

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A.No.231/2013

Friday, this the *6th* day of September, 2013

C O R A M :

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

HON'BLE Mr.K.GEORGE JOSEPH, ADMINISTRATIVE MEMBER

Sabeena Beevi.K

W/o.Salim Thengum Tharayil House

Kampallady

Poruvahy P.O

Kollam District, Pin – 690 520

- Applicant

(By Advocate Mr.S.Muhammed Haneef)

Versus

1. Employees State Insurance Corporation
Represented by its Director
Head Quarters Office
Panchdeep Bhavan, CIG Marg
New Delhi – 110 002
 2. The Medical Superintendent
Employees State Insurance Corporation
Model and Super Speciality Hospital
Asramam, Kollam – 691 002
 3. Union of India, Rep. by its Secretary to the Government
Ministry of Labour and Employment
Parliament Annexe
New Delhi – 110 001
- Respondents

(By Advocate Mr.T.V.Ajayakumar for R1&2, Mr.George Joseph, ACGSC for R3)

This application having been heard on 02nd September 2013 this Tribunal on *06.09.13* day delivered the following :-

ORDER

BY HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

1. The applicant, an ex service Women, was an aspirant for appointment to the post of Staff Nurse in the ESI and in response to a notification, vide Annexure A-1, which reflected 30 posts reserved for ex-serviceman, she

applied. She was called for examination and on her name not figuring in the list of selected candidates she had made a representation indicating that she had applied for under the OBC as well as Ex serviceman category. She was informed that the cut off marks prescribed for Ex service man was 58% and since she had secured only 56% she was not selected. Annexure A-5 order dated 30-03-2012 refers. Being aggrieved, the applicant has filed this OA relying upon the following decisions:-

- (a) Hemani Malhotra vs High Court of Delhi (2008) 7 SCC 11
- (b) Manjushree vs State of Andhra Pradesh (2008) 3 SCC 512

2. The relief sought for is as under:-

" (i) To declare that the cut off marks introduced by the respondents no.1 and 2 to include the candidates in the Ex-servicemen category of Annexure A-5 merit list is per se illegal.

(ii) To issue an order or direction, directing the respondents no.1 and 2 to draw a separate list for Ex-servicemen category based on the marks scored by them in pursuance of Annexure A1 selection process to the notified vacancies and to appoint the applicant from the list so drawn. "

3. Respondents have contested the O.A. They have stated that there were in all 136 vacancies and as many as 12915 applied. Since large number of eligible candidates were included in the merit list, in order to ensure quality of service and to select the best and suitable candidates from the combined merit list, cut off marks for the written test were prescribed separately for general merit and reserved categories. Accordingly, 82% cut off marks was prescribed for the general merit candidates. The cut off marks prescribed for reserved categories of OBC and SC/ST candidates were 81% and 78% respectively. The cut off marks prescribed for the Ex Servicemen Category was 58% which is much below the cut off marks prescribed for the general and other reserved categories. The applicant secured only 55%. Her rank in the overall merit list is 12764, while the last one selected under the Ex serviceman category was at 10111. According to the respondents, the reliance placed on by the applicant viz., Hemani Malhotra's

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case and Manjushree's case is of no consequence as the facts of those cases are distinguishable. In the former there was a prescription of minimum marks for written examination only and no minimum marks for viva were prescribed at the time of notification. However, later on minimum marks were introduced for viva-voce also and it was on that ground that the selection was held as vitiated. In the case of the applicant, the notification did not prescribe any such minimum marks etc., nor is there any rule prescribed the method of selection and hence, introduction of cut off marks for the written test which is the sole method of selection of the best meritorious candidate is sustainable in law as there is no contravention of any rule in this respect. Likewise, in re far as Manjushree's decision is concerned, the respondents contended that there was a particular professed stipulation of the method of selection but the same was changed during the midstream, whereas there was no such prescription initially which has been changed in the instant case. According to them, the decision of the Apex Court in the case of K.H. Siraj vs High Court of Kerala would apply. The respondents also rely upon another decision of the Apex Court in the case of Rameshkumar vs High Court of Delhi, wherein it has been stated that if no procedure is prescribed by the statutory Rules and there is no other impediments in law, the competent authority may specify the minimum bench marks for the written test as well as for viva voce.

