

**(2003) 12 RAJ CK 0016**  
**In the Rajasthan High Court**  
**Case No : Civil Writ Petition No. 989 of 2003**

Union of India (UOI) and Others

APPELLANT

Vs

C.A.T. and Another

RESPONDENT

**Date of Decision :** 18-12-2003

**Acts Referred:**

Constitution of India, 1950 — Article 226  
Income Tax Act, 1961 — Section 4, 5(7A), 6

**Citation :** (2004) 3 RLW 1555 : (2004) 3 WLC 45

**Hon'ble Judges :** Anil Dev Singh, C.J.; K.K. Acharya, J

**Bench :** Division Bench

**Advocate :** Manoj Bhandari, for the Appellant; Kuldeep Mathur in DBCWP No. 989/2003, N.K. Khandelwa, for Manoj Bhandari and Kuldeep Mathur, in DBCWP No. 902/2003, for the Respondent

**Final Decision :** Allowed

## Judgement

Acharya, J.—Both these writ petitions arise out of the judgment passed by the Central Administrative Tribunal, Jodhpur dated 14.11.2002, therefore, the same are being decided by a common judgment.

2. Both these writ petitions have been filed by the petitioners against the order dated 14.11.2002 (Annexure-1) passed by Central Administrative Tribunal, Jodhpur in Original Application No. 42/2002 in the case of Kailash Vasandani v. Union of India and Ors. (1), whereby the Original Application filed by the respondent-applicant No. 2 was allowed and the petitioners were directed to interpolate the name of the applicant in the selection panel dated 4.11.1996 on the post of Junior Chemist and Metallurgical Assistant (for short "JCMA").

3. The brief facts giving rise to above writ petitions are as follows :-

That Kailash Vasandani - respondent No. 2 was initially appointed as Khallasi on 31.1.1975 and was promoted as JCMA on ad hoc basis vide order dated 6.2.1980. Thereafter, he was reverted from the post of JCMA to the post of Lab

Assistant on 26.12.1992. Against this order, he preferred an original application before the Central Administrative Tribunal, Jodhpur, which was registered as O.A. No. 426/1992. The said Original Application was partly allowed by the Tribunal vide its order dated 7.2.2000. The Tribunal held that Kailash Vasandani was senior to Rishi Raj Kalla - respondent No. 5, therefore, the reversion order dated 26.12.1992 was set aside w.e.f. 1996. The selection test was held for regular promotion to the post of JCMA and Kailash Vasandani appeared in the said test but was not found qualified for appearing in the Viva-voce test. Thereafter, he challenged this selection before the Tribunal by filing another Original Application No. 303/1996 but the same was dismissed by the Tribunal vide order dated 19.7.2000. The respondent No. 2 preferred a writ petition against the order dated 19.7.2000 before this Court and this Court vide its judgment dated 5.11.2001 allowed the writ petition and set aside the order dated 19.7.2000, passed by the Tribunal. It was held that the respondent No. 2 was eligible to be called for interview/viva- voce test on the basis of marks allotted for his seniority. Thus, the respondent No. 2 was permitted to appear in the viva-voce test on the basis of marks obtained by him for his seniority but the respondent No. 2 was not found successful and he was declared failed in the interview.

4. It has been submitted in the writ petition that the respondent No. 2 not only failed in the viva-voce test but also failed in the written test and got only 29.15% marks, which was much less than 60% marks and which is pre-requisite criteria for being selected to the post of JCMA. According to the record, respondent No. 2-applicant secured 15.4 marks out of 35 marks in the written test and 8 marks out of 15 marks in viva-voce.

5. It has also been pleaded by the petitioners that for the selection to the post of JCMA, Para-219 (g) and (h) of the Indian Railway Establishment Manual Vol-I provides the procedure to be adopted by the selection board, which reads as follows:-

"219.g "Selection should be made primarily on the basis of overall merit, but for the guidance of Selection Board the factors to be taken into account and their relative weight are laid down below :-

E (NG) I-69/PM 1-126 dt. 18.9.1969

Maximum Qualifying Marks Marks (i) Professional ability 50 30 (ii) Personality, address, Leader- 20 -- ship and academic qualification (iii) A record of service 15 -- (iv) Seniority 15 --

Note (i)

The item "record of service" should also take into consideration the performances of the employee in essential Training Schools/Institutes apart from the examining CRs and other relevant record.

E (NG) I.72/PM 1/92 dtd. 27.6.73

(ii) Candidates must obtain a minimum of 30 marks in professional ability and 60% marks of the aggregate for being placed on the panel. Where both written and oral tests are held for adjudging the professional ability, the written test should not be of less than 35 marks and the candidates must secure 60% marks in written test for the purpose of being called in viva- voce test. This procedure is also applicable for filling up the general posts. Provided that 60% of the total of the marks prescribed for written examination and for seniority will also be the basis for calling candidates for viva-voce test instead of 60% of the marks for the written examination.

1/65 dt. 5.12.1984

(h) The importance of an adequate standard of professional ability and capacity to do the job must be kept in mind and a candidate who does not secure 60% marks in professional ability shall not be placed on the panel even if on the total marks secured, he qualifies for a place. Good work and a sense of public duty among the consciousness staff should be recognised by awarding mere marks both for record of service and for professional ability."

6. Therefore, as per the criteria, it is clear that to maintain an adequate standard of professional ability and capacity to do a particular job, it must be kept in mind that a person who does not secure at least 60% of marks in professional ability, shall not be placed on the panel even if on the total marks secured, he qualifies for a place. In the instant case, the respondent No. 2 neither passed written test nor was successful in the viva-voce test. Hence, merely on the basis of seniority marks, he cannot be empanelled for the post of JCMA. Since, the respondent No. 2 was not found suitable by the selection board, his empanelment was rejected vide order dated 29.10.2001.

