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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 20.12.2025

\+ W.P.(C) 13280/2019 & CM APPL. 54003/2019
EMPLOYEES STATE INSURANCE CORPORATION AND ORS. .....Petitioners

Through: Mr.T. Singhdev, Mr.Abhijit Chakravarty, Ms.Yamini Singh, Mr.Tanishq Srivastava, Mr.Vedant Sood, Mr.Sourabh Kumar, Ms.Ramanpreet Kaur, Mr.Bhanu Gulati, Advs.

versus

MOHIT KUMAR SHARMA .....Respondent

Through: Mr.Sourabh Ahuja, Mr.Keshav Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
HON'BLE MS. JUSTICE MADHU JAIN

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed, challenging the Order dated 11.01.2019 passed by the learned Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as the 'Tribunal') in O.A. No.1215/2017, titled ***Mohit Kumar Sharma vs. Employees State Insurance Corporation and Ors***., allowing the said O.A. filed by the respondent herein and directing the petitioners to reconsider the case of the respondent keeping in view the observations judgments of the Supreme Court in its judgments in ***K. Manjusree vs. State of***

Andhra Pradesh and Another, (2008) 3 SCC 512, and in ***Hemani Malhotra vs. High Court of Delhi***, (2008) 7 SCC 11.

2. On such consideration, the petitioners rejected the case of the respondent again *vide* Order dated 20.03.2019.

3. Complaining that the same was not in true compliance with the Order of the learned Tribunal, the respondent filed a contempt petition, being CP No.191/2019. The petitioners again re-considered the case of the respondent, and rejected the same by an Order dated 18.09.2019, which was placed before the learned Tribunal. The learned Tribunal, *vide* Order dated 22.11.2019, found the same to be *prima facie* in violation of its earlier Order dated 11.01.2019 and proceeded to initiate contempt proceedings against the petitioners.

4. It is at this stage that the petitioners filed the present petition challenging the Order dated 11.01.2019 passed by the learned Tribunal in the above O.A. as also the Order dated 22.11.2019 passed by the learned Tribunal in the Contempt Petition, that is, CP No.191/2019.

5. To give a brief background of the facts in which the present petition arises, the petitioners issued an online advertisement, on 01.12.2012, *inter alia*, for the post of 'Nursing Orderly' having 24 vacancies (23 for general/unreserved category and 1 for Scheduled Tribes category). As far as the post of Nursing Orderly is concerned, the mode of selection prescribed was only a written test.

6. The petitioners thereafter issued a Corrigendum dated 08.03.2016, to the Advertisement, *inter alia*, reserving with itself the right to introduce additional stage of examination to be notified at

suitable time if considered necessary. In this petition, we are not concerned with this Corrigendum and as far as the selection process is concerned, it continued to remain based only on the written examination which was conducted on 19.03.2016.

7. Before declaration of the result, the petitioners sent a proposal to the Ministry of Labour & Employment for fixing minimum qualifying marks and having received a go ahead, by an Office Memorandum dated 02.01.2017, prescribed the following marks for various categories of the candidates:

Category	Minimum Qualifying Marks/Benchmark
UR	45%
OBC	40%
SC, ST & Ex-Servicemen	35%
PWD-Person with Disabilities	30%

8. The result was thereafter, declared by the petitioners on 12.01.2017, in which the respondent secured 48.25 marks out of 125 marks, that is, 38.6% marks, thereby being rendered ineligible for offer of appointment.

9. A total of 7 candidates under the unreserved category were offered appointment for the post of Nursing Orderly, out of 23 General Category vacancies that had been advertised.

10. Aggrieved of the same, the respondent filed the above O.A. before the learned Tribunal, which has taken the path which we have already narrated hereinabove.

11. The limited issue which arises for our consideration is as to whether the petitioners, having not prescribed a minimum cut-off marks for the written examination in the advertisement, can, after the the examination has already been held, prescribe the same and deny the offer of appointment to the candidates who have failed to meet the cut-off marks.

12. As noted hereinabove, the learned Tribunal has based its direction on the judgments of the Supreme Court in ***K. Manjusree*** (supra) and ***Hemani Malhotra*** (supra). During the pendency of the present petition, however, we now have the benefit of the judgment of the Supreme Court in ***Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.*** (2025) 2 SCC 1, which not only considered the above two judgments, but also dealt with almost identical fact situation as is being presented before us. In the said case, the Rajasthan High Court, *vide* Notification dated 07.09.2009, invited applications from amongst the Judicial Assistants and Junior Judicial Assistants having experience of three years in the Establishment of the High Court and possessing a degree of M.A. in English Literature, for appointment to 13 posts of the Translators. Preference was to be given to Law Graduates. On 19.12.2009, the examination was held for the said post, wherein 21 aspirants appeared. The result of the examination was declared on 20.02.2010, wherein only three candidates were declared successful, as the Chief Justice of the High Court directed that only those candidates who secured a minimum of 75% marks will be selected to fill up the posts in question. Therefore, therein also the cut-off marks were prescribed after the written test had already been

conducted, though the same has not been prescribed in the Advertisement.

