
(2006) 03 CAL CK 0024

In the Calcutta High Court

Case No : WPST No's. 846 and 1013 of 2003 and R.V.W. No. 1987 of 2004

Abhijit Dey

APPELLANT

Vs

Learned West Bengal Administrative Tribunal and Others

RESPONDENT

Date of Decision : 24-03-2006

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19
Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Constitution of India, 1950 — Article 12, 14, 141

Citation : (2006) 4 CHN 476

Hon'ble Judges : Jyotirmay Bhattacharya, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Dibyendu Narayan Roy and Munmun Tewari, for the Appellant; Ashim Kumar Halder,, Amal Baran Chatterjee and Anadi Banerjee for the respondent No. 7 and, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—This is an application for review of an order dated 20th April, 2004, passed by a Division Bench of this Court by which the said Division Bench disposed of two separate writ applications, being WPST No. 846 of 2003 and WPST No. 1013 of 2003. both filed against the order dated 24th September, 2003 passed by the West Bengal Administrative Tribunal in ,O. A. No. 3334 of 1999.

2. The first of the aforesaid two applications was filed by one Subhro Mukherjee ("Subhro") who was the private-respondent before the learned Tribunal while the other was instituted by one Abhijit Dey ("Abhijit") who was the successful applicant before the Tribunal u/s 19 of the Administration Tribunals Act, 1985.

3. By the order of the Tribunal, the selection of Subhro was quashed at the instance of Abhijit and a direction was given by the Tribunal to the respondents, namely, the David Hare Training Institute to hold fresh selection test for the post of the Clerk-cum-Accountant as per norms laid down by the Supreme Court in the case of Ashok alias Somanna Gowda and Another Vs. State of Karnataka by

its Chief Secretary and Others, or as per the norms followed by the West Bengal Public Service Commission or in terms of any other recruitment rules that might have been finalised in the meantime.

4. By the first writ application referred to above, Subhro was the petitioner who was really aggrieved because his selection was quashed by the Tribunal. The grievance of Abhijit in the second writ application was, however, that the Tribunal, instead of giving direction for fresh selection, ought to have straightaway given appointment to him in place of Subhro because he stood first in the written test and he will be the next man in the merit list if the appointment of Subhro is set aside.

5. As indicated above, by the order dated 20th April, 2004, the Division Bench allowed the application of Subhro and dismissed the application filed by Abhijit thereby setting aside the order of the Tribunal and maintaining the selection of Subhro.

6. Being dissatisfied, Abhijit has come up with the present application for review alleging errors apparent on the face of the order dated April 20, 2004.

7. As one of the Hon''ble Judges of the said Division Bench (hereinafter referred to as the Division Bench) is no longer available before this Court, the Hon''ble Chief Justice has assigned the matter before this Bench.

8. Mr. Roy, the learned Advocate appearing on behalf of the applicant has laboriously contended before us that the Division Bench while setting aside the order of the Tribunal committed an error apparent on the face of the record by relying upon the decision of the Supreme Court in the case of Jasvinder Singh and Ors. v. State of Jammu and Kashmir and Ors. reported in 2003(3) SCC 132 and observing that the Tribunal below did not have the benefit of the later decisions of the Supreme Court and that the Tribunal delivered judgment only on the basis of two of the decisions passed by the Supreme Court, one in the case of Ashok Kumar Yadav and Others Vs. State of Haryana and Others, and the other, being the case of Ashok alias Somanna Gowda and Another Vs. State of Karnataka by its Chief Secretary and Others, which, according to the Division Bench, had since been distinguished in the Jasvinder Singh's case and according to the Division Bench, it was not even a case of conflict of decisions. Mr. Roy submits that the Division Bench totally overlooked the fact that the decision in the case of Ashok Kumar Yadav (supra), was given by a Bench consisting of four-Judges while the decision given in Jasvinder Singh's case (supra), was delivered by a Bench consisting of two-Judges; over and above, Mr. Roy proceeds, the facts involved in the case of Jasvinder Singh (supra), are not. similar to the one we are concerned in this case.

