

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

+ **LETTERS PATENT APPEAL No. 612/2011**

% **Reserved on: 1st August, 2011**
Date of Decision: 1st September, 2011

VIKAS GACHLI Appellants
Through Mr. Parvinder Chauhan, Advocate.

VERSUS

COMPETITION COMMISSION OF INDIA Respondent
Through Mr. Rajeev Saxena, Advocate.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

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

SANJIV KHANNA, J.

In the present intra-Court appeal the challenge is to the order dated 24th May, 2011 dismissing W.P.(C) No.914/2011 filed by Vikas Gachli, the appellant, against the Competition Commission of India, the respondent herein.

2. By an advertisement dated 11th November, 2009, the respondent had invited applications for appointment to 13 posts of Deputy Director (Law) including one post in the Scheduled Caste (SC) category. The appellant appeared in the written test and cleared the same and was called for interview,

but appointment letter was not issued to him on the ground that he had secured 55.25% marks in aggregate. Appointment letters were issued to candidates, who had secured at least 65% or 70% marks in the reserved category and unreserved category, respectively.

3. The contentions of the appellant can be divided into three. Firstly, the criteria that only candidates with 65/70% marks in aggregate would be appointed, imposes or fixes a new term or criteria for selection and is thus contrary to law. Reliance is placed upon *Hemani Malhotra Vs. High Court of Delhi* (2008) 7 SCC 11 and *N.T. Devin Katti Vs. Karnataka Public Service Commission* (1990) 3 SCC 157. Secondly, the aforesaid criteria has the effect of prescribing minimum qualifying marks for appointment and is, therefore, contrary to the law as expounded in the case of *Hemani Malhotra* (supra), *K. Manjusree Vs. State of A.P.* (2008) 3 SCC 512, *Durgacharan Misra Vs. State of Orissa* (1987) 4 SCC 646 and *Umesh Chandra Shukla Vs. Union of India* (1985) 3 SCC 721. Thirdly, the appellant had secured 54.24% marks in the written examination and was only awarded one mark out of 20 in the interview. This, it is submitted, shows that the interviews were not properly held and appropriate marks were not awarded to him in the interview.

4. To decide the first and second contention, the following facts may be noticed. In paragraph 7 of the invitation for applications for direct recruitment, it was stipulated as under:-

“7. 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.”

5. Before the written examination, the appellant was issued detailed instructions and it was stated in instruction Nos.4 and 9 as under:-

“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 the multiple choice questions. The second part carrying 30 marks will be distributed to the descriptive questions on the subject of your specialization within the board outline of the subject of specialization as indicated in the advertisement;

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 reserved categories, the cut off marks will be 40% of the total marks.”

6. It is not possible to agree with the contention of the appellant that the instruction 9 in the instructions to candidates dated 14th February, 2010 has been breached as the respondent decided to issue appointment letters to candidates, who have secured 65/70% marks in aggregate. Instruction 9 states that candidates, who did not secure 50/40% marks, depending upon whether they belong to general/reserved category, would not be called for interview. The said

instruction merely prescribes the minimum criteria for calling a person for interview and did not prescribe benchmark for issue of an appointment letter or selection. There is difference between two. It was not stated that the candidates who secure 50/40% marks would be selected. Similarly, instruction 4 in the instructions to candidates stipulated that the selection would be based upon a written test followed by an interview and bifurcated the marks allocated to the written test and the interview. 80% marks were allocated to the written test and 20% marks were allocated to the interview.

7. Paragraph 7 of the advertisement inviting applications enumerated that the applications received by the due date would be screened with reference to the minimum qualification criteria and suitable candidates would be short listed through a transparent mechanism and the short listed candidates would be called for interview. Merely fulfilling the minimum requirements for qualification would not entitle any applicant to be called for interview.

8. Thus, the respondent had retained the power and right to fix a minimum criteria and qualification, which would entitle a candidate to appear for interview. It was stated in paragraph 7 that from amongst the eligible candidates, suitable candidates would be short listed through a transparent mechanism and the short listed candidates would be called for interview before the final selection. Nowhere in the advertisement inviting applications or in the instructions to candidates, it was stipulated or promised that the respondent

would issue appointment letters to candidates clearing the written examination and interview with 50/40% marks. No cutoff percentage in this regard was prescribed or published. What should be the cutoff percentage or the criteria for issuing appointment letters was left to the respondent and this vested power was to be exercised by the respondent, albeit in a reasonable manner.

9. This aspect has been examined by us in LPA No. 561/2011 ***Yogesh Yadav vs. Union of India***, decided on 5th August, 2011, wherein it has been held as under:-

“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 crystallises 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.”

