IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

TUESDAY, THE 19TH DAY OF JULY 2022/28TH ASHADHA, 1944

W.A.NO.101 OF 2021
AGAINST THE JUDGMENT DATED 27.11.2020 IN W.P(C).NO.19153/2020 OF HIGH COURT OF KERALA

APPELLANTS/RESPONDENT NOS.1 AND 2 IN W.P.(C):

1 **STATE OF KERALA**
REPRESENTED BY THE PRINCIPAL SECRETARY TO THE GOVERNMENT OF KERALA, ENVIRONMENTAL DEPARTMENT, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695 001.

2 **THE SELECTION COMMITTEE FOR APPOINTMENT OF CHAIRMAN, KERALA STATE POLLUTION CONTROL BOARD, REPRESENTED BY THE CHIEF SECRETARY TO GOVERNMENT OF KERALA, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695 001.**

BY SRI.N.MANOJ KUMAR, STATE ATTORNEY

RESPONDENTS/PETITIONER & RESPONDENT NOS.3 & 4 IN WP(C):

1 **K.S. GOVINDAN NAIR,**
T.C.NO.19/1965, KRRA-19, KESHAVADEV ROAD, MUDAVANMUGAL, POOJAPURA, THIRUVANANTHAPURAM-695 012.

2 **THE KERALA STATE POLLUTION CONTROL BOARD,**
PATTOM, THIRUVANANTHAPURAM-695 004,
REPRESENTED BY ITS MEMBER SECRETARY.

3 **SRI.A.B.PRADEEP KUMAR,**
CHAIRMAN, KERALA STATE POLLUTION CONTROL BOARD, RESIDING AT TC/455(1), SHRUTHI, MADHU MUKKU, ANAYARA, THIRUVANANTHAPURAM-695 029.

BY ADV.SRI.K.JAJU BABU (SR.)
BY ADV.SMT.M.U.VIJAYALAKSHMI (B/O)

BY ADV.SRI.BRIJESH MOHAN
BY SRI.T.NAVEEN, SC
BY ADV.SRI.N.KRISHNAPRASAD

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 12.07.2022, THE COURT ON 19.07.2022 DELIVERED THE FOLLOWING:

'C.R.'

J U D G M E N T

A.K. Jayasankaran Nambiar, J.

The State is in appeal before us against the judgment dated 27.11.2020 of a learned Single Judge in W.P(C).No.19153 of 2020. The brief facts necessary for a disposal of the appeal are as follows:

The writ petitioner was an applicant for the post of Chairman, Kerala State Pollution Control Board, and he responded to the notification dated 05.05.2020 published by the State Government in that regard. The notification contained details of the essential and desirable qualifications to be possessed by aspirants for the post and they read as follows:

> "I(a) **ചെയർമാൻ തസ്തികയിലേക്കുള്ള നിയമന യോഗ്യത:-**
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> 1. പരിസ്ഥിതി വിഷയങ്ങളിൽ സ്പെഷ്യലൈസ് ചെയ്ത് സയൻസ്/ടെക്നോളജി/എഞ്ജിനീയറിംഗ് എന്നിവയിലുള്ള മാസ്റ്റേഴ്സ് ബിരുദം.
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> 2. പാരിസ്ഥിതിക സംരക്ഷണ പ്രവർത്തനങ്ങളിൽ ഏർപ്പെട്ടിരിക്കുന്ന സ്ഥാപനത്തിൽ 15 വർഷത്തിൽ കുറയാത്ത ഭരണപരിചയം.
>
> അല്ലെങ്കിൽ
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> വ്യാവസായിക മലിനീകരണം, ജലശുദ്ധീകരണം, വായു മലിനീകരണം എന്നീ വിഷയങ്ങളിലെ നൂതന ആശയങ്ങളിൽ പരിജ്ഞാനവും 15

വർഷത്തിൽ കുറയാത്ത പ്രായോഗിക പരിജ്ഞാനവും.

(b) **<u>അഭിലഷണീയ യോഗ്യതകൾ:</u>**

1. ഉദ്യോഗസ്ഥർക്കായുള്ള പാരിസ്ഥിതിക പരിപാടികൾ സംഘടിപ്പിച്ചിട്ടുള്ള പരിചയം.

