

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 13823 of 2015****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS JUSTICE SONIA GOKANI**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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HEENABEN PRAVINSINH CHAUHAN**Versus****UTTAR GUJARAT VIJ COMPANY LTD & 37 other(s)**

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Appearance:**MR JIGAR G GADHAVI for the Petitioner(s) No. 1****MALAV M MULANI(8844) for the Respondent(s) No. 33****MR DIGANT M POPAT(5385) for the Respondent(s) No.****10,11,13,15,16,17,18,2,20,21,22,23,24,25,26,27,29,30,31,32,33,35,36,6,7,8,9****MR DIPAK R DAVE(1232) for the Respondent(s) No. 1****NOTICE SERVED(4) for the Respondent(s) No. 12,14,19,28,3,34,37,38,4,5**

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CORAM: HONOURABLE MS JUSTICE SONIA GOKANI**Date : 06/02/2017****ORAL JUDGMENT**

1. Petitioners had applied on-line for the post of
Junior Engineer (Vidhyut Sahayak). After

completing necessary formalities, their applications came to be confirmed. The petitioners applied in the reserved category.

2. It is the case of the petitioners that the provisions of reservation of 30% for women in the said recruitment was provided as per the rules and regulations. The petitioners since were not selected to the said posts, those reserved seats have remained vacant till date. The petitioners made several efforts by visiting the office of the respondent. However, nothing was answered.

3. It is the case of the petitioner No.1 that despite written application to the office of respondent, regarding status of the recruitment, she came to know that the selection list of the successful candidate is prepared which does not contain names of the women candidates for reservation.

4. Before list came to be published, which did not indicate the names of women for whom reservation was provided, stage by stage allotment of merit

list was prepared and the reserved posts for women were not filled-in. The cut-off score was 65%. The petitioner made several efforts pointing out that there is no provision of cut off score for the post of reserved category of women. Therefore, she could be selected and cut-off score should be introduced at a later stage. Resultantly, it has aggrieved the petitioner who has alleged against such arbitrary bench-mark imposed by the respondent authority subsequent to the initiation of the process. Therefore, she has sought the following reliefs:-

"6. That the petitioner, therefore, most humbly prays that:-

- (A) This Honourable Court may be pleased to issue writ of mandamus and/or any other writ, order or direction in the nature of mandamus directing the respondent to consider the case of the petitioner and appoint the petitioner to the said post of Junior Engineer(Vidhyut Sahayak)-Electrical in accordance with law.
- (B) Pending admission hearing and final disposal of this petition, the Honourable Court may be pleased to direct the respondent to keep the posts reserved for women category vacant.
- (C) Such other and further relief/s as are deemed fit in the facts and circumstances of this case may kindly be granted."

5. On issuance of notice, affidavit-in-reply has been filed by the Industrial Relations Officer

the respondent Uttar Gujarat Vij Company Ltd. ("the UGVCL" for short) Those who have been selected and who are likely to be affected by the outcome of the petition had been impleaded as party respondent. The affidavit-in-reply indicates that the petitioner applied on-line for the post of Junior Engineer(Vidhyut Sahayak). Pursuant to the advertisement, she applied for the unreserved category in the written examination. The UGVCL has adhered to the women reservation policy of the State Government as per the circular issued by the holding company i.e. the UGVCL. The petitioner had appeared in the written examination and has secured 56% marks. It is further urged that the company decides the cut-off marks looking to the result of the examination. It is not possible for the company to decide the cut-off marks in view of the fact that cut-off marks would be decided only after the result of the examination. Even otherwise, it cannot be said that prescription of cut-off marks is changing the rule of the game. It is for the competent

authority to decide as to whether what should be proper marks to decide the cut-off marks for consideration of the candidates. The examination came to be conducted, admittedly, at L.D. College of Engineering on 11.10.2014 and it was decided by the authority that cut-off marks for the unreserved and SEBC category shall be 65 marks and for SC category it should be 62 marks and for ST category it should be 58 marks. So far as the petitioner is concerned, since she has secured far less than the cut-off marks, she cannot raise any grievance. The petitioner is general category candidate for the purpose of deciding the cut-off marks, a detailed note have been put up before the competent authority and the same has been approved at various levels. Therefore, also it cannot be said that at the whims and fancies of one officer, cut-off marks have been decided for succeeding in the written examination. It is further his say that the projected vacancies increased to 29 in numbers, in all 33 appointments have been issued out of list of 56 candidates who were in the merit

list. In all, two women candidates have been appointed, out of which one candidate is of unreserved category and one candidate is of SC category. It is further his say that in all 6 candidates from SC, 4 from ST, 11 candidates from SEBC and 12 candidates from unreserved category have been given appointment. Further affidavit has been filed by the Executive (HR) of the respondent UGVCL stating that four vacancies had arisen on the post of Junior Engineer (Vidhyut Sahayak-Electrical). The UGVCL has operated the select list and appointed four persons on 14.10.2015. Thus, in all 37 candidates from the select list have been appointed on the post of Junior Engineer (Vidhyut Sahayak-Electrical).