7. Against the order dated 29.10.2001, the respondent No. 2 preferred an Original Application before the Tribunal, which was registered as O.A. No. 42/2002. The Tribunal after hearing both the parties, passed the order dated 14.11.2002 whereby the Original application of the respondent No. 2 was allowed and it has been held that the object of making the provisions as 219 (h) was to enable the empanelment of the candidates who have put in long satisfactory service. The Tribunal has also observed that rule making authority omitted to make the necessary amendment in sub-para (h) and that has resulted in consistency between para 219 (g) and (h). In such circumstances, the learned Tribunal relied upon note to in sub-para (g) of para-219 and held that the respondent No. 2 shall be entitled for empanelment on account of his marks obtained by him as per the seniority despite the fact that he has not got 60% marks in aggregate.

8. Against this order dated 14.11.2002, these writ petitions have been filed by the petitioners praying that the order passed by the Tribunal may be declared illegal and be set aside and it was further prayed that the respondent No. 2 may not be empanelled for the selection post of JCMA.

9. Respondent No. 2-Kailash Vasandani is main contesting respondent, who has filed reply to the writ petition, wherein he has averred firstly in the preliminary objections that in D.B. Civil Writ Petition No. 2743/2000 decided by this Court on 5.11.2001, it has been held by this Court that the petitioner was fully entitled to appear in the viva-voce test conducted by the petitioner-Union of India. Para 219 of the Indian Railway Establishment Manual Vol. I, Sub-paras (g) and (h) have been discussed in detail by this Court, therefore, the petitioner- Union of India is disentitled from getting any relief from this Court. He has further alleged that the Union of India has suppressed the material facts and not produced the material documents before this Court.

10. In reply to the writ petition, he has averred that the respondent No. 2 was initially appointed on the post of Khalasi on 31.1.1975 at Jodhpur. In due course, he earned further promotion and enjoyed his last promotion to the post of Junior Chemist & Metallurgical Assistant (re-designated as Junior Chemist & Metallurgical Assistant-II) on 6.2.1980 on adhoc basis. The respondent No. 2 was sought to be reverted vide letter dated 26.12.1992 from the post of JCMA to the Post of Lab Assistant despite his junior being continued on the promotional post. The respondent No. 2 challenged the same before Central Administrative Tribunal, Jodhpur vide O.A. No. 426/1996. The reversion order was stayed and he continued on the promotional post i.e. JCMA. The original application was partly allowed by the Central Administrative Tribunal, Jodhpur vide judgment dated 7.2.2000 (Annexure-2).

11. The respondent No. 2 thereafter appeared in a regular selection conducted for the post of JCMA in the year 1996 and also appeared in the written test but was declared as not qualified for appearing in the viva-voce test. He challenged the same order before the Central Administrative Tribunal, Jodhpur by way of filing original application. His application was dismissed vide judgment dated 19.7.2000 (Annexure-3). He has also stated that one post of JCMA was ordered to be kept vacant during the pendency of the said case. He challenged the order dated 19.7.2000 passed by the Central Administrative Tribunal, Jodhpur by way of filing D.B. Civil Writ Petition No. 2743/2000 before this Court. This Court admitted the writ petition and passed the order to keep one post of JCMA vacant. The petitioner-Union of India allowed the respondent No. 2 his due seniority on the post of Lab Assistant vide letter dated 27.7.2000. Thereafter, the petitioner-Union of India also issued an order dated 3.8.2000 by which the respondent No. 2 had been ordered to be reverted from the post of JCMA to the post of Lab Assistant. The reversion order is said to have been issued in view of the rejection of the case of the respondent No. 2 by the Central Administrative Tribunal, Jodhpur and the respondent No. 2 had to join on the reverted post under protest.

12. He has further stated in his reply that Central Administrative Tribunal, Jodhpur in its order dated 19.7.2000 in para 4 has observed that as against the seven posts of JCMA only four person were regularly selected candidates and on two posts, persons on adhoc basis were working. It has been further observed by

the Tribunal that there were clear-cut three vacancies of JCMA for which nine candidates were rightly called to undertake the written examination. It is also submitted on behalf of the respondent No. 2 that he is one of the candidates who was working on adhoc basis with the petitioner-Union of India on the post of JCMA. The respondent No. 2 was also granted an interim order by the Central Administrative Tribunal, Jodhpur in O.A. No. 303/1996, which was decided vide order dated 19.7.2000. He has also averred that validity of the said order was challenged by the respondent No. 2 before this Court and this Court directed the petitioner-Union of India to keep one post of JCMA vacant till further orders but the petitioner-Union of India despite knowing that the petitioner is continuously working on the post of JCMA on adhoc basis since 1980 and this Court had directed to keep one post of JCMA vacant malafidely reverted the respondent No. 2 from his present post. The petitioner-Union of India thereafter called upon the respondent No. 2 to undertake viva- voce test for selection to the post of JCMA, as a result of assignment of due seniority by adding seniority marks as per Rule 4 vide letter dated 24.2.2001. This Court held that respondent No. 2 was eligible to be called for interview/viva voce test. The respondent No. 2 appeared in the same but was declared failed in the viva-voce test vide letter dated 29.10.2001 (Annexure-R/6). This petition was finally disposed of by this Court on 5.11.2001 and the respondent No. 2 was left free to follow his remedy, if so advised against the result of the viva-voce test in which he was declared failed by the petitioner-Union of India. Aggrieved by the result of the viva-voce test, the respondent No. 2 filed an Original application No. 42/2002 (Kailash Vasandani v. U.O.I. and Ors. (1)), before the Central Administrative Tribunal, Jodhpur. The Tribunal vide its order dated 14.11.2002 allowed the Original Application filed by the respondent No. 2 against the result of his viva-voce test where he has declared failed. The Tribunal in its judgment held that the respondent No. 2 cannot be declared failed in viva-voce test more particularly in view of the judgment rendered by the Hon"ble Supreme Court in the case of R.C. Shrivastav. The Tribunal after going through the Rules and Regulations framed by the Railway clearly found that the respondent No. 2 had obtained only eight marks in the interview/viva voce test, but came to the conclusion that as the total marks obtained by him in the written test, marks allotted to him by seniority, record of service and personality (15.4+15+8+9+14), make more than 60% of the total marks, he cannot be denied empanelment for the post of JCMA.

