

**CENTRAL ADMINISTRATIVE TRIBUNAL,
MUMBAI BENCH, MUMBAI.**

ORIGINAL APPLICATION NO.720 of 2017

Date Of Decision:- 27th July, 2018.

**CORAM:HON'BLE SHRI. R. VIJAYKUMAR, MEMBER (A) .
HON'BLE SHRI. R.N.SINGH, MEMBER (J) .**

Sumit Jairam Kode

Son of Jairam Genu Kode,
DOB 28.04.1999, Age: 18 years 07 months,
residing at: C/o. Dhansingh Wagh,
Room No. 1, Tiwari Chawl,
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Zipra Compound, Tembhi Pada Road,
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Pin code 400078.***Applicant***
(Applicant by Advocate Shri. R.G.Walia)

Versus

1. Union of India,

Through: The Secretary,
Integrated Headquarters (Navy),
Ministry of Defence,
Raksha Bhawan, South Block,
New Delhi 110011.

2. The Chief of the Naval Staff,

Integrated Headquarters (Navy),
Ministry of Defence,
Raksha Bhawan, South Block,
New Delhi 110011.

3. The Admiral Superintendent,

Naval Dockyard,
Shahid Bhagat Singh Road,
Mumbai 400023.

4. The Flag Officer Commanding-in-Chief,

Headquarters Office, Western Naval Command,
Shahid Bhagat Singh Road,
Mumbai 400001.***Respondents***
(Respondents by Advocate Shri. R.R. Shetty)

Reserved On : 13.07.2018.

Pronounced on: 27.07.2018

ORDER**PER:- R. VIJAYKUMAR, MEMBER (A).**

1. This application was filed on 20.11.2017 under Section 19 of the Administrative Tribunals Act, 1985 by the applicant challenging an advertisement issued in Employment News dated 29/04-05/05/2017 and corrigendum published in Employment News dated 06-12/05/2017 for recruitment of Tradesman Mate by the Naval Dockyard, Mumbai who are Respondent Nos. 3 and 4 in this case. The applicant had sought the following reliefs:-

"8(a). *This Hon'ble Tribunal will be pleased to call for the Records and Proceedings of the case which led to the passing of the impugned orders: i.e.*

(i) *Annexure "A1" is a copy of the illegal and void Advertisement dated 29.04.2017-05.05.2017 published in the Employment News.*

(ii) *Annexure "A2" is a copy of the illegal Reply dated 31.10.2017.*

(iii) *Annexure "A3" is a copy of the illegal Result dated 15.11.2017, and after going through its propriety, legality and constitutional validity be pleased to quash and set aside the same.*

(b) *This Hon'ble Tribunal will be*

pleased to Order and direct the Respondents a fresh Advertisements in accordance with SRO (Statutory Rules and Orders) No.43/2012 dated 18.05.2012 as amended vide SRO (Statutory Rules and Orders) No.31/2017 dated 24.04.2017 and accordingly conduct the entire Selection Process for 384 posts.

(c) This Hon'ble Tribunal will be pleased to Order and direct a high level Vigilance investigation in the issuance of the impugned and illegal Advertisement dated 29.04.2017-05.05.2017 which on the face of the record was contrary to the Recruitment Rules i.e. SRO (Statutory Rules and Orders) No.43/2012 dated 18.05.2012 as amended vide SRO (Statutory Rules and Orders) No.31/2017 dated 24.04.2017 and a detailed Report be submitted to the Hon'ble Tribunal on the same and the erring officials be dealt with in accordance with the Rules.

(d) Any other and further orders as this Hon'ble Tribunal may deem fit, proper and necessary in the facts and circumstances of the case.

(e) Costs of this Original Application may be provided for."

2. The incontrovertible facts in this case as elicited from the documents furnished by the applicant and respondents are that an advertisement was issued in the edition of Employment News for 29-05/04/2017 for filling up of 384 posts of

Tradesman Mate who are erstwhile MTS Industrial (Unskilled Labourers - USL) employed in loading/unloading and other tasks by respondents. The posts required qualification of 10th standard pass from a recognized board/ institution. The age requirements were also specified and were corrected thereafter in the next edition of the Employment News dated 06-12/05/2017 leaving other aspects unchanged. The advertisement provides for shortlisting of applications in the ratio of 1:50 based on marks obtained in the minimum requisite qualifications of Matriculation. This advertisement was issued in accordance with the Statutory Rules and Orders (SRO) No. 43/2012 dated 18.05.2012. However, this SRO was amended in order No. 31/2017 dated 24.04.2017 which was published in the Government Gazette on 29.04.2017 on the day this recruitment advertisement was posted in the first day of the weekly edition of Employment News. The SRO No. 31/2017

modified the rules in regard to the essential qualification by replacing the designation Tradesman Mate (Erstwhile MTS (Industrial)/USL) by Multi Tasking Staff (MTS) (Industrial), with pay of Level-I in the pay matrix. The share for direct recruitment was reduced from 100% to 90% and an additional requirement for essential qualification was of a certificate from a recognized ITI in the relevant trade.

