

*Before Mahabir Singh Sindhu, J.*

**DALJIT KAUR AND OTHERS—Petitioner(s)**

*versus*

**STATE OF PUNJAB AND OTHERS—Respondent(s)**

**CWP No. 3363 of 2021**

November 08, 2021

*Writ petition under Article 226 — Arts. 14,15 and 16 — The Punjab State Elementary Education (Teaching Cadre) Border Area Group ‘C’ Service Rules, 2018 — Rules 4 and 6(4) — Selection of Elementary Trained Teachers (ETT) — Selection criteria granting weightage of 05 marks for higher qualification of Graduation — Challenge to — On facts, applications invited by Director Recruitment against 2364 ETTs posts by issuing advertisement on 06.03.2020 — Written test held on 29.11.2020, result declared on 05.12.2020, thereafter, Director Recruitment prepared and displayed provisional merit list of candidates on the basis of marks in written test, higher qualification and work experience —Held, in terms of Rule 6 (4) final selection of candidates has to be made solely on the basis of their merit in the written test, and nothing more —Therefore, the impugned criteria specified by the Recruitment Directorate amounts to amending the service rules which is not permissible — Further held, Rule 4 lays down that all appointments to service by way of direct recruitment shall be made on the recommendations of the Education Recruitment Board — It is nowhere discernible that the Board was associated with the selection process for making consequent recommendations in terms of Rule 4 — The advertisement makes Recruitment Directorate the final authority for selection — The Government action conferring power of the Board in favour of the Directorate has trivialized service rules and lacks legitimacy — Consequently, the advertisement containing the impugned selection criteria along with the selection process quashed — Petition allowed.*

*Held*, that as a result thereof, there remains no doubt, that to put an end of all sorts of speculations and to make selection in a fair manner, the amendment dated 26.02.2020 was necessitated. The intention of rule making authority is further strengthened by an embargo under sub-rule 4, rule 6 to the effect that there shall be no marks for viva-voce or interview. Meaning thereby, the final selection

of the candidates for the posts in question has to be made solely on the basis of their merit in the written test to be specified by the Director Elementary Education and there is nothing more; nothing less.

(Para 22)

*Further held*, that after insertion of sub-rule 4 to rule 6, it is very clear that selection criteria for making appointment to the posts in question shall be by way of competitive test. Thus, in the present case, there was no gap or ambiguity at all to be supplemented while granting additional 05 marks (maximum) for higher qualification i.e. Graduation at the time of issuing the advertisement dated 06.03.2020. Therefore, the impugned criteria specified by the Recruitment Directorate in the advertisement virtually amounts to amending the service rules and that is not permissible in view of the settled law that selection body has no power or authority to amend the selection criteria laid down under the service rules.

(Para 23)

*Further held*, that in the present case, written test of 100 marks for recruitment of 2364 posts of ETT was conducted by the Recruitment Directorate. From perusal of the advertisement, it is nowhere discernable that at any point of time, the Board was associated in dealing with the selection process for making consequent recommendations in terms of rule 4.

As per Clause 7 (xv) of the advertisement dated 06.03.2020, the Education Recruitment Directorate has been made the final authority for selection to the posts in question and which reads as under:-

*“7(xv) For the present recruitment, decision taken by Education Recruitment Directorate, Punjab shall be final and binding upon all.”*

*Further held*, that the Recruitment Directorate is headed by the Director General School Education (Secondary Education) Punjab, (for short DGSE) who used to be merely a member of the “Board” which was constituted by the Government of Punjab on 30.07.2013. Utterly shocking, without there being any enabling provision under the service rules, the DGSE, the sole officer, has been assigned the powers of “Board” for making recommendations on the basis of selection process under challenge for appointment to the posts in question.

(Para 28)

*Further held*, that no doubt, the petitioners have not questioned the competency of Recruitment Directorate to initiate the selection

process for recruitment to the posts in question; but while examining the service rules, it has surfaced that “Board” would be the only competent authority for making recommendations leading to the appointment of 2364 ETTs and the Recruitment Directorate has no role at all. Thus, the action of the Government while conferring the power of the “Board” in favour of the Recruitment Directorate has trivialized the importance of service rules and as such the same is lacking legitimacy

(Para 29)

Vikas Chatrath, Advocate, *for the petitioner(s)* in CWP-3363-2021.

Karanvir Hooda, Advocate, for Harkesh Manuja, Advocate, *for the petitioner(s)* in CWP-3943-2021.

Har Avtar Singh Saini, Advocate, *for the petitioner(s)* in CWP-6093-2021.

Amit Shukla, Advocate, *for the petitioner(s)* in CWP-11318-2021.

Monica Chhibber Sharma, Sr. DAG, Punjab, assisted by Harpreet Singh, Deputy Director, Education Recruitment Board, Punjab.

Sanjay Kaushal, Senior Advocate, with Arjun Shukla, Advocate, for respondent Nos.4 to 152 in CWP-3363-2021.

