

SUPREME COURT OF INDIA

Barot Vijaykumar Balakrishna

Vs.

Modh Vinaykumar Dasrathlal & Ors.

C.A.No.4959-4962 of 2011

(Aftab Alam and R.M.Lodha,JJ.,)

05.07.2011

JUDGMENT

Aftab Alam,J.,

SLP (C)No.5177-5180 of 2010

1. Leave granted.

2. These appeals arise from a batch of writ petitions filed before the Gujarat High Court questioning the validity of the appointments of Assistant Public Prosecutor (Class-II) made from the select list prepared on the basis of the written examination and viva voce and personality test held by the Gujarat Public Service Commission. The challenge was based on the ground that the minimum qualifying mark, separately fixed for the viva voce, was introduced just two or three days before the commencement of the oral tests though it was not stipulated in the advertisement issued by the Commission for filling up the posts. According to the writ petitioners (respondents before this Court), the introduction of the minimum qualifying mark for the viva voce, after the commencement of the selection process was, illegal and actuated by bias on the part of the Commission. It led to a number of highly anomalous results and completely vitiated the selections and the appointments made on that basis.

3. A learned single judge of the High Court did not accept the writ petitioners' contention and dismissed all the writ petitions by judgment and order dated August 17, 2009, passed in Special Civil Application No.7699 of 2009 (and other analogous cases).

4. Against the judgment of the single judge, the writ petitioners filed intra-court appeals and a division bench of the High Court allowed the appeals and set aside the judgment of the single judge. It held that the action of the Commission in introducing the minimum qualifying mark for the viva voce, in the middle of the selection process, was bad and "the Commission appears to have guided by legal malafide (sic)". It, accordingly, quashed the select list and the appointments made on its basis and directed that a fresh list be drawn up on

the basis of the aggregate of marks obtained by the candidates in the written test and the viva voce regardless of the minimum qualifying mark prescribed by the Commission for the viva voce. It directed the concerned authorities to complete the process within 2 months from the date of the judgment and till then permitted the appointees to continue to serve in their respective positions.

5. Against the judgment of the division bench, the appeals are filed (i) by the candidates (102 in number) who were appointed as Assistant Public Prosecutors on the basis of the impugned selection made by the Commission (and who were not parties in the writ petitions, or the intra court appeals before the court) and (ii) by the Gujarat Public Service Commission.

6. Before proceeding to examine the facts of the case and the rival contentions of the parties, it may be stated that on behalf of the respondents, it was accepted that the direction by the division bench of the High Court to draw up the merit list ignoring the minimum qualifying mark separately fixed for the viva voce may not be sustainable as that would be contrary to the statutory rules governing the selection and appointment. The only course left open, therefore, was to scrap the entire selection process and start from the beginning all over again.

7. Coming to the facts of the case, it is interesting to note how the process of filling up the posts of Assistant Public Prosecutor in such large numbers was put into motion. From a limitation petition, for condoning the inordinate delay of 1695 days in filing a State criminal appeal, it came to light that there was acute shortage of Assistant Public Prosecutors and as a result, the functioning of the subordinate criminal courts in the State badly suffered. The High Court took up the matter and on its initiative, the State Government sanctioned 180 new posts of Assistant Public Prosecutors. After due consultation with the Gujarat Public Service Commission and the concerned authorities of the State Government, the Advocate General of the State, assured the High Court that all the newly sanctioned posts and the vacancies existing in the already sanctioned cadre (242 in total) would be filled up in a time bound manner on the basis of rules especially framed for the purpose as a one time measure. The statements made by the Advocate General before the High Court are recorded in the order dated October 08, 2008, passed by a division bench of the High Court in Criminal Miscellaneous Application No.13937 of 2007 in Criminal Appeal No.487 of 2006. From the order of the High Court it appears that the Advocate General stated before the court that selection would be made on the basis of a written test followed by oral interviews and minimum qualifying marks would be fixed for the tests. The relevant passage in the High Court order is as follows:

".... Shri Trivedi, learned Advocate General, in consultation with the Secretary, GPSC, has further submitted that approximately three times of number of posts to be filled in, starting from top to bottom, the applicants will be called for Oral Interviews. However, minimum qualifying marks will be prescribed and the aforesaid will also be reflected and/or notified in the Advertisement...."