3. The advertisement was also placed on the official websites of the respondents for inviting online applications and was adopted by a variety of private website including onlinetyari.com published on 28.04.2017, topcornerjob.com published on 28.04.2017, latestgovernmentjob.com published on 27.04.2017, www.fresherslive.com published on 28.04.2017, www.allgujaratjob.in published on 28.04.2017 and www.sarkarijobswala.com published on 27.04.2017. All notifications for filling up vacancies in Government

Departments are mandatorily required to be published in Employment News including by intimation to the local/Central Employment Exchanges. The objective is to ensure the widest possible publicity and this date is adopted for fixing time limits for filling applications. Under the advertisement terms for Employment News, advertisements for jobs are required to be sent 21 days in advance and in this instance, the advertisement was forwarded for publication through DAVP, Government of India on 11.04.2017 requesting publication on 15.04.2017 and respondents claim that they received the printed copy on 26.04.2017, three days prior to date of the weekly news edition. A corrigendum was also issued by respondents in letter No.DYP/P/9108/CM/Recruitment dated 28.04.2017 which was published in the Employment News on 06.05.2017.

4. The applicant bears the qualification of SSC pass and has also

completed ITI. However, in his application against the said advertisement, which was duly received by the respondents, he only claimed to have passed the SSC exam in 2014 with 74.80% of marks. He has not mentioned his ITI qualification in the application. After receipt of applications, which numbered nearly 2.5 lakhs, the respondents shortlisted these applications by fixing the minimum percentage of marks of 80% at the SSC level which was in accordance with their advertisement. On this basis, eligible persons were asked to appear in the written examination on 08.10.2017 and for which the applicant was not given an intimation as he was not shortlisted by virtue of lower marks in the SSC examination. Results of the written examination were published by way of a provisional list of candidates whose selection was provisional subject to medical examination and production of original documents. This list of 384

candidates and 98 wait listed candidates was published on 15.11.2017 which has been enclosed by the applicant as Annexure A-3 in his application which was, thereafter, filed on 20.11.2017.

5. Meanwhile, the applicant claims that he made a representation through a friend, Shri. Vivek Vasant Ambre, on 20.05.2017 and again on 16.10.2017 pointing out a discrepancy between the SRO 31/2017 dated 24.04.2017 and gazetted on 29.04.2017 and the contents of the advertisement published in the edition of Employment News in the week commencing on 29.04.2017. The applicant himself has not filed any representation on this issue and claims to adopt the representation filed by this person who is not stated to be an applicant for this recruitment or interested person at any stage of these proceedings. This representation was also considered by the respondents Chief Administrative Officer at Mumbai and in his letter No.

CS (II) /3300/IND/ND (MB) /VV Ambre dated 17.10.2017, the allegations made by the individual have been decided as baseless and it has been informed that no further action has been recommended by the Competent Authority.

6. After relaxation was granted on 04.12.2017 by this Tribunal on the interim orders dated 27.11.2017 of stay on selection process, the candidates in the provisional list were examined further and a final list of 384 candidates have been finalized which comprises 204 graduates and above (53.12%), 155 above SSC level which includes ITI, HSC, and Diploma (40.36%) holders, and 25 SSC holders (6.51%).

7. The main arguments of the applicant are that the recruitment should have been conducted in accordance with the revised Recruitment Rules of SRO 31/2017 which was applicable on the date of advertisement for the posts. He refers to Rule 1(2) of SRO 31/2017 which reads that

'they shall come into force on the date of their publication in the official gazette' which was dated 29.04.2017 and this is also the date on which the advertisement was published in the weekly edition of Employment News dated 29/04-05/05/2017. He also states that since corrigendum was published on 06.05.2017, the contents of SRO 31/2017 could have been incorporated at that stage but were not done which suggests mala fides. He argues that the reasons given by the respondents referring to the FAQ of the DoPT that old vacancies have to be filled up under the old rules has no valid basis in law. Therefore, the advertisement was not published in accordance with the Recruitment Rules in force on that date and needs to be quashed with consequent effects.

8. The respondents in their reply state that the applicant never objected or represented to the respondents with his objections to the advertisement.

