

**Central Administrative Tribunal
Principal Bench, New Delhi.**

**OA-2162/2016
MA-3192/2017**

Reserved on : 19.09.2017.

Pronounced on : 22.09.2017.

**Hon'ble Mr. Shekhar Agarwal, Member (A)
Hon'ble Mr. Raj Vir Sharma, Member (J)**

1. Ashwani Rana, 32 years
S/o Sh. Satyapal Singh Rana,
R/o H.No. 18, Vill. Mungeshpur,
Delhi-110 039.
2. Sandeep Rana, 30 years
S/o Sh. Mahender Singh,
R/o H.No. 737, Shahbad Daulatpur,
Delhi-110 042. Applicants

(through Sh. Ajesh Luthra, Advocate)

Versus

1. Govt. of NCT of Delhi through
Its Chief Secretary,
A-Wing, 5th Floor,
Delhi Secretariat, IP Estate,
New Delhi.
2. The Commissioner,
Transport Department,
5/9 Under Hill Road,
Delhi-110 054.
3. Delhi Subordinate Services Selection Board (DSSSB)
through its Secretary,
FC-18, Karkardooma Institutional Area,
Delhi-92.
4. Parveen Dahiya,
S/o Sh. Suraj Bhan,
R/o SE-6, Singhalpur Extension,

Shalimar Bagh, Delhi-110088.

5. Sumit,
S/o Sh. Narender,
Aged about 25 years,
R/o Village & Post Office-Kheri,
Manajat, District-Sonipat Haryana.
6. Jitender Singh,
S/o Sh. Mahendra Singh,
Aged about 25 years
R/o H.No. 284, Siraspur,
North Delhi.
7. Ajit,
S/o Sh. Dharampal,
Aged about 28 years,
R/o Village-Jahri, District-Sonipat,
Haryana.
8. Promod Kumar,
S/o Sh. Ramhit,
Aged about 28
R/o House No. 1016/22A, Swatantra Nagar,
Narela, Delhi. Respondents

(through Sh. Amit Anand, Advocate for R-1 to R-3, Sh. Avadh Kaushik, Advocate for R-4, Sh. Suderarshan Rawat with Sh. Ramesh Rawat, Advocate for R-5 & R-8 and Sh. M.K. Bhardwaj, Advocate for R-6 & 7)

ORDER

Mr. Shekhar Agarwal, Member (A)

The applicants were candidates for the post of Head Constable (Male) in Transport Department, GNCT of Delhi (Post Code-43/13) for which selection process was initiated by the respondents vide Advertisement No. 3/13 issued on 12.09.2013. They were belonging to the OBC category. They appeared in the written examination held on 28.09.2014. The result of the same was

declared on 24.07.2015 in which the applicants obtained first and second rank in the OBC category. Vide letter dated 09.06.2016, which the applicants claim was received by them on 13.06.2016, they were informed that physical test was scheduled for 15-16 June, 2016. The applicants appeared for the physical test on the said dates. However, they were shocked to know that besides chest and height measurement they were required to participate in a race event in which they had to cover 800 mts in 200 seconds. The applicants claim that they objected to this by saying that this was not mentioned in the advertisement. However, they were told to participate in the same, failing which they would be excluded from the selection process. They were also told that instruction regarding the race event had been uploaded on the website of the respondents and the candidates were supposed to peruse the same. The applicants participated in the race event but could not succeed in the same. They submitted a representation to the respondents on 24.06.2016 in which they stated that the race event was illegal and that the selection could not be declared based on the same. Thereafter, they have filed this O.A. before us seeking the following relief:-

“(a) Quash and set aside the impugned decision of the respondents at Annexure A/1 (to the extent of challenge) and

(b) Hold and declare that the respondents have illegally conducted the race event towards the recruitment of Head Constables in Transport Department (Post Code 43/13).

