HIGH COURT OF MADHYA PRADESH: JABALPUR

(Division Bench)

Writ Appeal No. 1011/2017

Madhya Pradesh Public Service Commission .....Appellant

Versus

Dr. Deepak Singh & others .....Respondents

WITH

Writ Appeal No. 1059/2017

Dr. Akhilesh Rathore .....Appellant

Versus

State of Madhya Pradesh & Others .....Respondents

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CORAM:

Hon'ble Shri Justice Hemant Gupta, Chief Justice

Hon'ble Shri Justice Vijay Kumar Shukla, Judge

PRESENT:

In W.A. No.1011/2017:

Shri Prashant Singh, Senior Advocate with Shri Anshul Tiwari, Advocate for the Appellant/M.P.P.S.C.

Shri Vishal Dhagat, Advocate for the Respondents/State.

Ms. Guncha Rasool, Advocate for the respondent-writ petitioner.

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In W.A. No.1059/2017:

Shri Naman Nagrath, Senior Advocate with Shri Anvesh Shrivastava, Advocate for the Appellant.

Shri Vishal Dhagat, Advocate for the Respondents/State.

Shri Prashant Singh, Senior Advocate with Shri Anshul Tiwari, Advocate for the Respondent No.3/M.P.P.S.C.

Ms. Guncha Rasool, Advocate for the Respondent No.4.

Whether Approved for Reporting: Yes
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Law Laid Down:

- ✓ Once the candidate has participated in the selection process knowing well the conditions thereof and without any protest and is subsequently found to be unsuccessful, he is estopped to dispute such conditions. The question of entertaining the writ petition challenging such examination would not arise. ***Relied*** *- (2017) 4 SCC 357 (Ashok Kumar v. State of Bihar); (2002) 6 SCC 127 (Chandra Prakash Tiwari v. Shakuntala Shukla)* and *(1986) Supp SCC 285 (Om Prakash Shukla v. Akhilesh Kumar Shukla).*
- ✓ The scheme of examination in the advertisement is specific that conditions and procedure of interview was to be made known to the candidates after the result of the written examination. The same cannot be treated as an additional condition.
- ✓ The minimal incentive of marks given to promote family planning keeping in view the problem of ever increasing population, whereby larger social object is sought to be achieved, cannot be made basis of challenge in the writ petition particularly when such clause is being applied for last more than 30 years and is not a recent benefit.

Significant Paragraphs: 12 to 18

Reserved on: 25.09.2018

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O R D E R

(Pronounced on this 5th day of October, 2018)

Per: Hemant Gupta, Chief Justice:

The challenge in the present intra-court appeals is to an order passed by the learned Single Bench on 10.08.2017 in W.P. No.3459/2016 (Dr. Deepak Singh v. State of M.P. and others) whereby the writ petition filed by writ-petitioner - Dr. Deepak Singh (here-in-after referred to as the writ petitioner) was allowed holding that the advertisement in question had no
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clause to grant benefit of 5% marks to the Green Card Holders, therefore, such condition cannot be imposed in the interview letter. Resultantly, the benefit of 5% marks in the interview was ordered not to come in the way of the writ-petitioner for selection on the post. Thus, both; the Public Service Commission as well as selected candidate, are in appeal.

2. The process of appointment of Homeopathy Medical Officer was initiated when advertisement dated 23rd September, 2013 was published. The important condition in bold in the front page of the advertisement is that the latest instructions in relation to advertisement can be seen on the website of the Public Service Commission.