They object to his adoption of the complaint filed by Shri Vivek Vasant Ambre who is a petitioner in another case decided by this Tribunal on 11.11.2016 and which is before the Hon'ble High Court in WP No. 13803/16 for recruitment of 325 Unskilled Labourers (the same category) for the same Dockyard. The applicant filed this application based on the advertisement and then after the shortlisting process was done on 15.09.2017 and written examination was conducted and further, after the list of candidates who cleared the written test was published on their website on 15.11.2017 and then, orders issued to successful candidates for appearing for pre-recruitment formalities, he had filed this application objecting to the advertisement itself. For that reason, they object to his locus standi. They also argue that despite having this list and enclosing it with this application, he has not made any of the selected candidates as

party respondents and therefore, the application suffers from non-joinder of relevant parties. They also point out that although the applicant seeks to question the non-application of SRO 31/2017 which had the essential qualification of SSC and ITI, the applicant did not indicate his qualification of ITI in his application. In this connection, during arguments, respondents produced a Select List of 384 candidates, included persons with ITI, HSC, Diploma, Graduation Degrees and Post-Graduation Degrees and argue that nothing prevented the applicant from stating his basic qualifications which meant that he had concurred with the requirements specified under the previous SRO 43/2012 of essential qualification being for SSC alone.

9. The respondents have explained the process by which these vacancies were determined and issue of the advertisement in various papers filed with their reply

and during the hearing. The respondents are required to address the Competent Authority and obtain orders by issue of Non Availability Certificate which is the basis for proceeding with recruitment. They first received an NAC for 132 posts in reference to their note dt. 18.08.2015 by reply from the Adjutant General Branch on 21.09.2015 for 132 posts of Tradesman Mate(erstwhile USL). They also received another NAC on 07.01.2017 for 291 additional posts reduced by 39 disabled category vacancies, already published, giving a total NAC recruitment need of 384 posts. These are in addition to the 325 posts that are sub-judice before the Hon'ble High Court. Based on this NAC, the respondents have proceeded to issue an advertisement in their letter No. DYP/P/9495/TM/2017-18 dt. 11.04.2017, eighteen days prior to actual publication, through the DAVP, Ministry of Information and Broadcasting, as prescribed for

Government Departments and requested publication in the edition of employment news for the week commencing 15.04.2017. This was preceded by getting the draft advertisement vetted by the Naval Headquarters at Delhi in an email dt. 29.03.2017 and which was followed by an approval of the draft advertisement received from NHQ, New Delhi by the FOC-in-C on 31.03.2017 and this was then communicated to the concerned Commander on 07.04.2017. The advertisement was also published on the respondent's website and they state that the advertisement was published in ten other websites based on their advertisement, some of which were separately filed and have been reflected in the relation of facts(supra). On this basis, they also deny the allegations of mala fides by the applicant.

10. During the hearing held on 12.04.2018, the respondents also produced a copy of the Employment News weekly edition

dated 14-20.04.2018 to support their averments that the actual release of Employment News pre-dates the week days mentioned in the newspaper and supports the genuineness of their explanations on the process of filing advertisement well in advance of the gazette notification for the new SRO No.31/2017. The respondents also explain that candidates were shortlisted on merit in the ratio 1:50 based on the marks obtained in the minimum requisite educational qualification of SSC as mentioned in the advertisement and after fixing the cut-off level at 80% marks in SSC, around 2.5 lakh applicants were reduced in the list of persons called for written examination to this ratio. The applicant was not called because he had secured only 74.80% and was, therefore, not eligible. The respondents refer to a 'Frequently Answered Questions(FAQ'S)' circular issued by DoP&T in OM No. AB.14017/13/2013-Estt.(RR) (1349) which

states as follows:

*"3. Whether Recruitment Rules are applicable retrospectively?
Ans. The legal position is that the posts are to be filled up as per the eligibility conditions prescribed in the Recruitment Rules in force at the time of occurrence of vacancies unless the Recruitment Rules are amended retrospectively. The practice has however been to give effect to the Recruitment Rules prospectively."*

11. According to the respondents, even if their advertisement is considered as having been published on 29.04.2017, they are in conformity with the guidelines of the DoPT in following the old SRO and were not under any requirement to recruit according to the new SRO as on that date. This FAQ is also the basis mentioned by respondents 3 & 4 in their fax message dated 23.05.2017 to respondent No. 2 following which, concurrence to proceed with the recruitment was accorded in letter No. CP(NG)/2852/DR dated 23.06.2017 (RJ-A2, P.157 in case) by respondent No. 2 who are the Head of Department for this matter.

