
(2007) 03 DEL CK 0063

In the Delhi High Court

Case No : Writ Petition (Civil) No. 1448 of 2001

Dr. Vibha Jain

APPELLANT

Vs

The Dir. National Board Of Exa.

RESPONDENT

Date of Decision : 02-03-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 19, 19(1), 19(2)
Evidence Act, 1872 — Section 125, 126, 8
Indian Medical Council Act, 1956 — Section 32

Citation : (2007) 7 AD 210

Hon'ble Judges : Gita Mittal, J

Bench : Single Bench

Advocate : Ravi Prakash, for the Appellant; Vinay Kishan Jetly and Vikram Jetly for resp. No. 1 and Maninder Singh, Kirtiman Singh and Girish Mishra for MCI, for the Respondent

Judgement

Gita Mittal, J.—The efficacy of an oral interview test for assessing and evaluating the capacity and calibre of candidates came up before the

Apex Court in the celebrated pronouncement reported *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, While noticing that an

oral interview test is undoubtedly not a very satisfactory test for assessing and evaluating the capacity and calibre of candidates, it was held that in

the absence of any better test for measuring personal characteristics and traits, the oral interview test, must, at the present stage, be regarded as

not irrational or irrelevant.

2. It is such a criterion which has been challenged by the petitioner in the present writ petition wherein the following prayers have been made by the petitioner:

(a) issue any appropriate writ or direction quashing provision contained in sub-

clause (d) of Clause 6.7 and Clause 6.16 of Bulletin of Information

and Application Form for Diplomat of National Board Final Examination for the year July/October, 2000 published by the National Board of

Examinations (Respondent No. 1) as ultra-vires violating Articles 14 and 19(1)(a) of the Constitution of India; and/or

(b) issue any appropriate writ or direction quashing provision contained in sub-clause (c) of Clause 6.7 of Bulletin of Information and Application

Form for Diplomat of National Board Final Examination for the year July/October, 2000 published by the National Board of Examinations

(Respondent No. 1) as ultra-vires violating Article 14 of the Constitution of India; and/or

(c) issue any appropriate writ or direction declaring the petitioner successful in the examination held by the National Board of Examination for the

year July/October, 2000 on the basis of marks obtained in the theory examination; and/or

(d) issue any appropriate writ or direction declaring the petitioner successful in the examination held by the National Board of Examination for the

year July/October, 2000 on the basis of combined marks obtained in the theory and practical examination; and/or

(e) issue any appropriate writ or direction commanding the respondent No. 1 namely the National Board of Examination to disclose the marks

obtained by the petitioner in both theory, thesis and practical examinations for the academic year April, 1999, June, 1999, December, 1999, April,

2000, July, 2000, November, 2000 in which she has appeared.

3. The petitioner has contended that prior to the year 1975, the proficiency and standard of medical education at the post-graduate level was laid

down by the Medical Council of India. However since the examinations used to be conducted by different universities and institutions, Therefore

the standard of evaluation used to vary from university to university. Accordingly, it is with a view to improve the quality of higher medical

education uniformly throughout the country that the respondent No. 1 was established.

4. The respondents have pointed out that the National Board of Examinations was established by the Government of India in the year 1975. The

main objective of the Board was to establish an examining body at the national

level which could conduct post-graduate and post doctoral examination of uniform and high standards. This Board became an independent and autonomous body in the year 1982. It confers a post-graduate degree which is known as the "Diplomat of National Board".

5. It appears that thereby a dual system of awarding post-graduate degrees was created, one being the post-graduate degree granted by various universities duly recognised by the Medical Council of India and the second one being the degree at the post-graduate level titled the "Diplomat of the National Board"(DNB for short) granted by the respondent No. 1. In exercise of the power conferred by Section 32 of the Indian Medical Council Act, 1956, Notification No. 5.11015/75/83 - ME(Policy) was issued by the Government of India through the Ministry of Health and Family Welfare whereby the DNB degree in 25 specialties and 11 super-specialties and 3 specialties under the direct five year course were incorporated in the First Schedule of the Indian Medical Council Act.

6. Before this Court, while the respondent No. 1 has claimed that the post-graduate degree awarded by the Board is equivalent to the M.D./M.S.

degree, this submission is vehemently disputed by Mr. Maninder Singh, learned Counsel appearing for the Medical Council of India - respondent

No. 2 who has contended that the scheme of the two courses, the method of admission, the nature of examination and the training imparted to the

students who undertook the M.D./M.S. courses is totally different from the scheme of the examination conducted by the respondent No. 1 and

consequently, no equivalence can be drawn between the two degrees in any manner. It has been vehemently submitted by Mr. Singh, learned

Counsel that the candidates who undergo the M.D./M.S. course not only undergo regular teaching but also get hands on experience on patients

and undergo vigorous training during the three year course which according to him is not undergone by the candidates who undergo the DNB tests.

Inasmuch as no such issue has been raised by the petitioner in this petition, this question is not being considered or answered in the present

judgment and is left open for consideration in appropriate proceedings.

7. The respondent No. 1 conducts examination in different specialities which consists of written examination and practical examinations in various

centres notified in its Bulletin of Information.

The scheme of the examination is to be found in Clauses 2.2, 2.5, 6.6, 6.7 of the Bulletin which read thus:

2.2 A Candidate for the Examinations in Broad specialities is required to pass two separate examinations viz. Primary and Final.

2.5 A candidate must pass the final theory examination within a period of eight years after passing the primary examination failing which the candidate will be required to reappear for this primary examination. Candidates passing the final theory examination will be governed by Clause

6.7b, page 20 for appearing in the practical examination.

6.6 All Candidate (Whether they have passed Diploma or Degree or Primary examination) are required to appear in four papers including one paper in Basic Sciences as applied to particular speciality.

6.7. Practical Examination (Broad Specialties)

(a) Only those candidates who obtain a minimum of 50% marks in aggregate of theory papers shall be declared successful in theory examination.

(b) Only a candidate who is declared successful in final theory examination will be allowed to appear for the practical examination immediately

following the theory examination. If he fails or does not appear in the examination, he will be allowed two more chances of practical examination

within two years of passing the theory examinations, but after paying full examination fee. Thereafter such a candidate will be required to take full

examination (theory and practical) as a fresh candidate.

(c) Candidate who obtain 50% in the aggregate of theory and practical combined and not less than 50% in practical, shall be declared successful in

the speciality examination.

(d) NBE will not provide details of marks/grading in the examination.

8. It is mandated that a candidate must pass the final theory examination within a period of eight years after passing the primary examination failing

which the candidate will be required to reappear for the primary examination. Candidates passing the final theory examination will be governed by

Clause 6.7(b), for appearing in the practical examination.

9. The candidate after passing the primary examination conducted by the Board, has to go for training for three years as per Clause 6.2 A (i), to

any of the hospital or institution recognised by the Medical Council of

India(respondent No. 2 herein)/ University as suitable for post graduate training maintaining a ratio of 1:1 of student to teacher. However, in case a candidate had completed a one year house job successfully in an institution recognised by the MCI, then such one year would be counted towards the three year training under this programme. All students undergoing training in the boards/accredited institution/medical colleges are required to intimate the Board regarding their admission in the proforma available from its office, immediately after the admission through the head of the institutions/medical colleges. During the duration of the training, the candidate is required to join a hospital as any other resident under employment therein however without any remuneration.

10. A candidate is allowed to appear in the final theory examination only after undergoing the training successfully and upon certification by the hospital. This final examination consists of four papers including one paper in basic sciences as applied to a super specialty. He/she is required to secure a minimum of 50% marks to pass this examination which is conducted at a centre set up by the respondent No. 1. Thereafter a candidate is allowed to appear for a practical examination in terms of Clause 6.7 as noticed above.

