

Sureshkumar Lalitkumar Patel vs The State Of Gujarat on 20 February, 2023

Author: M. M. Sundresh

Bench: M. M. Sundresh

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. OF 2023
[Arising out of SLP (Civil) Nos. 4302-4303 of 2021]

Sureshkumar Lalitkumar Patel & Ors.

...Appeal

Versus

State of Gujarat & Ors.

...Respondent

WITH
CIVIL APPEAL NOS. OF 2023
[Arising out of SLP (Civil) Nos. 5026-5027 of 2021]

JUDGMENT

M. M. Sundresh, J.

1. Leave granted. Applications for impleadment are allowed.
2. The decision of the Division Bench of the High Court of Gujarat giving its imprimatur to the decision of the Departmental Selection Committee in reducing the qualifying marks for the post of Supervisor Instructor Class III, after the publication of result to facilitate the inclusion of candidates constituting horizontal reservation, is under challenge in these civil appeals.
3. Heard Mr. P.S. Patwalia, learned senior counsel appearing for the appellants, Ms. Archana Dave Pathak, learned counsel for Respondent Nos. 1 and 2 and Mr. Vikas Singh, learned senior counsel for the private respondents. FACTS IN BRIEF:
4. Two advertisements were issued on 05.09.2015 to fill up the posts for Supervisor Instructor (Engineering Trade and Non-Engineering Trade) and Supervisor Instructor (Employability skill). The aforesaid two categories of posts carrying similar eligibility criteria in the nature of qualification

with a difference in the respective degree required, including the sub-categories in the Engineering Group, such as Automobile, Chemical, Electrical, Mechanical, Marine etc. with a total of 13.

5. Prior to the issuance of the advertisement, the Departmental Selection Committee (for short 'the Selection Committee') on 03.09.2015 resolved its procedure for the recruitment process. Accordingly, out of 300 marks, cut-off marks were fixed at 60% equivalent to 180 marks for General Category; 57% equivalent to 171 marks for Socially and Educational Backward Class and 55% equivalent to 165 marks for Schedule Caste and Schedule Tribe. It was amplified that any candidate scoring less than the cut-off marks would not be entitled for selection and appointment.

6. Clause (1) of the Advertisement in clear terms speaks about the horizontal reservation meant for females, ex-servicemen and physically handicapped. We shall reproduce the aforesaid clause:

“(1)... * The posts for the females are reserved as per 33% which shall be set off against the respective categories. If for the reserved post of the female candidate, if no suitable candidate is available then, the said post shall be filled by the male candidate of the same category.

* The posts are reserved by 10% of the total posts for the ex-serviceman. The same shall be set off against the respective category. if no suitable ex-serviceman candidates are available then, the said post shall be filled by the other suitable candidate of the respective category.

* The appointment of the physically handicapped having physical defect from 40% to 4%, shall be kept as 3% in the aforesaid posts as per the rules of the Government. The selection of the most suitable handicap candidate shall be selected by keeping in to the notice that, the disability is not coming in the way of educational work in I.T.I. If the suitable candidate having physical disability is not available then, the said posts shall be filled with the other suitable candidates of the respective category.”

7. Thus, for the above said three special reservations, it is made abundantly clear that in the event of inadequate candidates in each sub-category, the unfilled seats would be filled by the other eligible candidates.

8. The decision made by the Selection Committee was once again reiterated in the advertisement under Clause (5) which deals with the selection process.

“(5)...That means, out of total 300 marks, cut-off marks 60%. i.e. 180 marks shall be for General Category. The candidate getting fewer marks than the same shall not be eligible. For the candidate of the Socially and educationally backward class · these marks shall be 57% (171 marks) whereas, the for the candidate of Schedule Caste and the Schedule Tribe these marks shall be 55% (165 marks). The candidate getting less marks than the same, shall not be eligible for getting the appointment...”

9. Sub-clause (15) of Clause (7) (General Instructions) of the advertisement empowers the Selection Committee to cancel the entire process in the event of any necessity that may arise or, alternatively, to make an appropriate amendment. It further facilitates any addition or reduction in the number of posts originally announced. In the aforesaid circumstances, a candidate will not be entitled for any refund.

“(15) In case any necessity arises for cancelling this advertisement for any reason, or to make amendment in the same or to make addition or decrease in the numbers of posts, then, the Department shall have complete right/authority to do so, and, for this it will not bound to give reasons. Further, under such circumstances, the application made and the examination fee shall not be refundable.”

