

A.F.R.

Judgment Resered on 3.8.2022

Delivered on 30.8.2022

Court No. - 82

Case :- WRIT - A No. - 4225 of 2022

Petitioner :- Pramod Kumar Singh And 5 Others

Respondent :- State Of U.P. And 11 Others

Counsel for Petitioner :- Ajay Kumar Rai,Alok Mishra,Binod Kumar Mishra

Counsel for Respondent :- C.S.C.,Chandan Sharma,Siddharth Singhal,Uday Pratap Singh,Vinit Kumar Sharma

With

Case :- WRIT - A No. - 6056 of 2022

Petitioner :- Siddharth Pandey And 226 Others

Respondent :- State Of U.P. And 11 Others

Counsel for Petitioner :- Alok Mishra,Binod Kumar Mishra

Counsel for Respondent :- C.S.C.,Seemant Singh,Siddharth Singhal

Hon'ble Saurabh Shyam Shamshery,J.

1. Heard Sri.Ashok Khare, learned Senior Counsel assisted by Sri Alok Mishra for the petitioners, Sri. Rakesh Pandey, learned Senior Counsel assisted by Sri. Chandan Sharma & Sri. V.B.Yadav, learned Standing Counsel for respondents, Uday Pratap Singh & Sri. Seemant Singh, learned counsel for the selected candidates and Sri. Siddharth Singhal, learned counsel for the Commission and perused record as well as written submission. With consent, above referred both writ petitions are heard and decided together by common judgment.

2

FACTUAL MATRIX

2. . Petitioners have participated in recruitment process to the post of 'Excise Constable' according to selection procedure prescribed under Uttar Pradesh Direct Recruitment to Group 'C' Post (Mode and Procedure) Rules:2015 in pursuance of an Advertisement (09(2)/2016) issued by U.P. Subordinate Service Selection Board. Vacancies were notified with following reservations i.e. 203 Unreserved, 109 Other Backward Class, 85 Scheduled Caste and 8 Scheduled Tribes.

3. So far as horizontal reservation was concerned following reservation was provided i.e. 08 for Dependants of Freedom Fighter, 20 for Ex Army Personnel and 81 for women.

4. In above referred selection process, a qualifying nature Screening Examination was held on 25.9.2016. Physical Efficiency Test were held from 16.2.2021 to 20.3.2021 and result thereof was declared on 17.8.2021.

5. Petitioners who belonged to OBC, remained successful in the physical efficiency test. In anticipation that they would not be selected in final merit list, approached this Court on 10.3.2022 by way of filing present writ petition and soon thereafter on 15.3.2022 final result was declared and as expected they could not find place in the merit list. Initially, writ petitioners have sought relief by way of prayer nos.i,ii, iii and iv however later on they were permitted to add prayer nos.(ii-a) and (ii-b) also. For reference all prayers are mentioned hereinafter:

" (i) Issue a writ, order or direction in the nature of certiorari quashing the criteria of physical efficiency test contemplated Issue a writ, order or direction in the nature of certiorari quashing the in notification No.09 (2)/2016 which is against the article 14, 15 and 16 (2) of Constitution of India and result of physical efficiency test dated 17.08.2021.

ii. Issue a writ, order or direction in the nature of mandamus, commanding the respondents to re-fix the new criteria for selection in physical efficiency test for both male and female candidates, which could be made eligible to both types of candidates to be selected in an admissible ratio or alternatively direct the respondents to fix another criteria of selection which could balance the gap in both male and female candidates in the selection of Excise Constable.

ii-a. Issue a writ, order or direction in the nature of certiorari quashing the impugned result vide dated 15 March, 2022 issued by respondent no.3 (Annexure No.5A to this Writ Petition);

ii-b. Issue a writ, order or direction in the nature of mandamus commanding and directing the respondent no.3 to bring the records pertaining to the selection process for the post of Excise Constable in notification No.09 (2)/2016 issued by respondent no.3 and especially the list of those candidates who had availed the benefit of the reservation/relaxation at any stage of the selection procedure and illegally/arbitrarily given selections in Unreserved category whereby infringing the fundamental rights of the petitioners."

iii. Issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

iv. Award the cost of this writ petition to the petitioners".

6. According to advertisement, maximum number for Physical Efficiency Test was 60 whereas interview was of 40 marks, however, State Government by an order dated 10.8.2016, granted approval for allocation of marks for interview from 40 marks to 20 marks. This approval is not under challenge.