11. The petitioner has submitted that she secured a good first division in her school leaving examination and was granted admission to the MBBS course after passing the entrance examination in her first attempt. She also claims to have successfully completed a one year house job to the satisfaction of senior doctors and thereafter cleared the primary examination of the DNB course in the first attempt. As she had already done house job for one year, after her admission, the petitioner was required to undergo training for only two years more which she completed from the Deen Dayal Upadhyaya Hospital from Delhi in the year 1999. Her performance record of internal assessment was maintained in the log book which recorded satisfaction of the senior doctors and the head of the department with her work. Such training consisted of successful conduct and participation in hundreds of cases of deliveries and other related cases in her subject of specialisation which, she has submitted, that she competently handled individually.

12. The petitioner submits that she completed all the four papers in the final

theory examination held in February, 1999 as part of the DNB degree and also submitted the requisite thesis and dissertation. This thesis was also approved in a single attempt entitling the petitioner to appear for the practical examination in terms of Clause 6.7 noticed above.

13. On 3rd June, 1999, the petitioner appeared in the practical examination held at the KG Medical College, Lucknow which, according to the petitioner, was a mere formality and an interview of barely a few minutes without any test of either personality or professional ability was conducted.

The petitioner has submitted that she believes that she had knowledgeably and correctly answered all the questions. Yet to her dismay she has received a single word result simply informing her that she had failed.

14. The petitioner appeared in the viva voce thereafter on two occasions, firstly on 29th December, 1999 and thereafter again on 28th April,

2000. On both occasions she was again merely informed that she had failed. Suspecting foul play, vide a letter dated 6th June, 2000 the petitioner

demanding details of marks obtained in all the theory papers, the thesis and the practical examinations but she received no reply from the

respondents. Thereupon she had sent a further letter to the respondent No. 1 on 30th June, 2000.

15. As per Clause 6.7(d), a candidate who has failed to clear the practical examination in three attempts, is required to repeat the theory

examination. Accordingly the petitioner again appeared in the DNB theory examination in the month of July, 2000 and passed the same once again

in the first attempt. This time the petitioner demanded her marks as well as the marks obtained in all previous examinations vide a letter dated 24th

September, 2000. No reply has been given to her.

16. On the 17th of November, 2000, the petitioner again appeared in the practical examination held by the respondent No. 1. However, again she

has been informed that she has failed in the practical examination taken by her on 17th November, 2000 without disclosure of the marks secured

by her. Thus aggrieved by this action of the respondents the petitioner has filed the present petition. The present petitioner also makes a challenge

to the refusal of the respondent No. 1 to disclose the marks attained by a candidate in the examination including the oral examination conducted by

it claiming the same to be a constitutionally guaranteed fundamental right of the petitioner under Article 19 of the Constitution of India.

17. Appearing for the respondent No. 1, Mr. Vijay Kishan, Advocate has urged that the petitioner having unsuccessfully participated in, and

having failed repeatedly, cannot challenge the conditions for the examination. On merits it has been contended that the oral examinations were

conducted by four different experts each of whom has assessed the abilities of the petitioner objectively and in great detail and have awarded the

marks secured by her. Therefore the petitioner's challenge to the result secured by her is misconceived and also devoid of any factual or material

basis.

18. The respondent No. 1 further contends that having regard to the requirements of the field of medical science, the viva voce system has been so

designed so as to enable a fair assessment of a candidate's diagnostic and treatment abilities on a long case, short case and a detailed viva voce as

part of the practical examination in the clinical specialty. The submission is that the assessment by the experts is done objectively. The distribution

of the marks between the written examination and the viva voce examinations is also effected by the experts in the field. Learned Counsel have

sought to draw a distinction between the interviews held for a competitive entrance examination to arrive at a relative merit between the candidates

seeking admission to the educational institutions as against the practical examinations for grant of award of post-graduate medical qualifications.

19. Defending the refusal to disclose the results, it has been asserted that the reason thereof is in larger public interest as the Board does not want

the candidates to come to know the marks which have been awarded by different examiners. According to respondent No. 1 the same is

necessary and is a reasonable rule which is intended to ensure that no harm is caused to any examiner at the instance of a failed candidate. It is

submitted that this stipulation is also a reasonable one as it intends to achieve a laudable purpose and hence does not impinge on the rights of the

petitioner under Article 19(1)(a) of the Constitution. The respondent No. 1 places reliance on the fact that the rule has been applicable and has

been in existence for a long period of over two decades without any complaint.

Submitting that the respondent No. 1 has no objection to disclosing the marks

secured by a candidate to any court, the original record relating to the petitioner has been placed before this Court for perusal.

20. Before examining the position in law, it would be useful to set out the break up of marks of the practical/clinical examinations including the viva

voice examination in the examination pattern followed by the respondent No. 1. The method of examination and its break up into five categories

has been set out by the respondent No. 1 in para 9(B)(e) of its counter affidavit which reads as hereunder:

9(B) (e) The final examination is aimed at testing the candidate's professional competence to practice as a specialist (Junior Specialist). It consists

of four papers of three hours duration each consisting of short answer/essay type questions.

The board has developed and introduced various reforms in the conduct of postgraduate and postdoctoral examinations keeping in view the

purpose and process of evaluation. The present method of examination can be divided into five main categories:

1. Written examination:

a. Essay Examination

b. Objective Examination (MCQ)

2. Oral Examination

3. Practical Examinations

4. Observational reports on student's performances.

5. Thesis and research projects

21. The respondent has explained that the written test permits the examinee to give in writing and in his own words a relatively free and extended

response and thereby reveals information regarding a student's mental process. It measures achievements objectively in the cognitive domain and

enables assessment of a candidate's ability to recollect, interpret, apply, analyze and synthesize and development of his/her judgment skills.

22. It is further explained that the oral examination permits the candidate to orally display his knowledge, understanding and ability in the subject of

study, as also his/her thinking and problem solving ability through answers to the questions.

23. So far as the practical examination is concerned, it is intended to enable a

candidate to display his/her ability to do a particular thing as distinct from oral or written submissions.

24. According to the respondent No. 1, guidelines have been laid as a structure for the clinical examinations in the various specialties by the

respondent No. 1. As part of this process the examiners are required to meet a day prior to the clinical examination to unanimously decide clinical

problems on which the candidates are to decide and to arrive at the common accepted answers. The respondent No. 1 has also introduced

objectively structured clinical examinations in certain subjects which are structured to provide objective assessment of clinical skills. Guidelines

have been laid by the respondent No. 1 for competency based training programmes.

25. So far as the distribution of marks is concerned, claiming its expertise in deciding marks allocation, the respondents have submitted that 400

marks are for theory papers and 300 marks are for practical/clinical etc. including viva-voce examination and the break-up of these 300 marks is

as under:

Total Marks for clinical/viva examination

Distribution Group : C

(a) Long case/cases 100 marks

(b) 3 short cases 120 marks

(40 marks each)

(c) (i) Pathology & x-ray 40 marks

(ii) Surgery and Instruments 40 marks

300 marks

This distribution is the subject of challenge before this Court in the present writ petition.

26. On behalf of the respondent Mr. Vijay Kishan, learned Counsel has submitted that apart from the foregoing, the examination which is

conducted by the respondent No. 1 is not a competitive exam and is intended to assess the expertise of the candidate in his/her chosen field and

hence no parity can be drawn between the viva voce conducted by respondent No. 1 and an interview, either for admission to an academic course

or for employment. In addition to the above, the challenge to the writ petition is opposed on several additional grounds. It is asserted that a

candidate knowing the rules fully and having appeared in the examination cannot challenge the criterion of success or merit laid down by the rules.

In this behalf, reliance is placed on Madan Lal and Others Vs. State of Jammu and Kashmir and Others, Union of India and Another Vs. N.

Chandrasekharan and Another, Vijay Syal and Another Vs. State of Punjab and Others, Vijay Sayal v. State of Punjab; V 2002 AD Delhi 789

Continental Construction Limited v. Tihri Hydro Development Corporation Ltd. and Anr.