13. On the above facts, a Reference was made to the Constitutional Bench as to whether the decision in ***K. Manjusree*** (supra) was *per incuriam* inasmuch the earlier decision in ***State of Haryana v. Subash Chander Marwaha***, (1974) 3 SCC 220, had not been noticed by the Supreme Court while pronouncing its decision in ***K. Manjusree*** (supra). We quote paragraph 1 of the judgment of the ***Tej Prakash Pathak*** (supra), as under:

> *"1. A three-Judge Bench of this Court while accepting the salutary principle that once the recruitment process commences the State or its instrumentality cannot tinker with the "rules of the game" insofar as the prescription of eligibility criteria is concerned, wondered whether that should apply also to the procedure for selection. In that context, doubting the correctness of a coordinate Bench decision in K. Manjusree for not having noticed an earlier decision in Subash Chander Marwaha, vide order dated 20.03.2013, it was directed that the matter be placed before the Chief Justice for constituting a larger Bench for an authoritative pronouncement on the subject."*

14. Considering the submissions made by the learned counsels for the parties appearing therein, the Supreme Court divided its discussion into the following parts:

> *"21. To effectively analyse and adjudicate upon the questions referred, we would divide our discussion into following parts:*
> *21.1. (a) When the recruitment process commences and comes to an end;*
> *21.2. (b) Basis of the doctrine that "rules of the game" must not be changed during the*

course of the game, or after the game is played;
21.3. (c) Whether the decision in K. Manjusree is at variance with earlier precedents on the subject;
21.4. (d) Whether the above doctrine applies with equal strictness qua method or procedure for selection as it does qua eligibility criteria;
21.5. (e) Whether procedure for selection stipulated by Act or Rules framed either under the proviso to Article 309 of the Constitution or a statute could be given a go-by;
21.6. (f) Whether appointment could be denied by change in the eligibility criteria after the game is played."

15. It then considered the decision in ***K. Manjusree*** (supra) and as to whether it was at variance with earlier precedents, and while holding that it was not so, observed as under:

"36. What is important in K. Manjusree is that the minimum marks for the interview was fixed after the interviews were over. In that context, it was observed:
(a) that the game was played under the rule that there was no minimum marks for the interview, therefore introduction of the requirement of minimum marks for interview, after the entire selection process consisting of written examination and interview was completed, would amount to changing the rules of the game after the game was played; and
(b) if the interviewers had to proceed on the basis that there were minimum marks to be secured in the interview for being considered for selection and that the marks awarded by them would have the effect of barring or ousting any candidate from being considered for selection, the awarding of marks might have been markedly different.
The above observation (b) lends credence to the submission made before us that a change in the eligibility cut off, after evaluation is

done, denies the evaluator an opportunity to modulate the marks for placing the candidate in a category to which he/she, in the view of the evaluator, is entitled to be placed.

37. In the reference order the correctness of the decision in K. Manjusree has been doubted on two counts : (a) if the principle laid down in K. Manjusree is applied strictly, the High Court would be bound to recruit 13 of the "best" candidates out of the 21 who applied irrespective of their performance in the examination held, which would not be in the larger public interest or the goal of establishing an efficient administrative machinery; and (b) the decision of this Court in Subash Chander Marwaha was neither noticed in K. Manjusree nor in the decisions relied upon in K. Manjusree.

38. Insofar as the first reason to doubt K. Manjusree is concerned, we are of the view that the apprehension expressed in the referring order that all selected candidates regardless of their suitability to the establishment would have to be appointed, if the principle laid down in K. Manjusree, is strictly applied, is unfounded. Because K. Manjusree does not propound that mere placement in the list of selected candidates would confer an indefeasible right on the empanelled candidate to be appointed.

39. The law in this regard is already settled by a Constitution Bench of this Court in Shankarsan Dash, in the following terms: "7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is

under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted."

