

**IN THE GAUHATI HIGH COURT**

(THE HIGH COURT OF ASSAM:NAGALAND:MIZORAM & ARUNACHAL PRADESH)

**AIZAWL BENCH**

**WP(C) No. 555 (AP) of 2013**

Sh. Kaling Lego,  
S/o Sri Kalom Lego Resident of  
Village Seram PO Mebo PS  
Pasighat District, East Siang,  
Arunachal Pradesh.

..... Petitioner.

– *VERSUS* –

1. State of Arunachal Pradesh represented  
by the Chief Secretary, Itanagar (AP), Pin 791111.
2. Commissioner, (Tax & Excise)  
Govt. of Arunachal Pradesh, Itanagar.
3. Secretary, (Tax & Excise), Govt. of  
Arunachal Pradesh, Itanagar.
4. Shri Mani Rapgyal,  
Office of Superintendent, Tax & Excise  
Bomdila, PO/PS Bomdila, District West  
Kameng, Arunachal Pradesh.

..... Respondents.

Advocate for the Petitioner : Mr. C. Modi.

Advocate for the Respondents: Mr. D. Panging for pvt respondent.  
Ms. A. Mize, Addl. Senior G.A.

**BEFORE**

**THE HON'BLE MR. JUSTICE S. SERTO**

Date of Hearing : 23.02.2018

Date of Judgment & Order : 5-03-2018

**JUDGMENT & ORDER (CAV)**

This is a petition under Article 226 of the Constitution of India praying for issuance of a writ of mandamus or certiorari or any other appropriate writ quashing and setting aside the impugned Order No. TAX(E)-527/2012, dated 22.10.2013 issued by the Secretary-cum-Commissioner (Tax & Excise), Govt. of Arunachal Pradesh, Itanagar, and for a direction directing the State respondents to appoint the petitioner to the post of UDC based on the written test held on 14<sup>th</sup> to 16<sup>th</sup> January, 2012 and the subsequent viva voce held on 03.04.2012.

2. Heard Mr. C. Modi, learned counsel for the petitioner. Mr. D. Panging, learned counsel appearing for the respondent No. 4, and Ms. A. Mize, Addl. Senior Government Advocate appearing for the State respondents.

3. Facts of the case:-

Vide Advertisement No. TAX(E)-298/2009 dated 28.10.2011 issued by Secretary (Tax & Excise), Govt. of Arunachal Pradesh, applications in prescribed format were invited from eligible APST candidates belonging to the category of Persons with Disabilities for filling up one post of UDC and one post of LDC in the Department of Tax & Excise, Govt. of Arunachal Pradesh. The advertisement is reproduced herein below:-

**"GOVERNMENT OF ARUNACHAL PRADESH  
OFFICE OF THE COMMISSIONER TAX AND EXCISE**

**ITANAGAR**

**NO.TAX(E)-298/2009**

**Dated Itanagar, the 28<sup>th</sup> Oct' 2011.**

**ADVERTISEMENT**

Applications in prescribed form are hereby invited from eligible APST candidates for filling up the following posts reserved for Persons with Disabilities in Tax & Excise Department as details given below:-

Sl.No	Category of Post with PB & Grade Pay	No. of Post
1	Upper Division Clerk PB 1 Rs. 5200-20200+GP 2800/-	01
2	Lower Division Clerk PB 1 Rs. 5200-20200+GP 1900/-	01

**Eligibility criteria:-**

**A) Educational qualification**

(i) For Upper Division Clerk : Graduate from a recognized university.

(ii) For Lower Division Clerk : Class X Passed.

Candidates for above posts must appear a written test followed by viva voce comprising of following subjects:-

i)	General English	1 paper – 100 Marks
ii)	General Knowledge	1 paper – 100 Marks
iii)	Mathematics	1 paper – 100 Marks
iv)	<u>Viva voce</u>	<u>50 Marks</u>

