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

Decided on : 24.11.2015

+ **LPA 155/2013**

VARUN BHARDWAJ

.....Appellant

Through: Mr. Shanker Raju with Mr. Nilansh Gaur,
Advocates.

Versus

STATE BANK OF INDIA AND ORS.

.....Respondents

Through: Mr. Vikas Singh, Sr. Advocate with Mr. Rajiv
Kapur, Advocate, for SBI.

Mr. Vipin. K. Chilana, Professor (Psychometrics) and
Division Head, IBPS, Mumbai.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This letters patent appeal is preferred by an unsuccessful writ petitioner whose claim was rejected by a learned single judge in his judgment dated 06.02.2013. The appellant had sought for a direction that the results of his examination in the recruitment process/selection of candidates, conducted by the State Bank of India (SBI), should be declared.

2. The appellant completed his Bachelor in Arts and applied for the position of clerk in the SBI in September 2009 as a General Candidate. He later received a call letter to appear in the written examination from SBI. The appellant appeared in the written examination on 15.11.2009. He claims to have performed diligently and to the best of his abilities. The appellant

submits that he did not receive any response thereafter from the SBI with respect to the result of the examination. He sought a response under the Right to Information Act [RTI]. The SBI did not share any information which led to the filing of an appeal. On 04.02.2011 the Appellate Authority issued an order directing the Public Information Officer to provide the appellant a copy of his mark sheet that had been sought by him. Later this order was amended on 24.02.2011. In these circumstances the appellant approached this Court for a direction that his result in the examination should be declared and that he should be appointed to the post of clerk with all consequential benefits.

3. The SBI resisted the writ petition and contended that the appellant's candidature could not be accepted. In so doing it relied upon the report submitted by the Institute of Banking Personnel Selection (IBPS). The SBI was of the opinion that the petitioner's attempt in the recruitment process was vitiated by adoption of unfair means. The SBI alleged that a number of wrong answers given by the petitioner were identical to the wrong answers given by two other candidates. SBI did concede that the appellant was not found using unfair means; however it contended that the scientific basis for the IBPS report, led it to have a reasonable suspicion that he did use unfair means, thus entitling it to deny appointment to the petitioner.

4. The SBI contended in the course of the hearing before the learned single judge that the IBPS report led to the cancellation of candidature of 976 candidates who appeared in the test and that in such cases use of unfair means was strongly suspected. SBI admitted that though the candidates suspected to have copied or used unfair means appeared in different venues and centers, there were prevailing rampant practices whereby such

candidates were caught using mobile phones while attempting to answer the question papers. SBI revealed that the written tests held in the centres of Hissar, Ambala and Karnal witnessed large-scale use of unfair means by candidates while attempting to answer question papers. Candidates in fact admitted and confessed to using mobile phones/ SMS texting the answers even though they were sitting at different centers.

5. The learned single judge after considering the bank's plea was of the opinion that it had applied a scientific test on a uniform basis and that the test was devised by IBPS. The single judge – in the impugned judgment also took note of SBI's contention that the probability levels of a pair of candidates attempting the wrong answers simultaneously and which worked with respect to questions containing 5 similar choices were 0.25^{12} or 0.000000059. The single judge accepted the contention that the Appellant had 6 identical wrong answers with one candidate and 7 identical wrong answers with another candidate. The probability of such matching was far lower i.e. 0.000000003. After so discussing the petitioner's performance, learned single judge went on to hold that courts cannot suggest to expert bodies the rationality of tests applied to institutions to discern the use of unfair means.

6. Although the learned single judge admitted the possibility of the greatest coincidence of the appellant not having used unfair means, he nevertheless held that once SBI uniformly applied the IBPS test, as it did in the present case, the court would not interfere or intercede on behalf of one candidate as that would lead to the quashing of the application of the IBPS test used by SBI. After so concluding the learned single judge dismissed the appellant's writ petition.