27. It is noteworthy that there are two stages of every examination. One is the actual examination and second is the result thereof. In all the

judgments relied upon by the respondent No. 1, challenge was laid to the failure of the respondents to select the petitioners either for appointment

or for promotion or for an award of contract in the second stage.

In the instant case, a challenge has been laid not only to the petitioner's result but also to the very examination process. The petitioner has further

pointed out that as per the scheme of the respondent No. 1, she is required to take the examination afresh just as if she was a fresh candidate. In

the light of the several judgments cited by the respondent No. 1, while a candidate may be precluded from challenging her own result after

participating in the examination, it cannot possibly be urged as an absolute prohibition that the candidate is precluded from laying a challenge to the

principles on which the examination is conducted when the candidate is required to apply and take the examination afresh as in the instant case.

28. This Court is not concerned with any examination conducted for the purposes of appointment, selection, promotion or for award of a contract

but is concerned with an examination conducted by a board for the purposes of award of a certificate and a diploma. The field in which this

examination is to be conducted is also not in the nature of a course of general application but is a highly specialised area of professional

specialisation in different specialities in medicine. The number of marks which have to be assigned to the viva voce will depend on the level of the

examination and the nature of the specialisation.

29. It now becomes essential to examine the landmark judgment of the Supreme

Court reported in *Ajay Hasia and Others Vs. Khalid Mujib*

Sehravardi and Others, which is relied upon heavily by the petitioner in support of her case. The validity of a viva voce examination as a

permissible test had been principally challenged on the ground that the viva voce examination does not afford a proper criterion for assessment of

the suitability of the candidates for admission and it is a highly subjective and impressionistic test where the result is likely to be influenced by many

uncertain and imponderable factors such as predilections and prejudices of the interviewer, his attitudes and approaches, his preconceived notions

and idiosyncrasies. It has also been urged that it is capable of abuse because it leaves scope for discrimination, manipulation and nepotism which

can remain undetected under the cover of an interview. It had been urged that it is not possible to assess the capacity and calibre of a candidate in

the course of an interview lasting only for a few minutes and, Therefore, examination results made on the basis of an oral interview must be

regarded as arbitrary and hence violative of Article 14.

Despite all its criticism, the Apex court had recognised that the oral interview method continued to be very much in vogue as a supplementary test

for assessing the suitability of candidates wherever test of personal traits is considered essential. Its relevance as a test for determining suitability

based on personal characteristics has been recognised in a number of decisions of the Supreme Court inter alia in *R. Chitrallekha and Another Vs.*

State of Mysore and Others, .

30. As back as in *Minor A. Peeriakaruppan and Sobha Joseph Vs. State of Tamil Nadu and Others*, the court held that in the matter of admission

to a college or even in the matter of promotion, the oral interview test as presently held should not be relied upon as an exclusive test, but it may be

resorted to only as an additional or supplementary test and, moreover, great care should be taken to see that persons who are appointed to

conduct the interview test are men of high integrity, calibre and qualification. It was further observed that the oral interview test was undoubtedly

not a very satisfactory test for assessing and evaluating the capacity and calibre of candidate, but in the absence of a better test for measuring

personal characteristics and traits, the oral interview test must, at the present stage, be regarded as not irrational or irrelevant though it is subjective

and based on first impression, its result is influenced by many uncertain factors and it is capable of abuse.

31. In Ajay Hasia's case the Constitution Bench dealt with such an issue. In this case, the court found that a large number of successful candidates

succeeded in obtaining admission by virtue of getting very high marks in the viva voce which tilted the balance in their favor though the marks

secured by them at the qualifying examination were much less than those obtained by the petitioner and even in the written test they had fared

worse than the petitioner.

The court was called upon to consider the issue as to the legality of 50 marks for the viva voce examination as against 100 marks for the written

test. The court observed that in view of the fact that the time as spent on each candidate was not more than four minutes and in these

circumstances, reserving 50 marks for the interview out of the total of 150 does seem excessive. The same amounted to allotment of 33 1/3% of

the total marks for the oral interview. In these circumstances the allocation was held to be plainly arbitrary and unreasonable which vitiated the

selection of the candidate.

However, no absolute proposition of law was laid down.

32. This judgment of the Constitution Bench was relied before the Supreme Court in the case of Javid Rasool Bhat and Others Vs. State of Jammu

and Kashmir and Others, The Supreme Court explained the earlier judgment thus:

8. It would be noticed that most of the observations were made with a view to enable the Government to devise a selection procedure which

would be above reproach. It was never intended to lay down any hard and fast rules. In the very nature of things it would not be within the

province or even the competence of the Court and the Court would not venture into such exclusive thickets to discover ways out, when the matters

are more appropriately left to the wise expertise of medical academicians interested in the quality and integrity of medical education and public

administrators conversant with various administrative and socio-economic problems, needs and requirements. The Court's duty lies in preventing

arbitrariness and denial of equal opportunity. The question as to the subjects in which an entrance test may be held is hardly a matter for the Court,

unless, of course, the subjects are so arbitrarily chosen as to have not the slightest connection with the object of the examination. Such a situation is not likely to arise as the authorities may be expected to act reasonably. Again it is not for the court to lay down whether an interview test should be held at all or how many marks should be allotted for the interview test. Of course, the marks must be minimal so as to avoid charges of arbitrariness but not necessarily always. There may be posts and appointments where the only proper method of selection may be by an interview test. Even in the case of admission to higher degree courses, it may sometimes be necessary to allot a fairly high percentage of marks for the interview test. For admission to a Ph.D. Course, for example, candidates may have to be consummately interviewed, each of them for a few hours, perhaps, before any decision can be taken as to who may be admitted. That is why we say rigid rules cannot be laid in these matters, and not by courts. The expert bodies are generally the best judges. All that we may say is that allocation of a high percentage of marks for admission to undergraduate courses should be avoided as there is a risk of a certain amount of arbitrariness which may lead to frustration of the very object of the selection and disrepute of the system. Courts interfere when the risk of arbitrariness is so high that arbitrariness is inevitable. Again the court is not the best judge of what questions may be asked at the interview. As mentioned by us earlier, all that is necessary is that the questions should not be a mere pretence.

9. All that we have said above is only to supplement what has been said in *Ajay Hasia's* case and in the case of *Lila Dhar v. State of Rajasthan*. In

the latter case after referring to the Kothari committee's report on Recruitment Policy and Selection Methods, we said : (SCC p. 163, para 5)

It is now well recognised that while a written examination assesses a candidate's knowledge and intellectual ability, an interview-test is available to

assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantages over the interview-test

there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for

clear and logical presentation, effectiveness, in discussion, judgment, ability to make decision, ability to lead, intellectual and moral integrity. Some

of these qualities may be evaluated, perhaps with some degree of error, by an interview-test, much depending on the constitution of the interview

Board.

We then referred to Glenn Stahl on Public Personnel Administration and the United Nations Handbook on Civil Service Law and Practice. We

further said : (SCC p. 164, para 6)

Thus, the written examination assesses the man's intellect and the interview test the man himself and "the twain shall meet" for a proper selection. If

both written examination and interview test arise as to the weight to be attached respectively to them. In the case of admission to a college, for

instance, where the candidate's personality is eye to develop and it is too early to identify the personal qualities for which greater importance may

have to be attached in later life, greater weight has per force to be given to performance in the written examination. The importance to be attached

to the interview-test must be minimal. That was what was decided by this Court in Peeriakaruppan v. State of Tamil Nadu, Ajay Hasia v. Khalid

Mujib Sehravardi and other cases. On the other hand, in the case of services to which recruitment has necessarily to be made from persons of

mature personality, interview test may be the only way, subject to basic and essential academic and professional requirements being satisfied. To

subject such persons to a written examination may yield unfruitful and negative results, apart from its being an act of cruelty to those persons. There

are, of course, many services to which recruitment is made from younger candidates whose personalities are on the threshold of development and

who show signs of great promise, and the discerning may in an interview-test, catch a glimpse of the future personality. 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 a 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 the 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. It is a matter for determination by experts. It is a matter

for research. It is not for courts to pronounce upon it unless exaggerated weight

has been given with proven or obvious oblique motives. The

Kothari Committee also suggested that in view of the obvious importance of the subject, it may be examined in detail by the Research Unit of the

Union Public Service Commission.

