

(1993) 03 PAT CK 0002

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 7475 of 1992

Dr. Sadre Alam and Another

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 12-03-1993

Acts Referred:

Constitution of India, 1950 — Article 318, 320

Citation : (1993) 1 PLJR 729

Hon'ble Judges : S.N. Jha, J;Aftab Alam, J

Bench : Division Bench

Advocate : Sada Nand Jha, Jai Shanker Barnwal and Devi Das Srivastava, for the Appellant; P.K. Shahi and Rajesh Pd. Chaudhary for the State, Mr. Swaraj Kumar Ghose for the Bihar Public Service Commission and M/s Shyama Prasad Mukherjee and Md. Abu Haider for the Intervenor, for the Respondent

Final Decision : Allowed

Judgement

S.N. Jha, J.—This writ petition once again brings to the fore angularities of the Bihar Public Service Commission (in short "the Commission") which can hardly fit in the lay out the Constitution has designed for it. The petitioners have challenged the selection of candidates made and communicated by the Commission in its letter dated 14.6.92, vide Annexure-5, for appointment on the post of Unani Medical Officers. The grounds urged in the writ petition are diverse and many. On the one hand there are allegations of violation of the norms of recruitment, on the other, there are allegations of favouritism and corruption. However, perhaps, in order to steer clear off the disputed facts, Learned Counsel for the petitioners confined his argument to only one facet of the grievance, namely, allocation of 50% marks for viva voce test in making the impugned selection. The facts in so far as they are relevant to the point are these. The State Government issued an advertisement inviting applications against 88 posts of Unani Medical Officers (gazetted class II) through the Commission on 15.9.91. The advertisement laid down that the candidates must have a degree in B.U.M.S. or G.U.M.S. or equivalent qualification from a University, Board, Institute etc.,

should possess six months" training of internship from a recognised institution and should be registered with the State Government as a Unani doctor. The petitioners submitted their applications and appeared for interview. The Commission prepared a list of 55 candidates and recommended them for appointment in different categories in which the names of the petitioners do not find place although, according to them, they have a "bright and brilliant academic career" and had "faired very well" in the interview. It is said that only two out of the 55 candidates mentioned at serial nos. 11 and 17 of the list possess superior academic qualification compared to petitioner no. 2 and, likewise, only some of them are said to have superior academic career than petitioner no. 1.

2. According to the petitioners, on previous occasions, selection for appointment of Unani Medical Officers used to be made on the basis of 100 marks allocated for the academic career and only 20 marks for the viva voce test but for oblique reasons and motive in order to select candidates of influential persons a new mode was evolved in 1992 according to which the Commission allocated 100 marks for academic career and 100 marks for viva voce test in all 200 marks in making the selection. According to petitioners, they were not selected because they were given very low marks in the interview in comparison to the selected candidates. The petitioners have asserted that as per the law laid down by the Supreme Court the allocation of marks for the viva voce cannot exceed 15% of the total marks and thus on account of allocation of 50% marks for the viva voce the whole selection process is vitiated.

3. At this stage, it would be convenient to refer to certain documents having bearing on the question of the mode of recruitment for the post of Unani Medical Officers. The post of Unani Medical Officers (Degree holder Hakims) was made gazetted class II with effect from 1.4.79 under Government resolution dated 5.12.79 (Annexure-6). The resolution stipulated that the same recruitment process as applicable to the officers of the Bihar Health Service will be applicable for appointment of the Unani Medical Officers also. By letter dated 25.11.89 (Annexure-9) the State Government informed the Commission about the aforesaid resolution. The Commission pointed out to the State Government vide its letter dated 18.4.90 (Annexure R-4/B) that the appointment in the basic grade of the Bihar Health Service were now being made on the basis of competitive examination held by the Commission and, therefore, if, as per the said resolution, the same procedure was to be followed for appointment of the Unani Medical Officers as well, the Government should make available necessary details regarding syllabus etc. of the proposed competitive examination so that rules may be framed and the competitive examination may be held. The State Government informed the Commission vide its letter dated 20.9.90 (Annexure R-4/C) that appointments to the basic grade of the Bihar Health Service were made earlier, on the date of the resolution i.e. 5.12.79, on the basis of interview and not any competitive examination and since neither the rules of recruitment of Unani Medical Officers have been amended nor any rule has been framed for

holding any competitive examination for such appointment, the Commission may make the selection on the basis of interview "as before".

