

UNION OF INDIA AND ORS.

A

v.

S. VINODH KUMAR AND ORS.

SEPTEMBER 18, 2007

[S.B. SINHA AND H.S. BEDI, JJ.]

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*Service Law—Recruitment—Different cut-off-marks provided for different categories of candidates—Non-filling of few reserved posts due to non-availability of qualified candidates—Unsuccessful candidates seeking appointment against reserved post by lowering cut-off marks—Denied by Central Administrative Tribunal—Allowed by High Court—On appeal, held : The candidates of general category cannot be appointed against reserved posts—The Authority was having requisite jurisdiction to fix cut-off marks—In the facts, it cannot be said that fixing of cut-off was arbitrary so as to offend Article 14 of the Constitution—It was for the Authority to decide as to whether the post was to be dereserved or carried forward—The candidates, having taken part in the selection process, knowing the procedure thereof, estopped from challenging the same—Constitution of India, 1950—Article 14—Estoppel.*

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**Vacancies were advertised for recruitment to the post of ‘Gangman’ by Railways. The Authority had reserved the right to increase or decrease the number of posts. Certain seats were also reserved for the candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes. Cut-off marks were provided for different categories of candidates. Out of the total vacancies, the post belonging to General and Other Backward Class Category were filled. However, some posts belonging to Scheduled Caste and Scheduled Tribe category could not be filled up due to non-availability of qualified eligible candidates.**

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**Some unsuccessful candidates from General Category (respondents), filed application before Central Administrative**

A Tribunal. The same was disposed of, directing the Administration to consider the question of lowering of cut-off marks of the general candidates. The Competent Authority decided that lowering of cut-off-marks would not be conducive to general merit of the candidates. Thereafter another application was filed and the same was dismissed by the Central Administrative Tribunal. In Writ Petition, High Court directed the concerned Authority to appoint the general category candidates by lowering the cut-off marks against the reserved posts. Hence the present appeal.

C Appellant contended that the direction of the High Court was illegal, as the reserved vacancies could not be filled up by general candidates.

D Respondents contended that specification of cut-off-marks for general candidates was arbitrary; and the order of High Court could not be said to be illegal because previously Railway Board, itself had directed to fill up the unfilled reserved vacancies by general candidates in terms of Circular dated 12.3.1976.

Allowing the appeal, the Court

E HELD: 1. Only because the cut-off marks of general category candidates had been fixed on the basis of certain criteria, the same by itself, would not mean that no cut-off mark had been fixed. The fact that the Railway Administration intended to fix the cut-off mark for the purpose of filling up the vacancies in respect of the general category as also reserved category candidates is evident from the fact that different cut-off marks were fixed for different categories of candidates. Therefore, it cannot be said that the cut-off marks fixed was wholly arbitrary so as to offend the principles of equality enshrined under Article 14 of the Constitution of India. The power of the employer to fix the cut-off marks is neither denied nor disputed. If the cut-off mark was fixed on a rational basis, no exception thereto can be taken. [Para 10] [48-H; 49-A-C]

H 2. Respondents herein had approached the Tribunal in the year 2000. The Tribunal directed the appellants to consider this case of lowering of the cut-off marks. An inference, therefore, can be drawn

from the aforementioned fact that the main prayer of the respondents was that the cut-off marks should be lowered. Appellants admittedly did not agree to the said proposal. The action of the appellants impugned before the Tribunal must, therefore, be considered from the view point as to whether it had the requisite jurisdiction to do so. The Tribunal upheld the contention of the appellant. Once it is held that the appellants had the requisite jurisdiction to fix the cut-off marks, the necessary corollary thereof would be that it could not be directed to lower the same. It is trite that it is for the employer or the expert body to determine the cut-off marks. The court while exercising its power of judicial review would not ordinarily intermeddle therewith. The jurisdiction of the court, in this behalf, is limited. The cut-off marks fixed will depend upon the importance of the subject for the post in question. It is permissible to fix different cut-off marks for different categories of candidates.

[Para 11] [49-C-G]

*Banking Service Recruitment Board, Madras v. Ramalingam and Ors.*, [1998] 8 SCC 523, referred to.