10. Case of *Subhash Chander Marwaha* (supra) was referred to by the Constitution Bench in *Shankarsan Dash Vs. Union of India* (1993) 3 SCC 47 and a distinction was drawn between an eligibility condition and the right to claim appointment. An eligible person cannot claim a right to be appointed on the ground that vacancies exist and they have qualified and have been able to secure the prescribed marks. It is open to the government/authorities to decide

how many appointments should be made and it has been expressly ruled that existence of vacancies does not give a legal right to even a selected candidate. Candidates fulfilling the minimum requirements do not have an indefeasible right to seek appointment. They have only the right to be considered and subject to recruitment rules to the contrary, the authorities are under no legal obligation to fill up all or any of the vacancies. However, the authorities cannot act in an arbitrary and discriminatory manner. It was accordingly held as under:-

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha*, *Neelima Shangla v. State of Haryana*, or *Jatendra Kumar v. State of Punjab*.

11. The aforesaid judgment of the Supreme Court has been followed in *State of U.P. & Ors. Vs. Raj Kumar Sharma & Ors.* (2006) 3 SCC 330; *State of*

Rajasthan and Ors. Vs. Jagdish Chopra, (2007) 8 SCC 161; *S.S. Balu and Anr. Vs. State of Kerala and Ors.*, (2009) 2 SCC 479; *State of Orissa and Anr. Vs. Rajkishore Nanda and Ors.*, (2010) 6 SCC 777.

12. In *Umesh Chandra Shukla Vs. UOI & Ors.*, (1985) 3 SCC 721, two contentions were raised and accepted. Firstly, that the moderation by way of two marks was contrary to law and the High Court had no power to include names of candidates for interview, who had not secured the minimum qualifying marks. Secondly, it was held that in view of Rule 18 of the Delhi Judicial Service Rules, 1970, the High Court could not have fixed its own minimum marks. It was held that the Rule itself laid down the minimum marks which a candidate should obtain in the written papers or in aggregate to qualify to be a member of the judicial service. Thus the Rule was violated. This is not so in the present case. No statutory rule has been brought to our notice. The terms and conditions mentioned in the advertisement and in the instructions have been quoted and explained above. These do not support the contention of the appellant.

13. The first and second contention raised by the appellant fail and have to be rejected.

14. Regarding the third contention, it is submitted that the appellant had secured only 1 mark in the interview and 54.25 marks in the written examination and, therefore, he was wrongly not given the appointment. In this

connection, it was submitted that candidates, who secured 40% marks in the written examination were treated eligible and selected for interview. Thus, a reserved category candidate with 40% in the written examination and securing 100% marks, i.e. 20 marks, in the interview would have secured 60% marks in aggregate but was ineligible for issue of an appointment letter, as he had not secured 65% marks in the aggregate.

15. The respondent has, however, submitted that the responsibility of conducting the written test was assigned to the 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 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. The Commission, regard being had to the purpose and duties of the post, decided to fix the percentage for final selection at a minimum 70 marks out of 100 for the unreserved category and a minimum 65 marks out

of 100 for the reserved category for professional categories including the post of Deputy Director (Law). The rationale behind the criteria was to select only meritorious candidates.

16. The aforesaid contention of the appellant though attractive, but has to be rejected in view of the explanation. The aforesaid criteria of 50/40% marks in the written examination was fixed before the written examination had taken place in the instructions issued to the candidates on 14th February, 2010. This was issued before the written examination so that the candidates were aware as to who would be called for interview. Calling a candidate for interview did mean that he was eligible for appointment. The respondent had retained the power and was entitled to fix the criteria for issue of appointment letters from amongst the candidates, who had cleared the written examination as well as the interview. The aforesaid contention of the appellant in fact has to be rejected in view of the reasoning given above while dealing with the contentions 1 and 2. Out of 40 candidates, who had appeared for interview, only 6 candidates were awarded marks in double digit. 34 candidates were not awarded marks in double digit. Thus, the marking in the interview was strict and stringent. The appellant had referred to the marks awarded to Neha Raj, Praachi Mishra and Vijay Kumar in the interview, but the said persons had not been made parties to the writ petition. Similarly, some allegations were made against Amit Tayal, a candidate and M.L. Tayal, a member of the Commission, but again they were not made parties

to the writ petition. There is no specific allegation against the members of the interview committee and they are also not made parties to the writ petition or this appeal.

17. It is noticed that out of 13 posts, only 5 posts belonging to general category have been filled and 4 posts belonging to general category, 3 posts belonging to OBC category and 1 post in the reserved category have not been filled up. These posts have been advertised. The explanation given by the respondent is that they want the best and meritorious persons to be appointed as Deputy Director (Law). Once the said objective is kept in mind, this argument of the appellant has to be rejected.

18. In this connection, we may reproduce the findings recorded in LPA No.561/2011 titled *Yogesh Yadav* (supra) in which we have held as under:-

“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.”

19. In view of the aforesaid, we do not find any merit in the present appeal and the same is accordingly dismissed. No costs.

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(SANJIV KHANNA)
JUDGE

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(DIPAK MISRA)
CHIEF JUSTICE

SEPTEMBER 1, 2011

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