4. Dr. Sada Nand Jha, Learned Counsel for the petitioners, submitted that since the selection was to be made as per the procedure "as before" (poorva ki bhanti) the Commission was obliged to follow the same old procedure, namely, allocation of 100 marks for the academic performance and 20 marks for the viva voce. According to the Learned Counsel, the impugned procedure whereunder 100 marks had been allocated both for viva voce and academic qualification each is not only contrary to the directive of the State Government but also violates the law laid down by the Supreme Court.

5. The Commission in its counter affidavit did not deny the averments regarding allocation of marks for the academic performance and the viva voce as being 100 marks and 20 marks respectively in the previous selection and 100 marks each in the impugned selection. According to it, however, in all cases where candidates are called for interview without any written test on the basis of their eligibility in terms of qualification and experience prescribed in the advertisement regardless of the number of the vacancies, the uniform policy of the Commission has been "to give weightage for academic performance depending on the marks obtained by them in different examinations relating to the advertisement and this weightage is given out of 100 marks and the performance of the candidates in viva voce test is assessed out of 100 marks". According to the Commission further, the upper limit of allocation of marks for viva voce test as laid down in the various decisions of the Supreme Court can be applicable only where the recruitment is made on the basis of both written test and viva voce test.

6. It is an admitted position that no rule has been framed laying down the mode of recruitment of the Unani Medical Officers. It is also more or less an admitted position that in the absence of the rules the recruitment has to be made as per the procedure applicable to the basic grade post of the Bihar Health Service, and in the absence of rules for holding a competitive examination as in the case of Bihar Health Service, the procedure which was applicable in 1979 when the posts of Unani Medical Officers were made gazetted has to be followed. In other words, the recruitment has to be made on the basis of the merit of the candidate judged from his academic qualifications and the viva voce test. The assertion of the petitioners that in the past only 20 marks were allocated for the viva voce test having not been specifically denied (only a bald denial of the statement made in paragraph 19 of the writ petition has been made in paragraph 25 of the counter affidavit without giving the details of the previous recruitment process) and the assertion of the petitioners that in the impugned selection 100 marks have been allocated for both the academic performance and the viva voce test having been admitted in paragraph 26 of the counter affidavit, a question arose as to how and in what circumstances the decision was taken for the allocation of marks in the aforesaid manner and by whom. Since counsel representing the Commission was not in a position to take a firm stand on the point, having regard to its

significance, we directed him to produce the records. Accordingly, we have looked into the records. From the records it would appear that on the receipt of the requisition from the Government the Commission, meaning thereby the full Commission, decided to issue the advertisement on 21.12.90. On 7.2.92 the Chairman assigned the file to two of the members, namely, Sri K.K. Tripathi and Sri S. Singh, who after scrutiny of the applications, submitted a note giving out the details of the candidates who were to be called for interview. The Chairman approved the note and on 12.3.92 fixed the dates of the interview to be held on 8th, 9th and 10th April 1992 before two Boards. The Chairman assigned the work of taking interview to two members, namely, Sri S.A.A. Rizvi and Smt. Chandra Bhanu Devi. On 1.4.92 two experts were appointed for the two Boards and on 8.4.92 the aforesaid two members between themselves decided upon break up of the marks for the different examinations in respect of academic qualifications of the candidates. The interview was held as per schedule from 8th to 10th April 1992. On 11.6.92 the list was approved this time by the full Commission. At no stage any decision was taken by the Commission as to allocation of marks for viva voce.