13. He has also averred in his reply that the Tribunal has also considered para 2.2 of the record, note of the meeting held by the" Dy. Minister Railway and the Railway Board on 27.11.1975. According to the reply, the Tribunal has rightly held that the respondent No. 2 has put in long service without stigma and the respondent No. 2 has been working on adhoc basis on the post of JCMA satisfactorily for the last 22 years and the respondent No. 2 was having right to empanelment, even though he did not get sufficient marks in interview.

14. He has also stated that the respondent No. 2 was called in viva-voce test by the petitioner - Union of India without there being any order from any Court,

treating him eligible for appearing in the viva-voce test. The petitioner - Union of India after calling respondent No. 2 in viva-voce test now cannot say that he is not entitled for the selection on the basis of marks obtained by him in the written test.

15. The respondent No. 2 has also stated in his reply that the learned Tribunal in its order dated 14.11.2002 has discussed each and every aspect of the matter elaborately. There is no error apparent on the record. It does not call for any interference. He has also submitted that the respondent No. 2 after being found qualified in the professional ability test and on account of his continuous satisfactory adhoc service against the promotional post of JCMA for about 20 years has a right to be declared qualified in the viva-voce test as the same has a support of record of note of para 2.2 and the clear decision of the Hon'ble Supreme Court deciding the same legal question. Therefore, the writ petition, filed by the petitioner - Union of India deserves to be dismissed.

16. The respondent No. 3 and 4 have also filed reply to this writ petition and have stated that they have also filed DB Civil Writ Petition No. 902/2003 challenging the impugned order dated 14.11.2002 (Annexure A/1) on the same facts and grounds. In the reply filed by the respondent No. 3 and 4, it has been further averred that the service record of the petitioner was not at all satisfactory and even punishment was imposed upon him in departmental enquiry against which the respondent No. 2 filed an original Application No. 44/1999. The learned Tribunal dismissed the original application vide order dated 29.11.2001, therefore, the Tribunal had taken note of the fact that the service record of the respondent No. 2 was also not satisfactory.

17. We have heard learned counsel for the petitioners and learned counsel for the respondents in both the writ petition and gone through the record of the case.

18. The Tribunal in its order have interpreted para 219 (g) and (h) of Indian Railway Establishment Manual Vol. 1 (hereinafter IREM). It was of the opinion that reading of proviso to note (ii) below sub (g) and sub para (h) shows that there is inconsistency in the two sub-paras. A candidate is entitled to be called for the viva-voce test on the basis of marks obtained by him in the written test and marks allotted for seniority, provided both of them make the aggregate of 60% of the marks fixed for the professional ability. In other words, a candidate is required to obtain at least 30 marks in the written test and the marks allotted to him based on his seniority to become entitled for the viva-voce test. Whereas sub para (h) says that unless a candidate gets 60% in professional ability, he cannot be empanelled.

19. It has been further held by the Tribunal that it is not clear as to what is the use of permitting a candidate to appear in the viva-voce test on the basis of marks allotted for seniority, who had not got 60% marks under the heading "professional ability", if sub para (h) is applicable. The Tribunal was also of the view that the object of making this provision was to enable the empanelment of

the candidates, who have put in long satisfactory service. It appeared to the Tribunal that the rule making authority omitted to make necessary amendment in sub para (h) and that has resulted in inconsistency in the two sub paras.

20. The Tribunal further held that keeping in view the object of Note (ii) under sub para (g), it will have to be held that a candidate who had been allowed to appear in the viva voce test on the basis of marks obtained by him in the professional ability and the marks allowed to him on his seniority shall be entitled to be empanelled for the post, if he got not less than 60% in the aggregate. Since, he has secured more than 60% marks out of the total marks for seniority, interview, record of service and personality, he cannot be denied empanelment for the post of JCMA.

21. The Tribunal has also relied upon the decision taken in the meeting dated 27.11.75, which reads as follows :-

"2.2 Panel should be formed for selection posts in time to avoid ad hoc promotion. Care should be taken to see, while forming panels that employees who have been working in the posts on ad hoc basis quite satisfactorily are not declared unsuitable in interview. In particular any employee reaching the field of consideration should be saved from harassment."

22. The Tribunal has also relied upon the decision of the Hon<sup>ble</sup> Supreme Court in the case of R.C. Srivastava wherein the validity of Circular dated 27.11.75 was upheld. Therefore, the Tribunal held that a candidate, who is working on ad hoc basis satisfactorily, cannot be denied empanelment on the basis of marks obtained in the viva voce test.

23. Learned counsel for the petitioners in both the writ petition have vehemently argued before us that the learned Tribunal has no jurisdiction to reach to the conclusion that para (h) requires amendment and there is inconsistency in para 219 (g) and (h). They have argued that the learned Tribunal has committed illegality in interpreting the rules. Learned counsel for the petitioners have also argued that para (h) is very much clear in which it has been clearly stated that the importance of an adequate standard of professional ability and capacity to do the job must be kept in mind and a candidate who does not secure 60% marks in professional ability shall not be placed on the panel even if on the total marks secured, he qualifies for a place. Good work and a sense of public duty among the conscientious staff should be recognised by awarding more marks both for record of service and for professional ability.

