

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

Reserved on: 20.08.2014
Pronounced on: 05.09.2014

+ W.P.(C) 4976/2014, C.M. NOS. 9954/2014 & 9955/2014

SALIL MAHESHWARI Petitioner
Through : Sh. R.K. Kapoor and Ms. S. Rama,
Advocates.

Versus

THE HIGH COURT OF DELHI AND ANR..... Respondents
Through : Sh. Rajiv Bansal and Sh. Avirai Kumar,
Advocates, for the DHC.
Ms. Sana Ansari, for Ms. Zubeda Begum, Standing
Counsel (Civil), for Resp. No.2.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIPIN SANGHI

MR. JUSTICE S. RAVINDRA BHAT

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1. In this writ petition under Article 226 of the Constitution of India, the petitioner challenges the framing of a question paper for the Delhi Judicial Service (DJS) Preliminary Examination, 2014 by the first respondent, the Delhi High Court, as being contrary to the law laid down in the case of *Gunjan Sinha Jain v. Registrar General High Court of Delhi*, in W.P.(C). No. 449/2012.

2. The writ petitioner is a law graduate who, in accordance with an advertisement dated 18.2.2014 for recruitment to the Delhi Judicial

Service (“DJS”), took the exam held on 1.6.2014. 80 vacancies were advertised, of which 55 were for the General Category of candidates. The exam was to comprise of three parts, the preliminary exam, the main exam and the interview, and a candidate was required to secure a minimum of 60%, or 120 marks out of 200, and obtain a rank within ten times the number of vacancies advertised (“the requisite number”), to be eligible for the main exam after the preliminary exam. An answer key was published by a public notice on 9.6.2014 and objections were invited to the proposed answers from the candidates, before 23.6.2014. Accordingly, the petitioner conveyed his objections by speed post on 17.6.2014 against 11 answers in the answer key. The respondent accepted 3 of the 87 objections by its public notice of 2.7.2014. Of those accepted, one had been raised by the petitioner. On 8.7.2014, the results of the exam were declared and the petitioner was awarded 126.75 marks (which was more than the 60% minimum), while the cut-off marks fixed were 128.75. Out of a total 9033 candidates in the examination, the petitioner secured the 6196th position. Despite having secured the 60% minimum, the petitioner did not find a place within the requisite number.

3. The petitioner argues that he would have cleared the second criterion as well, had the respondent framed the questions in the question paper without any ambiguity. Given that a candidate has only about 45 seconds to select the correct answer to each question, he argues that there should be no ambiguity between the choices of possible answers that are provided, to admit of the possibility of more

than one “correct” answer. The petitioner states that the responses to the objections raised in respect of questions 34, 69, 82, 84, 121, 130, 167, 168 were not satisfactory. The objections raised are that the answers in the key, to Questions 34, 69, 121, 130 are incorrect, while Questions 84, 167, 168, 82 admit of two possible correct answers. The petitioner’s case is that if these answers were correctly set and the ambiguous questions are cancelled, then the petitioner would make it to the list within the requisite number. Relying upon a decision of this Court in *Gunjan Sinha Jain v. Registrar General, High Court of Delhi*, delivered on 9.4.2012 in W.P.(C) 449/2012, it is argued that the Delhi High Court was directed to ensure that questions be clear and must provide all necessary information to arrive at the appropriate answer; questions which could have doubtful or debatable answers were not to be allowed. On this basis, the petitioner argues that the respondent should be directed to make the necessary corrections in the question paper, to cancel the questions which admit of two possible answers, and then re-evaluate the candidates and redraw the merit list for the DJS exam. The petitioner also seeks a direction to the respondent to reschedule the main examination of the DJS from the scheduled dates of 11-12 October 2014, so as to provide sufficient time for candidates who may become entitled to appear in the exam.

4. This Court, when it was seized of this matter, also heard and subsequently dismissed W.P. (C) 4974/2014, with this order:

“After some hearing, learned counsel sought liberty to withdraw the petition in view of the fact that the issues are

covered in W.P.(C.)No.4976/2014. Dismissed as withdrawn.”

5. In this writ petition i.e W.P. (C) no. 4976/2014, this Court issued notice only in respect of three of the questions objected to, as the petitioner conceded the objections against the remaining questions. By an order dated 8.8.2014, the respondent was directed to provide explanations for the answers stipulated in their answer key against C series Questions 82 (on the point of organisation of gram sabhas), 84 (on the point of the High Court being considered “State” under Article 12 of the Constitution), and 130 (on the question of how a public prosecutor can withdraw from prosecution of a case involving misappropriation of Central Government property). The respondents placed its explanations on record on the last date of hearing.