33. The Supreme Court has relied upon the observations of old Glenn Stahl in his book on Public Personnel Administration. The author had

pointed out that there are three disadvantages from which the oral test method suffers which were (i) the difficulty of developing valid and reliable

oral tests; (ii) the difficulty of securing a reviewable record on an oral test and (iii) public suspicion of the oral test as a channel for the exertion of

political influence. Highly criticising the oral examinations, the author further observed thus:

The oral examination has failed in the past in direct proportion to the extent of its misuse. It is a delicate instrument and, in inexperienced hands, a

dangerous one. The first condition of its successful use is the full recognition of its limitations. One of the most prolific sources of error in the oral

test has been the failure on the part of examiners to understand the nature of evidence and to discriminate between that which was relevant,

material and reliable and that which was not. It also must be remembered that the best oral interview provides opportunity for analysis of only a

very small part of a person's total behavior. Generalisations from a single interview regarding an individual's total personality pattern have been

proved repeatedly to be wrong.

The Supreme Court added other influences as corrupt, nepotistic or extraneous considerations to the above.

34. The principles laid down by the Apex Court in the afore noticed pronouncements certainly bind this Court. However there is a fundamental

difference between the issue raised in these cases and that which has arisen before this Court. The aforenoticed cases before the Apex Court relate

to admission to different courses and the selection process which was provided in respect thereof.

35. It is necessary to bear in mind the scheme of medical education. Undoubtedly theory is important inasmuch as the intricacies and the

functioning of the human body requires an in depth study of all that goes on in order to make it up. While theoretical knowledge and medical terms

guide a medical student as to the structure of the human body, digestive processes, the neurological system etc however no amount of study material can teach a student as to the real functioning of the different organs and processes in the body. While a medical text may enable a student to learn the probability of a disease from which a patient may be suffering if he discloses certain symptoms, however the assessment of such symptoms can be made only by an actual examination of the patient. Physical examination may be required to be combined with the results of pathological or radiological tests. Therefore in order to have a complete assessment of the knowledge and skills imbibed by a doctor, the scheme of medical education requires that a student actually works on the patient and participates in clinical duties and assignments. Para clinical specialities as pathology, microbiology and such like subjects would require laboratory and research work. At the same time, clinical subjects as medicine, ophthalmology, gynaecology, neurology etc require extensive work in clinical departments. In these circumstances, no hard and fast rule can be laid down for testing a student undergoing specialization in medical specialities or efficacy of a system which would be considered fair while meeting the guidelines laid down in judicial pronouncements. So far as clinical specialisations are concerned, a candidate has to work on patients. He is required to extract information from patients, observe and assess changes in the physical appearance to diagnose correctly. Such ability has to be assessed while the student is working on the patient itself. While assessing the skills developed by a candidate, distinction is drawn between a patient and disease which requires long study and examination and another which may be instantly diagnosable. At the same time, an evaluation has to be made of the candidates ability to diagnose quickly and urgently and treat as per the needs of the patient. Further more, having undergone the undergraduate course, where the candidate applies himself to a large extent to the academic study curriculum, such course requires clinical application at the stage of specialisation and the ability of the candidate, at this level, has to be assessed primarily in terms of his ability to apply theoretical knowledge to diagnosis and treatment of patients. This important facet and element of assessment is missing in the various testing methods adopted in the several judicial pronouncements cited

before this Court. Examination of patients, recognition of technical medical and surgical instruments, ability to apply academic knowledge to

features displayed by the patient to arrive at a correct assessment of the disease etc cannot be evaluated by a written test. An evaluation of these

skills requires a "hands-on" practical test which would entail ""interviewing"" the candidate on the patient or on the pathology slides or the surgical

instruments. The duties and skills required of a doctor have no comparison with a student joining a course or a post in an office.

36. In the instant case, as per the scheme of the examination, the candidates undergo a theory examination and a practical examination. The

practical examination has several components as detailed in the counter affidavit which includes a long case/cases; short cases; pathology and x-

ray; anatomy; operative surgery and instruments. Certainly such a scheme of examination cannot be equated to the interview conducted in the

confines of an office room or a board room where only oral questions and answers are asked. The objectivity is to be found in the composition of

the practical examination.

37. For the same reason, the test conducted by the respondent No. 1, is at the stage when a candidate has completed his basic medical course

and claims to have undergone practical training. Such a test cannot be compared in any manner to an examination which is conducted for entrance

and selection for admission to an educational course or an examination which is conducted for the purposes of appointment and selection to any

test or for the purposes of promotion in the hierarchy of posts. A viva voce test is not only an essential part of assessment of a candidate's ability in

the field of medicine but is a necessary tool for measuring essential personal characteristics as the power of observation, initiative, ingenuity, ability,

amongst other, to get response from patients, ability to observe and assimilate, ability to diagnose the medical problems, inspire confidence in a

patient and to implement effective treatment.

38. To my mind, no parity can be drawn between such testing and the conventional interview conducted in an office room from behind a desk. In

these circumstances, I have no manner of doubt that the quantum of marks, their distribution between different subjects, the distribution in the

different examinations conducted and for the several components of the oral

examinations itself has to be left to the respondent No. 1 who would be guided by the experts in the field.

39. Having regard to the scheme of the examination and the manner in which examinations have been conducted from the record produced before me, I find that the assessment of the candidate is not done by a single expert but is effected by three or four experts in the field who are drawn from institutions of repute in different places. The scheme of the examination also shows that the viva voce examination is not restricted to an interview of a few minutes as is so in the case of interviews held for entrance and selection proposed or for the purposes of making admissions, appointments and promotions. A candidate is compelled to undergo the rigours of a prolonged examination when he/she has to present a long case or cases, three short cases, show skills of diagnosis based on ability of examination as well as aptitude in surgery and knowledge of instruments in the field of gynaecology and obstetrics.

40. Another facet of the examination conducted by the respondent No. 1 is that it is not a competitive examination but is an examination where the ability of an individual candidate is assessed not against ability or skills of another student. There is no element of competition with other candidates. A candidate has to satisfy the examiners with regard to his/her own ability and skills in his/her chosen area of specialisation. The possibility of bias and subjectivity is eliminated inasmuch as the examiners are concerned with the development of the skills of the individual without a comparison with those of another. The award of marks is based on the examiner's assessment of the candidate's skills in the area of his/her specialisation.

41. The view I have taken stands fortified by the judicial pronouncement of the Bombay High Court in *Dr. (Miss.) Suriana Subhash Rane Vs. University of Bombay and others*,

42. In this case, a challenge was laid to the admission process to the MD Pathology course where marks allocated to viva voce test exceeded 25% of the total marks. Negating the challenge, the court observed thus:

A specialist in pathology may require to devote more time to laboratory and research work. That however does not mean that his mental alertness

and agility do not require to be tested. Pathology and the Pathologists are an important feature of modern medicine. Pre-surgical tests require the

expertise of the Pathologist. Even when a surgery is in progress problems may come up where the Surgeon and the Anaesthetist require a snap

decision by an expert in the field of Pathology. The Pathologist in attendance has thus to be mentally alert. Viva voce test is useful tool for

measuring such personnel characteristics as initiative, ingenuity and ability to elicit cooperation.... When properly employed, the oral test today

deserves a place in the battery used by the technical examiner (these observations are made by Glenn Seth in his book on Public Personnel

Administration quoted with approval in *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, What marks should be awarded to a

head and whether a particular feature of the examination should constitute an independent head or sub-head is a subject better left to the academic

experts. It is argued that the orals which have met with the approval of the Courts have to be fool-proof such as those in *Koshal Kumar Gupta and*

Others Vs. State of Jammu & Kashmir and Others, and not like the one figuring in this case. Not it is true that no record of questions and answers

asked and given at the M.D. examination is maintained. Also true it is that the questions and answers are not tape-recorded. For that matter the

time taken by the candidates in an oral examination is far less than that in the theory and practical examinations. But the purpose of the orals is as

vital as that of the testing of the candidate by his performance at the theory and practicals.