9. Mr. Roy further contends that in the case of Ashok Kumar Yadav (supra), a Bench consisting of four-Judges of the Apex Court as a proposition of law, laid down that in case of a selection for a post by way of written test followed by viva voce, the marks allotted for viva voce, if exceeds 12.2 per cent of the total

marks for the general candidates and 22.5 per cent in case of ex-military persons, there is every possibility of abusing the process of selection and such selection should be quashed simply on the ground that in the process of selection there is scope of manipulation and favouritism. Mr. Roy points out that in the case of Ashok Kumar Yadav (supra), the Haryana State Civil Services Commission followed the rules which were in force for the last 17 years enabling the Commissions to allot higher percentage of marks for viva voce examination but the Supreme Court directed the Haryana Government to frame new rules by limiting the marks allotted for the viva voce test to the one indicated by the Supreme Court in that decision and also observed that the other States should follow the same principle so that there was no conflict of rules throughout the country. Mr. Roy submits that till today, the decision given in the case of Ashok Kumar Yadav (supra), is the law of the land and has not been overruled by any larger Bench of the Supreme Court.

10. Mr. Roy further contends even in Jasvinder Singh's case, the allotment of marks for viva voce was only 20 per cent of the total marks and not like the present one where 50 per cent marks were reserved for viva voce. According to him, the said decision cannot have any application to the facts of the present case where the selection is based on written examination followed by the viva voce test allotting as high as 50% marks for the latter.

11. Mr. Roy, therefore, contends that the Division Bench committed an error apparent on the face of record by overlooking the strength of the Judges of the Bench deciding the case of Ashok Kumar Yadav and that of Jasvinder Singh's case. He further submits that the observation that it was not a case of conflict of decisions as made by the Division Bench is also on the face of it erroneous which requires no elaborate argument.

12. Mr. Amal Baran Chatterjee, the learned Advocate appearing on behalf of Subhro has, however, opposed the aforesaid contentions of Mr. Roy and has made three-fold submission in this connection.

13. First, Mr. Chatterjee contends that in the case of Ashok Kumar Yadav, the Apex Court did not lay down as a proposition of law that in all the process of selections where the same consist of written test followed by viva voce assessment, if allotment for marks for viva voce exceeds 12.2 per cent of the total marks for general candidates, the same should be ipso facto set aside. Mr. Chatterjee submits that in Ashok Kumar Yadav's case, the Supreme Court itself said that there was no hard and fast rule for allotment of the maximum marks in the viva voce test and such allotment depended upon various factors as laid down in the earlier decision of the Supreme Court and the same had also been quoted therein. Mr. Chatterjee, therefore, submits that the decision of the Supreme Court in the case of Ashok Kumar Yadav (supra), is not an absolute authority for the proposition sought to be argued by Mr. Roy.

14. Secondly, Mr. Chatterjee contends that even if it is assumed for the sake of

argument that the decision of the Supreme Court in the later decision of Jasvinder Singh is conflict with that indicated in Ashok Kumar Yadav's case, the Division Bench on consideration of the materials on record and after considering the facts involved in this case having come to the conclusion that in this case no allegation of mala fide could be established by Abhijit as regards the selection of Subhro, this Court should not reappreciate the decision of the Division Bench as if this Court is hearing an appeal against the order of the Division Bench. At the most, Mr. Chatterjee continues, it may be argued that there was an error of law committed by the Division Bench and in such a case, the remedy of the present applicant lies by approaching higher forum against the order of the Division Bench.

15. Thirdly, Mr. Chatterjee contends that his client having been working in the said post from the date of his appointment in the year 1999 by virtue of order of stay granted by the Tribunal itself and the subsequent quashing of the order of the Tribunal by the Division Bench, this Court at this stage should not set aside the selection of his client even if there is some irregularity in the process of selection. He, therefore, prays for dismissal of the application for review.