12. During the arguments, the applicants have relied on the decisions of the Hon'ble Apex Court ***in Deepak Agarwal & Anr. Vs. State of Uttar Pradesh & Ors. [(2011) 6 SCC 725]*** in C.A. No. 6587 of 2003, decided on 31.03.2011 and also in ***State of Tripura Vs. Nikhil Ranjan Chakraborty & Ors. [(2017) 1 SCC(L&S) 718]*** in C.A. Nos. 691-93 of 2017 with Nos. 694-98 of 2017, decided on 20.01.2017 to argue that the rules which are prevalent at the time when consideration takes place for promotion would be applicable. This decision also referred to the previous decision of the Apex Court ***in Y.V. Rangaiah Vs. J. Sreenivasa Rao [(1983) 3 SCC 284]*** in which a duty had been cast on the respondents to conduct DPC against vacancies that had occurred prior to the amendment in the Recruitment Rules and therefore, the selection had to be made with reference to the old rules. In the present case, however, there was no vested

right for the applicant as also the persons applying in response to the advertisement and therefore, the amended SRO had to be applied for recruitment. The applicant also refers to cases of **N.T. Devin Katti & Ors. Vs. Karnataka Public Service Commission & Ors. [(1990) 3 SCC 157] in C.A. Nos. 2270-73 of 1987 and 1713 of 1990, decided on 30.03.1990** and **P. Mahendran & Ors. Vs. State of Karnataka & Ors. [(1990) 1 SCC 411] in C.A. No. 3948 of 1987, decided on 05.12.1989** by which it was held that a candidate does not acquire any vested right of selection pursuant to applying against an advertisement but if the candidate was otherwise qualified in terms of the advertisement inviting applications, he acquires a vested right to be considered for selection in accordance with the rules or orders then prevailing. Further, that Service Rules or Government Orders have normally prospective effect in application unless specifically ordered to the

contrary. Therefore, the applicants argue that the advertisement was based on a rule that ceases to exist on 21.04.2017 when the new rules under SRO 31/2017 came into place. Further, any deviation had to be approved, according to the applicants, by the Hon'ble President who had approved the issue of the Recruitment Rules under the Constitution. They state that since the advertisement is itself issued in violation of Recruitment Rules, the respondents cannot deny the validity of the objection raised by the applicant, especially when he had communicated his objection through his friend after the advertisement was issued and prior to the shortlisting. The applicant also refers to correspondence between respondent No. 2 and respondent No.4 under information to respondent No.3. A fax has been sent on 23.05.2017 as a reply to the message from respondent No. 2 that consequent upon the amendment of the SRO w.e.f. 29.04.2017, respondent No. 2 had

directed that all on-going recruitments where written examination had not been conducted, should be carried out in accordance with the revised Recruitment Rules. For this, respondent No. 3 had replied on 23.05.2017 that they had advertised in the Employment News as per the previous SRO and had received 1.60 lakh applications approximately until 19.05.2017. They referred in support to the DoPT FAQ issued in OM No. AB.14017/13/2013-Estt.(RR)(1349) at Para 3 reproduced at para 10 supra and the fax message requests early directions from respondent No.2.

13. The applicant also refers to the decision of the Hon'ble Apex Court *in M/s. Hindustan Aeronautics Ltd., Bangalore Vs. Commissioner of Income Tax, Karnataka-I, Bangalore*[AIR 2000 SC 2178] in C.A. No. 9104 of 1995, decided on 11.05.2000 which reiterated the law laid down that Courts cannot direct that circular should be given

effect to and not the law laid down by the High Court or Supreme Court. They also refer to the cases of ***The General Manager, South Central Railway, Secunderabad & Anr. Vs. A.V.R. Siddhantti & Ors [(1974) SCC (L&S) 290]***, C.A. Nos. 1937 & 1938 of 1972, decided on 30.01.1974 and ***A.Janardhana Vs. Union of India & Ors. [(1983) SCC (L&S) 467]*** in C.A. No. 360 of 1980, decided on 26.04.1983, in which the latter adopted the decision in the former case. They aver that this decision holds that when a seniority list is challenged alleging it to be based on illegal or invalid rule, the persons placed senior to the appellant are not necessary parties, since no relief has been claimed against them and therefore, the vice of non-joinder of parties would not apply which is one of the defenses put up by the respondents. Therefore, when the petitioners are impeaching the validity of policy decisions(Rules) on the ground of their being violative of Articles 14 & 16

of the Constitution and the relief is claimed against the Union Government and not against any particular individual, the petitioners need not implead the affected parties as respondents.