6. The respondents’ preliminarily argue against the maintainability of a challenge to the answer key for Question 82 (C series) as it was not objected to by the petitioner; the latter would thus be estopped from advancing this challenge in subsequent writ proceedings. This Court notes that the petitioner had communicated objections (Annexure P4 to the writ petition) to the model answer key, addressed to the office of the Joint Registrar (Vigilance) of this Court, in respect of Questions 114, 71, 83, 159, 185, as well as for the questions in respect of which a challenge is made in this writ petition, i.e. Questions 34, 69, 84, 121, 130, 167, 168. However, conspicuously, no objection was raised in respect of C series Question 82 (on whether gram sabhas are required to be organised under a Directive Principle

of State Policy). In WP (C) no. 4974/2014 as well, this Court notes that Question 107, in the E series question paper, which is identical to C series Question 82, was challenged. However, the petitioner in that petition had neither claimed that he had communicated objections to the respondents, nor placed on record any objections against the answer key. Therefore, it is apparent that Question 82 (C series)/Question 107(E series) was not objected to in both petitions.

7. This Court is of the opinion that the petitioner cannot be heard to challenge the answer key to a particular question, after having discovered that he was awarded no marks for his response, it being at variance with the answer key. Here, the last date for communicating objections was 23.6.2014, and the respondent released its response to the objections on 2.7.2014. The results were only published on 8.7.2014. It appears that the petitioner did not think it necessary to object to this question before the deadline for objections, but only sought to object after the results were published on 8.7.2014 by way of this petition filed on 1.8.2014. This Court finds that the petitioner was therefore estopped from raising a challenge at this belated stage, since a challenge cannot be advanced against a selection process only after the candidate has discovered his or her unsuccessful performance in the process. *See Dhananjay Malik v. State of Uttaranchal* (2008) 4 SCC 171 and *Madan Lal v. State of J&K* (1995) 3 SCC 486. Consequently, no findings will be recorded in regard to this question.

8. The High Court Establishment relies on *Himachal Pradesh Public Service Commission v. Mukesh Thakur and Anr.*, (2010) 6

SCC 759 and *Gurmehtab Singh v. State of Haryana*, in CWP No. 7570/2013 (O&M), to argue that in the absence of any provision in state or subordinate legislation authorising a re-evaluation, the Court should not direct re-evaluation. It is also submitted, based on *Kanpur University v. Samir Gupta*, (1983) 4 SCC 309, that the answer key must be presumed to be correct, unless it can be clearly demonstrated, without resorting to any inferential process of reasoning or rationalisation, that it is so patently wrong that no reasonable body of persons well-versed in the subject would regard the answer as correct. Without prejudice to these submissions, the respondent states the rationale behind the answer key for the challenged questions. C series Questions 84 reads:

“Which of the following is a State for the purpose of Article 12 of the Constitution?
(1) National Council of Educational research and training.
(2) Institute of Constitutional and Parliamentary studies.
(3) Indian oil Corporation.
(4) High Court of Delhi.”

9. According to the answer key, option (3) is the right option in accordance with *Mahabir Auto Stores v. Indian Oil Corporation* (1990) 3 SCC 752. The petitioner’s counsel, Shri R.K. Kapoor, on the other hand, submits that option (4) can also be considered “State” under Article 12, when the High Court exercises its administrative powers. The High Court establishment contends that option (4) refers to the High Court in its entirety, i.e. both the judicial as well as the administrative side of the High Court; in accordance with *Naresh Mirajkar v. State of Maharashtra* AIR 1967 SC 01 and *A R Antulay v.*

RS Nayak (1988) 2 SCC 602, the High Court in all its functions cannot be considered “State”. To mark option (4) as the correct answer would require some reasoning and rationalisation, argues the respondents. C series Question 130 reads:

“Prosecution of a case involving misappropriation of property belonging to the Central Government be withdrawn by

(1) Any public prosecutor on the direction of the State Government

(2) The public prosecutor appointed by the Central Government on the direction of the State Government.

(3) The Public Prosecutor appointed by the State Government on permission granted by the Government

(4) Any Public Prosecutor on the direction of the Central Government.”