3. The contention with regard to the Railway Board's circular letter dated 12.03.1976, had not been raised before the Tribunal. Respondents herein did not have any occasion to meet the said contention. In any event, only because in a case of this nature, the said circular had not been complied with, the same, would not lead to a conclusion that action on the part of the appellants in its entirety was unwarranted or *mala fide* in nature.

[Para 12] [49-G-H; 50-A]

4. Even assuming that the appellants should have filled up the unfilled vacancies meant for the reserved category candidates by the general candidates, but then for the said purpose, the general candidates were required to fulfill the eligibility clause including the cut-off marks fixed therefor. Respondents admittedly did not do so. The High Court, committed a serious error in directing the appellants to lower the cut-off marks. The cut-off mark 20 was fixed for the Scheduled Caste and Schedule Tribe

A candidates. The same was not meant to be applied to the general category candidates. The jurisdiction of the appellants to fix different cut-off marks for different category of candidates has never been questioned and in that view of the matter only because the Railway Board had issued a circular as far back as in the year 1976 to fill up the vacancies by unreserved candidates in the event the reserved category of candidates was not available therefor, the same would not mean that irrespective of the qualification and performance of general category candidates they were entitled to be appointed. It was for the appellant to decide as to whether the posts were to be dereserved or carried forwarded. [Para 13] [50-A-F]

C *Ashwani Kumar Singh v. U.P. Public Service Commission and Ors.*, [2003] 11 SCC 584; *State of Rajasthan and Ors. v. Jagdish Chopra*, (2007) 10 SCALE 470 and *Rajasthan Public Service Commission and Anr. etc. v. Harish Kumar Purohit and Ors. etc.*, [2003] 5 SCC 480, referred to.

D 5. In any view of the matter, the respondents appeared in a competitive examination. The posts advertised were public posts. They did not have any vested right for appointment. It is well-known that even selected candidates do not have legal right in this behalf. [Para 16] [50-G-H]

E *Shankarasan Dash v. Union of India*, [1991] 2 SCR 567; *Asha Kaul (Mrs.) and Anr. v. State of Jammu and Kashmir and Ors.*, [1993] 2 SCC 573; *All India SC and ST Employees' Association and Anr. v. A. Arthur Jeen and Ors.*, [2001] 6 SCC 380 and *Food Corporation of India and Ors. v. Bhanu Lodh and Ors.*, [2005] 3 SCC 618, referred to.

F *Pitta Naveen Kumar and Ors. v. Raja Narasaiah Zangiti and Ors.*, [2006] 10 SCC 261, relied on.

G 6. Those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. [Para 18]

H *Munindra Kumar and Ors. v. Rajiv Govil and Ors.*, AIR (1991) SC 1607; *Rashmi Mishra v. Madhya Pradesh Public Service Commission and Ors.*, (2006) 11 SCALE 5 and *Chandra Prakash*

*Tiwari and Ors. v. Shakuntala Shukla and Ors.*, [2002] 6 SCC 127, A  
referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4347  
of 2007.

From the Judgment and Order dated 17.03.2005 of the High B  
Court of Judicature Andhra Pradesh at Hyderabad in Writ Petition No.  
10166 of 2001.

Amarendra Sharan, ASG, Asha G. Nair, R.C. Kathia and B.  
Krishna Prasad for the Appellants.

A.K. Ganguli, S. Madhusudhan Babu and Mukesh K. Giri for C  
the Respondents.

