SUPREME COURT OF INDIA

Chairman, All Railway Rec. Board

Vs.

K. Shyam Kumar

C.A.Nos.5675-5677 of 2007

(Aftab Alam and K.S. Radhakrishnan JJ.)

06.05.2010

JUDGEMENT

K.S.Radhakrishnan, J.

1. We are in these cases concerned with the validity of an order dated 04.06.2004 issued by the Railway Board directing the Railway Recruitment Board (in short RRB) to conduct a re-test for recruitment to Group-D posts, for those candidates who had obtained minimum qualifying marks in the first written examination against which large scale irregularities were noticed.

2. The RRB vide its employment notification 1/2003 dated 13.06.2003 invited applications for filling up Group `D' posts in the South Central Railway Zone, Secunderabad. In response to the notification 10,02,909 applications were received by the RRB out of which 5,86,955 were found eligible and call letters were sent to them for appearing in the written test held at various centres from 09.11.2003 to 21.11.2003. 3,22,223 candidates appeared for the written test, out of which 2690 were selected to be called for Physical Efficiency Test (PET) held on 03.02.2004 to 12.02.2004.

> "Candidates who qualified in the PET were called for verification of original certificates from 04.04.2004 to 12.02.2004. During verification it was noticed that certain malpractices had taken place in the written examination.
>
> Meanwhile, several complaints were also received by the RRB stating that certain candidates had indulged in mass copying in some centers, including leakage of question papers and impersonation of certain candidates. Since large scale irregularities and malpractices were noticed it was decided to refer the matter to the State Vigilance Department. The Vigilance Department conducted a preliminary enquiry and submitted its report which was placed before the Tribunal as well as before the High Court. Portions of the report extracted in the judgment of the High Court prima facie revealed leakage of question papers, mass copying and

impersonation of candidates in the written test. Report also indicated the possibility of involvement of some employees of Railways and outsiders in the malpractices detected. Vigilance Department also recommended that the matter be referred to the Central Bureau of Investigation(CBI).”

3. The vigilance report and the various complaints were examined by the Railway Board and the Board after discussing the matters with the RRB gave a direction vide its letter dated 04.06.2004 to conduct a re-test for those candidates who had obtained minimum qualifying marks in the written examination. The operative portion of the order reads as follows:- "Board have gone into complete details of the matter in view of the nature of malpractices / irregularities involved, it has been decided that candidates obtaining minimum qualifying marks may be subjected to another written examination by conducting the same in good educational institution under tight control and supervision. This would ensure the exclusion of those, who might have secured undue advantage in the earlier examination.

“Thereafter, candidates may be called for PET on the basis of fresh merit list irrespective of the fact whether some of them had appeared in the PET held on February 2004".”

4. Railway Board also ordered that the cases of the candidates referred to GEQD including those found guilty during the course of investigation by the Vigilance or CBI be dealt with as per the extant rules at the time of preparation of the final panel or later stage. RRB was directed to take steps to conduct written examination and PET at the earliest. Railway Board vide its letter dated 1st September, 2004 directed the RRB to go ahead with the examination scheduled on 26.09.2004.

5. Aggrieved by the order dated 04.06.04 certain candidates who had taken the first written examination filed O.A. No.975/2004 before the Central Administrative Tribunal, Hyderabad questioning the decision to conduct re-test and also sought for a declaration that they are eligible to be appointed to Group `D' posts in the South Central Railway Zone, Secunderabad pursuant to the selection held in the month of February, 2004.

“Alternatively it was contended that even if the Board had the power to conduct second stage written examination it should be confined only to 2690 candidates who had qualified in the earlier written examination. The stand of the Board was that, there was no illegality in ordering a re-test and para 18.1 of the selection procedure empowered the Board to do so. Referring to paragraph 18.4 of the employment notice No.1/2003 it was contended that merely qualifying in the written and / or PET a candidate would not get any vested right for appointment, especially since no final list or panel was published. Reference was also made to the vigilance report and the report of the CBI which prima facie revealed serious malpractices including mass copying, leakage of question papers and impersonation in the written examination.”