14. The respondents have relied on a decision of the Hon'ble Apex Court ***in State of Punjab Vs. Khemi Ram***[1969(3) SCC 28] ***in C.A. No. 1217 of 1966, decided on 06.10.1969*** in which the issue of communication of orders of suspension to a delinquent officer was considered and it was held that since the word 'communicate' is to 'impart, confer or transmit information,' once an order is sent out, it goes out of the control of such an authority, and therefore, there would be no chance whatsoever of the said authority changing its mind or modifying it. Therefore, if an officer against whom action is sought to be taken, goes away from the address given by him for service of such orders or if he has deliberately

given a wrong address, he cannot deny its having been communicated. By this citation, they wish to argue that their communication to DAVP enclosing the advertisement dated 11.04.2017 should be taken as the date of commencement of the selection process.

15. They have also referred to decisions of the Hon'ble Apex Court *in the cases of Om Prakash Shukla Vs. Akhilesh Kumar Shukla & Ors.* [(1986) SCC (L&S) 614] in C.A. No. 2999 of 1985, decided on 18.03.1986; *Madan Lal & Ors. Vs. State of J & K & Ors.* [1995 SCC (L&S) 712], Writ Petition (Civil) No. 546 of 1994, decided on 06.02.1995, and the recent case of *Madras Institute of Development Studies & Anr. Vs. K. Sivasubramaniyan & Ors.* [2016 1 SCC (L&S) 164, C.A. No. 6465 of 2015, decided on 20.08.2015. In the first case, it was held that when candidates challenge the examination, the Courts could not set aside the results of that examination and

held ".....should not set aside the results of that examination, more so where candidates challenging the examination themselves appeared in the examination without protest and raised the challenge after realising their failure in the examination". ***In Madan Lal & Ors. Vs. State of J & K & Ors (Supra)***, the Court found that the petitioners and successful candidates who were respondents, were all found eligible based on the written test and were called for oral interview at which point of time, there was no dispute between parties. The petitioners appeared at the oral interview and took a chance to get themselves selected. The Court held the "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 this regard, they refer to the precedent of **Om Prakash Shukla Vs. Akhilesh Kumar Shukla & Ors. (supra)**. Therefore, the case summary reads that the locus standi to impugn, on the ground of unfairness of interview process or defect in constitution of Selection Committee, held, not possessed by unsuccessful candidates who had taken a chance to get themselves selected at the impugned interview. In the recent case decided by the Hon'ble Apex court in **Madras Institute of Development Studies & Anr. Vs. K. Sivasubramaniyan & Ors. (supra)**, the court found that respondent No.1 had alleged variations in the contents of the advertisement and the Rules, but submitted his application and participated in the selection process without raising any objections. The Court held as below:-

"14. The question as to whether a person who consciously takes part in the process of selection can turn around and question the method of selection is no longer res integra."

16. The Court referred to the previous two cases discussed above and further to **Manish Kumar Shahi Vs. State of Bihar [(2010) 12 SCC 576]** that after having taken part in the process of selection, the petitioner is not entitled to challenge the criteria or process of selection. The Court also referred to **Ramesh Chandra Shah Vs. Anil Joshi [(2013) 11 SCC 309]** which 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.

17. On the aspect of non-joinder of parties, the respondents relied on the decisions of the **Hon'ble Apex Court in Udit Narain Singh Malpaharia Vs. Addl. Member, Board of Revenue, Bihar & Ors. [1963 Supp(1) SCR 676]**, **C.A. No. 586 of 1962, decided on 19.10.1962** and **Khetrabasi Biswal Vs. Ajaya Kumar Baral & Ors. [2004 SCC (L&S) 182]**,

decided on 20.01.2003. In the latter case, after the Orissa Public Service Commission prepared a list of successful candidates, this was modified by the Orissa Government and when the matter went to the Hon'ble High Court, the judgment proposed a different list of candidates who should have been selected and the persons who were so affected proceeded on appeal. The Hon'ble High Court had not issued notices to these parties who were necessary parties and therefore, the orders of the Hon'ble High Court were quashed and matter remitted for decision on merits after giving due opportunity to the affected parties. In the case of **Udit Narain Singh Malpaharia Vs. Addl. Member, Board of Revenue, Bihar & Ors. (supra)**, it was considered whether the parties whose rights are directly affected are the necessary parties to a Writ Petition. The judgment referred to description of the procedure in "The Law of Extraordinary Legal Remedies":

"Those parties whose action is to be reviewed and who are interested therein and affected thereby, and in whose possession the record of such action remains, are not only proper, but necessary parties. It is to such parties that notice to show cause against the issuance of the writ must be given, and they are the only parties who may make return, or who may demur. The omission to make parties those officers whose proceedings it is sought to direct and control, goes to the very right of the relief sought. But in order that the court may do ample and complete justice, and render a judgment which will be binding on all persons concerned, all persons who are parties to the record, or who are interested in maintaining the regularity of the proceedings of which a review is sought, should be made parties respondents."