(c) Direct the respondents to exclude the result of the race event from the selection process and to draw and declare the results of selection accordingly based on the merit position of the candidates and in accordance with the Recruitment Rules prescribed for the post of Head Constables in Transport Department.

(d) Direct the respondents to further consider and appoint the applicants as Head Constables in Transport Department, with all consequential benefits.

(e) Award costs of the proceedings; and

(f) Pass any order/relief/direction(s) as this Hon'ble Tribunal may deem fit and proper in the interests of justice in favour of the applicants."

2. On 01.07.2016, while issuing notice to the respondents, we directed that the respondents shall not declare the result of the aforesaid examination.

3. The contention of the applicants is that the action of the respondents in holding this race event was illegal, arbitrary, unjustified and unconstitutional. The Recruitment Rules (RRs) framed under Article-309 of the Constitution for the aforesaid posts do not provide for any such event for selection of the candidates. From the information down loaded from the website of the respondents, it is evident that this test was introduced as a decision of the Delhi Subordinate Services Section Board (DSSSB). The applicants claim that DSSSB had no such authority competence or jurisdiction to introduce such a race event. Moreover, the decision to conduct such a race event had been taken by the respondents after declaration of the result of the written examination. Any criteria for selection is to be announced to the candidates at the

commencement of the selection process. Since this race event was not part of the advertisement issued at the time of commencement of the selection, introduction of the same at a later stage amounts to changing the rules of the game in the midst of the selection process. The applicants have further submitted that they were taken by surprise regarding introduction of this race event when they appeared for the physical test. They did not get a reasonable opportunity to challenge the impugned action of the respondents since it had been abruptly introduced. They, therefore, had no option but to succumb to the pressure of the respondents and participate in the same.

4. During the course of hearing of this OA, certain MAs were allowed by us and certain private respondents were impleaded as a party in this case. Reply has been filed both by the official respondents as well as private respondents. The official respondents in their reply have submitted that this race event was introduced to ascertain whether the candidates possessed sound health, which was a part of the RRs for the said post. The respondents submitted that the educational and other qualifications required for direct recruits under the rules are as follows:-

- “(i) 10+2 or equivalent from the recognized University/Board.
- (ii) Having valid L.M.V. driving licence for 2 yrs.
- (iii) Height 170 cms. & relaxable by 5 cms. for residents of hill areas.

- (iv) Chest 81 to 85 cms. and relaxable by 5 cms. for residents of hill areas.
- (v) Other physical standard Sound health/free from defect/deformity/disease vision 6/6 without glasses both eyes free from colour blindness."

4.1 The respondents have further submitted that a perusal of the Rules would reveal that while eligibility criteria and the physical standards have been defined in the same, the manner in which the suitability of a candidate in terms of these rules has to be judged is not defined. The respondents have claimed that framing of manner and mode of tests is in the domain of the Examining Body and hence DSSSB was well within its jurisdiction to prescribe a race of 800 mts in 200 seconds for checking "sound health" of the candidates, which was a requirement mentioned in the RRs. To justify introduction of this event, the respondents have further stated that it was the duty of a Head Constable to issue challans in the field after stopping vehicles, which would require swift running by him several times. On occasions, he would have to do so for the entire day. Hence, merely being free from illness would not be sufficient for candidate of such a post. The respondents have further submitted that in several Group-C posts involving similar nature of duties, such tests are prescribed. They have drawn our attention to the post of Assistant Superintendent in Delhi Police for which physical endurance test is prescribed in which candidates are required to run 1600 mts in 06 minutes and 30 seconds. For Forest Guards walking

test has been prescribed under which male candidates have to walk 25 kms. in four hours on foot. For Warders (Male) in Delhi Prisons 1600 mts. race in 06 minutes is prescribed. The respondents have submitted that RRs for all other posts require the test of physical endurance of the candidates whereas no such requirement had been prescribed in the RRs for the post in question. Hence, DSSSB had decided to introduce this race event.