6. The Tribunal found no irregularity in the decision taken by the Board in conducting a re-test which was taken after referring to the vigilance report and other relevant materials. Further it was noticed that the majority of the candidates had not objected to that course and the applicants had approached the Tribunal only at the eve of the re-test. Further it was also noticed the final select list was never published, hence no legal rights of the applicants were infringed. O.A. No.975/2004 was, therefore dismissed on 02.09.2004. O.A. No.1008/2004 filed by few other candidates who had not taken the re-test claiming identical reliefs was also dismissed by the Tribunal on 23.09.2004.

7. Aggrieved by the orders passed by the Tribunal in OA No.975 of 2004 and OA No.1008 of 2004, Writ Petition No.17144 of 2004 and Writ Petition No.19354 of 2004 were preferred before the High Court of Andhra Pradesh. Before the High Court it was contended that the decision to cancel the written test was arbitrary, unreasonable and violative of Articles 14,16 and 21 of the constitution of India. Further it was also pointed out that even if the allegation of mass copying in certain centres was true, those candidates could have been identified and there was no justification to order a re-test for the other candidates, who had obtained minimum qualifying marks in the written test.

8. The High Court found no reasons to cancel the first written examination and to conduct a re-test for 2690 candidates who got minimum qualifying marks in the written test which included 62 candidates against whom there were serious allegations of impersonation. Referring to the vigilance report, the High Court concluded that the controversy virtually boils down to identifying 62 candidates whose cases stood referred to CEQD/HYD for their certification and hence the process of recruitment could be proceeded with for the rest of the candidates. Further it was also held by the High Court that the materials available to support the complaint of leakage of question papers were limited and had no nexus to the large scale irregularities, noticed by the Railways. The High Court also noticed that when the order dated 04.06.2004 was passed only the vigilance report was available with the Board which was insufficient, to support that order and the materials collected by the CBI subsequently could not be relied upon to support that decision. Further it was also pointed out that no copy of the vigilance report was also made available to the petitioners and the decision taken to conduct a re-test was arbitrary, illegal and unreasonable.

9. The High Court rejected the contentions that the order was politically motivated and mala fide but applying Wednesbury's principle of unreasonableness the Court held that the decision of the Board was illegal, arbitrary and unreasonable and directed the Board to finalise the selection on the basis of the first written test and to issue appointment orders to all the candidates except the 62 candidates against whom there were allegations of impersonation.

10. Aggrieved by the above judgment the RRB has come up with these appeals. Shri D.K. Thakur, learned counsel appearing for the Board submitted that the High Court has committed a grave error in sustaining the first written test conducted by the Board in spite of large scale irregularities and illegalities detected during the course of the enquiry by the

Vigilance Department and subsequently by the CBI. Learned counsel submitted in the facts and circumstances of the case the best option available to the Railway Board was to conduct a re-test for those candidates who had obtained minimum qualifying marks in the first written test, since allegations of mass copying, leakage of question papers and impersonation were noticed.

> "Learned counsel also stated that the petitioners themselves had pointed out before the Tribunal that if a re-test is conducted, the same be confined only to those 2690 candidates. Learned counsel also submitted that the High Court has wrongly applied the principle of Wednesbury unreasonableness. Learned counsel placed reliance on the judgments of this Court in *Union of India v. Tarun K. Singh*[1], *B. Ramanjini v. State of A.P.*[2] , *Bihar School Examination Board v. Subhas Chandra Sinha*[3] , *State of Maharashtra v. Prabhu*[4] , *Madhyamic Shiksha Mandal, M.P. v. Abhilash Shiksha Prasar Samiti*[5] in support of his various contentions."

11. Learned counsel appearing for the respondents tried to support the judgment of the High Court contending that the best course open to the Railways was to complete the recruitment process based on the first written test after ordering inquiry with respect to the 62 candidates against whom there were allegations of impersonation rather than conducting a re-test.