16. In support of such contention, Mr. Chatterjee relies upon the following decisions of the Supreme Court:

1. National Insurance Company v. Mohd. Sultan Asim and Anr. reported in AIR 2005 NOC 318.

2. Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhury, .

3. Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, .

4. Jasvinder Singh and Others Vs. State of Jammu & Kashmir and Others, .

5. Anzar Ahmed Vs. State of Bihar and others, .

6. Vijay Syal and Another Vs. State of Punjab and Others, .

7. State of Orissa and Others Vs. Md. Illiyas,

17. Before we proceed to enter into the merit of the application for review, we are quite conscious of the position of law as regards the scope of an application for review. It is rightly pointed out by Mr. Chatterjee, appearing on behalf of the respondent herein that the Court dealing with an application for review cannot reappreciate the matter as if it is hearing an appeal against an order of a subordinate authority and even if there is any error of law or of fact which can be detected on elaborate scrutiny, it is not within the province of a Court of Review to rectify the earlier order merely on the ground of error of law or fact. A Court reviewing an earlier order can pass order in favour of the applicant if there is an error apparent on the face of record meaning thereby that it requires no convoluted argument and on the face of it, such error can be detected.

18. In the case before us, we find that the Division Bench after recording the submissions made by the Counsel for the parties came to the conclusion that there was really no allegation of any bias against the selection committee consisting of the Principal of the College and two senior readers and that no aspersion had at all been cast regarding the integrity of the three members of the selection committee except for a reference to the fact that Subhro was the son of a Class-III employee of the College and there was also no hint even of mala fide or bias regarding such statement. The Division Bench further pointed out that Abhijit was also related to the one of the teaching staff of the institution. According to the Division Bench, in the absence of any definite averment of bias and/or mala fide, the Division Bench was not willing to accept any submission made at that stage that the selection committee could have acted with bias in selecting Subhro for the post in question despite the fact that his academic achievements were in fact the lowest among all the candidates. The Division Bench further considered the broad-sheet prepared during the process of selection and came to the conclusion that in the absence of any recruitment rules, the procedure which was observed during the recruitment-process included 50 per cent marks awarded for written examination and 50 per cent marks for viva voce test which, however, was split up into two groups and 10 per cent marks were set apart for assessing personality and 40 per cent marks for evaluating the general knowledge and command over the current affairs of the candidates. The Division Bench further noted that from the broad-sheet, it appeared that the viva voce test was really confined to 10 marks which was allotted for assessment of the personality of the candidates and so far as the general knowledge and current affairs were concerned, the Division Bench proceeded there could be no scope of manipulation and/or nepotism since the candidates were required to deal with actual facts. Ultimately, the Division Bench, observed as follows:

The learned Tribunal, in our view, did not have the benefit of the later decisions and delivered judgment only on the basis of the two decisions rendered by the Hon'ble Supreme Court in the case of Ashok Kumar Yadav and Sumanna Gowda, which have since been distinguished in Jasvinder Singh's case. This, in our view, is not a case of conflict of decisions.

In such circumstances, we have no hesitation in allowing the writ application filed by Shri Subhro Mukherjee and dismissing the writ application filed by Shri Abhijit Dey and setting aside the judgment and order of the learned Tribunal impugned in both the writ applications. The said judgment having been set aside, the respondents are directed to reinstate the first writ petitioner, Shri Subhro Mukherjee, who has in any event continued in service on account of the interim orders passed subsequent to the judgment of the learned Tribunal.

