

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
ITANAGAR PERMANENT BENCH
(NAHARLAGUN)
WP(C) 241 (AP)2017

1. *Shri Biri Taha, Superintendent,
O/o Chief Engineer, (Western Zone),
Department of Hydro Power, Jal
Vidyut Bhawan, Itanagar-791111.*
2. *Smti. Jyoti Borang, Assistant (Env. & Forest),
O/o the Principal Chief Conservator of Forest,
Department of Environment and Forest,
Govt. of Arunachal Pradesh, Itanagar.*
3. *Shri Khamjat Ajang, Senior Personal Assistant,
O/o Arunachal Pradesh Public Service Commission,
Itanagar, Arunachal Pradesh-791111.*
4. *Shri Nabam Tarang, Assistant (Env. & Forest),
O/o the Principal Chief Conservator of Forest,
Department of Environment and Forest,
Govt. of Arunachal Pradesh, Itanagar.*

... Petitioners

-Versus-

1. *The State of Arunachal Pradesh represented by the Chief Secretary, Govt. of Arunachal Pradesh, Itanagar.*
2. *The Commissioner/ Secretary, (Personal),
Govt. of Arunachal Pradesh, Itanagar, Arunachal Pradesh.*
3. *Dorjee Wangchu, AMDO (Geo & Mines)*
4. *Nawang Tutan, AMDO (Geo & Mines)*
5. *Tatun Wangchu, DDMO (Disaster Management)*
6. *Kesang Wangda, AMDO (Geo & Mines)*
7. *Phunsto Tashi, AMDO (Geo & Mines).*
8. *Nyarik Diyum, SI, APP.*
9. *The Screening Committee to select the candidates to face the viva voce from the nominated candidates for appointment of Arunachal Pradesh Civil Services (Entry Grade) by selection from the Departmental candidates through the lateral entry headed by its chairman.*

... Respondents

∴∴BEFORE∴∴
HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

By Advocates:

For the petitioners:	Ms. N. Danggen, learned Adv.
For the respondents:	Mr. K. Ete, Sr. Addl. Adv. Gen., Ms. L. Hage, Govt. Adv. Mr. N. Ratan, Adv. for R-3 to 8.

Date of hearing : 15.03.2019

Date of Judgment : 05.04.2019

JUDGMENT & ORDER (CAV)

1. The Extra ordinary jurisdiction under Article 226 of the Constitution of India has been sought to be invoked by the 4 (four) petitioners who had

joined together with a common cause of action. The dispute involves a recruitment process for Lateral Entry into the Arunachal Pradesh Civil Service. Amongst other issues which will require determination in this proceedings, once again the phenomenon adopted in a recruitment process which is commonly termed as "**Changing the Rule of the game after the game has started**" will be dealt with in this writ petition.

2. Before coming to the controversy at hand, it would be useful to dilate the facts of the case in the following manner:

3. The petitioners who are 4 (four) in numbers have filed this writ petition assailing the legality and validity of an Office Memorandum dated 28.02.2017 (issued on 02.03.2017) on the ground of same being in conflict with Rule 11 of the Arunachal Pradesh Combined Competitive Examination Rules, 2001 (hereinafter referred to as the Rules).

4. The projected case of the petitioners are that a recruitment process was initiated for Lateral Entry of Arunachal Pradesh Civil Services (Entry Grade) in which the petitioners were short listed after various scrutiny procedures and were called for Interview/ Viva-voce. The recruitment process which commenced on 13.08.2014 was going on for a long time and on 03.03.2017 the date was fixed for the aforesaid Interview/ Viva-voce. It is the case of the petitioners that when they had arrived for appearing in the Interview/ Viva-voce, they were informed about the impugned Office Memorandum. By the said impugned O.M., the cut off marks was sought to be introduced which, according to the petitioners are in conflict with the recruitment Rules holding the field. As per the petitioners, the said Rules do not give any discretion to the Selection Committee to prescribe any cut off marks for the Viva-voce. The timing of the Office Memorandum is also highlighted to support the case of the petitioners that it has been issued in a *mala fide* manner. However, it is a matter of fact that the initial date

scheduled for the Viva-voce which was 03.03.2017 was postponed to 22.03.2017, on which date, the Viva-voce was held.