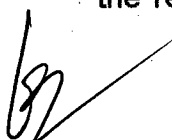
4. Earlier the Respondents were directed to furnish certain information relating to the selection and the same has been filed by the respondents by way of a statement filed on 2nd September, 2013. The said details are as under:-

<i>Sl.No</i>	<i>Information sought</i>	<i>Reply</i>
1	Whether instructions are issued prior to the notification regarding cut off marks to be prescribed	No



Sl.No	Information sought	Reply
2	At what level the decision to prescribe cut off marks has been taken	At the time of finalization of select list
3	Justification for prescribing a particular cut off marks for the examination	<p>Instructions on the subject, as reproduced below:-</p> <p>Relaxation in general standard for selection.</p> <p>In direct recruitment, if sufficient number of ex-servicemen are not available on the basis of general standard to fill all the vacancies reserved for them, selection may be made under a relaxed standard to make up the deficiency in the reserved quota, subject to the condition that such relaxation will not affect the level of performance by such candidates".</p> <p>Further, while preparing the merit list the ESIC included general candidates who scored up to 82%, scheduled tribe candidates who scored up to 78% marks, scheduled cast candidates who scored up to 78% marks, OBC candidates who scored up to 81% marks and ex-servicemen who scored up to 58% marks. While doing so the last ex-service candidate whose name was included in the select list is at 10111 in the overall rank number. Petitioner's overall rank number is 12764 who has secured only 55% marks. It was decided the cut-off marks for including ex-servicemen category at 58%. While doing so the merit of an ex-servicemen candidate has gone down by 24% (The lowest general candidate scored 82% mark and the lowest ex-servicemen candidate scored 58% marks). The ESIC Hospital, Asramam, Kollam being a Model & Super Speciality Hospital, is committed to provide the best possible medical care to its beneficiaries.</p>
4	Whether cut off marks has been only with reference to the Kerala region or it is applicable to all India	Kerala region only.

5. Counsel for the applicant argued that the applicant secured 55% and there are still 25 vacancies for ex servicemen kept unfilled by the respondents. The notification nowhere mentioned about any cut off marks. Even if there is a provision for introducing the cut off marks the same has not been reflected by the respondents anywhere. The decision made was not at the initial stage but



only at the final stage. The ESI is an All India Institution and uniformly examination for selection for appointment to various posts has been prescribed. In no other region, such a cut off mark had been prescribed much less at the midstream stage. The counsel further submitted that only 5 out of 30 vacancies have been filled up by ex serviceman, leaving as many as 25 vacancies unfilled. The counsel further argued that such a prescription of cut off marks is only in this Region, while the examination conducted for all India. The counsel relied upon the following decisions and argued that by virtue of the same, the action of the respondents cannot be sustained:-

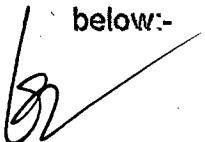
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|-----|------------------|
| (1) | (2006) 6 SCC 395 |
| (2) | (2010) 3 SCC 105 |
| (3) | (1974) 3 SCC 220 |
| (4) | (2010) 2 SCC 637 |
| (5) | (2010) 6 SCC 777 |
| (6) | (2008) 3 SCC 512 |
| (7) | (2013) 4 SCC 540 |
- "

6. Counsel for the respondents argued that the respondents can prescribe cut off marks to ensure that meritorious individuals only are inducted. There are two more individuals above the applicant who have secured 56% while the applicant has secured only 55%. No private individual has been impleaded as respondents. The case of Manjushree has been referred to a larger bench by the Apex Court. The counsel relied upon the decision in the case of K.H. Siraj vs High Court of Kerala.

7. Arguments were heard and documents perused. The Annexure A-1 notification prescribed as under:-

8. Applications are invited in the prescribed format for filling up of various categories of Para Medical Posts in different ESIC Hospitals as per details given

below:-



"XXXXXXX

08. KERALA STATE

Sl No	Name of the Cadre	Pay Band	Corresponding Pay Bands	Grade Pay	Details of Vacancies*						
					UR	SC	ST	OBC	Total	PH	Ex SM
X	X	X	X	X	X	X	X	X	X	X	X
15	Staff Nurse	PB-2	9300-34800	4600/-	86	13	1	36	136	-	30
X	X	X	X	X	X	X	X	X	X	X	X

Vacancies are likely to change depending upon the actual requirement.

Mode of selection:

(a) Only written test (objective type) for the following posts:

01 Staff nurse 02 xxxx 03 xxxx

9. Thus there has been no mention about the cut off marks in the notification. Of course, for 136 posts, there have been as many as 12915 applied and all were subjected to the written examination. It appears that all the applicants have been grouped together to work out the merit list as the respondents have contended that the applicant's position is 12764 and the last individual under the ex serviceman quota selected was at rank No. 10111. When 30 posts have been earmarked for ex serviceman, obviously, a separate merit list of ex-serviceman ought to have been prepared.

