

**IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL**

ON THE 31ST DAY OF MARCH, 2022

BEFORE:

HON'BLE SHRI JUSTICE MANOJ KUMAR TIWARI

WRIT PETITION (S/S) No. 1211 of 2021

BETWEEN:

Om Prakash Gaur & another ... Petitioners

AND:

State of Uttarakhand & others ... Respondents

With

WRIT PETITION (S/S) No. 6 of 2022

(By Mr. Abhilash Nainwal and Mr. Vinay Kumar,
Advocates for the petitioners)

(By Mr. C.S. Rawat, learned Chief Standing Counsel for
the State of Uttarakhand, Mr. D.K. Joshi, Mr. Lalit
Samant and Mr. Abhijay Negi, counsel for the
respondents)

JUDGMENT

1. Since common questions of fact and law are involved in both the petitions, therefore, these petitions are clubbed together and decided by this common judgment. However, for the sake of brevity, facts of WPSS No. 1211 of 2021 are being considered.

2. Uttarakhand Subordinate Service Selection Commission issued an advertisement on 13.10.2020 inviting applications for the post of Assistant Teacher L.T. Grade in various subjects and the last date of submission of online application was mentioned as 04.12.2020. The academic qualification required for different subjects was in terms of Uttarakhand

Subordinate Education (Trained Graduate Category) Service Rules, 2014, as amended in 2019.

3. Petitioners applied in response to the said advertisement for the post of Assistant Teacher L.T. Grade (Art) for which academic qualification required at the relevant point of time was as follows:

“(1) Graduate degree in Drawing and Painting/Fine Art (painting)/Visual Art (painting) from any University established by law in India.

(2) Degree of B.Ed. from any Government or Government recognized training Institution / College.

Or

Degree of BA.Ed. of minimum four years in the subject of Arts from any institution recognized from National Council for Teachers Education.”

4. It transpires that pursuant to order passed by Division Bench of this Court in WPPIL No. 33 of 2021, last date for submission of application by candidates, was extended to 25.03.2021 by the Selecting Body, on instructions of Government and a press release was issued for information to all concerned. In the same press release, it was mentioned that since applicable Recruitment Rules for the post of Assistant Teacher L.T. Grade (Art) have been recently amended, therefore, such candidates, who are eligible in terms of amendment Rules, notified on 25.02.2021, may also apply. It was further clarified in the press release that requirement of having B.Ed. qualification has been done away with by the amendment, therefore, candidates, not having B.Ed. degree, may also apply.

5. A copy of notification dated 25.02.2021, whereby Rules were amended has been enclosed as

Annexure No. 8 to the writ petition. English Translation of amended Rule 8(i)(v) of the relevant Recruitment Rules is given below: -

"8(i)(v) Graduate degree in Drawing and Painting/Drawing Design/ Technical Art/Painting (Fine Art), Painting (Visual Art) from any University established by law in India.

Note

The aforesaid subjects are compulsory in all the year/semester of Graduation course.

Degree of BA.Ed. Of minimum four yours in the subject of Arts from any institution recognized by National Council for Teachers Education."

6. Petitioners neither challenged the amendment to the Rules nor the press release dated 12.03.2021, whereby field of eligibility was enlarged to include candidates who did not possess B.Ed. qualification, before appearing in the written examination. Petitioners did participate in the written examination held on 08.08.2021, without any demur or protest and then turned around to challenge the selection process by filing this writ petition.

7. Mr. Lalit Samant, learned counsel appearing for the Selecting Body has informed that answer key to the objective type questions was also made public on 11.08.2021. Thus, according to him, petitioners became aware that they have bleak chance of success after assessing their performance with reference to the answers given in the answer key, consequently, they filed this writ petition.

8. This writ petition was filed on 18.09.2021 i.e. more than a month after publication of answer key. In WPSS No. 1211 of 2021 petitioners have sought the following reliefs: -

“(a) Issue a writ, order or direction in the nature of Certiorari to call for the record and to quash the impugned order contained in letter no. 1834 dated 12.03.2021 (Annexure No. -5) passed by the respondent no. 2 by which the respondent no. 2 illegally and in an arbitrary manner permitted the candidates without B.Ed. qualification to submit application form pursuant to the advertisement dated 13.10.2020 issued by respondent no. 2 on the post of Assistant Teacher (Arts).

(b) Issue a writ order or direction in the nature of Mandamus commanding the respondent commission to prepare the select list only of those candidate who possesses the B.Ed. qualification as per the Uttarakhand Subordinate Education (Training Graduate Grade) (Amendment) Service Rules, 2019 and the advertisement dated 13.10.2020.”