The Judgment of the Court was delivered by

**S.B. SINHA, J.** 1. Leave granted.

2. On or about 09.05.1998, 382 vacancies were advertised for D  
the post of 'Gangman' by the Waltair Division of the then South Eastern  
Railways (now known as East Coast Railways). By a corrigendum  
issued, the right of the authority to increase or decrease the number of  
posts projected for recruitment was reserved. The educational E  
qualification for the candidates was prescribed at 8th class pass.  
Applicants were required to be physically strong to carry out the job.  
They were to pass the requisite physical test. Reservation was provided  
for the candidates belonging to Scheduled Castes, Scheduled Tribes  
and Other Backward Classes. The number of vacancies was, however,  
enhanced to 792 posts. The appropriate authority, however, gave a F  
final clearance for filling up 480 posts pursuant to the notification dated  
09.06.1998. The category-wise vacancies were as under :

General	:	240
Other Backward Classes	:	115
Scheduled Castes	:	72
Scheduled Tribes	:	53

3. Out of 480 vacancies, 240 posts were meant for general G  
category candidates. The cut-off marks were provided for different  
categories of candidates in the following terms : H

A	General	:	71
	Other Backward Classes	:	56
	Scheduled Castes	:	20
	Scheduled Tribes	:	20

- B 4. Indisputably, 426 posts were filled up which were earmarked for candidates belonging to General Category, Other Backward Classes, Scheduled Castes and Scheduled Tribes. 12 posts reserved for Scheduled Castes and 42 posts reserved for Scheduled Tribes, however, could not be filled up owing to non-availability of the qualified eligible candidates. Respondents herein had not been appointed although they had obtained the qualifying marks specified in terms of the notification dated 09.06.1998. 39 unsuccessful candidates filed an application before the Central Administrative Tribunal. The said application was disposed of directing the Railway Administration to consider the question in regard to lowering of cut-off marks.

- E 5. The competent authority of the Railways, however, took a decision that it would not be conducive to general merit of the candidates if the cut-off marks were further lowered, whereafter another application was filed before the Tribunal. The said application was marked as OA No. 1750 of 2000. By an order dated 02.05.2001, the said application was dismissed by the Tribunal, *inter alia*, opining that the appellants could not be directed to lower down the cut-off marks. A writ petition filed thereagainst by the respondents herein, however, by reason of the impugned judgment has been allowed, directing the appellants to appoint them by lowering the cut-off marks against the posts reserved for candidates belonging to Scheduled Caste and Scheduled Tribe candidates, stating :

- G “According to Railways, the following is the break up of vacancies. Out of 480 vacancies, 240 posts are meant for OC category, 72 for SC category, 53 for ST category and 115 for OBC category. As far as OC and OBC categories are concerned, all the posts were filled, and for want of eligible candidates the posts meant for SC category were not filled up.
- H In such a situation, the only way to salvage the issue is to direct

the authorities to appoint the petitioners in the posts of Gangmen in the unfilled vacancies of SC/ST duly protecting the interests of SC/ST reservation in future selections. Out of 30 petitioners, 1 belongs to SC, 7 OC and 22 OBC. Inasmuch as the vacancy meant for SC candidate, there is no difficulty for him to be appointed as the are vacancies in SC category. But as far as OC candidates and OBC candidates are concerned, since their quota had already been filled up, they should be appointed in the quota meant for SC and ST vacancies. In the future vacancies, the quota meant for OC and OBC categories the vacancies unfilled shall be reduced and the same could be allotted to SC and ST categories, as in this case the petitioners are directed to be appointed from out of the quota meant for SC and ST categories. By this process the ratio between the reserved categories will be maintained. Since the petitioners have been languishing for the last more than seven years, this Court has to pass this order in the interest of justice.”

6. Appellants are, thus, before us.

7. Mr. Amarendra Sharan, learned Additional Solicitor General of India appearing on behalf of the appellants, submitted :

- (i) The vacancies reserved for Scheduled Castes and Scheduled Tribes should not have been directed to be filled up by general candidates.
- (ii) Having appeared at the competitive examination for public posts, the respondents had no vested legal right and, thus, the writ of mandamus issued by the High Court directing the appellants to fill up the vacancies is illegal.
- (iii) Respondents, in any event, having participated in the selection process knowing fully well to the procedure laid down therefor and having become unsuccessful therein, the writ application filed by them before the Tribunal was not maintainable.
- (iv) The High Court had no jurisdiction to lower the cut-off marks as it was the sole prerogative of the employer.

