

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (S) No.247 of 2016

Noshad Mohd. Khan, aged about 47 years, S/o late Mohd. Sharif Khan, R/o 42A, Friends Colony, Behind Police Station Ashoka Garden, Bhopal (M.P.)

---- Petitioner

Versus

1. The High Court of Chhattisgarh, At Bilaspur (C.G.) through Registrar General
2. The State of Chhattisgarh, through Chief Secretary, Secretariat, Mahanadi Bhawan, P.S. and Post Rakhi, New Raipur, District Raipur (C.G.)
3. The Selection Committee Higher Judicial Services, Through Registrar General High Court of Chhattisgarh at Bilaspur (C.G.)
4. Jaideep, S/o Shri Satyendra Kumar Garg
5. Santosh Kumar Tiwari, S/o Vidyadhar Tiwari
6. Manvendra Singh, S/o Vijay Singh
7. Rajbhan Singh, S/o Mahadeo Singh

Respondent No.4 to 7 through Registrar General, High Court of Chhattisgarh at Bilaspur (C.G.)

---- Respondents

For Petitioner: Mr. K.A. Ansari, Senior Advocate with
Mr. Devesh G. Kela, Advocate.

For State/Respondent No.2: -
Mr. S.P. Kale, Deputy Advocate General on
advance copy.

Hon'ble Shri Justice Sanjay K. Agrawal

CAV Order

18/02/2016

1. Excellent question that emanates for consideration is, where

recommendations made by Justice Shetty Commission and statutory Recruitment Rules namely the Chhattisgarh Higher Judicial Service (Recruitment and Conditions of Service) Rules, 2006, are at variance; which has to be followed in making selection and appointment for the post of District Judge (Entry Level).

2. Feeling aggrieved against his non-selection and appointment on the post of District Judge (Entry Level), the petitioner herein/non-appointee has preferred this writ petition stating inter alia that the prescription of 50% minimum marks in viva voce test is unsustainable and contrary to the rules.
3. Respondent No.1 High Court of Chhattisgarh advertised the post of District Judge (Entry Level) by Direct Recruitment Examination 2012, on 14-9-2012 for 11 posts for which written examination was held on 9-12-2012 and in which the petitioner appeared as a candidate for the said post. Result of the said examination was declared on 9-5-2013 in which the petitioner was successful and also secured second position in the said examination, as he had secured 135 marks out of 200. The petitioner thereafter, also appeared in the viva voce examination but when the final result was declared on 24-6-2013, he remained unsuccessful, as according to him he did not get minimum bench mark of 10 in the viva voce examination and he was declared non-selected. The petitioner firstly preferred W.P.(C)No.47/2014

before the Supreme Court of India and ultimately, that petition has been withdrawn with liberty to file the same before this Court. The principal ground of challenge in the writ petition is that there is no statutory rules fixing 50% marks as minimum and qualifying marks in viva voce and such prescription of 50% marks in viva voce is contrary to the law declared and further that the Supreme Court has accepted the recommendations of Justice Shetty Commission Report in **All India Judges' Assn. v. Union of India**¹ holding that there should not be any requirement for securing minimum marks in viva voce which ought to have been given effect to in the present case. The petitioner being meritorious candidate having secured second position in the merit list has suffered injustice in the viva voce examination on account of prescription of 50% qualifying marks and therefore, a writ of mandamus be issued directing respondent No.1 to consider his case for selection and appointment on the post of District Judge (Entry Level) along with other consequential service benefits.