2. പാരിസ്ഥിതിക പ്രശ്നങ്ങൾ കൈകാര്യം ചെയ്യുന്നതിലെ നവീന മാർഗ്ഗങ്ങളിൽ വിജ്ഞാനവും പ്രാവീണ്യവും തെളിയിക്കുന്ന പ്രസിദ്ധീകരണങ്ങൾ.

(c) **<u>പ്രായം:</u>**

അപേക്ഷ തീയതിയിൽ 60 വയസ്സ് കവിയരുത്.

(d) **<u>സേവന വേതന വ്യവസ്ഥ:</u>**

സർക്കാർ നിശ്ചയിക്കുന്ന നിരക്കിൽ."

2. It is significant that the notification did not specify the procedure to be followed for selection of a candidate to the post. That procedure was prescribed by the State Government through a G.O. dated 18.06.2020 that constituted a three-member Selection Committee to (i) scrutinize the applications received by the Government pursuant to the notification and (ii) nominate a suitable candidate after conducting an interview.

3. The Selection Committee at its first meeting held on 25.06.2020 screened all the 23 applications that were received by the State Government and found 17 out of them satisfying the essential qualification requirements in the notification. It then decided to seek the Annual

Confidential Reports (ACR)/Vigilance Clearance (VC) particulars of those candidates. At its second meeting held on 22.07.2020, the Selection Committee scrutinized the ACR/VC of the candidates and took a decision to not consider such candidates against whom disciplinary proceedings had been initiated or adverse vigilance comments recorded. It was also decided to assess the *inter se* merit of the candidates on the following criteria totaling 100 marks:

Sl.No.	Parameter	Marks
1	Professional Experience	15
2	Administrative Experience	5
3	Academic Publications	10
4	Exposure Outside the State & Country	10
5	Projects Executed	10
6	Awards	10
7	Leadership Demonstrated	10
8	Vision as Stated in the Performa	20
9	Public Impact	10

It was decided that those candidates who scored above 60 marks out of 100 would be called for the interview.

4. In the evaluation done as above 8 candidates scored above 60 marks and the Committee on 20.08.2020 interviewed them. The writ petitioner did not make it to the list of 8 candidates. After the interview, the

Selection Committee nominated the 4th respondent for the post. It is the said nomination that was impugned by the petitioner in the writ petition.

5. The main contention of the writ petitioner, in his challenge to the nomination of the 4th respondent, was that the shortlisting procedure followed by the Selection Committee was illegal. It was contended that the petitioner had satisfied the essential qualification requirements in the notification and hence there was no justification in excluding him from the interview process that was an integral part of the selection process. A faint-hearted challenge was also raised as regards the qualification of the 4th respondent in that he was a person who retired as an Environmental Engineer whereas there were others who were functioning as Chief Environmental Engineers who were not called for the interview.

6. The learned Single Judge who considered the writ petition found that in as much as the Government had prescribed an interview as the method of selection, all the candidates who possessed the essential qualifications prescribed in the notification had to be called for the interview. In particular, it was found that the reduction of the number of candidates from 17 to 8 was impermissible since the 17 persons had to be seen as qualified as per the notification, and none of those qualified

persons could have been excluded from the interview process that was specifically prescribed by the Government as a method of selection. The nomination of the 4th respondent was therefore set aside and the Government was directed to redo the selection process by getting the Selection Committee to interview all the 17 candidates. In as much as the learned Single Judge did not find anything against the 4th respondent, he was allowed to continue as the Chairman of the Pollution Control Board provisionally, pending a fresh finalization of the selection process by the Government and subject thereto.

7. In the appeal before us, it is the submission of Sri. N.Manoj Kumar, the learned State Attorney, relying on the decisions of this Court in ***Lethika Bhai***[1] and ***Yogesh Yadav***[2] that it was well settled that fixing of benchmarks to reduce the number of qualified candidates for consideration was permissible and that such an exercise did not amount to changing the rules of the game after the selection process had commenced. Reliance was placed on the judgment in ***MP Public Service Commission***[3] to contend that even where a selection is to be made only on the basis of an interview, the Selection Committee can adopt any rational procedure to fix the

1 Lethika Bhai C v. State of Kerala & Ors - 2018 (1) KHC 174
2 Yogesh Yadav v. Union of India – (2013) 14 SCC 623
3 Madhya Pradesh Public Service Commission v. Navnit Kumar Potdar & Anr – (1994) 6 SCC 293

number of candidates who should be called for the interview. The shortlisting procedure, he submits, is an essential part of the selection process itself.