### **MAHABIR SINGH SINDHU, J.**

(1) Present writ petitions have been filed under Article 226 of the Constitution to challenge the impugned selection criteria along with ongoing process for appointment of 2364 Elementary Trained Teachers, (for short “ETT”) meant for Border Area in pursuance of an Advertisement dated 06.03.2020 issued by the Director, Education Recruitment Directorate, Punjab; for short ‘Director Recruitment’.

(2) Since controversy has arisen out of the above advertisement, therefore, all four writ petitions are being disposed off vide this common order.

(3) In nutshell, prayer made on behalf of the petitioners can be summarized as under:-

(i) to quash the impugned selection criteria mentioned in the advertisement dated 06.03.2020 thereby granting

weightage of 05 marks for higher qualification i.e. Graduation;

(ii) to quash the impugned notification dated 12.10.2020, granting exemption from passing Teachers Eligibility Test, (for short TET) by the Education providers/ volunteers already working in the state of Punjab;

(iii) to quash the impugned corrigendum dated 11.11.2020 whereby the Director Recruitment changed the criteria in midway of selection and granted benefit of maximum 10 marks (01 mark for each year) on account of work experience to the Education Provider/ Education Volunteer, E.G.S. Volunteers, A.I.E. Volunteers and Special Training Resource (STR) Volunteers.

(iv) to quash the selection process and/ or direct the official respondents to prepare final merit list as per marks obtained in written test in view of the service rules of 2018, amended vide Gazette Notification dated 26.02.2020.

(v) to quash the letter dated 09.02.2021, whereby earlier public notice dated 16.12.2020 permitting the candidates for change of category has been withdrawn.

(vi) to issue a writ in the nature of mandamus directing the respondents to grant the benefit of 5 marks to the petitioners as well.

(vii) to issue any other appropriate writ, order or direction as this court deems fit and proper in view of the facts and circumstances of the cases.

Facts are not in dispute.

(4) Initially, the Director Recruitment, while issuing the advertisement dated 06.03.2020, invited applications for recruitment against 1664 posts of ETTs and last date for registration of online applications was fixed as 23.03.2020. Subsequently, vide corrigendum dated 23.06.2020, number of posts were increased to 2364 and last date for submission of applications was also extended to 09.07.2020; however, other terms & conditions of the advertisement remained same.

(5) The relevant portion of the advertisement dated 06.03.2020 reads as under:-

**“2. Educational Qualifications:-**

(1) Should have passed Graduation with minimum fifty-five percent marks in the case of General Category candidates, and fifty percent marks in the case of Scheduled Castes, Scheduled Tribes, Other Backward Classes and Physically Handicapped candidates, from a recognized university or institution:

Provided that the candidates, who have done or doing the ETT course (or have done this course with other nomenclature), with 10+2 qualification, shall be considered for appointment into the Service under these rules, as one time measure till the 1<sup>st</sup> day of April, 2022, in order to remove the hardship of these candidates, who have acquired the said qualification under the previous rules.

(2) Should possess two years Elementary Teachers’ Training course from a recognized university or institution or two years Diploma in Elementary Education (D.El.Ed.) or qualifications as per guidelines of the National Council for Teachers’ Education.

Besides above educational qualifications, for the post of E.T.T. Teacher, the candidates should have passed Punjab State Teacher Eligibility Test-I (P.S.T.E.T.-I) conducted by the Punjab Government as per Free and Compulsory Education for Children Act, 2009.

**3. Mode of Selection:-**

(i) A written test (objective type) of 100 marks at State Level shall be conducted for recruitment of these posts. Those candidates who fulfill the other prescribed conditions of educational/ professional qualification for these posts, their merit shall be prepared on the basis of marks obtained in written test as well as marks awarded for higher qualification. The marks obtained in Punjab State Teacher Eligibility Test-I (P.S.T.E.T. –I) shall not be added in the merit.

(ii) The marks for higher qualification shall be awarded as under:-

Graduation First Division	= 5
Marks Second Division = 3 Marks Third Division	= 2

Marks...”

(If more than one candidates secure equal marks in the written test, then the candidate who is older in age, will be kept higher in merit and if candidates more than one secure equal marks and are having the same age, then the candidate who is having %age of higher marks, will be kept higher in the merit).

### **5. Age limit**

(i) Age as on 01.01.2020 should be between 18 to 37 years.

(ii) Age relaxation upto 5 years will be admissible to the candidates belonging to Scheduled Castes and Backward Classes of Punjab State.

(iii) The upper age limit for the employees of Punjab State, other States and Central Government shall be 45 years.

(iv) The upper age limit for widows and divorced women of Punjab State shall be 42 years.

(v) Relaxation in age upto 10 years shall be admissible to the handicapped persons domiciled of Punjab State.

(vi) For Ex-Serviceman of Punjab State, their service period in Defence Forces shall be deducted from their present age and the balance age will be taken into account as per conditions above.”

