

THE HON'BLE THE CHIEF JUSTICE SRI KALYAN JYOTI SENGUPTA
AND
THE HON'BLE SRI JUSTICE SANJAY KUMAR

Writ Petition No.38252 of 2014

and

Writ Petition No.38687 of 2013

Dated: 25.03.2015

-

In W.P.No.38252 of 2014:

Between

1. P. Murali Mohana Reddy
2. Smt. Seeram Sarada Devi
3. Smt. Busi Reddy Sunitha Petitioners

And

1. The State of Andhra Pradesh, Law (LA & J SC.F) Department,
Rep. by its Chief Secretary to Government of Andhra Pradesh,
Secretariat, Hyderabad., and 3 others. Respondents

In W.P.No.38687 of 2013:

Between

Mrs. G. Bhuvaneswari Raju Petitioner

And

1. The High Court of Andhra Pradesh, rep. by its
Registrar General, Hyderabad, and two others. Respondents

THE HON'BLE THE CHIEF JUSTICE SRI KALYAN JYOTI SENGUPTA

AND

THE HON'BLE SRI JUSTICE SANJAY KUMAR

Writ Petition No.38252 of 2014

and

Writ Petition No.38687 of 2013

-

COMMON ORDER: (Per the Hon'ble The Chief Justice Sri Kalyan Jyoti Sengupta)

Both the writ petitions are taken up for hearing analogously in order to dispose of the same by a common order as the issues on fact and law are identical therein.

2. Bereft of unnecessary and irrelevant facts mentioned in the writ petitions, the fact which is relevant for our purpose is stated hereunder:

3. The petitioners and each of them were successful in the test conducted for *ad hoc* appointment of District & Sessions Judge (Entry Level) to preside over the Fast Track Courts (hereinafter referred to as, 'FTC') on 14.10.2003, in terms of Rules of Andhra Pradesh State Higher Judicial Service Special Rules

for *Ad hoc* Appointments, 2001, and since then they have been working in the said posts. According to them, they were entitled to be absorbed permanently as District & Sessions Judge (Entry Level) in view of the length of service. They demanded absorption unsuccessfully both in and outside Court before the appropriate authorities. However, ultimately, the Supreme Court in the case of *Brij Mohan Lal v. Union of India* [(2012) 6 SCC 502] laid down the procedure for the absorption that had hitherto been claimed by the petitioners. In the said judgment, automatic absorption has not been provided for by virtue of length of service alone. In that case, Supreme Court laid down the modalities viz., further test, both written and *viva voce*, and such test must be preceded by advertisement inviting applications for taking tests for absorption from the eligible candidates. Accordingly, all the four petitioners, in response to the notification dated 13.8.2012, along with other candidates applied for taking the test in order to be absorbed. In the advertisement, it was mentioned as follows:

Viva Voce (Interview): 100 marks

Minimum qualifying

marks to be secured: Qualifying marks in the written examination shall be 40% aggregate for general candidates and 35% for SC/ST/BC candidates.

Each of the appointees shall be entitled to one mark per year of service in the FTCs, which shall form part of the interview marks.

4. The petitioner in W.P.No.38687 of 2013 belongs to BC-A category, as such she was required to secure 35% qualifying marks in the written examination going by the above stipulation. However, the writ petitioners in the other writ petition (W.P.No.38252 of 2014) belong to other categories and were required to secure 40% qualifying marks. All the writ petitioners duly secured the minimum qualifying marks in the written test, as such they were invited to take *viva voce* test. According to them, in spite of securing qualifying marks in the written test, and taking *viva voce* test they were not selected for appointment. No reason has been disclosed as to why they were not selected. All the writ petitioners say that, going by the norms in the advertisement published in the

newspaper and read with the relevant Rule, they were entitled to be absorbed the moment they qualified in the written test followed by attending *viva voce* test. The writ petitioners and each of them state that refusal to absorb them has no basis and the same is discriminatory, and also not in accordance with the rules.