8. *Per Contra*, the learned senior Counsel Sri. Jaju Babu, appearing for the respondent writ petitioner supports the findings of the learned Single Judge in the impugned judgment and contends that when the State Government had specifically provided for an interview as the method of selection, all candidates who had the essential qualifications had to be seen as qualified for being called for the interview. The intervening assessment of desirable qualifications, according to him, effectively excluded candidates who were found qualified from proceeding further in the selection process.

9. We have considered the rival submissions and also perused the pleadings before us. In as much as the central issue that arises for consideration in this appeal is the validity of a shortlisting procedure adopted by the appellant in its quest to find a suitable person for the post of Chairman of the Kerala State Pollution Control Board, we deem it apposite to begin with a survey of the law on the point.

10. Shortlisting is often resorted to in a selection process to trim down the list of persons found eligible for the post to a level where the further process of identifying one or more persons from among those found eligible, becomes practical or manageable. Challenges are often laid questioning the legality of such shortlisting procedures, mostly on the contention that such procedures tantamount to changing the rules of the game after the selection process has commenced. The issue has engaged the attention of the Supreme Court in a number of cases and it would be apposite to notice a few of them in order to appreciate the difference between an elimination of a candidate from a selection process on account of changing the rules of the game and an elimination on account of adopting a valid shortlisting criterion.

11. As early as in 1974, the Supreme Court in ***Subhash Chander Marwaha***[4] while dealing with the recruitment of subordinate judges of the Punjab Civil Services (Judicial Branch) had to deal with a situation where the relevant rule prescribed minimum qualifying marks. The recruitment was for filling up of 15 vacancies. 40 candidates secured the minimum qualifying marks. Only 7 candidates who secured more than 55% marks were appointed and the remaining vacancies kept unfilled. The decision of

4 State of Haryana v. Subhash Chander Marwaha – (1974) 3 SCC 220

the State Government not to fill up the remaining vacancies despite the availability of candidates who had secured the minimum qualifying marks was challenged. The State Government defended its action on the ground that the decision was taken to maintain the high standards of competence in judicial service. The High Court upheld the challenge but the Supreme Court reversed the judgment of the High Court and opined that candidates securing the minimum qualifying marks at an examination held for the purpose of recruitment into the service of the State have no legal right to be appointed. It was further held that 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.

12. In ***Manjushree***[5], the Court was concerned with the legality of a selection process undertaken in connection with recruitment to the posts of District & Sessions Judges (Grade II) in the AP State Higher Judicial Service. While the notification issued by the State Government indicated that selection was to be through a written test and interview, the Administrative Committee of the High Court had through resolutions decided that while cut-off marks would be insisted for a pass in the written test for the different

5 K.Manjusree v. State of Andhra Pradesh & Anr – (2008) 3 SCC 512

categories of candidates, there would be no cut-off mark for the interview. A subsequent Committee that was constituted to review the said decision, however, recommended the prescription of a cut-off mark for interview also and the full court of judges accepted that recommendation. As a result, persons who had initially emerged successful based on the marks obtained in the written test and interview, subsequently stood excluded solely because they did not score more marks than the cut-off prescribed for the interview. The court found the said procedure to be illegal. In particular, it found that while there was no illegality in prescribing minimum marks for an interview, the same had to be done before the selection process began and not while it was underway. It was clarified that the authority making rules regulating the selection can prescribe the minimum marks both for written examination and interviews, or for either, or for neither. The only requirement was that it had to do so before the commencement of the selection process. In the case before it, the prescription of a cut-off mark for interview was seen as a prescription of an additional requirement during the selection process.