A 8. Mr. A.K. Ganguly, learned Senior Counsel appearing on behalf  
of the respondents, on the other hand, contended :

B (i) The cut-off mark for the general candidates was specified in  
an arbitrary manner inasmuch as the marks obtained by the  
240th candidate was made the basis thereof.

C (ii) The Railway Board itself having directed to fill up the unfilled  
reserved vacancies by general candidates in terms of their  
circular letter dated 12.03.1976, the impugned judgment of  
the High Court should not be interfered with.

D (iii) Despite the fact that the respondents did not have any legal  
right to be appointed but as they have been deprived of a  
valuable right by reason of a *mala fide* action on the part of  
the appellant in so far as they had not followed the  
aforementioned circular dated 12.03.1976 issued by the  
Railway Board, the High Court must be held to have acted in  
accordance with law.

E 9. The fact that the posts of Gangmen were required to be filled up  
by persons being physically strong and healthy is not denied or disputed.  
That would not, however, mean that the Railway Administration could  
not have fixed the other criteria therefor. As indicated hereinbefore, even  
the educational qualification was prescribed. The mode and manner of  
selection, as noticed hereinbefore, was laid down in the aforementioned  
notification dated 09.05.1998. It was also laid down that the candidates  
concerned would not only must procure the requisite educational  
qualification but must also pass the written test followed by an interview  
as also the physical test.

G 10. It may be true that the cut-off marks at 71 had been fixed for  
unreserved candidates on the basis that marks obtained by the last  
candidate, i.e. 240th candidate, calculated at 50% of the 480 candidates,  
but concededly 56 marks were fixed for Other Backward Classes  
candidates and 20 marks were fixed for Scheduled Caste and Scheduled  
Tribe candidates. Only because the cut-off marks at 71 had been fixed  
H on the basis of the aforementioned criteria, the same by itself, in our

opinion, would not mean that no cut-off mark had been fixed. The fact that the Railway Administration intended to fix the cut-off mark for the purpose of filling up the vacancies in respect of the general category as also reserved category candidates is evident from the fact that different cut-off marks were fixed for different categories of candidates. We are, therefore, unable to accept the submission of the learned counsel that the cut-off marks fixed was wholly arbitrary so as to offend the principles of equality enshrined under Article 14 of the Constitution of India. The power of the employer to fix the cut-off marks is neither denied nor disputed. If the cut-off mark was fixed on a rational basis, no exception thereto can be taken.

11. Respondents herein had approached the Tribunal in the year 2000. The Tribunal directed the appellants to consider this case of lowering of the cut-off marks. An inference, therefore, can be drawn from the aforementioned fact that the main prayer of the respondents was that the cut-off marks should be lowered. Appellants admittedly did not agree to the said proposal. The action of the appellants impugned before the Tribunal must, therefore, be considered from the view point as to whether it had the requisite jurisdiction to do so. The Tribunal upheld the contention of the appellant. Once it is held that the appellants had the requisite jurisdiction to fix the cut-off marks, the necessary corollary thereof would be that it could not be directed to lower the same. It is trite that it is for the employer or the expert body to determine the cut-off marks. The court while exercising its power of judicial review would not ordinarily intermeddle therewith. The jurisdiction of the court, in this behalf, is limited. The cut-off marks fixed will depend upon the importance of the subject for the post in question. It is permissible to fix different cut-off marks for different categories of candidates. [See *Banking Service Recruitment Board, Madras v. V. Ramalingam and Ors.*, [1998] 8 SCC 523].

12. So far as the submission of the learned senior counsel in regard to the Railway Board's circular letter dated 12.03.1976 is concerned, we may at the outset notice that such a contention had not been raised before the Tribunal. Respondents herein did not have any occasion to meet the said contention. In any event, only because in a case of this nature, the

A said circular had not been complied with, the same, in our opinion would not lead to a conclusion that action on the part of the appellants in its entirety was unwarranted or *mala fide* in nature.

