

(2022) 09 DEL CK 0092

In the Delhi High Court

Case No : Civil Writ Petition No. 12643 Of 2022, Civil Miscellaneous Application No. 38349 Of 2022

Mayank Garg

APPELLANT

Vs

Delhi High Court Through Its Registrar General

RESPONDENT

Date of Decision : 12-09-2022

Acts Referred:

Constitution Of India, 1950 — Article 142, 226

Citation : (2022) 09 DEL CK 0092

Hon'ble Judges : Vibhu Bakhru, J; Amit Mahajan, J

Bench : Division Bench

Advocate : Malvika Trivedi, Pararjay Chopra, Shailendra Slaraia, Sujal Gupta, Gaurav Agrawal, C. George Thomas

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition under Article 226 of the Constitution of India, inter alia, praying that direction be issued to the respondent (hereafter 'DHC') to 'recheck/re-examine/reassess' the petitioner's answer-sheets in respect of examination paper, Law-III. The petitioner has scored 89 marks out of the maximum of 200 marks in the said paper. This is one mark short of qualifying threshold of 45%. The petitioner's aggregate marks of all papers is 437 marks out of a maximum of 750 marks. This is the highest amongst all unsuccessful candidates and is significantly higher than the qualifying cut off of 50%. The petitioner has been eliminated from the competitive examination for appointment to Delhi Higher Judiciary Services, solely on account of not securing 45% marks in the examination paper, Law-III.

2. The principal question that falls for consideration of this court is whether the petitioner is entitled to seek re-evaluation of his answer-sheets in respect of the examination paper, Law-III.

3. The relevant facts necessary to address the aforesaid controversy are as under:-

3.1. On 23.02.2022, DHC had issued an advertisement for conducting the Delhi Higher Judicial Services Examination for filling up 45(forty-five) vacancies.

3.2. The petitioner is a practicing advocate and met the eligibility criteria for participating in the selection process for being appointed to Delhi Higher Judicial Service (hereafter 'DHJS'). The selection for DHJS is a competitive one. The DHJS examination is a three-tier process. First tier is the DHJS Preliminary examination. The second is the candidates taking the DHJS Main (written) examination. And the third is a viva voce test.

3.3. The DHJS Preliminary examination is a screening test comprising of one paper of multiple choice based objective type questions, carrying a maximum of 150 marks. The minimum qualifying marks for a general category candidate is fixed at 50% and for those of the reserved categories is fixed at 45%. Those candidates, securing the minimum qualifying marks in the preliminary examination, are eligible to be admitted to undertake the DHJS Main (written) examination. It is also stipulated that the number of candidates to be admitted to the DHJS Main (written) examination shall not be more than twenty times the total number of advertised vacancies in each category. The candidates qualifying the DHJS Main (written) examination are admitted to viva voce.

3.4. In all 1909 (one thousand nine hundred and nine) number of candidates appeared in the DHJS preliminary examination held on 03.04.2022 and 123 (one hundred and twenty three) number of general category candidates secured the minimum qualifying marks. These candidates were admitted to the DHJS Main (written) examination.

3.5. The DHJS Main (written) examination comprises of four papers. The brief description of the papers along the maximum marks, as set out in the Appendix to the Delhi Higher Judicial Service Rules, 1970 is set out below:-

MAIN (WRITTEN) EXAMINATION

Papers

Description

Max. Marks.

Paper-I

General Knowledge & Language –

This is to test the candidate's knowledge of current affairs etc. and power of expression in English. Credit will be given both for substance and expression. Conversely deduction will be made for bad expression, faults of grammar and misuse of words etc.

150

Paper-II

Law – I – Constitution of India, Code of Civil Procedure, Indian Evidence Act, Limitation Act, Registration Act and such other subjects as may be specified by the High Court from time to time.

200

Paper- III

Law – II – Transfer of Property Act, Indian Contract Act, Sale of Goods Act, Partnership Act, Specific Relief Act, Arbitration Law, Personal Law and such other subjects as may be specified by the High court from time to time.