7. The appellant contends and his counsel argues that the single judge fell into error in not appreciating that the criteria involved by the IBPS i.e. considering similarity and wrong answers attempted by different candidates could only be treated as suspect cases and in cases of those sitting in different venues and centers, the criteria were evolved earlier had been the use of mobile phones for communication between the candidates. This afforded an objective basis for cancellation of the candidature of one individual or the other. What was emphasized by the learned counsel Mr. Shankar Raju was that no material or objective evidence was established to link the appellant or other individuals with the use of unfair means. The SBI adopted a methodology based upon application of a statistical model. This, urged counsel, was arbitrary and could not have been the basis for a cancellation of the candidature of someone who had the question paper attempted to the best of his ability and knowledge. It was next highlighted that even though the single judge accepted that the appellant was not sitting in the same center of its other candidates whose answer sheets matched with his, nevertheless the single judge presumed without any basis and held that the technology and means of communications being sophisticated, it most probably led to the use of unfair means in the present case. This highlighted counsel was an unsustainable fact-finding based on no evidence. Learned counsel next relied upon the decision of the Supreme Court in *State Bank of India v. Palak Modi* 2013 (3) SCC 607 to say that the use of a similar IBPS model based for cancellation action was held to be unsustainable in law.

8. Mr. Raju submitted that mere application of a principle or method *ipso facto* cannot result in fair application. Rather it amounted to uniform application of an arbitrary and irrational principle which led to the

appellants' victimization and stigmatization as one using unfair means. Stressing that the SBI was unable to link the appellant and his answer sheet with any tangible material suggestive of use of unfair means, learned counsel stated that nothing short of an inquiry or the candidate being caught red-handed or admitting to the use of unfair means could have been the basis of cancellation of result and candidate check. Therefore submitted counsel the impugned judgment is unsustainable and has to be set aside.

9. SBI submits that the IBPS is an autonomous body; registered as a Public Trust under the Bombay Public Trust Act of 1950; and part of the Scientific and Industrial Research Organization, the Department of Scientific and Industrial Research, Ministry of Science and Technology, Government of India. The IBPS became an independent entity at the behest of Reserve Bank of India- (RBI) and Public Sector Banks. SBI relies upon a written description of the method used by IPBS. The basis of suspecting use of unfair means was that there were identical wrong answers (IWW) 6/7 (for 50 items test) in Marketing Aptitude/ computer knowledge. Copy of the analytical data prepared by the IBPS, was annexed to the reply filed in the writ petition.

10. It is stated that in the multiple choices objective type tests used by IBPS:

"there are 5 choices/ alternative answers to each question out of which one is correct answer and the other four are wrong answers. As far as possible all choices are made attractive enough; therefore, if the candidate does not happen to know the correct answer he would select one of the four wrong answers by chance. Thus, probability of picking a particular wrong answer is out of four or 1/4 (or 0.25). Similarly, if the other candidate of the pair also does not happen to know the right answer to the

same question he would also happen to select one of the 4 wrong answers. Therefore, the occurrence of one question with identical wrong answers by a pair of candidates will be $=1/16 = (1/4)^2 = (0.25)^2$. Similarly the probability of a pair of candidates having 2 question with identical wrong answers would be $(0.25^2)^2 = (0.25)^4$. If it is continued in the same way, the probability of the pair making wrong answers to 12 question will be $(0.25)^{12}$ i.e. 0.000000000000000035.. The probability of the pair making 7 wrong answers will be $(0.25)^{14}$ i.e. 0.0000000003 and 6 wrong answers will be $(0.25)^{12}$ i.e. 0.0000000059. It means that one can be certain that such an event just cannot occur by chance.."

11. Mr. Vikas Singh, learned senior counsel appearing for SBI, submits that this court should not interfere with the impugned judgment and order of the learned single judge. He argued that candidates who appeared in the selection process were cautioned against use of unfair means and also warned that the results would be analyzed to enable the SBI take appropriate action in case it was discerned that any candidate had used unfair means while appearing the selection process. He relied on item no. 16 of the Advertisement No. CRPD/CR/2009-10/04 dated 23.07.2009 entitled "*Action against candidates found guilty of misconduct*" which mentioned that if a candidate is found using *unfair means* during the examination, he shall be disqualified from the examination. He submitted that the said instructions specifically stated that at the time of written examination/ interview if a candidate were to be

"found guilty of the following:

- (i) using unfair means during the examination or*
- (ii) impersonating or procuring impersonation by any person or*
- (iii) misbehaving in the examination hall or taking away the question booklet/ answerer sheet from the examination hall or*
- (iv) resorting to any irregular or improper means in connection with his/her candidature for selection or*

(v) obtaining support for his/her candidature by any means, such a candidate may, in addition to rendering himself/herself liable to criminal prosecution, also be liable to be (a) to be disqualified from the examination for which he/she is a candidate; (b) - to be debarred, either permanently or for a specified period from any examination or recruitment conducted by the Central Recruitment and Promotion Department, State Bank of India, Corporate Centre, Mumbai."