8. The High Court passed the order incorporating the statements made by the Advocate General and directed the concerned authorities to make appointments on all the available posts of Assistant Public Prosecutor following the time schedule given in the order.

9. In furtherance of the Advocate General's assurance given to the court and in compliance with the court's direction on that basis, a set of rules called the Assistant Public Prosecutor, Gujarat General State Service Class II Recruitment (Examination) Rules, 2008 (for short "the Recruitment Rules") were framed by the State Government under the proviso to Article 309 of the Constitution of India and published in the Gujarat Government Gazette, Extraordinary, dated, August 6, 2008. Rule 12 of the Recruitment Rules dealing with the nature of examination provided as under:

"Nature of Examination 12 (1) The examination shall be in two parts as shown in Appendix. Part I shall be written examination and Part II shall be viva-voce and Personality Test.

(2) The Commission shall fix the qualifying marks to be obtained by a candidate in Part-I of the examination in Appendix and shall call only those candidates who fulfil qualifying standard for Viva-voce and Personality Test. Provided that candidates belongs to the Scheduled Castes, Scheduled Tribes or Socially and Educationally Backward Classes including Nomadic Tribes and Denotified Tribes, may be summoned for viva-voce and Personality Test by applying relaxed standard in Part-I of the examination if the Commission is of the opinion that sufficient number of candidates from those communities are not likely to be called for viva-voce and personality test on the basis of the qualifying standard for general category in order to fill up the vacancies reserved for such categories.

(3) The commission shall fix the qualifying marks to be obtained by a candidate in the viva-voce and personality test.

(4) The candidate shall be required to attend the written part of the examination and viva-voce and personality test at his own expense;

(5) If the candidate, who is qualified for the viva-voce and personality test, fails to attend the viva-voce and personality test, shall not be eligible for selection."

(emphasis added)

10. Rule 14 dealt with the result of the examination and in sub-rule (1) provided as follows:

"Result of Examination 14(1) After two stage of the examination are over, the commission shall prepare the result arranging the marks of the candidates seriatim according to merit taking into consideration the total marks obtained by the candidates as per the qualifying standards fixed for the written examination and viva-voce and personality test and shall declare a list of qualified candidates accordingly."

(emphasis added)

At the end of the Recruitment Rules there was an Appendix in two parts. Part I contained the details concerning the written examination which would consist of five papers with an aggregate of 600 marks; part II provided that there would be a viva voce and personality test of 75 marks.

11. After the Recruitment Rules were framed and notified, the Commission on October 17, 2008 issued an advertisement inviting applications for filling up 242 posts of Assistant Public Prosecutor (Class II). Of the 242 posts available, 122 were to be filled up on open merits and the remaining was reserved for the different reserved categories. Under the marginal heading, "Particulars of Examination", it was stated that the examination would consist of two parts, i.e., written (objective test) and oral interview. The question paper of written examination (Part I) would be of 300 marks. In connection with the second part of the examination relating to the oral interview it was stated as follows:

"PART- II Oral Interview- 30 Marks The candidate obtains minimum 105 marks in the written examination i.e. as decided by the Commission, and the candidate who fulfils the educations qualifications, age, experience, etc., as mentioned in the advertisement shall be called for the oral interview in exact numbers and there shall be 30 marks for the oral interview. The final result of this examination shall be published as per the recruitment rules. The examination is of objective aptitude type, the provision of re-checking is not adopted. The final result of the examination shall be furnished on the basis of the total marks obtained in written as well as oral examination/interview....