10. According to the answer key, option (3) is the correct answer, according to Section 321 of the Criminal Procedure Code and the settled proposition that the decision to withdraw prosecution must be made solely by the prosecutor, without any influence or interference of the Government, as recognised in *S K Shukla v. State of UP*, AIR 2006 SC 413; *Rahul Agarwal v. Rakesh Jain*, AIR 2005 SC 910 and *Subhash Chander v. State*, AIR 1980 SC 423. The proviso, however, recognises that a prosecutor not appointed by the Central Government would need permission from the Central Government in order to withdraw prosecution when the property misappropriated is Central Government property. This, argues learned counsel for Delhi High Court establishment, means that public prosecutors appointed by the Central Government have the sole discretion with regard to withdrawal of prosecution, but those appointed by the State

Government, on the other hand, have no such discretion, and need Central Government approval.

11. Before recording a decision on the merits, the scope of judicial review of an answer key in a test for law graduates, such as for the DJS examination, must be recognised. The law prevailing in this regard is laid down in *Kanpur University* (supra), in respect of the answer key in a combined medical test in which the four subjects tested were physics, chemistry, zoology and botany. The Court in that case held:

“We agree that the key-answer should be assumed to be correct unless it is proved to be wrong and that it should not be held to be wrong by an inferential process of reasoning or by a process of rationalisation. It must be clearly demonstrated to be wrong, that is to say, it must be such as no reasonable body of men well-versed in the particular subject would regard as correct. The contention of the University is falsified in this case by a large number of acknowledged text-books, which are commonly read by students in U.P. Those text-books leave no room for doubt that the answer given by the students is correct and the key answer is incorrect.

17. ...Certain books are prescribed for the Intermediate Board Examination and such knowledge of the subjects as the students have is derived from what is contained in those text-books. Those text-books support the case of the students fully. If this were a case of doubt, we would have unquestionably preferred the key answer. But if the matter is beyond the realm of doubt, it would be unfair to penalise the students for not giving an answer which accords with the key answer, that is to say, with an answer which is demonstrated to be wrong.”

12. Three propositions of law emerge from *Kanpur University* (supra), on the permissible extent of judicial review of an answer key. *First*, the answer key must be presumed to be correct and must be followed, even in the face of a mere doubt, *second*, only if a key answer is demonstrably wrong, in the opinion of a reasonable body of persons well-versed in the subject, it may be subject to judicial review, and *third*, if the answer key is incorrect beyond doubt, then a candidate cannot be penalised for answers at variance with the key. This position was reiterated in *Manish Ujwal and Ors. v. Maharishi Dayanand Saraswati University and Ors.*, (2005) 13 SCC 744 and *DPS Chawla v. Union of India*, 184 (2011) DLT 96.

13. The petitioner's submission is that experts in the subject can sit in judgment over the answer key only if the question is such that it admits of a single, objective, demonstrably correct answer. The challenge in this case, however, appears to be that the two questions do not even fulfil this basic premise. In other words, the petitioner here argues that the two questions admit of two demonstrably correct answers.

14. This Court has considered the submissions. As regards C series - Question 84, the petitioner's submission was that it would be incorrect to suggest that the High Court cannot be considered "State" under Article 12, under any circumstances. This Court is not persuaded by this argument. The DJS exam is concededly advertised as a Multiple Choice Examination, i.e. one in which every question has a single demonstrably correct answer. Thus, a candidate, who

must be presumed to be aware of this, must attempt the examination keeping in mind the requirement of selecting an option as the singularly, doubtlessly correct answer. It is clear that *Chandra Mohan Khanna v. NCERT*, AIR 1992 SC 76 and *Tekraj Vasandi v. Union of India* (1988) 1 SCC 236 hold that option (1) NCERT and option (2) the Institute of Constitutional and Parliamentary Studies, respectively are not “State” under Article 12. It is also clear that option (3) Indian Oil Corporation has been unquestionably recognised as “State” in *Mahabir Auto Stores v. Indian Oil Corporation*, (1990) 3 SCC 752. So far as option (4) i.e High Court of Delhi goes, it would be incorrect to suggest, without qualification, that the High Court is “State” for the purposes of Article 12. That it would be incorrect to suggest that the High Court is not State under Article 12 under all circumstances does not merit the inference that the High Court can unreservedly be considered “State”. Without a doubt, the High Court’s judicial activities, while they are an integral part of the judicial power of the State, do not admit of inclusion as an act which falls within the description of Article 12 of the Constitution. The High Court is only “State” during exercise of its administrative and not judicial powers. The High Court, or for that matter, other courts - manifest essentially judicial power; the exercise of such power is not subject to review under Article 32 of the Constitution. High Courts have not been set up under the Constitution to primarily perform administrative tasks or duties. Option (4) then cannot be the correct answer without qualifying “High Court of Delhi” with the added criterion of “*in exercise of administrative powers*”. Contrasted with this, the Indian

Oil Corporation is, without doubt, unqualifiedly “State” for the purposes of Article 12; a candidate need not resort to any reasoning of any kind to arrive at this conclusion. This Court is compelled to observe that option (3) Indian Oil Corporation, therefore, cannot be considered to be demonstrably wrong, so as to merit reviewing the answer key.