40. As regards the second reason (i.e. K. Manjusree, not considering earlier decision in Subash Chander Marwaha, it would be appropriate for us to first examine the facts of Marwaha case. In Subash Chander Marwaha against 15 vacancies in Haryana Civil Service (Judicial Branch) a select list of 40 candidates, who obtained minimum 45% or more marks in the competitive examination, was prepared. The State Government, however, which was the appointing authority, made only 7 appointments from amongst top seven in the select list. Candidates who were ranked 8, 9 and 13 filed writ petitions in the High Court for a direction to the State Government to fill up the remaining vacancies as per the order of merit in the select list. The State Government contested the petitions by claiming that in its view, to maintain high standards of competence in judicial service, candidates getting less than 55% marks in the examination were not suitable to be appointed as Subordinate Judges. The High Court allowed the writ petition by taking a view that the State Government was not entitled to impose a new standard of 55% of marks for selection as that was against the rule which provided for a minimum of 45% only.

41. After taking note of the relevant extant rules (i.e. Rules 8 and 10) this Court allowed the State's appeal with the following observations:

"10. … The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed. Indeed, if the

State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect. The true effect of Rule 10 … is that if and when the State Government propose to make appointments of Subordinate Judges the State Government: (i) shall not make such appointments by travelling outside the list, and (ii) shall make the selection for appointments strictly in the order the candidates have been placed in the list published in the Government Gazette. In the present case neither of these two requirements is infringed by the Government. They have appointed the first seven persons in the list as Subordinate Judges. Apart from these constraints on the power to make the appointments, Rule 10 does not impose any other constraint. There is no constraint that the Government shall make an appointment of a Subordinate Judge either because there are vacancies or because a list of candidates has been prepared and is in existence.

11. It must be remembered that the petition is for a mandamus. This Court has pointed out in Rai Shivendra Bahadur v. 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.

12. It was, however, contended by Dr Singhvi on behalf of the respondents that since Rule 8 … makes candidates who obtained 45% 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% 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) … 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 got 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.…"
(emphasis supplied)

42. A close reading of the judgment in Subash Chander Marwaha would disclose that there was no change in the rules of the game qua eligibility for placement in the select list. There the select list was prepared in accordance with the extant rules. But, since the extant rules did not create any obligation on the part of the State Government to make appointments against all notified vacancies, this Court opined that the State could take a policy decision not to appoint candidates securing less than 55% marks. With that reasoning and by taking into account that appointments made were of top seven candidates in the select list, who had secured 55% or higher marks, this Court found no merit in the petition of the writ petitioners.

43. On the other hand, in K. Manjusree, the eligibility criteria for placement in the select list was changed after interviews were held which had a material bearing on the select list. Thus, Subash Chander Marwaha dealt with the right to be appointed from the select list whereas K. Manjusree dealt with the right to be placed in the select list. The two cases therefore dealt with altogether different issues. For the foregoing reasons, in our view, K. Manjusree could not have been doubted for having failed to consider Subash Chander Marwaha.

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52. Thus, in our view, the appointing authority/recruiting competent authority, in

> *absence of rules to the contrary, can devise a procedure for selection of a candidate suitable to the post and while doing so it may also set benchmarks for different stages of the recruitment process including written examination and interview. However, if any such benchmark is set, the same should be stipulated before the commencement of the recruitment process. But if the extant Rules or the advertisement inviting applications empower the competent authority to set benchmarks at different stages of the recruitment process, then such benchmarks may be set any time before that stage is reached so that neither the candidate nor the evaluator/examiner/interviewer is taken by surprise.*
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> *53. The decision in K. Manjusree does not prescribe setting of benchmarks for various stages of the recruitment process but mandates that it should not be set after the stage is over, in other words after the game has already been played. This view is in consonance with the rule against arbitrariness enshrined in Article 14 of the Constitution and meets the legitimate expectation of the candidates as also the requirement of transparency in recruitment to public services and thereby obviates malpractices in preparation of select list."*

16. From a reading of the above, it would be apparent that the Supreme Court found that while in ***K. Manjusree*** (supra), the minimum qualifying marks for the interview had been prescribed after the interview had already been conducted, thereby denying an opportunity even to the evaluator to modulate the marks for placing the candidate in appropriate category to which he/she, in the view of the evaluator, is entitled to be placed, in ***Subash Chander Marwaha*** (supra), the cut-off marks had been prescribed to appoint the

candidates found suitable for the job on offer, and applying the principle that it is for the State Government to decide whether to make appointments to all notified vacancies or not, and that a candidate cannot claim indefeasible rights to appointment only because he/she is placed in the selected list, it was held that the cut off marks can be prescribed.