6. Affidavit-in-rejoinder has been filed by the petitioner. It is urged that it defies logic that cut-off is decided by the authority after the result of the examination, which is nothing but a clear cut discrimination and arbitrariness as it paves the way in favour of some of the candidates and prejudicially affect others. She

submits that cut-off marks of 65% is fixed for women as well as men. The determination of the cut off marks cannot be made such that the women fail to get appointment and thereby the very reservation policy may fail. The said action of prescribing cut off marks is, therefore, against Articles 15 and 16 of the Constitution of India.

7. Both the sides have been heard at length. They have also in support of their submissions, placed on record the judgments.

8. Taking firstly the decision of ***State of Haryana vs. Subash Chander Marwaha, 1974 (3) SCC 220*** where the Division Bench has held that the Government in case of selection on the post of Subordinate Judges as per the Punjab Civil Service (Judicial Branch) Rules was empowered to fix higher score for selection than marks required for eligibility. It also held that candidate on select list has no right to claim appointment on existing vacancies. While so holding the Court in the matter before the Apex Court, 40 candidates had passed the examination

with minimum score of 45%. Their names published in the Government Gazette as required by Rule 10(1) is already referred to. It is not disputed that mere entry in the list of the name of a candidates does not give him the right to be appointed. There were 15 vacancies to be filled, but, that does not give the candidate concerned a right to be appointed. It may so happen that the Government for financial or other administrative reasons may not fill up any vacancies. In such a case the candidates, even the first in the list, will not have a right to be appointed. The list is merely to help the State Government in making the appointments showing which candidates have the minimum qualifications under the Rules. Under the Constitution, according to the Apex Court, it is the State Government which alone can make the appointments. The stage for selection for appointment comes thereafter, and it is not dispute that, under the Constitution, it is the State Government alone which can make the appointments. The High Court does not come into

the picture for recommending any particular candidate. Relevant paragraphs of the said judgment are reproduced as under:-

"9. It must be remembered that the petition is for a mandamus. This Court has pointed out in *Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College*(") that in order that mandamus may issue to compel an authority to do something, it must be shown that the statute imposes a legal duty on that authority and the aggrieved party has a legal right under the statute to enforce its performance. Since there is no legal duty on the State Government to appoint all the 15 persons who are in the list and the petitioners have no legal right under the rules to enforce its performance the petition is clearly misconceived.

10. It was, however, contended by Dr. Singhvi on behalf of the respondents that since rule 8 of Part C makes candidates who obtained 45 per cent or more in the competitive examination eligible for appointment, the State Government had no right to introduce a new rule by which they can restrict the appointments to only those who have scored not less than 55%. It is contended that the State Government have acted arbitrarily in fixing 55 per cent as the minimum for selection and this is contrary to the rule referred to above. The argument has no force. Rule 8 is a step in the preparation of a list of eligible candidates with minimum qualifications who may be considered for appointment. The list is prepared in order of merit. The one higher in rank is deemed (1) [1962] (2) Suppl. S.C.R. 144. to be more meritorious than the one who is lower in rank. It could never be said that one who tops the list is equal in merit to the one who,, is at the bottom of the list. Except that they are all mentioned in one list, each one of them stands on a separate level of competence as compared with another. That is why rule

10(ii), Part C speaks of "selection for appointment". Even as there is no constraint on the State Government in respect of the number of appointments to be made, there is no constraint on the Government fixing a higher score of marks for the purpose of selection. In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high-standards of competence to fix a score which is much higher than the one required for mere eligibility. As shown in the letter of the Chief Secretary already referred to, they fixed a minimum of 55% for selection as they had done on a previous occasion. There is nothing arbitrary in fixing the score of 55% for the purpose of selection, because that was the view of the High Court also previously intimated to the Punjab Government on which the Haryana Government thought fit to act. that the Punjab Government later on fixed a lower score is no reason for the Haryana, Government to change their mind. This is essentially a matter of administrative policy and if the Haryana State Government think that in the interest of judicial competence persons securing less than 55% of marks in the competitive examination should not be selected for appointment, those who get less than 55% have no right to claim that the selections be made of also those candidates who obtained less than the minimum fixed by the State Government. In our view the High Court was in error in thinking. that the State Government had somehow contravened rule 8 of Part C"

