained minimum qualifying marks in the written examination, as may be fixed by the Commission at their discretion, were to be summoned for oral test in the ratio of 1:2 with reference to the number of vacancies duly following the special representation as laid down in General Rule 22 of Andhra Pradesh State and Subordinate Service Rules.

GOMs No. 200 dated 30th April, 2005 was issued by the State. Although the High Court has opined that the said GOMs was issued upon an independent decision taken by the State of Andhra Pradesh in that behalf, the recitals contained therein does not say so. The notification specifically referred to the interim direction issued by the Tribunal which was treated to be a general direction to admit all the candidates who had appeared in the preliminary examination. It was in the aforementioned situation only the qualifying marks were reduced from 66% to 61% to allow more candidates for the main examination for recruitment to Group 1 service with reference to the notification No. 21 of 2003 and the supplementary notification No. 6 of 2004. The State of Andhra Pradesh, however, did not stop there. As has been noticed hereinbefore, subsequent vacancies were also notified.

The State thereafter issued GOMs No. 164 dated 6.7.2004, having regard to the representations purported to have been received by it from the unemployed candidates to allow age concessions, considering that there had been long gap in issuing the notification, on taking a purported sympathetic view in the matter, stating :

"a) A supplementary notification will be issued for some more vacancies in addition to the vacancies already notified in various categories of posts under Group I Services, under Notification No. 21/2003 issued on 21-11-2003 by the A.P. Public Service Commission.

b) For the candidates who could not appear for recruitment to Group I Services with reference to Advt. No. 21/2003 issued on 21.11.2003 by the A.P. Public Service Commission, as they were over

and above the 33 years of age, age concession will be allowed duly reckoning the age limits prescribed in the rules, with effect from 1.7.1999 for the Notification No. 21/2003, and also for supplementary Notification to be issued. This age concession is only a one time measure and will not apply for further recruitments.

The candidates who were within the age limits, according to rules before the present concession raising the upper age limit and who could not apply for the notification issued on 21.11.2003 are also eligible to apply for the posts to be notified in the supplementary notification.

c) The candidates for the main examination will be finalized by the Commission from the common list of candidates qualified both in the preliminary examination already held and the preliminary exam to be held as per the supplementary notification to be issued."

Ad hoc rule was made by the Governor of Andhra Pradesh in exercise of the powers conferred by the proviso appended to Article 309 of the Constitution of India which reads as under :

"Notwithstanding anything contained in the Andhra Pradesh State and Subordinate Rules or in the Special Rules for any State Services or the Ad- hoc rules, the maximum age limit prescribed in the relevant special Rules for appointment by direct recruitment shall be reckoned as on 1-7-1999 instead of 1-7-2003 in respect of direct recruitment to Group. I Services Recruitment 2003 notified by the Andhra Pradesh Public Service Commission vide their Advertisement No. 21/2003/Supplementary notification.

This adhoc rule will apply only for the notification No. 21/2003/Supplementary notification of A.P. Public Service Commission."

Yet again, GOMs No. 133 was issued on 23.3.2005, in terms whereof the State allowed the candidates who had fulfilled the educational and age qualification, as per enhanced age limits eligible for recruitment to Group 1 service stating:

"Notwithstanding anything contained in the A.P. State and Subordinate Service Rules or in the Special Rules for any State Services or the adhoc rules, all the eligible candidates who are within the age limits in terms of the Orders issued in G.O. 164, G.A. (Ser.A) Department, dated 6-7-2004 and also those candidates who fulfill the Educational qualification as on the dte of Supplemental Notification (Notification No. 6/2004 to the Main Notification No. 21/2003) and who did not apply earlier are eligible to apply."

One of the contentions raised before us is as to whether the aforementioned three notifications are retrospective in nature. Submission of Mr. P.P. Rao is that they are only prospective. We, however, do not agree. GOMs No. 570 dated 31.12.1997 did not have any statutory flavour. The notifications in question were issued by the State in exercise of its jurisdiction under proviso to Article 309 of the

Constitution of India. In terms of the said provision, the State indisputably is entitled to issue a notification with retrospective effect. GOMs No. 200 indisputably affected those who had appeared at the examination as by reason thereof qualifying marks were reduced from 66% to 61%. Similarly, by reason of GOMs No. 164, the maximum age limit prescribed in the relevant special rules for appointment by direct recruitment was to be reckoned as on 1.7.1999 instead of 1.7.2003. Expressly, the adhoc rule made thereby was made applicable only in respect of the notification No. 21 of 2003 and the supplementary notification of the Commission. Similarly, in terms of GOMs No. 133 dated 23.3.2005 those candidates who were not eligible on the date of issuance of the first notification became entitled to avail the beneficient provision thereof as by reason thereof all those who had not applied earlier became eligible therefor.