5. To directly come to the controversy at hand, the impugned Office Memorandum is quoted hereinbelow:-

**“GOVERNMENT OF ARUNACHAL PRADESH
DEPARTMENT OF PERSONNEL:CIVIL SECRETARIAT
[ANNEX-IV::4th BLOCK:: ITANAGAR]
OFFICE MEMORANDUM**

No. PERS-44/2017

Dated, Itanagar, the February, 2017.

In continuation to Government Circular No. PERS-65/2014/2127 dated 09th July, 2015 and in pursuance of Rule 5 read with Rule 14 (1) of the Arunachal Pradesh Civil Service Rules, 2006, the Governor of Arunachal Pradesh is pleased to order that the candidates who fails to secure a minimum 45% of total marks in the forthcoming Interview/ Viva-voce test for selection to the post of APCS (Entry Grade) through Lateral Entry will not be considered for appointment to the post on the sole ground that they had appeared in the said selection Test as conducted by the Department.

**BY ORDER AND IN THE NAME OF THE
GOVERNOR OF ARUACHAL PRADESH**

*Sd/-
Chief Secretary
Govt. of Arunachal Pradesh,
Itanagar-791111.*

Memo No. PERS-44/2017/1123

Dated the Itanagar the 28th February, 2017

Copy to:-

All concerned (as per standard mailing list).

**(Gouri Chakraborty)
Under Secretary (PersI)
Govt. of Arunachal Pradesh.**

6. It is the case of the petitioners that because of the introduction of the minimum cut off marks in the Viva-voce, the petitioners could not be selected. Though, a lot of connected facts concerning the recruitment Rules

have been pleaded in the writ petition, those are not required to be discussed except the facts which are relevant for deciding the issue at hand.

7. The State respondents as well as the respondent Nos. 3 to 8 have filed their respective affidavits and rejoinder has also been filed by the petitioners. In the affidavit-in-opposition filed by the State, preliminary objection has been raised that the petitioners are unsuccessful candidates who took a chance in the recruitment process and therefore, they could not turn around and challenge the said process. It has also been submitted that as a preliminary objection that out of the 14 (fourteen) numbers of the selected candidates, only 6 (six) have been made party respondents and due to non joinder of necessary parties, the writ petition is not maintainable.

8. On merits, due justification has been pleaded for issuing the impugned notification dated 28.02.2017 and the primary concern was to raise the standards and bench mark as the service for which the recruitment was held was a superior service.

9. The respondent Nos. 3 to 8 in their affidavit submitted that they are duly eligible and in absence of specific allegation against them, their selection and appointment are not liable to be interfered with.

10. I have heard Ms. N. Danggen, the learned counsel for the petitioners. I have also heard Mr. K. Ete, learned Sr. Addl. Advocate General assisted by Ms. L. Hage, learned Junior Govt. Advocate for the State of Arunachal Pradesh and Shri N. Ratan, the learned counsel appearing for private respondent Nos. 3 to 8.

11. The principal contention of Ms. Danggen, the learned counsel for the petitioners is that there is a jurisdictional error in issuing the impugned notification which in conflict with the Rules holding the field. When the Rules

do not prescribe for any minimum cut off marks in the Viva-voce, the same cannot be made a part of the recruitment vide the impugned Office Memorandum. In essence, the learned counsel submits that an Office Memorandum cannot override the provision of a recruitment Rule duly enacted by the Legislature. The alternative submission is that even assuming that such power exist to issue the Memorandum containing the impugned condition, the same could not have been done after the recruitment process had started. Admittedly, in the instant case, the recruitment process was initiated sometime in August, 2014 and the impugned Office Memorandum incorporating new condition in the recruitment was issued on 28.02.2017, the same amounts to changing the Rules of the game after the game has started which is impressible in law. It is the further submission of the learned counsel that cut off marks cannot be prescribed in Viva-voce as the same would lead to arbitrariness which is the anti-thesis of transparency and fairness in public employment. Once cut off mark is introduced, an unfettered discretion would be vested on the interview board by which there would be gross in justice.

11. In support of her submission learned counsel Ms. Danggen relies upon the following case laws:-

- (i) Hemani Malhotra (2008) 7 SCC 11.
- (ii) K. Manjushree (2008) 3 SCC 512.

12. The learned counsel by referring to the aforesaid decisions submits that it is an established principle of law that the Rules cannot be changed after the process of recruitment has started and in the instant case, such mandate of law has been grossly violated. As regards the submission that the writ petition is not maintainable because of non joinder of parties, the learned counsel for the petitioners has countered the same by placing reliance upon a case reported in **2012 (2) GLT 893 (Sapam Jiten SINGH-vs-**

Manipur Public Service Commission) in which this Court has laid down that candidates against whom *mala fide* is imputed are only required to be made party. In the instant case, only 6 persons have been made party respondents as those persons according to the petitioners are least meritorious.