43. My attention has been drawn to an unreported judgment of the Division Bench of this Court which was rendered on 30th May, 2003 in LPA

No. 214/2003 *Pawan Kumar v. JNU and Ors.*, this Court was examining a challenge laid by a candidate who was seeking admission to the M.

Phil course conducted by the Jawaharlal Nehru University. As per the scheme of examination, 30 marks were allotted to the viva voce and 70

marks to the written test. It was urged that fixation of 30% marks for the interview was contrary to the mandate of the judgment of the Apex Court

in *Ajay Hasia v. Khalid Mujib Sehravardi and Ors.*

The Division Bench was of the view that the caution of fixing minimal marks for the interview was restricted to admission to undergraduate courses

and selections and promotions where there would be great possibility of arbitrary selection influenced by the predilections of the interviewer.

However in matters relating to admission to higher courses as M. Phil and Ph.D., the matter was best left to the wisdom of the academicians. In

these circumstances, as the admission was sought to the course of M. Phil and for admission to a course of this level, fixation of 30% marks for the

interview may not be arbitrary.

44. The distinction which has to be drawn between interview held for competitive examinations or admissions to educational institutions; interviews

forming part of the examination for selection and appointment to posts; interviews which are conducted as part of the selection scheme for

promotion to higher post as against interviews and viva voce which are conducted as part of testing the knowledge and ability of a candidate in a

speciality or a super speciality in a professional field as medicine has been recognised by the Apex Court in *Union of India and Another Vs. N.*

Chandrasekharan and Another,

The Apex Court has noticed that such a distinction has to be considered and the importance given to an interview cannot be termed as arbitrary or

vocative of Article 14 or 16 of the Constitution in every case. In this behalf in *Union of India and Another Vs. N. Chandrasekharan and Another*,

the court noticed the submissions made on behalf of the appellant thus:

9. Mr. Mahajan, learned Senior Counsel for the appellants, submitted that the Tribunal has wrongly applied the law laid down in *Ashok Kumar*

Yadav's case which related to interview held for competitive examination for recruitment to posts in the Haryana Civil Service and was not a case

of selection for higher posts. Therefore, the Tribunal was not right in applying the ratio laid down in *Ashok Kumar Yadav*'s case. He also

submitted that this Court had made a clear distinction between interview held for competitive examination or admission in educational institutions

and selection for higher posts. In this connection, he relied on two judgments of this Court in *Mehmood Alam Tariq and Others Vs. State of*

Rajasthan and Others, Through its Managing Director, Bombay and Ors. 1994 Supp. (1) SCC 454. He also emphasised the need for giving

importance to interview marks in this case by bringing to our notice the averments in the reply statement which reads as follows:

Usually, a written test may aim at ascertaining the theoretical knowledge. There is no scope in a written test to raise further questions on answers

written down nor to ascertain additional information as to how one would react in different practical situations such as the Vendor rating scenario,

space qualification requirement of components, sub-systems to be procured; skill required or the strategies to be adopted during contract

negotiations and during different tendering stages; up-to-date knowledge on the national and international market situations which are much

relevant to Indian Space Research Organization/DOS; capability for personal presentation of the cases to the satisfaction of the customs authorities

to obtain waiver for physical examination or cases; intricacies relating to the Laws such as Insurance Act etc. and above all the understanding of

the requirements of the space programmes which involve technological uncertainties, repetitive ground testing of systems, sub-systems, failure

analysis procedures, and reworking on components/sub-systems/systems which have already been procured or fabricated. The capability to

handle these and many similar practical aspects required to effectively discharge the duties and responsibilities of an Assistant Purchase Officer in

Indian Space Research Organization/DOS can normally be assessed only through a personal interview.

After a consideration of the earlier judicial pronouncements, the observations of the court in *Union of India v. N. Chandrasekharan* (supra) which

are both topical and instructive observed thus:

15. The reliance placed by the Tribunal on the ratio laid down by this Court in *Ashok Kumar Yadav*'s case is totally misconceived as that was not

a case of promotion to a higher post. This Court in *Kalra* case (supra) had occasion to consider similar situation and observed as follows:

7. It was next submitted that the promotion policy was unconstitutional as the marks assigned for the interview test were far in excess of the

permissible norm or limit. The 40% prescription for interview is based on Rule 2.6 of the promotion policy. This 40 per cent is divided under

different heads or factors as stated hereinabove. The submission of the learned Counsel for the petitioner was based on the observations of this

Court in *Ashok Kumar Yadav* wherein this Court observed that 33.3 per cent marks reserved for oral test were excessive and would suffer from

the vice of arbitrariness. The High Court has dealt with this submission and has pointed out that no hard and fast rule can be evolved in this behalf

because much would depend on the requirement for each post and the level of the post. A whole line of decisions were brought to our notice

beginning from Ajay Hasia case but it would be sufficient for us to refer to the latest decision in the case Indian Airlines Corpn. v. Capt. K.C.

Shukla. In that case this Court after referring to the decisions in Ajay Hasia, Lila Dhar, Ashok Kumar Yadav and Rafiquddin observed that a

distinction appears to have been drawn in interviews held for competitive examination or admission in educational institutions and selection for

higher posts. Efforts have been made to limit the scope of arbitrariness in the former by narrowing down the proportion as various factors are likely

to creep in, but the same standard cannot be applied for higher selections and this is clearly brought out in Lila Dhar case. It is, Therefore, clear

that this Court was also of the view that no hard and fast rule can be laid down in these matters because much would depend on the level of the

post and the nature of the performance expected from the incumbent. In that case, the method of evaluation was based 50 per cent on the ACRs

and 50 per cent on interviews and this Court upheld the said method notwithstanding the fact that the weightage for interview performance was as

high as 50 per cent. We are, Therefore, of the view that the contention that because in the instant case the weightage for the viva voce test is 40

per cent, it is per se excessive and hence arbitrary, cannot be accepted.

45. In Ashok Kumar Yadav and Others Vs. State of Haryana and Others, it is noteworthy that in para 23 of this report, the court held that there

may be posts and appointments where only the proper method of selection was a viva voce test. In this behalf, it would be instructive to recall the

following opinion of the Apex Court in Ashok Kumar Yadav and Others Vs. State of Haryana and Others,

23. This Court speaking through Chinnappa Reddy. J. pointed out in Lila Dhar Vs. State of Rajasthan and Others, that the object of any process

of selection for entry into public service is to secure the best and the most suitable person for the job, avoiding patronage and favoritism. Selection

based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So, open competitive

examination has come to be accepted almost universally as the gateway to public services. But the question is how should the competitive examination be devised? The competitive examination may be based exclusively on written examination or it may be based exclusively on oral interview or it may be a mixture of both. It is entirely for the Government to decide what kind of competitive examination would be appropriate in a given case. To quote the words of Chinnappa Reddy, J. "In the very nature of things it would not be within the province or even the competence of the court and the Court would not venture into such exclusive thickets to discover ways out, when the matters are more appropriately left to the wisdom of the experts. It is not for the Court to lay down whether interview test should be held at all or how many marks should be allowed for the interview test. Of course the marks must be minimal so as to avoid charges of arbitrariness, but not necessarily always. There may be posts and appointments where the only proper method of selection may be by a viva voce test. Even in the case of admission to higher degree courses, it may sometimes be necessary to allow a fairly high percentage of marks for the viva voce test. That is why rigid rules cannot be laid down in these matters and not by courts. The expert bodies are generally the best judges. The Government aided by experts in the field may appropriately decide to have a written examination followed by a viva voce test.

