
(2018) 01 GUJ CK 0024
In the Gujarat High Court
Case No : 17313 of 2011

SATHVARA AVANIBEN CHHANABHAI

APPELLANT

Vs

DIRECTOR OF EMPLOYMENT AND TRAINING & ORS

RESPONDENT

Date of Decision : 22-01-2018

Acts Referred:

Citation : (2018) 01 GUJ CK 0024

Hon'ble Judges : A.S.Supehia

Bench : Single Bench

Advocate : KB PUJARA, MM PATEL, CHINTAN DAVE

Final Decision : Dismissed

Judgement

1. In the present writ petition filed under Article 226 of the Constitution of India, the petitioner seeks the quashing and setting aside of the final

meritlist of the candidates for the posts of Supervisor Instructor ClassIII (Computer) published by the respondent authorities on 16.11.2011, pursuant to the advertisement dated 03.08.2011.

2. Petitioner also seeks a direction to the respondent authorities to include her name in the final meritlist of the candidates for the posts of

Supervisor Instructor ClassIII (Computer) published by the respondent authorities on 16.11.2011. Further directions are sought to direct the

respondents to hold the recruitment as per the prescribed norms of selection referred to in the advertisement instead of preparing the same only on the basis of the result of OMR Test.

3. The brief factual matrix of the case that emanates from the record is as follows:

4. The petitioner has passed Master of Science (Computer Application and

Information Technology) with distinction and Bachelor of Science

(Computer Information and Technology) (part of Five Years Integrated Program) from Hemchandracharya North Gujarat University, Patan.

5. The respondents issued advertisement dated 03.08.2011 for recruitment of Supervisor Instructor ClassIII for about 2639 vacancies inviting

online applications from the eligible candidates. The said advertisement is for 16 groups of Supervisor Instruction ClassIII. The petitioner submitted

online applications for Supervisor Instructor ClassIII (Computer) and Supervisor Instructor ClassIII (Information Technology). After a certificate

dated 16.08.2011 was issued to the petitioner certifying her degree, the respondents accepted the application of the petitioner in physical form for

the post of Supervisor Instructor ClassIII (Computer) and issued acknowledgment dated 17.08.2011.

6. Thereafter, some candidates, who possessed Degree of Master of Computer Application (M.C.A.), were not held eligible by the respondents,

approached this Court and pursuant to the order of this court their applications were ordered to be accepted. Thereupon, the respondents issued

another advertisement inviting applications from candidates possessing M.C.A. Degree for Supervisor Instructor ClassIII (Computer). The course

of M.C.A. and course of M.Sc. (Computer Application and Information Technology) are equivalent and the syllabus of both the said courses is

the same.

7. Since the respondents did not acknowledge the degree of the Post Graduation Qualification of M.Sc. (Information Technology, obtained by the

petitioner, she made a representation dated 27.08.2011 to recognize the same.

8. Thereafter, the state government issued Resolution dated 09.09.2011 whereby it was decided to conduct OMR Test for the direct recruitment

for the post of Supervisor instructor. The respondent authorities invited objections to the meritlist of the candidates published on the website from

15.09.2011 to 17.09.2011 which also indicated the eligibility of a candidate for the OMR (Optical Mark Reading) Test. When the petitioner tried

to obtained Hall Ticket for the OMR Test as required by the respondents, the petitioner could not obtain the same from the website of the

respondents. The petitioner, therefore, immediately rushed to the respondents with a letter dated 22.09.2011 and submitted the same to the

respondents and requested to make urgent arrangement so that the petitioner may obtain her Hall Ticket for the OMR Test, which was scheduled

on 25.09.2011 (Sunday). Since the petitioner could not obtain her Hall Ticket for the OMR Test, she preferred Special Civil Application

No.14821 of 2011. The said OMR Test, which was scheduled on 25.09.2011 (Sunday) was postponed as per the advertisement of the

respondents published on the website on 23.09.2011. By another advertisement, the OMR Test was scheduled to be held on 08.10.2011.

