

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Reserved on : 12.05.2010
Date of decision :21.05.2010

+ WP (C) No.10787/2009

KUNAL KISHOR & ANR. PETITIONERS

Through : Mr.Nagendra Rai, Sr.Adv. with
Mr.Praveen Kumar, Advocate

- V E R S U S -

LT.GOVERNOR & ANR. ... RESPONDENTS

Through : Mr.Mirza Aslam Beg, Advocate
for Ms.Sonia Sharma, Advocate
for R-1.

Mr.Viraj R.Datar and Mr.Chetan
Lokur, Advocates for R-2.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MS. JUSTICE VALMIKI J. MEHTA

Whether the Reporters of local papers
may be allowed to see the judgment? YES

To be referred to Reporter or not? YES

Whether the judgment should be
reported in the Digest? YES

SANJAY KISHAN KAUL, J.

1. The petitioners, who were desirous of joining the Delhi Judicial Service, are aggrieved by the application of the rule of minimum qualifying marks in the viva voce of Delhi Judicial Service Examination, 2008 ('DJS Examination, 2008' for short).

2. The Registrar of Delhi High Court issued an advertisement on 25.08.2008 for holding the Delhi Judicial Service Examination. The number of vacancies was set out as 36 with the provision for possible filling-up of 50 more posts in case there are additional seats which were created.
3. The examination was in a three-part format with a preliminary examination, main examination and a viva voce. The minimum qualifying marks were prescribed for the preliminary examination as 60 per cent for the General Category and 55 per cent for the Reserved Categories subject to a ceiling limit of 10 times the total number of vacancies of each category advertised. Such of the persons who would qualify the preliminary examination would be invited to take the main examination and such of the candidates who in the main examination would obtain 40 per cent marks in each written paper and 50 per cent marks in the aggregate for the General Category candidates and 35 per cent in each written paper and 45 per cent marks in the aggregate for the Reserved Category Candidates would be eligible to be called for viva voce. The viva voce marks were to be added to the marks obtained in the main examination to compute the merit list.
4. The controversy in the present matter revolves around the second norm specified in Part IV of the Instructions to DJS Examination, 2008 dealing with viva voce which reads as under:

“A candidate of general category must secure minimum 50% marks and a candidate of reserved category i.e. Scheduled Castes, Scheduled Tribes and Physically Handicapped (Blind/Low Vision) (mobility not to be restricted)/ Orthopaedically must secure minimum 45% marks in viva voce to be eligible for being recommended for appointment to the service.”

5. The effect of the aforesaid thus is that a minimum benchmark has been separately provided in viva voce for a candidate to be able to figure in the merit list irrespective of the marks obtained in the main examination.
6. The preliminary examination in respect of DJS Examination, 2008 was held on 02.11.2008 and a list of 255 candidates, who had qualified to appear for the main examination, was declared. The main examination was conducted on 21/22.12.2008 in which petitioner No.1 and petitioner No.2 obtained 476 and 478.5 marks respectively out of a total of 850 marks & 150 marks were separately provided for viva voce. The viva voce was conducted on 24.04.2009 and 25.04.2009. The final list of 81 candidates was published on 21.05.2009 who were recommended for appointment to the Delhi Judicial Service.
7. The grievance of the petitioners is that the last candidate in the merit list had secured a total of 508 marks with 425 marks in the main examination and 83 marks in the viva voce while the petitioners had secured more marks than that candidate but still did not figure in

the merit list. The petitioner No.1 and petitioner No.2 had secured a total of 548 and 540.5 marks respectively in the DJS Examination, 2008. The reason for the same was that the petitioners failed to secure the minimum 50 per cent marks in the viva voce as per the advertisement dated 15.12.2008. This has given rise to the present writ petition under Article 226 of the Constitution of India.