24. It is now admitted on all hands that while a written examination assesses the candidate's knowledge and intellectual ability, a viva voce test seeks to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantages over the viva voce test, there are yet no written tests which can evaluate a candidate's initiative, alertness, resource-fulness, dependableness, co-operativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity. Some of these qualities can be evaluated perhaps with some degree of error, by a viva voce test, much depending on the constitution of the interview Board.

46. The aforesaid observations were cited with approval in *Vijay Syal and Another Vs. State of Punjab and Others*,

47. In any case the respondent No. 1 has submitted that out of 700 marks for the examination, only 80 marks are devoted to the viva voce which forms barely 11.8% of the total marks. It is submitted that the viva voce is conducted on the pathology, x-rays and instruments to each of which are devoted 40 marks bringing the same to a total of 80 marks. The examination of a candidate on the long case and the short case cannot be termed as interview or a mere oral test inasmuch as there is no other method of testing a doctor's diagnostic and treatment skills. In the instant case a candidate is required to secure 50% of the total marks i.e. in the written examination as well as the interview and viva voce and not less than 50% in practical.

48. It is well settled that in matters of policy, courts will normally restrain their hands. It has been repeatedly held that no orders ought to be made which would have the effect of slackening the standard and would amount to a judicial fiat to control the mode of education and the examining system. Such directions would necessarily prove detrimental to the efficient management of the education (Re: State of Maharashtra Vs. Vikas Sahebrao Roundale and others,

49. In these circumstances, it is not possible to hold that the distribution of the marks or the test criterion laid down by the respondents is either arbitrary or irrational.

50. For all the foregoing reasons, I find that the petitioner has been unable to show that the extent of marks which have been devoted to the viva voce and oral examination and the marks allotted to the theory examination by the respondent No. 1 is arbitrary or vitiated for such reason.

51. At this stage it becomes necessary to point out that the petitioner was unfortunately never able to secure 50% or more marks in the practical/clinical examination including the viva voce examination in all the four practical examinations undertaken by her. Each time the practical examination was conducted by different experts in the speciality who were drawn from different institutions in India. The original record relating to the examination of the petitioner has been placed before this Court and has been carefully perused. The examiners in three of the practical examinations taken by the petitioner included the following:

Examination held on 8th, 28th, 29th and 30th December, 1999 at the Jaipur

Centre: The examiners were (i) Dr. Mathur (ii) Dr. P. Nagpal (iii) Dr. Neetu Sarin and (iv) Dr. Pandiyan (not completely legible).

Examination held from 26th April, 2000 to 29th April, 2000 at the Chandigarh Centre: The examiners were (i) Dr. Indu Gupta; (ii) Dr. P.R.

Vaidya; (iii) Dr. Kamla Ganesh and (iv) Dr. A. Dhar.

Examination held from 17th November, 2000 to 20th November, 2000 at the Chandigarh Centre: The examiners were (i) Dr. Kamla Ganesh; (ii)

Dr. A. Dhar; (iii) Dr. P.R. Vaidya (iv) Illegible.

It cannot possibly be contended that these experts from different institutions in the field did not fairly assess the petitioner. Apart from the

petitioner, several other candidates were also examined as per the result sheet produced before this Court by the same examiners who also failed

to secure the requisite pass percentage and were hence failed in the examination. There is no allegation of bias or malafide against any of the

examiners.

52. The present petitioner is of the view that she having been a good student and on her own assessment had faired extremely well. She has urged

that consequently she could not have been failed in the viva voce conducted by the respondent No. 1. The Apex Court in Madan Lal and Others

Vs. State of Jammu and Kashmir and Others, has noticed a similar submission by the petitioner in the case before it and held that such a

submission is based on a subjective assessment of her own performance in the examination. Such an assessment cannot normally be objective or

dispassionate and would be coloured by the candidates assessment of her own ability. For the same reason, reliance placed on the past academic

record may also not be a good guide for ascertaining by itself, a candidate's ability and performance. Therefore, for this reason the petitioner's

submission that she, having been a good student throughout her academic career and hence could not have failed the examination in question also

cannot possibly be sustained.

53. I find force in the contentions raised by the learned Counsel for the respondent No. 1 to the effect that the petitioner was fully aware of the

examination scheme of the respondent No. 1. The same was duly notified in the Bulletin of Information which was admittedly within the knowledge

of the petitioner. Having been fully aware of the position thereof, the petitioner has participated and taken the examination on all occasions noticed

hereinabove. For this reason, the petitioner cannot be permitted to raise a challenge to the result thereof only on the ground that the scheme of the

examination postulated unwarrantedly high percentage of marks to be awarded to the candidate's in the viva voce and the interview or that she

was a good student with a good academic record and Therefore it was not possible that she did not pass the examination.

54. In view of the above discussion, so far as prayers (c) and (d) are concerned, for the reasons set out hereinabove cannot be granted in any case

and are hereby rejected.

55. The last issue which remains for consideration is the petitioner's grievance that the National Board of Examinations does not provide details of

the marks/grading in the examinations. In this behalf, the stipulation is containing such prohibition is to be found in Clause 6.7 (d) of the Bulletin of

Information and Application Form for the Diplomat of Board Examination issued by the respondent. The same reads as follows:

6.7(d). NBE will not provide details of marks/grading in the examinations

The petitioner has submitted that the right to information has been universally recognised and in India is recognised under Article 19(1)(a) of the

Constitution of India besides international conventions and charters to which a country is a party. Placing reliance on Article 19(2) of the

Constitution, it is urged that the constitutional provision mandates that everyone shall have the right to freedom of expression which right includes

the right to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing, or in print, through any

medium of his choice. It is contended that the denial of the information with regard to the marks obtained by a candidate is a denial of the right of a

citizen to know the circumstances in which he or she has failed the examination. In this behalf reliance is placed on the Constitution Bench

pronouncement of the Apex Court in *State of U.P. v. Raj Narayan* AIR 1975 SC 685 and the pronouncement of the Seven Judge Bench of the

Supreme Court in *S.P. Gupta Vs. President of India and Others*, Based on this submission, the petitioner has sought a prayer seeking quashing of

the provisions in Clause 6.7 (d) and Clause 6.1(vi) of the Bulletin of Information

and Application Form for the Diplomat of National Board Final

examination being ultravires and violative of Article 14 and 19(1)(a) of the Constitution of India.

56. The respondents have opposed the submissions made by the petitioner and have rendered an Explanation that the incorporation of this clause.

It has also been vehemently submitted that the provisions of the Bulletin were fully known to the petitioner at the time she submitted her application

form and that the same have been incorporated in larger public interest, the respondent has explained that the National Board of Examinations

does not want that the candidate to know as to which of the examiners has awarded or given how many marks to the candidate. On the other

hand, it is the Board's submission, that where the candidate has failed in theory or in practical, it would hardly make any difference to the result of

the candidate if he is not informed as to whether he has failed by a large or a low margin. The Board contends that it is in public interest to have this

rule, which is reasonable which ensures that no harm is caused to any examiner, at the instance of a failed candidate. In the counter affidavit filed

the respondent No. 1 has stated that this Court is required to take judicial notice of the fact that "these days, lecturers and professors, even in

recognised universities, are harassed, bullied and maltreated by the students who are found by them to be short in attendance or are failed by them

in their examinations. The said rule is a reasonable restriction and achieves a laudable purpose and is not ultravires of Article 19(1)(a) of the

Constitution.

It is further stated that the rule has been followed and observed for over two decades without any complaint or grievance and that, "in any case this

sub-clause(d) is like a privilege claimed by the examining body and if the Board wants to keep the marks and or grades confidential for which the

Board/Academic board have some reason not to disclose to the candidate but the Board is always, willing and ready in case anything is challenged

by the candidate, as in this case, to produce the entire relevant examination record including marks and grades for appraisal of this Court, as it is

the court's which is to be satisfied and not that of the candidate.