> "Learned counsel also pointed out that the report of the Vigilance was not made available to the respondents and, therefore, the action of the Railway Board was illegal, arbitrary and violative of the principles of natural justice. In support of his contentions learned counsel placed reliance on various decisions of this Court viz., *K. Vijayalakshmi vs. Union of India*[6], *Asha Kaul vs. State of Jammu and Kashmir*[7] , *N.T. Davin Katti vs. Karnanataka Public Service Commission*[8] , *Union of India vs. Rajesh P.U.*[9] , *Munna Roy vs. Union of India*[10] , *Babita Prasad vs. State of Bihar*[11] , *Onkar Lal Bajaj vs. Union of India*[12].

12. We heard learned counsel on either side at length and we have also gone through the extract of the vigilance report which appears in para 15 of the judgment of the High Court. Report indicated that 100 to 200 candidates were suspected to have obtained answers for the questions three hours before the examination through some middleman who had arranged answers by accepting huge bribe. Apart from the serious allegations of impersonation in respect of 62 candidates it was stated on close scrutiny of the answer sheets at least six candidates had certainly adopted unfair means to secure qualifying marks in the written test. Report says that investigation prima facie established leakage of question papers to a sizable number of candidates for the examination held on 23.11.2003. Further, it was also noticed that leakage of question paper was pre-planned and widespread and the possibility of involvement of Railway / RRB staff and also outsiders could not be ruled out and hence, recommended that the matter be referred to CBI.

> "The High Court also referred to the reports of the superintendent of Police PEI(A)/2004/ CBI, Hyderabad which suggested certain measures to be adopted by the

Board to rule out such malpractices in future. Reports of the CBI of course, were not available with the Railway Board when they took the decision on 04.06.2004 to conduct a re-test but only the vigilance report and the complaints received."

13. We are, in this case, primarily concerned with the question whether the High Court was justified in interfering with the decision taken by the Board in conducting a re-test for those who had obtained minimum qualifying marks in the first written test and directing the Board to go ahead with the recruitment process on the basis of first written test against which there were serious allegations of irregularities and malpractices. When this matter came up for admission before this Court on 20.01.2006, this Court permitted the Board to declare the result of the second test and proceed to appoint the selected candidates, however, it was ordered that the appointments made be subject to the result of these appeals. We are informed that candidates who got qualified in the re-test were already appointed and have joined service.

14. We will first examine whether the High Court was justified in directing the Board to go ahead with the recruitment process based on the first written test in the wake of the report of the Vigilance and the materials collected by the CBI subsequently. Report of the Vigilance has prima facie established that the allegations of leakage of question papers, large scale impersonation of candidates, mass copying etc. was true. Possibility of the involvement of the staff of Railways and outsiders was also not ruled out by the Vigilance. In such circumstances, we fail to see how the High Court has concluded that there is no illegality in going ahead with the recruitment process on the basis of the first written test. We may indicate that the Railway Board had three alternatives viz., (1) to cancel the entire written test, and to conduct a fresh written test inviting applications afresh; (2) to conduct a re- test for those candidates who had obtained minimum qualifying marks in the first written test; and (3) to go ahead with the first written test (as suggested by the High Court), confining the investigation to 62 candidates against whom there were serious allegations of impersonation.

15. The High Court applying the Wednesbury's principle accepted the last alternative by rejecting the decision by the Railway Board to conduct a re- test for those candidates who had obtained minimum qualifying marks in the first written test. We are of the view that the High Court has wrongly applied the above principle and misdirected itself in directing the Board to accept the third alternative. We will examine the decision of the High Court by applying the principle of Wednesbury unreasonableness as well as the doctrine of proportionality. Before that let us examine both the concepts at some length.

16. Judicial review conventionally is concerned with the question of jurisdiction and natural justice and the Court is not much concerned with the merits of the decision but how the decision was reached. In Council of Civil (GCHQ Case) the House of Lords rationalized the grounds of judicial review and ruled that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality.

> "Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as audi alteram partem, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc."