8. The grievance of the petitioners is that the Delhi Judicial Service Rules, 1970 ('the DJS Rules' for short) were amended by the Delhi Judicial Service (Amendment) Rules, 2008 ('the said Rules' for short) only on 15.12.2008. The requirement of a minimum of 50 per cent marks in the viva voce for the General Category and 45 per cent marks for the Reserved Category was provided in terms of the said Rules. The examination process had already begun in August, 2008 with the preliminary examination being held prior to the amendment to the DJS Rules and thus such an amendment would have no application to the examination conducted for the year 2008.
9. In order to appreciate this controversy, it is necessary to look to certain pronouncements dealing with this aspect as the endeavour to introduce minimum marks for viva voce by the Delhi High Court has had a chequered history.
10. At the stage of recruitment of officers to the Delhi Higher Judicial Service Examination, 2006, there was no

provision made for minimum marks separately for viva voce and the prescribed minimum marks were only for written test. However, at the stage of viva voce, minimum marks were prescribed for viva voce. As a consequence thereof, two candidates who did not obtain the minimum marks in the viva voce challenged the prescription of such minimum marks mid-stream for viva voce by filing a writ petition under Article 32 of the Constitution of India before the Supreme Court. The decision came to be rendered in Hemani Malhotra v. High Court of Delhi and connected matters; (2008) 7 SCC 11. The Supreme Court came to the conclusion that it was not permissible to change the rule of the game midway through the selection process or when it is over. It was further held that even otherwise this course of action was not permissible for appointment to Delhi Higher Judicial Service as it was contrary to the recommendations of Justice Shetty Commission Report, as approved with certain modifications in All India Judges Association v. Union of India; (2002) 4 SCC 247 where it is expressly provided that there should be no cut off marks for viva voce.

11. The second important pronouncement in this regard was in the recent judgment of Ramesh Kumar v. High Court of Delhi & Anr.; 2010 (2) SCALE 86 (=2010 3 SCC 104). This case deals with an advertisement issued in 2007 in respect of Delhi Higher Judicial Service. The prescription of minimum marks for the viva voce

was this time prescribed in the advertisement itself. This was again sought to be challenged by the two petitioners by filing a writ petition under Article 32 of the Constitution of India. The High Court sought to defend the decision this time by contending that the decision for fixing the cut off marks in the written test and for further securing the minimum benchmark in the viva voce had been taken prior to initiation of the selection process and was made public at the same time. This selection process at that stage was never challenged and the petitioners cannot be permitted to challenge the selection process after having appeared in the examination. The minimum benchmark was stated to have been fixed under the provisions of Rule 10 of the DJS Rules which reads as under:

“The High Court shall before making recommendations to the Administrator invite applications by advertisement and may require the applicants to give such particulars as it may prescribe and may further hold **such tests as may be considered necessary.**”

(Emphasis supplied)

12. The Supreme Court analyzed the legal position by considering various judgments. The legal principle as set out in para 13 reads as under:

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

13. The Supreme Court thereafter proceeded to analyze the effect of acceptance of the Justice Shetty Commission Report, as approved with certain modifications in All India Judges Association v. Union of India's case (supra) for not having minimum marks for viva voce. It has also been observed that where statutory rules had not dealt with a particular subject/issue insofar as the appointment of judicial officers is concerned, directions issued by the Supreme Court would have binding effect in view of Article 141 of the Constitution of India. Thus, the prescription of minimum marks in the viva voce was held to be erroneous in the absence of any statutory rule in that behalf. The defence based on the petitioners having participated in the examination was dealt with in para 17 of said judgment, which reads as under:

“17. In pursuance of those directions, the Delhi High Court offered the appointment to such candidates. Selection to the post involved herein has not been completed in any subsequent years to the selection process under challenge. Therefore, in the instant case, in absence of any statutory requirement of securing minimum marks in interview, the High Court ought to have followed the same principle. In such a fact-situation, the question of acquiescence would not arise.”

14. The upshot of the aforesaid judgment thus is that unless there are statutorily specific rules providing for minimum marks for viva voce, the existing rules would not permit such minimum marks for viva voce to be prescribed.