19. From the aforesaid findings of the Division Bench we find that observation of the Division Bench that viva voce test was really confined to 10 per cent marks which were allotted for assessing the personality of the candidates was on the

faces of it wrong and the further observation of the Division Bench that so far the general knowledge and current affairs were concerned, there could be no scope of manipulation and/or nepotism since the candidates were required to deal with actual fact was equally wrong. It appears that the written test was taken for 50 marks but out of the balance 50 marks, 10 marks were provided for personality test and both Subhro and Abhijit obtained 6 marks each; but as regards the remaining 40 marks, those, according to the affidavit affirmed by the institution, were limited to general knowledge and current affairs. But such examination was definitely taken by way of viva voce and not by written test. Therefore, if the intention of the employer was really to evaluate the general knowledge of the candidates as also their command "over the current affairs, the same could be easily taken by way of a written test and the same set of questions could be put to all the candidates and they could be asked to disclose their knowledge about the current affairs on the basis of the same questions put to all the candidates; but if such test is taken orally, there is ample scope of favouritism and nepotism as the materials do not show how many questions were put to each of the candidates and what were those questions and their answers. Even what was the duration of such interview is not available from the records. Easy questions might be put to a particular candidate whereas some other might face tough ones. Therefore, the Division Bench committed an error apparent on the face of the record in treating the present case as one as if 10 per cent marks are really allotted for viva voce which was on the face of it erroneous inasmuch as the balance 40 per cent marks were also given on the basis of oral test.

20. The Division Bench further observed that apart from the allegation that Subhro was the son of a particular Class-III employee, it could not be established that there was mala fide intention on the part of the selectors in selecting him. In our view, in the case of Ashok Kumar Yadav, the Supreme Court having laid down as a proposition of law that in any process of selection where there is ample scope of favouritism and nepotism by allotment of marks above 12.2 per cent for general candidate for viva voce, such fact by itself is sufficient to vitiate the process, there is no scope of arriving at the conclusion that in this case there was no favouritism shown in favour of Subhro. The application was filed before the Tribunal by questioning the process of selection which specified 50 per cent for viva voce and in such a case, actual evil intention of the selectors is not required to be proved.

21. We have quoted the last observation of the Division Bench where the Division Bench set aside the order of Tribunal merely on the ground that the Tribunal did not have the benefit of later decisions of the Supreme Court and that it delivered judgment only on the basis of decision of Ashok Kumar Yadav and that of Sumanna Gowda which had since been distinguished in Jasvinder Singh's case.

22. In our view, there is also an error apparent on the face of it in the aforesaid observation because in Jasvinder Singh's case the Court was considering a process of selection where only 20% of the total marks were allotted for viva

voce whereas in the case before us, 50% marks are separated for the interview and thus, the observation made in Jasvinder Singh's case cannot have any application to the facts of the present case. Moreover, even the said decision cannot be relied upon as a precedent because of the fact that it is now settled by the Supreme Court in the case of Union of India (UOI) and Another Vs. Hansoli Devi and Others, that a Bench consisting of two Judges cannot dispute the correctness of a decision of an earlier Bench of larger number of Judges and in our view, the observation of the Division Bench that there was no difference of opinion is also an error apparent on the face of the record. That this is not a case of conflict of decisions is also not true because the decision of Jasvinder Singh is definitely in conflict with the decision of the Supreme Court in the case of Ashok Kumar Yadav (supra). We further find that Ashok Kumar Yadav's case has been followed by the following subsequent decisions of the Supreme Court which were totally overlooked by the Division Bench:

- 1) Praveen Singh v. State of Punjab reported in AIR 2001 SC 152;
- 2) Satpal v. State of Haryana reported in 1995 Suppl (1) SCC 206;
- 3) Vikram Singh v. Subordinate Selection Board reported in 1991(1) SCC 688;
- 4) Mohinder Sain Garg Ors. Vs. State of Punjab and Others, ;
5. Ashok alias Somanna Gowda and Another Vs. State of Karnataka by its Chief Secretary and Others, .