(6) The Government of Punjab, vide notification dated 12.10.2020, decided for grant of exemption from passing TET to Education providers/volunteers appointed prior to 23.08.2010 and having the qualification of B.Ed./ ETT for future recruitment to be made by the Department from time to time. In pursuance of the above decision, the Director Recruitment vide corrigendum dated 20.10.2020, granted exemption to the Education providers/ Volunteers from passing TET in the following manner:-

“Education Recruitment Directorate, Punjab had issued an advertisement dated 28.02.2020 to fill up 3294 posts of Master/Mistress and 06.03.2020 for filling up 2364 posts of ETT Teachers, in which while partially amending the same, it is written that vide Govt. of Punjab, Education Department (Education-7 Branch) Notification No.1/88812/2020(4) dated 12.10.2020 (copy enclosed as

Annexure O), the exemption is granted from passing of TET (Punjab State Eligibility Test) to the Education Provider/Volunteers as per Notification dated 23.08.2020 having the qualification of B.Ed./ETT and who are appointed prior to 23.08.2010. Therefore, date of submission of online applications is extended upto 29.10.2020 and last date for deposit of fee shall be 30.10.2020. The candidates may apply on the website [www.educationrecruitmentboard.com](http://www.educationrecruitmentboard.com) of the department.

**NOTE:-** All other terms/ conditions shall remain same.”

(7) The Director Recruitment vide corrigendum dated 11.11.2020, apart from granting age relaxation, awarded the benefit of maximum 10 marks (01 mark for each year) for work experience in favour of the Education Providers/Education Volunteers, EGS Volunteers, AIE Volunteers and Special Training Resource (STR) Volunteers, which reads as under:-

“Education Recruitment Directorate, vide an advertisement No.5/1-2020RD(1)/202082433(1), dated 06.03.2020 sought to fill up 664 posts on 06.03.2020 and other 1000 posts of ETT, thereafter, as per corrigendum posts were increased to 2364.

Now, in this advertisement dated 06.03.2020, at Serial No.5 after Column No.(i) to (vi) of the age limit, Sr. No.(vii) is added as under:-

(vii) As per Govt. of Punjab, Department of Education (E-7 Branch) Notification No.13/01/2020/5EDU7/301/4 dated 11.11.2020, for the Education Provider/Education Provider/ Education Volunteer, E.G.S. Volunteers, A.I.E. Volunteers and Special Training Resource (STR) Volunteers, working in the Education Department of State, shall be given upper age relaxation equal to the service rendered by them.

Similarly, in this advertisement, at Serial No.3- mode of selection, after Column No.(i) to (ii) Sr. No.(iii) is added as under:-

(iii) As per Govt. of Punjab, Department of Education (E-7 Branch) Notification No.13/01/2020/5EDU7/301/4 dated 11.11.2020, for the Sikhia Provider/Education Provider/

Education Volunteer, E.G.S. Volunteers, A.I.E. Volunteers and Special Training Resource (STR) Volunteers working in the Education Department of State, shall be given 1 mark against each year in lieu of the service rendered by them and there shall be maximum 10 marks. Besides above, in this recruitment, reservation shall be applicable as per Gazette Notification of Government of Punjab, Department of Social Security, Women and Child Development (Social Security Branch) Notification the 21<sup>st</sup> October, 2020.”

(8) The written test was held on 29.11.2020 and the result had been declared on 05.12.2020. Thereafter, the Director Recruitment, prepared provisional merit list and it was displayed through public notice which indicates that total marks of candidate(s) were assessed on following counts, viz.:-

i. Marks obtained in the written test;

ii. Maximum 05 marks on the basis of higher qualification (Graduation) i.e. Ist Division=05; IIrd Division=03 and IIIrd Division=02;

iii. Maximum 10 marks (01 mark for each year) for work experience as Education Provider/ Education Provider/ Education Volunteer,

E.G.S. Volunteers, A.I.E. Volunteers and Special Training Resource (STR) Volunteers.

(9) On the basis of provisional merit list, candidates were called for counseling/ scrutiny of documents from 16.12.2020 to 24.12.2020. Thereafter, the Director Recruitment vide public notice dated 16.12.2020 granted opportunity to the candidates for making necessary correction of categories in their application form(s) up to 31.12.2020. Again, vide public notice dated 01.01.2021, second opportunity for counselling/ scrutiny was granted to those candidates who could not appear on earlier occasion.

(10) It is necessary to mention here that one Gurpreet Singh filed **CWP No. 18337 of 2020** titled ***Gurpreet Singh*** versus ***State of Punjab & others*** for change of category from General to ESM (General) for the post of Pharmacist (Pharmacy Officer) claiming inadvertence while submitting online application, but remained unsuccessful as his writ petition was dismissed vide order dated



03.11.2020.

In view of the above development, the Director Recruitment vide communication dated 09.02.2021, decided to withdraw the earlier public notice dated 16.12.2020 for change/ correction of category and it was made clear that the categories mentioned by the candidates up to 17.11.2020 shall be considered as final.