15. We may notice at this stage that undisputedly the amendment to the DJS Rules was notified on 15.12.2008. There was no challenge laid to the amendment. It can thus be safely assumed that after 15.12.2008 there is no prohibition in prescribing the minimum marks for viva voce. The question, however, remains as to whether such an amendment (which has no retrospective effect) would apply to the DJS Examination, 2008 where the advertisement prescribed such minimum marks for viva voce and where the preliminary examination was held prior to the notification, but the main examination and viva voce have been conducted after the notification of the said Rules.

16. It is the case of the petitioners that the amendment to the DJS Rules being prospective in nature, application of the same to the DJS Examination, 2008 would not be permissible and the DJS Examination, 2008 has to be governed by the rules existing prior to the amendment. On the other hand, learned counsel for the respondents have contended that all the candidates were put to notice of the proposed amendment by incorporating the relevant condition in the advertisement itself and the issuance of the notification was a ministerial act. It has been further pleaded that the main examination and viva voce have been conducted after the notification.

17. Learned counsel for R-1 also sought to explain the historical process of such amendment to the rules. The

amendment in the appendix to the DJS Rules was recommended by the relevant committee of the High Court on 22.07.2008 and the recommendations were approved on 01.08.2008. A letter was sent to the Govt. of NCT of Delhi for notifying the amended appendix on 12.08.2008. The advertisement was issued on 25.08.2008 after completion of the aforesaid process. The preliminary examination was held on 02.11.2008 and the notification for amendment was issued on 15.12.2008. The remaining process of examination has been completed after that date.

18. In order to canvass their respective pleas in the aforesaid short compass, learned counsel for the parties referred to certain pronouncements.

19. Learned counsel for the petitioners relied upon the judgment in P.Mahendran and Ors. v. State of Karnataka and Ors; AIR 1990 SC 405 in respect of appointment of motor vehicle inspectors where it was observed that the selection process is to be complete in accordance with law as it stood at the commencement of the process of selection and the amended rule would not invalidate the selection already made. The amendment to the rules had been made changing the eligibility criteria during the process of selection and the rules had no retrospective effect. The selection of candidates already made was thus held as not effected. In Malik Mazhar Sultan and Anr.v. UP Public Service Commission & Ors.; (2006) 9 SCC 507, in para 21, it has been observed that

where excluded candidates were of eligible age as per the advertisement, the recruitment to the service could only be made in accordance with the rules and the error if any in the advertisement could not override the rules and create right in favour of a candidate otherwise not eligible in accordance with the rules.

20. Learned counsel for the respondents on the other hand referred to the observations made in paras 18 and 19 in Union of India & Ors. v. S.Vinodh Kumar & Ors.; (2007) 8 SCC 100 to canvass the proposition that the candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to the question the same. This judgment in turn had relied upon the observations in Chandra Prakash Tiwari and Ors. v.Shakuntala Shukla & Ors; (2002) 6 SCC 127 to the effect where it was held that only because the result of the interview is not 'palatable' to a candidate, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process.

21. Learned counsel for the respondents also referred to the judgment in Union of India & Anr. v. N.Chandrasekharan & Ors.; AIR 1998 SC 795 to contend that the weightage given to an interview cannot be termed as arbitrary or violative of Articles 14 and 16 of the Constitution of India and where a candidate is made aware of the procedure before he appears for the written test and before DPC, subsequently a plea cannot be

permitted to be raised that the marks allotted to interview and ACR was unduly disproportionate or that authorities cannot fix minimum marks to be secured in an interview or in ACR. In Madan Lal & Ors. v. The State of Jammu & Kashmir and Ors.; JT 1995(2) SC 291, once again it was observed that only because the result of an interview is not palatable to a candidate, he cannot turn around and subsequently contend that the process of interview as unfair and that the result of an interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the interview and who ultimately finds himself to be unsuccessful.