23. Be that as it may, if a Court while deciding a case ignores a binding authority, being a decision of the Supreme Court, given by a Bench consisting of four-Judges and prefers to follow a subsequent decision of a Bench consisting of two-Judges without considering the strength of the earlier Bench, that is an error apparent on the face of record. [See: Commissioner of Sales Tax, J and K and Others Vs. Pine Chemicals Ltd. and Others, .

24. In our view, the Division Bench committed errors on the face of its order, first, as if, this is a case where the viva voce is really restricted to 10 per cent which is not correct. Secondly, in holding that in order to challenge a selection, one is required to allege and prove actual corruption in the process of selection consisting of written test followed by viva voce, even if, 50 per cent of the total marks are kept apart for viva voce test therein and thirdly, by acting under a wrong impression that the decision given in Ashok Kumar Yadav's case is no longer a good law and the views expressed in Jasvinder Singh's case is the appropriate law applicable to the facts of the present case.

25. Therefore, there are errors apparent on the face of the order of the Division Bench justifying review of the same.

26. We now propose to discuss the decisions cited by Mr. Chatterjee in this connection.

27. In the case of Ashok Kumar Yadav and Ors. (supra), a Division Bench of the

Supreme Court consisting of four-Judges was considering the scope of interference with the process of selection of the candidates in the Haryana Civil Service (Executive) and in that case, various points were raised. One of the points taken by the petitioners was that where a process of selection consists of composite written test and viva voce, whether the allocation of 700 marks for candidates in general and 400 marks for ex-servicemen for the written test and 200 marks for the viva voce by itself vitiates the process of selection rendering the same arbitrary. The Supreme Court considered all the points and dealt with the aforesaid point in particular (in paragraph 26 of the judgment published in AIR.) which is quoted below:

We may now, in the background of this discussion, proceed to consider whether the allocation of as high a percentage of marks as 33.3% in case of ex-service officers and 22.2% in case of other candidates, for the viva voce test renders the selection process arbitrary. So far as ex-service officers are concerned, there can be no doubt that the percentage of marks allocated for the viva voce test in their case is unduly high and it does suffer from the vice of arbitrariness. It has been pointed out by the Division Bench in a fairly elaborate discussion that so far as the present selections in the category of ex-service officers are concerned, the spread of marks in the viva voce test was inordinately high compared to the spread of marks in the written examination. The minimum marks required to be obtained in the written examination for eligibility for the viva voce test are 180 and as against these minimum 180 marks, the highest marks obtained in the written examination in the category of ex-service officers were 270, the spread of marks in the written examination thus being only 90 marks which works out to a ratio of 22.2%. But when we turn to the marks obtained in the viva voce test, we find that in case of ex-service officers the lowest marks obtained were 20 while the highest marks secured were 171 and the spread of marks in the viva voce test was thus as wide as 151 in a total of 200 marks, which worked out to an inordinately high percentage of 76. The spread of marks in the viva voce test being enormously large compared to the spread of marks in the written examination, the viva voce test tended to become a determining factor in the selection process, because even if a candidate secured the highest marks in the written examination, he could be easily knocked out of the race by awarding him the lowest marks in the viva voce test and correspondingly, a candidate who obtained the lowest marks in the written examination could be raised to the topmost position in the merit list by an inordinately high marking in the viva voce test. It is therefore obvious that the allocation of such a high percentage of marks as 33.3% opens the door wide for arbitrariness and in order to diminish, if not eliminate, the risk of arbitrariness, this percentage needs to be reduced. But while considering what percentage of marks may legitimately be allocated for the viva voce test without incurring the reproach of arbitrariness, it must be remembered that ex-service officers would ordinarily be middle aged persons of mature personality and it would be hard on them at that age "to go through a long written examination involving 8 subjects and hence it would not be unfair to

require them to go through a shorter written examination in only 5 subjects and submit to a viva voce test carrying higher percentage of marks than what might be prescribed in case of younger candidates. The personalities of these ex-service officers being fully mature and developed, it would not be difficult to arrive at a fair assessment of their merits on the basis of searching and inclusive viva voce test and therefore in their case, the viva voce test may be accorded relatively greater weight. But in any event the marks allocated for the viva voce test cannot be as high as 33.3%.