B 13. Even assuming that the appellants should have filled up the unfilled vacancies meant for the reserved category candidates by the general candidates, but then for the said purpose, the general candidates were required to fulfill the eligibility clause including the cut-off marks fixed therefor. Respondents admittedly did not do so. The High Court, in our opinion, committed a serious error in directing the appellants to lower the cut-off marks. The cut-off mark 20 was fixed for the Scheduled Caste and Schedule Tribe candidates. The same was not meant to be applied to the general category candidates. The jurisdiction of the appellants to fix different cut-off marks for different category of candidates has never been questioned and in that view of the matter only because the Railway Board had issued a circular as far back as in the year 1976 to fill up the vacancies by unreserved candidates in the event the reserved category of candidates was not available therefor, in our opinion, the same would not mean that irrespective of the qualification and performance of general category candidates they were entitled to be appointed.

E 14. It is now a well-settled principle of law that even wait-listed candidates have no legal right to be appointed. [See *Ashwami Kumar Singh v. U.P. Public Service Commission and Ors.*, [2003] 11 SCC 584 and *State of Rajasthan & Ors. v. Jagdish Chopra*, (2007) 10 SCALE 470].

F 15. It was for the appellant to decide as to whether the posts were to be dereserved or carried forwarded. [See *Rajasthan Public Service Commission and Anr. etc. v. Harish Kumar Purohit and Ors. etc.*, [2003 5 SCC 480].

G 16. In any view of the matter, the respondents appeared in a competitive examination. The posts advertised were public posts. They did not have any vested right for appointment. It is well-known that even selected candidates do not have legal right in this behalf. [See *Shankarasan Dash v. Union of India*, [1991] 2 SCR 567 : [1991] 3

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SCC 47, *Asha Kaul (Mrs.) and Anr. v. State of Jammu and Kashmir and Ors.*, [1993] 2 SCC 573, *All India SC & ST Employees' Association and Anr. v. A. Arthur Jeen and Ors.*, [2001] 6 SCC 380, and *Food Corporation of India and Ors. v. Bhanu Lodh and Ors.*, [2005] 3 SCC 618]. A

17. In *Pitta Naveen Kumar and Ors. v. Raja Narasaiah Zangiti and Ors.*, [2006] 10 SCC 261, this Court observed : B

“The legal position obtaining in this behalf is not in dispute. A candidate does not have any legal right to be appointed. He in terms of Article 16 of the Constitution of India has only a right to be considered therefor. Consideration of the case of an individual candidate although ordinarily is required to be made in terms of the extant rules but strict adherence thereto would be necessary in a case where the rules operate only to the disadvantage of the candidates concerned and not otherwise.” C D

18. It is also well-settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. [See *Munindra Kumar and Ors. v. Rajiv Govil and Ors.*, AIR (1991) SC 1607. See also *Rashmi Mishra v. Madhya Pradesh Public Service Commission and Ors.*, (2006) 11 SCALE 5] E

19. In *Chandra Prakash Tiwari and Ors. v. Shakuntala Shukla and Ors.*, [2002] 6 SCC 127, it was held :

“32. In conclusion, this Court recorded that the issue of estoppel by conduct can only be said to be available in the event of there being a precise and unambiguous representation and it is on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or status - the situation, however, presently does not warrant such a conclusion and we are thus not in a position to lend concurrence to the contention of Dr. Dhawan pertaining the doctrine of Estoppel by conduct. It is to be noticed at this juncture that while the doctrine of estoppel by conduct may not have any application but that does not bar a contention as F G H

A regards the right to challenge an appointment upon due participation at the interview/selection. It is a remedy which stands barred and it is in this perspective in *Om Prakash Shukla (Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors.,* a three Judge Bench of this Court laid down in no uncertain terms that

B when a candidate appears at the examination without protest and subsequently found to be not successful in the examination, question of entertaining a petition challenging the said examination would not arise.”

C It was further observed :

“34. There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seem to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the

D interview is not 'palatable' to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process.

20. We are, however, not oblivious that there are certain exceptions to the aforementioned rules but we are not concerned therewith in the

E present case.

21. For the reasons aforementioned, the impugned judgment cannot be sustained, which is set aside accordingly. The appeal is allowed. However, in the facts and circumstances of the case, there shall be no

F order as to costs.

K.K.T.

Appeal allowed.