9. During hearing of the aforesaid writ petition, the respondents produced the relevant Recruitment Rules viz. Supervisor Instructor (Engineering

Trade, Non Engineering Trade), ClassIII, in the Gujarat Skill Training Service, Recruitment Rules, 2008 made under proviso to Article 309 of the

Constitution of India. Considering the same, this Court passed order dated 05.10.2011 directing the respondents to permit the petitioner to appear

in OMR Test which was to be held on 08.10.2011. The petitioner accordingly appeared at the OMR Test held on 08.10.2011. Since the

grievance of the petitioner stood redressed, this Court disposed of Special Civil Application No.14821 of 2011 vide order dated 19.10.2011.

10. In the meantime, on 13.10.2011, the respondents published the result of the OMR Test held on 08.10.2011. The petitioner obtained 54 marks

out of 100 marks in the said OMR Test. The respondents thereafter published the final meritlist dated 16.11.2011, in which the name of the

petitioner was not included.

11. Learned advocate for the petitioner has further submitted that in the present case the respondent authorities have not declared the recruitment

process that the result of OMR Test would be the sole criteria for the final selection. On the contrary, it was submitted that the advertisement

specifically referred to some norms of selection, which would be displaced on the website of the respondents and, therefore, it was submitted that

if the result of the OMR Test is considered as the sole basis for the final selection then it is tantamount to changing the criteria in the middle of the

Recruitment process, which itself is an illegality. Moreover, it was submitted that such an action clearly smacks of arbitrariness and lacking bona

fides as the criteria was changed because of grading system adopted by some institutes.

12. Learned advocate Mr.K.B.Pujara has placed reliance on the judgment rendered by the Supreme Court in the case of K.Manjusree Vs. State of Andhrapradesh & Anr., (2008) 3 S.C.C. 512 for the proposition of law that the selection criteria cannot be changed in the midst of the recruitment process. He has also placed reliance on the judgment of the Apex Court in the case of Rameshkumar Vs. High Court of Delhi and Anr., (2010) 3 S.C.C. 104, in support of his contention that the petitioner cannot be estopped from challenging the recruitment process after undertaking the same.

13. Learned advocate Mr.Pujara appearing on behalf of the petitioner has submitted that the Recruitment Rules of Supervisor Instructor, ClassIII issued vide Notification dated 29.09.2008 merely provide for the eligibility criteria but the norms of the selection are not provided in the Recruitment Rules and, therefore, it was submitted that the norms of selection are required to be laid down by the respondent authorities before initiating the Recruitment process and such norms of selection are required to be strictly adhered to in the selection process. He has submitted that the petitioner was not aware of the norms of the recruitment and the resolution dated 09.09.2011. Hence, she was unable to challenge the same before this Court in earlier writ petition filed by her.

14. Mr.Pujara has also contended that the entire selection is required to be set aside as there were irregularities in allotting the marks in the OMR Test. In this context he has referred to the marks of the candidates which were subsequently rectified by the authorities.

15. Learned advocate for the petitioner has submitted that the statutory reservation of 30% for women has also not been duly and fully implemented in the present case, in as much as out of total 547 vacancies of Group4 Computer 179 vacancies are provided for SEBC category to which the present petitioner belongs and, therefore, it was submitted that out of 179 vacancies at least 54 vacancies are required to be reserved for women candidates, which has not been done in the present case. It was also pointed out that 30% reservation for women is categorywise and hence, the same is required to be implemented accordingly. In view of the aforesaid factual matrix of the matter, it was urged to allow the present petition.

16. Per contra, the learned Assistant Government Pleader has placed reliance upon the affidavit in reply and stated that prior to 14.07.2011 the

Gujarat Service Selection Board (GSSB) was the recruitment agency, who had appointed the petitioner temporarily on contract basis of 11

months. It was submitted that vide Government Resolution dated 14.07.2011 issued by the General Administration Department (GAD), which

deals with filling up vacancies in Class III category in the Employment and Training Department has given sanction and kept it outside the purview

of the GSSB, whereby 2459 posts of the Supervisor Instructor, 85 posts of Forman Instructor, 19 posts of Junior Daily Computer Operator, a

total of 2653 posts are supposed to be filled in by direct recruitment by the Employment and Training Department vide communication dated

19.07.2011 issued by the Labour and Employment Department.