10. Sub-clause (19) of Clause (7) concerns itself with the recruitment process which confers a power on the Selection Committee as provided under sub-clause (15) in connection with the recruitment process.

“(19)...In connection with the recruitment process of this post, in case any necessity arises for cancelling this advertisement or instruction for any reason, or to make amendment in the same, then, the complete right/authority shall be with the Selection committee to do so, and for this the Selection Committee shall not be bound to give reasons for the same...”

11. Enclosure (1) of the advertisement 05.09.2015 once again reiterates Clause (1) by making the position abundantly clear on the posts being filled up with other eligible candidates, when the reserved candidate under the horizontal reservation is not available.

12. The aforesaid advertisement does not give any room for any interpretation otherwise. It thus speaks about the manner by which a post has to be filled up, inclusive of a special reservation in the form of a horizontal one. The power of either cancellation or amendment has to be exercised by way of an amendment to the advertisement, except in a case of reduction of seats. Further, such a power has to be exercised either at the initial stage, which only means before writing the examination or during the process, and thus giving ample indication that publishing the result would mean the completion and, therefore, the declaration of selected candidates would only be consequential.

13. The Selection Committee held a meeting on 05.10.2016 proposing to further relax the cut-off marks fixed only for the candidates belonging to the horizontal reserved categories. Accordingly, the cut-off marks for the General Category have been kept intact. Thereafter, a subsequent meeting was held on 17.12.2016 by which the earlier decision proposed to be implemented on 05.10.2016 was cancelled. The meeting was attended by all the members of the Selection Committee.

14. The State Government took a decision to give effect to the special reservation despite it being a horizontal one. The aforesaid decision was made apparently for the reason that the percentage of candidates expected to fill the post meant for the aforesaid reservation, were found inadequate. The decision of the State Government was taken note of and incorporated in the Selection Committee meeting held on 26.12.2016.

“...In the meeting of the selection committee held on 05.10.2016, it was decided to reduce the aforesaid cut of marks up to 10% and later on also, when the posts for women and specially abled candidates were remained vacant thus in the meeting held on 17.10.2016 while cancelling the provision of giving aforesaid relaxation, it was decided to make recruitment thereon for 1415 posts of supervisor instructors and publish final selection list thereof.

In this regard, as per guidance availed from the Gujarat Government, it was decided to fix the cut of marks (minimum eligible standard) as 40% for the candidates of general category and 35% for the candidates of Scheduled Caste, Scheduled Tribe, Socially and Educationally Backward Class and other reserved posts for filling total 1415 posts of Supervisor Instructor.”

15.The aforesaid decision is made by treating the special reservation which was otherwise horizontal, as a vertical reservation. As a consequence, the clause contained in the advertisement, as decided by the resolution of the Selection Committee dated 03.09.2015, providing for the consequence of non-filling of a post meant for a special category to be filled up with the other eligible candidates, was overturned without even bringing an amendment, that too unilaterally, after the declaration of the result.

16.Aggrieved by the aforesaid action, the appellants who would otherwise secure selection to the post, approached the High Court. Finding due merit, the learned Single Judge allowed the writ petitions filed.

17.The State and the official Respondents did not choose to challenge the decision made which was actually done based upon an earlier decision made by the Division Bench, but rather decided to give effect to it. However, certain individuals who were affected by the order of the learned Single Judge, having secured the benefit of the Selection Committee in a decision dated 26.12.2016, and accordingly got selected, filed the appeals before the Division Bench. The appeals were allowed on the ground that the original petitioners do not have a vested right, adequate power is available to the Selection Committee, and there is no change in the rule after the game has started.

18.In the present appeals, the private respondents alone are the contesting ones as even before the Division Bench, many others did not choose to contest the decision of the learned Single Judge for the reasons best known to them. The order of the learned Single Judge has in fact been given effect to by the official respondents, and therefore, they are actually in service for the past few years. With the aforesaid backdrop, we shall consider the respective contentions.

SUBMISSIONS:

19.Mr. P.S. Patwalia, learned senior counsel appearing for the appellants submitted that the Selection Committee did not have a power to reduce the cut-off marks. The Respondent Nos. 1 and 2 cannot be permitted to change the rules of the game after it has begun. The exercise of power, if any, is arbitrary. In any case, the State of Gujarat cannot usurp the power of the Selection Committee, and in turn the same ought not to have been followed by it. The Division Bench has committed an error in wrongly applying the law to the facts of the case. Learned senior counsel for the appellants

has pressed into service the following decisions, while seeking an order of reversal.

• Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors. (2013) 4 SCC 540; • Veerendra Kumar Gautam & Ors. v. Karuna Nidhan Upadhyay & Ors., (2016) 14 SCC 18;

• Anupal Singh & Ors. v. State of Uttar Pradesh & Ors., (2020) 2 SCC 173; • Ashok Kumar Thakur v. Union of India & Ors. (2008) 6 SCC 1.

20. Ms. Archana Dave Pathak, learned counsel appearing for Respondent Nos. 1 and 2 and Mr. Vikas Singh, learned senior counsel appearing for the private respondents, submitted that what was done before making the change is a mere publication of the marks obtained. The selection was done subsequently. So long as the power is available with the Selection Committee, and the objective being reasonable, there is no ground for any interference. The appellants do not have a vested right for appointment to a post. The Division Bench has correctly considered the legal issues while upholding the decision of Respondent Nos. 1 and 2, as being a policy decision. One has to see the objective behind the special reservation. Therefore, there is no need for any interference in these appeals.

21. On a query raised by us, Ms. Archana Dave Pathak, learned counsel appearing for Respondent Nos. 1 and 2 submitted that there are adequate posts available and if a direction is issued, the same would be given effect to by considering either the appellants or the private respondents. It is also acknowledged that filling up of the vacancies are to be made with respect to each of the sub-categories along with the reservation either vertical or horizontal. The learned senior counsel appearing for both sides have submitted that the issue of inter-se seniority between the appellants and the private respondents would also be considered to avoid any confusion at a later point of time.

DISCUSSION:

22. We are dealing with the recruitment process by which the posts pertaining to each of the separate categories is to be filled up by only one mode, i.e., written examination. The cut-off marks have been fixed with a distinct clarification that it would not be tinkered with by facilitating anyone to be considered, if the candidate acquired lesser marks. There is a difference between qualification for making an application, and the eligibility to be determined in the process of selection. We are not concerned with the qualification for making an application in the present case, but rather an eligibility after the examination is conducted.

23. Another unique feature of the present case is that the Selection Committee has reduced the marks to facilitate the horizontal reservation by treating it as a vertical reservation. Admittedly, the rules do not provide for such reservation to be treated as a vertical one. Likewise, the rules do not fix any cut-off marks. An advertisement, made pursuant to a notification, binds the parties. It has got all the trappings of a statutory prescription, unless it becomes contrary to either a rule or an Act. A change, if any, can only be brought forth by way of an amendment and nothing else. Such an amendment even if it is permissible can be tested on the touchstone of Article 14 of the Constitution of India. It cannot be introduced to give an entry to a special reservation, in a case where a right

becomes accrued to a candidate, under a policy decision reduced in the form of an advertisement, to be considered for a post in the absence of any eligible candidate from the horizontal category.

24. It is true that a candidate may not have a vested right to the post, however, it cannot be confused with a right to be considered in accordance with law. A law which enables a candidate to get a post cannot be changed to facilitate another group of persons, since the candidate acquires a vested right to be considered in accordance with law, as held by this Court in *N.T. Devin Katti v. Karnataka Public Service Commission*, (1990) 3 SCC 157, “11. There is yet another aspect of the question. Where advertisement is issued inviting applications for direct recruitment to a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing rules or government orders, and if it further indicates the extent of reservations in favour of various categories, the selection of candidates in such a case must be made in accordance with the then existing rules and government orders. Candidates who apply, and undergo written or viva voce test acquire vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystallises on the date of publication of advertisement, however he has no absolute right in the matter. If the recruitment Rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules. Whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication; if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the rules and orders which were in force on the date of advertisement. Determination of this question largely depends on the facts of each case having regard to the terms and conditions set out in the advertisement and the relevant rules and orders. Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right of selection, but if he is eligible and is otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire a vested right of being considered for selection in accordance with the rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of rules during the pendency of selection unless the amended rules are retrospective in nature.” (emphasis supplied)

25. Admittedly, in the case on hand, the appellants are entitled to get the respective post as per the advertisement issued. The said advertisement has not been amended. It was sought to be modified on the advice of the Government, though an earlier decision was taken on the similar line but wisely withdrawn. Fixing cut-off marks for a particular category has got a rationale behind it. Reducing it only for the purpose of providing employment to a particular category, when the others have already acquired some right would be an affront to Article 14 of the Constitution of India.