4. Mr. K.A. Ansari, learned Senior Advocate appearing for the petitioner, would vehemently submit that prescription of 50% minimum marks in the interview / viva voce contrary to the recommendations of Justice Shetty Commission which have been accepted by the Supreme Court in **All India Judges'**

1 AIR 2002 SC 1752

Assn. case (supra) is contrary to law, as it has already been held accepting the recommendations that there should not be any requirement to secure minimum marks in interview which ought to have been given effect to by respondent No.1 High Court of Chhattisgarh in the subject recruitment and prescription of minimum qualifying marks to the extent of 50%, if any, by the Chhattisgarh Higher Judicial Service (Recruitment and Conditions of Service) Rules, 2006 will not prevail over the report of Justice Shetty Commission duly accepted in **All India Judges' Assn.** case (supra). He placed reliance upon the decision of the Supreme Court in the case of Hemani Malhotra v. High Court of Delhi² and would further submit that non-selection of the petitioner on the basis that he could not secure 10 qualifying marks in the interview would run contrary to the recommendations of Justice Shetty Commission as accepted by the Supreme Court. He would also submit that the Rules of 2006 have to give way to the recommendations of Justice Shetty Commission duly accepted by the Supreme Court in **All India Judges' Assn.** (supra). Therefore, a writ in the nature of mandamus be issued commanding respondent No.1 to consider and appoint the petitioner on the post of District Judge (Entry Level), as the post of District Judge (Entry Level) is lying vacant.

2 (2008) 7 SCC 11

5. I have heard learned Senior Counsel on the question of admission of the instant writ petition and given thoughtful consideration to the submission raised therein.

6. Justice Shetty Commission, in its recommendations under the head of Procedure for Selection, made following recommendation in sub-paras (iv) and (v): -

“(iv) The viva-voce Test should be in a thorough and Scientific Manner and it should be taken anything between 25 and 30 minutes for each candidate. The viva-voce shall carry 50 marks. There shall be no cut off marks in viva-voice Test.

(v) The merit list will be prepared on the basis of marks/grades obtained both in the Written Examination and viva-voce.”

7. The Supreme Court in **All India Judges' Assn.** (supra) while accepting the recommendations of Justice Shetty Commission, held as under: -

“37. Subject to various modifications in this judgment, all other recommendations of the Shetty Commission are accepted.

38. We are aware that it will become necessary for service and other rules to be amended so as to implement the judgment.”

8. In exercise of powers conferred by Article 233 read with the proviso to Article 309 of the Constitution of India, the Chhattisgarh Higher Judicial Service (Recruitment and Conditions of Service) Rules, 2006 (for short 'the Rules, 2006') have been framed by the Governor of Chhattisgarh in consultation with the High Court to regulate the Recruitment and Service Condition of Members of Higher Judicial Service

which are in force with effect from 7th April, 2006.

9. The method of recruitment and appointment to the post of District Judge (Entry Level) is governed by the above stated Rules. The aforesaid Rules as it was in force on the date of impugned selection governing the recruitment, 2nd proviso to clause (c) of sub-rule (1) of Rule 5 of the Rules, 2006 provided as under: -

“Provided further that a candidate appearing in viva voce test shall not be eligible for appointment unless he secures minimum 50% marks in viva voce test.”

10. The aforesaid rule governing the subject-recruitment provides that candidate appearing in viva voce test shall not be eligible for appointment unless he secures 50% marks in viva voce test and the subject recruitment was held when the aforesaid proviso prescribing 50% marks in viva voce test was in force. The second proviso to clause (c) of sub-rule (1) of Rule 5 of the Rules, 2006 has been omitted vide notification No.7493/2548/21-B/C.G./2015 dated 3-8-2015. The subject recruitment was conducted initiating its process by advertisement dated 14-9-2012 and final result was declared on 24-6-2013. The Rules, 2006, which was in force, clearly provides that candidate appearing in viva voce test shall not be eligible for appointment unless he secures 50% minimum marks in viva voce test. Since the petitioner did not secure 50% marks in viva voce, as per his own showing, he was not

selected.

11. Now, in the light of the submission made on behalf of the petitioner that report of Justice Shetty Commission having been accepted by the Supreme Court in **All India Judges' Assn.** (supra) that there should be no minimum qualifying marks in viva voce test, the question for consideration would be whether the appointment having made by the High Court as per the Rules, 2006 prevalent and applicable at the time of recruitment, the petitioner's non-selection is unsustainable in law in view of the report of Justice Shetty Commission accepted by the Supreme Court in **All India Judges' Assn.** (supra).