**B) Age Limit:-** Between 18 to 28 years as on 01-12-2011 upper age relaxable upto 5 years

**General Instructions and Informations:-**

- (i) The candidates should apply in the prescribed format to be obtained from the office of Commissioner (Tax & Excise) on all working days. Application should be submitted alongwith attested copies of certificates in support of Age, Educational qualification, Medical board certificates, experience if any with 2 (two) copies of recent passport size photographs, APST certificate and a copy of Treasury challan of Rs. 20/- (Rupees twenty) only. The amount is to be deposited in favour of Commissioner (Tax & Excise), Govt. of Arunachal Pradesh, Itanagar 791111, under Head of Account, MH-0039-State Excise, and Minor Head-800 other receipts. The applications should reach this office on or before 23.11.2011.
- (ii) Candidates already in Govt. departments/PSU should apply through proper channel without which their applications shall be rejected. Candidates have to submit NOC from their present employers at the time of viva-voce.
- (iii) Candidates applying shall enclose necessary certificate in support of their claim duly certified by Board of Doctors indicating category of disabilities as mentioned above.
- (iv) No TA/DA will be admissible for appearing in the interview.

Sd/-  
(T.T. Gamdik) IAS  
Secretary (Tax & Excise)  
Govt. of Arunachal Pradesh  
Itanagar."

4. On coming across the advertisement, the petitioner also applied on the prescribed format and being found eligible appeared in the written examination held as scheduled. When the written examination result was declared, the petitioner alongwith the private respondent and another person were declared qualified to face the viva voce which was to be held on 03.04.2012. The viva voce was held as scheduled and the result was declared on 01.05.2012 and the same was published in the local newspaper. In the result declared, the private respondent No. 4 was declared successful and was recommended for appointment to the post of UDC. As per the recommendation, the respondent No. 4 was appointed to the post of UDC vide Order dated 03.05.2012.

5. Being aggrieved by the recommendation and appointment of the respondent No. 4 to the post of UDC, the petitioner by filing WP(C) No. 382(AP) of 2012 approached this Court praying for quashing and setting aside of the appointment of the respondent No. 4 alleging that existing rules were not followed by the Selection Board and also praying for a direction directing the State respondents to appoint him to the post of UDC.

6. The writ petition was disposed of after hearing the parties vide Judgment and Order dated 30.08.2013. The operative portion of the same is reproduced herein below:-

"15. Apart from producing the record, Mr. Nabam, learned Senior Govt. Advocate has also submitted that the Government is re-examining the matter on the basis of the

extant law and the Government would be able to take a decision if some time is provided, including, if necessary, a fresh advertisement.

16. Considered the submissions made by Mr. Nabam. Taking into consideration the facts and circumstances of the case, this Court deems it fit and proper to grant the Government 3 (three) months time to take the aforesaid decision in light of the discussion made hereinabove.

17. This Court while issuing notice of motion on 19.10.2012, also passed an interim order staying the impugned order dated 3.4.2012 (Annexure-H) and appointment order in respect of respondent No. 4 dated 30.4.2012 (Annexure-I). Interim order so passed shall continue till the Government takes the decision referred to above.

18. Accordingly, the writ petition is disposed of in terms of the above directions. No order as to costs."

7. Thereafter the Secretary-cum-Commissioner (Tax & Excise), Govt. of Arunachal Pradesh issued the Order No. TAX (E)-527/2012, dated 22.10.2013 (impugned herein) confirming the appointment Order dated 03.05.2012 of the private respondent No. 4 to the post of UDC. Being aggrieved by the said impugned order, the petitioner has come to this Court for the second time by filing the instant writ petition and challenging the impugned order and praying as stated above.

8. The case of the petitioner as submitted by his learned counsel is in two folds:-

i) that the private respondent No. 4 having secured 25 marks only out of 100 in Mathematics should not have been called for the interview/viva voce, since he was not qualified for the same in terms of the Office Memorandum No. OM-54/2006 dated 07.01.2008 issued by the Secretary (AR), Govt. of Arunachal Pradesh, Department of Personnel, Administrative Reforms & Training, which requires that a candidate to secure 33% in each paper in the written examination to be qualified for

viva voce. The Office Memorandum dated 07.01.2008 relied upon by the learned counsel for the petitioner is reproduced herein below:-

"ANNEXURE NO 'E'

(TO BE PUBLISHED IN ARUNACHAL PRADESH GAZETTE)

GOVERNMENT OF ARUNACHAL PRADESH  
DEPARTMENT OF PERSONNEL, ADMINISTRATIVE REFORMS & TRAINING  
ADMINISTRATIVE REFORMS

No. OM-54/2006  
January, 2008.