5. Counter-affidavit has been filed by the respondents 3 & 4 in W.P. No.38252 of 2014 (respondents 1 & 2 in W.P. No.38687 of 2013) who were responsible for holding the selection test. The major factual aspect has not been denied and disputed by these respondents in their counter-affidavits. In order to justify the exclusion of the petitioners from the consideration zone for absorption, it is stated as follows:

The Hon'ble Supreme Court specified the mode and manner in which the Fast Track Court Judges ought to be absorbed in the State Judicial Service and the relevant directions are as follows:

- i. Written examination is to be conducted for 150 marks.
- ii. Interview is to be conducted for 100 marks.
- iii. Qualifying marks in the written examination shall be aggregate 40% for General Candidates and 35% for SC/ST/OC candidates.
- iv. Each of the appointees shall be entitled to one mark per year of service in the FTCs, which shall form part of the interview marks.

6. In pursuance of the direction of the Hon'ble Supreme Court, the High Court placed the matter before the Administrative Committee in the meeting held on 9.8.2012 and the Committee resolved to issue a notification calling for applications from the working *Ad hoc* Fast Track Court District Judges and directed to conduct a written examination with syllabus. Accordingly, notifying the same in the official website of the High Court on 13.8.2012, applications from working/former *Ad hoc* Fast Track Court Judges were called for. All the 19 working/former *Ad hoc* Fast Track Court Judges submitted their applications in response to the same.

7. The answer scripts of the participating candidates were evaluated, and in order to invite the qualified candidates to take oral test on 27.11.2012, the Committee concerned found and resolved that out of 19 candidates, 17 candidates were qualified for interview and as such they were called on 17.12.2012 and 18.12.2012 for taking the *viva voce* test. Two more candidates, in terms of interim orders of the High Court, were also called for interview on 26.12.2012. The performance of the candidates was placed before the Committee of Hon'ble Judges and considering the same it was found and resolved that 12 candidates were eligible to be appointed as regular Additional District Judges, leaving out the present petitioners. It is further stated that the petitioners herein had to secure minimum 40% qualifying marks out of 250 marks in total i.e., 100 marks in general category. The 1st petitioner in W.P.No.38252 of 2014 secured 63 marks in written examination and 26 marks in oral interview totalling 89 marks, and the 2nd petitioner secured 60.5 marks in written examination and 38.8 marks in oral interview totalling 99.3 marks, whereas the 3rd petitioner in the same writ petition secured 67.5 marks in written examination and 32.2 marks in oral interview totalling 99.7 marks out of 250 marks respectively. Thus the writ petitioners did not secure the minimum 40% qualifying marks of 250 marks in total as laid down by the Supreme Court of India for absorption. Similarly, it is stated that the writ petitioner in W.P.No.38687 of 2013 secured 53 marks out of 150 marks in the written examination. However, she secured 20 marks out of 100 marks in oral test and 8 marks were added towards her service. Accordingly she got 28 marks in *viva voce*.

8. The learned counsel for the petitioners submits that it is clear from the affidavit that the petitioners and each of them were excluded from the consideration zone for absorption as they could not secure the qualifying marks in *viva voce* test, and the aggregate qualifying marks of 40% and 35% respectively. He says that neither the rules nor the judgment of the Supreme Court lay down the norm of a qualifying mark in the *viva voce* test. Even in the advertisement, such a norm was not published and it was later on stipulated unilaterally in derogation of the rules as well as the judgment of the Supreme Court. According to him, it was not a case of selection but absorption and the

tenor of the judgment in *Brij Mohan Lal v. Union of India* makes it clear that primacy should be given to the experience, because of length of service put in by the Fast Track Court Judges as they were recruited after having gone through the screening test once. There is no mention in the rules that the aggregate qualifying marks of 40% is to be a criteria. Therefore, norms were laid down for screening without being informed and it was done at the time of evaluation of the performance only and it is arbitrary, consequently unconstitutional.

9. In support of his submission, the learned counsel for the petitioners has relied on a number of decisions of the Supreme Court and they are as follows:

10. In the case of *A.A. Calton v. Director of Education*, the Supreme Court laid down the legal principle that a candidate's selection is to be done only on the basis of the original advertisement.

11. In the case of *Umesh Chandra Shukla v. Union of India*, the Supreme Court expounded the legal proposition that the High Court has no power to act contrary to the recruitment rules while undertaking selection process.

12. In the case of *N.T. Devin Katti v. Karnataka Public Service Commission*, the Supreme Court stated the legal proposition that the candidates who apply and undergo written or *viva voce* test acquire a vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has a 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. A candidate on making an application for a post pursuant to an advertisement does not acquire any vested right of 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 of being considered for selection in accordance with the Rules as they existed on the date of the advertisement. He cannot be deprived of that limited right on the amendment of rules during the pendency of the selection unless the amended rules are retrospective in nature.