7. Criteria for male and female candidates for physical examination was determined on different yardstick and was specifically mentioned in the advertisement, details thereof are extracted herein below:-

Sl No.	For Male Candidate			For Female Candidate		
	Particular	Time (in minutes)	Marks provided	Particular	Time (in seconds)	Marks

4

1	Total running 4.8 KM (3 miles)	30 27 24 21	12 15 18 20	Total running 200 meter	52 50 48 46	12 15 18 20
2	Long jump	Distance (in feet) 15 17 18	Marks provided 12 16 20	Long jump (according to calculation of meter in feet)	Distance (in fit) <u>8</u> <u>9.5.</u> 10	Marks provided <u>12</u> <u>16</u> 20
3.	Cricket ball throw.	Distance (in meter) 61 63 65	Marks provided 12 16 20	Cricket ball throw	Distance (in meter) 12 13 14	Marks provided 12 16 20

8. ISSUES FOR CONSIDERATION:

(a) Whether challenge to Rules of a recruitment process at instance of unsuccessful candidates would be permissible?

(b) Whether different set of criteria/yard stick for Physical Efficiency Test for male and female candidates has allowed arbitrariness being violative of Article 14 of the Constitution?

(c) Arbitrariness if any, has resulted into a anomaly which lead to selection of 143 female candidates i.e. much more than their 20% reserved quota of 81 seats?

SUBMISSIONS, DISCUSSION FINDINGS AND CONCLUSION.

ISSUE NO.(1)

9. Shri. Ashok Khare, learned Senior Advocate has argued that petitioners approached this Court before final result was announced, therefore, they were before this court during the game was on and have

5

challenged the criteria of different yardstick for physical efficiency test for male and female being arbitrary. Final result was announced during pendency of this writ petition also been challenged by way of amendment. They are aggrieved that 143 female candidates are selected much beyond to their 20% quota (81 seats) and it is an eventuality which appears after the final result, as expected by the petitioners and therefore this petition was filed even before final result was announced, therefore, present writ petition still maintainable at instance of the petitioners not withstanding being unsuccessful candidates.

10. Learned Senior Counsel appearing on behalf of respondents and other learned Advocates for other respondents have opposed above submission that it is settled law that after participation in recruitment process upto the final stage, it is not open for an unsuccessful candidate/candidates to challenge the criteria/rules of selection.

11. Before dealing with rival submission on the issue of maintainability of writ petitions at instance of unsuccessful candidates, it would be apposite to refer a judgment passed by Supreme Court in ***Ashok Kumar & Anr. Vs. State of Bihar & Ors, (2017) 4 SCC 357***, wherein previous judgments are referred on the issue and relevant paragraphs 12,13,14,15,16,17 and 18 thereof are extracted hereinafter:

" 12. The appellants participated in the fresh process of selection. If the appellants were aggrieved by the decision to hold a fresh process, they did not espouse their remedy. Instead, they participated in the fresh process of selection and it was only upon being unsuccessful that they challenged the result in the writ petition. This was clearly not open to the appellants. The principle of estoppel would operate.

13. The law on the subject has been crystalized in several decisions of this Court. In Chandra Prakash Tiwari v.

*Shakuntala Shukla (2002) 6 SCC 127, this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In *Union of India v. S. Vinodh Kumar (2007) 8 SCC 100*, this Court held that : (SCC p.107, para 18)*

*"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 also *Munindra Kumar v. Rajiv Govil, (1991) 3 SCC 368* and *Rashmi Mishra v. M.P. Public Service Commission, (2006) 12 SCC 724*)."*

*14. The same view was reiterated in *Amlan Jyoti Borroah v. Sate of Assam, (2009) 3 SCC 227* where it was held to be well settled that candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.*

*15. In *Manish Kumar Shahi v. State of Bihar (2010) 12 SCC 576*, the same principle was reiterated in the following observations: (SCC p.584 para 16)*

"16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the Petitioner is not entitled to challenge the criteria or process of selection. Surely, if the Petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The Petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the Petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection

may be made to the Judgments in MadanLal v. State of J. and K (1995) 3 SCC 486, Marrispati Nagaraja v. Government of Andhra Pradesh and Ors., (2007) 11 SCC 522, Dhananjay Malik and Ors. v. State of Uttaranchal and Ors., (2008) 4 SCC 171, Amlan Jyoti Borooah Vs. State of Assam, (2009) 3 SCC 227 and K.A. Nagamani v. Indian Airlines and Ors. (2009) 5 SCC 515."