Dated, Itanagar, the 7<sup>th</sup>

OFFICE MEMORANDUM

Subject:- Selection of candidates for appearing in Viva-Voce test on the basis of Recruitment Examination – procedure thereof.

It has been brought to the notice of the Government that various appointing authorities are selecting candidates for viva-voce test on the basis of one or two subject of written examination ignoring other equally important papers and without following a uniform pattern. As a result, the ratio of candidates selected per vacancy varies from one examination to other without maintaining common practice on prescription of ration or cut off marks even the candidates are selected in the ratio of 1:2.3. The issue was under examination of the Administrative Reforms Department and has found that no such procedure had been laid down earlier nor such procedures have been prescribed in the relevant Recruitment Rules.

After careful examination of the issue and in modification of point No. 2 & 3 of the OM dated 28-08-2006, the Government of Arunachal Pradesh has decided to prescribe the following procedures for all direct recruitment examinations for appointment to Group-A, B & C posts/services under the Government of Arunachal Pradesh :-

- 1) For appearing in the viva-voce test, candidates shall be selected in the 'ratio' of 1:3 (meaning 3 candidates shall be selected for each vacancy or 3 (three) times of the number of vacancies) on the basis of written examination papers. However, ratio of 1:3 shall not apply in case the candidates appearing the written examination is less then 3 time of the number of vacancies, all the candidates securing 33% of marks in each written examination papers shall be eligible for appearing viva-voce test.
- 2) The candidates securing a minimum of 33% or more marks in each written examination papers and has secured 45% of marks out of aggregate total marks in the written examination papers shall be eligible for viva-voce test. On the other, it will further mean that selection for viva-voce test shall be based on

the aggregate total marks secured in the written examination papers and subject to ratio of 1:3. The candidates securing less than 33% of marks in any of written examination paper shall not be eligible for appearing in the viva-voce test.

- 3) The Selection Committee or Commission may lower the 'cut off marks' of 45% to certain extent, in case of non-availability of Arunachal Pradesh Scheduled Tribe candidates securing the 'cut off marks'.

Therefore, all the appointing authorities are requested to comply with the above guidelines while conducting recruitment examinations for appointment to Group 'A' 'B' & 'C' level of posts/services.

(Y.D. Thongchi)  
Secretary (AR)  
Government of Arunachal  
Pradesh"

ii) that the marks given in the viva voce to the private respondent No. 4 i.e. 48 was beyond the prescribed full mark for viva voce test i.e. 40 marks as given in the Office Memorandum dated 28.08.2006, issued by the Commissioner & Secretary (AR), Govt. of Arunachal Pradesh, Ministry of Personnel, Administrative Reforms & Training, Department of Administrative Reforms. Therefore, the recommendation and appointment of the private respondent No. 4 is illegal and discriminatory. As such, the same are liable to be quashed and set aside. The Office Memorandum dated 28.08.2006 relied upon by the learned counsel for the petitioner is reproduced herein below:-

"ANNEXURE NO 'D'  
The Arunachal Pradesh Gazette  
EXTRAORDINARY  
PUBLISHED BY AUTHORITY

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No. 58, Vol. XIV, Naharlaqun, Wednesday, August 30, 2006, Bhadra 8, 1928  
(Saka)

GOVERNMENT OF ARUNACHAL PRADESH  
MINISTRY OF PERSONNEL, ADMINISTRATIVE REFRMS & TRAINING  
DEPARTMENT OF ADMINISTRATIVE REFORMS

OFFICE MEMORANDUM

The 28<sup>th</sup> August, 2006

Subject: A scheme on recruitment examination to Group-C and up to the level of Group-B (Non-Gazetted) posts against direct recruitment quota under various departments/offices/organizations-regarding.

No. OM-21/85 – After the constitution of Arunachal Pradesh Public Service Commission the direct recruitment examinations for appointment to Group-B (Gazetted) and Group-A posts under the Government of Arunachal Pradesh are conducted by the Arunachal Pradesh Public Service Commission since 1989. However, the direct recruitment examinations in the level of Group-C to Group-B (Non-Gazetted) posts are conducted by various appointing authorities of the departments/offices/organizations from time to time due to non formulation of a common examination scheme for recruitment to Group-C to Group-B (Non-Gazetted) posts against direct recruitment quota by the State Government. This has led to adoption of various methods by the appointing authorities of departments/offices/organizations on the recruitment process.

