Durgacharan Misra

Vs

State of Orissa and Others

Writ Petition No. 1123 of 1986

(O. Chinnappa Reddy, K. Jagannatha Shetty JJ)

27.08.1987

JUDGMENT

JAGANNATHA SHETTY, J. -

1. This is a petition under Article 32 of the Constitution challenging the validity of the list of candidates prepared by Orissa Public Service Commission, Cuttack for appointment as probationary Munsifs in the State Judicial Service.

2. The selection of candidates for subordinate judicial service is governed by the Orissa Judicial Service Rules, 1964 (the "Rules"). The Rules were framed under the proviso to Article 309 read with Article 234 of the Constitution of India. The State Public Service Commission (the "Commission") is the selecting authority. The candidates are required to be selected by written test followed by viva voce test. The written examination carries the maximum marks of 950 and the viva voce test 200.

3. In accordance with the Rules, the Commission issued advertisement No. 12 of 1982-83 inviting applications from eligible candidates for posts of Probationary Munsifs. The petitioner was one of the candidates who applied in response thereof. In the written examination conducted by the Commission the petitioner secured 470 marks. He was called for viva voce test in which he was given 30 marks. He thus secured in all 500 out of 1150. The Commission prepared a list of candidates which we may term as 'select list' and recommended to the government altogether 56 candidates in four batches as desired by the latter. The petitioner did not find a place in that list. The candidates with less number of aggregate marks than that of the petitioner have, however, been selected. The petitioner, therefore, challenges the validity of selection, on the ground among others that it is arbitrary and contrary to the Rules.

4. The reason for exclusion of the petitioner from the select list is not obscure. It has been at any rate now made explicit. He did not secure the minimum qualifying marks prescribed by the Commission in the viva voce test. In the counter-affidavit filed on behalf of the Commission it has been so stated. It is said that the Commission has taken a decision that a candidate to be suitable for the post of Munsif, should secure at least 30 per cent at the viva voce test. That decision was taken on the advice of the High Court judge.

5. The question for our consideration is whether the minimum marks prescribed by the Commission at the viva voce test is justified, and whether the select list prepared by the Commission is in accordance with the Rules.

6. Rules 16, 17, 18 and 19 are the relevant rules which have a material bearing on the question that falls for determination. These rules read as under :

> 16. The Commission shall summon for the viva voce test all candidates who have secured at the written examination not less than the minimum qualifying marks obtained in all subjects taken together which shall be 30 per cent of the total marks in all the papers :

Provided that government may after consultation with the High Court and Commission fix higher qualifying marks in any or all of the subjects in the written examination in respect of any particular recruitment.

> 17. The Chief Justice or any of the other judges of the High Court nominated by the Chief Justice shall represent the High Court and be present at the viva voce test and advise the Commission on the fitness of candidates at the viva voce test from the point of view of their possession of the special qualities required in the judicial service, but shall not be responsible for selection of candidates.
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> 18. The marks obtained at the viva voce test shall be added to the marks obtained in the written examination. The names of candidates will then be arranged by the Commission in order of merit. If two or more candidates obtain equal marks in the aggregate, the order shall be determined in accordance with the marks, secured at the written examination. Should the marks secured at the written examination of the candidate concerned be also equal, then the order shall be decided in accordance with the total number of marks obtained in the optional papers.
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> 19(1) The Commission shall then forward to the government in the Law Department the list of candidates prepared in accordance with Rule 18 indicating therein whether a candidate belongs to Scheduled Caste or Scheduled Tribes.
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> (2) The list prepared shall be published by the Commission for general information.
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> (3) The list, unless the Governor in consultation with the High Court otherwise decides, shall ordinarily be in force for one year from the date of its preparation by the Commission.

7. The rule-making authorities have provided a scheme for selection of candidates for appointment to judicial posts. Rules 16 prescribes the minimum qualifying marks to be secured by candidates in the written examination. It is 30 per cent of the total marks in all the papers. The candidates who have secured more than that minimum would alone be called for viva voce test. The Rules do not prescribe any such minimum marks to be secured at the viva voce test. After the viva voce test, the Commission shall add the marks of the viva voce test to the marks in the written examination. There then, Rule 18 states :

The names of candidates will then be arranged by the Commission in the order of merit.

8. This is the mandate of Rule 18. The Commission shall add the two marks together, no matter what those marks (sic) at the viva voce test. On the basis of the aggregate marks in both the tests, the names of candidates will have to be arranged in order of merit. The list so prepared shall be forwarded to the government. The Commission has no power to exclude the name of any candidate

from the select list merely because he has secured less marks at the viva voce test.

