

(2010) 09 BOM CK 0192

In the Bombay High Court

Case No : Writ Petition No's. 4313 and 4452 of 2010

Manoj Sable and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 27-09-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 234

Maharashtra Judicial Service Rules, 2008 — Rule 12, 12(1), 3(A), 5, 6

Citation : (2011) 2 ALLMR 325 : (2011) 4 BomCR 680 : (2011) 1 MhLj 344

Hon'ble Judges : Mohit S. Shah, C.J.; Vasanti A. Naik, J

Bench : Division Bench

Advocate : A.S. Agrawal, in W.P. No. 4313 of 2010 and A.S. Chandurkar, in W.P. No. 4452 of 2010, for the Appellant; A.G. Mujumdar, Assistant Government Pleader for Respondent No. 1 in W.P. No. 4313 of 2010 and A.G. Mujumdar, Assistant Govt. Pleader For Respondent Nos. 1 and 2 in W.P. No. 4452 of 2010, for the Respondent

Final Decision : Dismissed

Judgement

Mohit S. Shah, C.J.—Both these petitions under Article 226 of the Constitution of India pertain to the selection process for appointment to the post of District Judges by direct recruitment under the Maharashtra Judicial Service Rules, 2008.

2. In Writ Petition No. 4313 of 2010, the Petitioners, 12 in numbers, have challenged the constitutional validity of proviso to Rule 6(2)(a) of the Maharashtra Judicial Service Rules, 2008 (hereinafter referred to as "said Rules") to the extent the rules lay down the condition that the candidate must obtain minimum 40% marks at the interview for being included in the select list. The Petitioners have also challenged the advertisement dated 28th July, 2008 insofar as the same specified minimum cut off of 40% marks at the interview/viva voce examination. The Petitioners have also challenged the select list dated 8th July, 2010 consisting of 14 candidates (Respondent Nos. 3 to 16) who are selected for appointment to the post of District Judge by nomination i.e. by direct recruitment.

3. In Writ Petition No. 4452 of 2010, the sole Petitioner has challenged the same select list dated 8th July, 2010 mainly on the ground that the Petitioner's answer books at the written test were not correctly and fully assessed. Since the said Petitioner had obtained less than 40% marks at the oral interview, the said petition was also heard along with Writ Petition No. 4313 of 2010. The petitions were heard together and since common questions of law were raised, both the petitions are being disposed of by this common judgment.

4. As per the Maharashtra Judicial Service Rules, 2008 for appointment to the post of District Judge by nomination, the recruitment rules make the following provisions in Rules 6 and 12:

6(1)(c) The Recruitment Authority shall hold the final examination of two hundred marks for the category of District Judges referred to in Sub-rule (1) of Rule 12 of these rules.

(d) xxx xxx xxx

(e) The Recruiting Authority shall hold viva voce Examination carrying fifty marks.

6(2)(a) Candidate who secures not less than fifty percent of marks in each paper in written examination shall be eligible for the viva-voce examination for appointment to the post of District Judge under 1(b) and 1(c) and Civil Judge, Junior Division under 3(A) of the table "c" under Rule 5 and by nomination;

Provided that Scheduled Caste or Scheduled Tribe candidates who obtain forty-five percent or more marks in the written examination shall be eligible for the viva voce examination:

Provided further that the candidate who obtains 40% marks in viva-voce examination shall be eligible for selection."

12. Competitive Examination -- (1) The Competitive Examination or Written Examination for recruitment to the posts of District Judges whether by nomination or promotion shall be of two hours duration carrying maximum 200 marks.

(2) The Competitive Examination for recruitment of Civil Judge, Junior Division shall consist of a Written Examination of two papers having duration of two hours each carrying 100 marks each in Civil Law and Criminal Law respectively.

(3) The object of the viva-voce examination under these Rules is to assess the suitability of the candidate for the cadre by judging the mental alertness, knowledge of law, clear and logical exposition, balance of Judgment, skills, attitude, ethics, power of assimilation, power of communication, character, intellectual depth and the like of the candidate.