2. In view of above and to ensure a proper examination process for recruitment to Group-C to Group-B (Non-Gazetted) posts in all the departments/offices/organizations, the Government of Arunachal Pradesh has now decided to introduce a common recruitment examination scheme as under:-

1. All recruitment examination process for appointment in the level of Group-C to Group-B (Non-Gazetted) posts against direct recruitment quota which include posts in police administration shall be conducted under the process detailed below:-

- |                           |  |
|---------------------------|--|
| (a) General English       | - 100 marks  |
| (b) General knowledge     | - 100 marks  |
| (c) Elementary maths      | - 100 marks (appointing authority could opt the specialized subject as per relevant Requirement Rules in place of Elementary Mathematics for posts like JE/Technical Assistant/Architectural Assistant/Draughtsman posts etc.) |
| (d) <u>Viva voce Test</u> | - 40 marks   |
| Total                     | - 340 marks  |



2. The candidates who secure more than 45 percent, out of aggregate mark of 300 but not exceeding 3 times of the actual vacancy may be eligible for appearing in the viva-voce test. The Selection Committee/Board is allowed to increase or reduce the limit of 45 per cent to certain extent to maintain the required number of candidates to 3 times of the actual vacancy. However, in case of non-availability of sufficient APST candidates the Selection Committee/Board may reduce the limit.
3. Merit list of selected candidates shall be prepared by the Selection Committee/Board on the basis of marks secured by the candidate (out of the aggregate total of 340 marks).
4. Registration of applicants in any of the Employment Exchange in Arunachal Pradesh is compulsory for all candidates for employment under the Government of Arunachal Pradesh irrespective of whether a candidate belongs to APST or Non-APST category

Henceforth, all the recruitment examination for appointment to Group-C to Group-B (Non-Gazetted) posts/services and against direct recruitment quota conducted by appointing authorities in various departments offices/organizations under the Government of Arunachal Pradesh shall strictly observe the above mentioned Common Recruitment Examination Scheme.

All the appointing authorities are requested to comply with above guidelines while conducting recruitment examination to the posts/services in Group-C to Group-B (Non-Gazetted) level.

**Otem Dai,**  
**Commissioner & Secretary (AR)**  
**Government of Arunachal Pradesh,**  
**Itanagar."**

9. Mr. C. Modi, learned counsel for the petitioner submitted that the two Office Memorandums issued by the Department of Personnel, Administrative Reforms & Training, Govt. of Arunachal Pradesh are the only rules available and applicable for recruitment to the post of UDC and there is no other rules separately framed or

notified for on same purpose for the category of Persons with Disabilities. Therefore, the said rules are applicable.

**10.** Mr. C. Modi in support of his submission cited 3 judgments of the Hon'ble Supreme Court passed in the following cases:-

i) *Ramesh Kumar-vs- High Court of Delhi and Another* reported in *(2010) 3 SCC 104*, relevant paragraphs are *14, 15, 18 and 19*.

The contents of the paragraphs 14, 15, 18 and 19 are given herein below:-

"14. Similarly, in *K. Manjusree v. State of A.P.* this Court held that selection criteria has to be adopted and declared at the time of commencement of the recruitment process. The rules of the game cannot be changed after the game is over. The competent authority, if the statutory rules do not restrain, is fully competent to prescribe the minimum qualifying marks for written examination as well as for interview. But such prescription must be done at the time of initiation of selection process. Change of criteria of selection in the midst of selection process is not permissible.

15. Thus, the law on the issue can be summarized 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 test and further specify the minimum benchmarks for written test as well as for viva voce.

18. These cases are squarely covered by the judgment of this Court in *Hemani Malhotra v. High Court of Delhi*, 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' Assn. (3)* case 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 fact situation, the question of acquiescence would not arise.

19. In view of the above, as it remains admitted position that petitioner Ramesh Kumar had secured 46.25% marks in aggregate and as he was required only to have 45% marks for appointment, Writ Petition (C) No. 57 of 2008 stands allowed. The connected writ petition filed by Desh Raj Chalia as he failed to secure the required marks in aggregate, stands dismissed. The respondents are requested to offer appointment to petitioner Ramesh Kumar, at the earliest, preferably within a period of two months from the date of submitting the certified copy of this order before the Delhi High Court. It is, however, clarified that he shall not be entitled to get any seniority or any other perquisite on the basis of his notional entitlement. Service benefits shall be given to him from the date of his appointment. No costs."

ii) **Rajesh Awasthi –vs- Nand Lal Jaiswal and Others** reported in (2013) 1 SCC 501, relevant paragraphs at 19, 23, 32, 50 and 53.