3. The advertisement has 12 different conditions regarding the number of posts, reservation for each post, the pay scale, essential qualification etc. At serial No.12 there are three appendixes. The Appendix-I pertains to the conditions for relaxation in age. Appendix-II pertains to instructions to fill up the forms and Appendix-III pertains to scheme of written examination and the syllabus. In Appendix-I, Condition No.(2) relates to relaxation in age. The first condition is relaxation in age for two years in terms of Circular No. C-3-40/AA/84(3)1, dated 11.01.1985. The relaxation in age is given to Green Card holders (one who have undergone family planning operation). The Clause (2) thereof, is for relaxation in age up to five years to those candidates who have undergone marriage with Scheduled Caste/Scheduled Tribe/Other Backward Classes in terms of the Promotion of Inter-caste Marriage Scheme dated 29.06.1985. Clause (3) grants relaxation in age up to five years to those sports-persons who have been awarded Vikram Award as per Circular dated 03.09.1985. Appendix-II, pertains to written examination

and the procedure. Clause 8(2) of the said Appendix-II is to the effect that necessary conditions of the interview will be published along with the publication of the result of the written examination. The relevant clause 8(2) of Appendix-II, which is in Hindi, on being translated into English, reads as under:-

> "**8- Necessary instructions in relation to procedure pursuant to written examination**:
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> 01 *** *** ***
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> 02 All the necessary information in relation to interview shall be published along with the result of the examination. Hence, successful candidates may go through the complete information relating to interview along with the result of the examination and may download and fill up the police verification form, personal details form and attendance form as per instructions in the website of the Commission (www.mppsc.nic.in and www.mppsc.com). The aforesaid form and the enclosures of all necessary documents be submitted before the last date as fixed. Self-attested application submitted online may also be enclosed."

4. After the result of the preliminary examination was declared on 12/13th November, 2014, the letters were issued on 22.12.2014 for interview. In respect of the writ-petitioner, the interview was scheduled to be held on 13.01.2015. Condition No.2 in the said interview letter is to the effect that there is a policy of the State Government to grant 5% marks in interview to the Green Card Holders as a part of family welfare schemes. Such Green Card has to be produced in original along with one attested copy. Relevant clause, on being translated into English, reads as under:-

> "(2) **Relaxation for Encouragement**:
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> (1) Under the Family Welfare Programme, candidates holding the green cards are entitled to facility of 5% marks as additional marks by the Government. Hence, if you hold a green-card, you may produce the

> original at the time of interview (in addition, an attested copy of same be also produced). If the original green card is not produced, then you shall not be granted additional marks)."

5. After interview, the final result was declared on 14.02.2015 in which the writ-petitioner was unsuccessful. It is the said selection process which was challenged by the writ petitioner in the year 2016.

6. Learned Single Bench has allowed the writ petition on the ground that condition of 5% marks for interview shall be given to Grant Card Holders was not specified in the advertisement, therefore, such clause cannot be introduced.

7. It is not in dispute that condition of 5% marks for interview was introduced on 11.01.1985 simultaneously while granting age relaxation to the candidates holding Green Card. Such scheme of grant of 5% marks is in vogue since 1985. It is also not in dispute that such condition was not challenged by the unsuccessful candidate soon after the interview letter was received by the writ-petitioner.

8. Therefore, in view of the said fact, the argument of the learned counsel for the appellants is that writ-petitioner is the fence-sitter. He never objected to the condition of 5% marks for the interview as additional marks before appearing in the interview. He competed and invoked the writ jurisdiction after he remained unsuccessful in selection process. It is explained that the interview was of 25 marks and the 5% of the interview marks is 1.5 marks. Therefore, the writ petitioner is estopped to challenge the selection of the selected candidates. The reliance is placed upon a decision of the Supreme Court reported as **(2002) 6 SCC 127 (Chandra**

Prakash Tiwari and others v. Shakuntala Shukla and others) and three Judge Bench judgment reported as **(2017) 4 SCC 357 (Ashok Kumar and another v. State of Bihar and others**).

9. It is also argued that the scheme of the advertisement was to apprise the candidates of the procedure for written examination and the syllabus thereof. The procedure for interview and the condition thereof was to be communicated subsequently as is mentioned in Clause 8(2) of the Appendix-II. Therefore, there was no stage for communicating that 5% marks would be given to the candidates for the interview at any stage prior to finalization of result of the written examination. The scheme of examination was specific that the conditions and procedure of interview was to be made known to the candidates after the result of the written examination, which condition is part of the advertisement. Therefore, it cannot be said that the additional condition was imposed. It is contended that such condition was introduced to promote family planning keeping in view the problem of ever increasing population. Since larger social object is sought to be achieved by such minimal incentive, therefore, such incentive cannot be made basis of challenge in the writ petition. Such clause is being applied for last more than 30 years and is not a recent benefit.