The advertisement issued by the Commission was subject to GOMs No. 570. Administrative instructions contained in GOMs No. 570 did not contain any statutory rules. Any rule made subsequently by the State will override the administrative instructions to the extent it was repugnant thereto. It is, however, one thing to say that, a retrospective effect was given to the said rules but it is another thing to say that by reason thereof accrued or vested right of a candidate has been taken away.

We begin our discussions by taking into consideration what would be a vested right vis-'-vis an accrued right.

In Kuldeep Singh v. Govt. of NCT of Delhi [2006 (6) SCALE 588], this Court observed:

"What would be an acquired or accrued right in the present situation is the question.

In Director of Public Works and Another v. HO PO Sang and Others [(1961) AC 901], the Privy Council considered the said question having regard to the repealing provisions of Landlord and Tenant Ordinance, 1947 as amended on 9th April, 1957. It was held that having regard to the repeal of Sections 3A to 3E, when applications remained pending, no accrued or vested right was derived stating:

"In summary, the application of the second appellant for a rebuilding certificate conferred no right on him which was preserved after the repeal of sections 3A-E, but merely conferred hope or expectation that the Governor in Council would exercise his executive or ministerial discretion in his favour and the first appellant would thereafter issue a certificate. Similarly, the issue by the first appellant of notice of intention to grant a rebuilding certificate conferred no right on the second appellant which was preserved after the repeal, but merely instituted a procedure whereby the matter could be referred to the Governor in Council. The repeal disentitled the first appellant from thereafter issuing any rebuilding certificate where the matter had been referred by petition to the Governor in Council but had not been determined by the Governor."

In Saurabh Chaudri (Dr.) v. Union of India [(2004) 5 SCC 618], it is stated:

"A statute is applied prospectively only when thereby a vested or accrued right is taken away and not otherwise. (See S.S. Bola v. B.D. Sardana) A judgment rendered by a superior court declaring the law may even affect the right of the parties retrospectively."

The legal position obtaining in this behalf is not in dispute. A candidate does not have any legal right to be appointed. He in terms of Article 16 of the Constitution of India has only a right to be considered therefor. Consideration of the case of an individual candidate although ordinarily is required to be made in terms of the extant rules but strict adherence thereto would be necessary in a case where the rules operate only to the disadvantage of the candidates concerned and not otherwise. By reason of the amended notifications, no change in the qualification has been directed to be made. Only the area of consideration has been increased. Those who were not eligible due to age bar in 2003 became eligible if they were within the prescribed age limit as on 01.07.1999. By reason thereof only the field of choice was enlarged. We would briefly consider the purport and effect thereof.

Initially, there had been 301 vacancies. 223 vacancies were later on added. 1, 52, 000 applications were received pursuant to the first advertisement. About 51, 768 applications were filed after issuance of the impugned GOs. By reason of the subsequent GOs, however, those who had appeared in the first preliminary examination were debarred from appearing in the second examination. The reason therefor is not far to seek. The result of the first preliminary examination had not been announced. A combined result was announced both in respect of the first preliminary examination as also the second preliminary examination. Both the examinations were held to be a part of the same recruitment process. It may be that in relation thereto different question papers were set or different examiners examined them but it must be borne in mind that the said examinations were held only for the purpose of elimination of candidates. The result of the said examination was not to affect the ultimate selection process.

We may at this juncture examine some of the decisions whereupon reliance has been placed by the learned counsel.