12. Two things are to be seen from the advertisement. One, though in the Recruitment Rules, 600 marks were allotted for the written examination and 75 for the viva voce, in the advertisement the written examination was given 300 and viva voce 30 marks. The second, though the minimum qualifying mark of 105 out of 300 was fixed for the written examination, no qualifying mark was fixed separately for the viva voce as required by rule 12 (3) of the Recruitment Rules. Nevertheless, there was a broad and general stipulation that, "the final result of this examination shall be published as per the recruitment rules".

13. The first discrepancy in regard to the allotment of marks to the written and oral tests respectively, though not quite vital, was rectified by the notification dated October 24, 2008, issued by the State Government, under the proviso to Article 309 of the Constitution. By this notification, rule 19 was added at the end of the Recruitment Rules which reads as under:

"19. Notwithstanding anything contained in these rules, the competitive examination, held by the Commission pursuant to the advertisement issued during the year 2008 for the recruitment to the post specified in rule 3, shall be the multiple choice objective type written examination for 300 marks from the subjects mentioned in Papers I, II, III, IV and V in Part I of the Appendix, Provided that

(i) For papers I and II of the Gujarati and English in Part I of the Appendix respectively except grammar, all other topics be deemed as excluded.

(ii) In Part II Viva-voce and Personality Test, the maximum of 75 marks, shall be read as 30 marks and

(iii) The provisions of rules 12,13,14 and 16 shall apply mutatis mutandis to such competitive examination"

(emphasis added)

14. The written test was held by the Commission on January 11, 2009 and its result was published on March 20, 2009 by giving out the roll numbers (and not the names) of the qualifying candidates. Approximately 5,550 candidates sat for the written examination out of which 790 candidates were short-listed for being called for the oral interview. After the publication of the result of the written test the marks obtained by the short-listed candidates were kept in a sealed cover.

15. At this stage, while preparations were underway for holding the viva voce of the short-listed candidates, in the meeting held on April 22, 2009, it was decided that in terms of rule 12(3) of the Recruitment Rules, the Commission was required to decide the minimum qualifying marks for the viva voce. Accordingly, on April 23, 2009, the Secretary to the Commission submitted the proposal together with a copy of the Rules for order of the Commission and on the same day the Commission took the decision fixing 10 out of 30 as the minimum qualifying mark for the viva voce. The proceedings of the Commission dated April 23, 2009 read as follows:

"The Commission has taken following decision after discussion. The Commission shall decide qualifying marks to be obtained by the candidate in interview under rule 12(3) of Recruitment (Examination) Rules (Page No.5/C) for this post. Accordingly, the Commission is supposed to decide minimum qualifying marks for considering the candidate successful, in interview. Hence, after careful consideration the Commission decides that to get out of the maximum 30 marks of the interview, 10 marks as minimum qualifying marks. The intimation of this decision may be given in time, to every candidate before they appear in interview. For this purpose the Commission gives its approval for procedure to be followed as per suggestion made in paragraph No.3 shown against- on previous page. Further, this decision may be displayed on notice board in such a proper way that all the concerned persons may get intimated. It may please be noted that it may get published tomorrow.

Sd/- Member
[Shree Variya]
23.4.09

Sd/- Chairman
[Shree Bhavsar]
23.4.09

Sd/- Secretary
23.4.09

J.S./D.S.
Sd/- (Jt.Secretary)
24.4.09

The details to be displayed on Notice board as well as taken in to register in consonance with the above decision is submitted for approval.

1. Following details may be displayed on notice board. As per rule 12(3), the Commission has decided the minimum qualifying 10 marks out of 30, for the candidate appearing in interview (Viva-Voce) of Assistant Public Prosecutor Class-II. The candidate getting less marks than the this may not be eligible for selection. Which may be please noted. Make a note in the register as below, in which signatures of the candidates are being taken at the time of interview."