9. The Apex Court in the case of **Yogesh Yadav vs. Union of India, 2013(14)SCC 623** while making appointment to the post of Deputy Director (Law) in the OBC category, was considering the case where selection process had changed. There was

no selection of the appellants due to altering the prescribed mode of selection process, which according to the Court, was impermissible. After initiation of recruitment process, that change was held impermissible. Whether fixation of benchmark would amount to change in the criteria of selection in the midstream when there was no such stipulation in that regard in the advertisement, it held that benchmark was not stipulated for giving appointments. What was done in the instant case was that a decision was taken to give appointments only to those persons who have secured 70% marks or above marks in the unreserved category and 65% or above marks in the reserved category. In absence of any rule on this aspect in the first instance, this does not amount to changing the "rules of the game". The High Court rightly held that it was not a situation where securing of minimum marks was introduced which was not stipulated in the advertisement, standard was fixed for the purpose of selection. There was no change in the criteria of selection which remained of 80 marks

for written test and 20 marks for interview without any subsequent introduction of minimum cut off marks in the interview. It is the short listing which is done by fixing the benchmark to recruit best candidates on rational and reasonable basis. In the instructions given to all the candidates it was mentioned that the selection to all the posts advertised would be based on written test followed by an interview. Written test would carry 80% and interview would have 20% of the marks. The written test was to be in two parts, first part, based on multiple choice questions and there was no negative marks inasmuch as 30 marks would be distributed to the descriptive questions on the subject of specialization of candidates within the broad outline of the subject of specialization as indicated in the advertisement. It was further mentioned that the candidates who had secured 50% marks in the test would not be called for the interview. However, for the candidates belonging to reserved category the cut-off marks were fixed at 40% of the total marks. The

written examination since was of 80% marks, the appellants who secured more than 50% marks were to be called for interview and the result of which was published on the website. One of the candidates secured only 2 marks out of 20 marks in the interview and the total marks secured by him were 53 out of 100 marks. The respondent had fixed benchmark of 70% marks for the general category and 65 marks for the reserved category. Since the total marks obtained by all these appellants were less than 65, that was the reason for their non-selection. This fixation of benchmarks which has agitated the appellants and according to them amounted to changing the selection procedure mid-way, was urged to be illegal. It is emphasized that after the advertisement, the law did not permit the appellants to change the rules of the game after the game had started.

10. In such circumstances, the Apex Court examined various decisions and concluded thus:-

"14. Instant is not a case where no minimum marks prescribed for viva voce and this is sought to be done after the written test. As

noted above, the instructions to the examinees provided that written test will carry 80% marks and 20% marks were assigned for the interview. It was also provided that candidates who secured minimum 50% marks in the general category and minimum 40% marks in the reserved categories in the written test would qualify for the interview. Entire selection was undertaken in accordance with the aforesaid criterion which was laid down at the time of recruitment process. After conducting the interview, marks of the written test and viva voce were to be added. However, since bench-mark was not stipulated for giving the appointment. What is done in the instant case is that a decision is taken to give appointments only to those persons who have secured 70% marks or above marks in the unreserved category and 65% or above marks in the reserved category. In the absence of any rule on this aspect in the first instance, this does not amount to changing the "rules of the game". The High Court has rightly held that it is not a situation where securing of minimum marks was introduced which was not stipulated in the advertisement, standard was fixed for the purpose of selection. Therefore, it is not a case of changing the rules of game. On the contrary in the instant case a decision is taken to give appointment to only those who fulfilled the bench-mark prescribed. Fixation of such a bench-mark is permissible in law. This is an altogether different situation not covered by Hemani Malhotra case (AIR 2008 SC 2103 : 2008 AIR SCW 3205).