24. They have also argued that the respondent No. 2 was called for the viva-voce test before passing of the judgment in writ petition No. 2743/2000 as per para 219 (g) (ii) wherein it has been stated that this procedure is also applicable for filling up of general posts, provided that 60% of the total marks prescribed for written examination and for seniority will also be the basis for calling candidates for viva-voce test instead of 60% of the marks for the written examination alone. Learned counsel for the petitioners, therefore, argued that respondent No. 2 has

never challenged the validity of para 219 (h), which is a criteria laid down by the petitioners for selecting the candidates against the sanctioned post. Admittedly, the respondent No. 2 not only failed in written test but also in the viva-voce test and only secured 23.4 marks out of 50 in the professional ability which comes to 46.8% only. That apart in total he only secured 29.15% of marks and, therefore, he was not found suitable by the selection board. Therefore, the learned Tribunal has committed a serious error in giving direction to interpolate the name of the respondent No. 2 in the selection panel presuming that the law making authority has failed to make necessary amendments in the rules laid down for selecting a particular incumbent against the selection post. Thus, the learned Tribunal has exceeded its jurisdiction in granting such a direction and hence, the impugned judgment dated 14.11.2002 be declared contrary to law and without jurisdiction. For this, they have cited a judgment of the Hon"ble Supreme Court in the case of Gunanidhi Martha v. State of Orissa and Ors. (2).

25. Whereas the respondent No. 2 has supported the views taken by the learned Tribunal and argued that SB Civil Writ Petition No. 2743/2000 filed by him before this Court has been allowed and it was held that the respondent No. 2 was eligible to be called for interview/viva voce test on the basis of the marks allotted for his seniority. Therefore, the precise controversy involved in this matter is as to whether he may be declared failed after his appearing in the viva-voce test on the basis of marks obtained by him in the written test or not. Learned counsel for the respondent No. 2 has argued that the learned Tribunal has discussed this aspect of the matter elaborately and it requires no interference and no illegality has been committed by the learned Tribunal while passing this judgment. The learned Tribunal has relied upon para 2.2 of the record note of the meeting dated 27.11.75 and also relied upon the judgment of the Hon"ble Supreme Court in the case of R.C. Srivastava. Learned counsel for the respondent No. 2 has submitted that this Court has already decided this controversy in SB Civil Writ Petition No. 2743/2000 and the petitioner was held to be eligible for viva voce test. Now the petitioners want to deprive him of the fruits of empanelment in the selection panel dated 4.11.96/24.7.98 by adopting illegal means. Learned counsel for the respondent No. 2 has also argued that he has also pleaded malafides in his reply, therefore also both the writ petitions deserves to be dismissed.

26. We have considered the arguments advanced by the learned counsel for the parties and also gone through the judgment rendered by the Tribunal as also the material on record.

27. From the above facts, it is clear that the respondent No. 2 was initially appointed as Khalasi on 31.1.75 and promoted as JCMA on ad hoc basis vide order dated 6.2.80. Thereafter he was reverted from the post of JCMA to the post of Lab Assistant by order dated 26.12.92. Against this order, he preferred an original application before the Tribunal, which was registered as O.A. No. 426/92. The said O.A. was partly allowed by the Tribunal vide order dated 7.2.2000 and it was held that Kailash Vasandani was senior to Rishi Raj Kalla-respondent No. 5,

therefore, the reversion order dated 26.12.92 was set aside. In the year 1996, a selection test was held for regular promotion to the post of JCMA. The respondent No. 2 appeared in the said test but was not found qualified for appearing in the viva voce test. He challenged the said selection before the Tribunal by filing O.A. No. 303/96. The Tribunal vide order dated 19.7.2000 dismissed the said O.A. The respondent No. 2 preferred a writ petition being No. 2743/2000 against that order before this Court and this Court vide judgment dated 5.11.2001 allowed the writ petition and set aside the order dated 19.7.2000 and it was held that the applicant was eligible to be called for the interview/viva voce test on the basis of the marks allotted for his seniority. In pursuance of the judgment of this Court, the respondent No. 2 was allowed to appear in the viva-voce test on the basis of marks obtained by him for his seniority position but he was not found successful and was declared failed in the interview. It is also clear that the respondent No. 2 not only failed in viva voce test but also failed in written test. According to the record, respondent No. 2 has secured 15.4 marks out of 35 marks in the written test and 8 marks out of 15 in viva voce.

28. While perusing para 219 (g) as quoted hereinabove, it is clear that a candidate must obtain a minimum of 30 marks in professional ability and 60% marks of the aggregate for being placed on the panel. Where both written and oral tests are held for adjudging the professional ability, the written test should not be of less than 35 marks and the candidates must secure 60% marks in written test for the purpose of being called in viva- voce test. This procedure is also applicable for filling up the general posts. Provided that 60% of the total of the marks prescribed for written examination and for seniority will also be the basis for calling candidates for viva-voce test instead of 60% of the marks for the written examination.

29. This Court in DB Civil Writ Petition No. 2743/2000 filed by Kailash Vasandani - respondent No. 2 against the petitioners - Union of India while interpreting Clause 219 (g) of the Indian Railway Establishment Manual Part I, held as follows :-

"Thus it does not remain in doubt and dispute any how that as per the seniority claim of the petitioner which has been found to be justified, he was eligible to be called for viva-voce. Thus order passed by the Central Administrative Tribunal on 19.7.2000 is apparently erroneous as it has not taken in account the position to which the petitioner's seniority has been restored by its earlier order dated 7.2.2000. The said order, therefore, is set aside."

"XXX XXX XXX XXX XXX XXX" "It was the case of the respondents that unless he passes the viva-voce with the requisite marks, he does not become entitled to be posed as JCMA, by merely becoming eligible for viva-voce test, he does not become eligible or entitled for promotion to the post of JCMA. This position is not in dispute. In that view of the matter, the aforesaid interim order was passed by this Court on 3.9.2001."

"XXX XXX XXX XXX XXX XXX" "It has now been stated by filing an additional affidavit by respondents that in the viva-voce test in which the respondents called him treating him eligible, he has been declared fail."