17. Ground of irrationality takes in Wednesbury unreasonableness propounded in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation*[13] Lord Greene MR alluded to the grounds of attack which could be made against the decision, citing unreasonableness as an `umbrella concept' which covers the major heads of review and pointed out that the court can interfere with a decision if it is so absurd that no reasonable decision maker would in law come to it. In GCHQ Case (supra) Lord Diplock fashioned the principle of unreasonableness and preferred to use the term irrationality as follows:

> "By `irrationality' I mean what can now be succinctly referred to as "Wednesbury's unreasonableness", ... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

18. In *R. v. Secretary of State for the Home Department ex parte Brind*[14] the House of Lords re-examined the reasonableness of the exercise of the Home Secretary's discretion to issue a notice banning the transmission of speech by representatives of the Irish Republican Army and its political party, Sinn Fein. Court ruled that the exercise of the Home Secretary's power did not amount to an unreasonable exercise of discretion despite the issue involving a denial of freedom of expression. House of Lords however, stressed that in all cases raising a human rights issue proportionality is the appropriate standard of review. The House of Lords in *R (Daly) v. Secretary of State for the Home Department*[15] demonstrated how the traditional test of Wednesbury unreasonableness has moved towards the doctrine of necessity and proportionality. Lord Steyn noted that the criteria of proportionality are more precise and more sophisticated than traditional grounds of review and went on to outline three concrete differences between the two:-

> "(1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.
>
> (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations.

(3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights."

19. Lord Steyn also felt most cases would be decided in the same way whatever approach is adopted, though conceded for human right cases proportionality is the appropriate test.

20. The question arose as to whether doctrine of proportionality applies only where fundamental human rights are in issue or whether it will come to provide all aspects of judicial review. *Lord Steyn in R. (Alconbury Development Limited) v. Secretary of State for the Environment, Transport and the Regions*[16] stated as follows:- "I consider that even without reference to the Human Rights Act, 1998 the time has come to recognize that this principle (proportionality) is part of English administrative law not only when Judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing".

21. Lord Steyn was of the opinion that the difference between both the principles was in practice much less than it was sometimes suggested and whatever principle was applied the result in the case was the same. Whether the proportionality will ultimately supersede the concept of reasonableness or rationality was also considered by Dyson Lord Justice in *R. (Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence*[17] and stated as follows:- "We have difficulty in seeing what justification there now is for retaining Wednesbury test ..... but we consider that it is not for this Court to perform burial rights. The continuing existence of the Wednesbury test has been acknowledged by House of Lords on more than one occasion. A survey of the various judgments of House of Lords, Court of Appeals, etc. would reveal for the time being both the tests continued to co-exist."

22. Position in English Administrative Law is that both the tests that is. Wednesbury and proportionality continue to co-exist and the proportionality test is more and more applied, when there is violation of human rights, and fundamental freedom and the Wednesbury finds its presence more on the domestic law when there is violations of citizens ordinary rights.

"Proportionality principle has not so far replaced the Wednesbury principle and the time has not reached to say good bye to Wednesbury much less its burial."

23. In *Huang case*[18], the House of Lords was concerned with the question whether denial of asylum infringes Article 8 (Right to Respect Family Life) of the *Human Rights Act, 1998*. House of Lords ruled that it was the duty of the authorities when faced with individuals who did not qualify under the rules to consider whether the refusal of asylum status was unlawful on the ground that it violated the individual's right to family life. A structured proportionality test has emerged from that decision in the context of the violation of human rights. In R (Daly) (supra) the House of Lords considered both common law and Article 8 of the convention and ruled that the policy of excluding prisoners from their cells while prison

officers conducted searches, which included scrutinizing privileged legal correspondence was unlawful.

24. Both the above-mentioned cases, mainly concerned with the violation of human rights under the *Human Rights Act, 1998* but demonstrated the movement away from the traditional test of Wednesbury unreasonableness towards the test of proportionality. But it is not safe to conclude that the principle of Wednesbury unreasonableness has been replaced by the doctrine of proportionality.