5. On behalf of reply filed by certain private respondents, it has been stated that the race event was not only for the OA applicants but was for all candidates. Thus, there was no arbitrariness, discrimination or bias against the applicants. Moreover, the official respondents were required to select the most suitable candidate for the post and they were well within their rights to lay down the benchmark for doing so. Relying on the judgment of the Apex Court in the case of **MP Public Service Commission Vs. Navnit Kumar Potdar & Anr.**, 1994(6) SCC 293 as well as **Yogesh Yadav Vs. UOI & Ors.** (Civil Appeal No. 6799/2013 decided on 16.08.2013), they have submitted that the race event introduced by the official respondents was a rational and reasonable basis for assessing the candidate and did not amount to changing of criteria. They have further submitted that even though the names of the applicants had appeared in the select list, they had no indefeasible right to be appointed as has been laid down by the Apex Court in the case of **Kulwinder Pal Singh**

& Anr. Vs. State of Punjab & Ors., 2016(6)SCC 532 as well as in the case of **State of Orissa & Anr. Vs. Rajkishore Nanda & Ors.**, 2010 (6) SCC 777.

6. Both the official respondents and the private respondents have questioned the locus of the applicants in challenging the selection process. According to them, the applicants had without demur participated in the race event and having done so cannot now turn round and question the same. According to the respondents, the applicants are now estopped from doing so. In this regard, they have relied on several judgments, which are as follows:-

- (i) **Dhananjay Malik & Ors. Vs. State of Uttarakhand & Ors.**, (2008) 4 SCC 171.
- (ii) **State of U.P. and Ors. Vs. Pankaj Kumar Vishnoi**, JT 2013(11) SC 408.
- (iii) **D. Sarojkumari Vs. R. Helen Thilakom & Ors.**, (Civil Appeal Nos. 8345-8346 of 2009 decided on 13.09.2017.
- (iv) **Ashok Kumar and Anr. Vs. State of Bihar & Ors.**, (2017) 4 SCC 357.
- (v) **Madan Lal and Ors. Vs. State of Jammu and Kashmir and Ors.**, (1995) 3 SCC 486.

They have also relied on judgment of this Tribunal in the case of **Pramod Kumar Vs. Commissioner of Police & Ors.** dated 03.01.2008. However, on perusal of the judgment, we find that in this case the respondents had prescribed a race of 1600 mts. to be completed in 06 minutes and 30 seconds in the rules itself. Hence, this case does not appear to be relevant. They have further relied on the judgment

of the Apex Court in the case of **Yogesh Yadav** (supra) wherein it has been held that fixation of bench-mark was permissible under law and does not amount to changing the rules of the game mid way.

7. We have heard both sides and have perused the material placed on record. Learned counsel for the applicants Sh. Ajesh Luthra argued that in the advertisement issued on 12.09.2013, which marked the commencement of the selection process, the race event was not notified. It was introduced subsequently as a decision of DSSSB vide their letter dated 01.06.2016, which has been impugned in this case. Thus, the respondents have changed the rules of the game after commencement of the selection process. This was clearly impermissible under law as laid down by the Apex Court in the case of **Hemani Malhotra Vs. High Court of Delhi** [Writ Petition (Civil) No. 490/2007 on 03.04.2008]. Similar view has been taken by the Apex Court in the case of **K. Manjusree Vs. State of A.P. & Anr.**, (Civil Appeal No. 1313/2008) decided on 15.02.2008. Sh. Luthra further argued that the RRs for the post are framed under proviso to Article-309 of the Constitution and were sacrosanct. It is settled law that they had to be strictly observed and any recruitment done contrary to the RRs was not valid in the eyes of the law. Moreover, it is also a settled law that rules once framed, cannot be modified by executive orders. Nothing can be added or taken away from the rules by issue of executive orders. While gaps in the

RRs can be covered by issue of executive orders but these instructions must be issued in exercise of Executive Power of the State under Article 162 of the Constitution. In this regard, he has relied on several judgments, which are as follows:-