22. The second set of judgments cited by learned counsel for the respondents are on the issue of applicability of the said Rules. In High Court of Gujarat & Anr. v. Gujarat Kishan Mazdoor Panchayat and Ors; AIR 2003 SC 1201, the proposed recruitment rules were framed by the High Court were pending approval with the Government. The appointment offered to a candidate in accordance with the draft rules was held not to be violative of Articles 14 and 16 of the Constitution of India. In that context, the observations of S.B.Sinha, J. in para 27 are as under:

“27. It is now trite that draft rules which are made to lie in a nascent state for a long time cannot be the basis for making appointment or recommendation. Rules even in their draft stage can be acted upon provided there is a clear intention on the part of the Government to enforce those rules in the

near future (See Vimal Kumari v. State of Haryana and others reported in (1998) 4 SCC 114).”

23. In Delhi Judicial Services Association and Ors. v. Delhi High Court and Ors.; (2001) 5 SCC 145 the selection to Delhi Higher Judicial Service in the light of draft rules and in anticipation of sanction of the draft rules was held to be valid and the screening of applications received in response to an advertisement issued in anticipation of sanction of draft rules was directed to save time.

24. In Vimal Kumari v. State of Haryana & Ors.; (1998) 4 SCC 114, it was held that draft rules cannot be enforced for recruitment observing that it was open to the Government to regulate the service conditions of the employees for whom the rules are made by those rules which are even in their draft stage provided there is clear intention on the part of the Government to enforce those rules in the near future. Recourse to such draft rules is permissible in the interregnum period to meet the emergent situations. Similarly in Abraham Jacob and Ors. v. Union of India; (1998) 4 SCC 65 since statutory rules had not come into force, promotions given on the basis of provisions contained in the draft rules by virtue of an administrative order of the Government was found permissible.

25. We have given our deep thought to the matter especially as the issue relates to the selection of persons to the judicial service. The endeavour is to get the best

persons eligible as its impact is felt over a long period of time during which a judicial officer performs his duties. The citizens look to the judiciary for redressal of their grievances and the best talent available only must thus be recruited. In this context, the importance of a viva voce can hardly be not emphasized. The knowledge of law is essential but certain other parameters including the ability to appreciate law and finer points as compared to mere bookish knowledge can often emerge only during a viva voce. It is in this background that not only a certain percentage of marks prescribed for viva voce but a minimum benchmark to be achieved in viva voce is also sought to be prescribed by way of amendment to the DJS Rules.

26. There is no doubt that however salutary be the objective, it must be done in accordance with law. Thus, an endeavour to mid-stream change the rules of the game was frowned upon by the Supreme Court in Hemani Malhotra v. High Court of Delhi and connected matters' case (supra). Thereafter, the High Court mistakenly thought that the powers vested under Rule 10 of the DJS Rules sufficiently empower it to prescribe the minimum marks in the viva voce for the year 2007.

27. In any case, insofar as the examination for the DJS Examination, 2008 is concerned, steps were taken to incorporate the intention by amendment to the DJS Rules. After due deliberations, the recommendation to amend the DJS Rules was made on 22.07.2008 and the

Full Court approved the same on 01.08.2008. Thereafter, the said Rules were forwarded for being notified. The fact that the Govt. of NCT of Delhi had no objection is apparent from the notification of the amended appendix/Rules on 15.12.2008. However, in anticipation of the notification, in order to not delay the recruitment and in an endeavour to meet the mandates of various pronouncements of the Supreme Court for yearly recruitment, the process for DJS Examination, 2008 was put in motion by issuing the advertisement. The advertisement clearly provided for such minimum marks to be prescribed in the interview. Thus, not only were all prospective candidates put to notice of the prescription of minimum marks to be obtained in viva voce, but the amendment to the DJS Rules also came into place soon after the process of recruitment was put into motion and admittedly prior to the written examination and the viva voce.