28. The Supreme Court ultimately directed that in future selection to be made to the Haryana Civil Services (Executive Branch) and other allied services where the competitive examination consists of a written test followed by viva voce, the marks allocated for the viva voce test should not exceed 12.2% of the total marks taken into account for the purpose of selection. The Supreme Court further observed that the aforesaid percentage should also be adopted by the Public Service Commissions in other States because it was desirable that there should be uniformity in the selection process throughout the country.

29. From the aforesaid observations, it is clear that the said direction was a mandate of the Supreme Court binding upon all in terms of Article 141 of the Constitution of India directing that henceforth if the State within the meaning of Article 12 of the Constitution of India undertakes any process of selection which consists of written test followed by viva voce one, the percentage of marks allocated for viva voce should not exceed the percentage of marks indicated in the said judgment. The present case is one for selection by a "State" within the meaning of Article 12 of the Constitution of India for the post of Clark-cum-Accountant and there is no rules framed by the employer for selection to such post. In such a situation, in the absence of any rules whatsoever, it was the duty of the Employer to follow the decision of the Supreme Court in the case of Ashok Kumar Yadav (supra), because in this case, the process of selection comprised of a written test followed by viva voce. The various observations made by the Supreme Court in that case by quoting earlier decisions of the said Court could not be said to be the ratio of the decision. The ratio of the decision is that in a case like the present one if there is more allotment of marks than the one indicated therein there is every possibility of favouritism and manipulation and that itself is a ground for setting aside the selection. We, therefore, find that the various observations made in the body of the judgment of Ashok Kumar Yadav (supra), in arriving at the final conclusion including observations of the few earlier decisions did not constitute the ratio of the decision and those observations do not help Mr. Chatterjee's client in any way.

30. In the case of State of Orissa and Ors. (supra), a Division Bench of the Supreme Court held that the binding force attaches only to ratio decidendi of a judgment and every observations found in a judgment are not binding as a precedent. We respectfully agree with the aforesaid decision and hold that in the case of Ashok Kumar Yadav (supra), the ratio decidendi is that in a case; where

the selection consists of a written test followed by viva voce, allotment of more than 12.2% marks for general candidate and 25% marks of the total marks for ex-servicemen towards viva voce vitiate the process of selection. We, therefore, find that the aforesaid decision rather supports the case of the applicant for review.

31. In the case of *Vijay Syal and Anr.* (supra), the Supreme Court was considering a case where 10.4% marks were allocated for interview and the Supreme Court found that in the said case, no allegation of arbitrariness was made out and in such a situation, it was of the view that in the absence of any mala fides or extraneous consideration, there was no scope of interference and the marks given by the Interview-Committee were not subject to judicial review unless mala fides or extraneous considerations were alleged and proved. In the said decision, we find that allotment of marks for interview was only 10.4% which was within the norms specified in *Ashok Kumar Yadav's* case and in such circumstances, unless mala fides by the selectors were specifically proved, there was no scope of interference with the marks given on interview; but in a case where 50% marks are allocated for interview, there is no necessity of proving actual mala fides as the process itself gives scope of undue favouritism to any of the candidates. Therefore, principles laid down in the case of *Vijay Syal and Anr.* (supra), has no application to the case before us.

32. In the case of *Anzar Ahmad* (supra), a Division Bench consisting of two-Judges of the Supreme Court was considering a case where selection was made as per past practice by allocating 50% marks for academic performance and 50% for interview. In that case, the selection was for the post of Unani Medical Officer. There was no rules framed but that was the practice. In the said case, the decision of *Ashok Kumar Yadav* (supra) was referred to by the Bench and in paragraph 17 of the judgment of AIR., it was held that Their Lordships were unable to construe the said decision to mean that the principles which govern the allocation of marks for interview in a selection based on written and viva voce test would also apply to a selection where no written test is held and the selection is based on interview only. We fail to appreciate how the said decision can be of any help to Mr. Chatterjee's client where the process of selection consists of written test followed by interview. The Division Bench in the case of *Anzar Ahmad* (supra), only distinguished the said decision observing that the principles laid down in the case of *Ashok Kumar Yadav* had application only to the process of selection which consisted of written test followed by viva voce which is the case before us.