"So far as eligibility of the petitioner for calling for viva-voce is concerned, we have noticed that no dispute now exists that he was eligible to be called for viva-voce test as per marks allotted for his seniority claim which was found to be correct by the Central Administrative Tribunal, and which has become final."

"So far as the result of the viva-voce is concerned, it is not subject matter of this writ petition and the plea of the petitioner that the result declared by the respondent is malafide, cannot be considered in this petition. The petitioner is free to pursue his remedy if so advised against the declaration of the result of the his viva-voce test."

30. Accordingly, the writ petition was allowed and the order passed by the Central Administrative Tribunal was set aside.

31. After the decision of this writ petition the Original Application No. 42/2002 was filed by the respondent No. 2, which was decided on 14.11.2002 against which these writ petition have been filed.

32. In these writ petition we are required to decide the following questions regarding the interpretation of para 219 (g) and (h) and also the questions whether the decision of the Tribunal is correct or not and whether the judgment rendered by the Hon'ble Supreme Court in the case of R.C. Srivastava is applicable to the facts of the present case or not.

33. The Tribunal has held that there is inconsistency between sub-para (g) and (h) of Para 219 and since, the respondent No. 2 has secured 60% marks in aggregate, therefore, he cannot be denied empanelment. The Tribunal has also held that sub-para (h) of para 219 requires amendment. This view of the Tribunal seems to be erroneous. The Tribunal has failed to notice the opening lines of para 219 (g). They read as follows:-

"Selection should be made primarily on the basis of overall merit, but for the guidance of Selection Board the factors to be taken into account and their relative weight are laid down. The maximum marks allotted for Professional ability are 50 and Qualifying Marks are allotted as 30. For Personality, address, Leadership and academic qualification, 20 marks have been allotted, for Record of Service 15 marks and for Seniority 15 marks have been allotted."

34. As is apparent from above, for the three heads namely personality etc., Record of Service and seniority, no qualifying marks have been prescribed. Para (ii) of Sub-para (g) of para 219 also provides that candidates must obtain a minimum of 30 marks in professional ability and 60% marks of the aggregate for being placed on the panel. Where both written and oral tests are held for adjudging the professional ability, the written test should not be of less than 35 marks and the candidates must secure 60% marks in written test for the purpose

of being called in viva- voce test. This procedure is also applicable for filling up of general posts. Provided that 60% of the total of the marks prescribed for written examination and for seniority will also be the basis for calling candidates for viva-voce test instead of 60% of the marks for the written examination. Therefore, if a person gets 60% marks from written examination, seniority, record of service and personality, he can be called for viva-voce test. On 5.12.1984, new Clause has been added in which further guidance has been given. It says that the importance of an adequate standard of professional ability and capacity to do the job must be kept in mind and a candidate who does not secure 60% marks in professional ability shall not be placed on the panel even if on the total marks secured he qualifies for a place. Good work and a sense of public duty among the conscientious staff should be recognised by awarding marks both for record of service and for professional ability. It appears to us that there is no inconsistency between sub-paras (g) and (h) of para 219. At the threshold itself, sub-para (g) of para 219 clearly states that selection should be made primarily on the basis of overall merit. It provides 15 marks for seniority, 15 marks for record of service and 20 marks for personality but for professional ability 50 marks alone have been allotted and qualifying marks have been fixed as 30. Sub-para (h) of para 219 in unambiguous terms declares that a candidate who does not secure 60% marks in professional ability shall not be placed on the panel. In the present case, the respondent No. 2 has secured only 23.4 marks out of 50 marks in professional ability, which comes to only 46.8%. The respondent No. 2 has secured 15.4 marks out of 35 marks in written test and 8 marks out of 15 marks in viva-voce. Thus, the total comes to 23.4 marks.

35. Learned counsel for the petitioners drew out attention to the fact that the sum total of the marks secured by the respondent No. 2 under various heads was aggregate to 29.15% marks, therefore, he was not empanelled. This fact has not been denied. Therefore, from the rule itself it was very much clear that the candidate must secure 60% marks in professional ability test but since the respondent No. 2 has not been able to pass written test and has also failed in the viva-voce test, therefore, merely on the basis of the marks of the seniority, he cannot be empanelled on the post of JCMA. As per the criteria and the procedure to be adopted by the selection board, the respondent No. 2 does not qualify for the selection to the post of JCMA. Therefore, the Tribunal has committed error while granting direction to empanel him and interpolate his name with all consequential benefits. In fact, the Tribunal has exceeded its jurisdiction in passing such an order. The Tribunal has to decide the matter or cause before it on the basis of the prevalent rules. Para 219 (h) was very much before the Tribunal and the Tribunal has gone through this para also but has held that the rule making authority has omitted to make necessary amendment in sub-para (h) and that has resulted in inconsistency in two sub-paras.

36. In our view, there is no inconsistency in between two sub- paras. The Tribunal has committed error while observing that it is not clear that what is the use of permitting a candidate to appear in the viva-voce test on the basis of

marks allotted for seniority, when he had not secured 60% marks for "Professional ability", in case sub para (h) is applicable. In our view, the object of making this provision was to enable the empanelment of the candidates, who have put in long period of satisfactory service. We are of the opinion that if a candidate gets another chance and after appearing in viva-voce test he improves his marks for professional ability then, he will be selected if there is a marginal difference. Hence, as per para 219 (g), a candidate can be called for viva-voce test, if he gets 60% marks for his seniority, professional ability, written test and as per the other criteria still he has a chance to improve his marks in professional ability. Merely calling a candidate in viva-voce test, who has not secured minimum 60% marks for professional ability, cannot be empanelled. The Tribunal has committed jurisdictional error while holding that sub-para (h) of para 219 requires amendment. We agree with the arguments advanced by the learned counsel for the petitioner that the validity of para 219 (h) was never challenged by the respondent No. 2 before any Court and this para is still on the statute book. The respondent No. 2 has appeared in the professional ability test and he has also appeared in the viva-voce test without challenging para 219 (h), therefore, on the principles of acquiescence, he cannot say that para 219 (h) is not applicable to him or it requires amendment. No Tribunal, who is deciding a cause before it, can say that para 219 (h) required amendment. Since, the respondent No. 2 has appeared in the professional ability test and written examination and was not called for viva voce test and he has agitated the same before this Court by filing a writ petition. Then he was called for viva-voce test and where he failed even in written test as well as in the viva-voce test. From his own conduct and on the principles of acquiescence, he has no cause before this Court now to say that only seniority can be the criteria for promotion and para 219 (h) is not applicable in his case.