13. He concluded that in terms of the advertisement and also the rules, the petitioners and each of them secured qualifying marks in the written test, the performance in the *viva voce* test is immaterial and they should have been absorbed taking note of their performance in the written examination.

14. The learned counsel for respondents 3 & 4 submits that in terms of the stipulation given by the Supreme Court in *Brij Mohan Lal's case (1 supra)*, the Selection Committee found that the petitioners and each of them could not secure 40% qualifying marks in *viva voce* and also the consolidated qualifying marks both in written and *viva voce* tests. He drew our attention to clause (c) of paragraph 207.9 of the report in case of *Brij Mohan Lal's case (1 supra)* wherein it is provided as follows:

“There shall be 150 marks for the written examination and 100 marks for the interview. The qualifying marks shall be 40% aggregate for general candidates and 35% for SC/ST/OBC candidates. The examination and interview shall be held in accordance with the relevant Rules enacted by the States for direct appointment to Higher Judicial Services.”

15. Following the aforesaid direction, the Hon'ble Committee laid down 40% of qualifying marks in *viva voce* also. Therefore, there is nothing wrong in the decision of excluding the petitioners as they did not qualify in the *viva voce* test nor they did secure aggregate qualifying marks of 40%.

16. In view of the aforesaid contention and rival contention of the parties and on the revelation of facts, it appears to us that there is no dispute that the petitioners and each of them qualified in the written test securing the minimum qualifying mark as published in the advertisement and in accordance with the rules. We have already set out the norms published in the notification. Now, we

need to set out the Andhra Pradesh State Judicial Service Rules, 2007, to the extent relevant, which were in effect on the date of selection.

6. Methodology for conducting examination:

(1) The High Court from time to time shall notify the number of vacancies for the category of District Judges to

be appointed by direct recruitment indicating *inter alia*, the eligibility criteria, the syllabus, the number of marks allotted for written examination, the qualifying mark to be secured by a candidate, the number of marks allotted for the viva voce and the minimum to be secured therein by the candidate.

Provided that owing to the contingency it shall be open to the High Court to conduct a screening test which shall be objective type before conducting the written examination followed up by viva voce after duly notifying the same.

(2) While the written examination is meant to test the academic knowledge of the candidate, the viva voce is to test his communication skills; his tact; ability to defuse the situations to control the examination of witnesses and also lengthy irrelevant arguments and the like; and his general knowledge.

(3)

(4) The written examination shall invariably carry 80 marks limiting the viva voce to the remaining 20 marks.

Provided that the candidate shall secure a minimum qualifying mark of 40% for O.C. category, 35% for B.C. category; and 30% for S.C. and S.T. category in the written examination. (*as amended by G.O.Ms.No.132, dated 16th November, 2011*)

(5)

(6)

(7)

(8)

(9)

(10)

17. Thus, it will appear, neither in the advertisement nor in the rules, there is any stipulation for securing minimum qualifying marks in *viva voce* test in order to secure aggregate qualifying marks. Even in the Rules, there is no mention about minimum aggregate qualifying marks.

18. The contention of the learned counsel for the third and fourth respondents is that the aforesaid stipulation in *Brij Mohan Lal's case (1 supra)* authorizes the Selection Committee to stipulate such qualifying marks in *viva voce* and aggregate qualifying marks as well.

19. If the said clause (c) of paragraph 207.9 is read as a whole, which was set out hereinbefore, it will appear that the qualifying marks shall be 40% aggregate for general candidates and 35% for SC/ST/OBC candidates. It does not mention about qualifying marks in *viva voce*. The examination and interview were also to be held in accordance with the relevant Rules enacted by the States for direct appointment to Higher Judicial Services.

20. While reading the above pronouncement of Supreme Court harmoniously with the Rule, we think the following procedure would have been a fair one, as the said judgment has not ignored, rather accepted the relevant Rules:-

- (i) Written test would be for 150 marks.
- (ii) Viva voce would be for 100 marks.
- (iii) Candidate has to secure minimum 40% qualifying marks in written test.
- (iv) Candidate has to participate in *viva voce* test.
- (v) Securing qualifying marks in *viva voce* or in aggregate are not the requirements.

21. Therefore, we are of the view that the Selection Committee should not have adopted the norm of securing a minimum qualifying mark in the *viva voce* test or for that matter, minimum aggregate qualifying marks.