7. Clause (1) of Article 320 of the Constitution lays down the duty of the Union and the State Public Service Commission "to conduct examinations for appointment to the service of the Union and the service of the State respectively". The Governor of Bihar has framed regulation entitled The Bihar Public Service Commission (Conditions of Service) Regulations, 1960 under Article 318 of the Constitution, Regulation 3 (1) whereof reads as follows :-

The Commission shall consist of a Chairman and ten other members :

Provided that in the case of absence of one or more member on leave or otherwise, the remaining members or member, as the case may be, shall constitute the Commission.

In the case of *S.S. Dhanoa v. Union of India* (AIR 1991 Supreme Court, 1745) it has been said : ?

It is further an acknowledged rule of transacting business in a multi-member body that when there is no express provision to the contrary, the business has to be carried on unanimously. The rule to the contrary such as the decision by majority has to be laid down specifically by spelling out the kind of majority? whether simple, special, of all the members present and voting etc,

In the same volume of All India Reporter in the case of *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, it has been held :?

It is inadvisable to depend on the good sense of the individual, however, high placed they may be. It is all the more improper and undesirable to expose the precious rights like the light of life, liberty and property to the vagaries of the individual whims and fancies. It is trite to say that the individuals are not and do not become wise because they occupy high seats of power, and good sense,

circumspection and fairness does not go with the post however high they may be.

In the case of Sanjay Kumar and others v. The Bihar Public Service Commission and others (C.W.J.C. No. 1192 of 1992) disposed of on 11.6.92 complaining of irregularities in holding the 37th Combined Competitive Civil Services Examination a question arose as to whether the Chairman of the Commission could take decision by himself for holding centralised evaluation. Brother Aftab Alam, who delivered the judgment in that case, disapproved the manner in which the Chairman had been taking unilateral decisions on basic issues and policy matters without trying to evolve any unanimity or consensus on such matters.

8. Mr. Swaraj Kumar Ghose, Learned Counsel appearing for the Commission was not in a position to point out any policy decision on the question of allocation of 100 marks for the viva voce, muchless by the Commission as a whole. It appears that the aforesaid two members, namely, Sri Rizvi and Smt. Chandra Bhanu Devi either themselves took the decision in regard to allocation of marks or they were told by someone to evaluate the merit on the basis of the impugned allocation of marks. Be that as it may, I have no doubt in my mind that the question as to how much marks should be set apart or allocated for the viva voce vis-a-vis the marks for the academic qualifications relates to a policy matter which goes to the root of the recruitment process and a decision on the question could be taken only by the Commission meaning thereby the whole body and not by the members comprising the Interview Boards or the Chairman individually. That, in my opinion, is sufficient to render the whole selection process as illegal.

9. However, in order to satisfy myself that prejudice has been caused to the petitioners (or others similarly situate) on account of evaluation of the inter se merits of the candidates on the basis of the impugned allocation of marks. I have gone into the main question canvassed at the Bar, as briefly indicated at the very outset of the judgment.

10. The question as to what should be the percentage of marks for the viva voce test has been the subject matter of discussion in many cases. I propose to refer to only some of them. In *Minor A. Peeriakaruppan and Sobha Joseph Vs. State of Tamil Nadu and Others*, allocation of 75 marks out of total of 275 marks for the viva voce test was held to be on the high side. In *Miss Nishi Meghu v. State of Jammu & Kashmir* (AIR 1980 Supreme Court, 1975) reserving 50 marks for interview out of a total of 150 was found to be excessive. In the case of *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, a Constitution Bench of the Court regarded the allocation of 33 1/3% of the total marks (50 out of 150) for oral interview as infecting the selection procedure with the vice of arbitrariness. In *Lila Dhar Vs. State of Rajasthan and Others*, a three-Judges Bench while dealing with recruitment rules for appointment of Munsifs, striking a somewhat discordant note, observed that observations of the Court in *Ajay Hasia* were made, primarily in the context of admission to educational institution and were not intended to lay down any wide, general rule that the same principle will be applicable in the matter of recruitment to public services, and, accordingly,

held that allocation of 25% of total marks for viva voce was not arbitrary or unreasonable. The legal position, however, was stated with a note of caution in these words :?