In Umesh Chandra Shukla v. Union of India and Others [(1985) 3 SCC 721], the candidates were admitted to the viva-voce test by the Selection Committee. It is at that stage names of certain candidates, whose names had not been included in the Select List, were included in the final list of the Selection Committee and the names of certain candidates who had been interviewed by the Selection Committee had been omitted therefrom This Court in the aforementioned fact situation opined:

"The area of competition which the 27 candidates who had been declared as candidates eligible to appear at the Viva Voce examination before such moderation had to face became enlarged as they had to compete also against those who had not been so qualified according to the Rules. The candidates who appear at the examination under the Delhi Judicial Service Rules acquire a right immediately after their names are included in the list prepared under Rule 16 of the Rules which limits the scope of competition and that right cannot be defeated by enlarging the said list by inclusion of certain other candidates who were otherwise ineligible, by adding extra marks by way

of moderation. In a competitive examination of this nature the aggregate of the marks obtained in the written papers and at the Viva Voce test should be the basis for selection"

This Court found a blatant violation of Rule 16 of the Delhi Judicial Service Rules, 1970 which had limited the scope of competition. In the instant case, the scope of the competition has not been limited by enlarging the field of consideration.

In N.T. Devin Katti and Others v. Karnataka Public Service Commission and Others [(1990) 3 SCC 157], this Court was concerned with a situation where the advertisement expressly stated that selection would be made in accordance with the existing rules or government orders. In that case, it had categorically been stated that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right of selection. Once, however, he is found to be eligible and he is otherwise qualified in accordance with the relevant rules, he acquires a vested right of being considered for selection in accordance with the rules as they existed.

With a view to understand the implication of the ratio laid down in the said case, we may notice the factual matrix obtaining therein. The Appellants therein were in service of the State Government. They had applied for selection pursuant to the said advertisement. Written examination and viva-voce test had been held. The list of successful candidates was finalized. It was also notified in Karnataka Gazette. An additional list of successful candidates had also been finalized. However, the said list was not approved by the State on the ground that its reservation policy has not been made in accordance with the directions and procedures issued subsequently, i.e., on 9th July, 1975 whereas the advertisement was issued on 23rd May, 1975. The matter relating to reservation was provided under the statutory rules.

The direction of the State to issue a fresh list on the Commission, therefore, came to be questioned. It was in the aforementioned situation, the law was laid down to the effect that the Appellants therein acquired some right for being considered for selection in view of the rules as they existed on the date of advertisement. However, we may notice that no law in absolute terms was laid down therefor. This Court categorically held:

"If the recruitment Rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules. Whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication; if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the rules and orders which were in force on the date of advertisement. Determination of this question largely depends on the facts of each case having regard to the terms and conditions set out in the advertisement and the relevant rules and orders"

In that case it was held that the Government Order dated 9th July, 1975 made the Government's intention clear that the revised directions which were contained therein would not apply to the selections in respect of which advertisement had already been issued and, therefore, the mode of selection as contained in Annexure 2 of the said Order was not applicable to the selection for filling

50 posts of Tehsildars pending before the Commission. A list, thus, validly prepared, could not have been directed to be changed because of a policy adopted by the State which was not applicable.

In Shankarsan Dash (supra), this Court stated the law in the following terms:

"It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. and if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha, Neelima Shangla v. State of Haryana, or Jatendra Kumar v. State of Punjab."

[See also Food Corpn. of India and Others v. Bhanu Lodh and Others (2005) 3 SCC 618 and Punjab State Electricity Board and Others v. Malkiat Singh (2005) 9 SCC 22]

What is, therefore, required to be seen is as to whether the action of the State is arbitrary.

Strong reliance has been placed by Mr. P.P. Rao on Hoshiar Singh v. State of Haryana and Others [1993 Supp (4) SCC 377] wherein it was observed:

"The appointment on the additional posts on the basis of such selection and recommendation would deprive candidates who were not eligible for appointment to the posts on the last date for submission of applications mentioned in the advertisement and who became eligible for appointment thereafter, of the opportunity of being considered for appointment on the additional posts because if the said additional posts are advertised subsequently those who become eligible for appointment would be entitled to apply for the same"

Selection in that case was for police service. Selection had been made in excess of requisition in violation of Rule 12.6 of the Punjab Police Rules, 1934. Standard of physical fitness was relaxed by the Selection Committee which power in terms of the advertisement it did not possess. There was nothing on record to show that the Director General of Police had sent any further requisition apart from the 8 posts for which the notification was issued and it was in that situation this Court opined that the Board on its own could not recommend names of 19 persons for the selection and recommendation of larger number of persons than the posts for which requisition was sent.