The contents of the paragraphs 19, 23, 32, 50 and 53 are given herein below:-

19. A writ of quo warranto will lie when the appointment is made contrary to the statutory provisions. This Court in *Mor Modern Coop. Transport Society Ltd. v. Govt. of Haryana* held that a writ of quo warranto can be issued when appointment is contrary to the statutory provisions. In *B. Srinivasa Reddy*, this Court has reiterated the legal position that the jurisdiction of the High Court to issue a writ of quo warranto is limited to one which can only be issued if the appointment is contrary to the statutory rules. The said position has been reiterated by this Court in *Hari Bansh Lal* wherein this Court has held that for the issuance of writ of quo warranto, the High Court has to satisfy itself that the appointment is contrary to the statutory rules.

23. We are of the view that non-compliance with sub-section (5) of Section 85 of the Act is not a procedural violation, as it affects the very substratum of the appointment, being a mandatory requirement to be complied with, by the Selection Committee before recommending a person for the post of Chairperson. We are of the view that non-compliance with sub-section (5) of Section 85 of the Act will vitiate the entire selection process since it is intended to be followed before making the recommendation to the State Government. Non-compliance with mandatory requirements results in nullification of the process of selection unless it is shown that performance of that requirement was impossible or it could be statutorily waived. The expression "before recommending any person" clearly indicates that it is a mandatory requirement to be

followed by the Selection Committee before recommending the name of any person for the post of Chairperson. The expression "before" clearly indicates the intention of the legislature. The meaning of the expression "before" came for consideration before this Court in *State Bank of Travancore v. Mohd. Mohammed Khan* where the words "any debt due at and before the commencement of this Act to any banking company" as occurring in Section 4(1) of the Kerala Agriculturists' Debt Relief Act, 1970, were construed by the Supreme Court to mean "any debt due at and before the commencement of this Act". We, therefore, find it difficult to accept the contention of the learned Senior Counsel that this, being a procedural provision and non-compliance with sub-section (S) of Section 85 of the Act, is a defect curable by sending the recommendation back to the Selection Committee for compliance with sub-section (5) of Section 85 of the Act.

32. In *High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat* it has been laid down by this Court that a writ of quo warranto can be issued when there is violation of statutory provisions/rules. The said principle has been reiterated in *Retd. Armed Forces Medical Assn. v. Union of India*.

50. It is necessary to state here that in many an enactment the legislature has created regulatory bodies. No one can be oblivious of the fact that in a global economy the trust on the regulators has been accentuated. Credibility of governance to a great extent depends on the functioning of such regulatory bodies and, therefore, their selection has to be in total consonance with the statutory provisions, the same inspires public confidence and helps in systematic growth of economy. Trust in such institutions helps in progress and distrust corrodes it like an incurable malignancy. Progress is achieved when there is good governance and good governance depends on how law is implemented. Keeping in view the objects and reasons and Preamble of the Act and the functions of the Commission, it can be stated with certitude that no latitude can be given and laxity can have no allowance when there is total violation of the statutory provisions pertaining to selection. It has been said long back "a society is well governed when the people who are in the helm of affairs obey the command of the law". But, in the case at hand the Selection Committee has failed to obey the mandate of the law as a consequence of which the appellant has been selected and, therefore, in the ultimate eventuate the selection becomes unsustainable.

53. In view of the aforesaid analysis, I conclude that there has been total non-compliance with the statutory provision by the Selection Committee which makes the decision-making process vulnerable warranting interference by the constitutional courts and, therefore, the High Court is justified in holding that the appointment is non est in law."

iii) The learned counsel also relied on the judgment of the Hon'ble Supreme Court passed in the case of *Ganapath Singh Gangaram Singh Rajput -vs-*

*Gulbarga University represented by its Registrar and Others* reported in *(2014) 3 SCC 767*, relevant paragraph at *23 and 25*.