13. In ***Yogesh Yadav***[6] the selection process for recruitment of a Deputy Director (Law) under the OBC Category in the office of the

6 Yogesh Yadav v. Union of India & Ors – (2013) 14 SCC 623

Competition Commission of India was challenged on the ground that the petitioners who had qualified in the written test and interview were illegally excluded from the list of candidates finally selected. The notification calling for applications, however, clearly indicated that applicants would be screened with reference to the minimum qualification criteria and that thereafter, from among those found eligible, a shortlisting would be done while calling candidates for interview before final selection. It appeared that the petitioners were not shortlisted because they did not secure the benchmark of 65 marks that was fixed for OBC candidates by the Selection Committee. The challenge did not succeed before the High Court or the Supreme Court since the case was not seen as one where an additional requirement was prescribed after the selection process had commenced. Rather, it was seen as a case where after applying the notified rules of selection, a decision was taken to give appointment to only those who had obtained 65 marks in total ie, to those who fulfilled the benchmark prescribed.

14. The principle informing the decision in ***Yogesh Yadav***[7] was akin to the one adopted in ***Subhash Chandra Marwaha***[8] and, taking note of

7 Yogesh Yadav v. Union of India & Ors – (2013) 14 SCC 623
8 State of Haryana v. Subhash Chander Marwaha – (1974) 3 SCC 220

the ambiguity brought about by the decision in ***Manjusree***[9], a three-judge bench of the Supreme Court in ***Tej Prakash Pathak***[10], that involved facts similar to ***Subhash Chandra Marwaha***, referred the matter to a larger bench for consideration. While doing so, the referring bench observed as follows:

> "**7.** The question whether the "rules of the game" could be changed was considered by this Court on a number of occasions in different circumstances. Such question arose in the context of employment under the State which under the scheme of our Constitution is required to be regulated by "law" made under Article 309 or employment under the instrumentalities of the State which could be regulated either by statute or subordinate legislation. In either case the "law" dealing with the recruitment is subject to the discipline of Article 14.
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> **8.** The legal relationship between employer and employee is essentially contractual. Though in the context of employment under the State the contract of employment is generally regulated by statutory provisions or subordinate legislation which restricts the freedom of the employer i.e. the "State" in certain respects.
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> **9.** In the context of the employment covered by the regime of Article 309, the "law" – the recruitment rules in theory could be either prospective or retrospective subject of course to the rule of non-arbitrariness. However, in the context of employment under the instrumentalities of the State which is normally regulated by subordinate legislation, such rules cannot be made retrospectively unless specifically authorised by some constitutionally valid statute.
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> **10.** Under the scheme of our Constitution an absolute and non-negotiable prohibition against retrospective law making is made only with reference to the creation of crimes. Any other legal right or

9 K.Manjusree v. State of Andhra Pradesh & Anr – (2008) 3 SCC 512

10 Tej Prakash Pathak & Ors v. Rajasthan High Court and Ors – (2013) 4 SCC 540

> obligation could be created, altered, extinguished retrospectively by the sovereign law-making bodies. However such drastic power is required to be exercised in a manner that it does not conflict with any other constitutionally guaranteed rights, such as, Articles 14 and 16 etc. Changing the "rules of game" either midstream or after the game is played is an aspect of retrospective law-making power.
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> **11.** Those various cases deal with situations where the State sought to alter (1) the eligibility criteria of the candidates seeking employment or (2) the method and manner of making the selection of the suitable candidates. The latter could be termed as the procedure adopted for the selection, such as, prescribing minimum cut-off marks to be secured by the candidates either in the written examination or viva voce as was done in the case of *Manjusree (supra)* or the present case or calling upon the candidates to undergo some test relevant to the nature of the employment (such as driving test as was the case in *Maharashtra SRTC v. Rajendra Bhimrao Mandve (2001) 10 SCC 51 at pp. 55-56, para 5; 202 SCC (L&S) 720)*."

The matter is still pending consideration before a larger bench of the Supreme Court.

15. The principle that can be culled out from the above precedents on the issue of shortlisting is that while a Selection Committee cannot alter the method of identifying qualified candidates, if such method is prescribed by the rules or in the notification calling for candidates, if the number of candidates satisfying the qualification criteria under the notification is disproportionately large when compared to the vacancies available, then their number can be trimmed down through the process of shortlisting. The

only limitation thereto is that the criteria for shortlisting should not have the effect of eliminating candidates for not having qualifications that were never notified. The latter would be the case, for instance, when the rules/notification in question indicate that the marks obtained by a candidate in an interview would contribute to the overall marks obtained by him/her to qualify, and the employer subsequently prescribes a minimum cut-off mark as a condition for including his interview marks in the overall score. Barring such instances, however, the Selection Committee can adopt any rational criteria, keeping in mind the nature of the duties required to be performed by the incumbent to the post in question, and trim down the number of candidates to a level commensurate with the number of vacancies notified.