16. In Vijendra Kumar Verma v. Public Service Commission, (2011) 1 SCC 150, candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations. The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible.

17. In Ramesh Chandra Shah v. Anil Joshi, (2013) 11 SCC 309, candidates who were competing for the post of Physiotherapist in the State of Utrkhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that: (SCC p.318, para 18)

"18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome."

18. In Chandigarh Administration v. Jasmine Kaur (2014) 10 SCC 521, it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. In Pradeep Kumar Rai v. Dinesh Kumar Pandey (2015) 11 SCC 493, this Court held that : (SCC p.500, para 17)

"Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time.

Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."

This principle has been reiterated in a recent judgment in Madras Institute of Development v. S.K. Shiva Subramanyan (2016) 1 SCC 454."

(Emphasis supplied)

12. Aforesaid issue was affirmed recently by Supreme Court in Ramjit Singh Kardam vs Sanjeev Kumar (2020) 20 SCC 209 wherein it has been held in paragraph 39 that:

"39. The proposition that a candidate, who participates in a selection without a demur taking a calculated chance to get selected cannot turn around and challenge the criteria of selection and the constitution of the selection committee is well settled.

(Emphasis supplied)

13. In the preset case, petitioners have participated in the recruitment process with open eyes, having complete knowledge of different criteria of physical efficiency test for male and female, however, when they anticipated likely to be unsuccessful in final result, they approached this Court just before declaration of final result, challenging the entire

9

notification as well as criteria of physical efficiency test, therefore, in view of above judgments and law on issue, petitioners are estopped from challenging recruitment process as well as physical efficiency test being different for male and female after they have participated therein with open eyes. Their act of turn around to question criteria of recruitment process is therefore impermissible. Accordingly, issue no.1 is decided against the petitioners.

14. After the decision on Issue no.(a), there is no need to consider issue no. (b) and (c), which are connected to each other, however considering these issues to be important, the Court proceeds further to consider submissions of rival advocates on these two issue also.

15. Issue Nos.(b) and (c):

In regard to issue nos.(b) and (c), the learned Senior Counsel on behalf of petitioners submitted that there was discrimination between male and female candidates in respect of their respective criteria for physical efficiency test being different and it was comparatively easy for female candidates to score more marks in comparison of male candidates and since a consolidated merit list was prepared, female candidates have marched over male candidates by big numbers of 143 seats, i.e. much more than their reserved quota of 81 seats. In case of different yardstick for male and female candidates, there ought to be a separate merit list for male and female and number of selected female candidates ought to have restricted to their reserved quota i.e. 81 seats and no more, however common consolidated merit list has led to arbitrariness and it had adversely affected the male candidates such as petitioners who were not able to find place in final select list, whereas female candidates had taken advantage, therefore, Article 14 of the Constitution was violated.

10

16. Above submissions are vehemently opposed by Shri. Siddharth Singhal, learned counsel for the Subordinate Services Selection Board that selection to the post in question are governed by Uttar Pradesh Excise Constable Drivers and Liquor Superintendent Service (5th Amendment) Rules, 2016. Rule 15 of said Rule provides that selection shall be conducted on basis of rules known as Uttar Pradesh Direct Recruitment to Group C Post (Mode and Procedure) Rules, 2015. Rule 15 of Rules 2015 further provides criteria for physical efficiency test as contained in the 4th Amendment Rules of 2008 shall stand included in 2016 Rules. The criteria for male and female are on different yardstick details thereof were part of advertisement and also mentioned in earlier part of this judgment. The different criteria are based on basis of different physical ability of a male and a female.

17. Learned counsel for respondents also submitted that criteria for physical efficiency test was challenged on the ground of being arbitrary however above referred specific rule was not challenged. The criteria was not based on a arbitrary classification among male and female rather legislature has objectively fixed different criteria for male and female to determine their respective physical efficiency on basis of their performance in running, long jump and cricket ball throwing and different yardstick has a basis keeping in view difference in their normal physical strength.

18. Now, I proceed to consider above submissions to decide issue no. (b) and (c). The ground of arbitrariness appears to be baseless on face of it and as it is raised without considering the ratio behind fixing of different yardstick for physical efficiency test for male and female.