18. Therefore, this passage indicates, that both the authority whose order is sought to be quashed and the persons who are interested in maintaining the regularity of the proceeding of which a review is sought, should be added as parties in a writ proceeding. The judgment cites the decision of the Bombay High Court in **Ahmedalli Vs. M.D. Lalkaka** [AIR 1954 Bom

33,34] which laid down the procedure as:

"I think we should lay down the rule of practice, that whenever a writ is sought challenging the order of a Tribunal, the Tribunal must always be a necessary party to the petition. It is difficult to understand how under any circumstances the Tribunal would not be a necessary party when the petitioner wants the order of the Tribunal to be quashed or to be called in question. It is equally clear that all parties affected by that order should also be necessary parties to the petition."

19. Further, a Full Bench of the Nagpur High Court in **Kanglu Baula Vs. Chief Executive Officer**[AIR 1955 Nag. 49] held that a writ of certiorari which includes a writ in the nature of certiorari should include as necessary parties not only the Tribunal or Authority whose order is to be quashed but also parties in whose favour the said order is issued and it would be against all principles of natural justice to make an order adverse to them behind their back and any order so made could not be an effective one.

20. The respondents have also referred to a decision of the **Hon'ble Apex Court of Three Judges in Sant Ram Sharma Vs. State of Rajasthan & Ors. [(1968) 1 SCR 111], W.P. No. 182 of 1966, decided on 07.08.1967** and argued that in the present case, neither the SRO 43/2012 nor the SRO 31/2017 categorically lays down that all vacancies available on the day on which the rule is existing has to be filled up as per the old rule or as per the new rule and since this issue is open, the DoPT Circular(FAQ) cited above could be an administrative instruction that would prevail as supplementing the rule. This judgment is also followed by the decision of the Hon'ble Apex Court **in Union of India Vs. P.K. Lambodaran Nair [(2001) 9 SCC 276], C.A. No. 1788 of 1997, decided on 29.03.2000** which held that the Office Memorandum restricting extension of service for the period beyond retirement for the purposes of promotion to higher post was, on facts, applicable irrespective

of the fact of existence of statutory rules for promotion. Respondents have also referred to the decision in **Dr. K. Ramulu & Anr. Vs. Dr. S. Suryaprakash Rao & Ors. [(1997) 3 SCC 59], C.A. Nos. 404-407 of 1997, decided on 15.01.1997** in which it was held that the omission to prepare and operate promotional panels for the years 1995-96 was, on facts, not arbitrary with the Government taking a conscious decision in the year 1988 to amend the 1977 Rules and not to fill up any vacancy till such amendment.

21. Respondents have also referred to a decision of the Hon'ble Apex Court **in Haryana Public Service Commission Vs. Amarjeet Singh & Ors [(1999) SCC (L&S) 1451], decided on 18.03.1999** in which it was held that the criterion adopted might be defective but it was applied uniformly and therefore, no prejudice was caused to Respondents 1 & 2 or any other candidate and it was inappropriate for the High Court to

reallocate marks and direct the Commission to select Respondents 1 & 2. ***In Vijendra Kumar Verma Vs. Public Service Commission, Uttarakhand & Ors. [(2011) 1 SCC (L&S) 21], C.A. No. 8861 of 2010, decided on 08.10.2010,*** on the appointment of Judges, the Hon'ble Apex Court held that in reference to the questions posed to assess basic knowledge of computer operation during the interview, 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. The judgment also cites the decisions of the ***Hon'ble Apex Court in Dr. G. Sarana Vs. University of Lucknow [(1976) 3 SCC 585]; Union of India Vs. S.Vinodh Kumar [(2007) 8 SCC 100]; K.H. Siraj Vs. High Court of Kerala [(2006) 6 SCC 395]; P.S. Gopinathan***

Vs. State of Kerala [(2008) 7 SCC 70],

where it was held "... Apart from the fact that the appellant accepted his posting orders without any demur in that capacity, his subsequent order of appointment dated 15-7-1992 issued by the Governor had not been challenged by the appellant. Once he chose to join the mainstream on the basis of option given to him, he cannot turn back and challenge the conditions. He could have opted not to join at all but he did not do so. Now it does not lie in his mouth to clamour regarding the cut-off date or for that matter any other condition. The High Court, therefore, in our opinion, rightly held that the appellant is estopped and precluded from questioning the said order dated 14-1-1992. The application of principles of estoppel, waiver and acquiescence has been considered by us in many cases, one of them being *G. Sarana (Dr.) V. University of Lucknow, (in P.S. Gopinathan V. State of Kerala (supra))*.