(4) The mode of evaluating the performance shall be specified in numerical marks obtained in written and oral examination. The scheme of examination of the candidates including written and viva voce shall be framed by the High Court

in consultation with the Commission.

5. The learned Counsel for the Petitioners have submitted that the aforesaid prescription in the recruitment rules laying down that the candidate must obtain at least 40% marks in the viva voce or oral interview is illegal for the following:

(A) The Shetty Commission report lays down that "the merit list will be prepared on the basis of the marks/grades obtained both in the written examination and viva-voce". [Para 10.97(v)]. The final selection list will be readied combining the Cumulative Grade Value obtained in the written examination and the Viva Voce examination." [Para 10.99(viii)]

It is submitted that the Apex Court has held in All India Judges Association and Others Vs. Union of India (UOI) and Others, that the recommendations made by the Shetty Commission are accepted.

(B) Strong reliance is also placed on the decision of the Apex Court in the case of Ramesh Kumar Vs. High Court of Delhi and Another, and particularly the observations made in paragraph 18 of the decision which read as under:

... This Court in All India Judges Association and Others Vs. Union of India (UOI) and Others, had accepted Justice Shetty Commission's Report in this respect i.e. that there should be no requirement of securing the minimum marks in interview, thus, this ought to have been given effect to. The Court had issued directions to offer the appointment to candidates who had secured the requisite marks in aggregate in the written examination as well as in interview, ignoring the requirement of securing minimum marks in interview....

6. It is also submitted by the learned Counsel for the Petitioners that the advertisement was issued on 28th July, 2008 and, therefore, the selection process on which date the applicable rules were Bombay Judicial Service Recruitment Rules which did not provide for any minimum passing marks at the oral interview. Hence, the subsequent rules called "the Maharashtra Judicial Service Recruitment Rules, 2008" as contained in the Notification dated 25th August, 2008 and published in the Government Gazette dated 27th August, 2008 could not have been applied while preparing the impugned select list.

7. It is also submitted on behalf of the Petitioners that otherwise also the High Court erred in calling for interview a larger number of candidates in excess of the ratio of three candidates for one vacancy. In support of the said contention, reliance is placed on the decision in Malik Mazhar Sulgar (3) and Anr. v. Uttar Pradesh Public Service Commission and Ors. (2008) 17 SCC 703. It is submitted that for 14 (fourteen) vacancies only three times the number of candidates i.e. 42 candidates could have been called for interview, but the High Court called 258 candidates for interview who had secured 50% or more marks in the written test. It is submitted that out of 14 selected candidates, only 9 candidates would have been within the zone of consideration, if the number of candidates called for interview was confined to three times the number of advertised vacancies, but by

calling all the candidates who had obtained more than 50% marks at the written test, the Respondents adversely affected the Petitioners' chances of being selected. Candidates at serial Nos. 11, 12 and 14 of the select list could not have been called for interview as their names were at serial Nos. 163, 171 and 105 respectively of the merit list prepared on the basis of the marks obtained at the written test (i.e. the list of candidates who had obtained 50% or higher marks at the written examination).

8. On the other hand, the learned Assistant Government Pleader for Respondent No. 1 has submitted that the petitions deserve to be dismissed as they suffer from delay, laches and acquiescence. The Petitioners could have challenged the advertisement dated 28th July, 2010 at the relevant time, but they participated in the selection process knowing fully well that the candidates with 50% or higher marks of the written examination who will be called for interview, will have to obtain minimum 40% marks in the interview.