10. The following factors are to be considered at this juncture:-

(a) There has been no information about the prescription of cut off marks in the notification.

(b) The decision taken was at the regional level and that too at the final stage.

© This prescription of cut off marks is only at Kerala Region and nowhere else.

(d) The post is one of Staff nurse and nowhere the standard, save qualifications has been prescribed.

(e) On the basis of prescription of 58% only 5 could be selected.

(f) The general instructions applicable to Central Government employees etc., provide for certain relaxation of standards in respect of ex serviceman.

11. It is not the case of the respondents that the number of ex serviceman who had secured high marks was much more than the number of vacancies earmarked for them necessitating a cut off marks. In this case, out of 30 posts, on the basis of the cut off marks only 5 have been selected. Respondents could have arranged the names of ex-serviceman in the order of their merit position in the examination and drawn a line at 30. If the marks secured by the candidates is not ridiculously low all the 30 could be selected. If not, certain minimum could be prescribed, that too uniformly with reference to all regions, to be considered and decided by the Highest Authority in the organization. Prescription of cut off marks of 58 at Kerala Region alone is not appropriate. Possibly, in other regions those who have been selected would have secured marks much lower than the applicant or the two candidates who have secured 56%. As the number of vacancies unfilled in the ex serviceman quota is very high (83% of the total vacancies earmarked for ex-serviceman) and as such a cut off marks have not been prescribed uniformly in all the Regions and such a prescription of cut off marks is at the final stage, the respondents shall have to recast the selection, by drawing a separate list of ex-serviceman in the order of merit and draw a line at 30.

12. The Apex Court has, as recently as on 14th August, 2013 pronounced a judgment in CIVIL APPEAL NO.6799/2013 Yogesh Yadav vs Union of India and others with certain other Civil Appeals wherein the question of change of game plan in the midstream was examined. In that case, the Matter pertains to appointment to the post of Deputy Director (Law) in the OBC category in the Competition Commission of India. The appellants before the Apex Court



qualified in the written test and participated in the interview, but were not selected. The writ petition filed before the Single Judge did not find favour and so is the case before the Division Bench. In that case, the CCI issued notification through public notice calling for application for the said post and in the notification it was clearly stated as under:-

"7. Mode of Selection


All the applications received by the due date will be screened with reference to the minimum qualification criteria. From amongst the eligible candidates, suitable candidates will be short listed through a transparent mechanism and the short listed candidates will be called for interview before final selection. Mere fulfilling of minimum qualifications by itself would not entitle any applicant for being called for interview."

13. In addition, in that case the instructions also contained the fact that written test will carry 80% of the marks and interview will have 20% of the marks. General Candidates who do not secure 50% of the marks in the test were not to be called for interview, while reserved candidates securing 45%.

14. The learned Single Judge of the High Court held that there was no change in criteria in the selection procedure, holding that fixation of the benchmark was legal and justified. The Division Bench also held as such. Before the Apex Court the appellant had referred to the decision in the case of Himani as also Manjushree (supra) and the Apex Court held as under:-

"Since we are agreeing with the view of the High Court, it would be appropriate to take notice of the relevant discussion on this aspect.:

"18. From the aforesaid pronouncement of law, it is vivid that an amended rule cannot affect the right of a candidate who has qualified as per the terms stipulated in the advertisement and is entitled to claim a selection in accordance with the rules as they existed on the date of the advertisement; that the selection can be regulated by stipulating a provision in the rule or laying a postulate in the advertisement for obtaining minimum marks are not prescribed for viva voce before the commencement of



the selection process, the authority, during the selection process or after the selection process, cannot add an additional requirement/qualification that the candidate should also secure minimum marks in the interview; that the norms or rules as existing on the date when the process of selection begins will control such selection and that revisiting the merit list by adopting a minimum percentage of marks for interview is impermissible.

19. The factual scenario in the present case has a different backdrop. The advertisement stipulated that the short listed candidates would be called for interview before the final selection and mere fulfilling of minimum qualifications by itself would not entitle any applicant for being called for interview. Thereafter, in the instruction, the marks were divided. Regard being had to the level of the post and the technical legal aspects which are required to be dealt with, a concise decision was taken to fix 65% marks for OBC category in toto, i.e., marks obtained in the written examination and marks secured in the interview. It is not a situation where securing of minimum marks was introduced which was not stipulated in the advertisement. A standard was fixed for the purpose of selection."