Counsel also relied upon the note which contained the following caution:

"Note: The Bank would be analyzing the responses of a candidate with other appeared candidates to detect patterns of similarity. On the basis of such an analysis, if it is found that the responses have been shared and scores obtained are not genuine/valid, the Bank reserves the right to cancel his/her candidature."

12. It is contended that *Palak Modi's (supra)* case referred by the Appellant is not applicable to the facts and circumstances of the present case. In *Palak Modi (supra)*, termination of service of a Probationary Officer on the ground of using unfair means in the examination meant to be cleared as a pre-requisite for confirmation to the post and the Supreme Court had consequently ruled that an opportunity of hearing should be given to the Probationers before terminating their services. Counsel argued that however, the present case is for appointment in service of the Bank as Clerk; consequently the said decision is not an apt authority, because here there is no question of termination, but of appointment and therefore no opportunity of hearing is required to be given.

13. Learned counsel relied on the monogram which describes the process adopted by IBPS and submitted that this is a time tested method which pin

points with most accuracy the candidates who in all likelihood adopted unfair means. Arguing that this process was devised and adopted by SBI, counsel submitted that it was adopted uniformly. Learned counsel also produced the answer sheet of the petitioner and submitted several what he called tell tale features which revealed that unfair methods were used, in all certainty, given the nature of the unique features. These included the traces of erased answer codes which were actually attempted by the candidates, initially taken down in pencil, on the question sheet; the fact that the question sheet (which was the only piece of paper on which any calculation was permitted according to the test rules) contained no mathematical calculations to fairly complex set of about 40 questions, of which the petitioner managed to attempt nearly 30 accurately, etc.

Analysis and conclusions

14. As is evident from the discussion in the previous portion of this judgment, the appellant applied for recruitment to the post of Clerk in the SBI pursuant to a public advertisement issued by the latter. He appeared in the written test on 15.11.2009. Significantly the written test was a multiple choice objective type question paper which required the candidate to indicate or choose one among 5 options for each question that had to be attempted by her or him. This meant that the candidate had to be sure of the answer or instead, guess the correct answer from amongst the 5 choices. Obviously four of the options are incorrect. The petitioner's result was not declared: rather, it was withheld by the SBI. He sought information under the RTI Act, unsuccessfully. He therefore approached this Court in writ proceedings. Before the learned single judge, SBI's position was that the

manner in which the appellant attempted the questions was such that his pattern of incorrect answers matched entirely with the incorrect answers of 2 other candidates. Both the other candidates, like the appellant, had attempted the written test in the same zone – though in separate centers. Looking at the pattern of incorrect answers obtained, SBI decided to cancel the result of the appellant and the other 2 candidates. The SBI also deposed in its affidavit before the learned single judge that as many as 976 candidates had similarly adopted unfair means in the written test conducted by it. The SBI informed the Court that this could be ascertained by the adoption of the methodology evolved by IBPS, uniformly to detect the pattern of incorrect answers beyond a certain number. The learned single judge was satisfied that SBI's action was not arbitrary and that the court in exercise of its judicial review jurisdiction, would not substitute the opinion of experts with their own.

15. The appellant's objection to the cancellation of his result and candidature is primarily based on the adoption of a statistical method; he contends that without any tangible material or proof of his using unfair means, SBI could not have validly cancelled his test and withheld the result. His argument, in other words, is that in order to say that a candidate is guilty of using unfair means, the authority (public employer or examining body) should have material in the form of a report of an invigilator who sees or finds something wrong in the behavior of the candidate, or recovers something or object from a candidate or notices the use of unfair means by her or him. SBI, on the other hand, highlights that in the recent past, candidates have been known to receive answers from other source(s) through modern communication devices like cell phone. The detection of such irregularity therefore, is inbuilt in the multiple choice objective test

process, which is tailor made to find out - through post examination test analysis - whether a few or a group of candidates used unfair means. The disclosure of a pattern, found through a time tested statistical sample method, leads to scrutiny of the answer sheets after which the SBI finally decides whether the candidate or candidate's test should be cancelled.