26. We have already discussed the scope and ambit of the relevant clauses contained in the advertisement, particularly sub-clauses (15) and (19). In our considered view, they do not confer unbridled power either on the State Government or on the Selection Committee to modify the selection process, and thereby, reduce the cut-off marks after the results are published. The

submission made that the selection was made only thereafter, will not hold water. What was done by way of publishing the selection list after the change is nothing but a ministerial act.

27. We wish to place reliance on the judgment of this Court in Tamil Nadu Computer Science B.Ed. Graduate Teachers Welfare Society (1) v. Higher Secondary School Computer Teachers Association & Ors., (2009) 14 SCC 517,

20. It is thus established, that the State Government reduced the minimum qualifying marks for the post of computer instructors to 35% which is contrary to an earlier decision taken in a meeting held on 10-10-2006 that the minimum qualifying marks for filling up the posts of computer instructors would be 50% i.e. 75 marks out of total 150 marks. It is thus established that the Government changed the rules of recruitment and terms and conditions of appointment in the midway after the selection process was initiated. The said decision was taken on a Sunday i.e. on 12-10-2008, after the candidates had taken their exams.

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29. The counsel appearing for the respondents, however, submitted that since these contract employees have been working for a very long time in the government schools, therefore, the Government had taken the decision to reduce the minimum qualifying marks to see that at least some of them who could qualify in the special recruitment test could be recruited and absorbed so as not to deprive them from getting absorbed in the government employment through a regular process.

30. It was also submitted that out of 1714 candidates, who have written the special recruitment test only 894 candidates could receive more than 50% marks whereas 906 candidates could obtain less than 50%, which was minimum qualifying marks prescribed by the Government in its earlier policy decision but obtained more than 35% marks. Consequently, it was submitted that the Government thought it fit that the said minimum qualifying marks should be reduced to 35% so as to absorb more people, who are still working in the government schools as computer instructors.

31. We have considered the aforesaid rival submissions of the counsel appearing for the parties in the light of the records placed before us. It is clearly established from the records that in order to give one-time opportunity, a special recruitment test was ordered to be held for selection and recruitment as also absorption of existing computer instructors. The said decision was taken on sympathetic consideration and with the intention of doing justice to those existing computer instructors who were working in government schools for a very long time. Such a recruitment drive and test was held by laying down rules of recruitment thereby providing a level playing field for all concerned.

32. Prior to holding of the said test guidelines were formulated through a policy decision laying down the criteria that the minimum qualifying marks in the said test would be at least 50%. The said guidelines of recruitment as laid down through a policy decision were sacrosanct and were required to be followed for all practical purposes even if we accept that the Government could have filled up

the said posts of computer instructors by holding a special recruitment test of the aforesaid nature as one-time exception.

33. We, however, cannot hold that the subsequent decision of the Government thereby changing qualifying norms by reducing the minimum qualifying marks from 50% to 35% after the holding of the examination and at the time when the result of the examination was to be announced and thereby changing the said criteria at the verge of and towards the end of the game as justified, for we find the same as arbitrary and unjustified. This Court in *Hemani Malhotra v. High Court of Delhi* [(2008) 7 SCC 11 : (2008) 2 SCC (L&S) 203] has held that in recruitment process changing rules of the game during selection process or when it is over are not permissible.”

28. The aforesaid judgment would certainly govern the issue, therefore, the decision of the Division Bench in holding the aforesaid decision as having no application to the facts of the present case cannot be sustained. In fact, the case we are dealing with, stands on a better footing than the facts governing the aforesaid case, wherein the selection process was not completed when a decision to reduce the marks was made. The Division Bench is also not correct in not following the earlier decisions of the Co-ordinate Bench in *Prajapati Ishwarbhai Joitaram v. State of Gujarat*, Letters Patent Appeal No.1350 of 2012 dated 20.03.2013, which dealt with the issue of reduction in cut-off marks to accommodate horizontal reservations.

29. Much argument has been made based upon the decision of this Court in *K. Manjusree v. State of Andhra Pradesh & Anr.*, (2008) 3 SCC 512 and the reference pending before the Constitution Bench in *Tej Prakash Pathak v. Rajasthan High Court.*, (2013) 4 SCC 540. On the facts of the case, we do not think that the said issue has any bearing, as held by this Court, while dealing with a case of arbitrary change in criteria, in *Ramjit Singh Kardam v. Sanjeev Kumar*, (2020) 20 SCC 209, “Was the Chairman competent to take policy decisions like “selection criteria” or “mode of selection”?

