

(2020) 03 J&K CK 0012

In the Jammu And Kashmir High Court

Case No : Writ Petition (C) No. 3824, 3398, 4169 Of 2019, 571 Of 2020, CM No. 9289, 9198, 9150, 9199, 8596, 8726, 7121, 9197, 9149, 7964 Of 2019, 1293 Of 2020

Jaskaran Singh Sudan And Others

APPELLANT

Vs

State Of J&K And Others

RESPONDENT

Date of Decision : 10-03-2020

Acts Referred:

Constitution Of India, 1950 — Article 14, 16, 226

Citation : (2020) 03 J&K CK 0012

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Gagan Basotra, S.S.Nanda, Amit Gupta, Jehangir Iqbal Ganai, Ahtsham H. Bhat, Arif Sikander Mir, Abhinav Sharma, Ashok Sharma, B.R.Manhas

Final Decision : Dismissed

Judgement

1. In WP(C) Nos.3824/2019, 4169/2019 and 571/2020, the petitioners, inter alia, have prayed for the following reliefs:-

i) To quash the result of the examination conducted by the J&K Services Selection Board (hereinafter "the SSB" for short) for testing the

"working knowledge of Urdu" published vide notice No.SSB/Secy/Sel/2019/4563-66 dated 04.09.2019 insofar as it declares the petitioners

"disqualified".

ii) To quash the notice issued by SSB vide its No.SSB/Sel/Secy/2017/11832-46 dated 18.11.2017, whereby written examination for testing "working

knowledge of Urdu" has been prescribed as qualifying examination.

In the alternative the petitioners pray for following directions:-

i) To take aggregate 25% marks as required percentage for qualifying the

descriptive test conducted by the SSB for testing the 'working knowledge of Urdu'.

ii) To select and appoint the petitioners as Naib Tehsildars in revenue department.

The petitioners have lastly laid challenge to the vires of Schedule II-A Executive under the J&K Revenue(Subordinate) Service Recruitment Rules,

2009 (to be referred as 'the Rules of 2009' hereinafter) to the extent it prescribes the 'knowledge of Urdu along with graduation' as the

minimum eligibility qualification for direct recruitment to the post of Naib Tehsildar. However, in WP(C) No. 3398/2019 the petitioners have restricted

their challenge only to the outcome of the examination conducted for testing the 'working knowledge of Urdu' in which the petitioners, who have

obtained 33% marks in both objective and descriptive test, yet have been disqualified on the ground that they have fallen short of 40% in the

aggregate.

2. The grievance in all the four petitions emanates from the Urdu examination conducted by the Service Selection Board, (for short 'SSB') for

testing the 'working knowledge of Urdu' in terms of its notification dated 18.11.2017. All the petitioners have failed to qualify the Urdu test and,

therefore, have been ousted from the zone of consideration for selection. It is the claim of the petitioners that they have fared exceptionally very well

in the written examination conducted as a part of the selection process and had fair chances of selection but they were thrown out of competition by

prescribing the test of 'working knowledge of Urdu' in most discriminatory and irrational manner.

3. Before evaluating the merit of contentions raised by the learned counsel appearing for the petitioners, it would be necessary to take note of few

facts relevant to the controversy raised in these petitions.

4. Pursuant to a requisition received from the Revenue Department, the SSB, vide advertisement notice No.01 of 2015 dated 07.04.2015, invited

applications from the eligible candidates for the post of Naib Tehsildar. The last date for submission of application forms was 09.05.2015. The

qualification prescribed in the advertisement notice was 'graduate with knowledge of Urdu', which was, in turn, in tune with the qualification

prescribed for the post in the Rules of 2009. The petitioners, claimably eligible for the notified post, submitted their application forms, some in open and

some in different reserved categories.