15. The decision taken in the instant case amounts to short listing of candidates for the purpose of selection/appointment which is always permissible. For this course of action of the CCI, justification is found by the High Court noticing the judgment of this Court in the State of Haryana v. Subash Chander Marwaha and Ors. (1974) 3 SCC 220 : (AIR 1973 SC 2216). In that case, Rule 8 of the Punjab Civil Service (Judicial Branch) Service Rules

was the subject matter of interpretation. This rule stipulated consideration of candidates who secured 45% marks in aggregate. Notwithstanding the same, the High Court recommended the names of candidates who had secured 55% marks and the Government accepted the same. However, later on it changed its mind and High Court issued Mandamus directing appointment to be given to those who had secured 45% and above marks instead of 55% marks. In appeal, the judgment of the High Court was set aside holding as under:

"It is contended that the State Government have acted arbitrarily in fixing 55 per cent. as the minimum for selection and this is contrary to the rule referred to above. The argument has no force. Rule 8 is a step in the preparation of a list of eligible candidates with minimum qualifications who may be considered for appointment. The list is prepared in order of merit. The one higher in rank is deemed to be more meritorious than the one who is lower in rank. It could never be said that one who tops the list is equal in merit to the one who is at the bottom of the list. Except that they are all mentioned in one list, each one of them stands on a separate level of competence as compared with another. That is why Rule 10(ii), Part C speaks of "selection for appointment". Even as there is no constraint on the State Government in respect of the number of appointment to be made, there is no constraint on the Government fixing a higher score of marks for the purpose of selection. In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high-standards of competence to fix a score which is much higher than the one required for mere eligibility."

16. Another weighty reason given by the High Court in the instant case, while approving the aforesaid action of the CCI, is that the intention of the CCI was to get more

meritorious candidates. There was no change of norm or procedure and no mandate was fixed that a candidate should secure minimum marks in the interview. In order to have meritorious persons for those posts, fixation of minimum 65% marks for selecting a person from the OBC category and minimum 70% for general category, was legitimate giving a demarcating choice to the employer. In the words of the High Court:

"In the case at hand, as we perceive, the intention of the Commission was to get more meritorious candidates. There has been no change of norm or procedure. No mandate was fixed that a candidate should secure minimum marks in the interview. Obtaining of 65% marks was thought as a guidelines for selecting the candidate from the OBC category. The objective is to have the best hands in the field of law. According to us, fixation of such marks is legitimate and gives a demarcating choice to the employer. It has to be borne in mind that the requirement of the job in a Competition Commission demands a well structured selection process. Such a selection would advance the cause of efficiency. Thus scrutinized, we do not perceive any error in the fixation of marks at 65% by the Commission which has been uniformly applied. The said action of the Commission cannot be treated to be illegal, irrational or illegitimate."

17. It is stated at the cost of repetition that there is no change in the criteria of selection which remained of 80 marks for written test and 20 marks for interview without any subsequent introduction of minimum cut off marks in the interview. It is the short listing which is done by fixing the bench-mark, to recruit best candidates on rational and reasonable basis. That is clearly permissible under the law. (M.P. Public Service Commission v. Navnit Kumar Potdar and Anr. (1994) 6 SCC 293) : (AIR 1995 SC 77 : 1994 AIR SCW 4088)."

11. This decision is very clear where minimum marks had been prescribed at the time of advertisement. However, later on, the committee was of the opinion that overall reasons of the Board is necessary for better selection. The Court distinguished the facts from the decisions of *Himani Malhotra vs. High Court of Delhi*, (2008) 7 SCC 11 and *K.Manjusree vs. State of A.P.*, (2008) 3 SCC 512.

12. Admittedly, in the instant case, there was no prescription of any mark in the advertisement. Neither the rules nor any guidelines provided for any minimum marks as only one written test is conducted. It is admitted in the written submissions so also on the specific query raised by the learned advocate for the petitioner that the minimum prescription of the marks had been done after result has been obtained of the written examination. It is only with a view to do the comparative merit and decide for better selection that the minimum marks had been

prescribed.

13. In the instant case, in the advertisement to the post of Junior Engineer(Vidhyut Sahayak), 30% seats have been kept reserved for women belonging to reserved category as is provided by a notification of the General Administrative Department of 9.4.1997 in the rules made which are called Gujarat Civil Services (Reservation of Posts for Women) Rules, 1997. Applications were invited for the post of Junior Engineer with the qualification of B.Ed.,B.Tech. or equivalent degree in Engineering from UGC or recognized University of UGC with minimum 60% marks for unreserved category candidates and 55% marks for reserved category candidates. Advertisement does not prescribe anywhere as to what kind of examination is needed to be conducted. According to respondent-UGVCL, as per the practice in UGVCL, company decides cut-off marks looking to the result of the examination. It is not possible to decide cut-off marks before the result in view of the fact that cut-

off marks would be decided only after result of the examination. It is also submitted that looking to the result of the written examination, the competent authority needs to decide as to what should be proper marks which should be decided on cut-off for consideration of the candidates. It is always after deciding of cut-off marks. Thus, after declaration of result there may not be any change in the recruitment rules or addition of criteria.