200

Paper -IV

Law – III – Indian Penal Code, Criminal Procedure Code, Indian Evidence Act and such other subjects as may be specified by the High court from time to time.

200

3.6. In all 140 candidates appeared in all papers of DHJS Main (written) examination. The minimum qualifying marks as prescribed in respect of the DHJS Main (written) examination is 45% in each paper and 50% in aggregate for the general category. The qualifying marks are 5% less for the candidates belonging to the reserved category (SC, ST and Persons with Disability).

3.7. Out of the 140 candidates, who appeared in the DHJS Main (written) examination, 45 (forty five) candidates were short-listed as they met the criteria of the minimum qualifying marks. Nine candidates did not appear in all papers and thus, did not qualify the said examination. 86 (eighty-six) number of candidates, who appeared in all papers, were found to be unsuccessful.

3.8. The marks awarded to the qualifying candidates have not been disclosed, however, the marks awarded to the unsuccessful candidates, in the DHJS Main (written) examination, have been declared. The petitioner has scored an aggregate of 437 marks in all papers, which is significantly higher than the qualifying threshold of 50% or 375 marks. The petitioner's score is the highest amongst the unsuccessful candidates whose marks have been disclosed.

3.9. A tabular statement indicating the marks scored by the petitioner in the four papers is set out below:-

Sl.No.

Roll No. (Mains)

Name

Category

General Knowledge & Language (150

Marks) Pass

Marks 67.50

Law-I (200

Marks) Pass Marks 90

Law-II (200

Marks) Pass Marks 90

Law- III (200

Marks) Pass Marks 90

Total Marks (750

Marks) Pass Marks 375

86

095

Mayank

Garg

General

83

134

131

89

437

3.10. It is apparent from the above that the petitioner has secured marks significantly higher than the qualifying marks in the examination papers of general knowledge and language, Law-I and Law-II. He has not met the qualifying threshold in Law-III.

4. Ms. Trivedi, learned senior counsel appearing on behalf of the petitioner, submitted that in terms of paragraph XV of the Appendix to the Delhi Higher Judicial Service Rules, 1970, if there is any litigation that involves totaling, evaluation or re-evaluation of the answer-sheets; the answer-sheets are required to be preserved. She contended that this clearly implies that in certain cases where litigation is instituted, the court can direct re-evaluation of the answer sheets.

5. Further, she also submitted that in rare and special circumstances, the courts have directed re-evaluation of the answer-sheets and the present case is one that qualifies to be considered as one such case. She referred to the decision of the High Court of Orissa in *Amitav Tripathy v. Orissa High Court*: (2022) SCC OnLine Ori 1920 and the Supreme Court in *High Court of Tripura v. Tirtha Sarathi Mukherjee & Ors.*: (2019) 16 SCC 663, in support of her contention. She submitted that the courts, in several decisions, had directed re-evaluation of the answer-sheets. She referred to *Pranav Verma & Ors v. Registrar General of the High Court of Punjab and Haryana & Anr.*: (2020) 15 SCC 377 and contended that in special circumstances, the courts can grant grace marks.

Reasons and Conclusion

6. Undisputedly, the petitioner is a meritorious candidate and the same is evidenced by the fact that he has scored significantly higher marks in all papers other than the examination paper of Law-III. He was short by only one mark, which translates to 0.5%. He has secured 44.5% in paper of Law-III, which is below the qualifying marks as stipulated. There is no cavil with the provision that in cases where the court finds that there is manifest error in the marking system; failure to follow the procedure; or a systemic failure of the examination/selection scheme, the court can exercise the powers under Article 226 of the Constitution of India to remedy the same.

7. Undoubtedly, this is a hard case where a meritorious candidate has not met the requisite cut-off. However, this Court is unable to accept that there is any manifest error in the marking system or any systematic failure. There is no credible challenge to the relevant rules or any allegation that the procedure as prescribed has not been followed. Undeniably, the marking in examination of paper Law-I and Law-III has been strict. In the case of Law-I paper, only 68 (sixty-eight) candidates have secured the qualifying marks; 64(sixty-four) candidates could not clear the same. In Law-III paper, 77(seventy-seven) candidates have secured the qualifying marks but 54(fifty-four) candidates had failed to do so. It is apparent that even though the marking has been somewhat strict, sufficient number of candidates have secured the qualifying marks.