22. Moreover, it is rightly contended by the learned counsel for the petitioners, relying on the aforesaid judgment of Supreme Court in *Umesh Chandra Shukla v. Union of India* (3 supra) and *A.A. Calton v. Director of Education* (2 supra), that the respondents and each of them cannot act contrary to the norms as published in the advertisement or the Rules and admittedly, the advertisement does not stipulate a minimum qualifying mark for the *viva voce* test or that of aggregate marks both in written and *viva voce* test. As the petitioners and each of them, in terms of the advertisement as well as the rules, have acted upon and that they acquired a vested right to be considered in terms of the advertisement and the rules.

23. It is not that the norms cannot be changed or varied, but this has to be done in terms of the statutory rules. If they do not permit, the Selection Committee cannot lay down the same as it will be *ultra vires*.

24. Moreover, as it appears from the original record produced before us, we find that the assessment was made on the basis of minimum qualifying marks in the aggregate as well as in *viva voce* tests and it does not appear that the aforesaid norms were ever published.

25. In case of *K. Manjusree v. State of A.P.*, the Supreme Court in paragraph-27 it was held amongst others as follows:

27. Therefore, introduction of the requirement of minimum marks for interview, after the entire selection process (consisting of written examination and interview) was completed, would amount to changing the rules of the game after the game was played which is clearly impermissible.”

In paragraph-33 of the said report, it is observed as follows:

33. Therefore, extending the minimum marks prescribed for written examination, to interviews, in the selection process is

impermissible. We may clarify that prescription of minimum marks for any interview is not illegal. We have no doubt that the authority making rules regulating the selection, can prescribe by rules, the minimum marks both for written examination and interviews, or prescribe minimum marks for written examination but not for interview, or may not prescribe any minimum marks for either written examination or interview. Where the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the Selection Committee prescribed minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview.

26. Thus, it is clear from the above pronouncement that the concept of estoppel has been applied by the Supreme Court in a case of this nature. To put it differently, the Selection Committee must stick to the norms published at the time of commencement of the selection process. In the case on hand, it is not only a question of estoppel but a case of non-application of the law also.

27. Again in the case of *Hemani Malhotra v. High Court of Delhi*, the Supreme Court in paragraph-14 has observed by way of reiteration of the statement of law in *K. Manjusree v. State of A.P.* (5 supra) as follows:

14. The question, therefore, which arises for consideration of the Court is whether introduction of the requirement of minimum marks for interview, after the entire selection process was completed would amount to changing the rules of the game after the game was played.

Therefore, prescribing minimum marks for viva voce was not permissible at all after the written test was conducted.

28. In the case of *State of Bihar v. Mitilesh Kumar*, the Supreme Court in

paragraph-20 of the report has laid down the law as follows:

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.

29. In the case of *Arunachal Pradesh Public Service Commission v. Tage Habung*, the Supreme Court in paragraph-31 says as follows:

31. It is now well settled that fixing the qualifying marks in the viva voce test after the commencement of the process of selection is not justified but fixing some criteria for qualifying a candidate in the written examination is necessary in order to shortlist the candidates for participating in the interview.

30. Therefore, it emerges after reading of the aforesaid authoritative pronouncements of the Supreme Court that if the rules do not permit to adopt any different criteria, the Selection Committee cannot fix of its own. The minimum qualifying marks in the *viva voce* test cannot be laid down after the written test is over. However, it is possible before commencement of the selection process, provided it conforms to the rule.

31. In view of the aforesaid discussion, we hold that the decision of the Selection Committee declaring that the petitioners and each of them are not eligible to be absorbed for not securing the minimum qualifying marks in *viva voce* or aggregate qualifying marks in written and *viva voce* is illegal and arbitrary. Therefore, we direct the respondents to appoint the petitioners and each of them as they have qualified in the written test and have also taken *viva voce* test. This appointment shall be made within a period of one month from the date of communication of this order, subject to compliance with other

formalities as required under law.

32. Both the Writ Petitions are accordingly allowed.

There will be no order as to costs. The records produced before us by the Registry shall be returned.

Consequently, pending miscellaneous petitions, if any, shall also stand closed.

Kalyan Jyoti Sengupta, CJ

Sanjay Kumar, J

Dt. 25.03.2015

Note:- LR copy to be marked.

(B/O)

gbs