33. Lastly, in the case of *Jasvinder Singh and Ors.* (supra), upon which Mr. Chatterjee has been placed strong reliance and which is also the basis of the judgment of the Division Bench, we find that in that case, selections were made for the appointments of Sub-Inspector of Executive/Armed Police in the State of Jammu and Kashmir on the basis of (a) physical measurement test, (b) outdoor test, (c) written test and (d) viva voce. 25 marks were allocated for viva voce as

compared to 100 marks allocated for written test and as such, it was found to be 20% of the total marks. The appellant before the Supreme Court filed writ application in the High Court challenging the selections and relied on the decision of Ashok Kumar Yadav (supra). A learned Single Judge held that the allocation of marks for viva voce test in excess of 12.5% was bad. The learned Single Judge concluded that the marks in interview were awarded with a conscious effort to bring up within the selection zone candidates with low marks in the written test by awarding more marks in the viva voce and low marks to those who secured higher percentage in the written test. Since the last candidate already selected and appointed in the general category had obtained 56 marks in the written test, he directed that all those writ petitioners falling in the general category who had obtained 56 marks or above in the written test should be entitled to appointment. In appeal, a Division Bench reversed that decision.

34. While dismissing the appeal, the Supreme Court held that the very observations of Ashok Kumar Yadav's case showed that there could not be any hard and fast rule of universal application for allocating the marks for viva voce vis-a-vis the marks for written examination and consequently, the percentage indicated therein alone could not be the touchstone in all cases. What ultimately was required to be ensured was, the Bench proceeded, as to whether the allocation, as such was with an oblique intention and whether it was so arbitrary as capable of being abused and misused in its exercise. The Bench ultimately held that the Division Bench of the High Court had not committed any error in sustaining the allocation of 25 marks (20%) for viva voce as against 100 marks for written examination. In our view, even if the principle laid down in Jasvinder Singh's case is treated to be correct, the same cannot apply to a fact where 50% marks are allocated for interview whereas in Jasvinder Singh's case, only 20% marks were allocated for viva voce. Over and above, in our view, the said Division Bench consisting to two-Judges definitely came to a contrary decision to the one taken in the case of Ashok Kumar Yadav which consisted of four-Judges. Therefore, even the observation in the case of Jasvinder Singh where allocation for interview was restricted to 20% was in conflict with the decision of the case of Ashok Kumar Yadav. We, therefore, find that there is an error apparent on the face of the judgment of the Division Bench in applying the principle of the Jasvinder Singh's case to the fact of the present case where allotment is 50% for interview by treating it as if for viva voce only 10 marks were allocated.

35. We are, therefore, unable to follow the principles laid down in the case of Jasvinder Singh to the fact of the present case.

36. In the case of Satyanarayan Laxminarayan Hegde and Ors. (supra), the Supreme Court pointed out that an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of record. According to the Supreme Court where an alleged error is far from self-evident and even if it can be established the same is to be established by lengthy and

complicated argument, such an error cannot be cured by a writ of certiorari.

37. Similarly, in the case of Meera Bhanja (*supra*), the Supreme Court pointed out the scope of Order 47 Rule 1 of the Code and held that an error apparent on the face of record means an error which strikes one on mere looking at record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions.