14. The written examination was conducted at L.D. Engineering College on 11.10.2014 and looking to the result, it was decided by the competent authority that cut-off marks for unreserved and SEBC category shall be 65 marks and for SC category it should be 62 marks, whereas ST category cut-off marks was prescribed at 58 marks. The petitioner is in unreserved category and the entire list of unreserved candidates had been prepared who secured cut-off marks, which had been decided by the authority. It is also emphasized at the level of DGM, AGM, GM, Chief Engineer (Operations) and Managing

Director that the cut-off has not been decided at the whims and fancies of one officer.

15.As already held by the Apex Court in the case of **Yogesh Yadav** (supra) every authority has a right to fix the benchmark if there is an objective to select the best in the concerned field. In the selection process, this Court cannot be oblivious of the fact that in the advertisement in the case of **Yogesh Yadav** (supra), written test carried 80% marks and interview carried 20% marks. It was specified that those from general category who do not secure 50% marks or from reserved category 40% of marks would not be called for the interview and thus, cut-off marks for the unreserved category and for reserved category was 40% marks. There was no minimum marks prescribed. Of course, in the interview, the interview committee was not shown the marks of the written examination and the aggregate of the two was considered for final selection where benchmark was permitted.

16.It would be apt to remember the case of **K.Manjusree vs. State of A.P.**(supra) where it

was held that procedure prescribing minimum marks was not permissible at all after the written test was conducted, it has been held that authority making rules and regulating the selection can prescribe by rules the minimum marks both for written examination and viva voce, but when minimum marks are not prescribed, before commencing of the selection process, the authority concerned cannot add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. As can be noticed here that at the time of initiation of selection process, there was no stipulation of minimum marks and after written examination, benchmarks have been set.

17. The petitioner belongs to unreserved category and claims 30% of reservation for women. There cannot be any relaxation so far as marks to be obtained by the unreserved category candidates is concerned and hence, the marks which otherwise are meant for unreserved category shall have to be matched by the women candidates who would otherwise claim 30% of reservation.

18. As the detailed discussion made hereinabove, the benchmarks is permissible and raising of the bar is also made permissible for better efficiency as long as there is strict adherence to the rules and regulations.

19. Here, surprisingly there is no cut off marks prescribed and it is only at the end of selection process, that the authority decided the cut off marks, the authority can be permitted to raise the bar or set the benchmark and select better talents, however, with no prescription of minimum marks at all and with no cut-off marks, this can lead to a complete arbitrariness. Admittedly, the petitioner does not fulfill the benchmark which has been set by the authority for unreserved category. She having secured only 65% marks which is nowhere close to 65% which has been set for unreserved category, but, admittedly, this is a benchmark set without any cut-off marks decided before the written test has been conducted.

20. Above referred decisions are very clear that minimum marks needed to be prescribed at the time of advertisement or in the rules before the game begins. However, later on, the committee can opine and on overall consideration, the Board is permitted

to have better selection. In the decision of **Malhotra**(supra) the Supreme Court had frowned upon changing of the criteria during the course of selection process.

21. Admittedly, in the instant case, there was no prescription of any minimum or cut off marks in the advertisement. Neither the rules nor any guidelines provided for any minimum marks. There is one written test to be conducted. It is admitted in the written statement so also on the specific query raised to this Court that the minimum prescription of the marks has not been set for the written examination. It is only with a vie to do the comparative merit and for better selection that the marks have been prescribed, which are to be treated as benchmarks.

22. Considering the fact that for all the persons in unreserved category, 65% marks is decided and as the petitioner has only 58% of marks, she is not selected in unreserved category where 30% was meant for women. There is no discrimination towards her, as she was even otherwise required to obtain 65% marks in unreserved category. There was no possibility of any relaxation in the basic criteria of selection for the candidates belonging to unreserved category.

23. Bearing in mind the fact that years after years, the board choses the benchmark after the process, even though permitted, for better quality of candidates, without any disturbance of result in this petition, it is being directed that there should be necessary changes in the rules for prescribing minimum or set such minimum criteria before the selection process begins.

24. In competitive examination also, minimum criteria is prescribed because otherwise it may give way to a very sub-standard quality of candidates to be selected and, if left to the board to select a benchmark without the minimum criteria, it may sometimes act in discriminatory way to select candidates without very low percentages. Therefore, having set the benchmark for higher percentage of marks for all the categories, no indulgence is shown, for the future purpose, it is being directed that the respondents shall follow the decision discussed hereinabove and make it more clear and transparent for the candidates.

25. Petition stands disposed of accordingly.

(MS SONIA GOKANI, J.)

SUDHIR s