The contents of the relevant paragraphs 23 and 25 are given herein below:-

"23. The language of the advertisement is clear and explicit and does not admit any ambiguity and, hence, it has to be given effect to. Since the appellant Ganpat did not have a Masters degree in Computer Application, in our opinion, he was not entitled to be considered for appointment as Lecturer in MCA. We are aghast to see that when a candidate possessing Masters degree in MCA is available, the Board of Appointment had chosen an unqualified and ineligible person for appointment in that subject. Its recommendations are, therefore, illegal and invalid. The natural corollary thereof is that the University acting on such recommendation and appointing Ganpat as Lecturer cannot be allowed to do so and that the Division Bench of the High Court was right in setting aside his appointment. In our opinion, an unqualified person cannot be appointed, whoever may be the recommended. We are of the opinion that the Division Bench of the High Court was right in holding that Ganpat was not eligible for appointment of Lecturer in Masters of Computer Application.

25. Ordinarily, in a case where the person appointed is found ineligible, this Court after setting aside such appointment, directs for consideration of cases of such of the candidates, who have been found eligible. It is only in exceptional cases that this Court issues mandamus for appointment. The case in hand is not one of those cases where the High Court ought to have issued mandamus for appointment of Shivanand as Lecturer in MCA. Hence, we are of the opinion that the High Court rightly held Ganpat ineligible and quashed his appointment. However, it erred in issuing mandamus for appointment of Shivanand. Accordingly, we uphold the impugned order of the High Court whereby it had set aside the appointment of the appellant herein and direct that the case of the writ petitioner Shivanand and all other candidates be considered in accordance with law. However, we make it clear that the selection already made shall be taken to its logical conclusion."

11. Mr. D. Panging, the learned counsel appearing for the private respondent No. 4 submitted at the very outset that as per the advertisement, two posts were advertised, one was of LDC and the other was of UDC. The petitioner applied for both and he was selected for the post of LDC and has been appointed. He never

challenged the advertisement and he is in fact beneficiary of the same, therefore, he is barred from challenging the same in connection with selection to the post of UDC.

Thereafter, Mr. D. Panging drew my attention to the contents of the advertisement particularly at (iv) of eligibility criteria wherein for viva voce, 50 marks is prescribed. And after referring to the above stated contents of the advertisement, the learned counsel submitted that in the advertisement, full marks for the viva voce was given as 50 and if the petitioner was aggrieved by that he should have challenged it before the Examination was conducted. But after having fully participated in the examination and in fact having enjoyed the benefit of it in the case of LDC, he cannot now turn around and challenge the same.

The learned counsel further submitted that the advertisement was issued and the exam was conducted specially for persons belonging to category of disability persons therefore, rules or guidelines applicable in the case of persons belonging to General Category cannot be applied, unless specifically mentioned.

**12.** Mr. D. Panging also submitted that the Office Memorandum referred to and relied upon by the learned counsel for the petitioner are neither rules nor orders issued in the name of the Governor. Therefore, they are mere advisories or instructions issued by executive, therefore, adherence to such is not compulsory or mandatory. He also submitted that such instructions or advisories have no force of law and they do not confer any legal right to anybody.

The learned counsel in support of his submission referred to the judgment of the Hon'ble Supreme Court passed in the case of ***Chief Commercial Manager, South Central Railway, Secunderabad and Others -vs- G. Ratnam and***

*Others* reported in *(2007) 8 SCC 212*. The paragraph specifically or particularly referred to are paragraphs 19 and 20.

The contents of the paragraphs 19 and 20 are given herein below:-

"19. We have carefully gone through the contents of various chapters of the Vigilance Manual. Chapters II, III, VIII, IX and Chapter XIII which deal with Railway Vigilance Organisation and its role, Central Vigilance Commission, Central Bureau of Investigation, investigation of complaints by Railway Vigilance, processing of vigilance cases in Railway Board, suspension and relevant aspects of Railway Servants (Discipline and Appeal) Rules, 1968 as relevant to vigilance work, etc. Paras 704 and 705, as noticed earlier, cover the procedures and guidelines to be followed by the investigating officers, who are entrusted with the task of investigation of trap cases and departmental trap cases against the railway officials. Broadly speaking, the administrative rules, regulations and instructions, which have no statutory force, do not give rise to any legal right in favour of the aggrieved party and cannot be enforced in a court of law against the administration. The executive orders appropriately so-called do not confer any legally enforceable rights on any persons and impose no legal obligation on the subordinate authorities for whose guidance they are issued. Such an order would confer no legal and enforceable rights on the delinquent even if any of the directions is ignored, no right would lie. Their breach may expose the subordinate authorities to disciplinary or other appropriate action, but they cannot be said to be in the nature of statutory rules having the force of law, subject to the jurisdiction of certiorari.