25. Justice S.B. Sinha, as His Lordship then was, speaking for the Bench in *State of U.P. v. Sheo Shanker Lal Srivastava and Others*[19] after referring to the judgment of the Court of appeal in *Huang v. Secretary of State for the Home Department*[20], *R. v. Secretary of State of the Home Department, ex parte Daly*[21] opined that Wednesbury principle may not now be held to be applicable in view of the development in constitutional law and held as follows:-

> "24. While saying so, we are not oblivious of the fact that the doctrine of unreasonableness is giving way to the doctrine of proportionality.
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> 25. It is interesting to note that the Wednesbury principles may not now be held to be applicable in view of the development in constitutional law in this behalf. See, for example, Huang v. Secy. of State for the Home Deptt. wherein referring to R. v. Secy. of State of the Home Deptt., ex p Daly, it was held that in certain cases, the adjudicator may require to conduct a judicial exercise which is not merely more intrusive than Wednesbury, but involves a full-blown merit judgment, which is yet more than ex p. Daly, requires on a judicial review where the court has to decide a proportionality issue."

26. Sheo Shanker Lal Srivastava case was later followed in *Indian Airlines Ltd. v. Prabha D. Kanan*[22]. Following the above mentioned two judgments in *Jitendra Kumar And Others v. State of Haryana and Another*[23] the Bench has referred to a passage in HWR Wade and CF Forsyth on Administrative Law, 9th Edition. (2004), pages 371- 372 with the caption "Goodbye to Wednesbury" and quoted from the book which reads as follows:- "The Wednesbury doctrine is now in terminal decline but the coup de grace has not yet fallen, despite calls for it from very high authorities" and opined that in some jurisdictions the doctrine of unreasonableness is giving way to doctrine of proportionality."

27. Indian Airlines Ltd.'s case and Sheo Shanker Lal Srivastava's case (supra) were again followed in *State of Madhya Pradesh and Others v. Hazarilal*[24] and the Bench opined as follows:- "Furthermore the legal parameters of judicial review have undergone a change. Wednesbury principle of unreasonableness has been replaced by the doctrine of proportionality.".

28. With due respect, we are unable to subscribe to that view, which is an overstatement of the English Administrative Law.

29. Wednesbury principle of unreasonableness as such has not been replaced by the doctrine of proportionality though that test is being applied more and more when violation of human rights is alleged. H.W.R. Wade & C.F. Forsyth in the 10th Edition of Administrative Law (2009), has omitted the passage quoted by this court in Jitender Kumar case and stated as follows:

> "Notwithstanding the apparent persuasiveness of these views the coup de grace has not yet fallen on Wednesbury unreasonableness. Where a matter falls outside the ambit of 1998 Act, the doctrine is regularly relied upon by the courts.
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> Reports of its imminent demise are perhaps exaggerated."
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> (emphasis applied).

30. Wednesbury and Proportionality - Wednesbury applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to `assess the balance or equation' struck by the decision maker. Proportionality test in some jurisdictions is also described as the "least injurious means" or "minimal impairment" test so as to safeguard fundamental rights of citizens and to ensure a fair balance between individual rights and public interest. Suffice to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalize or lay down a straight jacket formula and to say that Wednesbury has met with its death knell is too tall a statement. Let us, however, recognize the fact that the current trend seems to favour proportionality test but Wednesbury has not met with its judicial burial and a state burial, with full honours is surely not to happen in the near future.

31. Proportionality, requires the Court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision- maker has achieved more or less the correct balance or equilibrium. Courts entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate, i.e. well balanced and harmonious, to this extent court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.

32. Leyland and Anthony on Textbook on Administrative Law (5th edn. OUP, 2005) at p.331 has amply put as follows:

> "Proportionality works on the assumption that administrative action ought not to go beyond what is necessary to achieve its desired results (in every day terms, that you should not use a sledgehammer to crack a nut) and in contrast to irrationality is often understood to bring the courts much closer to reviewing the merits of a decision."

33. Courts have to develop an indefeasible and principled approach to proportionality till that is done there will always be an overlapping between the traditional grounds of review and the principle of proportionality and the cases would continue to be decided in the same manner whichever principle is adopted. Proportionality as the word indicates has reference to variables or comparison, it enables the Court to apply the principle with various degrees of intensity and offers a potentially deeper inquiry into the reasons, projected by the decision maker.

