

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 8th July, 2011

% Judgment Pronounced on: 5th August, 2011

+ **LPA No. 561/2011**

YOGESH YADAV

..... Appellant
Through: Mr.Preet Pal Singh, Adv.

Versus

UNION OF INDIA & ANR.

..... Respondents
Through: Mr. Rajeev Saxena, Adv.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

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| 1 | Whether reporters of the local papers be allowed to see the judgment? | Yes |
| 2 | To be referred to the Reporter or not? | Yes |
| 3 | Whether the judgment should be reported in the Digest? | Yes |

DIPAK MISRA, CJ

In this intra-court appeal, the warrantableness of the order dated 24th May, 2011 passed by the learned Single Judge in WP (C) No. 7007/2007 is called in question.

2. Bereft of unnecessary details, the necessitous facts which are required to be stated are that the appellant applied for the post of Deputy

Director (Law) in the Other Backward Classes (OBC) category in the office of Competition Commission of India (CCI) pursuant to a notification / public notice dated 11th November, 2009 inviting applications for various posts. In the notification, 13 vacancies were mentioned for the post of Deputy Director (Law) and there was a break-up in three categories, General, Scheduled Caste and OBC and the number of vacancies were 9, 1 and 3 respectively. Under the head of eligibility / qualification / experience for the post of Deputy Director (Law) was Bachelor of Law (Professional) or equivalent with three years' experience in the relevant field, including the corporate sector. Clause 7 of the Notification provided for the mode of selection. It was stipulated as follows: -

"7. Mode of Selection

All the applications received by the due date will be screened with reference to the minimum qualification criteria. From amongst the eligible candidates, suitable candidates will be short listed through a transparent mechanism and the short listed candidates will be called for interview before final selection. Mere fulfilling of minimum qualifications by itself would not entitle any applicant for being called for interview."

3. The appellant, on 5th January, 2010, was informed that the written examination was to be held on 14th February, 2010 for short listing the

candidates for interview. The appellant was issued the admit card and the detailed instructions including the syllabus and the scheme of examination. Clause 4 of the instructions postulated as follows: -

“4. The selection to all the positions advertised will be based on a written test followed by an interview. The written test will carry 80% of the marks and interview will have 20% of the marks. The written test will be in two parts. The first part will be based on multiple choice questions for 50 marks. There is no negative marking in this multiple choice questions. The second part carrying 30 marks will be distributed to the descriptive questions on the subject of your specialization within the broad outline of the subject of specialization as indicated in the advertisement.”

Clause 9 of the said instructions was as follows: -

“9. Candidates who do not secure 50% of the marks in the test will not be called for the interview. However, for candidates belonging to the reserved categories, the cut off marks will be 40% of the total marks.”

4. The appellant appeared in the written examination on 14th February, 2010 and secured 51 out of 80 marks. He was called for interview on 19th March, 2010. The result for the post of Deputy Director (Law) was published on the website by the respondent and only five candidates from

the general category were finally selected against 13 vacancies notified by the Commission. None from the reserved category was selected for the said post. As the final result did not give details about the individual marks secured by the candidates, the appellant sought certain information under the Right to Information Act, 2005 and eventually, the appellant was informed that he had secured two marks out of 20 marks in the interview and was, thus, awarded 53 out of 100 marks. The appellant came to learn that the final selection was made on the basis of benchmark fixed at 70 and 65 marks or above in the general and reserved category respectively and because of the said fixation of the benchmark, he was not selected.

5. Being dissatisfied with the aforesaid action, the appellant visited this Court in the writ petition contending, inter alia, that the respondent-Commission had acted in an arbitrary manner by changing the selection criteria inasmuch as it had prescribed an additional selection criteria, which was not notified to the candidates. It was further put forth that the appellant had secured 51 marks in the written examination but the persons who had secured less marks than him in the written paper had been selected as a decision had been taken to select candidates who had secured 65 marks in toto.

6. The stand put forth by the appellant was combated by the respondent in the writ petition stating that due to overwhelming response received from the candidates, the Commission decided to undertake the selection to all posts notified in the advertisement on the basis of a written test followed by interview and accordingly, it was determined that written test would be for 80 marks, while 20 marks were attributed to interview. The responsibility of conducting the written test was assigned to National Law School of India University, Bangalore so as to maintain absolute impartiality and fairness in the conducting of examination. The candidates who secured minimum of 50% marks in the written test in the unreserved category and minimum of 40% marks in the reserved category were called for interview in the ratio of three times of the number of vacancies where the number of vacancies were more than 10 and five times of the number of vacancies where the vacancies were less than 10. After completion of the interview, the marks awarded by the Board were kept in a sealed cover. The sealed cover containing the marks was opened in the presence of the senior most member of the Commission. The marks obtained by each candidate in the written test and in the interview were tabulated and the merit list was prepared. A reference has been made to Clause 7 of the

Notification which stipulates that 'mere fulfilling of minimum qualifications by itself would not entitle any applicant for being called for interview'. The Commission, regard being had to the purpose of the post, decided to fix the percentage for final selection at minimum 70 marks out of 100 for unreserved category and minimum 65 marks out of 100 for reserved category for professional categories including that of the post of Deputy Director (Law). The rationale to adopt such criteria was to select only meritorious candidates.