22. Learned counsel for respondents on a query made by the Bench with regard to the final selection list of 384 persons that a large number of persons who are Graduates, Post-graduates, B-Tech, Diploma, and Higher Secondary qualified, which is far above the qualifications required for both the older SRO and the new SRO, the respondents have cited the decision of the Hon'ble Apex Court in ***K.K. Jyoti & Ors. Vs. Kerala Public Service Commission(supra)*** in which the notification required qualifications of SSLC along with diploma or certificate in engineering from a technical school or MGTE/KGTE in the subject from the Board. The Court took the view that a qualification of degree in electrical engineering in that case presupposes the acquisition of the lower qualification of diploma in that subject prescribed for the post, and should be considered sufficient for the post. The Court held that if the Government was of the view that only

diploma holders should have applied for the post, either this rule should have excluded candidates who possess higher qualifications or the position should have been made clear that degree holders shall not be eligible to apply for such post. When that position is not clear but on the other hand, rules do not disqualify per se the holders of higher qualifications in the same faculty, it becomes clear that the rule could be understood in an appropriate manner as stated above.

23. We have gone through the O.A. along with Annexures A-1 to A-7, Rejoinder along with Annexures RJ-A1 to RJ-A4, filed on behalf of the applicants. We have also gone through the reply along with Annexures R-1 to R-5 filed on behalf of the respondents.

24. We have heard the learned counsel for the applicant and the learned counsel for the respondents and carefully considered the facts and circumstances,

Written Submissions, law points and rival contentions in the case.

25. In this application, the applicant is essentially contesting the adoption of the SRO 43/2012 for implementation in the advertisement issued by respondents for this post. The advertisement itself, as described in the previous paragraphs, was issued after considerable consultations and necessary approvals from the Head of Department on the number of vacancies obtained in 2015 and 2017 and then, for the advertisement itself, which was published after necessary approvals by respondent No. 2 well before the date of advertisement. The advertisement itself was clearly published well before the date on which it was published in the Employment News and, as demonstrated by the respondents, the Employment News in its print edition was available much before the first mentioned date in the weekly edition of the paper itself and is claimed to have been received

three days prior to 29.04.2017 which had also not been rebutted by the applicant. The Government has made publication in the Employment News mandatory which essentially means that public knowledge through the Employment News is an essential condition for potential applicants to become aware of the job opportunity and therefore, the advertisement cannot reduce the time period granted for applicants by fixing a commencement date prior to its availability. That is, however, a different proposition from claiming that the rules should have been applied on the date mentioned in the Employment News weekly edition and becomes an arguable issue for adjudication. The change brought about by SRO 31/2017 was to alter the minimum classification from SSLC to SSLC and ITI. This does not bar higher qualifications in the same technical field as brought out by respondents in their citation of **K.K. Jyoti & Ors. Vs. Kerala**

Public Service Commission (supra) .

Considering the results that have been presented by respondents and the fact that 80% cut-off was fixed for the SSLC marks to shortlist candidates, there is certainly a hypothetical possibility that the applicant could have come into the zone of consideration if only the qualifications mentioned in SRO 31/2017 read with the law as settled in **K.K. Jyoti & Ors. Vs. Kerala Public Service Commission (supra)** had been taken into account by elimination of applicants with SSC alone. The applicant has probably adopted that hypothetical situation to claim a right by which he has filed this application challenging the SRO applied. However, given that the applicant scored 5.2% less than the cut-off level adopted of 80%, his position may still be hazardous. Pointedly, he also never claimed any qualification other than SSC. Further, as an incidental observation on the interpretations by both parties, it is

clear that variations between the Recruitment Rules adopted in any particular case as against the Recruitment Rules that are in force are neither to be approved by the Hon'ble President nor can it clearly be done by the Administrative Department itself but as specified in FAQs of DoPT referred both by applicants and by respondents at Serial No. 7, such relaxation needs to be done in consultation with DoPT and also the UPSC, where relevant. In this case, however, these issues become germane only after considering the aspects raised by respondents of non-joinder of parties and of estoppel, waiver and acquiescence.

26. The applicant in the present case has only impleaded official respondents R-1 to R-4 and has not impleaded any of the persons provisionally selected that he has enclosed with this application.