28. It is also no doubt true that normally any amendment to the rules would have prospective effect. The rules do not provide for any retrospective application. It is in this context that learned counsel for the petitioners had referred to the judgment in P.Mahendran and Ors. v. State of Karnataka and Ors's case (supra). However, in Malik Mazhar Sultan and Anr.v. UP Public Service Commission & Ors.'s case (supra) certain observations were made that only a mistake in advertisement would not make a candidate

eligible if rules do not provide so. It would not have any application in the present case as there was no mistake.

29. It is in the aforesaid context that the judgment cited by learned counsel for the respondents in respect of the draft rules being sent for issuance of notification and the same being acted upon by the Govt. of NCT of Delhi become material. As noticed in High Court of Gujarat & Anr. v. Gujarat Kishan Mazdoor Panchayat and Ors's case (supra), the appointments made in pursuance to the draft rules was upheld. The observations of S.B.Sinha, J. in the said case that rules even at their draft stage can be acted upon provided there is a clear intention on the part of the Government to enforce those rules in the near future, become material in the present case. The relevant dates given aforesaid shows that the recommendation to the Govt. of NCT of Delhi had already been sent and the same was acted upon by the Govt. of NCT of Delhi by issuing a notification within a period of about three months. It is not as if the draft rules were at a nascent stage and were sought to be acted upon. (Re: observations of S.B.Sinha, J.). The other judgments in Delhi Judicial Services Association and Ors. v. Delhi High Court and Ors.'s case (supra), Vimal Kumari v. State of Haryana & Ors.'s case (supra) and Abraham Jacob and Ors. v. Union of India's case (supra) also set forth the same principle that where the intention of all the parties is clear and draft rules are in the process of being brought into force,

the mere fact that on the relevant date the draft rules were not in force, would not negate the process of recruitment based on the same. The intent in the present case was clear to bring the amendment into force as the process of consultation and discussion in the High Court was over prior to the issuance of notification of DJS Examination, 2008 on 25.08.2008 and the matter was already with the Govt. of NCT of Delhi for issuance of a notification well before the date of the main examination and the viva voce.

30. The High Court did not wait for the pronouncement in Ramesh Kumar v.High Court of Delhi & Anr's case (supra) but the process of amendment had started much earlier. The judgment was pronounced on 01.02.2010 while the process of amendment was complete and recommendations made prior to even the issuance of advertisement in August, 2008.

31. No doubt in Ramesh Kumar v.High Court of Delhi & Anr.'s case (supra), the factum of the candidates having participated in the selection process did not come in the way of their being granted the relief. This was, however, so because the norms sought to be applied were found to have no sanction under the rules. However, the observations made in Union of India & Ors. v. S.Vinodh Kumar & Ors.'s case (supra) relying upon the observations in Chandra Prakash Tiwari and Ors. v.Shakuntala Shukla & Ors's case (supra) as also the observations in Madan Lal & Ors. v. The State of Jammu

& Kashmir and Ors.'s case (supra) emphasizing the importance of participation in an examination to negate a relief cannot be ignored. The petitioners in the present case knew that the existing rules did not provide for such minimum marks in viva voce though the advertisement sought to provide for the same. They were also aware that in December, 2008, the amendment came into force and thus the intention was to apply the amendment to the examination of 2008. The petitioners participated in the examination and the viva voce but on their non-selection on account of not having obtained minimum marks in the viva voce, sought to rake up this issue in the present petition. The petitioners were thus fully conscious that the rules now mandate obtainment of minimum marks in viva voce, appeared for the viva voce but on being unsuccessful seek to raise the issue of cut off date for application of viva voce.

32. We find that the conduct of the petitioners in continuing to participate in the main examination and viva voce without challenging the same would also stand in their way.

33. We are thus of the considered view that the said Rules for which the process was completed prior to the issuance of the advertisement but the formal notification was issued post advertisement and preliminary examination but pre the main examination and viva voce, would apply to the selection process of 2008 for

which results were declared in May, 2009. We may also notice that the subsequent examination of 2009 has also been held for which the preliminary examination is over and the main examination is due in June, 2010.

34. We thus dismiss the writ petition leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

MAY 21, 2010
dm

VALMIKI J. MEHTA, J.