9. The learned Assistant Government Pleader also submitted that advertisement dated 28th July, 2010 provided that the last date of receiving applications was 30th August, 2008 and in the mean time the Maharashtra Judicial Service Rules, 2008 as contained in the Notification dated 25th August, 2008 were published in the Government of Maharashtra Gazette dated 27th August, 2008. Hence, the 2008 Rules are applicable to the selection process which commenced from 30th August, 2008. Even otherwise the advertisement dated 28th July, 2008, issued on the basis of the Maharashtra Judicial Service Rules, 2008 as approved by the High Court of Bombay and framed as Rules by the Governor of Maharashtra after consultation with the Maharashtra Public Service Commission clearly provided that the candidates called for the interview will have to obtain minimum 40% marks in the interview. Rules of the game were not changed after the commencement of the selection process, because the Maharashtra Judicial Service Rules, 2008 had already come into force before the last date for receiving applications.

10. It is further submitted that the Shetty Commission report itself has indicated the evaluating procedure for written and viva voce and has provided the following chart in Schedule B to the Draft Judicial Service Rules (with Draft Rule 6(5):

Percentage of Mark

Grade

Grade Value

70% and above

0

1

65% to 69%

A+

6

60% to 64%

A

5

55% to 59%

B+

4

50% to 54%

B

3

45% to 49%

C+

2

40% to 44%

C

1

Below 40%

F

0

It is submitted that the candidate getting less than 40% marks in the interview is to be given "F" grade with grade value "0" (zero).

11. It is submitted that in the decisions relied upon by the learned Counsel for the Petitioners, the Apex Court had held that the interview committee or the selection board cannot provide for any minimum qualifying marks at the viva voce, if the rules do not provide for any such minimum marks for viva voce and that rule providing for such minimum qualifying marks for viva voce cannot be introduced after the selection process has already commenced and reached midstream. However, in the instant case, the recruitment rules framed in exercise of the powers under Article 234 of the Constitution of India specifically contained a provision that the candidate must obtain minimum 40% marks in the viva voce examination for being eligible to be included in the select list. It is submitted that when the marks for the written test are 200 and the candidate is required to obtain minimum 50% marks in the written test (100 marks) and the

marks for the interview are 50, and the minimum required in interview are 40% marks (i.e. 20 out of 50 marks), the selection procedure can never be considered to be arbitrary or irrational. Strong reliance is placed on decision of the Apex Court in the case of K.H. Siraj v. High Court of Kerala and Ors. AIR 2006 SC 395.

It is further submitted that for the candidates belonging to reserved categories, the minimum passing marks are 45% in the written examination and 40% in the viva voce test. It is submitted that the Petitioners herein secured between 9 and 15 marks in the oral interview which was much below the required 40% (i.e. 20 out of 50 marks). Hence, the Petitioners were rightly not included in the select list.

12. Having heard the learned Counsel for the parties, we have given anxious consideration to the rival submissions. As far as the first preliminary submission made by the learned Assistant Government Pleader is concerned, we do not propose to examine the same in detail as, according to us, the Petitioners do not have any case on merits. But the fact remains that the Petitioners did not choose to challenge the advertisement dated 28th July, 2008 till the select list was published on 8th July, 2010.

13. Be that as it may, the contention that the Respondents changed the rules of the game after the game had commenced cannot be accepted. The Maharashtra Judicial Service Rules, 2008 as contained in the Notification dated 25th August, 2008 came to be published in Government Gazette on 27th August, 2008. The last date for receiving applications was 30th August, 2008. The advertisement dated 28th July, 2008 itself provided as under:

6. Eligible candidates will have to appear for Competitive Examination/Written Examination which shall be not less than two hours duration with 200 marks. The High Court shall hold viva-voce examination carrying 50 marks of candidates who secure not less than 50% of marks at such written examination, provided that Scheduled Caste/Scheduled Tribe candidates who obtain 45% or more marks in the written examination, shall be eligible for the viva-voce examination. No candidate who secures less than 40% marks in viva-voce shall be considered for appointment". (Emphasis supplied)

The prospective candidates were thus left in no doubt about the minimum qualifying marks at the written examination to be eligible to be called for viva voce and the minimum marks to be obtained at the viva voce for being considered for appointment. Hence, it cannot be said that the rules of the game were changed after the game commenced.

