

**Central Administrative Tribunal
Principal Bench**

OA No. 1664/2016
MA No.979/2018
CP No. 337/2016

Order Reserved on: 03.04.2018
Order Pronounced on: 06.04.2018

Hon'ble Mr.V.Ajay Kumar, Member (J)
Hon'ble Ms. Nita Chowdhury, Member (A)

Tarun Kataria,
Aged 29 years,
Group 'C',
S/o Sh. Satnarain,
R/o M-29, Vijay Nagar,
Bawana, Delhi-110039.

... Applicant

(By Advocate: Mr. Asish Nischal)

Versus

1. Union of India
Through its Secretary,
Ministry of Health and Family Welfare,
Nirman Bhawan, New Delhi.
2. Director General of Health Services,
Ministry of Health and Family Welfare,
Nirman Bhawan, New Delhi.
3. Medical Superintendent,
Dr. RML Hospital,
New Delhi-110001.
4. Subhash Chand Dhanka,
S/o Shri Pooran Mal Dhanka,
R/o V&PO – Khadab (Narehra),
Tehsil Kotputli, District-Jaipur,
Rajasthan.

... Respondents

(By Advocate: Sh. S.M.Zulfiqar Alam for official respondents
Sh. Yogesh Sharma for private respondent)

ORDER

By Hon'ble Ms. Nita Chowdhury, Member (A)

This Original Application has been filed by the applicants claiming the following reliefs:-

- “a. call for the record of the entire selection process for the post of Junior (ECG) Technician;
- b. direct the respondents to consider and appoint the applicant to the post of Junior (ECG) Technician;
- c. pass any other relief that this Hon'ble Tribunal may consider fit in the interest of justice.”

2. Brief facts of the case are that the applicant, who belongs to the OBC community, applied for the post of Junior (ECG) Technician pursuant to an advertisement. On 27.05.2013, respondent no.3 issued an advertisement inviting applications to fill up 15 posts (UR-9, OBC-4, SC-1 and ST-1) of Junior ECG Technician on regular basis. Applicant applied for the said post. Written examination was conducted on 14.11.2014 wherein applicant appeared and passed. Thereafter, on 19.02.2016 he was also declared as 'suitable' in the skill test. On 26.04.2016 respondent no.3 issued the final select list for the post of Junior (ECG) Technician wherein the name of the applicant was not there. He further submitted that one Shri Tanuj Singh Chaprana was declared as selected despite the fact that he is having only 14 months experience whereas the applicant has seven years experience in the ECG field. It is, however, submitted that no appointments have been made as yet following the order of CAT dated 12.05.2016.

3. Learned counsel for the applicant has relied on the following judgments:

(i) **Secretary (Health), Deptt. of Health and Family Welfare and Anr. Vs. Dr. Anita Puri and ors.**, (1996) 6 SCC 282.

(ii) **Vijay Shankar Sharma and ors. vs. State of UP and ors.**, 2005 (6) AWC 5666 All.

4. The official respondents in their reply submitted that the Selection Committee shortlisted the candidates in order of merit against each category in the ratio as decided. However, in view of the fact that the candidates have scored same marks in the written examination, therefore, the number of candidates had been increased by two more candidates in unreserved category and two candidates in SC category and one candidate in OBC category. Thereafter another Committee constituted to test the skill of the candidates conducted the skill test of the short listed candidates and recommend a total of 44 candidates including applicant as suitable for the post of Junior ECG Technician. It is pertinent to mention here that skill test does not carry any marks and it only talks of the suitability of the candidates. It is, however, submitted that applicant obtained only 29 marks in written test but last cut off marks in OBC category was 35, therefore, he has failed in the examination. It is further submitted that applicant has concealed the truth and obtained a blanket stay order by misleading the Tribunal. It is also submitted that in the advertisement dated 27.05.2013 in the 'Scheme of Selection' it has been mentioned that "selection to the said posts will be on the basis of interview, which will be conducted by a duly constituted Selection Committee. However, if the number of applications received for a particular post is large, then the hospital reserves the right

to lay down any criteria for the purpose of short listing of the candidates for interview.” Finally, on the basis of marks obtained by the candidates in the written test, considering the performance in the skill test, the result was declared. It is also stated in the reply that even in the cases of SC and OBC category candidates, they have been appointed treating them as general candidates since they have secured higher marks in written test and are placed higher in the merit list. Learned counsel for official respondents has also drawn attention to the vacancy advertisement notice wherein it is clearly stated that the eligibility requirement of experience is “Matriculation or equivalent qualification from a recognized Board with experience of handling E.C.G. Machine for one year”. Hence from the above, it becomes clear that the eligibility for consideration in the selection was experience only for one year.

5. Learned counsel for private respondent no. 4 have contradicted the claim made by the applicant in this OA and submitted that applicant appeared in the selection without any objection and when in the final result he has not been selected, he challenged the selection process, which is not permissible in the eyes of law as it is well settled proposition of law that an unsuccessful candidate cannot challenge the advertisement and procedure of selection after participating in the same. Applicant had not urged any grievance prior to the participation in the examination. Now, at this belated stage, after having been unsuccessful in the final selection, he cannot be allowed to question the procedure.

6. Learned counsel for private respondent no.4 also filed MA No.979/2018 for vacation/modification of interim order dated

12.05.2016 and submitted that for grant of interim relief three factors should be relevant and should be fulfilled i.e. (i) prima facie case, (ii) irreparable loss and (iii) balance of convenience. In this case there is no prima facie case as the applicant cannot be allowed to question the procedure of selection at this belated stage after having been declared unsuccessful in the final selection. Thereafter, there is no irreparable loss to the applicant as he will not be appointed automatically even if he succeeds in the OA, as the entire selection/result will be issued afresh whereas, on the other hand, there is an irreparable loss to respondent no.4 as he is a selected candidate and offer of appointment has been issued to him. As regards balance of convenience, same is not in favour of the applicant as he is an unsuccessful candidate.