5. The SSB, after having received the applications, issued another notice bearing No.SSB/Sel/Secy/2015/7029-39 dated 31.07.2015 informing the

applicants that it was going to conduct objective type written test during the month of September, 2015. The SSB, while informing the candidates

aforsaid, also made public the syllabus for such examination. The objective type written test also earmarked 30 marks for descriptive test in Urdu.

This was resented to by the petitioners and many others. SWP No.2657/2015, 2676/2015 and 2715/2017 came to be filed in this Court in which the

descriptive test in Urdu of 30 marks was assailed on various grounds. All the three writ petitions were clubbed together under the lead case of SWP

No.2657/2015 (Azhar Khan v. State of J&K and others) and disposed of by a Bench of this Court vide judgment dated 25.10.2017. The descriptive

written test in Urdu for 30 marks provided by the SSB in terms of its notification dated 31.07.2015 was found by this Court arbitrary and in violation of

the statutory recruitment Rules and, accordingly, the notification providing for syllabus of descriptive test in Urdu was set aside. There appears to be a

typographic error in paragraph No.19 of the judgment dated 25.10.2017, wherein instead of notice SSB/Sel/Secy/2015/7029-39 dated 31.07.2015,

notification No.01 of 2015 dated 07.04.2015 appears to have been erroneously mentioned. The Notification No.01 of 2015 dated 07.04.2015 is the

advertisement notice and does not relate to publication of any syllabus with regard to any test including descriptive test of Urdu.

6. Be that as it may, this Court, as is apparent from the reading of the judgment, did not find favour with the plea of the SSB that descriptive type test

in Urdu subject was necessary to test the knowledge of the aspirants to the post of Naib Tehsildar. The judgment, was statedly compiled by the SSB

and a fresh notice bearing No.SSB/Sel/Secy/2017/11832-46 dated 18.11.2017 was issued. This notification was obviously in supersession of the earlier

notification issued by the SSB on 31.07.2015. The SSB prescribed a multiple choice based written test and issued syllabus therefor. It also issued

general guidelines for testing 'working knowledge of Urdu'. The examination for testing the working knowledge of Urdu was provided to be of

two sections, (i) computer based reading section and (ii) descriptive in the reading section with a further stipulation that the Urdu examination will only

be of qualifying nature. The general guidelines contained in Annexure-B appended to the notice dated 18.11.2017 further provided that to qualify the Urdu test, a candidate belonging to OM category will be required to score atleast 40% aggregate marks in the said examination with at least 33% marks in both Reading and Writing sections.

7. The petitioners, as is admitted by them, did not challenge the notification dated 18.11.2017 and instead appeared in the written examination (MCQ) on 29.04.2018 and on the basis of their merit, were shortlisted for interview, which was conducted by the SSB w.e.f. 03.12.2018 to 11.01.2019. After concluding the process of interview, the SSB conducted the examination for testing the "working knowledge of Urdu" on 12.05.2019 in terms of its notification dated 18.11.2017. The petitioners failed to qualify the Urdu examination and, therefore, were ousted from the zone of consideration being ineligible for the post of Naib Tehsildar. Some of the petitioners have obtained 33% marks in both reading and writing section of Urdu test but have failed to obtain aggregate of 40%. Some of the petitioners have not been able to obtain 33% marks in either of the Section of Urdu test. In nutshell, all the petitioners have failed to qualify the test of Urdu and, therefore, found ineligible by the respondent-SSB to be considered for the post of Naib Tehsildar.

8. Feeling aggrieved of the mode and manner in which the Urdu test was conducted and the petitioners were ousted from the zone of selection, the petitioners have filed these petitions seeking reliefs as have been delineated in detail herein above. With a view to substantiate their plea against the methodology adopted by the respondent-Board in conducting the Urdu test, the petitioners have gone to the extent of challenging the vires of Rules of 2009 and also notification issued on 18.11.2017.