16. Here it needs to be clarified that normally the Gujarat Public Service Commission consists of a Chairperson and four members but at that time the positions of three members were vacant and only a Chairman and a member comprised the Commission. Hence, the proceedings are shown to have been signed by the Chairman and one member.

17. In accordance with the Commission's direction, the decision fixing 10 out of 30 marks as the minimum qualifying mark for the viva voce was put up on the notice board. Further, each candidate was individually intimated and was made to sign a declaration/consent form before going for the oral test. The consent form bore the following declaration under which the candidates were required to put their signatures:

"Under recruitment rules 12(3) the commission has prescribed 10 qualifying marks to be obtained by candidates out of 30 in viva-voce test for appointment to the post of Assistant Public Prosecutor (Class -II) and it is to be noted that the candidates who will secure less than 10 marks will not be eligible for recruitment to the post of Assistant Public Prosecutor."

(emphasis added)

18. The forms signed by each of the candidates are on record.

19. The viva voce of all the 790 short listed candidates was held from April 27, 2009 to July 9, 2009. On July 15, 2009, marks of the written test of the candidates who were called for interview were taken out of the sealed cover and on July 16, the Commission declared the final result as per Rule 14(1).

20. In the facts as stated above, we are completely unable to see any illegality in the selection process much less any bias or malice of any kind. But on behalf of the writ petitioners-

respondents, it is contended that it is a clear case of bias. It is alleged that in order to bring in its favoured candidates the Commission found it necessary to exclude a sufficient number of meritorious candidates by any ruse and the minimum qualifying mark for viva voce was introduced at the last minute only for that intent and purpose. The respondents pointed out that the application of the minimum qualifying mark separately for the viva voce excluded some candidates who would have been selected only on the strength of their marks in the written test even though they were given nil mark in the viva voce. The respondents cited several kinds of figures before the High Court to high light the "anomalies" resulting from the introduction of the minimum qualifying mark for the viva voce. It was pointed out that 81 out of the 203 selected candidates had got the minimum qualifying mark in the viva voce, i.e., 10 out of the total of 30; 190 candidates out of 790 called for interview got just 8 or 9 marks in the viva voce and were, thus, excluded from the final select list; 503 candidates out of the 790 called for interview got less than the qualifying mark in the viva voce. One or two more examples of a similar nature were also cited by the respondents. The Division Bench of the High Court appears to have attached considerable importance to these so called anomalies and its judgment seems to have been influenced by these results.

21. We are unable to accept or even to follow the allegation based on the figures as cited above. It is necessary to bear in mind that no objection can be taken to the fixing of the cut off mark separately for the viva voce as that is the mandate of the statutory rules governing the recruitment. What alone can be objected to is the omission to specify the cut off mark for viva voce in the advertisement and fixing it later on. But we fail to see any connection between the "anomalies" and the fact that the cut off mark for viva voce was fixed at a later stage, though before the commencement of the interviews and with due intimation to all the candidates.

22. Further, as noted above the marks obtained by the short listed candidates in the written test were kept in a sealed cover and those were taken out only after the oral interview of all the candidates was over. At the time a candidate appeared for the interview the members of the interview board had no means to know the mark obtained by him/her in the written test. In such a situation we don't see how it could be possible for the interview board to purposefully exclude a candidate by giving less than the minimum qualifying mark for the viva voce even though he/she might have been selected on the basis of the mark obtained in the written test alone.

23. When playing around with numbers one is quite likely to come up with some figures that might appear unusual and unexpected but that alone will not make out a case of bias or legal malafide (See the decision by a bench of four judges of this Court in Ashok Kumar Yadav v. State of Haryana, (1985) 4 SCC 417, paragraph 21). In the facts of the case as noted above we are satisfied that the examples cited by the respondents do not show that there was any arbitrariness or play of bias in giving marks to the candidates in the viva voce or that there was any flaw in the selection process making it liable to be struck down.

