

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A No. 454 / 2008

Friday, this the 27th day of February, 2009.

CORAM

HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER

HON'BLE Ms. K NOORJEHAN, ADMINISTRATIVE MEMBER

1. T.K.Babu,
Wireman,
Calicut Central Electrical Sub Division,
Central Public Works Department,
Dutt Saw Mill Road,
Kallayi.P.O. Calicut.

2. P.V.Karunakaran,
Wireman,
Calicut Central Electrical Sub Division,
Central Public Works Department,
Dutt Saw Mill Road,
Kallayi.P.O. Calicut.

....Applicants

(By Advocate Mr TC Govindaswamy)

v.

1. Union of India represented by
the Secretary to Government of India,
Ministry of Urban Development,
New Delhi.

2. The Director General,
Central Public Works Department,
Nirman Bhavan, New Delhi.

3. The Additional Director General (Training)I,
O/o the Additional Director General (Training),
Central Public Works Department,
Training Institute E-Wing,
Nirman Bhavan, New Delhi.

....Respondents

(By Advocate Mr George Joseph, ACGSC)

This application having been finally heard on 27.2.2009, the Tribunal on the same day delivered the following:



ORDER

HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER

The applicants in this O.A are Wireman in the scale Rs.3050-4590 working in the Central Electrical Sub Division, C.P.W.D., Calicut. Their grievance is that they have not been promoted as Junior Engineer (Electrical) against the O.B.C vacancies notified vide Annexure A-1 notice dated 25.9.2007.

2. In terms of the Recruitment Rules for the post of J.E.(E), the 2nd respondent invited applications from eligible candidates for participating in the Limited Departmental Competitive Examination to be held on 30.12.2007 to fill up 50 vacancies (OC-26, SC-07, ST-04 and OBC-13) for the years 2005-06. It was stated in the rules appended to the notice that after the examination, the candidates will be arranged by the Controller of examination in the order of merit as per the marks finally awarded to them and those who have been found qualified in the examination will be recommended for promotion upto the required number. It was also stated therein that candidates should clearly understand that the proposed examination is a competitive one and not qualifying and the number of persons to be promoted on the results of the examination is entirely within the competence of the Government to decide and no candidate will have any claim for appointment on the basis of his performance in the examination as a matter of right. Further, it was stated that the success in the examination would confer no right on the candidate for appointment to the post of Junior Engineer. The total marks in 2 papers viz, General Engineering and Mechanical Engineering was 100 each and for assessment of confidential report, the maximum mark was 50. The applicants have appeared in the examination and their names were included at Sl.No.68 and Sl.No.58 respectively of the Annexure A-2 merit list. Out of the total of 250 marks, the 1st applicant Shri T.K.Babu secured 65.25 marks and the second applicant Shri M.Manoharan secured



77.75 marks. Their names were not included in the Annexure A-3 list of eligible candidates for appointment arranged in the order of merit. When they found that their names were not included in the said list, they approached the respondent-department under the Right to Information Act, 2005. The respondents informed them that the total number vacancies to be filled was 76 including 13 vacancies earmarked for OBCs. The Central PWD Mazdoor Union made Annexure A-5 representation to the 1st respondent stating that out of the 13 vacancies earmarked for OBC candidates, 9 vacancies were not filled up and requested to take necessary steps in filling up the reservation quota for OBC as per rules and regulations of the Government of India. As no action on the aforesaid representation was taken by the respondents, the applicants have approached this Tribunal for quashing the Annexure A-2 merit list and the A-3 select list and to issue a direction to the respondents to re-evaluate their answer sheets afresh and to consider and promote them on that basis or to declare that they were entitled to be considered for promotion as J.E(E) against the unfilled OBC vacancies already earmarked vide Annexure A-1 notification.

3. They challenged their non-selection on the ground that there was no qualifying marks prescribed in the selection. Moreover, as they belong to the OBC category, they are entitled to be promoted as J.E(E) from the OBC quota as there are vacancies still available in the said quota. They have also stated that their performance in the examination was exemplary and there were no adverse remarks in their ACRs.

4. In support of their claim, they have relied upon the Apex Court judgment in **Hemani Malhotra v. High Court of Delhi**, [(AIR 2008 SC 2103)]. Para 9 of the said judgment reads as under:

“9. From the proposition of law laid down by this Court in the above

mentioned case it is evident that previous procedure was not to have any minimum marks for viva voce. Therefore, prescribing minimum marks for viva voce was not permissible at all after written test was conducted. There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and viva voce, but if minimum marks are not prescribed for viva voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at viva voce, test was illegal."