9. The petitions are contested by respondent No.1 as also respondent Nos.2 and 3. Some aspirants, who have qualified the Urdu test and are awaiting outcome of the selection process have also been arrayed as party-respondents. They are represented by Mr. Jehangir Iqbal Ganai, Sr. Advocate along with M/s Arif Sikander Mir and Ahtsham Hussain Bhat, Advocates.

10. The respondent-Board has defended its action contending, inter alia, that the petitioners were well aware of the mode, manner and methodology to be adopted for testing the "working knowledge of Urdu" and they, without

any protest or demur, participated in the test expecting favourable outcome and therefore, they cannot be now allowed to turn around and find fault with the Urdu test only because the result of the test has not been palatable to them. Doctrine of ‘‘approve and reprobate’’ and blowing of ‘‘hot and cold in same breath’’ have been sought to be invoked by the respondents to non-suit the petitioners. The vires of the Recruitment Rules of 2009 have been defended by submitting that given the nature of job a Naib Tehsildar is required to perform, the working knowledge of Urdu is necessary and is a requirement, which cannot be dispensed with. The deviation from November, 2017 notification and holding of Urdu test after the viva voce/interview, however, has not been explained by the respondents. However, they submit that the timing of holding the qualifying Urdu test does not vitiate the otherwise fair and transparent selection process. The respondent No.1, in its objections, has delineated the job profile of a Naib Tehsildar to buttress its submission that ‘‘working knowledge of Urdu’’ is sine qua non for performing the duties of a revenue officer i.e. Naib Tehsildar. It is contended that as on date the entire revenue record is in Urdu and Naib Tehsildar is a highest revenue officer in the non-gazetted cadre of the revenue service and is required to oversee the functioning of Patwaris, Girdawars etc and in the absence of knowledge of Urdu, a Naib Tehsildar would be handicapped in performing its duties.

11. Learned counsel appearing for private respondents has echoed the arguments of respondent No.1 and the SSB.

12. Having heard learned counsel for the parties and perused the record, I am of the view that determination of following questions is necessary to

decide the controversy raised in these petitions:-

- i) Whether the petitioners, by their conduct and participation in the Urdu test without any protest or demur, are estopped from challenging the test?
- ii) Whether the mode, manner and methodology adopted by the SSB in the conduct of Urdu test is irrational and arbitrary?
- iii) Whether standard of examination for testing the ‘‘working knowledge of Urdu’’ prescribed by the SSB is arbitrary and irrational having no nexus with the object sought to be achieved?
- iv) Whether the conduct of examination for testing ‘‘working knowledge of Urdu’’ instead of ‘‘knowledge of Urdu’’, as is the requirement of

statutory Rules and the advertisement notification has been used by the respondent-Board to favour a particular class of candidates?

Issue No.i: Estoppel or acquiescence

13. Indisputably, the SSB vide its notification dated 18.11.2017 clearly provided that apart from multiple choice based written test, there shall be a

separate examination for testing the 'working knowledge of Urdu'. What would be the format of such examination was also clearly indicated in

Annexure-B appended to the notice. From a bare reading of impugned notice dated 18.11.2017 in its entirety along with annexures, it is abundantly

clear that the aspirants for the post were made aware well in advance that the examination for testing 'working knowledge of Urdu' will be of two

sections; computer based reading section and descriptive (writing section). Detailed guidelines for holding the test were also clearly indicated in

Annexure-B to the notice. It was made known to the aspirants that for qualifying the Urdu examination, they shall have to obtain minimum 33% marks

in both the sections and 40% marks in the aggregate. It was also indicated in Annexure-B to the notice that in the reading section, which would

comprise of 50 marks; a candidate would be required to answer a total of 50 questions out of five given passages, each carrying 10 questions of one

mark each. With regard to writing section, which too was to comprise of 50 marks, the split of marks i.e. 10 marks in each subject were clearly

indicated.