(11) All the petitioners participated in the selection process; but remained unsuccessful as per provisional merit list.

(12) Hence, the present writ petitions.

(13) Learned counsel for the petitioners contended that in view of the amendment dated 26.02.2020, the final selection of the candidate(s) shall be on the basis of their merit list in the written examination and provisions of Rule 6 (4) are mandatory in nature. Thus, the selection criteria mentioned in the advertisement dated 06.03.2020 for awarding additional marks to the candidates on the basis of higher qualification i.e. graduation is not legally permissible. Further contended that the initial selection criteria as specified in the advertisement dated 06.03.2020 is running contrary to rule 6 (4) and as such the whole process is vitiated.

Also contended that vide public notice dated 11.11.2020, apart from giving age relaxation, the initial selection criteria was changed in an arbitrary manner and weight age of 01 mark against each year of work experience (upto maximum 10 marks) was also granted in favour of Education Providers/ Education Volunteers, EGS Volunteers, AIE Volunteers and Special Training Resource (STR) Volunteers despite the fact that there is no such provision under service rules. Also contended that the actions of official respondents are patently in violation of articles 14 & 16 of the constitution and as such the same deserve to be quashed and set aside.

On the other hand, learned State counsel opposed contentions raised on behalf of the petitioners while submitting that there had been a past practice for grant of weight age on account of higher educational qualifications and as such, specific clause to that effect was incorporated in the advertisement dated 06.03.2020. Thus, granting of maximum 05 marks on the basis of higher qualification i.e. Graduation is claimed to be justified. Learned State counsel further submitted that all the petitioners duly participated in the selection process, but remained unsuccessful; therefore, now they cannot be permitted to challenge the criteria or selection process for recruitment

of the posts in question while alleging the violation of service rules. Learned state counsel also submitted that in view of the settled law, if a candidate had appeared in the written test, but remained unsuccessful; then, he or she cannot be permitted to assail the selection process while invoking the extraordinary remedy of writ jurisdiction under article 226 of the Constitution. Again submitted that official respondents were well within their power to determine the selection criteria for recruitment of the posts in question. Still further submitted that issuance of the impugned corrigendum dated 20.10.2020 & 11.11.2020 were warranted in view of the facts that Education Providers/ Volunteers have been working for the last more than 10 years in the State of Punjab and at the time of their initial engagement they were fully qualified as per the service rules prevalent at that time; thus, challenge to that effect is also unfounded.

Learned Senior counsel representing the private respondents supported the pleas raised by learned State counsel. In addition, he submitted that even if no weightage is granted for higher qualification (Graduation); or for work experience, still the private respondents being higher in merit on the basis of written test deserve to be finally selected and appointed on the posts of ETTs. He further submitted that due to interim stay obtained by the petitioners, private respondents are suffering irreparable loss which cannot be compensated in any manner, thus prayed for dismissal of the writ petitions with costs.

(14) Heard learned counsel for the parties at length and perused the paper books.

(15) The moot point for consideration to decide the matter in controversy would be:—

As to whether in view of the provisions of sub- rule (4) of rule 6 inserted vide amendment dated 26.02.2020, the impugned selection criteria specified in the advertisement dated 06.03.2020 is legally sustainable?

If the above point is decided in affirmative, the 2nd point for consideration is :—

As to whether during the pendency of selection process, it was legally permissible for the official respondents to change the selection criteria vide corrigendum dated 11.11.2020, thereby granting weightage of maximum 10 marks for work experience (01 mark for each year) in favour of the Education Providers/ Volunteers, E.G.S.

Volunteers, A.I.E. Volunteers and Special Training Resource(STR) Volunteers?

3<sup>rd</sup> point would be :-

As to whether the actions of official respondents while issuing corrigendum dated 20.10.2020, for granting exemption from passing TET in favour of the Education Providers/ Volunteers as well as conferring upon them the benefit of age relaxation vide corrigendum dated 11.11.2020 are legally sustainable?

### Point No.1

(16) Undisputedly, recruitment to the posts in question is regulated under the service rules framed by the Governor of Punjab in terms of proviso to Article 309 of the Constitution; namely, 'The Punjab State Elementary Education (Teaching Cadre) Border Area Group 'C' Service Rules, 2018, (for short 'the service rules') and which were amended vide Gazette Notification dated 26.02.2020.