9. It is contended on behalf of petitioners that since amendment in the Recruitment Rules was made after initiation of selection process, therefore, enlarging the field of eligibility, in terms of amendment Rules notified on 25.02.2021, would amount to change in the rules of the game, thus impermissible and illegal. In support of this contention, reliance has been placed upon the judgment rendered by Hon’ble Supreme Court in the case of *State of Bihar & others vs. Mithilesh Kumar* reported in (2010) 13 SCC 467. Para 19 of the said judgment is reproduced below: -

“**19.** Both the learned Single Judge as also the Division Bench rightly held that the change in the norms of recruitment could be applied prospectively and could not affect those who had been selected for being recommended for appointment after following the norms as were in place at the time when the selection process was commenced. The respondent had been selected for recommendation to be appointed as Assistant Instructor in accordance with the existing norms. Before he could be appointed or even considered

for appointment, the norms of recruitment were altered to the prejudice of the respondent. The question is whether those altered norms will apply to the respondent.”

10. From the aforesaid judgment, it is apparent that norms of recruitment cannot be altered, post commencement of selection process, if such alteration causes prejudice to a candidate.

11. The question before this Court would be whether any prejudice is caused to the petitioners by inclusion of candidates without B.Ed. degree, in the ongoing selection. Secondly, whether the challenge thrown by petitioners to the press release, issued on 12.03.2021 in terms of amended rules, can be entertained after their participation in the selection process, held in terms of amended Rules.

12. It is not the case of the petitioners that by the amended Rules and the press release, issued pursuant thereto, their eligibility for participation in the selection was taken away. It is also not their case that mode & manner of making selection of suitable candidates has undergone any change by the amended Rules. It is also not their case that criteria for selection has been altered to the prejudice of petitioners by application of amended Rules to the ongoing selection. The only change, which has been brought about is in the field of eligibility, as earlier, candidates not having B.Ed. qualification were ineligible and by the amendment, non-B.Ed. candidates have become eligible.

13. In my humble opinion, no prejudice is caused to the petitioners by inclusion of non-B.Ed. candidates

in the selection process, therefore, it cannot be said that rules of the game have been changed midway to the prejudice of the petitioners. Thus, there is no illegality in the press release dated 12.03.2021, the challenge thereto is without any substance.

14. Even otherwise also, it cannot be contended that right of petitioners got crystallized, merely by submitting application in response to the advertisement issued on 13.10.2020, so as to prevent the employer from changing the condition of eligibility, as mentioned in the advertisement. Thus viewed, employer was well within its right to issue press release in terms of the amended Rules before the selection process could progress post advertisement of vacancies.

15. By the press release, all candidates who had become eligible in terms of the amendment, were given opportunity to apply for the post of Assistant Teacher L.T. Grade (Art), therefore, it cannot be said that equal opportunity was not given to such candidates who could not apply earlier. The press release would amount to corrigendum to the earlier advertisement issued on 13.10.2020. Thus plea of violation of "Right to Equality" to the eligible candidates also cannot be accepted.

16. In the case of *Jharkhand Public Service Commission Vs Manoj Kumar Gupta reported in (2019) 20 SCC 178*, challenge to prescription of cut-off marks for Paper III, after conduct of Paper I and Paper II in the midst of selection process in the State Eligibility Test conducted by Jharkhand Public Service Commission on the ground that rules of game were changed after commencement of selection process,

was negated. Para 6 & 7 of the said judgment are reproduced below: -

"6. A perusal of Clause 4.1 of the scheme clearly indicates that the Moderation Committee has been constituted only for the purpose of deciding the cut-off marks in each subject for declaring the result. The advertisement clearly indicates that only those candidates who obtained 50% marks in Paper I and II would be eligible to take the test in Paper III. The minimum qualifying marks in case of General/OBC candidates was 50%. At this stage, there was no need to fix the qualifying marks for Paper III. That need will arise only when the Moderation Committee meets and decides what should be the level of competence expected from the people who are to be considered for appointment as Lecturers. It is for the Moderation Committee to decide what should be the cut-off marks. There could be the subject where all the people who qualified Paper I and II get very low marks in Paper III and the Moderation Committee may be justified in lowering the standards and prescribing lower qualifying standards. On the other hand, there may be a subject where there are many candidates who do extremely well in Paper III and the Moderation Committee may decide to fix a higher minimum standard. The constitution of a Moderation Committee is normally done only to do this sort of moderation.

7. As far as the finding of the High Court that the rules of the game were changed after the selection process had started, we are of the considered view that this is not the case as far as the present case is concerned. There were no minimum marks provided for Paper III in the advertisement. This could be done by the Moderation Committee even at a later stage. This is not a change brought about but an additional aspect brought in while determining the merit of the candidates who are found fit to be eligible for consideration for appointment as Lecturers."