24. Mr. Viswanathan, senior advocate, appearing for the respondents submitted that the Advocate General had undertaken before the High Court that the qualifying marks for both

the written test and the viva voce would be published in the advertisement. He further submitted that sub-rule (2) of rule 12 provided for fixing the minimum qualifying mark for the written test in the same way as sub-rule (3) provided for fixing the minimum qualifying mark for the viva voce. He argued that the provisions of sub-rules (2) and (3) of rule 12 could not be read and given effect to differently and when the minimum qualifying mark for the written test was specified in the advertisement there was no reason for not indicating the minimum qualifying mark for the viva voce in the advertisement itself.

25. The grievance of Mr. Viswanathan cannot be said to be wholly without substance. It is true that the better and the more proper way to give effect to the provision of rule 12 (3) of the Recruitment Rules was to specify the minimum qualifying mark for the viva voce also in the advertisement itself. But that was not done. The question is what would be the consequence of the omission and was it open to the Commission to rectify the error by fixing the minimum qualifying mark for the viva voce later on and giving intimation of its decision to each of the candidates appearing for the oral interview before the beginning of the test.

26. The Division Bench of the High Court has held that the introduction of the minimum qualifying mark for the viva voce at the later stage in the selection process was not permissible and it completely vitiated the selection process. Mr. Viswanathan strongly supports the view taken by the High Court. In support of its view, the Division Bench of the High Court, has placed reliance on two decisions of this Court, one in *K. Manjusree v. State of Andhra Pradesh* and another, (2008) 3 SCC 512 and the other *Hemani Malhotra v. High Court of Delhi*, (2008) 7 SCC 11. Mr. Viswanathan also cited before us the decision in *K. Manjusree* and invited our attention particularly to the following passage in paragraph 33 of the judgment:

"33..... Where the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the Selection Committee prescribed minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to be illegal is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview."

27. In our view, both the decisions relied upon in support of the respondents' case are completely distinguishable and have no application to the facts of this case. *K. Manjusree* was a case of selection and appointment to the posts of District & Sessions Judge (Grade II) in the Andhra Pradesh Higher Judicial Service. The selection and appointment to the post of District & Sessions Judge was governed by the resolutions of the High Court and the resolution dated November 30, 2004 decided the method and manner of selection. It resolved to conduct the written examination for the candidates for 75 marks and oral examination for 25 marks. It also resolved that the minimum qualifying marks for the O.C., B.C., S.C. and

S.T. candidates would be as prescribed earlier. Following the written examination, the qualified candidates were called for interview before a committee of five judges. After the interview, the select committee of five judges prepared a merit list on the basis of the aggregate of marks obtained by each of the candidates in the written test and the oral interview. At that stage, the select committee did not apply any cut off mark for the viva voce. The list prepared by the select committee was approved by the administrative committee and it finally came before the Full Court of the High Court. The Full Court decided to have the matter reviewed by a committee of two judges constituted by the Chief Justice of the High Court. It was at that stage that the committee of two judges decided that there should have been a minimum qualifying mark for the oral interview as well, in the same ratio as prescribed for the written test. It, accordingly, decided that only those candidates who secured the minimum of 12.5 out of 25 (for the open category), 10 marks (for B.C. candidates), and 8.75 marks (for SC and ST candidates) would be considered as having succeeded in the interview. The decision of the committee of two judges was approved by the Full Court and consequently, the earlier list prepared by the select committee and approved by the administrative committee was revised and the final recommendation for appointment was made by the High Court on the basis of the revised merit list. It was in those facts that this Court held that the introduction of the cut off mark for the viva voce after the oral interviews were over amounted to changing the rules of the game in mid-play and was not permissible in law. The passage from paragraph 33 of the judgment relied upon by the respondents must be understood in the facts of the case.