15. Likewise, with C series - Question 130, the petitioner argues that the term “State Government” is nowhere used in the section, which merely contemplates that a Public Prosecutor not appointed by the Government needed Central Government’s permission before withdrawing prosecution. To quote from the writ petition, it is submitted that:

“A bare perusal of this section and especially of Clause (3) and clause (4) clearly shows that nowhere the word State Government is used in the section, the section merely contemplates that when the Public Prosecutor has not been appointed by the Central Government, the Public Prosecutor in such a case has to withdraw the case only with the permission of the Central Government, so the Public Prosecutor can be appointed by any Government including Central Government or State Government. Another important point to be kept in mind is this that Agencies like C.B.I. and N.I.A. can also appoint Special Counsels in certain cases, and they are not necessarily appointed by the Central or State Government. Moreover in such a case Central Government can appoint its own Public Prosecutor, who would be considered as Central Governments Prosecutor.

As per the above held discussion one can find that Section 321 (4) merely contemplates a situation where Public

Prosecutor is not appointed by the Central Government, it cannot in any way be seen as the Public Prosecutor appointed by the State Government. The provision is also a kind of a Proviso in nature.

The answer as per the key is 3 but the correct above question is incorrectly framed because even option 4 is correct and therefore objection is as to framing of question and the options given in the question. As per section 321 of Cr. P.C. any Public Prosecutor can withdraw the prosecution with permission of the, Central Government and any direction issued by the Central Government to withdraw the prosecution would in itself include the permission of the Central Government.

In the light of above held discussion, option '4' should also be taken as the correct answer, instead of option '3' only."

16. This Court finds that this submission is both incoherent and contrary to the position of law at hand. As pointed out by the High Court establishment, the response to this question is categorical and evident from the proviso to Section 321 which states the exception to the rule that a prosecutor must be uninfluenced by any Government, in his/her decision to withdraw prosecution, if she or he is not appointed by the Central Government. If the case is one of misappropriation of Central Government property, the proviso requires that the prosecutor must have the permission of the Central Government, before seeking withdrawal of prosecution. This Court is thus of the opinion that it is apparent, without advertng to any case law, that option (3) is doubtlessly and demonstrably the correct answer here.

17. Pertinently, the aforesaid two questions do not provide multiple choices of answers. The candidates had to choose only the most appropriate answer. In contrast, there are several questions which offered multiple choices of answers. For example, Question Nos. 121 and 126 provided:

“121. The categories of persons who may, without their consent be charged and tried together include persons accused of

- (1) different offences committed in the course of the same transaction.*
- (2) more than one offence of the same kind committed by them within the period of twelve months.*
- (3) Neither (1) nor (2)*
- (4) Both (1) and (2)*

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126. A criminal court, at conclusion of trial, may order

- (1) restoration of possession of immovable property to the person who had been dispossessed therefrom by use of criminal force or by criminal intimidation by the person convicted.*
- (2) the destruction of pornographic material in respect of which conviction was recorded.*
- (3) Both (1) and (2)*
- (4) Neither (1) nor (2)”*

18. The petitioner’s submissions that the options picked by him are also possible answers cannot, therefore, be accepted.

19. The High Court establishment argued that a Court cannot direct re-evaluation of answer sheets in absence of rules/regulations

permitting the same, drawing from *Mukesh Thakur* (supra). The position of law was crystallised in a series of precedents beginning with *Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupesh Kumar Sheth*, (1984) 4 SCC 27, in which the Court held that a court cannot direct re-evaluation (by striking down rules prohibiting it) on the ground that every student has the right to receive marks fairly and in a manner commensurate to his or her performance. The Court held that it could not create a right of inspection, disclosure, and re-evaluation of answer sheets in light of the express rule that forbade re-evaluation while only permitting verification of answer sheets (whether all questions have been awarded marks and the marks have been totalled correctly, etc.) Under similar circumstances, the Court held in *Pramod Kumar Srivastava v. Bihar Public Service Commission*, (2004) 6 SCC 714 that in absence of a rule permitting re-evaluation, it could not direct re-evaluation given that safeguards are in place to ensure that answer books are not tampered with and that a uniform method is used for marking all the answer books of various candidates. Pertinently, it was observed that if courts started directing re-evaluation, then candidates would start approaching courts to “take a chance” and seek re-evaluation through writ proceedings; courts would then direct individual answer books back to the evaluation committee for a second opinion, which would ultimately add to delays in declaration of final results. Should some candidates secure lower marks on re-evaluation, there would no rules clearly stating whether the marks after re-evaluation would be binding, thus leading to an impractical situation in an area where the rules are