9. Similar pattern of selection is generally found in all the rules of recruitment which prescribe written examination and also viva voce test. There are two authorities of this Court in this aspect of the matter. In P. K. Ramachandra Iyer v. Union of India ((1984) 2 SCR 200 : (1984) 2 SCC 141 : 1984 SCC (L&S) 214 : (1984) 1 LLN 433) this Court considered the scope of recruitment rules governing the selection of candidates to various disciplines under the Indian Council of Agricultural Research. There the Agricultural Scientist Recruitment Board (ASRB) was required to select candidates by holding competitive examination and viva voce test. ASRB prescribed minimum qualifying marks which candidate must obtain at the viva voce test before his name could be included in the merit list. The question that fell for consideration was whether the ASRB was competent to prescribe such a minimum ? Accepting the contention, that ASRB has no such power, this Court observed (p. 244) : [SCC pp. 180-81, SCC (L&S) pp. 253-54, para 44]

Neither Rule 13 nor Rule 14 nor any other rule enables the ASRB to prescribe minimum qualifying marks to be obtained by the candidate at the viva voce test. On the contrary, the language of Rule 14 clearly negatives any such power in the ASRB when it provides that after the written test if the candidate has obtained minimum marks, he is eligible for being called for viva voce test and the final merit list would be drawn up according to the aggregate of marks obtained by the candidate written test plus viva voce examination. The additional qualification which ASRB prescribed to itself namely, that the candidate must have a further qualification of obtaining minimum marks in the viva voce test does not find place in Rules 13 and 14, it amounts virtually to a modification of the rules. By necessary inference, there was no such power in the ASRB to add to the required qualifications. If such power is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reason that such deviation from the rules is likely to cause irreparable and irreversibly harm.

10. The closest to the facts of this case is the recent decision of this Court in Umesh Chandra Shukla v. Union of India (1985 Supp 2 SCR 367 : (1985) 3 SCC 721 : 1985 SCC (L&S) 919 : 1985 Lab IC 1625). There the scope of Delhi Judicial Service Rules, 1970 came up for consideration. Rules 17 and 18 of the Delhi Judicial Service Rules, 1970 are similar to Rules 16 and 18 of Orissa Judicial Service Rules, 1964. The Selection Committee constituted under these Rules consisted among others of judges of the High Court of Delhi. The Selection Committee apparently though that it has got power to exclude candidates securing less than 600 marks in the aggregate as not being suitable for appointment to the Judicial Service. Accordingly it excluded all such candidates from the select list. It was contended before this Court that the Selection Committee would be competent to prescribe a minimum standard to be crossed by candidates at the viva voce test in order to be suitable for appointment to judicial posts. Repelling that contention this Court observed (pp. 382-383) : [SCC pp. 735-36, SCC (L&S) pp. 932-33, para 14]

With regard to the second contention, namely, that the High Court had no power to eliminate the names of candidates who had secured less than 600 marks in the aggregate after the viva voce test, reference has to be made to Rules 17 and 18 of the Rules which provide that the Selection Committee shall call for viva voce test only such candidates who are qualified at the written test as provided in the Appendix and that the Selection Committee shall prepare the list of candidates in order of merit after the viva voce test. There is no power reserved under Rule 18 of the Rules for the High Court to fix its own minimum marks in order to include candidates in the final list. It is stated in paragraph 7 of the counter-affidavit filed in Writ Petition No. 4363 of 1985 that the Selection Committee has inherent power to select candidates who according to it are suitable for appointment

by prescribing the minimum marks which a candidate should obtain in the aggregate in order to get into the Delhi Judicial Service. It is not necessary to consider in this case whether any other reason such as character, antecedents, physical fitness which may disqualify a candidate from being appointed to the Delhi Judicial Service may be taken into consideration by the Selection Committee while preparing the final list. But on going through the Rules, we are of the view that no fresh disqualification or bar may be created by the High Court or the Selection Committee merely on the basis of the marks obtained at the examination because clause (6) of the Appendix itself has laid down the minimum marks which a candidate should obtain in the written papers or in the aggregate in order to qualify himself to become a member of the Judicial Service. The prescription of the minimum of 600 marks in the aggregate by the Selection Committee as an additional requirement which the candidate has to satisfy amounts to an amendment of what is prescribed by clause (6) of the Appendix. The question whether a candidate included in the final list prepared and forwarded by the Selection Committee may be appointed or not is a matter to be considered by the appointing authority. In the instant case the decision that a candidate should have secured a minimum of 600 marks in the aggregate in order to be included in the final select list is not even taken by the High Court but by the Selection Committee. Moreover recruitment of persons other than District Judges to the Judicial service is required to be made under Article 234 of the Constitution in accordance with the Rules made by the Governor as provided therein, in consultation with the High Court. Article 235 which vests in the High Court the control over the District Courts and courts subordinate thereto, cannot include the power of making rules with regard to recruitment of persons other than District Judges to the Judicial Service as it has been expressly dealt with in Article 234 of the Constitution. We are of the view that the Selection Committee has no power to prescribe the minimum marks which a candidate should obtain in the aggregate different from the minimum already prescribed by the Rules in its Appendix. We are, therefore, of the view that the exclusion of the names of certain candidates, who had not secured 600 marks in the aggregate including marks obtained at the viva voce test from the list prepared under Rule 18 of the Rules is not legal.