(17) Law is well-settled that such rules are legislative in nature and reference in this regard can be made to constitution Bench judgment of the Hon'ble Supreme Court reported as ***B.S. Yadav and others*** versus ***State of Haryana and others***<sup>1</sup> which *inter-alia* laid down:-

“That the Governor possesses legislative power under our Constitution is incontrovertible and, therefore, there is nothing unique about the Governor's power under the proviso to Article 309 being in the nature of a legislative power. By Article 168, the Governor of a State is a part of the legislature of the State. And the most obvious exercise of legislative power by the Governor is the power given to him by Art. 213 to promulgate ordinances when the legislature is not in session. Under that Article, he exercises a power of the same kind which the legislature normally exercises: the power to make laws. The heading of Chapter IV of Part VI of the Constitution, in which Art. 213 occurs, is significant: "Legislative Power of the Governor". The power of the Governor under the proviso to Article 309 to make appropriate rules is of the same kind. It is legislative power. Under Article 213, he substitutes for the

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<sup>1</sup> 1981 SCR (1) 1024

legislature because the legislature is in recess. Under the proviso to Article 309, he substitutes for the legislature because the legislature has not yet exercised its power to pass an appropriate law on the subject.”

Hon’ble Supreme Court in *A.K. Bhatnagar and others* versus *Union of India and others*<sup>2</sup> in paragraph-13 while putting an injunction against Union as well as State Governments for acting contrary to the rules framed under Article 309, reiterated the binding effect thereof as under:-

“On more than one occasion this Court has indicated to the Union and the State Governments that once they frame rules, their action in respect of matters covered by rules should be regulated by the rules. The rules framed in exercise of powers conferred under the proviso to Article 309 of the Constitution are solemn rules having binding effect. Acting in a manner contrary to the rules does create problem and dislocation. Very often government themselves get trapped on account of their own mistakes or actions in excess of what is provided in the rules. We take serious view of these lapses and hope and trust that the government both at the Centre and in the States would take note of this position and refrain from acting in a manner not contemplated by their own rules.”

(18) The concept of “equality before law” is well engrained under article 14 of the constitution and which reads as under:-

“**Equality Before Law:-** The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

Again article 16(1) which is the beacon for equality of opportunity in public employment and the same can be extracted as under:-

“**16. Equality of opportunity in matters of public employment:-** (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.”

Perusal of article 16 (1) reveals that it is a fundamental guarantee for equality of opportunity to all citizens in matters relating to

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<sup>2</sup> (1991) 1 S C C 544

employment or appointment to any office under the State. Needless to say that there are certain enabling provisions under article 16 which talk about affirmative actions; but those are not relevant for discussion in view of the matter in controversy.

It is well settled that article 14 is the genus; while article 16 is a species (vide *E.P. Royappa* versus *State of Tamil Nadu and anr.*<sup>3</sup> Article 16 gives effect to them doctrine of equality in all matters relating to public employment. Thus, from conjoint reading of both these articles, the basic principle which emerges is that there shall be no discrimination or arbitrariness in State action while dealing with public employment for maintenance of the rule of law. In case, there is denial of equal opportunity by the State on irrelevant consideration, the same shall be justiciable.

In *Union of India & Ors* versus *N. Hargopal & Ors*<sup>4</sup> Hon'ble Supreme Court while emphasizing the importance of procedural fairness at the time of recruitment by public employer, held that:-

“The object of recruitment to any service or post is to secure the most suitable person who answers the demands of the requirements of the job. In the case of public employment, it is necessary to eliminate arbitrariness and favouritism and introduce uniformity of standards and orderliness in the matter of employment. There has to be an element of procedural fairness in recruitment. If a public employer chooses to receive applications for employment where and when he pleases, and chooses to make appointments as he likes, a grave element of arbitrariness is certainly introduced. This must necessarily be avoided if Articles 14 and 16 have to be given any meaning.”

(19) There is no quarrel that the official respondents are falling within the definition of ‘State’ for the purposes of Articles 14 & 16; therefore, they are under obligation to follow the service rules faithfully which have the force of law.

In view of the above legal position, it can be safely concluded that the service rules are equally binding upon the official respondents like other citizens; their actions for the matters covered under service rules are supposed to be regulated in the manner laid down under these

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<sup>3</sup> (1974) 2 SCR 348

<sup>4</sup> (1987) 3 SCC 308

rules and if there is any aberration, the same can be subjected to judicial review.

(20) Since service rules are germane to the present controversy, therefore, relevant provisions can be extracted as under:-

**“Rule 2:- Definitions.—**

(1) In these rules, unless the context otherwise requires,-

(a) ‘Appendix’ means an Appendix appended to these rules;

(b) ‘Board’ means the Education Recruitment Board, Punjab;

(c) ‘Border Area Cadre’ means a separate cadre created for the members of Service of the Punjab State Elementary Education (Teaching Cadre) Group C Service to be posted in Districts Amritsar, Gurdaspur, Ferozepur, Fazilka, Tarntaran and Pathankot;

(d) ‘Director’ means the Director of Public Instructions (Elementary Education), Punjab.

(e) ‘District Education Officer’ means the District Education Officer (Elementary Education) in which the member of Service serves;

(f) ‘District Cadre’ means the posts in the Service specified District wise in Appendix ‘A’;

(g) ‘Government’ means the Government of the State of Punjab in the Department of School Education; and

(h) ‘Service’ means Punjab State Elementary Education (Teaching Cadre) Border Area Group C Service.

(2) .....