14. True it is, the petitioners despite being aware about the mode, manner and methodology to be adopted by the SSB for conducting written test,

participated in the written test with their eyes wide open and did not raise any protest or demur. They took a calculated chance in the examination with

a hope that they would qualify the same and will be considered for selection. It is, however, a different matter that the petitioners, somehow, failed to

qualify the examination. In these circumstances, the petitioners cannot be permitted to turn around and challenge the Urdu test particularly on the

grounds it has been assailed in these petitions. The challenge of the petitioners to the Urdu test would be permissible only, if it is demonstrated that the

test was not fairly conducted or that during the conduct of the test some bungling or copying took place. The provision of minimum 33% marks in both

the sections of test and 40% in the aggregate is not assailable at the behest of

the petitioners, who despite being aware of the aforesaid stipulation, participated in the test whole-hog and without any protest or demur. The petitioners have also failed to demonstrate by reference to any relevant material that in the process of written examination of Urdu, the petitioners have been unfairly treated viz-a-viz those who have succeeded to qualify the test.

15. Undoubtedly, the candidates who have been Urdu students all along and all through may have an edge over those who may have acquired the knowledge of Urdu only with a view to qualify in the test for the post of Naib Tehsildar, Patwari etc. But this cannot be a ground to hold the written test for Urdu bad. The law of estoppel and the doctrine of approbate and reprobate is now firmly established. In the case of *Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others*, (2011) 1 SCC 150. Hon^{ble} the Supreme Court was confronted with the similar situation and what was held by the Supreme Court in para 24 after analyzing the case law on the subject reads as under:-

â??24. When the list of successful candidates in the written examination was published in such notification itself, it was also made clear that the knowledge of the candidates with regard to basic knowledge of computer operation would be tested at the time of interview for which knowledge of Microsoft Operating System and Microsoft Office operation would be essential. In the call letter also which was sent to the appellant at the time of calling him for interview, the aforesaid criteria was reiterated and spelt out. Therefore, no minimum benchmark or a new procedure was ever introduced during the midstream of the selection process. All the candidates knew the requirements of the selection process and were also fully aware that they must possess the basic knowledge of computer operation meaning thereby Microsoft Operating System and Microsoft Office Operation. Knowing the said criteria, the appellant also appeared in the interview, faced the questions from the expert of the computer application and has taken a chance and opportunity therein without any protest at any stage and now cannot turn back to state that the the aforesaid procedure adopted was wrong and without jurisdiction.â??

16. This view was reiterated by the Supreme Court in its subsequent judgment rendered in the case of *Romesh Chandra Shah and others v. Anil Joshi*

and others, (2013) 11 SCC 309. The latest view of the Supreme Court on the point is available in the case of Union of India and others v. C. Girja and

others, (2019) 2 Supreme 513 in which strong reliance is placed on the judgments of Vijendra Kumar Verma and Romesh Chandra Shah (supra) and

the legal position was reiterated.

17. In the case of D. Sarojkumari v. R. Helen Thilakom and others (2017) 9 SCC 478 after surveying the case law on the subject and while reversing

the judgment of the Kerala High Court in paragraph No.10 Hon'ble the Supreme Court held thus:-

“10. The Kerala High Court did not note the above mentioned judgments and ignored the well settled position of law in rejecting the specific plea

raised by the appellant herein that the appellant could not raise the issue that no direct recruitment should have been conducted once she had applied

for and taken part in the selection process by direct recruitment.”

18. Similar view was echoed by a 3-Judge Bench of the Supreme Court in the case of A. Shok Kumar and another v. State of Bihar and others, (2017)

4 SCC 357. Hon'ble the Supreme Court after referring to catena of judgments on the point in paragraph Nos.12, 13, 14 and 17 held thus:-

“12. The appellants participated in the fresh process of selection. If the appellants were aggrieved by the decision to hold a fresh process, they did

not espouse their remedy. Instead, they participated in the fresh process of selection and it was only upon being unsuccessful that they challenged the

result in the writ petition. This was clearly not open to the appellants. The principle of estoppel would operate.