16. It might be profitable at this stage to remind ourselves of the true role of a Selection Committee. The Supreme Court in ***National Institute of Mental Health***[11], following the decision in ***R.S.Dass***[12] observed that the function of a Selection Committee is neither judicial nor adjudicatory but purely administrative. That being the case, once it has adopted shortlisting criteria that are (i) fair (ii) reasonable (iii) have a

11 National Institute of Mental Health & Neuro Sciences v. K.Kalyana Raman – 1992 Supp. (2) SCC 481
12 R.S.Dass v. Union of India – 1986 Supp. SCC 617

rational connection with the object of the selection process, and (iv) are applied uniformly to all candidates at the different stages of shortlisting, this court would refrain from interfering with such shortlisting on the broader principle of deference to the wisdom of the employer in the matter of selecting its employees. As observed by the Supreme Court in ***Balagandhi***[13], even if there are no rules providing for shortlisting, nor any mention of it in the advertisement calling for applications for the post, the Selection Committee can resort to a short listing procedure if there are a large number of eligible candidates who apply, and it is not possible for the authority to interview all of them. The only requirement for a valid shortlisting in that situation is that it should be on some rational and objective basis. Even in situations where the rules mandate that a selection has to be done only on the basis of an interview, the Selection Committee can adopt any rational procedure to fix the number of candidates who should be called for the interview.

17. On the facts in the instant case, we find that while the notification calling for applications indicated therein the essential as well as desirable qualifications that an aspirant to the post had to possess, the prescription of an interview as part of the selection methodology was only

13 B.Ramakichenin alias Balagandhi v. Union of India & Ors – (2008) 1 SCC 362

in the later Government order that constituted the Selection Committee. In other words, the interview was not a procedure that a candidate was told that he/she had to undergo so as to qualify for a consideration of his/her candidature in the selection process. It was only a part of the shortlisting procedure applied to qualified candidates so as to identify one among them for nomination. The question then arises as to when a candidate could be said to have qualified for a consideration of his candidature ? In our view, the format of the application for the post provides a clue. It is produced as Ext.P4 in the writ petition and a perusal of the same clearly reveals that the applicants had to furnish details of not only their essential educational qualifications but also details showing their performance under various heads/parameters on which they were to be assessed by the Selection Committee. It was based on their declaration in respect of the said parameters of assessment that the Selection Committee assessed them. Thereafter, the benchmark of 60 marks was applied to identify the 8 persons who were shortlisted for the interview.

18. Thus, the applicants attained the status of qualified persons only after their evaluation on the various parameters stipulated in the application format. It was to such qualified candidates that the benchmark of 60 marks was applied, to identify the more meritorious among them who

could then be evaluated in an interview. The application of the benchmark and the conduct of the interview have therefore to be seen as part of the shortlisting procedure adopted by the Selection Committee to identify the best candidate among all the qualified candidates, through progressive elimination of the others. We do not think that the said procedure adopted by the Selection Committee falls foul of the principles laid down in the precedents discussed above.

19. Before parting, we might also observe that on the facts of the instant case, even the writ court found that there was no material available before it to cast doubt on the merit of the 4th respondent who was ultimately nominated by the Selection Committee. He had admittedly scored more marks than the petitioner in the evaluation done on various parameters and there was no *mala fides* established against the members of the Selection Committee. Under such circumstances, even assuming that the writ court felt that there was an irregularity in the selection process, this was perhaps not a case where the court should have exercised its discretion to interfere with the selection process. The writ petitioner, albeit disgruntled, was not really prejudiced by the nomination in question, and public interest favoured an expediency in the matter of filling up the post of the Chairman of the Kerala State Pollution Control Board.

In the result, we allow this writ appeal by setting aside the impugned judgment of the learned Single Judge and dismissing the writ petition.

Sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-
MOHAMMED NIAS C.P.
JUDGE

prp/