57. Reliance is placed on certain judgments and orders passed by this Court in matters where candidates had sought disclosure of their marks

which relief was not granted. I find that the orders relied on relate to entrance exams and consequently cannot govern the adjudication in the present case.

As noticed above, the instant case does not relate to a case where a candidate is seeking admission to a course. Award of the certificate by the

respondent No. 1 is a serious matter. The candidate who is taking a detailed examination is a qualified doctor who has the basic medical degree in

hand. The candidate is looking to secure a better qualification and for this reason strives to take, first, the primary examination, then the theory

examination and lastly, the practical exam. Such an examination entails a difficult course of study and can by no means, in my view, be equated to

the entrance examination undertaken by candidates for securing admission either to the graduate, undergraduate course, MBBS or BDS courses

or even an entrance examination for selection to an admission to a post-graduate degree course or a super-specialty course.

58. When a candidate appears for an examination, he does so after a rigorous training schedule and after following a study curriculum as well as

reasonable preparation. Having done so, she takes an examination in the reasonable hope that he/she shall qualify the same successfully. Every

candidate has his own method of study and self assessment. Perfection in medicine is not attained, and, does not stop at acquisition of a degree

alone. Every patient dealt with, touched or attended to and every additional page read, adds to the knowledge and ability of the doctor. It is for

this reason, that this system has to be treated differently than the other courses of study and specialisation. A candidate, taking an examination in

medicine may appear to be competing with a colleague. But in the real sense, is competing with himself. He/she is developing skills of

communication, ability to assess and diagnose, honing his skills on medical procedures including intricacies of equipment and the human body,

perfecting surgical skills and abilities, inculcating patience, improving his powers of observation and several other such qualities.

59. Examination of the ability of such a candidate is not comparable to an examination of any other kind.

60. In support of the contention that respondent No. 1 has the absolute right to make the provisions and provide the conditions for the conduct of

examinations and that Clause 6.7(d) which has been challenged by the petitioner has been validly incorporated and is binding, Mr Vijay Kishan

Jetly, learned Counsel for the respondent No. 1 has placed reliance on Maharashtra State Board of Secondary and Higher Secondary Education

and Another Vs. Paritosh Bhupeshkumar Sheth and Others, Pramod Kumar Srivastava Vs. Chairman, Bihar Public Service Commission and

Others, .

61. In Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others, the

court was concerned with a Regulation 1043 of the Maharashtra Secondary & Higher Secondary Education Boards Act, 1965. Challenge was

laid to the validity of the regulation on the ground that the same was violative of the rules of natural justice and was unconstitutional. By Regulation

104, the Board had provided the method of verification of marks obtained by a candidate in a subject. Sub-regulation 3 stipulated that no

candidate shall claim or be entitled to revaluation of his answers or disclosure or inspection of the answer books or other documents as these were

treated by the Divisional Board as most confidential. It was held by the Apex Court that the constitutionality of the regulation has to be adjudged

only by a three fold test namely : (i) whether the provisions of such regulation fall within the scope and ambit of the power conferred by the statute

on the delegate (ii) whether the rules/regulations framed by the delegate are to any extent in consistent with the provisions of the parent enactment

and lastly (iii) whether they infringe any of the fundamental rights or the other restrictions or limitations imposed by the constitution.

Upon consideration of the matter, it was held that principles of natural justice were not attracted or not applicable. The regulation was not in the

nature of a bye-law and is not ultra vires on the ground of its being an unreasonable provision. It was further held that it was not within the legitimate

domain of the court to determine whether the purpose of statute can be served better by adopting any policy different from the policy of the

legislature or its delegates. It was held that what constitutes fair play depends on the facts and circumstances relating to a particular given situation.

In this case, it was held that the procedure evolved by the Board for ensuring fairness and accuracy in evaluation of the answer books has made

the system as foolproof as can be possible and it could not be said that the denial of the right to demand a revaluation constitutes a denial of fair

play and is unreasonable. The court also observed that it is in public interest that the results of public examination when published should have

some finality attached to them. If inspection, verification in the presence of the candidates and revaluation are to be allowed as of right, it may lead

to gross and indefinite uncertainty, particularly in regard to the relative rankings etc of the candidates besides leading to utter confusion on account

of the enormity of the labour and the time involved in the process.

62. In *Pramod Kumar Srivastava Vs. Chairman, Bihar Public Service Commission and Others*, the court was concerned with the Judicial Services

(Competitive) Examination, 1999 conducted by the respondents and a prayer was made in the writ petition filed by the petitioner for a direction to

the commission to reevaluate his general science paper on the ground that the petitioner had scored good marks in all papers and had answered the

general science paper correctly and consequently he should be awarded higher marks. The court relied on the principles laid down in *Maharashtra*

State Board of Secondary & Higher Secondary Education and Anr. v. Paritosh Bhupesh Kumarsheth etc. (supra) and held thus:

8. Adopting such a course as was done by the learned single judge will give rise to practical problems. Many candidates may like to take a chance

and pray for re-evaluation of their answer-books. Naturally, the court will pass orders on different dates as and when writ petitions are filed. the

Commission will have to then send the copies of individual candidates to examiners for re-evaluation which is bound to take time. The examination

conducted by the Commission being a competitive examination, the declaration of final result will thus be unduly delayed and the vacancies will

remain unfilled for a long time. What will happen if a candidate secures lesser marks in re-evaluation? He may come forward with a plea that the

marks as originally awarded to him may be taken into consideration. The absence of clear rules on the subject may throw many problems and in

the larger interest, they must be avoided.

9. Even otherwise, the manner in which the learned single judge had the answer-book of the appellant in General Science paper re-evaluated

cannot be justified. The answer book was not sent directly by the court either to

the Registrar of the Patna university or to the Principal of the Science College. A photocopy of the answer-book was handed-over to the standing counsel for the Patna university who returned the same to the court after some time and a statement was made to the effect that the same had been examined by two teachers of Patna Science College. The names of the teachers were not even disclosed to the court. The examination in question is a competitive examination where the comparative merit of a candidate has to be judged. It is, Therefore, absolutely necessary that a uniform standard is applied in examining the answer-books of all the candidates. It is the specific case of the commission that in order to achieve such an objective, a centralized system of evaluation of answer-books is adopted wherein different examiners examined the answer-books on the basis of model answers prepared by the head examiner with the assistance of other examiners. It was pleaded in the letters patent appeal preferred by the Commission and which fact has not been disputed that the model answer was not supplied to the two teachers of the Patna Science College. There can be a variation of standard in awarding marks by different examiners. The manner in which the answer-books were got evaluated, the marks awarded therein cannot be treated as sacrosanct and consequently the direction issued by the learned single judge tot he Commission to treat the marks of the appellant in general science paper as 63 cannot be justified.

63. The respondents have framed Clause 6.7(d) whereby it is stated that National Board of Education will not provide details of marking/grading in the examinations. As per the scheme of the examination, the score achieved by a candidate is not based on a competitive assessment but is based on an evaluation of his/her skills alone. It is not the respondent's contention that several thousands or lakhs take this examination or that there is any procedural or practical difficulty involved with the disclosure of the result. The candidate's desire to know his or her marks is also not based on any exalted aspirations and hopes but the desire is confined, rooted and based in the spirit of effecting self- improvement and a legitimate expectation of knowing the rating which her/his skills would have received at the hands of experts in the field. Such an aspiration cannot be considered unreasonable or unwarranted bearing in mind the scheme of the

examination. There is no legal nor other prohibition from a candidate appearing in the examination gaining knowledge of the score secured by him. The petitioner has urged that such information would enable him to address those areas of his knowledge skills where she was assessed as lacking by the examiners.

64. At this stage, it becomes necessary to advert to the reasons disclosed by the respondents for their refusal to disclose the marks. According to the respondents, there is a threat perception that lecturers and professors would be harassed, bullied and maltreated by students who are failed in the examination. The respondent has failed to point out even a single instance in this behalf has been pointed out other than an apprehension that an examiner would be harmed at the instance of a failed candidate.