In the case of such services where Sound Selection must combine academic ability with personality promise, some weight has to be given, though not much too great weight, to the interview test. There cannot be any rule of thumb regarding the precise weight to be given. It must vary from service to service according to the requirements of the service, the minimum qualifications prescribed, the age group from which selection is to be made, the body to which the task of holding the interview test is proposed to be entrusted and a host of other factors.

(emphasis added)

In *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, dealing with, the case of recruitment to services another Constitution Bench of the Court reiterated the above noted observations in *Lila Dhar's* case but applied the same test as laid down in *Ajay Hasia's* case, fixing upper limit for allocation of marks for the viva voce test and held on facts that allocation of 22.2% of the total marks for the viva voce test was excessive and arbitrary. The court favoured allocation of marks for the Viva voce not exceeding 12.2% for the candidates of general category. Reference may also be made to the cases of *Mohinder Sain Garg v. State of Punjab* (1990) 4 *Judgement Today* (S.C.) 794 and *Munindra Kumar and others Vs. Rajiv Govil and others*, . In *Mohinder Sain Garg's* case (supra), after noticing the earlier cases on the point it was held that maximum percentage for the viva voce test should not exceed 15% of the total marks.

11. Mr. Shyama Prasad Mukherjee, Learned Counsel for the intervenors, submitted that the decisions referred to above had been rendered in an entirely different context, where the recruitment is made on the basis of both written test and the viva voce. According to him the ratio of the decisions aforesaid cannot be applicable where recruitment is made without holding any written test. Learned Counsel placed reliance on *State of U.P. Vs. Rafiquddin and Others*, and *Mehmood Alam Tariq and Others Vs. State of Rajasthan and Others*, . It would appear from the judgment rendered in the former case that the point was noticed but not decided because of absence of allegation of malafide or arbitrariness against the Commission. In the latter, the question for consideration was whether the rule prescribing 33% as minimum qualifying marks in the viva voce test was arbitrary. That was a case relating to recruitment of officers in the Rajasthan Police Service and Rajasthan Forest Service. The Court took notice of the observations made in the earlier decisions and held that in view of the nature of the service to which recruitment was to be made only person of better personality should be appointed and, therefore, the interview test was the only way, subject to the basic of essential academic and professional requirements being satisfied, to test the fitness of the candidate.

12. As observed in *Lila Dhar (supra)* and *Ashok Kumar Yadav (supra)* there cannot be any hard and fast rule regarding the precise weight to be given to the viva voce test as against the written examination which must vary from service to service according to its requirements, the minimum qualification prescribed and so on. The requirement of the service in the case of professionals, such as doctor, cannot be the same as in the case of officers of executive services. The personality factor has certainly a more important role to play in the administrative service than in the professional service. The merit of the doctor has to be primarily judged on the basis of his performance in the qualifying examination whether at the Board/University/Institute level or the competitive examination held for the purpose of recruitment. His personality which is to be evaluated in the interview has comparatively a small role to play in the discharge of his duty as a professional doctor compared to his counterparts in the executive service. Seen in this light there can be hardly any justification to equate the performance of a candidate in the different examinations with his performance in the viva voce test and assign them equal marks. It has to be kept in mind that the underlying idea to restrict the marks and fix maximum percentage for the viva voce test is to eliminate the vagaries of arbitrariness and reduce the chances of subjective and, indeed in some cases, extraneous consideration to the minimum. If in the matter of selection of officers in the administrative service the viva voce test is not to be allocated more than a certain percentage of the total marks where personality of the candidates counts more, it is difficult to countenance how the viva voce test for appointment as Unani Medical Officers can be assigned 50% of the total marks. It is true that the maximum percentage (of the total marks) has not been worked out on the basis of the written examination forming part of the recruitment process but, in my opinion, the mere fact that written tests are not held for appointment of Unani Medical Officers cannot be a ground to justify allocation of as high as 50% marks for the viva voce, vis-a-vis the marks to be obtained by the candidate on the basis of his academic qualifications.