7. We have heard the learned counsel for the parties and perused the pleadings on record.

8. Learned counsel for applicant vehemently argued on the point of experience in the ECG field that the applicant has seven years of experience whereas Sh. Tanu Singh Chaprana has only 14 months experience. Therefore, the applicant should be selected.

9. Learned counsel for official respondents in the reply has drawn attention to the vacancy advertisement notice. The term 'experience' in the vacancy notice clearly states that the eligibility requirement of experience is "Matriculation or equivalent qualification from a recognized Board with experience of handling E.C.G. Machine for one year". Hence from the above, it becomes clear that the eligibility for consideration in the selection was experience only for one year. Hence, this ground taken

by the applicant has no merit as it is not disputed that the selected person also had the required experience.

10. We note that the respondents have refuted the allegation of the applicant that he should have been selected because he had more experience than the selected person. The experience required in the advertisement notice was only for one year and all candidates entertained including applicant had the required experience.

11. It is also well settled proposition of law that an unsuccessful candidate cannot challenge the advertisement and procedure of selection after participating in the same. In this regard, learned counsel for respondent no.4 relied on the judgment of Hon'ble Supreme Court in **Ramesh Chandra Shah vs. Anil Joshi**, (2013) 11 SCC 309 wherein it is held as under:

“18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.

19. One of the earliest judgments on the subject is *Manak Lal v. Dr. Prem Chand* AIR 1957 SC 425. In that case, this Court considered the question whether the decision taken by the High Court on the allegation of professional misconduct leveled against the appellant was vitiated due to bias of the Chairman of the Tribunal constituted for holding inquiry into the allegation. The appellant alleged that the Chairman had appeared for the complainant in an earlier proceeding and, thus, he was disqualified to judge his conduct. This Court held that by not having taken any objection against the participation of the Chairman of the Tribunal in the inquiry held against him, the appellant will be deemed to have waived his objection. Some of the observations made in the judgment are extracted below:

“.....If, in the present case, it appears that the appellant knew all the facts about the alleged

disability of Shri Chhangani and was also aware that he could effectively request the learned Chief Justice to nominate some other member instead of Shri Chhangani and yet did not adopt that course, it may well be that he deliberately took a chance to obtain a report in his favour from the Tribunal and when he came to know that the report had gone against him he thought better of his rights and raised this point before the High Court for the first time.

From the record it is clear that the appellant never raised this point before the Tribunal and the manner in which this point was raised by him even before the High Court is somewhat significant. The first ground of objection filed by the appellant against the Tribunal's report was that Shri Chhangani had pecuniary and personal interest in the complainant Dr Prem Chand. The learned Judges of the High Court have found that the allegations about the pecuniary interest of Shri Chhangani in the present proceedings are wholly unfounded and this finding has not been challenged before us by Shri Daphtary. The learned Judges of the High Court have also found that the objection was raised by the appellant before them only to obtain an order for a fresh enquiry and thus gain time.....

.....Since we have no doubt that the appellant knew the material facts and must be deemed to have been conscious of his legal rights in that matter, his failure to take the present plea at the earlier stage of the proceedings creates an effective bar of waiver against him. It seems clear that the appellant wanted to take a chance to secure a favourable report from the Tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.”

20. In *Dr. G. Sarna v. University of Lucknow* (1976) 3 SCC 585, this Court held that the appellant who knew about the composition of the Selection Committee and took a chance to be selected cannot, thereafter, question the constitution of the Committee.

21. In *Om Prakash Shukla v. Akhilesh Kumar Shukla* (1986) Supp. SCC 285, a three-Judge Bench ruled that when the petitioner appeared in the examination without protest, he was not entitled to challenge the result of the examination. The same view was reiterated in *Madan Lal v. State of J & K* (1995) 3 SCC 486 in the following words:

“The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of *Om Prakash Shukla v. Akhilesh Kumar Shukla* it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.”

22. In *Manish Kumar Shahi v. State of Bihar* (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed:

“We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition.”

23. The doctrine of waiver was also invoked in *Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others* (2011) 1 SCC 150 and it was held:

“When the list of successful candidates in the written examination was published in such notification itself, it was also made clear that the knowledge of the

candidates with regard to basic knowledge of computer operation would be tested at the time of interview for which knowledge of Microsoft Operating System and Microsoft Office operation would be essential. In the call letter also which was sent to the appellant at the time of calling him for interview, the aforesaid criteria was reiterated and spelt out. Therefore, no minimum benchmark or a new procedure was ever introduced during the midstream of the selection process. All the candidates knew the requirements of the selection process and were also fully aware that they must possess the basic knowledge of computer operation meaning thereby Microsoft Operating System and Microsoft Office operation. Knowing the said criteria, the appellant also appeared in the interview, faced the questions from the expert of computer application and has taken a chance and opportunity therein without any protest at any stage and now cannot turn back to state that the aforesaid procedure adopted was wrong and without jurisdiction.”

24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents.”

12. In the light of the aforesaid reasons, we find that there is no merit in the OA and it deserves to be dismissed, as such. No costs.

13. In the circumstances, as the OA is heard and decided, all pending MAs and CP shall also stand disposed of.

(Nita Chowdhury)
Member (A)

(V. Ajay Kumar)
Member (J)

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