
(2014) 11 DEL CK 0217
In the Delhi High Court
Case No : Writ Petition (Civil) 963/2014

Sandeep Kumar

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 19-11-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 217 DLT 670

Hon'ble Judges : Najmi Waziri, J; Kailash Gambhir, J

Bench : Division Bench

Advocate : Rekha Palli, Ankita Patnaik and Garima Sachdeva, Advocate for the Appellant; Anurag Ahluwalia, CGSC and Amrit Singh, Advocate for the Respondent

Judgement

Kailash Gambhir, J.—In this Writ Petition under Article 226 of the Constitution of India the six petitioners have challenged the introduction of the criteria of mandatorily qualifying the interview test comprising 25 marks for selection to the post of ASI (Radio Mechanic) and HC (Radio Operator) in Border Security Force Communication, set up in September 2013 through an advertisement. The petitioners also seek quashing of the results of the interview held for the aforesaid post at Delhi Centre at STS BSF, New Delhi from 23.12.2013 to 1.1.2014.

2. The facts and circumstances giving rise to the filing of the present petition are that in September 2013, the respondents had issued an advertisement inviting applications from male/female candidates for direct recruitment to the post of ASI (RM) , HC (RO) and HC Fitter in BSF Communication. As per the terms and conditions provided in the advertisement, the selection was to be held in two phases; the first phase comprised a written examination of three hours, divided into four parts wherein: Part I comprised of Physics paper for 60 marks; Part II of Mathematics paper for 60 marks; Part III of Chemistry paper for 30 marks and Part IV of English and GK for 50 marks. All the four parts formed part of one

OMR based objective type multiple choice paper. The minimum qualifying marks for General and OBC candidates were 38% and for SC/ST candidates were 33%. The second phase of selection process comprised of four steps in the case of ASI (RM) and 5 steps in the case of HC (RO) . After qualifying these steps, the candidates had to go through a detailed medical examination to assess their fitness. The said steps are as under:-

- i) "Preliminary screening -- Height and weight
- ii) Physical efficiency test -- 800 m race in 4 mins., 9 ft. long jump and 3 ft. high jump (3 chances)
- iii) Verification of original documents
- iv) Dictation (in English) for HC (RO) -- 10 marks
- v) Personal interview -- 25 marks."

3. The final selection of the candidates was to be made on the basis of the overall merit, as secured in the written test, dictation test and interview. No minimum qualifying marks were prescribed for the interview, unlike the qualifying marks allocated for the written examination.

4. The grievance raised by these petitioners is that based on their performance in the written examination, they were called to participate in the selection process for the second phase, but thereafter, they were not called for their medical examination as they failed to score the minimum qualifying marks in the interview. They contend that in the advertisement, no minimum qualifying marks had been prescribed for the interview and that the respondents had changed the rules, in the midst of the selection process, despite the fact that there was neither such provision for the interview in the Recruitment Rules nor did the advertisement prescribe any qualifying marks for the interview, even though it specifically provided for qualifying marks in the written examination.

5. Ms. Rekha Palli, the learned counsel for the petitioner vehemently submits that the Recruitment Rules never prescribed any personal interview, therefore the respondents could not have acted contrary to the Recruitment Rules by prescribing a personal interview for 25 marks as a part of the second phase of the selection process, therefore the introduction of the same should be struck down. Therefore, the respondents could not have changed the rules of a game amidst the selection process to the prejudice and detriment of these candidates who had qualified the written examination and the other tests to reach the final stage of their medical examination. In support of her contentions, the learned counsel for the petitioner placed reliance on the following judgments:-

- i) Praveen Singh Vs. State of Punjab and Others, ;
- ii) Ramesh Kumar Vs. High Court of Delhi and Another, ;
- iii) Hemani Malhotra Vs. High Court of Delhi, ;

iv) Durgacharan Misra Vs. State of Orissa and Others, .