16. SBI relies on IBPS's document entitled "*Detection of use of unfair means/Malpractices in objective tests*". Part III of the said document states that IBPS consider two important criteria; one, where a pair of candidates answer 12 or more identical wrong answers; and the mismatches (number of questions with different answers) being small, i.e 5 or less. The other, criteria is to detect those scoring high in tests, but having used unfair means, discernable by application of a two pronged filter (a) criteria by which pairs of candidates have more than 90 % number of questions, containing wrong answers are picked up. Identical wrong answers (IWWs) should be a minimum number for a different set of total number of questions: (i) for a 50 item test, IWW should be more than 5 or more; (ii) where the total number of questions is 75, the identical wrong answers should be minimum 7, etc and so on. The document further states as follows:

"It can be concluded that the candidates under criteria (A) have used unfair means beyond all reasonable doubts.

It can be inferred based on the very low probability of such an event occurring by chance with good degree of accuracy that the candidates under Criteria (B) have resorted to use of unfair means."

Other material parts of the said document are extracted below:

"PROCESS FOLLOWED AT IBPS FOR IDENTIFYING CASES OF USE OF UNFAIR MEANS :

(i) IBPS has a practice of analyzing the responses of all candidates who have appeared in objective tests of all the examinations at a particular centre (city/town) for identifying cases of use of unfair means.

(ii) IBPS has indigenously developed software for identifying such cases based on an internationally accepted method. The responses of each candidate are compared with the responses of all the remaining candidates at each centre (city/town) and matched for identical responses. The software generates report of all pairs of cases which have identical responses mainly identical wrong responses.

(iii) This report is critically reviewed by group of IBPS experts. The expert group considers the following in addition to identical wrong answers while deciding on reporting use of unfair means and a final report is prepared only after the committee reviews other factors supporting the analysis and the cases are forwarded to the bank for taking necessary action:

- (1) Evidence of any random/pattern marking*
- (2) Identical matches of 'intermittent' and 'end' skipped questions*
- (3) Item which otherwise show different answer across centre*
- (4) Evidence of copying by a common group of candidates.*

IPBS removes these candidates from the result of its own examinations (CWEs). For all other examinations, the report is sent to the concerned organization."

17. In the petitioner's case, the answer sheet contained 7 or more identical wrong answers, compared to two other candidates who also appeared in Centre/Code No.28. The petitioner's answer sheet itself discloses a revealing tale: one, traces of penciled numerals (which correspond with the answers actually attempted by him, including the wrong answers, all in one place) which were sought to be erased and two, the fact that he attempted a large

number of mathematical problems, which would be humanly impossible to solve, without some manual calculation. The giveaway here is that no candidate is allowed to attempt the answer by prior rough calculation in any other piece of paper; he or she has to carry out the rough calculation on the question paper itself; the question paper was taken away from each candidate after she or he attempted the test. The absence of any calculation, on the one hand, and the correct answers by the petitioner of a large number of such mathematical problems (involving complex multiplication of numerals in several digits, finding out square root, etc) rule out the possibility of coincidence.

18. In *Union of India v Anand Kumar Pandey* 1994 (5) SCC 663, the authority had conducted a post examination analysis of the results, albeit manually, and directed cancellation of results of some candidates. The Supreme Court held as follows:

"The inquiry report and the noting on the file show that the railway authorities rightly came to the conclusion that there was large-scale copying at Centre No. 115 Katihar. The inquiry report reveals that overall pass percentage in the written examination for all the centers at Katihar was 0.6% whereas the pass percentage in two rooms at Centre No. 115 alone was 45.4%.