28. The decision in Hemani Malhotra is equally inapplicable to the facts of the case. Hemani Malhotra was a case of selection and appointment to the vacant posts in the Delhi Higher Judicial Service and those appointments too were governed by the administrative resolutions of the High Court. For filling up the posts, the Registrar General of the High Court issued an advertisement that laid down that the minimum qualifying mark in the written examination would be 55% for general candidates and 50% for scheduled castes and scheduled tribes candidates. In the advertisement there was no indication at all about any cut off mark for the oral interview. After the written examination, no result was published giving out the names or roll numbers of the qualified candidates but the successful candidates were called to appear for the oral interview individually through letters. After the date fixed for oral interview was postponed three or four times the selection committee of the High Court resolved that it was desirable to prescribe a minimum mark for the viva voce and referred the matter to the Full Court. The Full Court accepted the suggestion made by the select committee and resolved that for recruitment to the Delhi Higher Judicial Service from the Bar the minimum qualifying mark in the viva voce will be 55% for general candidates and 50% for scheduled castes and scheduled tribes candidates. After the decision, interviews were held but significantly the candidates were kept in dark about the decision fixing the cut off mark for the viva voce. The High Court prepared the select list applying the cut off mark fixed for viva voce but the candidates who appeared for the oral interviews still did not know why they were not selected despite getting higher marks. It was only through applications made under the Right to Information Act that some of the unselected candidates were able to gather that their non- selection was on account of their failure to secure the cut off mark in the viva voce and then the selection was challenged before the Court. It is evident that the

facts of the case in hand are entirely different and the decision in Hemani Malhotra has no application to this case.

29. Mr. Viswanathan also relied upon the decision of this Court in Ramesh Kumar v. High Court of Delhi and another, (2010) 3 SCC 104. This decision also has no relevance to the facts of the present case. In Ramesh Kumar, what this Court said is that for appointment to the judicial services, in the absence of any contrary provision in the relevant rules Delhi High Court should not have fixed any minimum qualifying marks for the viva voce because this Court had accepted Justice Shetty Commission's report which had prescribed not to have any cut off mark for interview. Actually what is said in paragraph 15 of the judgment in Ramesh Kumar demolishes the case of the respondents:

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

30. Having, thus, made the legal position clear, the judgment in paragraph 16 went on to say:

"16. In the instant case, the Rules do not provide for any particular procedure/criteria for holding the tests rather it enables the High Court to prescribe the criteria. This Court in All India Judges' Assn. (3) v. Union of India, [(2002) 4 SCC 247], 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 v. State of J&K [(2003) 9 SCC 592] and Malik Mazhar Sultan (3) v. U.P. Public Service Commission [(2008) 17 SCC 703]. We have also accepted the said settled legal proposition while deciding the connected cases i.e. Rakhi Ray v. High Court of Delhi [(2010) 2 SCC 637] vide judgment and order of this date. It has been clarified in Rakhi Ray 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."

31. Now coming back to the facts of the case in hand, though the rules framed under Article 309 of the Constitution governing the selection process mandated that there would be minimum qualifying marks each for the written test and the oral interview, the cut off mark for viva voce was not specified in the advertisement. In view of the omission, there were only two courses open. One, to carry on with the selection process and to complete it without fixing any cut off mark for the viva voce and to prepare the select list on the basis of the

aggregate of marks obtained by the candidates in the written test and the viva voce. That would have been clearly wrong and in violation of the statutory rule governing the selection. The other course was to fix the cut off mark for the viva voce and to notify the candidates called for interview about it. This is the course that the Commission followed. This was in compliance with the rules and it did not cause any prejudice to any candidate either. We, thus, see no illegality at all in the selection process.

32. In light of the discussions made above we find that the Division Bench of the High Court took a wrong view of the matter and its judgment and order are quite unsustainable. We, accordingly, set aside the impugned judgment and dismiss all the writ petitions filed by the respondents before the Gujarat High Court.

33. In the result, the appeals are allowed but with no order as to costs.