51. As per the notification extracted above it is the Commission, which “shall devise the mode of selection and fix the criteria for selection”. The said power has to be exercised in a reasonable and fair manner to advance the purpose and object of selection. Even if it is assumed for the sake of the argument that the Commission can change the criteria of selection from time to time, the said power has to be exercised not in an arbitrary manner.

52. We may in this context refer to the three-Judge Bench judgment of this Court in *T.N. Computer Science B.Ed. Govt. Welfare Society (1) v. Higher Secondary School Computer Teachers Assn.* [(2009) 14 SCC 517 : (2010) 1 SCC (L&S) 367] In the above case computer instructors were appointed on contract basis to various schools. The Government decided to hold a special test by the Teacher Recruitment Board for selection of computer instructors. On 10-10-2008 the State Government took decision that minimum qualification marks would be 50%. Special recruitment test was announced as 12-10-2008. On the night of 12-10-2008 a list of candidates for appointment to the post of computer instructors based on the special recruitment test was put on the internet. While publishing the said marks of the candidates, it was made clear that all candidates who have secured 35% marks in the test would be called for certificate verification. The State Government reduced the minimum qualifying marks to 35%. This Court did not approve the reduction of

qualifying marks from 50% to 35%. The following was laid down in para 33 : (SCC p. 523) “33. We, however, cannot hold that the subsequent decision of the Government thereby changing qualifying norms by reducing the minimum qualifying marks from 50% to 35% after the holding of the examination and at the time when the result of the examination was to be announced and thereby changing the said criteria at the verge of and towards the end of the game as justified, for we find the same as arbitrary and unjustified. This Court in Hemani Malhotra v. High Court of Delhi [(2008) 7 SCC 11 : (2008) 2 SCC (L&S) 203] , has held that in recruitment process changing rules of the game during selection process or when it is over are not permissible.”

53. The learned counsel for the appellant has submitted that judgments of this Court laying down the criteria for selection cannot be changed during the course of selection has been referred to a larger Bench by a judgment of this Court in Tej Prakash Pathak v. High Court of Rajasthan [(2013) 4 SCC 540 : (2013) 2 SCC (L&S) 353], hence the judgment of this Court laying down the criteria cannot be changed during the course of the selection is yet to be tested. For the purposes of the present case we proceed on the assumption that even if the criteria can be changed by selecting body from time to time, the said change cannot be affected arbitrarily. The present is a case where change in criteria has been affected and altered arbitrarily with the object of downgrading and not upgrading the standards of selection. The High Court did not commit any error in not upholding the change of criteria effected after start of selection process with which finding we fully concur.”

30. The decision to reduce the cut-off marks is not based upon an objective-criteria, namely, the suitability of the candidate to the post, but for extraneous reason, i.e., to accommodate otherwise ineligible candidates. In other words, earlier cut-off marks were fixed on a conscious consideration of the marks required to be eligible for the post, which could not be reduced, unless there is a sound reason that the reduced marks also would be sufficient to be suitable for that post.

31. Having held that the order of the Division Bench of the High Court of Gujarat cannot be sustained in the eye of law, we are inclined to balance the equities and do justice by exercising our power under Article 142 of the Constitution of India. We agree with the submission of Mr. Vikas Singh, learned senior counsel, that the object behind the decision is laudable and the private respondents belong to the special category comprising of women, ex-servicemen and physically challenged. They are waiting to get their appointments for long years with fond hopes. They have the order of the Division Bench to their benefit which was occasioned by the policy decision of the State Government and the Selection Committee. Thus, we find the said submission merits moderation of the impact of our decision, at least insofar as the private respondents before us are concerned, as the others similarly placed being fence sitters cannot be extended the same benefit. Probably, they would have either moved on or got some other jobs.

32. In such view of the matter, taking note of the peculiar facts of the case, particularly in the light of our finding that the situation has been brought forth by Respondent Nos. 1 and 2 and the vacancies that still remain, we are inclined to issue a direction to them to consider accommodating the private respondents in their respective reserved category, provided they do not exceed the percentage of reservation made permissible, without upsetting the appointment of the appellants and others similarly placed and subject to their eligibility. On the question of inter-se seniority, we do not need

to delve much, as the order of the Division Bench stands set aside, and therefore, the private respondents are certainly new entrants, and hence cannot seek precedence. The appeals are allowed. No order as to costs.

33.All pending applications are disposed of.

.....J. (SANJIV KHANNA)J. (M. M. SUNDRESH) New Delhi,
February 20, 2023