In Gopal Krushna Rath (supra), the question which arose for consideration was in regard to the qualification of the Appellant for being appointed to the post of Professor at the relevant time. On fact it was held that the Appellant did possess the requisite qualification which was in accordance with the rules / guidelines then in force. He had also obtained higher marks than the original Respondent at the selection. It was in the aforementioned situation, this Court held that the subsequent change in the requirements regarding qualification by the University Grant Commission would not affect the process of selection which had already commenced. In this case, however, the private Respondents concerned cannot be said to have no qualification on the date of advertisement.

Strong reliance has also been placed by Mr. P.P. Rao on Maharashtra State Road Transport Corpn. and Others v. Rajendra Bhimrao Mandve and Others[(2001) 10 SCC 51]. In that case, the rule of game said to be involved was in terms of circular issued by the State. No statutory rule or requisition was governing the field. A question arose as to which circular would apply. The contention of the Respondent was that the circular dated 4.4.1995 would apply providing for assignment of 87=% marks for written/ trade test and 12=% for the oral test (personal interview) which was accepted having regard to the fact that the driving test had been conducted on 27.11.1995 and, therefore, the circular letter which was issued on 24.6.1996 providing for a different standards was held to be not applicable, as on fact it was found that the other circulars issued have no application in respect of the driving tests held for appointment of the drivers. In the aforementioned fact situation, it was opined:

"Therefore, the High Court cannot be said to be correct in holding that the circular order dated 24-6-1996 is illegal or arbitrary or against the orders of the State Government or the resolution of the Board of the Transport Corporation. Instead, it would have been well open to the High Court to have declared that the criteria sought to be fixed by the circular dated 24-6-1996 as the sole determinative of the merit or grade of a candidate for selection long after the last date fixed for receipt of application and in the middle of the course of selection process (since in this case the driving test was stated to have been conducted on 27-11-1995) cannot be applied to the selections under consideration and challenged before the High Court"

The said decision is, thus, also not an authority for the proposition that a subsequent circular would not per se be illegal or invalid. The court in all situations of this nature is required to consider only the applicability thereof.

In Union Public Service Commission v. Gaurav Dwivedi and Others [(1999) 5 SCC 180], this Court held:

"We are unable to agree with this contention. Once it is considered, and in our opinion rightly so, that the number of vacancies to be filled could be reduced then the rules do not stipulate that the entire process of examination must be completed, including the conduct of the interview/viva voce, on the basis of the original number of vacancies which were notified. When before the declaration of the result of the main examination, the number of vacancies have been determined then it was only proper that candidates who are twice the number of revised vacancies are called for interview and not more. It is to be borne in mind that this is a competitive examination with the number of

vacancies being 470 only, 940 candidates were required to be called for interview. By calling more than this number may result in prejudice to one or more of the candidates who were in the position of 940 or above. For example, it is possible that a candidate at Serial No. 941, who is not entitled to be called for interview, if he is permitted to be called for interview, may secure higher marks in the viva voce and oust those candidates who were higher in rank to him in the merit list. The High Court, in our opinion, was not right in permitting more than 940 candidates being called for interview/viva voce."

We may, however, notice that in Ashok Kumar Sharma and Another v. Chander Shekher and Another [1993 Supp (2) SCC 611], advertisement was issued on 9.6.1982. The last date of submission of applications was 15th July, 1982. The Appellants and the Respondents by that date had submitted applications. The Appellants, however, had appeared for B.E. Civil Examination. Its results, however, was not published. Rule 37 of the J&K Public Service Commission Business Rules reads, thus:

"Applications of candidates who have appeared in the examination, the passing of which may make them eligible to appear in an interview for recruitment to a post to be made otherwise than by a competitive examination, but results whereof have not been declared up to the date of making of the application, may be entertained provisionally, but no such candidate shall be permitted to take the interview if he is declared as having failed in the examination or if the results are not available on the date the viva-voce test is held."

In terms of the said Rules, therefore, the Appellants were found to be eligible although he did not pass the examination on the date thereof. It was in that situation, the Appellants were held to be eligible.

In this case, we are dealing with a peculiar situation. The Government took a sympathetic view about the fate of those candidates who could not be accommodated earlier. Such consideration was made to broad-base the field of selection in view of the fact that since 1997 there had been no further recruitment. It is also not in dispute that the vacancies were notified from time to time as they were brought to the notice of the concerned department by the other departments.