19. The challenge to the criteria of running of distance and time being different of male and female as well as in regard to other events such as

11

Long Jump and cricket ball throwing are without visualizing that even in international games such recently concluded Common Wealth Games, the fastest runner for 200 metres amongst male and female, there was a difference of running time i.e. for male Gold Medalist, it was 19.08 seconds, whereas for female gold medalist it was 22.02 seconds i.e. a female runner has taken more time 200 metres in comparison to male runner.

20. Similarly, in long jump, gold medalist (male) had jumped 8.41 metres, whereas Gold Medalist (female) had jumped of 7.00 metres, i.e. lesser than male athlete. Even in cricket, area of field is lesser when females play in respect of the area when male players play. The above referred difference of criteria of physical efficiency test is based on physical strength of a male and a female as in number of research papers it has come that in a normal situation male has more physical strength than her female counterpart. The argument to challenge criteria of female for physical efficiency test is not only without any legal basis but is also against women empowerment.

21. In the present recruitment, females have succeeded in huge numbers and it appears that unsuccessful male candidates are not able to cope up with the fact that female have outnumbered them in merit. It is an example of 'male chauvinism' which is unacceptable in twenty first century

22. In view of the above discussions, the arguments against different criteria for male and female candidates for their respective physical efficiency test are not only baseless but unreasonable also, therefore, the argument of any arbitrariness is rejected. Issue no.(b) is accordingly decided against the petitioners.

12

23. Since there is no arbitrariness in fixing different yardstick in selection process, therefore, selection of female candidates more than their reserved quota of 20% is also not arbitrary or erroneous. In **Saurav Yadav & Anr. Vs. State of Uttar Pradesh & Ors, (2021) 4 SCC 542**, it has been categorically held if number of female candidates have satisfied their quota and have entered into general list, on their own, merit, then separate list of women candidate is not required. In this regard relevant paragraphs 60, 61 and 62 are extracted hereinafter:

"60. Horizontal reservations on the other hand, by their nature, are not inviolate pools or carved in stone. They are premised on their overlaps and are 'interlocking' reservations (The expression used by B.P.Jeevan Reddy, J., in Indira Sawhney Vs. Union of India, 1992 supp (3) SCC 217). As a sequel, they are to be calculated concurrently and along with the inviolate 'vertical' (or "social") reservation quotas, by application of the various steps laid out with clarity in paragraph 11 of Justice Lalit's judgement. They cannot be carried forward. The first rule that applies to filling horizontal reservation quotas is one of adjustment, i.e. examining whether on merit any of the horizontal categories are adjusted in the merit list in the open category, and then, in the quota for such horizontal category within the particular specified/social reservation.

61. The open category is not a 'quota', but rather available to all women and men alike. Similarly, as held in Rajesh Kumar Daria Vs. Rajasthan Public Service Commission (2007) 8 SCC 785, there is no quota for men. If we are to accept the second view [as held by the Allahabad High Court in Ajay Kumar v. State of UP, 2019 SCC OnLine All 2674 and the Madhya Pradesh High Court in State of Madhya Pradesh & Anr. v. Uday Sisode & Ors, 2019 SCC OnLine MP 5750, referred to in paragraph 20 of Justice Lalit's judgement], the result would be confining the number of women candidates, irrespective of their performance, in their social reservation categories and therefore, destructive of logic and merit. The second view, therefore – perhaps unconsciously supports- but definitely results in confining the number of women in the select list to the overall numerical quota assured by the rule.

62. In my opinion, the second view collapse completely, when more than the stipulated percentage 20% (say, 40% or 50%) of women candidates figure in the most meritorious category. The said second view in Ajay Kumar and Uday Sisode (supra) thus penalizes merit. The principle of mobility or migration, upheld by this court in Union of India v. Ramesh Ram, (2010) 7 SCC 234 and other cases, would then have discriminatory application, as it would apply for mobility of special category men, but would not apply to the case of women in such special categories (as glaringly evident from the facts of this case) to women who score equal to or more than their counterparts in the open/ general category."

(Emphasis supplied)

24. Accordingly, issue no.(c) is also decided against the petitioners. Therefore, submissions of counsel for petitioners are rejected and the above referred three issues are accordingly decided against the petitioners and in favour of the respondents and selected female candidates.

25. Before coming to final conclusion on basis of above discussion, it would be apposite to state that:

"नारी शक्ति शक्तिशाली समाजस्य निर्माण करोति"

(Women empowerment can make the society powerful)

26. Both writ petitions are dismissed.

Order Date :-30.8.2022

SB