17. In the case of *Yogesh Kumar Yadav vs Union of India* reported in (2013) 14 SCC 623, challenge was to fixation of bench mark/cut-off marks in the selection

process for Deputy Director (Law) on the ground that there was no such stipulation in the advertisement. However, Hon'ble Supreme Court held that it did not amount to changing the rules of the game. Para 13 to 16 of the said judgment are reproduced below: -

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

14. The decision taken in the instant case amounts to shortlisting of candidates for the purpose of selection/appointment which is always permissible. For this course of action of CCI, justification is found by the High Court noticing the judgment of this Court in State of Haryana v. Subash Chander Marwaha⁶. In that case, Rule 8 of the Punjab Civil

Service (Judicial Branch) Service Rules was the subject-matter of interpretation. This Rule stipulated consideration of candidates who secured 45% marks in aggregate. Notwithstanding the same, the High Court recommended the names of candidates who had secured 55% marks and the Government accepted the same. However, later on it changed its mind and the High Court issued mandamus directing appointment to be given to those who had secured 45% and above marks instead of 55% marks. In appeal, the judgment of the High Court was set aside holding as under: (SCC pp. 226-27, para 12)

"12. ... It is contended that the State Government have acted arbitrarily in fixing 55% as the minimum for selection and this is contrary to the rule referred to above. The argument has no force. Rule 8 is a step in the preparation of a list of eligible candidates with minimum qualifications who may be considered for appointment. The list is prepared in order of merit. The one higher in rank is deemed to be more meritorious than the one who is lower in rank. It could never be said that one who tops the list is equal in merit to the one who is at the bottom of the list. Except that they are all mentioned in one list, each one of them stands on a separate level of competence as compared with another. That is why Rule 10(ii), Part C speaks of 'selection for appointment'. Even as there is no constraint on the State Government in respect of the number of appointment to be made, there is no constraint on the State Government in respect of the number of appointments to be made, there is no constraint on the Government fixing a higher score of marks for the purpose of selection. In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high standards of competence to fix a score which is much higher than the one required for mere eligibility."

15. Another weighty reason given by the High Court in the instant case, while approving the aforesaid action of CCI is that the intention of

CCI was to get more meritorious candidates. There was no change of norm or procedure and no mandate was fixed that a candidate should secure minimum marks in the interview. In order to have meritorious persons for those posts, fixation of minimum 65% marks for selecting a person from the OBC category and minimum 70% for general category, was legitimate giving a demarcating choice to the employer. In the words of the High Court:

“In the case at hand, as we perceive, the intention of the Commission was to get more meritorious candidates. There has been no change of norm or procedure. No mandate was fixed that a candidate should secure minimum marks in the interview. Obtaining of 65% marks was thought as a guideline for selecting the candidate from the OBC category. The objective is to have the best hands in the field of law. According to us, fixation of such marks is legitimate and gives a demarcating choice to the employer. It has to be borne in mind that the requirement of the job in a Competition Commission demands a well-structured selection process. Such a selection would advance the cause of efficiency. Thus scrutinised, we do not perceive any error in the fixation of marks at 65% by the Commission which has been uniformly applied. The said action of the Commission cannot be treated to be illegal, irrational or illegitimate.”

16. It is stated at the cost of repetition that there is no change in the criteria of selection which remained of 80 marks for written test and 20 marks for interview without any subsequent introduction of minimum cut-off marks in the interview. It is the short listing which is done by fixing the benchmark, to recruit best candidates on rational and reasonable basis. That is clearly permissible under the law. (M.P. Public Service Commission v. Navnit Kumar Potdar⁷)”

18. Even otherwise also, petitioners having consciously appeared in the written examination held on 08.08.2021 in terms of the amended Rules cannot turn around and challenge the press release dated

12.03.2021 by contending that amended Rules were wrongly applied. After taking a chance in the written examination, it is not open to the petitioners to challenge the press release dated 12.03.2021. Thus, petitioners are estopped from questioning the press release, whereby amended Rules were made applicable to the selection process. Reference may be made to judgment of Hon'ble Supreme Court in the case of *Saurav Yadav Vs State of U.P.* reported in (2020) 2 SCC 173, where principle of estoppel was invoked in a similar fact situation.

19. In the case of *Union of India & others Vs S. Vinodh Kumar* reported in (2007) 8 SCC 100, Hon'ble Supreme Court has held as under:-

"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 Others v. Rajiv Govil and Others* - AIR 1991 SC 1607]. [See also *Rashmi Mishra v. Madhya Pradesh Public Service Commission and Others*, (2006) 12 SCC 724]

19. In *Chandra Prakash Tiwari v. Shakuntala Shukla and Others* reported in (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 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 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."

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 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. In view of the aforesaid discussion, I do not find any scope for interference with the impugned press release dated 12.03.2021. Accordingly, writ petitions fail and are hereby dismissed.

(MANOJ KUMAR TIWARI, J.)