17. Learned Assistant Government Pleader further pointed out that vide Government Resolution dated 02.08.2011 the minimum qualifications for

the posts of Supervisor Instructor through direct recruitments were set out, whereby as per the said Government Resolution dated 02.08.2011,

one of the conditions was that in the qualifying examination only theory marks will be taken into consideration. It was pointed out that certain

institutions since 1990, like Birla Vishwakarma Vidhyalaya, BVM Engineering College, Vallabh Vidyanagar have started following and adopting

Grading System instead of marking and percentage system, accordingly students graduating are given transcripts instead of regular mark sheets,

wherein for Fourth year and Final year percentage are separated stated. It was therefore submitted that it was getting difficult for the authorities to

separately ascertain the Theory marks after deducting the practical marks obtained by the students. It was submitted that in view of this practical

difficulty faced by the authorities, a proposal was made to the State Government on 11.08.2011 that in order to have a commonality and to avoid

such complexities, OMR examination system should be adopted for the Direct Recruitment for the post of Supervisor Instructor. It was submitted

that it was in view of this practical difficulty faced by the respondent authorities qua the selection procedure, the same was not uploaded on the

website of the Department, in order to avoid any further complexities and complications. Learned Assistant Government Pleader further submitted

that even otherwise as per the advertisement dated 03.08.2011, under the head of Selection Procedure, it is clearly stated that, in case of necessity

and requirement felt by the department necessary changes shall be made and it shall be informed through the website of the department.

18. Learned Assistant Government Pleader further pointed out that pursuant to the proposal dated 11.08.2011, the State Government accepted

the same and issued Government Resolution dated 09.09.2011, whereby it was decided that for the Direct Recruitment for the post of Supervisor

Instructor, OMR examination will be taken by the Gujarat Technological University and based upon that the final select list will be prepared. It was

further submitted that after Government Resolution dated 09.09.2011 was issued by the State Government, it was uploaded on the website of the

Department and was also advertised and published in the newspaper. It was further submitted that with regard to the advertisement for the

recruitment for the year 2011, for the post of Supervisor Instructor (ClassIII) was in consonance with the Recruitment Rules and was in

accordance with law. It was also submitted that even the answer key of the OMR question paper of the respective candidate was also uploaded

on the website of the department, which shows the transparency of the recruitment procedure undertaken by the Department. It was stated that

even otherwise as per the settled legal principles once the petitioner having appeared in the OMR examination, more specifically in view of the fact

that the same petitioner had approached this Court by filing SCA No.14821 of 2011, with a prayer to allow the petitioner to appear in the OMR

examination and in view of the order passed therein dated 05.10.2011, now cannot raise a grievance for the same and is estopped from doing so.

19. Learned Assistant Government Pleader further submitted that with regard to the advertisement dated 03.08.2011, the OMR Test was

conducted on 08.10.2011, the result was declared on the website of the department on 13.10.2011 and subsequently, the final select list was also

prepared on 16.11.2011 thereafter, the qualified candidates from the final select list were given appointment orders on 21.11.2011 and the posting

orders were given on 23/24/25.11.2011 respectively and, therefore, all the selection procedure qua the recruitment of Supervisor Instructor

(ClassIII) for the year 2011 has been completed in consonance with the Recruitment Rules and in accordance with law and, therefore, even

otherwise the present petition is rendered infructuous. It was also submitted that the present petition is filed by petitioner on 22.11.2011 wherein

the petitioner was fully aware with the fact that her name was rightly not included in the final select list dated 16.11.2011 and, therefore, as a last

resort, the present petition was moved by the petitioner to stall the regular recruitment procedure undertaken by the department, which was in

accordance with law. In view the aforesaid facts, it was submitted to dismiss the present petition.

20. I have given thoughtful considerations to the rival contentions made by the learned advocates appearing for the respective parties. I have also

perused the documents on which the reliance is placed.

21. The facts which are established from the writ petition are that:

(a) Prior to date 14.07.2011, the Gujarat Service Selection Board was the recruitment agency and vide Government Resolution dated 14.07.2011

issued by the General Administrative Department, which deals with filling up vacancies in Class-III category, has barred the Gujarat Service

Selection Board from making appointments to Class- III category in the Employment and Training Department.