nebulous at best, and non-existent at worst. These are the reasons for which re-evaluation in particular is not permitted by Courts, where the rules do not admit of such a mechanism. The concern of the Courts in these cases has been to prevent facilitating re-evaluation claims randomly and arbitrarily, by candidates who are willing to venture a chance that their answers might receive higher marks than initially awarded. In these cases, there was neither an objective answer key which indicated the single, correct answer for each question, nor was there a procedure by which candidates could apply for disclosure or inspection of their answer books, once marked, to check whether they were unfairly denied marks, even after supplying the “correct answer”.

20. In matters of judicial review which involve examination of academic content and award of marks, the previous rulings of the Supreme Court and other authorities have cautioned a circumspect approach, leaving evaluation of merits to the expertise of academics. However, if the approach complained of falls within the traditional parameters of judicial review – i.e illegality, irregularity; non-consideration of material facts or consideration of extraneous considerations; or lack of *bona fides* in the decision making process as contrasted with the decision itself, the action or decision can be corrected in judicial review. The last category is where the decision is so manifestly and patently erroneous that no reasonable person, similarly circumstanced, could have taken it, the court would intervene. *Maharashtra State Board of Secondary and Higher Secondary Education & Anr. Vs. Paritosh Bhupesh Kurmarsheth*

etc.etc. AIR 1984 SC 1543 is an authority for the proposition that the wisdom of the policy maker in regard to providing for re-valuation or denying it, is not within the domain of the court in judicial review. This general circumspection in exercising power under Article 226 of the Constitution, even in matters where the subject matter fell within the expertise of the court (such as pertaining to law subjects, etc) was spelt out in *H.P. Public Service Commission v Mukesh Thakur* (2010) 6 SCC 759. The said appeal was decided by the Supreme Court by judgment dated 25.5.2010 as follows:

“In view of the above, it was not permissible for the High Court to examine the question paper and answer sheets itself, particularly, when the Commission had assessed the inter-se merit of the candidates. If there was a discrepancy in framing the question or evaluation of the answer, it could be for all the candidates appearing for the examination and not for respondent no.1 only. It is a matter of chance that the High Court was examining the answer sheets relating to law. Had it been other subjects like physics, chemistry and mathematics, we are unable to understand as to whether such a course could have been adopted by the High Court..”

21. In this the Court is compelled to conclude that the question of re-evaluation does not arise for consideration in the matter at hand, since the examination in question comprised only Multiple Choice Question (“MCQ”). What this writ petition seeks is a declaration that the answer options provided in the MCQs admit of two possible answers, and are thus ambiguous. *If a Court were to find that the key answers are indeed incorrect, or that more than one key answer could*

be correct, then there arises no question of “re-evaluation”. This is because such an examination with MCQs is premised on the basis that there is only one, objective, correct answer to every question. As recognised in *Kanpur University* (supra):

“18. ... Fourthly, in a system of 'Multiple Choice Objective- type test', care must be taken to see that questions having an ambiguous import are not set in the papers. That kind of system of examination involves merely the tick-marking of the correct answer. It leaves no scope for reasoning or argument. The answer is 'yes' or 'no'. That is why the questions have to be clear and unequivocal.”

22. The very finding that a key answer is not the objective, single, correct answer of the four options provided, and that another answer is “correct” according to those well-versed in the subject, itself would merit the awarding of additional marks to candidates who had chosen the latter answer. There arises no need to “evaluate” or examine a response of a candidate for a second time, since all candidates who have answered in accordance with the answer key that the experts in the field affirm, are automatically entitled to the award of additional marks. The precedents on re-evaluation are only applicable in the context of examinations which permit subjective written answers, and not objective, multiple-choice questions that permit the selection of just one “correct” answer. There would be no infirmity in the approach of a Court that directs reassessment, such as in *Kanpur University* (supra) itself, on the ground that the answer key is incorrect. In the present case, this court has recorded findings on each of the three questions, to say that the answer keys used for correcting the question

papers used one single correct answer; the alternative options cannot be said to be unambiguously clear answers, so as to result in confusion on the part of the examinee, who attempted the preliminary test.

23. For the above reasons, the writ petition is dismissed along with the pending applications, without any order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**VIPIN SANGHI
(JUDGE)**

SEPTEMBER 05, 2014