11. In the light of these decisions the conclusion is inevitable that the Commission in the instant case also has no power to prescribe the minimum standard at viva voce test for determining the suitability of candidates for appointment as Munsifs.

12. It was, however, urged by counsel for the respondents that the principle enunciated by the aforesaid two decisions of this Court cannot be extended to the case on hand. The counsel sought to derive support for their contention on Rule 17. Rule 17 provides that, the Chief Justice or any other judge of the High Court nominated by the Chief Justice shall represent the High Court and be present at the viva voce test. He shall also advice the Commission on the fitness of the candidates at the viva voce test. The advice may relate to the special qualities to be possessed by candidates for Judicial Service. Rule 17, however, proceeds to state that such a judge shall not be responsible for selection of candidates. The contention for the respondents was that a judge of the High Court was present at the viva voce test. It was an expert in the field. He was primarily concerned with regard to fitness of candidates for judicial service. He advice the Commission to determine the minimum marks to be secured at the viva voce test. The Commission accepted the advice and determined the cut out (sic off) marks in the viva voce. It was also contended that the judge could advice as to fitness of candidates for judicial appointment and his advice could also relate to the minimum which a candidate should secure in the viva voce test. If such power is not conceded to the judge, his presence at the interview as provided under Rule 17 would totally be unnecessary.

13. We are not persuaded by this agreement. That does not mean that we are doubting the purpose of Rule 17. The purpose is undoubtedly laudable and indeed, it is in accordance with the

observations of this Court in Ashok Kumar Yadav v. State of Haryana (1985 Supp 1 SCR 657 : (1985) 4 SCC 417 : 1986 SCC (L&S) 88 : (1985) 2 SLJ 482) There it was observed : [SCC pp. 456-57, SCC (L&S) p. 128, para 31]

> It is therefore essential that when selections to the Judicial Service are being made, a sitting judge of the High Court to be nominated by the Chief Justice of the State should be invited to participate in the interview as an expert and since such sitting judge comes as an expert who, by reason of the fact that he is a sitting High Court Judge, knows the quality and character of the candidates appearing for the interview, the advice given by him should ordinarily be accepted, unless there are strong and cogent reasons for not accepting such advice and such strong and cogent reasons must be recorded in writing by the Chairman and members of the Public Service Commission.

14. But the crux of the matter is whether the judge present at the viva voce test has the power to add anything to the rules of recruitment. He may advice the Commission as to the special qualities required for judicial appointment. His advice may be in regard to the range of subjects in respects of which the viva voce shall be conducted. It may also cover the type and standard of questions to be put to candidates; or the acceptance of the answers given thereof. But his advice cannot run counter to the statutory rules.

15. The Rules have been framed under the proviso to Article 309 read with the Article 234 of the Constitution. Article 234 requires that the appointment of persons other than District Judge to the Judicial Service of State shall be made by the Governor of the State. It shall be in accordance with the rules made by the Governor in that behalf after consultation with the State Service Commission and with the State High Court. The Rules in question have been made after consultation with the Commission and the State High Court. The Commission which has been constituted under the Rules must, therefore faithfully follow the Rules. It must select candidates in accordance with the Rules. It cannot prescribe additional requirements for selection either as to eligibility or as to suitability. The decision of the Commission to prescribe the minimum marks to be secured at the viva voce test would, therefore, be illegal and without authority.

16. In the result we allow the petition and quash the selection made by the Orissa Public Service Commission with a direction to re-do the select list of the basis of the aggregate marks obtained by the candidates in the written examination and at the viva voce test and in the light of the observations made. The list so prepared shall be forwarded to the government as required under Rule 19 of the Rules for appointments as Munsifs. The persons who fall within the revised list, if they are already in service need not be disturbed. Their inter se seniority, may however, be regulated as per the rankings in the revised list.

17. In the circumstances, however, we make no order as to costs.

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