**Rule 4. Appointing Authority.** Appointments to the Service shall be made by the District Education Officer concerned or any other authority empowered by the Government in this behalf. However, all appointments to the Service by way of direct recruitment shall be made on the recommendations of the Board.

**Rule 6. Method of appointment, qualifications and experience.**-(1) All appointments to the Service shall be made in the manner specified in Appendix ‘B’:

Where the Government is of the opinion that it is expedient to do so, the Government may, in exceptional circumstances, fill the vacancy by making appointment of the person by transfer from any other State Government or Government of India against direct quota if the person holds similar post.

(2) No person shall be appointed to a post in the Service, unless he possesses the qualifications and experience, as specified against that post in Appendix 'B'.

(3) Appointment to the Service by promotion shall be made on seniority-cum-merit basis and no person shall have any right to claim promotion on the basis of seniority alone.

(4) \* No person shall be appointed to the Service by way of direct recruitment unless he qualifies in the competitive test as specified by the Director from time to time. The final selection of candidates shall be on the basis of their merit in the said written examination. There shall be no marks for viva voce or interview.”

\*(Inserted vide Gazette Notification dated 26.02.2020.)

(21) There is no dispute that mode of appointment to the posts in question is by way of direct recruitment. Rule 4 says that all appointments to the service by way of direct recruitment shall be made on recommendations of the “Board”. Rule 6 (4) envisages that, “no person shall be appointed to the Service by way of direct recruitment unless he qualifies in the competitive test as specified by the “Director” from time to time”. Rule 2(1)(d), defines the word ‘Director’ and it means the Director of Public Instructions (Elementary Education), Punjab.

Still further rule 6 (4) specifically says that “final selection of candidates shall be on the basis of their merit in the said written examination”. Again there is a clear interdict under rule 6 (4) that there shall be no marks for viva-voce or interview. It is relevant to mention here that sub-rule 4 to rule 6 was inserted just before the issuance of the present advertisement vide amendment dated 26.02.2020. Concededly, prior to this amendment, there was no provision under the service rules regarding written test for appointment to the posts in question. Thus, it seems that in order to rule out any sort of arbitrariness in the selection process, the rule making authority thought it appropriate to insert specific provision by way of the competitive test

under the service rules itself. Had there been an idea in the mind of the rule making authority for grant of weightage on account of some higher qualification, then the same ought to have been incorporated in the service rules. It is specifically observed that despite repeated asking, learned State counsel was not in a position to point out that there has been any amendment to the service rules after 26.02.2020.

(22) As a result thereof, there remains no doubt, that to put an end of all sorts of speculations and to make selection in a fair manner, the amendment dated 26.02.2020 was necessitated. The intention of rule making authority is further strengthened by an embargo under sub-rule 4, rule 6 to the effect that there shall be no marks for viva-voce or interview. Meaning thereby, the final selection of the candidates for the posts in question has to be made solely on the basis of their merit in the written test to be specified by the Director Elementary Education and there is nothing more; nothing less.

(23) Even otherwise, Hon'ble Supreme Court in a constitution bench judgment, *Sant Ram Sharma* versus *State of Rajasthan*, 1968 (1) SCR 111, laid down "that government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

After insertion of sub-rule 4 to rule 6, it is very clear that selection criteria for making appointment to the posts in question shall be by way of competitive test. Thus, in the present case, there was no gap or ambiguity at all to be supplemented while granting additional 05 marks (maximum) for higher qualification i.e. Graduation at the time of issuing the advertisement dated 06.03.2020. Therefore, the impugned criteria specified by the Recruitment Directorate in the advertisement virtually amounts to amending the service rules and that is not permissible in view of the settled law that selection body has no power or authority to amend the selection criteria laid down under the service rules.

(24) Despite above, the impugned selection criteria was incorporated in the advertisement dated 06.03.2020 while making provision for grant of additional marks on the basis of higher qualification i.e. Graduation as under :-

First Division=	5 Marks; Second
Division =	3 Marks and Third



Division = 2 Marks.

Although learned state counsel tried to justify the impugned selection criteria while raising the plea of past practice, but that cannot be accepted being contrary to the provision contained under rule 6 (4) which is mandatory in nature and as such there is no scope for grant of any additional marks on the basis of higher qualification; rather such a course would be subversion of the service rules and negation of the rule of law.

(25) Even otherwise the past practice cannot override or amend the service rules which are legislative in nature; thus on that count also, the plea of learned State counsel is liable to be rejected being misplaced in law. So long as rule 6(4) is existing in the present form, the official respondents have no other choice, except to follow the same scrupulously. Needless to say, that rule making authority has the power under proviso to article 309 for making a provision regarding weightage on the basis of higher qualification, if deems appropriate; however, that would be prospective, until and unless made applicable with retrospective effect either specifically or by necessary implications. At the same time, such a step is always subject to the provisions of the Constitution, including articles 14 & 16; thus from all angles, as on today, the rule 6 (4) deserves to be accepted as sacrosanct. The Director Recruitment while incorporating the impugned selection criteria in the advertisement dated 06.03.2020 has arbitrarily conferred undue benefits in favour of the graduates in an illegal manner being *de hors* the mandatory provision of rule 6(4). In view of the above there remains no doubt that the impugned selection criteria while granting additional marks for higher qualification (Graduation) is not in accordance with law; rather the same is totally illegal, arbitrary and discriminatory being contrary to the imperatives contained under rule 6(4). As a result thereof, the impugned selection criteria is held to be legally indefensible and violative of articles 14 & 16 of the constitution.