10. It is also contended that the appellant is working from the date of his appointment in the year 2016 and that at this stage, to oust him from service will cause serious prejudice to him for no fault of his as he had participated in the selection process on the basis of the recommendation of the Public Service Commission which is based upon a policy decision taken way back in the year 1985.

11. On the other hand, learned counsel for the respondent relies upon a judgment reported as **(2008) 3 SCC 512 (K. Manjusree v. State of Andhra Pradesh and Another)** wherein the appointment to the post of District and Sessions Judges in the State of Andhra Pradesh was subject matter of consideration. In the aforesaid case, minimum qualifying marks for the written examination was subsequently introduced midway the selection process. It was found that the entire process of selection from the stage of holding interview, finalization of list of candidates was done by the selection committee on the basis that there were no minimum marks for interview. In these circumstances, it was held that game was played under the rule that there were no minimum marks for interview. In support of her arguments, learned counsel also relied upon another decision of the Supreme Court reported as **(2014) 14 SCC 50 (Renu and others v. District and Sessions Judge, Tis Hazari Courts, Delhi and another)**.

12. We have heard learned counsel for the parties and find that the principle that the rules of game cannot be changed after the game has begun is not applicable to the facts of the present case. The advertisement clearly distinguished between the process of written examination and interview. The details of written examination and procedure thereof were published whereas the procedure and details of interview was to be uploaded and/or circulated after the result of the written examination was declared. The circular to grant 5% marks for interview was not issued after the advertisement was published or written result was declared. It was in existence since the year 1985. The writ-petitioner was made aware of such circular when such condition was communicated to him in the interview letter. The petitioner

did not raise any little finger about such condition being introduced at that time. The petitioner had more than three weeks before the interview from the date of the issuance of the interview letter. Thus, the petitioner was fence-sitter who participated in the interview process knowing fully well that there is a condition of 5% marks for the interview to the Green Card Holders. Once the writ-petitioner participated knowing well the said condition, he is estopped to dispute such condition.

13. A three Judge Bench in a judgment reported as **(1986) Supp SCC 285 (Om Prakash Shukla v. Akhilesh Kumar Shukla and others)** held that when a candidate appears in the examination without protest and is subsequently found to be not successful in the examination, question of entertaining the petition challenging such examination would not arise. The relevant extract of the decision reads, as under:-

> "**24**. Moreover, this is a case where the petitioner in the writ petition should not have been granted any relief. He had appeared for the examination without protest. He filed the petition only after he had perhaps realised that he would not succeed in the examination. The High Court itself has observed that the setting aside of the results of examinations held in the other districts would cause hardship to the candidates who had appeared there. The same yardstick should have been applied to the candidates in the District of Kanpur also. They were not responsible for the conduct of the examination.

14. In **Chandra Prakash Tiwari** (supra), the Supreme Court examined as to when the plea of estoppel by conduct can be available in respect of challenge to appointment after due participation and interview. Considering the judgment in **Om Prakash Shukla**'s case (supra), the Court held as under:-

"**32**. In conclusion, this Court recorded that the issue of estoppel by conduct can only be said to be available in the event of there being a precise and unambiguous representation and it is on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or status - the situation, however, presently does not warrant such a conclusion and we are thus not in a position to lend concurrence to the contention of Dr. Dhawan pertaining to the doctrine of estoppel by conduct. It is to be noticed at this juncture that while the doctrine of estoppel by conduct may not have any application but that does not bar a contention as regards the right to challenge an appointment upon due participation at the interview/ selection. It is a remedy which stands barred and it is in this perspective in Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors., [1986] Supp. SCC 285 a Three Judge Bench of this Court laid down in no uncertain terms that when a candidate appears at the examination without protest and subsequently found to be not successful in the examination, question of entertaining a petition challenging the said examination would not arise.