8. In *Pranav Verma & Ors v. Registrar General of the High Court of Punjab and Haryana & Anr* (supra), the Supreme Court found that 14301 (fourteen thousand three hundred and one) numbers of candidates had appeared for the preliminary examination and only 9 (nine) candidates were found fit for viva voce. Only 0.702% of the candidates had cleared the DHJS Main (written) examination and the rest 99.298% had failed. This was against the 107 (one hundred and seven) vacancies that were notified. In the circumstances, the Supreme Court exercised its power under Article 142 of the Constitution of India and directed awarding of grace marks to candidates to ensure that a larger number of candidates qualify to appear for the viva voce.

9. At this point, it is relevant to refer to paragraphs XII and XV of the Appendix

to the Rules that sets out the scheme of the DHJS examination. Paragraph XII of the Appendix to the Delhi Higher Judicial Service Rules, 1970 expressly provides that re-evaluation of the answer-sheets would not be permissible. Paragraph XV of the Appendix provides that all examination material including answer-sheets of the main examination would be destroyed one year after declaration of the final result. However, it also posits that if there is any litigation pending in respect of the said examination, which concerns the answer-sheets of the candidates including evaluation or re-evaluation, the same shall be preserved till the decision is pronounced. Paragraph XII and XV of the said appendix to the rules is set out below:-

"XII RE-EVALUATION OF ANSWER SHEETS

There shall be no re-evaluation of answer sheets in respect of Preliminary Examination and Mains Examination. No request for re-evaluation of answer sheets shall be entertained and the same shall be liable to be rejected without any notice to the candidates.

XV DESTRUCTION OF EXAMINATION MATERIAL

All Examination material including OMR answer sheets relating to Preliminary Examination, answer sheets of Main Examination, award sheets of viva voce, etc. in relation to each recruitment examination for Delhi Higher Judicial Services (25% direct recruitment quota) will be destroyed one year after the declaration of the final result.

However, if any litigation pertaining to any examination is pending before any Court, and the question/issue involved in the lis touches upon the answer sheets of the candidate(s) i.e. totalling, evaluation, re-evaluation, etc., the Registry shall preserve such answer sheets before initiating the process of destruction in terms of the above decision."

10. It is clear from the paragraph XII of the Appendix to the Rules as set out above that the Delhi Higher Judicial Service Rules, 1970 expressly prohibit re-evaluation of the answer-sheets. The contention that the paragraph XV of the Appendix to the said rules indicates that re-evaluation is permissible in certain cases where litigation is instituted, is unpersuasive. A plain reading of paragraph XV provides that the answer-sheets and the examination material would be preserved in case of any litigation that may involve reference to the said material. The said paragraph cannot be construed to mean that it would be permissible for the courts to direct re-evaluation of answer-sheets contrary to the relevant rules.

11. The decision in the case of Amitabh Tripathy v. Orissa High Court (supra), is also of little assistance to the petitioner. In that case, there was no rule, which prohibited re-evaluation of the answer-sheets. The establishment of High Court of Orissa had relied upon the general principle of law that in case where re-evaluation is not expressly permissible, it must be proscribed. In that case, the

court found that there was an error in respect of two questions and therefore, directed that answers in respect of the two specified questions be re-evaluated by an expert of law. The court observed that in rare and exceptional cases, the power of the court to order the re-evaluation is not diluted. According to the court, the said case fell into the category of rare and exceptional cases.