13. The law on the subject has been crystallized in several decisions of this Court. In Chandra Prakash Tiwari v. Shakuntala Shukla (2002) 6 SCC

127, this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not

successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a

candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a

lacuna therein, merely because the result is not palatable. In Union of India v. S. Vinodh Kumar (2007) SCC 100, this Court held that:

“18. It is also well settled that those candidates who had taken part in the

selection process knowing fully well the procedure laid down therein

were not entitled to question the same. (See *Munindra Kumar v. Rajiv Govil* (1991) 3 SCC 368 and *Rashmi Mishra v. M.P. Public Service Commission*

(2006) 12 SCC 724.)

14. The same view was reiterated in *Alan Jyoti Barooah* (2009) 3 SCC 227 wherein it was held to be well settled that the candidates who have taken

part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.

15. It is settled law that a person who consciously takes part in the process of

selection cannot, thereafter, turn around and question the method of

17. In *Ramesh Chandra Shah v. Anil Joshi*, (2013) 11 SCC 309 candidates who were competing for the post of Physiotherapist in the State of

Uttarakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the

respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was

held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the

advertisement or the procedure of selection. This Court held that:

18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of

selection and its outcome. 18. The legal position enunciated by the Supreme Court in the cases of *Chandra Prakash Tiwari v. Shakuntala Shukla*,

(2002) 6 SCC 127, *Union of India v. S. Vinodh Kumar*, (2007) 8 SCC 100, *Manish Kumar Shah v. State of Bihar*, (2010) 12 SCC 576, *Vijendra*

Kumar Verma (supra), *Ramesh Chandra Shah* (supra), *Chandigarh Administration v. Jasmine Kaur*, (2014) 10 SCC 521, *Pardeep Kumar Rai v.*

Dinesh Kumar Pandey, (2015) 11 SCC 493 and *Madras Institute of Development v. S.K. Shiva Subramanyam*, (2016) 1 SCC 454 was reaffirmed by

a larger Bench in *Ashok Kumar* (supra).

19. Before proceeding to conclude on question No.1, it would be appropriate to mention that the principle of estoppel or waiver in selection matters is

not absolute rule and without exceptions, as is aptly observed by the Supreme Court in paragraph No.18 of the judgment rendered in the case of Dr.

(Maj.) Meeta Sahai v. State of Bihar and others, Civil Appeal No.9482 of 2019 decided on 17.12.2019, which for facility of reference is reproduced

hereunder:-

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

20. Reconciling the recent judgment of the Supreme Court in the case of Dr. (Major) Meeta Sahai (supra) with the three Judge judgment of Ashok

Kumar (supra), following principles can be fairly deducible:-

a) That, as a general proposition of law, a candidate who has taken part in the selection process without any protest or demure cannot lay challenge to

it only on the ground that the result of selection is not palatable to him.

b) In the circumstances, where the candidate is well aware about the mode, manner and the methodology to be adopted in the selection process, he

cannot, on failure, challenge the same as in that event, he would be estopped by his conduct and will not be permitted to approbate and reprobate.

c) That this principle is not absolute but is subject to well recognized exceptions i.e. if the selection process is conducted in violation of the notified

procedure or is in violation or misconstruction of statutory rules or that the selection process suffers from incurable illegality or has been conducted in

derogation of the provisions of the Constitution.

21. When the case of the petitioners is viewed in the aforesaid context and in light of the legal position adumbrated herein above, this Court does not

find it a case falling in the exceptions illustrated above. Although, there is half-hearted challenge thrown to the statutory Recruitment Rules of 2009,

but no material has been placed on record to substantiate it. The argument of Mr. Gagan Basotra, learned counsel appearing for the petitioner in

WP(C) No.3824/2019 that, with the process of digitization of the revenue record having been set in motion in the Union Territories of Jammu and

Kashmir and Ladakh, knowledge of Urdu by a Naib Tehsildar may not be essential requirement anymore and, therefore, the Rules providing for