34. We shall now test the validity of the order impugned applying both the principles.

35. Application of the principles We have already indicated the three alternatives available to the decision- maker (Board) when serious infirmities were pointed out in the conduct of the first written test. Let us examine which was the best alternative, the Board could have accepted applying the test of Wednesbury unreasonableness. Was the decision taken by the Board to conduct a re-test for those candidates who had obtained minimum qualifying marks in the first written test so unreasonable that no reasonable authority could ever have decided so and whether the Board before reaching that conclusion had taken into account the matters which they ought not to have taken into account or had refused to take into account the matters that they ought to have taken into account and the decision taken by it was so unreasonable that no reasonable authority could ever have come to it? Judging the decision taken by the Board applying the standard laid down in the Wednesbury principle unreasonableness, the first alternative that is the decision to cancel the entire written test and to conduct a fresh written test would have been time consuming and expensive. Initially 10,02,909 applications were received when advertisement was issued by the Board out of which 5,86,955 were found to be eligible and call letters were sent to them for appearing in the written test held at various centres. 3,22,223 candidates appeared for the written test, out of which 2690 were selected. Further the candidates who had approached the Court had also not opted that course instead many of them wanted to conduct a re-test for 2690 candidates, the second alternative. The third alternative was to go ahead with the first written test confining the investigation to 62 candidates against whom there were serious allegations of impersonation. The Board felt in the wake of the vigilance report and the reports of the CBI, it would not be the best option for the Railway Administration to accept the third alternative since there were serious allegations of malpractices against the test. From a reasonable man's point of view it was felt that the second option i.e. to conduct a re-test for those candidates who had obtained minimum qualifying marks in the first written test was the best alternative.

36. We will now apply the proportionality test to three alternatives suggested. Principle of proportionality, as we have already indicated, is more concerned with the aims of the

decision maker and whether the decision maker has achieved the correct balance. The proportionality test may require the attention of the Court to be directed to the relative weight according to interest and considerations. When we apply that test and look at the three alternatives, we are of the view that the decision maker has struck a correct balance in accepting the second alternative. First alternative was not accepted not only because such a process was time consuming and expensive, but nobody favoured that option, and even the candidates who had approached the court was more in favour of the second alternative. Applying the proportionality test also in our view the Board has struck the correct balance in adopting the second alternative which was well balanced and harmonious.

37. We, therefore hold, applying the test of Wednesbury unreasonableness as well as the proportionality test, the decision taken by the Board in the facts and circumstances of this case was fair, reasonable, well balanced and harmonious. By accepting the third alternative, the High Court was perpetuating the illegality since there were serious allegations of leakage of question papers, large scale of impersonation by candidates, mass copying in the first written test.

38. We are also of the view that the High Court has committed a grave error in taking the view that the order of the Board could be judged only on the basis of the reasons stated in the impugned order based on the report of vigilance and not on the subsequent materials furnished by the CBI.

> "Possibly, the High Court had in mind the constitution bench judgment of this *New Delhi and Anr.*[25]

39. We are of the view that the decision maker can always rely upon subsequent materials to support the decision already taken when larger public interest is involved. This Court in *Madhyamic Shiksha Mandal, M.P. v. Abhilash Shiksha Prasar Samiti and Others*[26] found no irregularity in placing reliance on a subsequent report to sustain the cancellation of the examination conducted where there were serious allegations of mass copying. The principle laid down in Mohinder Singh Gill's case is not applicable where larger public interest is involved and in such situations, additional grounds can be looked into to examine the validity of an order. Finding recorded by the High Court that the report of the CBI cannot be looked into to examine the validity of order dated 04.06.2004, cannot be sustained.