65. No material has been placed before this Court which would evidence any legitimate basis for such an apprehension. No instance has been cited on which such apprehension could be held to be justified. In these circumstances, the respondents have certainly failed to disclose any rationale or sound reasoning based whereon it could possibly refuse to disclose the marks which have been secured by a candidate other than the ipse dixit of the respondent as an examining body.

No practical difficulty which would persuade this Court to hold that the quantum of work entailed because of the number of students was such that the work involved was so much as to justify the stand of the respondents to refuse to inform the marks as has been urged.

66. As noticed above, the entire Explanation for the inclusion of the prohibition in Clause 6.7(d) is given in one sentence by the respondent No. 1.

Undoubtedly, the courts have increasingly held that the respondents should be at liberty to evolve the examination process upon consideration of all

pros and cons and safeguards and that courts are not equipped and should not substitute its own views as to what may be considered wise,

prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich

experience of only day to day working of educational institutions and the departments controlling them.

However, there is no dispute that the regulations in the instant case are non-statutory. The respondents are possessed of the power to impose such

prohibitions as are necessary for effective conduct of the examination and in public interest. However it is well settled that all measures, substantive

as well as procedural as are incorporated in the regulations are done so for the efficacious achievement of the object and purpose sought to be

achieved by the prohibition.

67. So far as a delegated legislation in the nature of bye-laws is concerned, it is well settled that only if it can be said that a bye law is manifestly

unjust, capricious, inequitable or partial in its operation, that it can be invalidated by the court on the ground of unreasonableness. (Re : Para 21 of

Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others,

Unreasonableness relates to partiality and inequality in operation as between different classes. The bye-laws would also be invalidated if they

disclose bad faith; if they involved such oppressive or gratuitous interference with the rights of those subjected to them as could find no justification

in the minds of reasonable men. It is equally well settled that a bye-law or a regulation would not be rendered unreasonable on the predilection of

the court.

68. Even though the prohibition in the instant case is not contained in any legislation or delegated legislation, however, the same impacts the rights

of the student to know his or her result. In view of the challenge which has been laid in my view, this prohibition would required to be examined in

the light of the principles which have been laid down by the courts so far as challenges to delegated legislations are concerned. Examined in the

light of these principles, I have no hesitation in holding that the prohibition contained in Clause 6.7(d) in the instant case does not have any rationale

and is arbitrary and unreasonable in the light of the stated reasons for its inclusion as set out in the counter affidavit.

69. There is yet another reason for so holding in the instant case. The citizens of India have a fundamental right to impart and receive information

under the freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution of India. The Apex Court in Reliance

Petrochemicals Ltd. Vs. Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd. and Others, read into Article 21 of the Constitution of

India, the right to know of the citizen of India. This right to information has

received statutory recognition in several enactments. In Mr "X" Vs.

Hospital "Z", the Supreme Court held that it was open to the hospital authorities or the doctor concerned to reveal such information to the persons

related to a girl whom the appellant intended to marry and she had a right to know about the HIV+ status of the appellant. Further observations in

this regard were made in Mr. X Vs. Hospital Z, entitled Mr. X v. Hospital Z.

70. It is necessary to notice the submission on behalf of the respondents claiming privilege over the disclosure of the marks of the candidate. It is

trite that privilege cannot be claimed in any situation at the whim of the authority concerned. The courts are increasingly leaning in favor of

disclosure of information to further transparency in systems which were hitherto regarded as bastions of closed working. The statutory provisions

contending claiming of privilege are to be found in Sections 125 and 126 of the Indian Evidence Act, 1872 which read thus:

125. Information as to commission of offences - No Magistrate or Police officer shall be compelled to say whence he got any information as to the

commission of any offence, and no Revenue officer shall be compelled to say whence he got any information as to the commission of any offence

against the public revenue.

126. Professional communications - No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent,

to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or

on behalf of his client, or to state the contents or condition of any document with which he has become, acquainted in the course and for the

purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure -

(1) Any such communication made in furtherance of any [illegal] purpose;

(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has

been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [pleader], attorney or vakil was or was not directed to such fact by or on behalf of this

client.

Certainly, the present case does not fall within any of the contingencies in which the respondents could have claimed privilege over the disclosure of the information.

71. In recognition of the entitlement of a citizen to secure access to information under control of public authorities which is consistent with public interests, the parliament has also enacted the Right of Information Act, 2005. This enactment is a statutory recognition of the requirement to promote openness, transparency and accountability in administration and in relation to matters connected therewith or incidental thereto. In accordance with the requirement of Article 19 of the Constitution of India as well as Article 19 of the Universal Declaration of Human Rights, 1948, an obligation is cast on several public authorities to provide information and maintain all records consistent with its operational requirements, duly catalogued, indexed and published at regular prescribed intervals. Needless to say this right to information is not an absolute right, but is subject to statutory and constitutional restrictions. Thus u/s 8 of the legislation, the authorities are exempted from disclosing such information where the sovereignty and integrity of India may be prejudicially affected by such disclosure or where public safety and order would be affected by said disclosure of a protection of trade or commercial secret etc. The application of this statute amongst others is excluded to intelligence and security organisations as specified in the Schedule.

72. Certainly, no such reasons have been put forth by the respondents for the incorporation of Clause 6.7(d).

73. There are several examinations relating to specialisations wherein the marks of the candidate are not disclosed. The scheme of medical education also postulates several courses where the candidate is only informed as to whether he has passed or failed in the examinations. The purpose for testing the doctors in these examinations is to assess their skills and abilities in order to evaluate as to whether they deserve to be awarded the degree or the certificate in question. No such reason or material even for forming the basis for the refusal to disclose the marks or as to why Clause 6.7(d) was included in the brochure has been advanced by the respondent No. 1.

74. In this background, the stand of the respondent that it has a right to withhold the information with regard to the marks secured by a candidate

when a request for information about the marks has been actually made, cannot be held to be legally permissible.

75. The respondents have placed reliance on several orders passed by the courts where candidates were seeking either revaluation of their marks

where no such rule existed or were seeking information of marks secured in entrance exams. The considerations which weighed the court in

rejecting these requests were based on the practical difficulty in notifying results resulting to lakhs of candidates who participated in such entrance

examinations and also the rules which existed prescribing a re-totaling of the marks. These considerations certainly have no bearing in the instant

case. Again, no such stand has been taken by the respondents in the counter affidavit or in the Explanation which has been rendered.

In the light of this discussion, Clause 6.7(d) Therefore is clearly without any rationale or legal basis. The same also is devoid of any statutory force

and has been carved out by the respondents for no good reason.

76. I find that the petitioner has made a prayer that sub-clause (c) of Clause 6.7 of the Bulletin of Information and application form for Diplomat of

National Board Final Examination for the year July/October, 2000 only be declared as ultravires and that she be declared successful in the

examination held by the respondent No. 1 for the year July/October, 2000 on the basis of marks obtained in the theory examination. The petitioner

applied for the examination based on the information given to her in the Bulletin of Information and application form for Diplomat of National

Board Final Examination for the year July/October, 2000. In case she had any grievance against any provision contained in this Bulletin, the

petitioner ought to have vented the same prior to applying for the examination and undertaking the test. In any case, issuing such a direction so far

as examination already conducted is concerned would serve no fruitful purpose. It is well settled that this Court cannot be called upon to issue a

futile writ. (Re: S.L. Kapoor Vs. Jagmohan and Others,

Accordingly, the prayer made by the petitioner in prayers (a) and (b) are also rejected.

However in the light of the a foregoing discussion, the writ petition is allowed to

the extent of prayer (e). The respondent No. 1 is directed to disclose the marks obtained by the petitioner in the theory, thesis and practical examinations taken by her.

This writ petition is disposed of in the above terms.