“knowledge of Urdu” as one of the essential qualification is totally illegal, arbitrary and irrational and, therefore, offends Article 14 and 16 of the

Constitution, is wholly without any substance. There is nothing on record to indicate that all the revenue records are now being maintained in a

language other than Urdu. The process of selection in the instant case was initiated way back in the year 2015, when admittedly, given the nature of

job required to be performed by revenue officers particularly Patwaris and Naib Tehsildar, “working knowledge of Urdu” is indispensable. It is not

the case of any of the petitioner that the respondents in the conduct of written examination of Urdu have violated any statutory rules or have acted in

derogation thereof. There is no allegation by the petitioners that the Urdu test has been conducted by the respondent-Board in derogation to the

statutory rules.

22. It is also not the case pleaded by any of the petitioners that the written test of Urdu conducted by SSB was unfair or that there were instances of

facilitating copying in the examination or that the examination was marred by any bunglings. Once, it is held that case of the petitioners does not fall in

any of the exceptions carved out to the Rules of estoppel, the petitioners cannot be said to have locus to assail the mode, manner and methodology of

the Urdu test conducted by the SSB to test the “working knowledge of Urdu”.

23. Equally, I am not impressed with the argument raised by the learned counsel appearing for the petitioners that the statutory rules provide for

“knowledge of Urdu”, whereas the examination was aimed at testing the “working knowledge of Urdu”.

24. “Knowledge of Urdu” is a term more comprehensive and wider in its amplitude than the term “working knowledge of Urdu”. The

working knowledge of Urdu would literally mean such knowledge of Urdu as is sufficient to perform the duties of office i.e. Naib Tehsildar in the

instant case, whereas “knowledge of Urdu” would be wide enough to cover even the extensive and thorough knowledge of Urdu. By restricting

the test to “working knowledge of Urdu”, the respondent-Board, in my opinion, have not acted in derogation to the statutory Rules. Equally,

untenable and flimsy is the argument of learned counsel for the petitioners that

the selection process particularly with regard to holding of Urdu test violates the judgment of the Writ Court and, therefore, unsustainable in law.

25. Having gone through the judgment of this Court in SWP No.2657/2015 carefully, it is found that the learned Single Bench took objection to the manner in which descriptive test in Urdu for 30 marks was provided by the respondent-Board. Learned Single Bench, after evaluating the rival contentions, concluded that such prescription was bad. The respondents did not pursue the earlier notification issued in the year 2015 and issued a fresh notification on 18.11.2017 by clearly providing that the examination of Urdu to be conducted by the SSB was only of qualifying nature and it would have two sections, reading and writing. It is not understandable as to how the 'working knowledge of Urdu' of a candidate can be tested without holding reading and writing test. How the knowledge of Urdu is to be tested and what should be the standard of paper is best left to the domain of the experts and the recruiting agency. It is none of the business of the Court to hold that in a particular examination, a particular standard should have been maintained. Even if, the Court is of the opinion that a different examination could have been provided to test the knowledge of Urdu, yet it would be loath to substitute its opinion with that of experts and the recruiting agency.

26. In nutshell, I do not find any unfairness and arbitrariness in the conduct of Urdu test. Possibly and it may be a fact that mode, manner and methodology as also the standard adopted by the respondent-Board in conducting the written Urdu test might have resulted into advantage in favour of such candidates, who had read Urdu as a regular student in comparison to those, who may have acquired the knowledge of Urdu subsequently, may be, while making preparation for the post in question, but that alone cannot be a ground to hold the selection bad.

Issue No.(i) and (iii)

27. The foregoing analysis and discussion made herein above, in my opinion, answers the other two questions as well.

28. In the light of the preceding analysis, these petitions are found to be devoid of any merit and are, accordingly, dismissed. Interim direction, if any, shall stand vacated.

A copy of the judgment be placed on the file of each connected case.