- (i) **Dr. Krushna Chandra Sahu and Ors. Vs. State of Orissa and Ors.**, (1995) 6 SCC 1.
- (ii) **State of Orissa & Ors. Vs. Prasana Kumar Sahoo**, (2007) 15 SCC 129.
- (iii) **Punjab Water Supply & Sewerage Board Vs. Ranjodh Singh and Ors.**, (2007) 2 SCC 491.
- (iv) **Punjab State Warehousing Corpn. Vs. Manmohan Singh and Anr.**, (2007) 9 SCC 337.
- (v) **State of Uttarakhand Vs. Alok Sharma & Ors.**, (2009) 7 SCC 647.

Sh. Luthra submitted that in this case the RRs prescribed by the Lt. Governor did not contain any provision for holding the race event. Even if the contention of the respondents that there was a gap in the RRs inasmuch as the manner in which sound health of the candidate was to be judged was not prescribed, this gap could not have been filled by DSSSB on their own. If this gap was sought to be filled, it could have been done by executive instructions issued by the Lt. Governor of Delhi under Article-162 of the Constitution State Government of Delhi. DSSSB had no authority to take such a decision on their own and that also after the commencement of the selection process. Hence, the action of DSSSB was blatantly illegal. Sh. Luthra further argued that although it is a settled law that unsuccessful candidates after participating in the selection process

are estopped from questioning the same, yet, in this case, what the applicants were questioning was blatantly illegal act committed by the respondents and there cannot be any estoppel against law. In this regard, he has relied on the following judgments:-

- (i) **Damir Ch. Marak Vs. The State of Meghalaya and Ors.**, [WP(C) No. 61/2014 decided on 20.05.2015].
- (ii) **Rajesh Kumar Gupta and Ors. Vs. State of UP & Ors.**, [Civil Appeal No. 3048-3064 of 2005 decided on 04.05.2005].
- (iii) **Anithakumary K.S. Blue Nile Vs. State of Kerla and the Director of Social Welfare**, [WP(C) No. 23729 of 2010 decided on 17.02.2011].

7.1 We have considered the submissions of both sides. It is evident from the facts narrated above that the RRs for the post provided that the candidates should be of sound health, besides laying down the requirements of height & chest measurement etc. It has also been laid down that candidates should be free from defect/deformity/disease vision 6/6 without glasses both eyes free from colour blindness. Thus, besides prescribing other requirements, the RRs only say that the candidate should possess sound health. According to the respondents, since the RRs did not prescribe how sound health of the candidates has to be judged, taking a cue from the RRs of certain other similar posts, DSSSB introduced the race event, which has been questioned in this OA. From this submission, it is clear that RRs of several other posts quoted by the respondents themselves, do prescribe physical endurance test but the same was missing from the RRs of the posts in question. Thus, it is evident that

Framers of the Rules in their wisdom decided not to incorporate physical endurance test involving race event in the RRs. Moreover, even if the contention of the respondents that not prescribing race event in the RRs was an inadvertent lapse which left a gap in the RRs, is accepted then this gap could have been filled by issue of executive instructions by the Govt. of NCT of Delhi. The examining body like the DSSSB on their own could not have prescribed this test. In doing so, they have clearly traversed beyond their jurisdiction and usurped the powers vested in the State Govt. Proper course of action would have been to bring existence of this gap in RRs to the notice of the State Govt. and request them to issue appropriate instructions. Further, this should have been done prior to commencement of the selection process so that instructions issued could have been duly notified to the candidates in the advertisement issued for the post. Prescribing this test after commencement of the selection process, in our opinion, did amount to changing the rules of the game mid way and was impermissible. Hence, the action of the respondents has not legally sustainable.