13. Referring to the pleadings made in Paragraph-8 of the writ petition, the learned counsel for the petitioners submits that in the similar recruitment undertaken for the years 2007-08, no cut off marks were prescribed and in the said recruitment, even wait listed candidates were given the benefit of appointment. However, the terminology used in the Office Memorandum dated 28.02.2017 is 'forthcoming' and not 'henceforth'. The learned counsel has tried to develop an argument that the introduction of cut off marks in the Viva-voce test was confined to the recruitment process in which the petitioners had participated and the same was neither existing nor introduced later.

14. Countering the submission of the learned counsel for the petitioners, the learned Sr. Addl. Advocate General, Arunachal Pradesh strenuously argued that the law laid down **Hemani Malhotra and K. Manushree (supra)** is not *per se* applicable inasmuch as, the views expressed in those 2 (two) cases is put to question and is referred to a larger bench. In this connection, a reference has been made to the case of **Tej Prakash Pathak and Ors.**, reported in **(2013) 4 SCC 540**. Support is also taken from the decisions of **Sivanandan C.T. and Ors.-vs-High Court of Kerala and Ors.**, reported in **(2018) 1 SCC 239**. As regards the point of jurisdiction and conflict with the Rules which is highlighted by the petitioners, the learned State Counsel has submitted that in absence of contrary provisions in the Rules, there is no restriction to introduce a cut off marks in the Viva-voce test. In other words, Shri Ete, the learned Sr. Counsel submits that unless there is an express bar in the Rules for introduction of cut off marks in Viva-voce, the authorities have the powers to

do so by means of an Office Memorandum. The Sr. Counsel reiterates that the introduction of the cut off marks is only to raise bench mark and the standard which is in the interest of public service. The Sr. Counsel further submits that there is no *mala fide* exercise of powers and in such situation, the interference from this Court will not be justified. Regarding the amendment of the Rules of the APPSC in the year 2017, the State counsel has tried to explain that since the APPSC was a specialized body to hold the recruitment process, the requirement of holding the same by a selection Committee as per the un-amended Rules was done away with and the matter was placed under the exclusive domain and aegis of the APPSC. The learned Sr. Counsel submits that since a separate set of Rules exist for APPSC to hold recruitment test, the subsequent amendment of 2017 would not have introduced the minimum cut off marks and therefore, the submission made on behalf of the petitioners is not justified that even in the subsequent amendment, the cut off marks for Viva-voce has not been introduced.

15. Shri K. Ete, the learned Sr. Addl. Advocate General also produces the original files containing the note-sheet.

16. Re-joining the submission, Ms. Danggen submits that though the law laid down in the case of **Hemani Malhotra & K. Manjushree** has been placed before a larger bench in view of the conflict with the decision of **Tej Prakash Pathak and Ors.**, the learned counsel submits that on a minute reading of the decisions, the law existing on date would still be applicable. The learned counsel for the petitioners submits that in case of **Tej Prakash Pathak and Ors**, a set of Rules with minimum marks had earlier existed and the same was reintroduced and under such circumstances, the Hon'ble Supreme Court had doubled the law laid down in these two cases. In any case, the learned counsel submits that though the matters have been referred to a larger bench, it is yet to be decided and there is no stay of the principle of law laid down that the '**Rules of the game cannot be changed after the game has started**'.

According to the learned counsel, such directive is based on the principles of justice, equity and good conscience. Further the learned counsel justifies of not making all the selected candidates party respondents, in view of the existing vacancies in which the petitioners can be accommodated in the event of fair selection, the challenge to the appointment of the private respondents may be foregone. A reference is also made to the existing policy of the State to reduce the cut off marks in certain recruitment test in case of non availability of Arunachal Pradesh ST candidates. Those, recruitments also being for higher service, the submission on behalf of the respondent that cut off marks has been introduced to raise the bench mark will not be justified. A further reference has been made to a case reported in **(2013) 7 SCC 737** (APPSC-vs-Tage Habung) whereby the APPSC has been divested of powers to give cut off marks in Viva-voce and such cut off marks can only be given in written examination.

17. The rival contention of the respective parties have been duly considered and the materials before this Court have been carefully perused. The note-sheet and the files in original which has been produced have also been perused.