12. In *Maharashtra State Board of Secondary and Higher Secondary Education & Anr. v. Paritosh Bhupeshkumar Seth & Ors.*: (1984) 4 SCC 27, the Supreme Court set aside the order of the High Court striking down the rule that provided that no re-evaluation of answer-book or supplement would be done and no candidate shall claim or be entitled to claim re-evaluation of answer books. In that case, certain students had filed a writ petition praying that they may be allowed to inspect the answer-sheets and the appellant (Maharashtra State Board of Secondary and Higher Secondary Education) be directed to re-evaluate the answer-sheets. They challenged the validity of the rules proscribing the same. The High Court partly allowed the petition. Resultantly, the examinees were entitled to seek a disclosure, inspection and re-evaluation of the answer-sheets. In the aforesaid background of the facts, the Supreme Court observed as under:

"20. We consider that the above approach made by the High Court is totally fallacious and is vitiated by its failure to follow the well-established doctrine of interpretation that the provisions contained in a statutory enactment or in rules/regulations framed thereunder have to be so construed as to be in harmony with each other and that where under a specific section or rule a particular subject has received special treatment, such special provision will exclude the applicability of any general provision which might otherwise cover the said topic.....Clause (1) of the said regulation states that any candidate who has appeared at the HSC examination may apply to Divisional Secretary for verification of marks, particularly in any subject, but such verification will be restricted to check whether all the answers have been examined and whether any mistake has been committed in totalling of marks in that subject or in transferring marks correctly on the first cover page of the answer book as well as whether the supplements attached to the answer books as mentioned by the candidates are intact. Clause (3) of the said regulation imposes the further limitation that no candidate shall claim or be entitled to revaluation of his answer book or disclosure or inspection of the answer book or further documents as these are to be treated by the Divisional Boards as most confidential. It is obvious that clauses (1) and (3) have to be read together and not in isolation from each other as has apparently been done by the High Court. The right of verification conferred by clause (1) is subject to the limitation contained in the same clause that no revaluation of the answer books or supplements shall be done and the further restriction imposed by clause (3), prohibiting disclosure or inspection of the answer books.

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26. We are unable to agree with the further reasons stated by the High Court

that since "every student has a right to receive fair play in examination and get appropriate marks matching his performance" it will be a denial of the right to such fair play if there is to be a prohibition on the right to demand revaluation and unless a right to revaluation is recognized and permitted there is an infringement of rules of fair play.....The candidates have taken the examination with full awareness of the provisions contained in the Regulations and in the declaration made in the form of application for admission to the examination they have solemnly stated that they fully agree to abide by the regulations issued by the Board. In the circumstances, when we find that all safeguards against errors and malpractices have been provided for, there cannot be said to be any denial of fair play to the examinees by reason of the prohibition against asking for revaluation."

13. In *Pramod Kumar Srivastava vs. Chairman, Bihar Public Service Commission, Patna*: (2004) 6 SCC 714, the Supreme Court referred to the earlier decision in *Maharashtra State Board of Secondary and Higher Secondary Education & Anr. v. Paritosh Bhupeshkumar Seth & Ors.* (supra) and observed as under:-

"7. ...There is no dispute that under the relevant rule of the Commission there is no provision entitling a candidate to have his answer-books re-evaluated. In such a situation, the prayer made by the appellant in the writ petition was wholly untenable and the learned Single Judge had clearly erred in having the answer-book of the appellant re-evaluated.

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."

14. In *Himachal Pradesh Public Service Commission v. Mukesh Thakur & Anr.*: (2010) 6 SCC 759, the Supreme Court considered the case which is somewhat similar to the present case. In that case, the respondent (Mukesh Thakur) had participated in the examination for selection of a Civil Judge (Junior Division). He had secured the required 50% marks in aggregate but had failed to secure 45% marks in the paper of Civil Law-II. Resultantly, he did not meet the qualifying criteria for being short-listed for viva voce. In the writ petition filed by respondent no.1, the High Court passed an order directing the appellant (Himachal Pradesh Public Service Commission) to arrange a special interview for the respondent as the court found that there were some inconsistencies in

framing two questions. The High Court also directed that the answer-sheets be sent to another re-examiner of a rank of reader-in-law of Himachal Pradesh University, for re-evaluation. On re-evaluation, the marks awarded to the candidate were higher than the qualifying threshold and the High Court directed Himachal Pradesh Public Commission to issue an appointment letter. The Supreme Court faulted the High Court for taking upon itself the task of examining the two questions and observed as under:-