37. Learned counsel for the petitioners has relied upon the judgment of the Hon'ble Supreme Court in the case of *Gunanidhi Martha and Ors. v. Govt. of Orissa and Ors.*, 2003 (3) SCC 561 This judgment has been passed while interpreting the Police Order No. 266 of 1981 where the criteria for selection of candidates and procedure has been prescribed. According to the Police Order, a Constable can be promoted to the post of Lance Naik provided (i) he has put in three years" service after recruits" training; (ii) is below 35 years of age; (iii) has passed the district drill test; and (iv) has a good record of service. The Selection Board was constituted as per the orders to conduct the test. The subjects on which the test was to be conducted was specified in the Police Order as also in the judgment. The pass marks for outdoor and indoor subjects was 50% i.e. 80 marks. On this rule, the Hon'ble Supreme Court has held that when the candidate has appeared in the test knowing fully well that they had to secure minimum pass marks in each individual subject, they cannot be permitted to say that they need not secure pass marks and yet they should be considered for promotion. It is to be stated here itself that the prescription of pass marks in the police order was not at all challenged.

38. On the principles of acquiescence, laches and conduct we may cite some judgment of the Hon''ble Supreme Court.

39. In the case of State of Rajasthan and Ors. v. Anil Kumar Sunil Kumar & Party and Anr. (4), it was held by the Hon''ble Supreme Court that, "In the case at hand we find that the petitioners are trying to wriggle out of a contractual obligation by raising a plea which was highly belated and clearly an afterthought. They knew it very well that they were not bidding for a privilege by way of licence to sell country liquor by retail in the areas of Abu Road Tehsil nor could they have had that privilege in view of the State's policy decision whereunder a government undertaking only was allowed to operate its licence in those areas. They, having been faced with a demand raised against them, appear to have looked into several documents and found out scope for raising plea on the phraseology employed by the State or its officers in different documents which were brought on record. Such a plea could not be allowed to be entertained. The learned Single Judge was right in turning down the plea raised by the petitioners and thereby dismissing the writ petition. In our opinion, the Division Bench ought not to have interfered with the judgment of the learned Single Judge.

40. In the case of Suneeta Aggarwal v. State of Haryana and Ors. (5), it was held by the Hon''ble Supreme Court that, "The appellant did not challenge the order of the Vice-Chancellor declining to accord approval to her selection and, on the contrary, she applied afresh for the said post in response to readvertisement of the post without any kind of protest. Not only did she apply for the post, but she also appeared before the Selection Committee constituted consequent upon readvertisement of the post and that too without any kind of protest, and on the same day she filed a writ petition against the order of the Vice- Chancellor declining to accord his approval and obtained an ad interim order. In the writ petition she also did not disclose that she had applied for the post consequent upon the second advertisement. The appellant having appeared before the Selection Committee without any protest and having taken a chance, we are of the view that the appellant is estopped by her conduct from challenging the earlier order of the Vice-Chancellor. The High Court was justified in refusing to accord any discretionary relief in favour of the appellant. The writ petition was rightly dismissed."

41. In the case of Maharashtra State Road Transport Corporation v. Blawant Regular Motor Service, Amravati and Ors. (6), Supreme Court 329, it was held by the Hon''ble Supreme Court that, "It is well established that the writ of certiorari will not be granted in a case where there is such negligence of omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party."

42. In the case of Smt. Ratni Devi and Anr. v. Chief Commissioner, Delhi and Ors. (7), it was held by the Hon''ble Supreme Court that, "In Aflatoon's case (supra), it was said that "to have sat on the fence and allowed the Government to complete the acquisition proceedings on the basis that the notification u/s 4 and

the declaration u/s 6 were valid and then to attack the notification on grounds which were available to them at the time when the notification was published would be putting a premium on dilatory tactics."

43. In the case of *Yasar Shafi and Ors. v. State of J&K and Ors.* (8), it was held by the Hon"ble Supreme Court that, "A person who enters into certain contractual obligations with his eyes open and works the entire contract, cannot be allowed to turn round, and question the validity of those obligations or the validity of the Rules which constitute the terms of the contract. The extraordinary jurisdiction of the High Court under Article 226, which is of a discretionary nature and is exercised only to advance the interests of justice, cannot certainly be employed in aid of such persons. Neither justice nor enquiry is in their favour."

44. In the case of *Pannalal Binjraj and Ors. v. Union of India and Ors.* (9), it was held by the Hon"ble Supreme Court in para 45 that, "Where none of the petitioners raised any objection to their cases being transferred u/s 5 (7A) Income Tax Act, and in fact submitted to the jurisdiction of the Income Tax Officers to whom their cases had been transferred." It was held that, "the petitioners were not entitled to invoke the jurisdiction of the Supreme Court under Article 32. It is well settled that such conduct of the petitioners would disentitle them to any relief at the hands of the Supreme Court."

45. In the case of *Nain Sukh Das and Ors. v. State of U.P. and Ors.* (10), it was held by the Hon"ble Supreme Court that, "In fact, the petitioners acquiesced in the elections being conducted under the old system or separate electorates and felt no discrimination having been practised against them until a no- confidence motion was tabled recently against the former Chairman who has since lost his seat as a result of that motion having been carried.