(26) As already noticed, in view of the provisions of rule 4, all appointments to the service shall be made by the District Education Officer concerned or any other authority empowered by the Government in this behalf; however, it has been specifically laid down that “*all appointments to the Service by way of direct recruitment shall be made on the recommendations of the Board*”. As per the definition given under rule 2(1) (b), the “Board” means the Education Recruitment Board, Punjab.

(27) There is no quarrel that service rules do not indicate as to how the “Board” is to be constituted. But it is pertinent to mention here that the National University of Educational Planning and Administration, New Delhi (NUEPA) published various research Reports about Teachers in the Indian Education System. In June 2016, one such Report [NRRPS/001(1/9)/2016] relating to working conditions of teachers in the state of Punjab was published by NUEPA. Chapter 4 of this report talks about Teacher Policy in Punjab.

Clause 4.1.3.1 of the report deals with creation of Recruitment Board and which reads as under :-

“4.1.3.1 Creation of Recruitment Board in Punjab To assess the performance of the newly founded schools and quality of recruiting teacher staff, Punjab Govt. has created a recruitment board in 2013 vide its order no. 1590 Edu 6 dated 30.7.2013 (table 4.4). The Recruitment Board has the following constitution.

Table 4.4: Composition of Punjab School Recruitment Board.

1.	Principal Secretary, School Education Punjab	Chairman
2.	Vice Chancellor, G.N.D.U, Amritsar	Member
3.	Vice Chancellor, Punjabi University, Patiala.	Member
4.	Chairman, Punjab School Education Board, S.A.S. Nagar, Punjab	Member
5.	Directorate General of School Education	Member
6.	Director of Public Instructions, (S.E.), Punjab	Convenor”

Perusal of extracted portion of the Report reveals that for recruitment of teachers, the Government of Punjab constituted a “Board” not only as an independent authority, but multi- member body to ensure transparency.

Black’s Law Dictionary being an authoritative source for legal definition can also be pressed into service to ascertain the proper meaning of word “Board”, and which is in the following manner:-

**“Board:-** A group of persons having managerial, supervisory or advisory powers.

In Parliamentary law, a Board is form of deliberative assembly and is distinct from Committee which is usually subordinate to a Board or other deliberative assembly having greater autonomy and authority.”

In view of the over all discussion made hereinabove, it can be safely concluded that for the purpose of making recommendations in terms of rule 4, the “Board” has to be a multi-member body with an independent identity, free from the direct control of the department to accord fairness in view of the object of service rules.

(28) In the present case, written test of 100 marks for recruitment of 2364 posts of ETT was conducted by the Recruitment Directorate. From perusal of the advertisement, it is nowhere discernable that at any point of time, the Board was associated in dealing with the selection process for making consequent recommendations in terms of rule 4.

As per Clause 7 (xv) of the advertisement dated 06.03.2020, the ducation Recruitment Directorate has been made the final authority for selection to the posts in question and which reads as under:-

“7(xv) For the present recruitment, decision taken by Education Recruitment Directorate, Punjab shall be final and binding upon all.”

The Recruitment Directorate is headed by the Director General School Education (Secondary Education) Punjab, (for short DGSE) who used to be merely a member of the “Board” which was constituted by the Government of Punjab on 30.07.2013. Utterly shocking, without there being any enabling provision under the service rules, the DGSE, the sole officer, has been assigned the powers of “Board” for making recommendations on the basis of selection process under challenge for appointment to the posts in question.

(29) No doubt, the petitioners have not questioned the competency of Recruitment Directorate to initiate the selection process for recruitment to the posts in question; but while examining the service rules, it has surfaced that “Board” would be the only competent authority for making recommendations leading to the appointment of 2364 ETTs and the Recruitment Directorate has no role at all. Thus, the action of the Government while conferring the

power of the “Board” in favour of the Recruitment Directorate has trivialized the importance of service rules and as such the same is lacking legitimacy.