72. In our opinion, it is also debatable whether prescribing such a race event was appropriate for judging “sound health” of the candidates. Physical endurance test of this nature demands much higher level of fitness than merely being of “sound health”. When Framers of RRs did not in their wisdom consider it necessary for the

candidates to possess fitness level more than “Sound health” for the post, there was no reason for DSSSB to introduce it on their own. We also do not agree with the private respondents that DSSSB was only laying down a “benchmark” and not changing the rules of the game. Benchmarks could have been laid down only for attributes prescribed in the RRs. A new criterion of selection could not have been introduced by DSSSB.

8. The only question left now for our adjudication is whether the applicants have locus to challenge the selection process after having participated in the same and after having been declared unsuccessful. The respondents have relied on several judgments cited above to say that the applicants were estopped from doing so. In response, Sh. Luthra had submitted that the applicants were taken by surprise and had no time to protest before participating in the race event. The respondents hotly disputed this submission and stated that enough notice was given to the candidates about this race event. Even then the applicants participated in the same and took calculated chance of being selected. It was only after they came to know that they were unsuccessful that they have challenged this event by filing this OA.

8.1 Even if this argument of the respondents is accepted that enough notice was given to the candidates about the race event,

the other argument of the applicants, namely, that the action of the respondents was illegal and that there cannot be any estoppel against law needs to be considered.

8.2 We find merit in this argument of the applicants that the action of the respondents was blatantly illegal and there cannot be any estoppel against law. An illegality committed by the respondents can be questioned at any stage. We are fortified in this regard by the observations of the Apex Court in the case of **Damir Ch. Marak** (supra) where in para-11 it has been held as follows:-

"At the last there was a faint attempt from the side of the respondents that the petitioner is barred from filing the present writ petition as he had already participated in the concerned selection process by the principle of estoppel or acquiescence. Yes, the petitioner may be barred from filing the writ petition after he had participated in the selection process on the ground that the result of the selection process is not palatable to him, but the writ petitioner is not barred, even if he participated in the selection process, by principle of estoppels or acquiescence in questioning as to the legality or otherwise of the recommendations of the candidates inasmuch as there cannot be estoppels against the law."

In the same judgment, the Apex Court judgment in the case of **Raj Kumar & Ors. Vs. Shakti Raj & Ors.**, (1997) 9 SCC 527 has been noted where in para-16 the Apex Court has observed as follows:-

"....The entire procedure is also obviously illegal. It is true, as contended by Shri Madhava Reedy, that this Court in *Madan Lal v. State of J&K*: MANU/SC/0208/1995 : (1995) 3 SCC 486: 1995 SCC (L&S) 712: (1995) 29 ATC 603 and other decisions referred therein had held that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge either the constitution of the Selection Board or the method of selection as being illegal; he is stopped to question the correctness of the selection. But in his case, the Government have committed glaring illegalities in the procedure to get the candidates for examination under the 1955 Rules, so also in the method of selection and exercise of the power in taking out from the purview of the Board and also conduct of the selection in accordance

with the Rules. Therefore, the principle of estoppels by conduct or acquiescence has no application to the facts in this case. Thus, we consider that the procedure offered under the 1955 Rules adopted by the Government or the Committee as well as the action taken by the Government are not correct in law."

8.3 After considering the facts and circumstances of this case, we reject the arguments of the respondents that the applicants were estopped from challenging the selection process after having participated in the same.

9. Thus, we come to the conclusion that the action of the respondent DSSSB in prescribing a race event for judging suitability of the candidates for the post in question was against law and beyond their jurisdiction. We also come to the conclusion that the applicants by mere participation in the selection process were not estopped from questioning the same since the action of the respondents was not sustainable under law. We, therefore, allow this O.A. and direct the respondents to prepare the merit list of the aforesaid selection by ignoring the race event. If the applicants are otherwise eligible and find a place in the merit list, they shall be considered for appointment along with others. No costs.

(Raj Vir Sharma)
Member (J)

(Shekhar Agarwal)
Member (A)

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