(b) By the resolution dated 02.08.2011 issued by the Labour and Employment Department, the qualifying standards for the post of Supervisor

Instructor through direct recruitment was set out. It was also decided that in the qualifying examination, only theory marks will be taken into

consideration. A Selection Committee was also constituted for carrying out the selection process.

(c) By the Government Resolution dated 09.09.2011, it was decided by the State Government, Labour and Welfare Department to make direct

recruitment of the Supervisor Instructor by adopting the OMR system. The same was uploaded on the website of the department and was also

advertised and published in the newspaper.

22. Thus, it can be safely presumed that all the candidates including the petitioner who had applied to post of Supervisor Instructor pursuant to the

advertisement were aware of the fact that they had to appear in the OMR examination. Such candidates had undertaken the OMR examination

and accordingly, the respondents prepared the select list of those candidates as per their comparative merit on 16.11.2011.

23. Keeping in mind the aforesaid facts, I shall now endeavor to deal with the legal submissions raised by the learned advocate for the petitioner.

The foremost contention raised is that the selection is in violation of the law enunciated by the Apex Court in the case of K.Manjusree (supra) that

the an additional requirement either during the selection process or after the selection process cannot be prescribed in selection criteria. In

K.Manjusree (supra), the Apex Court has observed thus:

The resolution dated 30.11.2004 merely adopted the procedure prescribed earlier. The previous procedure was not to have any minimum marks

for interview. Therefore, extending the minimum marks prescribed for written examination, to interviews, in the selection process is impermissible.

We may clarify that prescription of minimum marks for any interview is not illegal. We have no doubt that the authority making rules regulating the

selection, can prescribe by rules, the minimum marks both for written examination and interviews, or prescribe minimum marks for written

examination but not for interview, or may not prescribe any minimum marks for either written examination or interview. Where the rules do not

prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee want

to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the selection committee prescribed

minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or

after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have

found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will

be no minimum marks for the interview.

In the present case, it was clarified in the Advertisement dated 03.08.2011, that ""the selection will be made on merit as per the selection standards

placed on the web site and in case the department feels it appropriate and essential to alter them then necessary changes will be done, and in such

circumstances, the same will be placed on the website"". It also refers that the select list will be prepared as per merit. Thus, the advertisement itself

stipulates the condition of bringing necessary changes in the selection standards

if the department finds it necessary. The candidates who had applied for the concerned posts were aware of the same. Thereafter, vide Resolution dated 09.09.2011, the State government decided to introduce the OMR examination for preparing the merit list and due publicity was also given to it. It is not the case of the petitioner that the respondent authorities were not empowered to stipulate the selection procedure. The law enunciated by the Apex Court in the case of K.Manjusree (supra) that the criteria of selection cannot be altered during and after the selection will not apply to the present set of facts in wake of the condition stipulated in the advertisement. The respondents have not changed the selection criteria neither during the selection nor after the selection as the OMR Test is necessitated for the purpose of selection and preparing the merit list. The OMR Test was conducted after issuing the advertisement/clarification in the news papers and on the website. The facts of the case suggest that the pursuant to the advertisement dated 03.08.2011, the candidates had only filed their applications for the post of Supervisor Instructor, and thereafter, the state government introduced the OMR examination for preparing the merit list. The list of the candidates who were found eligible for OMR Test was published on the web site. No one had challenged the selection at that stage. The candidates had only legitimate expectation to be considered for appointment as per the advertisement. It observed by the Apex Court that if the Rules do not prescribe any procedure, the Selection Committee may also prescribe. The recruitment Rules issued vide Notification dated 29.09.2008 prescribe the appointment of the Supervisor Instructor, ClassIII by way of direct selection which lay down the requisite qualifications and experience. The Respondents have conducted the OMR Test for preparation of merit list for selection of the candidates to the aforesaid post. In my considered opinion no illegality is committed by the respondents in conducting an OMR Test for judging the suitability of the candidates as per the merits obtained by them. It is not the case of the petitioners that the respondents have prescribed extra marks to be obtained during the selection or after the selection, which would have scuttled their appointments. Thus, the contention of the petitioner that the entire selection is require to be quashed and set aside since the selection criteria is changed in the midst of the

recruitment does not merit acceptance.