"16. It is a settled legal proposition that the court cannot take upon itself the task of the statutory authorities.

xxxx xxxx xxxx

20. In view of the above, it was not permissible for the High Court to examine the question papers and answer sheets itself, particularly, when the Commission had assessed the inter se merit of the candidates. If there was a discrepancy in framing the question or evaluation of the answer, it could be for all the candidates appearing for the examination and not for Respondent 1 only. It is matter of chance that the High Court was examining the answer sheets relating to Law. Had it been other subjects like Physics, Chemistry and Mathematics, we are unable to understand as to whether such a course could have been adopted by the High Court. Therefore, we are of the considered opinion that such a course was not permissible to the High Court."

15. In a more recent decision, a Coordinate Bench of this Court in Subhash Chand v. High Court of Delhi: 2019 SCC OnLine Del 8132 referred to the various decisions including Board of Secondary Education v. Pravas Ranjan Panda: (2004) 13 SCC 383; Himachal Pradesh Public Service Commission v. Mukesh Thakur: (2010) 6 SCC 759; and Central Board of Secondary Education v. Khushboo Shrivastava: (2014) 14 SCC 523 and observed that "a long line of authority lays down that no re-evaluation can be ordered by the court in absence of rules providing the same."

16. The proposition that absent specific provisions permitting re-evaluation of examination answer-sheets, the same is impermissible, is not without exception. In Ran Vijay Singh & Ors. v. State of Uttar Pradesh & Ors.: (2018) 2 SCC 357, the Supreme Court had observed as under: -

"30.2 If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;"

17. In High Court of Tripura v. Tirtha Sarathi Mukherjee and Ors. (supra), the Supreme Court had expressed a similar view.

18. Thus, in rare and exceptional cases where it is established that there is a

manifest error in evaluation of examination papers, the court may exercise powers under Article 226 of the Constitution of India to provide appropriate relief. In cases where it is established that the right of candidates for a fair evaluation in accordance with the specified procedure has been impinged, it may be necessary for the courts to exercise power to ensure that the rights of examinees are preserved.

19. The present case is undoubtedly a hard case but we are unable to accept that there is any manifest error in evaluation of the answer sheets that warrants any interference by this Court. It is relevant to note that answers to the questions set in the paper for Law-III were essay type questions and were evaluated subjectively. This Court is informed that to ensure consistency, the answer-sheets were evaluated by the same examiner.

20. It is possible that on a re-evaluation, the petitioner may secure higher marks. However, absent circumstances that indicate any flaw in the marking system or the procedure followed for evaluation of answer sheets, this Court is unable to lend any assistance to the petitioner.

21. In terms of the selection scheme, a number of candidates equaling three times the number of vacancies can be admitted to appear in viva voce. In the present case, the number of vacancies for the general candidates is 32 and therefore, as many as 96 candidates of the general category could have been admitted for viva voce. Had the marking been any more lenient, a larger number of candidates would have qualified.

22. In the present case there are at least five candidates, whose marks are falling short of the qualifying marks by two marks or less. One of the candidates has not been short-listed because he has secured 67 marks in the paper of general knowledge and language, which is 0.5 marks less than the qualifying cut-off. Marks of another candidate are short by 1.5 marks in the same paper. There is also a similarly placed candidate as the petitioner, who has secured 89 marks in Law-III and has not been selected even though his aggregate marks in all papers is above 50%.

23. If any paper is to be revaluated, it would also be necessary to re-evaluate the answer-sheets of these candidates as well.

24. In the given facts, this Court is unable to accept that any interference in the marks awarded to the petitioner is permissible, or any direction can be issued for revaluation of answer sheets, in exercise of its power under Article 226 of the Constitution of India.

25. The petition is, accordingly, dismissed. All pending applications are disposed of.