The authority of the State to frame rules is not in question. The purport and object for which the said notifications were issued also cannot be said to be wholly arbitrary so as to attract the wrath of Article 14 of the Constitution of India. The Appellants herein no doubt had a right to be considered but their right to be considered along with other candidates had not been taken away. Both the groups appeared in the preliminary examination. Those who had succeeded in the preliminary examination were, however, allowed to sit in the main examination and the candidature of those had been taken into consideration for the purpose of viva-voce test who had passed the written examination.

The question, however, remains as to whether the State could reduce the cut-off marks. If the cut-off mark specified by the State is arbitrary, Article 14 would be attracted. The Tribunal did not have

any jurisdiction to pass an interim order directing reduction in the cut-off mark. The cut-off mark at 66% was fixed having regard to the ratio of the candidates eligible for sitting at the written examination at 1:50. An interim order as is well- known is issued for a limited purpose. By reason thereof, the Tribunal had no jurisdiction to grant a final relief.

Moreover, the Tribunal could not have directed the Commission to do something which was contrary to rules. An interim order is subject to variation or modification. An interim order would ordinarily not survive when the main matter is dismissed. The Commission also did not intend to abide by the said directions. It wanted the State to pass an appropriate order. It was, pursuant to or in furtherance of the said desire of the Commission as also the direction of the Tribunal as contained in its interim order dated 6.1.2005, GOMs 200 was issued. The said Government Order was, thus, not issued by the State of its own. There was no independent application of mind. The statutory requirements for passing an government order independent of the interim directions issued by the Tribunal were wholly absent.

In Gaurav Dwivedi (supra), this Court categorically held the possibility that a person who was otherwise entitled to be called for an interview may lose its chance if the others who were not eligible are called for interview.

The standard was fixed as 1:50. The Commission came to the conclusion, having regard to the results published on written examination, that 66% should be the cut-off mark. It need not have been 66%. If the candidature of more candidates was to be taken into consideration, the same would mean that the State shall give a go by to principle of selection fixed by it, viz., 1:50. If the submission of the Commission and consequently, the State is to be accepted that the ratio should be 1:50, the same could not have been reduced to 10:90. A violation of that rule would, in our opinion, be arbitrary.

In total 558 vacancies were notified. Thus, only 27, 900 candidates could have been called for main written examination on the basis of the norms fixed by the State itself. However, the actual number of candidates who passed the examination are said to have been 50, 726. Although, actually it is stated that 32, 056 candidates appeared. Thus, indisputably, a large number of candidates who had been allowed to appear at the examination were evidently permitted to do so in violation of norm of 1:50, as was specified by the State. The aforementioned rule could not have been relaxed. It did not have any rational basis. 66% cut-off mark was not fixed by the Commission. It was arrived at by the Commission in view of the marks secured by the respective candidates on applying the ratio of 1:50. Once a person falls beyond the said ratio, he was not qualified. He was not to be considered any further. The State and the Commission had themselves fixed three different stages of selection process which were required to be adhered to.

We may notice at this stage Suraj Parkash Gupta and Others v. State of J&K and Others [(2000) 7 SCC 561], wherein it was held:

"The result of the discussion, therefore, is that the wholesale regularisation by order dated 2-1-1998

(for the Electrical Wing), by way of implied relaxation of the Recruitment Rule to the gazetted category is invalid. It is also bad as it has been done without following the quota rule and without consulting the Service Commission. Further, the power under Rule 5 of the J&K (CCA) Rules, 1956 to relax the Rules cannot, in our opinion, be treated as wide enough to include a power to relax rules of recruitment."

Relaxation can be given only if there exists any provision therefor in the Rules. GOMs No. 200 dated 30th April, 2005, in our opinion, must fall having regard to the vacation of interim order by the Tribunal and consequent dismissal of the original application. It will bear repetition to state that, while issuing the same, the Government did not apply its own mind. Only those candidates who came within the purview of the rule existing theretobefore could have been subjected to further selection process.

For the foregoing reasons, we are of the opinion that while GOMs No. 164 and 133 are not invalid, GOMs No. 200 is. The Commission was, thus, statutorily enjoined to interview only such candidates who had passed the written examination in 1:50 ratio. Only upon shortlisting the said candidates, the interview can be held at the ratio of 1:2.

To the aforementioned extent, the Commission must undertake selection process afresh. We, however, make it clear that those who have not passed the written examination would not be entitled to be considered in terms of the aforementioned directions. The appeals are allowed to the aforementioned extent. No costs.