24. It is pertinent to note that the petitioner was not allowed to appear in the OMR Test, which was to be held on 08.10.2011, hence, she

approached this Court by way of filing Special Civil Application No.14821 of 2011. By way of interim order dated 05.10.2011, this court

directed the respondents to permit the petitioner to appear in the OMR Test scheduled to be held on 08.10.2011. The same was to be held

pursuant to the advertisement dated 03.08.2011. The said writ petition was disposed of vide order dated 19.10.2011 since the grievance raised

by the petitioner stood redressed as she was permitted to appear in the OMR Test. After undergoing the OMR Test, the petitioner failed in the

same and having been unsuccessful, she has challenged the recruitment process in the present writ petition. Thus, the petitioner, after getting the

order in her favour of appearing in the OMR Test and having been unsuccessful, cannot challenge the recruitment process. The petitioner cannot

claim ignorance of the same. It is not the case of the petitioner that the State Government was not empowered or authorized to issue executive

instructions for adopting the OMR Test for the recruitment to the post of Supervisor Instructor. At this juncture, it would be apposite to refer to the

judgment rendered by the Apex Court in the case of Karnati Ravi and Anr. Vs. Commissioner, Survey Settlements and Land Records and Ors.,

reported in AIR 2017 S .C. 3611. The Supreme Court has observed as under.

5. It may be seen that even a written examination is not a procedure prescribed under the Rules. The Rules only provide the essential qualifications

for the post. The method of selection, in the absence of Rules has to be supplied by the executive instructions. All the appellants have appeared in

the written examination. They were also subjected to a physical endurance test which they could not qualify. It is, thereafter, the unsuccessful

candidates in the physical endurance test put up a challenge regarding the validity of the executive instructions whereby physical endurance test has

been prescribed.

6. As we have already noted above, in the absence of the Rules, it is well within the powers of the Executive under Article 162 of the Constitution

to provide for the required instructions with regard to the procedure for selection, so long as they do not come in conflict with the Rules.

7. That apart, all the candidates have participated in the selection, both in the written examination, though not a prescribed one, for which there is no objection, as also the physical endurance test. Having participated in the selection without any objection, they cannot later challenge the procedure.

The Supreme Court has held that the Rules only provide the essential qualifications for the post. The method of selection, in the absence of Rules has to be supplied by the executive instructions. The recruitment rules of Supervisor Instructors issued vide Notification dated 29.09.2008 only prescribe the essential qualifications and experience. By the resolution dated 09.09.2011, the state government has prescribed the OMR test which was duly publicized. All the candidates including the petitioner were aware of the same. As held by the Apex Court having participated in the selection without objection, they cannot challenge the recruitment procedure.

25. In the case of Suneet Agarwal Vs. State of Haryana, reported in 2000 (2) S.C.C. 615 has observed thus:

We have heard learned counsel for the parties. Narration of aforesaid facts would show that the appellant had disintitiled herself to seek relief in the writ petition filed by her before the High Court. The appellant did not challenge the order of the Vice Chancellor declining to accord approval to her selection and, on the contrary, she applied afresh to the said post in response to readvertisement of the post without any kind of protest. Not only did she apply for the post, but also she appeared before the Selection Committee constituted consequent upon readvertisement of the post and that too without any kind of protest, and on the same day she filed a writ petition against the order of the Vice Chancellor declining to accord his approval and obtained an adinterim order. In the writ petition she also did not disclose that she has applied for the post consequent upon second advertisement. The appellant having appeared before the Selection Committee without any protest and having taken a chance, we are of the view that the appellant is estopped by her conduct from challenging the earlier order of the Vice Chancellor. The High Court was justified in refusing to accord any discretionary relief in favour of the appellant. The writ petition was rightly dismissed.

In view of the observations made by the Apex Court in the aforementioned

judgements, the petitioner is estopped from challenging the entire recruitment after having participated in the same.