They have also relied upon the judgment of the Apex Court in **K. Manjusree v. State of A.P.**, [AIR 2008 SC 1470]. In paras 24 to 30 of the said judgment it is stated as under:

"24. The merit list and selection list prepared by the Interview Committee and approved by the Administrative Committee, on the basis that there was no minimum marks for interview, however, contained one error. The inter se merit of the candidates was prepared with reference to a total of 125 marks, comprising 100 for the written examination and 25 for the interview. But the Administrative Committee had clearly resolved on 30-11-2004 that evaluation of performance should be with reference to a maximum marks of 75 for written examination and 25 for interview. The written examination was, however, conducted with reference to a question paper set for a maximum of 100 marks. The interviews, of course, were held with reference to maximum of 25 marks. Therefore, it was necessary to scale down the marks secured by the candidates in the written examination (with reference to a maximum of 100 marks) proportionately to arrive at the marks with reference to a maximum of 75 marks so that the ratio of maximum marks in written examination and interview would be 3:1. If the maximum marks for the written examination was 100 and for the interview was 25, then the ratio between the marks for written examination and interview would be 4:1, thereby altering the prescribed marks, after the selection process had begun. We are, therefore, of the view that the first list required an arithmetical correction, that is, scaling down of the written examination marks to three-fourth of what was secured by them with reference to a maximum of 100 marks, so that the ratio of 3:1 could be maintained in respect of the marks for written examination and interviews.

Re: Question (iii)

25. When the Administrative Committee placed the merit lists and selection list before the Full Court, apparently objections were raised on two grounds. One related to the failure to provide the minimum of 50%, 40% and 35% marks for interviews, on the interpretation of Resolution dated 30-11-2004 read with earlier Resolutions dated 24-7-2001 and 21-2-2002. The second objection was that even though the Administrative Committee had resolved that the marks for written examination would be 75 and interview would be 25, at the time of

tabulating the marks, the marks secured (out of 100 marks) in the written examination had been taken into account without scaling it down with reference to a maximum of 75 marks. The Full Court, therefore, appointed a sub-committee of two Judges to examine the matter and prepare a fresh merit list and selection list. The sub-committee examined the matter and submitted a revised merit list by incorporating two changes. Firstly, while tabulating the marks, it scaled down the marks secured by the candidates in the written examination with reference to a maximum of 100 marks, in proportion to a maximum of 75 marks so that the final marks were with reference to a base of 75 marks for written examination and 25 marks for interview as resolved on 30-11-2004. Secondly, it applied the minimum percentage of 50%, 40% and 35% for OC, BC, SC/ST even in regard to interviews and consequently, eliminated those who secured less than the minimum in the interview from the process of selection. The final selection list was prepared with reference to the fresh merit list prepared by incorporating the said two changes.

26. As far as the first change is concerned, we have already held that scaling down is unexceptional as it is in consonance with the criteria decided by the Administrative Committee on 30-11-2004 before commencing the selection process.

27. But what could not have been done was the second change, by introduction of the criterion of minimum marks for the interview. The minimum marks for interview had never been adopted by the Andhra Pradesh High Court earlier for selection of District & Sessions Judges, (Grade II). In regard to the present selection, the Administrative Committee merely adopted the previous procedure in vogue. The previous procedure as stated above was to apply minimum marks only for written examination and not for the oral examination. We have referred to the proper interpretation of the earlier Resolutions dated 24-7-2001 and 21-2-2002 and held that what was adopted on 30-11-2004 was only minimum marks for written examination and not for the interviews. Therefore, introduction of the requirement of minimum marks for interview, after the entire selection process (consisting of written examination and interview) was completed, would amount to changing the rules of the game after the game was played which is clearly impermissible. We are fortified in this view by several decisions of this Court. It is sufficient to refer to three of them — *P.K. Ramachandra Iyer v. Union of India*, *Umesh Chandra Shukla v. Union of India* and *Durgacharan Misra v. State of Orissa*.

28. In *Ramachandra Iyer*¹ this Court was considering the validity of a selection process under the ICAR Rules, 1977 which provided for minimum marks only in the written examination and did not envisage obtaining minimum marks in the interview. But the Recruitment Board (ASRB) prescribed a further qualification of obtaining minimum marks in the interview also. This Court observed that the power to prescribe minimum marks in the interview should be explicit and cannot be read by implication for the obvious reason that such deviation from the Rules is likely to cause irreparable and irreversible harm. This Court held that as there was no power under the Rules for the Selection Board to prescribe the additional qualification of securing minimum marks in the interview, the restriction was impermissible and had a direct impact on the merit list because the merit list was to be prepared according to the aggregate marks obtained by the candidates at written test and interview. This Court observed: (SCC p. 181, para 44)

"44. ... Once an additional qualification of obtaining minimum

marks at the viva voce test is adhered to, a candidate who may figure high up in the merit list was likely to be rejected on the ground that he has not obtained minimum qualifying marks at viva voce test. To illustrate, a candidate who has obtained 400 marks at the written test and obtained 38 marks at the viva voce test, if considered on the aggregate of marks being 438 was likely to come within the zone of selection, but would be eliminated by ASRB on the ground that he has not obtained qualifying marks at viva voce test. This was impermissible and contrary to Rules and the merit list prepared in contravention of Rules cannot be sustained."