27. The learned counsel for applicant argued based on the decisions of the

Hon'ble Apex Court in the **The General Manager, South Central Railway, Secunderabad & Anr. Vs. A.V.R. Sinddhanthi & Ors. (supra)** and **A. Janardhana Vs. Union of India & Ors. (supra)** that they were only challenging the validity of policy decisions with reference to the Rules and the violation of the Rules by the respondents by not adopting the later SRO of 31/2017 which became effective from 29.04.2017 and have instead continued to apply the previous SRO 43/2012. As a counter, respondents have referred to a number of cases namely, **Udit Narain Singh Malpaharia Vs. Addl. Member, Board of Revenue, Bihar & Ors. (supra)**; **Khetrabasi Biswal Vs. Ajaya Kumar Baral & Ors. (supra)** and the decision of the Bombay High Court in **Ahmedalli Vs. M.D. Lalkaka (supra)** and the Nagpur High Court in **Kanglu Baula Vs. Chief Executive Officer (supra)**. As these have been discussed as presented by the respondents, the essential aspect that

needs to be considered is that the applicant's challenge to the rule, as reflected in the advertisement, continues to apply right from the date of the advertisement until the conclusion of the selection. However, once the shortlist was prepared and as in this case, the provisional list of selected candidates was published and the applicant mounted a challenge against the selection after determining that he was not selected, the selected candidates in that list acquired a vested right to be considered for appointment. Therefore, as ruled by the Hon'ble Apex Court in ***Udit Narain Singh Malpaharia Vs. Addl. Member, Board of Revenue, Bihar & Ors.(supra)*** by reference to the description of procedure in "The Law of Extraordinary Legal Remedies", "...But in order that the court may do ample and complete justice, and render a judgment which will be binding on all persons concerned, all persons who are parties to

the record, or who are interested in maintaining the regularity of the proceedings of which a review is sought, should be made parties respondents." This has been reiterated by the Full Bench of the Nagpur High Court in **Kanglu Baula Vs. Chief Executive Officer(supra)** wherein it states that it would be against all principles of natural justice to make an order adverse to them behind their back and any order so made could not be an effective one. Therefore, it was the bounden duty of the applicant to have made, at least one if not all, the selected candidates as formal parties through the official respondents citing their registration numbers if more details was unavailable to him at the time of filing the application. Not having done so, the application suffers from the vice of non-joinder of parties.

28. The applicant in this case was duly qualified in accordance with the advertisement and had an SSC degree.

Although he had an ITI qualification, he did not mention it in the application whereas, it is clear from the list of candidates who applied that many of them have been able to cite their higher qualifications although these were not relevant for the purpose of deciding their eligibility and only the SSLC marks were adopted as laid out in the advertisement. Since he was qualified as per advertisement, the applicant had a right to be considered and he has been duly considered. However, when shortlisting took place, the applicant was found to be below the desired cut-off in terms of qualifications and he was not admitted to the written examination. The applicant may plead that he was not aware of this fact but the selected candidates appeared in the written examination and a provisional selection list was prepared. It is only after this, that the applicant sought to challenge the selection itself.

29. The respondents have referred to the decisions of the Hon'ble Apex Court in ***Om Prakash Shukla Vs. Akhilesh Kumar Shukla & Ors.(supra)***; ***Madan Lal & Ors. Vs. State of J & K & Ors.(supra)***, and ***Madras Institute of Development Studies & Anr. Vs. K. Sivasubramaniyan & Ors.(surpa)*** by which it has been held that having consciously taken part in the process of selection, the petitioner cannot later gain a right to challenge the criteria or the process of selection including the advertisement and the methodology and in that sense, as summarised in the decision, there is an estoppel which operates against the applicant. The respondents have also cited decisions of the Apex Court in ***in Vijendra Kumar Verma Vs. Public Service Commission, Uttarakhand & Ors.(supra)*** and ***Haryana Public Service Commission Vs. Amarjeet Singh & Ors.(supra)*** where, in the latter case, it was held that although the criterion adopted might have been defective

but it was applied uniformly and therefore, no prejudice was caused to the respondents. In these circumstances and by virtue of the settled law on the subject, the applicants challenge to the advertisement, the Rules adopted in the advertisement and the methodology adopted by the respondents for the selection process is clearly not maintainable.

30. In the circumstances, based on the non-maintainability of the application by virtue of his acquiescence and estoppel that operates against him and additionally, for reason of non-joinder of parties, this OA is dismissed without any order as to costs. The interim orders passed earlier are also vacated with immediate effect.

(R.N. Singh)
Member (J)

(R. Vijaykumar)
Member (A)

srp/Ram.