46. Although, the judgments as we have cited above are on different facts and different rules but still the principle is the same. In this case, the respondent No. 2 has appeared in professional ability written examination but has not secured qualifying marks so as to enable him to appear in viva-voce test, then, he filed a writ petition before this Court. Thereafter, he appeared in the viva-voce test and when he failed in professional ability written test as well as in the viva voce test, then he filed original application before the Tribunal in which he has stated that seniority should have been criteria for his promotion since he has put in long satisfactory service. This plea of the respondent No. 2 cannot be allowed to be taken at this belated stage since he has acquiesced himself while appearing in the professional ability written test as well as in the viva-voce test. If he would have declared passed, he would not have challenged this rule. Since, he was declared failed now he cannot be allowed to say that para 219 (h) has no application. Therefore, without challenging the validity of para 219 (h), which is a criteria laid down by the petitioners for selecting the candidates against the sanctioned post and the respondent No. 2 who has not only failed in written test but also failed in viva-voce test, he cannot be allowed to re-agitate the matter before this Court while stating that para 219 (h) has no application for his

promotion. Therefore, we are of the view that the Tribunal has committed serious error while reaching to the conclusion that para 219 (h) requires amendment and there is conflict in sub-para (g.) and (h) of para 219. We do not find any conflict in these two sub-paras. The opening lines of para 219 (g) says that the criteria for promotion will be overall merit and only 15% marks have been allotted for seniority. The respondent No. 2 has been awarded the maximum 15 marks in his favour for seniority and when he failed in written test as well as in the viva-voce, he was not selected and was not empanelled. Therefore, the Tribunal has wrongly interpreted para 219 (g) and (h).

47. The Tribunal has decided the original application filed by the respondent No. 2 on the basis of the judgment of the Hon'ble Supreme Court rendered in the case of R.C. Srivastava. The Tribunal has held that the Hon'ble Supreme Court has upheld the validity of the circular dated 27.11.1975 and it has, therefore, to be held that a candidate, who is working on ad hoc basis satisfactorily, cannot be denied empanelment on the basis of marks obtained in the viva-voce test. The Tribunal has also held that it is not in dispute that the applicant has put in long service without stigma and since, the applicant was working satisfactorily on the post of JCMSA for last more than 22 years, therefore, he could not be deprived of the empanelment on the ground of unsuitability in the interview. The Tribunal has further observed that following the dictum in the case of R.C. Srivastava, it will have to be held that the applicant has a right of empanelment, even though he did not get sufficient marks in interview.

48. We have perused the judgment rendered by the Hon'ble Supreme Court in the case of R.C. Srivastava v. Union of India and Ors. (arising out of SLP (C) No. 9866/1993 (11)). The Hon'ble Supreme Court has discussed the Board's letter No. 75-E (SCT) 15/48, dated 9.12.1975 as received vide their office letter No. OM 1/264 dated 25.1.1976 as reproduced hereinabove. The Hon'ble Supreme Court has held regarding this decision that a Circular of the Railway Board cannot override a statutory rule but a Circular which is in the nature of administrative direction can certainly supplement the rules on matters on which the rules are silent. A reading of the Circular dated March 19, 1976 would show that it does not run contrary to any statutory rule. Indeed the said Circular only gives guidance in the matter of exercise of the power by the selection committee. While considering the suitability at the stage of interview and says that a person who has been working on the post for which selection is being made on ad hoc basis and whose work is quite satisfactory should not be declared unsuitable in the interview. The Hon'ble Supreme Court has further held that the learned counsel for the respondents has not been able to show that this direction is inconsistent with any statutory rule. Therefore, the Hon'ble Supreme Court has held that "We are therefore unable to hold that the said direction in the Circular dated March 19, 1976 is inconsistent with any statutory rule. "But in the present case para 219 (h) is very much there, which says that the importance of an adequate standard of professional ability and capacity to do the job must be kept in mind and a candidate who does not secure 60% marks in professional ability

shall not be placed on the panel even if on the total marks secured he qualifies for a place. Therefore, the respondent No. 2 while submitting that para 2.2 of the meeting dated 27.11.1975 has applicability in his case since this circular is an administrative circular, cannot take any advantage.

49. The Hon''ble Supreme Court in the case of R.C. Srivastava (supra), has discussed para 2.2 and has held that since no inconsistency with any statutory rule has been shown, therefore, this circular was not found to be consistent with the statutory rule. The Tribunal has committed error while applying the decision taken on 27.11.1975 in para 2.2. The facts of the case of R.C. Srivastava (supra), are also different from the facts of the present case. In the case of Shri R.C. Srivastava (supra), the appellant has secured more than 60% marks in professional ability test. Moreover, it has been mentioned in the judgment that the Circular which has been relied upon by the respondents dated 25.11.1975 is only applicable where he has wrongly been denied selection on the basis of the marks given to him in the viva-voce, test. So far as respondent No. 2 is concerned, he was called for viva-voce test on the basis of para 219 (g) and para 2.2 and also taking into account the marks obtained by him in written test as well as considering his seniority. Although, he failed in written test and did not secure minimum marks in professional ability still he was called for viva-voce test. In such a situation, then Hon''ble Supreme Court has not interpreted the rule because rule 219 (h) is very specific which lays down that a person who does not secure 60% marks in professional ability shall not be placed on panel even if on the total marks secured he qualifies for the place. In this regard, the object is also stated as to why such a rule has been framed which is mentioned in para 219 (h) and as mentioned hereinabove. Therefore, a person who has not secured 60% marks in professional ability test cannot be empanelled on the post of JCMA. The respondent No. 2 who has not secured minimum 60% marks in the professional ability test cannot be allowed to be empanelled on the post. Therefore, the facts of the case of Shri R.C. Srivastava are altogether different. In this regard, the Tribunal has wrongly relied upon the judgment given by the Hon''ble Supreme Court in the case of Shri R.C. Srivastava. In that case, only one mark was less and the appellant had secured 29.15 marks out of 50 marks for professional ability covers written test and viva-voce. He had obtained 24.15 marks out of 35 marks for the written test and 5 marks out of 15 marks for viva-voce. Since, he did not secure 30 marks under professional ability, which was necessary for the purpose of empanelment he was not selected. If the appellant has been given 6 marks he would have qualified because he could have secured 30.15 marks. Therefore, in these circumstances, when the appellant's service record was satisfactory and he worked satisfactorily on the ad hoc post, therefore, he was entitled for the benefits given in the circular dated 19.3.1976. But in the present case, the respondent No. 2 has not only failed in the viva-voce test but he has also failed in written test and he secured only 23.4 marks out of 50 marks in professional ability, which comes to only 46.8%, therefore, the facts of this case as well as the case of Shri R.C. Srivastava (supra), are on different