7. A further stand was taken that the selected candidates were not impleaded and, therefore, the writ petition deserves to be thrown over Board on the ground of non-impleadment of necessary parties. It was also highlighted that the final placement has been worked out keeping in view the benchmark and there has been no deviation from the same. The stance was put forth that in the larger interest of the Commission, a standard was fixed and, hence, no grievance can be made in that regard.

8. A rejoinder affidavit was filed controverting the stand and stance put forth in the counter affidavit and also highlighting that in respect of the subsequent years, the criteria for selection had been stipulated stating

that for the post in professional category, aggregate minimum 70%/65% marks out of 100 for general/reserved category respectively in the written examination and cross interview would be the qualifying standard for empanelment had been inserted and the same clearly shows that there had been an incurable error in the earlier fixation of the benchmark and an endeavour has been made to rectify the same.

9. The learned Single Judge placed reliance on the decision rendered in W.P.(C) No.8272/2010 titled *Devi Darshan Seth v. UOI* decided on 5th May, 2011 and considered the additional submissions and came to hold that the fixation of the benchmark was justified in law and the decisions cited by the learned counsel for the petitioner in *Lila Dhar v. State of Rajasthan*, (1981) 4 SCC 159, *Umesh Chandra Shukla v. Union of India*, (1985) 3 SCC 721, *Durgacharan Misra v. State of Orissa*, (1987) 4 SCC 646, *N.T. Devni Katti v. Karnataka Public Service Commission*, (1990) 3 SCC 157, *K. Manjusree v. State of A.P.*, (2008) 3 SCC 512 and *Hemani Malhotra v. High Court of Delhi*, (2008) 7 SCC 11 are distinguishable. The learned Single Judge opined that the decision in *Devi Darshan Seth* (supra) solely covered the lis and, accordingly, opined that when the petitioner had not

obtained the minimum standard, he had no right to be appointed to the post.

10. Questioning the soundness of the order, Mr. Preet Pal Singh, learned counsel appearing for the appellant, has contended that the learned Single Judge has failed to appreciate the fact that the advertisement did not specify the benchmark for the purpose of selection and, therefore, the same could not have been fixed by the Commission at a later stage as the same tantamounts to change of procedure in the midstream. It is canvassed by him that the learned Single Judge has absolutely erred in distinguishing the authorities cited by the petitioner and, therefore, the order passed by him is sensitively susceptible.

11. Mr. Rajeev Saxena, learned counsel appearing for the respondents, per-contra, contended that the learned Single Judge has appreciated the factual scenario in the backdrop of the conditions stipulated in the advertisement and, hence, there is no fallacy in the decision on that score. It is his further submission that the respondents have correctly determined the benchmark for the purpose of selection and the decisions which have

been pressed into service by the petitioner have been rightly distinguished by the learned Single Judge and no fault can be found with the same.

12. The hub of the matter is whether the respondents could have fixed a benchmark of 65% / 70% obtained in toto from the written test and interview in the absence of any stipulation in that regard in the advertisement.

13. In the case of *Durgacharan Misra* (supra), the question arose whether the minimum marks prescribed by the Commission in the viva voce test was justified and in that context, their Lordships opined thus:

“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.”

14. In *N.T. Devin Katti* (supra), it has been opined as follows:

11. There is yet another aspect of the question. Where advertisement is issued inviting applications for direct recruitment to a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing rules or government orders, and if it further indicates the extent of reservations in favour of various categories, the selection of candidates in such a case must be made in accordance with the then existing rules and government

orders. Candidates who apply, and undergo written or viva voce test acquire vested right for being considered for selections in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystalises on the date of publication of advertisement, however he has no absolute right in the matter. If the recruitment Rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules. Whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication; if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the rules and orders which were in force on the date of advertisement. Determination of this question largely depends on the facts of each case having regard to the terms and conditions set out in the advertisement and the relevant rules and orders. Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right for selection, but if he is eligible and is otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire a vested right for being considered for selection in accordance with the rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of rules during the pendency of selection unless the amended rules are retrospective in nature."