26. The judgment relied upon by the petitioner in the case of Rameshkumar (Supra) in support of the contention that the principle of waiver and acquiescence will not apply in the present case does not deserve acceptance. The Supreme Court, in the case of Rameshkumar (Supra) has observed that:

These cases are squarely covered by the judgment of this Court in Hemani Malhotra V/s. High Court of Delhi AIR 2008 SC 2103, wherein it has

been held that it was not permissible for the High Court to change the criteria of selection in the midst of selection process. This Court in All India

Judges" case (supra) had accepted Justice Shetty Commission's Report in this respect i.e. that there should be no requirement of securing the

minimum marks in interview, thus, this ought to have been given effect to. The Court had issued directions to offer the appointment to candidates

who had secured the requisite marks in aggregate in the written examination as well as in interview, ignoring the requirement of securing minimum

marks in interview. In pursuance of those directions, the Delhi High Court offered the appointment to such candidates. Selection to the post

involved herein has not been completed in any subsequent years to the selection process under challenge. Therefore, in the instant case, in absence

of any statutory requirement of securing minimum marks in interview, the High Court ought to have followed the same principle. In such a

factsituation, the question of acquiescence would not arise.

The Apex Court was conscious of the fact that the selection process was not completed and hence, it was observed that the question of

acquiescence would not arise. The facts of the case before the Apex Court suggests that the criteria for selection were changed by prescribing

minimum marks at the interview level after the selection process which was not completed in any subsequent years. As observed in preceding

paragraphs, in the present case the OMR test was held for the purpose of preparing the select list as per merits obtained in the examination. The

selection got over on declaration of the merit list on 16.11.2011 in which the petitioner name of the petitioner did not figure. The qualified

candidates were given appointment on 21.11.2011 the posting orders were given

on 23/24/25.11.2011. The petition was filed on 22.11.2011.

Thus, the selection process was already completed and the petitioner on being unsuccessful in the same has subsequently challenged it in the

present writ petition. Hence, the bar of acquiescence will apply in the present case. In Rameshkumar(Supra), the Apex Court has also held as

under:

Thus, law on the issue can be summarised to the effect that in case the statutory rules prescribe a particular mode of selection, it has to be given

strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority

while laying down the norms for selection may prescribe for the tests and further specify the minimum Bench Marks for written test as well as for

vivavoce.

The foregoing observation signify that the competent authority while laying down the norms of selection may prescribe for the test and prescribe

minimum Bench Marks in case no procedure is prescribed in the Rules. The petitioner was unable to point out that the respondents were not

competent to prescribe the OMR test. I may reiterate that in the present case the statutory rules only prescribe for qualifications and experience,

hence, there was no predicament for the respondents to prescribe OMR test. Thus, the contention raised by the petitioner that the respondent

could not have prescribed the OMR test since the recruitment rules do not provide the same deserves to be discarded.

27. So far as the grievance made by the petitioner that since there was malpractice in the result of the OMR Test, the same is required to set aside

does not merit acceptance, as it can be gathered from the facts that subsequently in such cases, marks were rectified by the respondent authorities

on the complaint filed by the respective candidates. The petitioner could have adopted the same process or filed a complaint to the authority in

case she had doubt about the allotment of her marks. The respondent authorities have acted in fair manner by correcting marks of such candidates

pursuant to their grievance made in that behalf. Thus, it cannot be said that the entire OMR Test was faulty and the same is required to be quashed

and set aside merely because in some cases, marks of some of the candidates were rectified subsequently.

28. The petitioner has also contended that the statutory reservation of 30% for women has not been implemented while issuing the advertisement.

In this regard the petitioner neither has raised any grievance on this issue before this Court in the earlier writ petition nor before the respondent

authorities. On the contrary she filed the writ petition for participating in OMR test. The petitioner did not challenge the advertisement raising this

issue before participating in the recruitment process. Any interference by this Court in the recruitment process after so many years on this issue will

unsettle the things, which are already settled. Hence, the aforesaid contention of the petitioner challenging the advertisement and selection on the

nonimplementation of issue of women's reservation is rejected.

29. On overall analysis of the entire material and on the bedrock on the law enunciated by the Supreme Court, the submissions canvassed by the

petitioner does not merit acceptance. Consequently; the petition, being sans merit, stands dismissed. RULE is discharged. There shall be no order

as to costs.