8. *The railway authorities, relying upon the material placed on the record by the inquiring agency came to the conclusion that it was not safe to make appointments based on the written examination wherein unfair means were adopted on a large scale. We see no ground to differ with the conclusions reached by the railway authorities. The Tribunal was wholly unjustified in*

interfering with the order of the appellants calling upon the respondents to sit in the written examination again.

9. *This Court has repeatedly held that the rules of natural justice cannot be put in a strait-jacket. Applicability of these rules depends upon the facts and circumstances relating to each particular given situation. Out of the total candidates who appeared in the written test at the Centre concerned only 35 candidates qualified the test. In that situation the action of the railway authorities in directing the 35 candidates of Centre No. 115 to appear in a fresh written examination virtually amounts to canceling the result of the said centre. Although it would have been fair to call upon all the candidates who appeared from Centre No. 115 to take the written examination again but in the facts and circumstances of this case no fault can be found with the action of the railway authorities in calling upon only 35 (empanelled candidates) to take the examination afresh. The purpose of a competitive examination is to select the most suitable candidates for appointment to public services. It is entirely different than an examination held by a college or university to award degrees to the candidates appearing at the examination. Even if a candidate is selected he may still be not appointed for a justifiable reason. In the present case the railway authorities have rightly refused to make appointments on the basis of the written examination wherein unfair means were adopted by the candidates. No candidate had been debarred or disqualified from taking the exam. To make sure that the deserving candidates are selected the respondents have been asked to go through the process of written examination once again. We are of the view that there is no violation of the rules of natural justice in any manner in the facts and circumstances of this case."*

19. In a very recent judgment of the Supreme Court, *Tanvi Sarval v Central Board of Secondary Education* 2015 (6) SCC 573, the Court held that public interest would be subserved if the entire examination were to be cancelled. There, investigations held after the exams revealed widespread

use of unfair means, whereby "123 solved answers of a particular code and retrieved from the mobile set of one of the persons arrested i.e. Dr. Bhupender, 102 answers were found correct on a comparison with the answer key provided by the CBSE. As referred to hereinabove, 358 mobile numbers had been pressed into service and at least 300 vests fitted with electronic devices have been used." Looking into the nature and gravity of the methods, the court made the following pertinent observations:

"Having regard to the uncompromising essentiality of a blemishless process of examination involving public participation, we have no alternative but to hold that examination involved suffers from an infraction of its expected requirement of authenticity and credence. We are conscious of the fact that every examination being conducted by a human agency is likely to suffer from some shortcomings, but deliberate inroads into its framework of the magnitude and the nature, as exhibited, in the present case, demonstrate a deep seated and pervasive impact, which ought not to be disregarded or glossed over, lest it may amount to travesty of a proclaimed mechanism to impartially judge the comparative merit of the candidates partaking therein. If such an examination is saved, merit would be casualty generating a sense of frustration in the genuine students, with aversion to the concept of examination. The possibility of leaning towards unfair means may also be the ultimate fall out. Even if, one undeserving candidate, a beneficiary of such illegal machination, though undetected is retained in the process it would be in denial of, the claim of more deserving candidates."

20. In one of the earliest decisions, *The Board of High School and Intermediate Education, U.P. and Ors. v. Kumari Chitra Srivastava and Ors.* (1970) 1 SCC 121 the Supreme Court had ruled that the compulsion to adhere to principles of natural justice is dependent on the nature of the

subject matter. The context was action taken by a State Education Board in somewhat similar circumstances. The court observed as follows:

"8. The learned Counsel for the Appellant, Mr. C.B. Aggarwal, contends that the facts are not in dispute and it is further clear that no useful purpose would have been served if the Board had served a show cause notice on the Petitioner. He says that in view of these circumstances it was not necessary for the Board to have issued a show cause notice. We are unable to accept this contention. Whether a duty arises in a particular case to issue a show cause notice before inflicting a penalty does not depend on the authority's satisfaction that the person to be penalised has no defence but on the nature of the order proposed to be passed."