20. It is well settled that the Central Government or the State Government can give administrative instructions to its servants how to act in certain circumstances; but that will not make such instructions statutory rules which are justiciable in certain circumstances. In order that such executive instructions have the force of statutory rules, it must be shown that they have been issued either under the authority conferred on the Central Government or the State Government by some statute or under some provision of the Constitution providing therefor. Therefore, even if there has been any breach of such executive

instructions that does not confer any right on any member of the public to ask for a writ against the Government by a petition under Article 226 of the Constitution of India.”

13. The learned counsel, Mr. D. Panging further submitted that in the absence of any authentication by the Governor, such memorandums cannot be construed as statutory rules but are simple guidelines having no binding effect. Therefore, the Recruitment Board did not commit any illegality by not having adopted or followed the guidelines given in the two Office Memorandums.

The learned counsel for the private respondent for his submission relied on the judgment of the Hon'ble Supreme Court in the case of *Gulf Goans Hotels Company Limited and Another –vs- Union of India and Others* reported in *(2014) 10 SCC 673*. The relevant paragraph referred to are paragraphs 19, 20 and 21 of the judgment.

The contents of the paragraphs 19, 20 and 21 are reproduced herein below:-

“19. Article 77 of the Constitution provides the form in which the Executive must make and authenticate its orders and decisions. Clause (1) of Article 77 provides that all executive action of the Government must be expressed to be taken in the name of the President. The celebrated author H.M. Seervai in *Constitutional Law of India*, 4<sup>th</sup> Edn., Vol. 2, 1999 describes the consequences of government orders or instructions not being in accordance with clauses (1) or (2) of Article 77 by opining that the same would deprive the orders of the immunity conferred by the aforesaid clauses and they may be open to challenge on the ground that they have not been made by or under the authority of the President in which case the burden would be on the Government to show that they were, in fact, so made. In the present case, the said burden has not been discharged in any manner whatsoever. The decision in *Air India Cabin Crew Assn. v. Yeshaswinee Merchant*, taking a somewhat different view can, perhaps, be explained by the fact that in the said case the impugned directions contained in the government letter (not expressed in the name of the



President) was in exercise of the statutory power under Section 34 of the Air Corporations Act, 1953. In the present case, the impugned guidelines have not been issued under any existing statute.

20. Clause (2) of Article 77 also provides for the authentication of orders and instruments in a manner as may be prescribed by the Rules. In this regard, vide S.O. No. 2297 dated 3.11.1958 published in the Gazette of India, the President has issued the Authentication (Orders and Other Instruments) Rules, 1958. The said Rules have been superseded subsequently in 2002. Admittedly, the provisions of the said 1958 Rules had not been followed in the present case insofar as the promulgation of the guidelines is concerned.

21. In the absence of due authentication and promulgation of the guidelines, the contents thereof cannot be treated as an order of the Government and would really represent and expression of opinion. In law, the said guidelines and their binding effect would be no more than what was expressed by this Court in *State of Uttaranchal v. Sunil Kumar Vaish* in the following paragraph of the report:

"23. It is settled law that all executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be [Articles 77(1) and 166(1)]. Orders and other instruments made and executed in the name of the President or the Governor of a State, as the case may be, are required to be authenticated in the manner specified in the rules made by the President or the Governor, as the case may be [Articles 77(2) and 166(2)]. In other words, unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order on behalf of the Government.

24. A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, can such noting be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be terms as a decision of the Government unless it is

sanctified and acted upon by issuing an order in accordance with Articles 77 (1) and (2) or Articles 166 (1) and (2). The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166 (2). A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review."