6. Mr. Anurag Ahluwalia, the learned Standing Counsel for the respondents on the other hand submits that the petitioners were fully aware of the process of appearing for a mandatory interview for which 25 marks were allocated and therefore the petitioners cannot complain that no minimum qualifying marks were specifically laid down in the advertisement; that once the specified marks have been allocated for the interview, then it was necessary for the candidates to secure the qualifying marks; that all these candidates failed to score the minimum qualifying marks in their interview therefore, they were rightly not selected as per the result published on 26th March 2014 through the BSF Website; that petitioner Nos. 1, 5 and 6 have scored 7 marks each in the interview, while petitioner Nos.3 and 4 have scored 6 marks each in the interview. The learned counsel for the respondents also invited the attention of this Court to the Recruitment Rules, 2012 and the Standing Operating Procedure (SOP) , as per which BSF conducted recruitment for the post of ASI/RM, HC/RO and HC/Fitter. As per the respondents the provision for the interview has been in existence since the recruitment started in BSF for the abovementioned posts, this was further reviewed and approved by the Director General, BSF on 29.07.2004 and that there is nothing wrong in the advertisement in the second phase.

7. We have heard the learned counsel for the parties; gone through the judgments relied upon by them and have also perused the records of this case.

8. The issue involved in the present petition is no more *res integra*. In *Hemani Malhotra Vs. High Court of Delhi*, , the Hon"ble Supreme Court clearly held that prescribing minimum marks for viva voce was not permissible at all after the written test was conducted. Relevant paragraph of the said judgment is reproduced as under:-

"9. From the proposition of law laid down by this Court in the above mentioned case it is evident that previous procedure was not to have any minimum marks for vive-voce. Therefore, prescribing minimum marks for vive-voce was not permissible at all after written test was conducted. There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and vive-voce, but if minimum marks are not prescribed for vive-voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at vive-voce, test was illegal.

10. The contention raised by the learned Counsel for the respondent that the decision rendered in *K.Manjusree (Supra)* did not notice the decisions in *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, as well as *K.H. Siraj*

Vs. High Court of Kerala and Others, and therefore should be regarded either as decision per incuriam or should be referred to Larger Bench for reconsideration, cannot be accepted. What is laid down in the decisions relied upon by the learned Counsel for the respondent is that it is always open to the authority making the rules regulating the selection to prescribe the minimum marks both for written examination and interview. The question whether introduction of the requirement of minimum marks for interview after the entire selection process was completed was valid or not, never fell for consideration of this Court in the decisions referred to by the learned Counsel for the respondent. While deciding the case of K.Manjusree (Supra) the Court noticed the decisions in (1) P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others, ; (2) Umesh Chandra Shukla Vs. Union of India (UOI) and Others, ; and (3) Durgacharan Misra Vs. State of Orissa and Others, , and has thereafter laid down the proposition of law which is quoted above. On the facts and in the circumstances of the case this Court is of the opinion that the decision rendered by this Court in K.Manjusree (Supra) can neither be regarded as Judgment per incuriam nor good case is made out by the respondent for referring the matter to the Larger Bench for reconsidering the said decision.

11. At this stage this Court notices that as per the information supplied by the respondent to the petitioners under the provisions of Right to Information Act, the petitioner in Writ Petition Civil No. 490/2007 had secured 142 marks out of 250 prescribed for the written test and 363 marks out of 750 marks in vive-voce test, whereas the petitioner in Writ Petition No. 491/2007 had secured 153.50 marks out of 250 marks in the written test and 316 marks out of 750 marks in vive-voce test. There is no manner of doubt that the prescription of 750 marks for vive-voce test is on higher side. This Court further notices that Hon"ble Justice Shetty Commission has recommended in its Report that "The vive- voce test should be in a thorough and scientific manner and it should be taken anything between 25 to 30 minutes for each candidate. What is recommended by the Commission is that the vive-voce test shall carry 50 marks and there shall be no cut off marks in vive-voce test.- This Court notices that in All India Judges Association and Others Vs. Union of India (UOI) and Others, , subject to the various modifications indicated in the said decision, the other recommendations of the Shetty Commission (supra) were accepted by this Court. It means that prescription of cut off marks at vive-voce test by the respondent was not in accordance with the decision of this Court. It is an admitted position that both the petitioners had cleared written examination and therefore after adding marks obtained by them in the written examination to the marks obtained in the vive-voce test, the result of the petitioners should have been declared. As noticed earlier 16 vacant posts were notified to be filled up and only five candidates had cleared the written test. Therefore, if the marks obtained by the petitioners at vive-voce test had been added to the marks obtained by them in the written test then the names of the petitioners would have found place in the merit list prepared by the respondent. Under the circumstances, this Court is of the