12. The question of making recruitment in light of the recommendations of Justice Shetty Commission vis-a-vis the Recruitment Rules of the High Court came up for consideration before the Supreme Court in the matter of **Syed T.A. Naqshbandi and others v. State of Jammu & Kashmir and others**³ in which Their Lordships have clearly held that till the rules are amended, recruitment has to be made as per applicable rules, and observed in paragraph eight as under: -

“8. Reliance placed upon the recommendations of Justice Jagannatha Shetty Commission or the decision reported in [All India Judges' Assn. v. Union of India](#)¹ or even the resolution of the Full Court of the High Court dated 27-4-2002 is

3 (2003) 9 SCC 592

not only inappropriate but a misplaced one and the grievances espoused based on this assumption deserve a mere mention only to be rejected. The conditions of service of members of any service for that matter are governed by statutory rules and orders, lawfully made in the absence of rules to cover the area which has not been specifically covered by such rules, and so long as they are not replaced or amended in the manner known to law, it would be futile for anyone to claim for those existing rules/orders being ignored yielding place to certain policy decisions taken even to alter, amend or modify them. Alive to this indisputable position of law only, this Court observed at SCC p. 273, para 38, that "we are aware that it will become necessary for service and other rules to be amended so as to implement this judgment". Consequently, the High Court could not be found at fault for considering the matters in question in the light of the Jammu and Kashmir Higher Judicial Service Rules, 1983 and the Jammu and Kashmir District and Sessions Judges (Selection Grade Post) Rules, 1968 as well as the criteria formulated by the High Court. Equally, the guidelines laid down by the High Court for the purpose of adjudging the efficiency, merit and integrity of the respective candidates cannot be said to be either arbitrary or irrational or illegal in any manner to warrant the interference of this Court with the same. Even dehors any provision of law specifically enabling the High Courts with such powers in view of [Article 235](#) of the Constitution of India, unless the exercise of power in this regard is shown to violate any other provision of the Constitution of India or any of the existing statutory rules, the same cannot be challenged by making it a justiciable issue before courts. The grievance of the petitioners, in this regard, has no merit of acceptance."

13. Thereafter, in the matter of **Ramesh Kumar v. High Court**

Delhi and another⁴, the Supreme Court has again held that

till the amendment is carried out, vacancies shall be filled as

4 (2010) 3 SCC 104

per the existing statutory rules, and relied upon **Syed T.A.**

Naqshbandi (supra) by observing as under in paragraph 16:

“16. In the instant case, the Rules do not provide for any particular procedure/criteria for holding the tests rather it enables the High Court to prescribe the criteria. This Court in *All India Judges' Assn. (3) v. Union of India*¹ accepted Justice Shetty Commission's Report in this regard which had prescribed for not having minimum marks for interview. The Court further explained that to give effect to the said judgment, the existing statutory rules may be amended. However, till the amendment is carried out, the vacancies shall be filled as per the existing statutory rules. A similar view has been reiterated by this Court while dealing with the appointment of Judicial Officers in *Syed T.A. Naqshbandi v. State of J & K*³ and *Malik Mazhar Sultan (3) v. U.P. Public Service Commission*⁵. We have also accepted the said settled legal proposition while deciding the connected cases, i.e., *Rakhi Ray v. High Court of Delhi*⁶ & Ors.) vide judgment and order of this date. It has been clarified in *Rakhi Ray* (supra) that where statutory rules do not deal with a particular subject/issue, so far as the appointment of the Judicial Officers is concerned, directions issued by this Court would have binding effect.”

