

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO. 9849 OF 2015

SHRINIVAS SURESHRAO KULKARNI
VERSUS
STATE OF MAHARASHTRA AND ANR.

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Advocate for Petitioner : Mr. P.G. Deshmukh h/f Mr. Y.P.
Deshmukh & Mr. H.A. Joshi
AGP for Respondent/State : Mr. V.H. Dighe

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CORAM : S.S. SHINDE & A.M. BADAR, JJ.

Dated: October 09, 2015

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PER COURT :-

This Petition is filed with following prayers :-

“B) By issue of writ of certiorari or any other appropriate writ, order of like nature, the proviso to Rule 6(1)(e) which says that only such candidate who obtains at least 40% of marks in viva voce test shall be eligible for selection of Maharashtra Judicial Service Rules, 2008 (Exh-J) & condition incorporated in advertisement No.A-5504/2014 to fill up 17 posts of District Judge (Exh-A) be declared as unconstitutional and the same may kindly be struck down.

C) By issue of writ of mandamus or any other appropriate writ, order or directions of like nature, non-selection of petitioner may kindly be declared as illegal and the same may kindly be quashed and set-aside and direction may kindly be issued to respondents to include the name of petitioner in the list of selected candidate at appropriate place on the basis of order of merit.

2. The learned counsel appearing for the petitioner submits that, the petitioner stood first in the written examination and giving less than 40% marks to the petitioner, who stood first in the written examination, is most unjust, unfair and arbitrary. It is further submitted that, proviso to Rule 6(11)(e) which makes condition precedent of securing at least 40% marks in viva voce test to be eligible for selection is itself arbitrary, unreasonable and has no nexus with the object to be achieved. It is submitted that, the object is to select more meritorious candidate for the post of District Judge and the basis of merit as per Rule 3(a) is cumulative marks secured by a candidate. It is submitted that, if the marks obtained by the petitioner in written examination and that of the viva voce test as it

stands are taken together, the petitioner would definitely find place in the merit list because it is gathered from the personal knowledge of the petitioner that even the candidates securing around 101 marks in written examination are selected for the post of District Judge and they were called for verification of documents by law and judiciary department. It is submitted that, the recruiting authority is required to prepare list of eligible candidates for appointment in order of merit on the basis of cumulative marks secured by a candidate but such a list is not prepared or not supplied to the petitioner. It is submitted that, by providing 40% marks as minimum marks for viva voce test are the arbitrary and unguided powers vested with the committee, which gives a power to exclude the most meritorious candidate who obtained the highest marks like the petitioner in the written examination from zone of consideration for selection. Vesting of such power is violative of Article 14 of the Constitution of India, as the arbitrariness and legal malafides are possible to crept in. It is submitted that, if the candidates more than 17 are given appointment orders and if the selection process is made for more than 17 vacancies on the basis of same examination and interview, it

would be contrary to law laid down by the Apex Court. It is submitted that, it has been the regular feature and experience also that the candidate securing highest marks in written examination had been preferred for selection to the post of District Judge, however, the non selection of the petitioner is exception to the said regular feature and experience. It is further submitted that, the nature of selection process makes the stages of preliminary examination and written examination at second place and the viva-voce at first place. The stages of preliminary examination and written examination rendered less importance in the present selection process and only the fate of candidate made dependable only on the marks secured in viva-voce.

3. The learned A.G.P. appearing for Respondent No.1 invited our attention to the relevant rules and submits that, the relevant rule provides for 40% as a minimum marks for viva voce test, and also such condition was incorporated in the advertisement, and therefore, the Petition is devoid of any merits and same may be rejected.

4. We have heard the learned counsel appearing for the petitioner and the learned A.G.P. appearing for the Respondent/State. With their able assistance, we have perused the pleadings and grounds taken in the Petition, annexures thereto and also the relevant rules.

5. It is not in dispute that, the petitioner did not secure 40% marks in viva voce test. Out of 50% marks earmarked for the viva voce test, the petitioner secured only 18.6 marks. The condition no.7 in the advertisement to secure 40% marks in viva voce test is based on proviso to Rule 6(11) (e). The said Rule 6(11)(e) reads thus :-

“6(11)(e):- The candidate applying for being appointed by nomination who secures not less than 50 marks in each paper and not less than 60% of marks in aggregate shall be eligible for viva voce carrying 50 marks;

Provided that the Scheduled Castes and Scheduled Tribes candidates who secure not less than 45% marks in each paper and not less than 50% of marks in aggregate shall be eligible for the viva voce;

Provided further that, the Recruiting Authority shall call the candidates for viva voce in the ratio of 1:3 of the available vacancies to the successful candidates:

Provided also that if there are more than one candidates have secured identical cutoff marks as fixed by the Recruiting Authority for maintaining the ratio of 1:3, all such candidates shall be called upon to appear for viva voce:

Provided also that only such candidate who obtains at least 40% of marks in viva voce test shall be eligible for selection.”

6. Another relevant Rule 12(f) reads thus :-

12(f) The object of the viva voce examination under these Rules is to assess the suitability of the candidate for the cadre by judging the mental alertness, knowledge of law, clear and logical exposition, balance of judgment, skills, attitude, ethics, power of assimilation, power of communication, character, intellectual depth and the like of the candidate.

7. Therefore, the relevant condition in the

advertisement that, only such candidate, who obtains at least 40% of marks in viva voce test shall be eligible for selection, cannot be said to be arbitrary. In fact, the petitioner has undergone the selection process and he is unsuccessful candidate. The Supreme Court in the case of **Dhananjay Malik & ors V/s State of Uttaranchal and others**¹ in paras 8 and 9 held thus :-

“8. In Madan Lal vs. State of J & K, (1995) 3 SCC 486, this Court pointed out that when the petitioners appeared at the oral interview conducted by the members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned, the petitioners took a chance to get themselves selected at the said oral interview. Therefore, only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed writ petitions. This Court further pointed out that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not

1 AIR 2008 SC 1913

properly constituted. In the present case, as already pointed out, the writ petitioners-respondents herein participated in the selection process without any demur; they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance with the Rules they could have challenged the advertisement and selection process without participating in the selection process. This has not been done.

9. In a recent judgment in the case of Marripati Nagaraja vs. The Government of Andhra Pradesh, (2007) 11 SCR 506 at p. 516 SCR this Court has succinctly held that the appellants had appeared at the examination without any demur. They did not question the validity of fixing the said date before the appropriate authority. They are, therefore, estopped and precluded from questioning the selection process.”

8. The contention of the learned counsel appearing for the petitioner that, the Respondents ought to have selected the petitioner by calculating the marks secured in written examination and viva voce, deserves no consideration in view of the specific condition in the advertisement and also proviso to Rule 6(11)(e) that, only

such candidate who obtains at least 40% marks in viva voce test shall be eligible for selection. As already observed, the petitioner has secured only 18.6% marks out of 50% marks. In that view of the matter, we do not see any merit in the Petition and hence the Petition stands rejected.

(**A.M. BADAR, J.**)

(**S.S. SHINDE, J.**)

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