33. Subsequently, the decision in Om Prakash stands followed by a later decision of this Court in *Madan Lal and others v. State of J & K and others*, [1995] 3 SCC 486, wherein this Court stated as below: (SCC p. 493, paras 9-10)

> "*9*. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he

cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of *Om Prakash Shukla v. Akhilesh Kumar Shukla, [1986] Supp SCC 285* it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

10. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition we cannot sit as a court of appeal and try to reassess the relative merits of the candidates concerned who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed, in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a court of appeal over the assessment made by such an expert committee."

34. There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seem to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not “palatable” to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process.”

15. The principle laid down in **Chandra Prakash Tiwari** (supra) has again been reiterated in another three Judge Bench judgment in **Ashok Kumar** (supra) wherein the Court held as under:-

> "**13**. The law on the subject has been crystalized in several decisions of this Court. In Chandra Prakash Tiwari v. Shakuntala Shukla [2002] 6 SCC 127, this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In Union of India v. S. Vinodh Kumar [(2007) 8 SCC 100], this Court held that :
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> > "18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same... (See Munindra Kumar v. Rajiv Govil [(1991) 3 SCC 368] and Rashmi Mishra v. M.P. Public Service Commission [(2006) 12 SCC 724])."
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> **14**. The same view was reiterated in Amlan Jyoti Borroah v. State of Assam (2009) 3 SCC 227 wherein it was held to be well settled that candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.
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> **15**. In Manish Kumar Shahi v. State of Bihar [(2010) 12 SCC 576], the same principle was reiterated in the following observations :(SCC p.584, para 16)
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> > "16. We also agree with the High Court [Manish Kumar Shahi Vs. State of Bihar, 2008 SCC OnLine Pat 321] that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction

> of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the judgments in Madan Lal v. State of J. and K. [(1995) 3 SCC 486], Marripati Nagaraja v. State of Andhra Pradesh [(2007) 11 SCC 522], Dhananjay Malik v. State of Uttaranchal [(2008) 4 SCC 171], Amlan Jyoti Borooah v. State of Assam [(2009) 3 SCC 227] and K.A. Nagamani v. Indian Airlines and Ors. [(2009) 5 SCC 515]."

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

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

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

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

Kumar Pandey [(2015) 11 SCC 493], this Court held that: (SCC p. 500, Para 17)

> "17. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."
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> This principle has been reiterated in a recent judgment in Madras Institute of Development Studies v. S.K. Shiva Subaramanyam [(2016) 1 SCC 454]."

16. In view of the aforesaid judgments, the writ-petitioner was aware of the fact that there is incentive of 1.5 marks to the candidates who possess Green Card certificate but still the writ-petitioner did not dispute such condition.

17. The argument that such condition should have been made explicitly clear in the advertisement is not tenable for the reason, as discussed above, as the procedure and process of interview was to be circulated only after declaration of the result of the examination. Therefore, the writ-petitioner is estopped to challenge the appointment of the selected candidate for the reason that he had been granted weightage of 1.5 marks while preparing final merit list.

18. In respect of the judgments rendered in **K. Manjusree** (supra) and **Renu** (supra) referred to by the learned counsel for the respondents, they are

the judgments where additional condition was imposed for the first time midway through the selection. The said judgments are not applicable to the facts of the present case when the benefit of social welfare scheme has been extended to certain candidates, which is based upon the old policy decision of 1985. It may be noticed that question as to whether there could be alteration in the selection criteria after selection process has commenced, is pending consideration before the Larger Bench in a judgment reported as **(2013) 4 SCC 540 (Tej Prakash Pathak v. Rajasthan High Court**). Therefore, the argument based upon change of selection criteria after advertisement has not attained finality nor such question arises in the present appeal. In the present case, the advertisement itself contemplated circulation of the conditions of the interview after result of the written examination.

19. In view of the foregoing reasons, we find that the order passed by the learned Single Bench is not sustainable. Consequently, the same is set aside by allowing the present appeals. As a result thereof, the writ petition is **dismissed.**

20. The writ appeals are **allowed** and disposed of.

(HEMANT GUPTA)
CHIEF JUSTICE

(VIJAY KUMAR SHUKLA)
JUDGE

S/