14. Instant is not a case where no minimum marks prescribed for viva voce and this is sought to be done after the written test. As noted above, the instructions to the examinees provided that written test will carry 80% marks and 20% marks were assigned for the interview. It was also provided that candidates who secured minimum 50% marks in the general category and minimum 40% marks in the reserved categories in the written test would qualify for the interview. Entire selection was undertaken in accordance with the aforesaid criterion which was laid down at the time of recruitment process. After conducting the interview, marks of the written test and viva voce were to be added. However, since benchmark was not stipulated for giving the appointment. What is done in the instant case is that a decision is taken to give appointments only to those persons who have secured 70% marks or above marks in the unreserved category and 65% or above marks in the reserved category. In the absence of any rule on this aspect in the first instance, this does not amount to changing the "rules of the game". The High Court has rightly held that it is not a situation where securing of minimum marks was introduced which was not stipulated in the advertisement, standard was fixed for the purpose of selection. Therefore, it is not a case of changing the rules of game. On the contrary in the instant case a decision is taken to give appointment to only those who fulfilled the benchmark prescribed. Fixation of such a benchmark is permissible in law. This is an altogether different situation not covered by Hemani Malhotra case.

15. The decision taken in the instant case amounts to short listing of candidates for the purpose of selection/appointment which is always permissible. For this course of action of the CCI, justification is found by the High Court noticing the judgment of this

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Court in the State of Haryana vs. Subash Chander Marwaha & Ors. (1974) 3 SCC 220. In that case, Rule 8 of the Punjab Civil Service (Judicial Branch) Service Rules was the subject matter of interpretation. This rule stipulated consideration of candidates who secured 45% marks in aggregate. Notwithstanding the same, the High Court recommended the names of candidates who had secured 55% marks and the Government accepted the same. However, later on it changed its mind and High Court issued *Mandamus* directing appointment to be given to those who had secured 45% and above marks instead of 55% marks. In appeal, the judgment of the High Court was set aside holding as under:

"It is contended that the State Government have acted arbitrarily in fixing 55 per cent as the minimum for selection

and this is contrary to the rule referred to above. The argument has no force. Rule 8 is a step in the preparation of a list of eligible candidates with minimum qualifications who may be considered for appointment. The list is prepared in order of merit. The one higher in rank is deemed to be more meritorious than the one who is lower in rank. It could never be said that one who tops the list is equal in merit to the one who is at the bottom of the list. Except that they are all mentioned in one list, each one of them stands on a separate level of competence as compared with another. That is why Rule 10(ii), Part C speaks of "selection for appointment". Even as there is no constraint on the State Government in respect of the number of appointment to be made, there is no constraint on the State Government in respect of the number of appointments to be made, there is no constraint on the Government fixing a higher score of marks for the purpose of selection. In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high-standards of competence to fix a score which is much higher than the one required for mere eligibility."

17. It is stated at the cost of repetition that there is no change in the criteria of selection which remained of 80 marks for written test and 20 marks for interview without any subsequent introduction of minimum cut off marks in the interview. It is the short listing which is done by fixing the benchmark, to recruit best candidates on rational and reasonable basis. That is clearly permissible under the law. (M.P. Public Service Commission vs. Navnit Kumar Potdar & Anr. (1994) 6 SCC 293). "

15. From the above it is evident that change in game plan in the midstream could be conceived if the initial notification does not give any inkling about the mode of selection, by way of shortlisting or prescribing the minimum marks in the written examination for interview etc., Viewed from the same, in the

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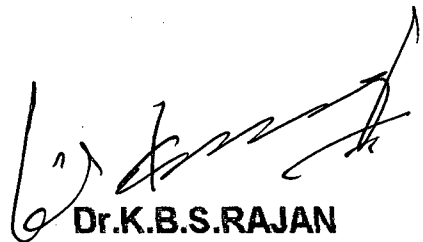
instant case, there had been no such stipulation in the notification. Again, in the above decision, it was also indicated that the status of the post therein warranted more meritorious candidates. In the instant case, the post is one of Group C and of Staff Nurse. This should also be reckoned for selection.

16. In view of the above, the OA is allowed. Respondents are directed to ascertain the rank of the applicant in the merit list as of Ex serviceman and if his merit position is within the first 30, she should be considered for appointment as Staff Nurse. Those who have secured higher marks but not so far been selected under the Ex serviceman quota should also be considered, as otherwise, it would result in further litigation by those who have secured more marks than the applicant.

17. This order shall be complied with, within a period of two months from the date of communication. No costs



K. GEORGE JOSEPH
ADMINISTRATIVE MEMBER



Dr. K. B. S. RAJAN
JUDICIAL MEMBER