14. We also find considerable substance in the submission made by the learned Assistant Government Pleader that the High Court had approved the Maharashtra Judicial Service Rules, 2008 before 28th July, 2008 which were then sent to the State Government and Maharashtra Public Service Commission, as the rules were thereafter made by the Governor and they were issued through the Government Notification dated 25th August, 2008 and published in the Government Gazette

dated 27th August, 2008. Looking to this proximity of dates also, it cannot be said that the rules of the game were changed after the commencement of the selection process.

15. Coming to the major contention urged on behalf of the Petitioners that Rule 6(2)(a) providing for minimum passing marks at the viva voce test is contrary to the Shetty Commission recommendations, this contention does not take into consideration the relevant portion of the Shetty Commission recommendations providing for Grade Value for both written examination and viva voce also. Draft Rule 6(5) of the Draft Judicial Service Rules in Volume II of the Report reads as under:

The mode of evaluating the programme and gradation, the written and viva voce examination shall be as specified in Schedule "B" Schedule "B" to the Draft Judicial Service Rules in Vol. II of the Report contains the following chart:

Percentage of Mark

Grade

Grade Value

70% and above

O

7

65% to 69%

A+

6

60% to 64%

A

5

55% to 59%

B+

4

50% to 54%

B

3

45% to 49%

C+

2

40% to 44%

C

1

Below 40%

F

0

The above chart in the Shetty Commission recommendations would indicate that the candidate getting less than 40% marks in viva voce is required to be given "F" grade with zero grade value. If the Shetty Commission were of the view that a person getting less than 40% marks in the viva voce test should also be considered to have passed the viva voce, the Shetty Commission would have given "D" grade to the candidate getting less than 40% marks and would not have given zero value.

We further find that the observations in paragraph 27 of the judgment in All India Judges Association and Others Vs. Union of India (UOI) and Others, are for evolving an objective method of testing the suitability of the subordinate judicial officers for promotion to the posts of District Judges and not for direct recruitment.

16. That is why in K.H. Siraj Vs. High Court of Kerala and Others, , dealing with the case of direct recruitment of judicial officers, the Apex Court has held as under:

54 In our opinion, the interview is the best mode of assessing the suitability of a candidate for a particular position. While the written examination will testify the candidate's academic knowledge, the oral test alone can bring out or disclose his overall intellectual and personal qualities like alertness, resourcefulness, dependability, capacity for discussion, ability to take decisions, qualities of leadership, etc. which are also essential for a judicial officer.

57. The qualities which a judicial officer would possess are delineated by this Court in Delhi Bar Association v. Union of India and Ors., (2002) 10 SCC 159 . A judicial officer must, apart from academic knowledge, have the capacity to communicate his thoughts, he must be tactful, he must be diplomatic, he must have a sense of humour, he must have the ability to defuse situations, to control the examination of witnesses and also lengthy irrelevant arguments and the like. Existence of such capacities can be brought out only in an oral interview. It is imperative that only persons with a minimum of such capacities should be selected for the judiciary as otherwise the standards would get diluted and substandard stuff may be getting into the judiciary. Acceptance of the contention of the Appellant-Petitioners can even lead to a postulate that a candidate who

scores high in the written examination but is totally inadequate for the job as evidence from the oral interview and gets zero marks may still find a place in the judiciary...." (Emphasis supplied)

17. By now it is well known that for any employment the candidate must not only have what is called "the hard skills" i.e. the knowledge about the subject, but he also must possess "the soft skills" i.e. the manner in which the knowledge is to be put into practice.