footings. Therefore, the learned Tribunal has wrongly relied upon the decision of the Hon''ble Supreme Court.

50. Learned counsel for the petitioners, who have filed the writ petition No. 902/2003 has also argued before us that the service record of the respondent No. 3 was also not satisfactory and the Tribunal has wrongly held that the respondent No. 2 had put in 22 years satisfactory service without stigma. They have further argued that as regards para 2.2 of the decision dated 27.11.1975 taken by the Board, the respondent No. 2 cannot take any advantage in this case and Para 2.2 clearly states that the employees who have been working in the post on ad hoc basis quite satisfactorily are not to be declared unsuitable in interview. Learned counsel for the petitioners states that record of the respondent No. 3 is also not good. They have stated in their writ petition that in reply to the O.A. No. 42/2002 (Kailash Vasandani v. Union of India and Ors.) (supra), under Para 4.1, they have denied that the working of the non-petitioner No. 3 is satisfactory. It has also been mentioned in that reply of original application that the respondent No. 3 was served with a number of charge-sheets including SF-5 (which is the highest charge-sheet for major penalty). The Original Application No. 44/1999 was filed by the respondent No. 3 for quashing the impugned order dated 5.6.1992, which was issued to the respondent No. 3 on conclusion of the departmental enquiry and punishment of reduction to the initial stage in the current time scale of pay for a period of three years without cumulative effect was also imposed vide order dated 23.12.1997 by the Disciplinary Authority. The Tribunal has dismissed the said original application on 29.11.2001 (Annexure P/6). On this count also, the learned counsel for the petitioners states that the service of the respondent No. 3 was also not at all satisfactory and even he was not found suitable in interview. Therefore, he cannot get any benefit from para 2.2 as mentioned hereinabove.

51. We have gone through the record of the case and also gone the Annexure-P/6. The Tribunal vide order dated 29.11.2001 has dismissed the original application in which the respondent No. 3 has challenged the order of penalty dated 23.12.1997 passed against him. Therefore, we are of the view that the Tribunal has wrongly relied upon para 2.2 of the decision dated 27.11.1975. The Tribunal has also wrongly relied upon the decision of the Hon''ble Supreme Court in the case of Shri R.C. Srivastava and has also wrongly interpreted para 219 (g) and (h). We need not go into the controversy regarding the ad hoc service rendered by the respondent No. 2 because this fact is also admitted by the respondent No. 2 in his reply that the petitioner-Union of India allowed him his due seniority on the post of Lab Assistant vide letter dated 27.7.2000. Thereafter, the petitioner-Union of India also issued an order dated 3.8.2000 by which the respondent No. 2 had been ordered to be reverted from the post of JGMA to the post of Lab Assistant. The reversion order is said to have been issued in view of the rejection of the case of the respondent No. 2 by the Central Administrative Tribunal, Jodhpur and the respondent No. 2 had to join on the reverted post under protest. Therefore, it is clear from the record that the

respondent No. 2 was already reverted vide order dated 3.8.2000 on the post of Lab Assistant when he was called for interview on 4.10.2001. Thus, the respondent No. 2 is not entitled for any relief in view of para 2.2 of the Circular dated 27.11.1975 as relied upon by the Tribunal.

52. Learned counsel for the respondent No. 2 has also tried to convince us while arguing that the petitioners or their officials have malafides against him. He has brought to our notice that different original applications as well as writ petitions have been filed by him time and again for securing justice. Learned counsel for the respondent No. 2 has also stated that he has also pleaded malafides in his reply to the writ petition. We have considered the argument advanced by the learned counsel for the respondent No. 2 and gone through the judgment delivered in different original applications and writ petitions, which have been placed on record as well as the pleadings filed by the respondent No. 2. The respondent No. 2 has not at all pleaded the details of malafides. He has not even named a single officer who was showing malice against him. Since, there is no proper impleadment regarding the malafides and no details or particulars have been given, therefore, no malafides can be inferred. We are not convinced with the arguments advanced by the learned counsel for the respondent No. 2.

53. From the overall discussions, it is clear that the Tribunal has wrongly interpreted para 219 (g) and (h) of IREM. We do not find any inconsistency in these two sub-paras and hold that the merit is the basic criteria. Para 219 (h) specifically provides that if a candidate does not secure 60% marks in professional ability, he cannot be empanelled.

54. Looking to all the aspects of the case since the respondent No. 2 has not secured minimum 60% marks in professional ability test, therefore, merely calling a candidate in viva-voce test does not create any vested right in him to be selected since he has not secured 60% marks in professional ability test, therefore, respondent No. 2 was wrongly allowed empanelment by the Tribunal.

55. Accordingly, both these writ petitions are allowed and the judgment and order passed by the Central Administrative Tribunal dated 14.11.2002 is hereby quashed and set aside. Respondent No. 2 - Kailash Vasandani is not entitled for empanelment on the post of JCMA.