

**Surendra Kumar and ors. Vs. State of Rajasthan and anr.**

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**Court :** Rajasthan

**Decided On :** Aug-30-2001

**Reported in :** [2001(91)FLR1048]; 2001(3)WLC506; 2002(5)WLN492

**Judge :** V.S. Kokje and; Khem Chand Sharma, JJ.

**Acts :** Rajasthan Panchayat Samities and Zila Parishad Service Rules, 1959

**Appeal No. :** D.B. Civil Special Appeal (W) No. 596 of 1997

**Appellant :** Surendra Kumar and ors.

**Respondent :** State of Rajasthan and anr.

**Advocate for Def. :** Manish Bhandari and; B.C. Chirania, Advs.

**Advocate for Pet/Ap. :** Y.C. Sharma, Adv.

**Disposition :** Appeals allowed

**Judgement :**

**Kokje, J.**

1. These two appeals raise a similar question and therefore, are being decided together:

2. In appeal No. 596/97, there are nine appellants, but appellant in Government service and the result of the appeal is not going to affect them. The surviving appellant No. 2 Jagdish Prasad, appellant No.5 Hemant and appellant No.6 Subhash Chandra will only be affected by the result of the appeal and therefore, for all practical purposes, they are the only contesting appellants. Likewise, in Appeal No. 828/97, out of the seven appellants, Appellant Nos. 3, 4, 5, 6 and 7 have been absorbed in the government service and appellant No. 1 Puran and appellant No.2 Om Prakash Dhaka are the only contesting appellants who will be affected by the result of the appeal.

3. In both the special appeals the writ petitioners alleged that they had applied for being appointed as Primary School Teacher as they were eligible for the post under the Rajasthan Panchayat Samitis and Zila Parishad Service Rules, 1959. All of them had passed their Secondary School Examination from the Board of Secondary Education and had also passed Higher Secondary, B.A., B.Ed, examinations. After obtaining higher qualifications than the Higher Secondary examination, they again appeared at the Secondary examination for improving their marks and division as per the provisions and regulations of the Board of Secondary Education. Rajasthan, Ajmer. Their grievance is that the marks obtained by them at such Secondary Examination subsequently taken are not being reckoned by the respondents for determination of their merit and the respondents are insisting that the marks obtained by them at the original examination will only be counted.

4. Appellants also submitted that a circular was issued by the State Govt. on 5.5.93 in exercise of powers Under Rule 17(2) of the Rules, in which no mention was made about the condition that the marks obtained at the original examination will only be taken into consideration. On 24.7.95, another circular in exercise of the same power was issued without specifying that the marks obtained at the original Secondary/ Higher Secondary examination will only be considered. On the contrary, this circular in para 7 (b) stated that if a candidate produces a mark-sheet for the purpose of improvement of division/marks before the last date of application or before the process for determination of merit starts, it shall be considered while determining merit. This clearly indicated that the marks obtained

at the subsequent examination for improvement of division/improvement of marks were to be considered for determining merit. These instructions were in force on the date of the relevant advertisement. On 20th July, 1996, another circular was issued in exercise of powers Under Rule 17 of the Rules which also provided for submitting the mark-sheet of the subsequent examination taken for the improvement of division/improvement of marks before the last date of application or before commencement of the process of determination of merit.

5. Appellants case is that because of the circular dated 20.7.1996, their revised marks are not being taken into consideration and because of that, employment has been denied to them. Learned Single Judge has turned down the contention of the appellants on the ground that there was no justification for considering the improved merit as reflected in the marks obtained in the second attempt by a candidate taken after a long lapse of time and after having passed subsequent higher examination and in some cases, when the candidates had obtained the degree of Ph.D. also. The learned Single Judge dismissed the writ petitions filed by the appellants and aggrieved by that, the appellants have filed these appeals.

6. Learned counsel for the appellants submitted that when the merit is to be determined on the basis of marks obtained at the secondary examination, a candidate having obtained higher degrees, has no relevance and for deciding the question as to whether a candidate was entitled to his improved marks being reckoned or not, it is absolutely irrelevant whether he has obtained the higher qualification or not. Learned counsel submitted that for preparation of the merit list on the basis of marks obtained at the secondary examination, the only relevant thing is as to what are the marks obtained by the candidate in that examination. Whether the marks were obtained in one attempt or more than one attempt, is absolutely irrelevant. Learned counsel also submitted that after the advertisement was issued, no amendment could be made in the notification changing the very basis of preparation of the merit list.