17. Similarly, while considering the case of ***Hemani Malhotra*** (supra), the Supreme Court again emphasized that the object of any process of selection for entering into a public service is to ensure that a person most suitable for the post is selected. Therefore, a certain degree of discretion is necessary to be left to the employer to devise the method/procedure for selection of candidate most suitable for the post, subject to Articles 14 and 16 of the Constitution of India as also rules/statutes governing service and reservation. It was held that ***K. Manjusree*** (supra) and ***Hemani Malhotra*** (supra) do not proscribe setting of benchmarks for various stages of the recruitment process, but mandate that it should not be set after the stage is over, in other words after the game has already been played, however, said rules do not apply with equal strictness to steps for selection. Therefore, where there are no rules or the rules are silent on the subject, administrative instructions may be issued to supplement and fill in the gaps in the rules. It concluded the discussion on the issue raised, in the following terms:

> *"65. We, therefore, answer the reference in the following terms:*
> *65.1. Recruitment process commences from the issuance of the advertisement calling for applications and ends with filling up of*

vacancies;

65.2. Eligibility criteria for being placed in the select list, notified at the commencement of the recruitment process, cannot be changed midway through the recruitment process unless the extant Rules so permit, or the advertisement, which is not contrary to the extant Rules, so permit. Even if such change is permissible under the extant Rules or the advertisement, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness;

65.3. The decision in K. Manjusree lays down good law and is not in conflict with the decision in Subash Chander Marwaha. Subash Chander Marwaha deals with the right to be appointed from the select list whereas K. Manjusree deals with the right to be placed in the select list. The two cases therefore deal with altogether different issues;

65.4. Recruiting bodies, subject to the extant Rules, may devise appropriate procedure for bringing the recruitment process to its logical end provided the procedure so adopted is transparent, non-discriminatory/non-arbitrary and has a rational nexus to the object sought to be achieved;

65.5. Extant Rules having statutory force are binding on the recruiting body both in terms of procedure and eligibility. However, where the rules are non-existent, or silent, administrative instructions may fill in the gaps;

65.6. Placement in the select list gives no indefeasible right to appointment. The State or its instrumentality for bona fide reasons may choose not to fill up the vacancies. However, if vacancies exist, the State or its instrumentality cannot arbitrarily deny appointment to a person within the zone of consideration in the select list."

18. Applying the above ratio, the appeals filed challenging the High Court decision therein were dismissed by the Supreme Court *vide* its

Order dated 04.02.2025.

19. We may again emphasis, as it was done by the Supreme Court, that the placement in the select list gives no indefeasible right to appointment and the State or its instrumentalities, for *bona fide* reasons, may choose not to fill up the vacancies. Therefore, the State or its instrumentalities may, even at the end of the selection process, choose, on a reasonable, non-discriminating and not arbitrary manner, candidates who are most suitable for the job on offer by prescribing the cut off marks.

20. Applying the above principle to the facts of the present case, as noted hereinabove, the selection process was single stage, that is, based on the written examination. The petitioners, as an employer, concluded that a candidate securing less than 45% for an unreserved category, is not suitable for appointment to the post of Nursing Orderly. We find nothing arbitrary in the said decision. As an employer, it is for the petitioners to decide whether to fill up all the posts that were advertised or leave them vacant in case the suitable candidates could not be found in the selection process. Testing the decision on the touchstone of Articles 14 and 16 of the Constitution of India, the decision of the petitioners to leave certain vacancies unfilled cannot be termed as arbitrary. The prescribed cut-off was not that high so as to give a rise to the challenge on ground of arbitrariness or unreasonableness.

21. We must, however, also consider the judgment of this Court in ***Airports Authority of India v. Vikas Singh & Ors.,*** 2015:DHC:9384-DB, which was also relied upon by the learned counsel for the

respondent. Therein, the Court was considering the appeal where the Management had decided to prescribe the cut-off marks for the aggregate obtained by the candidates in the written examination and in the interview, which was adopted post the conclusion of the process. It was only after the interview had been conducted that the benchmark, which was not stipulated earlier, was prescribed. The same, therefore, falls within the scope of the judgment of the Supreme Court in ***K. Manjusree*** (supra), which has been discussed in detail by the Supreme Court in ***Tej Prakash Pathak*** (supra) and distinguished as far as the facts are concerned. The said judgment, therefore, can come to no help to the respondent in the present case.

22. In view of the above, we are unable to sustain the Orders passed by the learned Tribunal. The same are set aside.

23. The petition, along with the pending application, is allowed in the above terms.

24. There shall be no order as to costs.

NAVIN CHAWLA, J

MADHU JAIN, J

DECEMBER 20, 2025/Arya/SS