opinion that the petitions filed by the petitioners will have to be accepted in part.

12. For the foregoing reasons both the petitions succeed. The respondent is directed to add the marks obtained by the petitioners in the written examination to the marks obtained by them in the vive-voce test and prepare a combined merit list along with the other selected candidates. The respondent is directed to amend the notice dated April 10, 2007 issued by the Registrar (Vig.) , High Court of Delhi, New Delhi and declare the petitioners as selected for being recommended for appointment to the post in Delhi Higher Judicial Service. It is clarified that the petitioners would neither be entitled to, seniority or salary with retrospective effect. Their seniority shall be reckoned from the date of their appointment and salary as allowable be paid from that date only. Rule is made absolute accordingly in each petition. There shall be no order as to cost."

9. In Ramesh Kumar Vs. High Court of Delhi and Another, , reiterating the same legal position, the Hon"ble Supreme Court in the following paras held as under:-

13. Thus, 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 Bench Marks for written test as well as for viva-voce.

14. 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. This Court in All India Judges Association and Others Vs. Union of India (UOI) and Others, accepted Justice Shetty Commission's Report in this regard which had prescribed for not having minimum marks for interview. The Court further explained that to give effect to the said judgment, the existing statutory rules may be amended. However, till the amendment is carried out, the vacancies shall be filled as per the existing statutory rules. A similar view has been reiterated by this Court while dealing with the appointment of Judicial Officers in Syed T.A. Naqshbandi and Others Vs. State of Jammu and Kashmir and Others, ; and Malik Mazhar Sultan and Another Vs. U.P. Public Service Commission and Others, . We have also accepted the said settled legal proposition while deciding the connected cases, i.e., Civil Appeals @ SLP (Civil) Nos.... in CC 14852-14854 of 2008 (Rakhi Ray and Ors. v. The High Court of Delhi and Ors.) vide judgment and order of this date. It has been clarified in Ms. Rakhi Ray (supra) that 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.

10. Applying the aforesaid dicta of law in the facts of the present case, it is manifest that the respondents did not prescribe any minimum qualifying marks, in the advertisement, for the interview which was of 25 marks. Therefore the respondents had no right to deviate, from the laid down criteria, to prescribe the

minimum qualifying marks for the interview midway through the selection process. Once the rules of the game are settled, the same cannot be changed amidst the game or after the game is over. The action of the respondents prescribing the minimum qualifying marks for the interview is thus wholly arbitrary, unreasonable and unfair and not in accordance with the settled principles of law.

11. In view of the preceding discussion, we find that the writ petition deserves to be allowed. Accordingly, the respondents are directed to assess the marks of the petitioners on the basis of the aggregate marks scored by them in their written examination as well as the interview test. In case the total marks scored by them brings them in the list of candidates selected on merit, then the respondent shall proceed to conduct their medical examination. The steps in this direction shall be taken by the respondents within a period of three weeks from the date of this order.

12. In the peculiar facts and circumstances of this case, it is made clear that the benefit of this order shall go only to the petitioners and not to other candidates who have not approached this Court to challenge the aforesaid criteria.

13. In case these petitioners are finally found eligible for being selected to their respective posts, then the respondents are directed to grant notional seniority to the petitioners as per their merit alongwith their batch mates and the petitioners would also be entitled to all consequential benefits but as to salary only from the date they are appointed.

With aforesaid directions, the present petition stands disposed off.