40. We also find it difficult to accept the reasoning of the High Court that the copy of the Vigilance report should have been made available to the candidates at least when the matters came up for hearing. Copy of the report, if at all to be served, need be served only if any action is proposed against the individual candidates in connection with the malpractices alleged. Question here lies on a larger canvas as to whether the written test conducted was vitiated by serious irregularities like mass copying, impersonation and leakage of question paper, etc not against the conduct of few candidates. In this connection reference may be made to the judgment of this Court in *Bihar School Examination Board v. Subhas Chandra Sinha and others*[27]. That was a case where 36 students of S.S.H.E. School, Jagdishpur and

H.E. School Malaur, District Shahbad, moved a Writ Petition before the Patna High Court against the order of the Board canceling annual Secondary School Examination of 1969 in relation to Hanswadih Centre in Shahbad District. The High Court quashed the order of cancellation and directed the Board to publish the results. Against the judgment and order of the High Court the Board filed an appeal by way of special leave petition to this Court. This Court allowed the appeal and upheld the order of the Board cancelling the examination. On the complaint that no opportunity was given to the candidates to represent their case before cancellation, this Court observed as follows:- "This is not a case of any particular individual who is being charged with adoption of unfair means but of the conduct of all the examinees or at least a vast majority of them at a particular centre. If it is not a question of charging any one individually with unfair means but to condemn the examination as ineffective for the purpose it was held. Must the Board give an opportunity to all the candidates to represent their cases? We think not. It was not necessary for the Board to give an opportunity to the candidates if the examinations as a whole were being cancelled. The Board had not charged any one with unfair means so that he could claim to defend himself. The examination was vitiated by adoption of unfair means on a mass scale. In these circumstances it would be wrong to insist that the Board must hold a detailed inquiry into the matter and examine each individual case to satisfy itself which of the candidates had not adopted unfair means. The examination as a whole had to go."

41. Applying the above principle, we are of the view that the finding recorded by the High Court that non supply of the copy of the Vigilance report to the candidates was a legal infirmity, cannot be sustained.

42. Writ Petitioners, in our view, have also no legal right to insist that they should be appointed to Group `D' posts. Final merit list was never published. No appointment orders were issued to the candidates. Even if a number of vacancies were notified for appointment and adequate number of candidates were found successful, they would not acquire any indefeasible right to be appointed against the existing vacancies. This legal position has been settled by a catena of decisions of this Court. Reference can be made to the judgment of this *Court in Shankarsan Dash v. Union of India*[28] *, B. Ramanjini and Others v. State of A.P. and Others*[29].

43. We are also of the view that the High Court was in error in holding that the materials available relating to leakage of question papers was limited and had no reasonable nexus to the alleged large scale irregularity. Even a minute leakage of question paper would be sufficient to besmirch the written test and to go for a re-test so as to achieve the ultimate object of fair selection.

44. We, therefore, find no infirmity in the decision taken by the Board in conducting the second written test for those who have obtained minimum qualifying marks in the first written test rather than going ahead with the first written test which was tainted by large scale irregularities and malpractices.

The Board can now take further steps to regularize the results of the second test and the appointments of the selected candidates. Ordered accordingly.

Appeals are accordingly allowed and the judgment of the High Court is set aside.

[1]*(2003) 11 SCC 768* [2]*(2002) 5 SCC 533* [3]*(1970) 1 SCC 648* [4]*(1994) 2 SCC 481*
[5]*(1998) 9 SCC 236* [6]*(1998) 4 SCC 37* [7]*(1993) 2 SCC 573* [8]*(1990) 3 SCC 157*
[9]*(2003) 7 SCC 285* [10]*(2000) 9 SCC 283* [11]*(1993) Suppl.3 SCC 268* [12]*(2003) 2 SCC 673*
[13]*(1947)2 All ER 680* [14]*(1991) 1 All ER 720* [15]*(2001) 2 AC 532* [16]*(2001) 2 All ER 929*
[17]*[2003] QB 1397* [18]*(2007) 4 All ER 15 (HL)* [19]*(2006) 3 SCC 276* [20]*(2005) 3 All ER 435*
[21]*(2001) 3 All ER 433 (HL)* [22]*(2006) 11 SCC 67* [23]*(2008) 2 SCC 161* [24]*(2008) 3 SCC 273*
[25]*(1978) 1 SCC 405* [26]*(1998) 9 SCC 236* [27]*1970(1) SCC 648* [28]*(1991) 3 SCC 47*
[29]*(2002) 5 SCC 533*