29. In *Umesh Chandra* the scope of the Delhi Judicial Service Rules, 1970 came up for consideration. The Rules provided that those who secured the prescribed minimum qualifying marks in the written examination will be called for viva voce; and that the marks obtained in the viva voce shall be added to the marks obtained in the written test and the candidate's ranking shall depend on the aggregate of both. 27 candidates were found eligible to appear for viva voce on the basis of their having secured the minimum prescribed marks in the written examination. The final list was therefore, expected to be prepared by merely adding the viva voce marks to the written examination marks in regard to those 27 candidates. But the final list that was prepared contained some new names which were not in the list of 27 candidates who passed the written examination. Some names were omitted from the list of 27 candidates who passed the written examination.

30. It was found that the Selection Committee had moderated the written examination marks by an addition of 2% for all the candidates, as a result of which some candidates who did not get through the written examination, became eligible for viva voce and came into the list. Secondly, the Selection Committee prescribed for selection, a minimum aggregate of 600 marks in the written examination and viva voce which was not provided in the Rules and that resulted in some of the names in the list of 27 candidates being omitted. This Court held neither was permissible. Dealing with the prescription of minimum 600 marks in the aggregate this Court observed: (*Umesh Chandra case*, SCC pp. 735-36, para 14)

"14. ... There is no power reserved under Rule 18 of the Rules for the High Court to fix its own minimum marks in order to include candidates in the final list. It is stated in Para 7 of the counter-affidavit filed in Writ Petition No. 4363 of 1985 that the Selection Committee has inherent power to select candidates who according to it are suitable for appointment by prescribing the minimum marks which a candidate should obtain in the aggregate in order to get into the Delhi Judicial Service. ... But on going through the Rules, we are of the view that no fresh disqualification or bar may be created by the High Court or the Selection Committee merely on the basis of the marks obtained at the examination because Clause (6) of the Appendix itself has laid down the minimum marks which a candidate should obtain in the written papers or in the aggregate in order to qualify himself to become a member of the Judicial Service. The prescription of the minimum of 600 marks in the aggregate by the Selection Committee as an additional requirement which the candidate has to satisfy amounts to an amendment of what is prescribed by Clause (6) of the Appendix. ... We are of the view




that the Selection Committee has no power to prescribe the minimum marks which a candidate should obtain in the aggregate different from the minimum already prescribed by the Rules in its Appendix. We are, therefore, of the view that the exclusion of the names of certain candidates, who had not secured 600 marks in the aggregate including marks obtained at the viva voce test from the list prepared under Rule 18 of the Rules is not legal."

5. They have also produced a copy of the letter No.34012/2/2008-Exam/58 dated 30.1.2009 showing the result of the Limited Departmental Examination 2008 held on 9.11.2008 according to which they have qualified in the said examination and their names were included at Sl.No.1 and 3 respectively in the merit list under the OBC category.

6. In the reply statement, the respondents have stated that after the examination was held, the minimum marks for general category was fixed at 40% of the aggregate and for the reserved category was fixed at 33.33% of the aggregate. The applicants T.K.Babu and P.V.Karunakaran belong to OBC category and they have secured only 65.25 marks which was 26% and 77.75 marks which was 31%. Since minimum cut off marks for reserve candidates was 33.33%, they were not recommended for appointment.

7. We have heard the learned counsel on both sides. The only contentious issue is whether the respondents could fix the cut off marks after the examination was over. In the notification for the examination itself, the respondents have informed the applicants that after the examination, candidate will be arranged by the Controller of Examination in the order of merit as per the marks finally awarded to each of them and in the same order, so many candidates who have been found to be qualified in the examination by the Controller of Examination shall be recommended for promotion as per the vacancies notified. They were also informed that it was a competitive examination and not qualifying examination. It was on the basis of the aforesaid



notice that the respondents have determined the minimum eligibility criterion for the general category candidates and the reserved category candidates. The cut off marks have been prescribed in order to ensure that only persons with certain minimum standard should be given the appointment. It was a conscious decision of the respondent-department and there is nothing arbitrary about it. In such a situation, fixing up the cut off marks prior to the holding examination or after the examination will not make any difference. It was only the presumption of the applicants that they have done very well in the examination. The marks awarded in the examination will depend upon the performance of the candidate in the examination. If they do not perform well, they will get less marks. As the applicants have failed to secure the minimum percentage of marks so prescribed by the respondents, they were not included in the merit list. Therefore, we do not find any merit in the O.A. Accordingly the O.A is dismissed. There shall be no order as to costs.


K NOORJEHAN
ADMINISTRATIVE MEMBER


GEORGE PARACKEN
JUDICIAL MEMBER

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