7. Learned counsel for the respondents supported the impugned order.

8. Learned counsel for the appellants relied upon several decisions in support of their case. A decision of the Division Bench of this Court in The State of Rajasthan

and Ors. v. M.S. Chanani Vishnoi and Anr. (1), was cited in support of the contention that the marks obtained in the subsequent examination were required to be taken into consideration.

9. The case of P. Mahendran and Ors. v. State of Karnataka and Ors. (2), was cited in support of the contention that once the process of selection starts, any amended Rules coming into force after the start of the process of selection, shall be implemented prospectively and would not affect the selection. Another decision of this court in Rajvendra and Ors. v. State of Rajasthan and Ors. (3), was also cited for the same purpose.

10. The decision of this Court in Ms. Godawari Chablani v. Distt Education Officer (Primary Education), Ajmer and Ors. (4), was cited in support of the contention that the eligibility governed by the Rules cannot be changed by administrative circulars.

11. The decision of the Supreme Court in P. Ganeshwar Rao and Ors. v. State of Andhra Pradesh and Ors. (5), was cited in support of the contention that the amended rules have only prospective operation. It was also contended that several candidates were appointed on the basis of the revised marks in the same selection and therefore, the appellants have been discriminated against and their fundamental rights under Articles 14 and 16 of the Constitution of India have been violated.

12. We have heard learned counsel and perused the record. We do not find any justification in not taking into consideration the revised marks obtained by a candidate in a subsequent examination. When under the scheme of examination, it was permissible for a candidate to appear only for improvement of his marks even at a subsequent examination, there is no logic in not giving benefit of the marks obtained at the subsequent examination, to such a candidate. In fact, when the examination is taken and fresh marks are obtained, they should have the effect of superseding the earlier marks and substituting them. The State Government, as an employer, is only concerned with the merit of a particular candidate at the time of his selection. Whether that merit was obtained in one attempt or more than one attempt, is absolutely irrelevant in absence of any rule permitting discounting of

merit on the ground of attempts after which that merit was obtained. In the present cases, no rule has been pointed out which requires rejection of marks obtained in an examination passed in more than one attempt. In face, there is no knowing from the marks-sheets whether the candidates had passed the secondary examination in only one attempt. When the candidate, who has failed in the secondary examination, could appear at the subsequent examination and after passing that examination, get his marks obtained in the second examination counted for the purpose of selection, there is no reason why the candidate who had passed an earlier examination but not being satisfied with the marks obtained in that examination, attempts second time and obtains higher marks, should be deprived of his right to get the improved marks counted for the purpose of merit. To our mind, it is also not relevant as to whether a candidate has obtained higher qualification like graduation, post graduation or Ph.D. degrees. When such candidates are not being given any weightage for the higher qualifications they cannot be put at a disadvantageous position only because of obtaining higher qualifications. After all, there is nothing sacrosanct about the first attempt at the examination. For various reasons and fortuitous circumstances, a candidate, otherwise meritorious, may not score well in the first attempt or might be suffering from any other handicap, which might have undermined his performance. The employer is concerned with the current merit of the candidates to be employed and not their past performance. We, therefore, see no justification in the government's decision discontinuing the earlier practice of counting the marks obtained at the subsequent examination taken for improvement of marks.

13. There is also considerable force in the argument that once the selection process is started, it was not open for the State Government to change in mid-stream, the criteria on which merit was to be counted. For this reason also, the decision of the Government cannot be sustained.

14. We, therefore, find that the appeals deserve to be allowed and the same are hereby allowed, the Impugned order dated 18.3.97 is set aside and the writ petitions are allowed directing the respondents to take into consideration the marks obtained by the writ petitioner-appellants in subsequent examination taken by them for improvement of marks and then prepare a merit list on that basis and if the

appellants are entitled to appointment according to their merit, they shall be appointed within three months from today.

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