14. Mr. D. Panging also submitted that there is a recruitment rule for the post of UDC and he referred to Annexure-F of the writ petition. After referring to the same, the learned counsel submitted that this rule was framed under Article 309 of the Constitution of India and in that none of the 2 memorandums relied upon by the petitioner are referred to but the only one referred to is the Office Memorandum issued by the Government of Arunachal Pradesh being No. OM-21/85, dated 28.08.2007, as such, the two Office Memorandums are not relevant for recruitment to the post of UDC, more particularly, in the case of recruitment to post reserved for Persons with Disabilities. The learned counsel went on and submitted that the fact that the scheme of the examination is not mentioned in the rules shows that the rule makers have left it to the department/recruitment authorities to adopt or work out a scheme suitable for the recruitment. And that is what happen in this case when the department of Tax & Excise chose to fix 50 marks for viva voce and the same was published in the advertisement itself. Being fully aware of the same but not challenging it in time instead participated in the examination under that scheme, it is too late by now for the petitioner to turn around and challenge the same.

15. From the facts stated above, it is cleared that for viva voce, 50 marks was fixed and it was notified in the advertisement itself. Therefore, the contention of the petitioner that the private respondent No. 4 was given 4B marks beyond the

prescribed 40 marks is patently wrong. Further, if the petitioner felt that 50 marks fixed for viva voce by the recruitment authorities was not as per the prescribed mark in the relevant rules, he should have challenged it before the examination started. Having not done so, but, instead having participated in the whole process of the recruitment, he cannot now turn around and challenge the same. Because he had accepted the same and taken his chance and the game is over. In fact, according to the learned counsel of the respondent No. 4 which is not refuted by the petitioner's counsel that he had taken benefit of the examination in respect of LDC post for which recruitment examination was also held in pursuant to the same advertisement and got his appointment to such post shows that the petitioner did not have any problem with the scheme of the examination as notified in the advertisement at the time of appearing the examination but only after the results were declared and he was not selected for the post of UDC he tried to make out a case for challenging the same. In such circumstances, it would amount to blowing hot and cold at the same time, and that is not permissible in law. Besides, the two office memorandums on which basis the petitioner has challenged the whole recruitment process of the post of UDC, as they appear were not issued in the name of the Governor and they are not rules framed under Article 309 of the Constitution of India or in pursuant to rules framed under the same Article of the Constitution. Therefore, they are mere executive guidelines or advisories at best. As such, they are not binding and they do not confer any legal right to any person or persons. On this, the judgments of the Hon'ble Supreme Court cited by the learned counsel for the respondent No. 4 and reproduced at paragraphs 12 and 13 of this judgment have provided unambiguous and clear guidance. Further, though the petitioner's learned counsel had forgotten that there is a rule framed under Article 309 of the Constitution of India which

regulates the method of recruitment to the post of UDC, Group 'C' in various departments under the Government of Arunachal Pradesh except Civil Secretariat/Assembly Secretariat/Governor Secretariat and Commissions, in the Schedule of the said rule, at column No. 11, it is stated as follows:

**"50% by direct recruitment: i) Recruitment shall be made on the basis of merit adjust through the common examination scheme on the subjects notified vide Government Notification No. OM.21/85 dated 28.08.2007', ii) 50% by promotion failing which by transfer on deputation."**

This rule neither refers to the 2 office memorandums on which basis the petitioner has come to the Court nor provides the scheme of examination relating to the minimum marks required to be scored by candidates to be eligible for viva voce. Therefore, it can safely be assumed that the rule makers have left such details or nitty gritty to be worked out or adopted by the departments or recruitment authorities. Precisely that is what has been done by the recruitment authority in this case. In fact, office memorandum dated 07.01.2008 relied upon by the petitioner does not provides that a candidate must secure 33% in every subjects rather it says 33% out, of the aggregate total marks in the written examination. Therefore, the recruitment authorities have not committed any fault or illegality when they have allowed the respondent No. 4 to appear the viva voce though he got only 25 marks in Mathematics but got more than 33% in aggregate in the written examination. For reference, paragraph 2 of the said memorandum full text of which is reproduced at paragraph 8 of the judgment is reproduced here again:

**"4. The candidates securing a minimum of 33% or more marks in each written examination papers and has secured 45% of marks out of aggregate total marks in the written examination papers shall be eligible for viva-voce test. On the other, it will further mean that selection for viva-voce test shall be based on the aggregate total marks secured**

in the written examination papers and subject to ratio of 1:3. The candidates securing less than 33% of marks in any of written examination paper shall not be eligible for appearing in the viva-voce test."

In view of the above contention of the learned counsel for the petitioner based on this memorandum is clearly baseless.

**16.** From the above discussions, I find no merit in the writ petition. Accordingly, it is dismissed.

JUDGE

Mahruati