14. Very recently, in the matter of **Sasidhar Reddy Sura v. State of Andhra Pradesh and others**⁷, the Supreme Court has considered the question of procedure to be followed where recommendations made by the Commission and statutory rules are at variance, and held that recruitment rules should be followed, and observed as under in paragraphs 14 and 17 as under: -

“14. The said concept, with regard to the

⁵ (2008) 17 SCC 703 : (2007) 2 Scale 159

⁶ (2010) 2 SCC 637

⁷ (2014) 2 SCC 158

minimum age, has been brought in only from the report of the Commission. For the reasons recorded in the report of the Commission, the Commission was of the view that the post of a District and Sessions Judge, being an important post, which not only requires integrity and intelligence but also requires maturity, the Commission was of the view that a person not having completed 35 years of age should not be appointed to the said post. It is pertinent to note that this was merely a recommendation or suggestion made by the Commission. The recommendation or suggestion, if not supported by the Rules, cannot be implemented. In the instant case, the Rules are silent with regard to the minimum age. It only speaks about the maximum age. In the circumstances, one cannot read provisions incorporated in the report of the Commission into the Rules. The Rules are statutory and framed under the provisions of Article 309 of the Constitution of India. In our opinion, if the recommendations made by the Commission and the statutory rules are at variance, the provisions incorporated in the recruitment rules have to be followed. It is pertinent to note that when such a question had been raised before this Court, in Syed T.A. Naqshbandi's case (supra), this Court had also observed that till relevant recruitment rules are suitably amended so as to incorporate the recommendations made by the Commission, provisions of the statutory rules must be followed.

17. In our opinion, the High Court was in error while giving undue weightage to the recommendations made by the Shetty Commission, especially when the Rules do not provide for any minimum age for the appointment to the post in question. Moreover, even Article 233 of the Constitution of India is also silent about the minimum age for being appointed as a District Judge."

15. In light of the principle of law laid down by Their Lordships of

the Supreme Court in aforesaid cases namely **Syed T.A.**

Naqshbandi (supra), **Ramesh Kumar** (supra) and **Sasidhar**

Reddy (supra), it is held that recommendations and report of Justice Shetty Commission can be implemented if supported by relevant Recruitment Rules of the High Court. Applying the law laid down in the above stated judgments to the factual matrix of the case, it is quite vivid that here the subject recruitment was made as per the Rules, 2006 of which second proviso to clause (c) of sub-rule (1) of Rule 5 clearly provides for 50% minimum marks in the viva voce test. The petitioner, as per his own showing, having failed to secure 50% marks in the viva voce test was held ineligible for the post of District Judge (Entry Level) and, therefore, he was rightly not selected for the said post. Since the Rule in vogue itself prescribed minimum qualifying marks in viva voce test when the subject recruitment was made and the Rules were amended subsequently with effect from 3-8-2015 omitting second proviso to clause (c) of sub-rule (1) of Rule 5 of the Rules, 2006 which prescribes minimum qualifying marks for viva voce test, the petitioner's submission that prescription of qualifying marks in viva voce test is irrational and unreasonable being contrary to the recommendations of Justice Shetty Commission, deserves non-acceptance, as the Recruitment Rules of the High Court as on force would prevail over the report of the Commission as authoritatively held by the Supreme Court. Thus, the singular argument raised by learned Senior Counsel on behalf of the petitioner

deserves non-acceptance. No other point was raised.

16.As a fall out and consequence of aforesaid discussion, the writ petition deserves to be and is accordingly dismissed without imposition of costs.

Sd/-
(Sanjay K. Agrawal)
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (S) No.247 of 2016

Noshad Mohd. Khan

- Versus -

The High Court of Chhattisgarh and others

HEAD NOTE

Selection on the post of District Judge (Entry Level) has to be made in accordance with the Chhattisgarh Higher Judicial Service (Recruitment and Conditions of Service) Rules, 2006.

जिला न्यायाधीश (प्रवेश स्तर) के पद पर चयन छत्तीसगढ़ उच्चतर न्यायिक सेवा (भर्ती और सेवा की शर्तें) नियम, 2006 के अनुसार ही किया जाना चाहिए।