18. From the note-sheet, it is not discernible as to why the decision to introduce a cut off marks in the Viva-voce was taken. Though, such cut off marks appears to be introduced on the recommendation of the Selection Committee, the decision culminating to such recommendation is not available. Though, the learned Sr. Addl. Advocate General strenuously urged that the same was introduced to raise the standard and the bench mark, in absence of such consideration appearing from the records, the same cannot be taken up in the affidavit or by oral submission to justify. In this connection, support can be drawn from the judgment of the Hon'ble Apex Court rendered in the case of **M.S. Gill and Anr.,-vs- The Chief Election**

Commissioner, New Delhi and Ors., reported in **(1978) 7 SCC 405**. In para-8 of the said Judgment, the Hon'ble Apex Court had laid down as follows:-

"8 The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji"

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in Ms mind, or what he intended to, do. Public orders made by public authorities are meant to have public effect and are intended to effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older".

19. As regards the submission made on behalf of the petitioners that it was in respect of the present selection only wherein such cut off marks were introduced which were neither found earlier nor followed later in respect of the amendment of the Rules, it is the submission of the learned Senior Counsel for the State that by the subsequent amendment of the year 2017, the recruitment process was brought on the purview of the APPSC and therefore, it is the Rules which governs the APPSC which will be operative and therefore, the amendment cannot have brought in the concept of the cut off marks. This Court is unable to accept the said submission inasmuch as, amending powers of the Legislature cannot be confined of such grounds and by following the due process, amendments could have been done for recruitment of the present nature.

20. As regards the submission that in certain cases where cut off marks are prescribed, even the same are reduced in case of non-availability of Arunachal Pradesh Scheduled Tribe Candidates and therefore, the justification of raising the standards cannot be countenance, the learned State counsel submits that the recruitment process in hand involves superior service and therefore, raising the bench mark is justifiable. The said

submission is also not liable to be accepted by this Court for the following 2 (two) reasons:-

“(i) There is no denial of the fact that such clause exist to reduced the cut off marks in examination conducted by the APPSC in the case of non-availability of Arunachal Pradesh Schedule Tribe Candidates.

(ii) The services for which the recruitment is done by the APPSC are also superior service and therefore, the so called requirement of increasing the standards could not have been limited to the present recruitment process”.

21. Though the learned State Counsel by referring to the decision in **Tej Prakash Pathak**(supra) and **Salam Samarjeet Singh**, reported in **(2016) 10 SCC 484** has submitted that the earlier decision of the Hon'ble Supreme Court regarding change of the Rules has been referred to a larger bench, the facts and circumstances of the aforesaid cases are distinguishable from the case in hand which has been discussed above. However, since there is no declaration of law by the larger bench till date, this Court is inclined to follow the law laid down in the case of **K. Manjushree** (supra) and **Hemani Malhotra** (supra) as the facts of the instant case are similar to the facts of those cases.

22. Reference has also been made to the case of **K. H. Siraj-vs- High Court of Kerala and Ors.**, reported in **(2006) 6 SCC 395** and **Taniya Malik-vs- Registrar General of the High Court of Delhi**, reported in **(2018) 14 SCC 129** to fortify the submission that the requirement of interview and good performance in the same are of immense importance and prescription of minimum marks is desirable. There is no dispute with the aforesaid proposition of law. However, the issue at hand is distinct and different whether such requirement was not existing when the process of recruitment started and it was at the time of holding the Viva-voce, such minimum cut off marks were sought to be introduced by the impugned Office Memorandum.

23. In view of the aforesaid discussions and after perusal of the materials on record including the original files produced, this Court is of the opinion that this writ petition is liable to be allowed. Accordingly, the Office Memorandum dated 28.02.2017 (issued on 02.03.2017) is set aside. As the learned counsel for the petitioners had taken a specific stand not to disturb the selection of the private respondents, their selection is not interfered with. Consequently, the cases of the petitioners for appointment to the post of APCS (EG) Lateral Entry be considered without insisting on the cut off marks in the Viva-voce and based upon their performance, make the recruitments as per merit and in accordance with law. The aforesaid exercise is directed to be undertaken and complete within an outer limit of 2 (two) months from today.

The writ petition is accordingly disposed of.

The records contained in 2 (two) files in original are dispatched to the Registry of the Itanagar Permanent Bench to be delivered to the learned Govt. Advocate.

JUDGE

talom