13. Recently in the case of *Ashok alias Somanna Gowda and Another Vs. State of Karnataka* by its Chief Secretary and Others, a similar question arose for consideration in the matter of recruitment of Assistant Engineers in the Public Works Department in the State of Karnataka. The rules for recruitment did not provide for any written examination and the merit of the candidates was to be evaluated on the basis of his performance in the qualifying examination and the viva voce test. The Supreme Court following the principle laid down in *Ashok Kumar Yadav (supra)* and *Mohinder Sain Garg (supra)* held that allocation of 33.3% of the total marks in the interview was unjustified. The relevant portions of the judgment read thus :?

According to these rules total marks for qualifying examinations were kept at 100 and 50 for interview. Thus, the marks allotted for interview amounted to 33.3% of the total marks.....It is not necessary to examine the matter in detail inasmuch as 50 marks for interview out of 150 are clearly in violation of the

judgment of this Court in Ashok Kumar Yadav and Others Vs. State of Haryana and Others, and Mohinder Sain Garg v. State of Punjab, (1990)4 J.T. (S.C.) 704.....The rules are clearly in violation of the dictum laid down by this Court in the above referred cases.

This decision is nearest to the points on facts and squarely meets the stand of the Commission and the intervenors that where the recruitment is to be made without holding written test, the upper limit of marks for viva voce test as laid down in the earlier cases of the Supreme Court cannot be applicable and that it can be as high as equal to the marks allocated for the qualifying examination. It should be kept in mind that according to the petitioners, they had secured 71% and 75.5% marks respectively in the Bachelor of Unani Medicines and Surgery (B.U.M.S.) examinations from the Government Tibbi College, Patna, the latter having also secured distinction in five honours papers. I am satisfied on the facts of the case that not only the allocation of 50% marks for the viva voce test is unjustified and arbitrary but also that the petitioners have suffered prejudice on account of such wrong and arbitrary allocation of marks and the whole recruitment process has been vitiated and the same is liable to be struck down by this Court.

14. On the question of the consequential relief, Learned Counsel for the intervenors pointed out that the Supreme Court in almost all the cases on the subject had refused to set aside the appointments already made. Counsel, therefore, urged that it would not be proper exercise of discretion to nullify the whole selection.

15. It is true that the Supreme Court in the cases referred to above refused to pass any consequential order and did not disturb the admissions (to educational institutions) or the appointments already made since the same had taken place a long time back and the question came up for consideration only couple of years after. In the instant case, however, till the date of filing of the writ petition on 10.8.92 or even upto the stage of final hearing before the Division Bench no appointment had been made on the post. It may be mentioned that in the course of preliminary hearing at the admission stage on 20.8.92 a Bench of this Court restrained the State Government from giving effect to the recommendation during pendency of the writ application. Later, while admitting the writ petition on 24.9.92 the Court directed that any appointment made in the meantime shall be subject to the result of the writ application. Thus, although the interim order made on 20.8.92 was modified it is obvious that if appointment has been made during the intervening period, it will be deemed to be subject to the final order that may be passed in the case. In my opinion, in such a situation, equity does not stand in the way of passing appropriate consequential order. If any selection is made, and consequently any appointments is made, on the basis of an illegal recruitment process and pursuant to a policy decision regarding allocation of marks for the viva voce, which cannot be said to be decision of the Commission, the same has to be held to be illegal and a nullity. In 1988 PLJR 102 a Division

Bench of this Court quashed the appointment made pursuant to an illegal selection process. In the result, this writ application is allowed, the communication of the Commission dated 14.6.92, contained in Annexure-5, making recommendation for appointment on the post of Unani Medical Officers is quashed. Accordingly, respondent-State is commanded not to issue any notification of appointment pursuant to the aforesaid recommendation. If any appointment has been made on the post in the meantime the same shall be deemed to be null and void. The respondents should now take fresh steps for recruitment on the post of Unani Medical Officers in accordance with law giving due regard to the observation made in this judgment and complete the process within six months. There will be no order as to costs.

Aftab Alam, J.

I agree.