The Hon’ble Supreme Court in **Rajesh Awasthi** versus **Nand Lal Jaiswal & Ors**<sup>5</sup> while examining the legality of appointment to the post of Chairperson of U.P. State Electricity Regulatory Commission, where recommendations were not made by the Selection Committee; rather the same were entrusted in favour of the State Government, it was held in para 23 that “non-compliance of sub-section (5) of Section 85 of the Act is not a procedural violation, as it affects the very substratum of the appointment, being a mandatory requirement to be complied with, by the Selection Committee before recommending a person for the post of Chairperson. We are of the view that non-compliance with sub-section (5) of Section 85 of the Act will vitiate the entire selection process since it is intended to be followed before making the recommendation to the State Government. Non-compliance with mandatory requirements results in nullification of the process of selection unless it is shown that performance of that requirement was impossible or it could be statutorily waived. The expression “before recommending any person” clearly indicates that it is a mandatory requirement to be followed by the Selection Committee before recommending the name of any person for the post of Chairperson.”

(30) The initial step taken by the Recruitment Directorate while inviting applications vide advertisement was *void* and *non est* in the eyes of law. Therefore, in case, the exercise undertaken by the Director Recruitment is allowed to culminate into the recommendations for the purpose of rule 4, then it would amount to putting a seal over the illegal action resulting into travesty of justice.

(31) Also necessary to mention here that learned State counsel raised the plea of estoppel against the petitioners, but mere participation in the selection process will not debar them from invoking the jurisdiction of this court by way of the present writ petitions in view of the recent judgment of Hon’ble Supreme Court in **Dr. (Major) Meeta Sahai** versus **State of Bihar and ors.**<sup>6</sup> and paragraphs no. 16 & 17 of the same read as under:-

“16. It is well settled that the principle of estoppel prevents

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<sup>5</sup> (2013) 1 SCC 501

<sup>6</sup> (2019) 20 SCC 17

a candidate from challenging the selection process after having failed in it as iterated by this Court in a plethora of judgments including *Manish Kumar Shahi v. State of Bihar*, observing as follows:

“16. We also agree with the High Court 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 appellant is not entitled to challenge the criteria or process of selection. Surely, if the appellant's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The (appellant) 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 appellant clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition.”

The underlying objective of this principle is to prevent candidates from trying another shot at consideration, and to avoid an impasse wherein every disgruntled candidate, having failed the selection, challenges it in the hope of getting a second chance.

17. However, we must differentiate from this principle insofar as the candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. In a situation where a candidate alleges misconstruction of statutory rules and discriminating consequences arising there from, the same cannot be condoned merely because a candidate has partaken in it. The constitutional scheme is sacrosanct and its violation in any manner is impermissible. In fact, a candidate may not have locus to assail the incurable illegality or derogation of the provisions of the Constitution, unless he/she participates in the selection process.”

(32) As a result of the above discussion, this Court is not only empowered; rather, under obligation to protect the rule of law and deems it appropriate even to invalidate the entire selection process initiated vide advertisement dated 06.03.2020 by an incompetent authority.

(33) Thus, the irresistible conclusions would be as under:-

- i. In the present case, weightage by way of additional marks ranging from 2 to 5 was incorporated under the selection criteria in the advertisement dated 06.03.2020, which is running *de hors* the mandatory provisions of the rule 6 (4);
- ii. In view of the *dicta* under rule 4, appointments to the posts in question have to be made on the basis of recommendations by the “Board”;
- iii. The “Board” has not been constituted in terms of rule 2 (1) (b); rather the Director Recruitment has been made the final authority for making recommendations without there being any competency to that effect under service rules;
- iv. Selection for the posts in question has to be made on the basis of merit in the written examination to be specified by the Director, Elementary Education in terms of rule 6(4), but the written test was conducted by the Director Recruitment as is clear from condition number- 7 (xv) of the advertisement itself.

(34) Above all the Hon’ble Supreme Court, in *Babu Verguese versus Bar Council of Kerala*<sup>7</sup>, held that:-

“It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor which was followed by Lord Roche in Nazir Ahmad v. King Emperor who stated as under:

“Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all”.

(35) The impugned selection criteria specified in the advertisement granting weightage of 05 marks (maximum) for higher qualification was inherently flawed with incurable illegality. Still further in view of rule 4, the selection has to be made on the basis of recommendations by the “Board”. On the other hand, selection process is being carried out by the Recruitment Directorate without any lawful authority, therefore, the whole exercise is patently illegal.

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<sup>7</sup> (1999) 3 SCC 422

**Point No.2 & 3:**

(36) Both these points were seriously contested by the parties, but in view of the conclusion recorded on point No.1, this Court does not deem it appropriate to delve any further on these points as the same have become academic in nature; thus, left open for future, in case the occasion so arises.

(37) This Court is very well conscious that quashing of the advertisement may cause great hardship to the candidates aspiring for appointment (s) against the posts in question. But at the same time, it cannot be ignored that in case the selection process initiated in disregard of the service rules is allowed to attain finality, the same shall perpetuate the illegality.

(38) As a result thereof, there is no option except to allow the present writ petitions.

(39) Consequently, the writ petitions are allowed; advertisement dated 06.03.2020 containing the impugned selection criteria along with entire selection process, including provisional merit list for recruitment to the posts of 2364 ETT are quashed and set aside.

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*Tribhuvan Dahiya*