21. Again, the need to be aware that natural justice is not a stereotyped principle, of unbending universal application was emphasized in *Chairman, Board of Mining Examination v. Ramjee* (1977) 2 SCC 256, where the Court observed that natural justice is not an unruly horse, no lurking landmine, nor a "judicial cure-all". The Courts cannot look at law in the abstract or natural justice as a mere artifact. Nor can they fit into a rigid mould the concept of reasonable opportunity. If the totality of circumstances satisfies the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be "punctilious or fanatical as if the rules of natural justice were sacred scriptures" (Ref *Dharampal Satyapal Ltd Vs. Deputy Commissioner of Central Excise & Ors.* 2015 (8) SCC 519). As a result, the appellant's submissions with regard to SBI's failure to adhere to principles of natural justice have to fail.

22. The appellant had relied on *Palak Modi* (supra). The following observations in that judgment are relevant:

"The use of unfair means in the evaluation test/confirmation test held by the Bank certainly constitutes a misconduct. The Bank itself had treated such an act to be a misconduct (paragraph 10 of advertisement dated 1.7.2008). It is not in dispute that the services of the private respondents were not terminated on the ground that there was any deficiency or shortcoming in their work or performance during probation or that they had failed to satisfactorily complete the training or had failed to secure the qualifying marks in the test held on 27.2.2011. As a matter of fact, the note prepared by the Deputy General Manager, which was approved by the General Manager makes it crystal clear that the decision to dispense with the services of the private respondents was taken solely on the ground that they were guilty of using unfair means in the test held on 27.2.2011. To put it differently, the foundation of the action taken by the General Manager was the accusation that while appearing in the objective test, the private respondents had resorted to copying. IBPS had relied upon the analysis made by the computer and sent report to the Bank that 18 candidates were suspected to have used unfair means. The concerned authority then sent for the chart of seating arrangement and treated the same as a piece of evidence for coming to the conclusion that the private respondents had indeed used unfair means in the examination. This exercise was not preceded by an inquiry involving the private respondents and no opportunity was given to them to defend themselves against the charge of use of unfair means. In other words, they were condemned unheard which, in our considered view, was legally impermissible."

23. In the present instance, we are of the opinion that the rules of natural justice have not been contravened by the SBI. The above judgment of *Palak Modi*, and the facts that led to such judgment are clearly distinguishable from the case at hand. As we have seen, the application of the principles of natural justice, though vital, ultimately turns on the facts of every individual case. It is not every time a particular action has a consequence that is not

favourable to the petitioner that the rules may be relied upon as a fallback to nullify such action. First, the petitioner has no vested right to an inquiry, he being merely an entry-level *candidate* and not employed in any manner by the SBI. He is therefore not entitled to the same terms of service that the petitioners in *Palak Modi* (supra) could claim by virtue of them actually being employed. His right extends, and is limited to, a fair opportunity to attempt the examination and therefore have a fighting chance at being employed by SBI. His decision to squander away this opportunity by employing unfair means in his attempt at the examination cannot be countenanced simply because the SBI did not first approach him when they discovered that his answers matched perfectly with two other candidates. There is in fact, no need for the SBI to do so. The object of the examination being to select the candidates suitable for such initial appointment, veritable evidence that the petitioner does not fall within that category, does not become unreliable or contrary to the principles of natural justice merely because the petitioner did not have the opportunity to represent against them.

24. The Court is conscious that technology often empowers citizens; at the same time it has the potential to facilitate misuse. In the context of the facts of this case, this Court is not persuaded with the appellant's submission that without tangible material or evidence, the SBI could not have inferred the employment of "unfair means" by candidates generally and the petitioner in particular. Use of electronic devices to transmit information – either in the form of text messages or by use of hidden listening devices which go undetected may be hard to establish. That does not mean that

patterns which are discernible and are thrown up on application of scientific formulae or statistical models, which leads to further examination of the primary material should be eliminated by the Courts. In the present case, the pattern which emerged showed that the appellant's results in respect of wrong answers matched with some other candidates who also appeared in the New Delhi centre. On further scrutiny, the reasonableness of the suspicion was strengthened by the manner of his attempting the answers. These, in the opinion of the Court, were sufficient basis for the SBI to conclude that unfair means had been employed and withhold his result. The directions sought are, therefore, unavailable in exercise of judicial review discretion under Article 226 of the Constitution. As a result, this Court finds that the impugned judgment and order of the learned Single Judge does not call for interference. The appeal is, therefore, dismissed without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

NOVEMBER 24, 2015