38. There is no dispute with the aforesaid proposition of law and at the very outset of our judgment, we narrated the aforesaid principle. In the case before use, we have already pointed out the fact that the decision of the Supreme Court in the case of Ashok Kumar Yadav (*supra*), was given by a Bench consisting of four-Judges and that the judgment delivered in the case of Jasvinder Singh (*supra*), was by a Division Bench consisting of two-Judges and such fact was totally overlooked by the Division Bench. We have also pointed out that the decision given in Jasvinder Singh's case is no doubt in conflict with the one given in Ashok Kumar Yadav's case because in Ashok Kumar Yadav's case the Supreme Court propounded as a proposition of law specifying what should be the maximum marks allocated for interview when a process of selection consists of written test followed by interview and according to the Supreme Court, the same in case of general candidate should not exceed 12.2% whereas in Jasvinder Singh's case the two-Judges Bench decision opined that a Court is not required to comply with the mandate given in Ashok Kumar Yadav's case. Similarly, we have also pointed out that the Division Bench was of the view that only 10% was allocated for viva voce by totally overlooking that 40% marks allocated for general knowledge was also assessed by way of oral test and that was also an error apparent on the face of record and thirdly, the Division Bench was of the opinion that even if there is scope of manipulation in the process of selection by allotting huge amount of marks for interview, that itself is not a ground for setting aside the selection unless in such a case, specific instance of favouritism is established. We have already said that in Ashok Kumar Yadav's case, the Supreme Court in clear language indicated that where there is possibility of favouritism by setting apart high percentage of marks of interview, the process of selection should be struck down.

39. In the case of National Insurance Co. v. Md. Sultan Asim and Anr. reported in AIR 2005 NOC 318, a Division Bench of Jammu and Kashmir High Court held that the review is admissible to correct mistake or error apparent on the face of record and on the basis of new important material which is not being with the knowledge of applicant despite exercise of due diligence when the judgment was delivered. According to the said Division Bench, the judgment rendered in ignorance of a binding decision of Court cannot be said to be an error apparent on the face of record nor can it be said to be discovery of new material. With great respect to the learned Judges, we are unable to follow the aforesaid observation. If a decision is based overlooking a binding precedent, the same is treated as a judgment per incuriam and is not even recognised as a "precedent"

by a subordinate Court and in such a situation, such a decision must be held to be vitiated by an error apparent on the face of record justifying review. [See: C.S.T. v. Pine Chemicals Ltd. (supra)]. Therefore, the decisions cited by Mr. Chatterjee are of no assistance to his client.

40. On consideration of the materials on record, we, thus, find that the Tribunal rightly applied the decision of the Supreme Court in the case of Ashok Kumar Yadav which is the law of the land in a case of the present nature and the Division Bench on the basis of errors apparent on the face of the order upset the judgment of the Tribunal.

41. Merely because the respondent herein is enjoying the benefit of an improper selection from the year 1999, such fact cannot be a ground of maintaining an illegal selection which was violative of Article 14 of the Constitution of India. The applicant herein challenged the selection immediately thereafter and the respondent after losing before Tribunal moved the Division Bench which granted an interim stay and ultimately set aside the order of the Tribunal. Therefore, the respondent cannot take advantage of the interim order obtained by him if the writ application filed by him before this Court is liable to be dismissed. Although the law is that if a person by way of interim order enjoys any undue benefit, on ultimate failure in the litigation, he is bound to restore the benefit unduly received, we do not intend to pass any order of return of the salary obtained by Subhro as he has rendered service. The employer will return the amount of deposit in the provident fund of the employee's contribution with the usual rate of interest within one month to Subhro.

42. We are, however, not prepared to accept the submission of Mr. Roy that instead of fresh selection ordered by the Tribunal Abhijit should be given appointment. If the process of selection itself is vitiated by arbitrariness, even the applicant cannot be selected on the basis of such illegal process of selection.

43. We, therefore, review the order of the Division Bench and maintain the order of the Tribunal. In the facts and circumstances, there will be, however, no order as to costs.

Jyotirmay Bhattacharya, J.

44. I agree.