18. Coming to the decision of the Apex Court in Ramesh Kumar Vs. High Court of Delhi and Another, , relied upon by the learned Counsel for the Petitioners, the Apex Court has not disapproved of the ratio in K.H. Siraj (supra), but on the contrary the importance given in the case of K.H. Siraj (supra) to interview as a test to ascertain the essential qualities for a judicial officer has been approved as will be clear from paragraph 11 of the said decision in Ramesh Kumar (supra), which reads as under:

11. In State of U.P. Vs. Rafiquddin and Others, , Dr. Krushna Chandra Sahu and others Vs. State of Orissa and others, , Majeet Singh, UDC and others Vs. Employees" State Insurance Corpn. and another, and K.H. Siraj Vs. High Court of Kerala and Others, , this Court held that the Commission/Board has to satisfy itself that a candidate had obtained such aggregate marks in the written test as to qualify for interview and obtained "sufficient marks in viva voce" which would show his suitability for service. Such a course is permissible for adjudging the qualities/capacities of the candidates. It may be necessary in view of the fact that it is imperative that only persons with a prescribed minimum of said qualities/capacities should be selected as otherwise the standard of judiciary would get diluted and substandard stuff may get selected. Interview may also be the best mode of assessing the suitability of a candidate for a particular position as it brings out the overall intellectual qualities of the candidates. While the written test will testify the candidate's academic knowledge, the oral test can bring out or disclose overall intellectual and personal qualities like alertness, resourcefulness, dependability, capacity for discussion, ability to take decisions, qualities of leadership, etc. which are also essential for a Judicial Officer.

The Apex Court then held in paragraphs 14, 15 and 16 in Ramesh Kumar(supra) as under:

14. Similarly, in K. Manjusree Vs. State of A.P. and Another, this Court held that selection criteria has to be adopted and declared at the time of commencement of the recruitment process. The rules of the game cannot be changed after the game is over. The competent authority, if the statutory rules do not restrain, is fully competent to prescribe the minimum qualifying marks for written examination as well as for interview. But such prescription must be done at the time of initiation of selection process. Change of criteria of selection in the midst of selection process is not permissible.

15. Thus, the law on the issue can be summarised to the effect that in case the

statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum benchmarks for written test as well as for viva voce.

16. In the instant case, the Rules do not provide for any particular procedure/criteria for holding the tests rather it enables the High Court to prescribe the criteria." (Emphasis supplied)

Thus, in Ramesh Kumar(supra), the rules themselves did not provide for minimum qualifying marks for passing the viva voce. In paragraph 16 of the said judgment, the Apex Court also held as under:

...where statutory rules do not deal with a particular subject/issue, so far as the appointment of the Judicial Officers is concerned, directions issued by this Court would have binding effect." (Emphasis supplied) Thus, it is clear that the Ramesh Kumar's case (supra) does not lay down that any statutory rule laying down the minimum qualifying marks to pass an interview or viva voce would be unconstitutional. On the contrary such rule is expressly held to be permissible. Only in absence of a statutory rule, the recommendation of the Shetty Commission as approved by the Apex Court will apply.

19. Coming to the last contention about the zone of consideration, the recruitment rules do not provide for any zone of consideration. The zone of consideration 1:3 (three candidates for one vacancy) as indicated in Malik Mazhar Sultan's case (supra) does not provide for the maximum zone of consideration but that is merely a minimum zone of consideration. It is for the appointing authority or the selection body to decide as to how many candidates shall be called for interview. The decision in Malik Mazhar Sultan's case (supra) does not take away the discretion of the appointing authority/selection committee to call more candidates than 3 times the number of vacancies. In the instant case, the selection committee called for interview all the candidates who secured 50% or higher marks at the written examination. Under Rule 6(2)(a), candidates who secure 50% or higher marks at the written examination (45% marks for reserved category candidates) are eligible to be called for interview. The selection committee therefore did not commit any illegality in calling all such candidates for interview who had secured 50% or higher marks at the written examination (100 out of 200 marks in case of general category and 90 marks in case of reserved category)

20. We, therefore, do not find any merit in any of the contentions urged on behalf of the Petitioners. The writ petitions are, therefore, summarily dismissed.