15. In *K. Manjusree* (supra), it has been held that revisiting the merit list by adopting a minimum percentage of marks for interview is impermissible.

16. In the case of *Hemani Malhotra* (supra), it has been held as follows:

“15. There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and viva voce, but if minimum marks are not prescribed for viva voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at viva voce, test was illegal.”

17. In *State of Bihar & Ors. v. Mithilesh Kumar*, (2010) 13 SCC 467, it has been opined thus:

“20. The decisions which have been cited on behalf of the respondent have clearly explained the law with regard to the applicability of the rules which are amended and/or altered during the selection process. They all say in one voice that the norms or rules as existing on the date when the process of selection begins will control such selection and any alteration to such norms would not affect the continuing process, unless specifically the same were given retrospective effect.”

18. From the aforesaid pronouncement of law, it is vivid that an amended rule cannot affect the right of a candidate who has qualified as per the terms stipulated in the advertisement and is entitled to claim a selection in accordance with the rules as they existed on the date of the advertisement; that the selection can be regulated by stipulating a provision in the rule or laying a postulate in the advertisement for obtaining minimum marks both in the written examination and viva voce, but if minimum marks are not prescribed for viva voce before the commencement of the selection process, the authority, during the selection process or after the selection process, cannot add an additional requirement / qualification that the candidate should also secure minimum marks in the interview; that the norms or rules as existing on the date when the process of selection begins will control such selection and that revisiting the merit list by adopting a minimum percentage of marks for interview is impermissible.

19. The factual scenario in the present case has a different backdrop. The advertisement stipulated that the short listed candidates would be called for interview before the final selection and mere fulfilling of minimum qualifications by itself would not entitle any applicant for being

called for interview. Thereafter, in the instruction, the marks were divided. Regard being had to the level of the post and the technical legal aspects which are required to be dealt with, a concise decision was taken to fix 65% marks for OBC category in toto, i.e., marks obtained in the written examination and marks secured in the interview. It is not a situation where securing of minimum marks was introduced which was not stipulated in the advertisement. A standard was fixed for the purpose of selection.

20. In the case of *The State of Haryana v. Subash Chander Marwaha and others*, (1974) 3 SCC 220, a two-Judge Bench of the Apex Court, while interpreting Rule 8 of the Punjab Civil Service (Judicial Branch) Service Rules which stipulated consideration of a candidate who secures 45% marks in aggregate dealt with the facet where initially the High Court recommended the names of candidates who had secured 55% marks and the Government accepted the same but later on changed its mind and the High Court of Punjab and Haryana issued a mandamus. Their Lordships, dislodging the order, held thus:

“It is contended that the State Government have acted arbitrarily in fixing 55 per cent as the minimum for

selection and this is contrary to the rule referred to above. The argument has no force. Rule 8 is a step in the preparation of a list of eligible candidates with minimum qualifications who may be considered for appointment. The list is prepared in order of merit. The one higher in rank is deemed to be more meritorious than the one who is lower in rank. It could never be said that one who tops the list is equal in merit to the one who is at the bottom of the list. Except that they are all mentioned in one list, each one of them stands on a separate level of competence as compared with another. That is why Rule 10(ii), Part C speaks of "selection for appointment". Even as there is no constraint on the State Government in respect of the number of appointments to be made, there is no constraint on the Government fixing a higher score of marks for the purpose of selection. In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high-standards of competence to fix a score which is much higher than the one required for mere eligibility."

21. In the case of *Madhya Pradesh Public Service Commission v. Navnit Kumar Potdar and another*, (1994) 6 SCC 293, the Apex Court has upheld that short-listing of candidates on some rationale and reasonable basis is permissible.

22. In the case at hand, as we perceive, the intention of the Commission was to get more meritorious candidates. There has been no change of norm or procedure. No mandate was fixed that a candidate should secure

minimum marks in the interview. Obtaining of 65% marks was thought as a guideline for selecting the candidate from the OBC category. The objective is to have the best hands in the field of law. According to us, fixation of such marks is legitimate and gives a demarcating choice to the employer. It has to be borne in mind that the requirement of the job in a Competition Commission demands a well structured selection process. Such a selection would advance the cause of efficiency. Thus scrutinized, we do not perceive any error in the fixation of marks at 65% by the Commission which has been uniformly applied. The said action of the Commission cannot be treated to be illegal, irrational or illegitimate.

23. Consequently, we concur with the view expressed by the learned Single Judge and dismiss the appeal without any order as to costs.

CHIEF JUSTICE

AUGUST 5, 2011
kapil / dk

SANJIV KHANNA, J.