

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 8766 OF 2016

**Harsha d/o Bhikaji Gadekar } Petitioner
 versus
The State of Maharashtra }
and Anr. } Respondents**

Mr. Anil V. Anturkar – Senior Advocate
with Mr. Sandeep M. Pathak i/b.
Mr. Sugandh Deshmukh for the petitioner.

Ms. Sushma Bhende – AGP for respondent
no. 1.

Mr. Amit Borkar for respondent no. 2.

**CORAM :- S. C. DHARMADHIKARI &
DR. SHALINI PHANSALKAR-JOSHI, JJ.**

DATED :- August 9, 2016

ORAL JUDGMENT:-

1) By this petition under Article 226 of the Constitution of India, the petitioner challenges the communication dated 1st July, 2016 issued by respondent no. 1 conveying that the petitioner is ineligible for appointing as Civil Judge, Junior Division and Judicial Magistrate, First Class (for short “CJJD and JMFC”). Since a very short point is involved and we have the benefit of detailed arguments, we grant Rule. Respondents waive service. We dispose of this petition finally by this judgment.

2) It is common ground that the petitioner is a citizen of India and she applied for being appointed as CJJD and JMFC.

3) She has narrated in the petition as to how throughout she has been meritorious in her career. She joined the five year degree course of law in the M. P. Law College, Aurangabad. After taking admission to the first year of the five year law course, she enrolled herself with the National Cadet Corps (NCC). She had actively participated in its activities. She was part of the National Integration Camp held in the State of Nagaland from 28th November, 2008 to 9th December, 2008. The evidence of her participation is a certificate, copy of which is at Annexure 'A'. It is after her participation that she came to be appointed as a Commanding Officer of NCC Group while studying in the second year of the five year law course. The petitioner submits that as she was involved and busy with these activities, she could not appear for the pre-law first year examination. There was no question of failing in such examination for she was marked as absent. She submits that there is difference between having failed in examination and having not taken the examination at all. Since it was permissible for her to go ahead and continue studies and appear for both examinations, in May, 2009 she appeared and duly passed the same with flying colours.

Subsequently, she completed her course. Thereafter, the petitioner came across an advertisement and which indicated the availability of posts in the district judiciary. She refers to the Maharashtra Public Service Commission (MPSC) brochure/advertisement and the Maharashtra Judicial Services Rules, 2008. The petitioner states that after her appearance in the examination, namely, preliminary on 31st May, 2015 and having qualified therein, she appeared at the main examination held on 4th October, 2015. The petitioner was called for interview/viva which was held on 22nd January, 2016. At the time of her interview and prior thereto, the MPSC had verified the documents submitted by all the candidates including the petitioner and no defect or shortcoming was detected therein. On 10th March, 2016, the MPSC published final list, which included the name of the petitioner at serial number 79. Thus, having proved her merit, she was expecting a appointment order. Rather she went through all the preliminary steps including the medical examination.

4) However, before her appointment order could be issued, she was in receipt of a communication dated 20th June, 2016. That communication relied upon a Rule of the Maharashtra Judicial Services Rules, 2008. That communication dated 1st July, 2016

(the impugned one) informs the petitioner that having not cleared the examination of the first semester in first attempt, she is not qualified for appointment. The Rules and the clauses in the advertisement came in her way. Reliance was placed on the Maharashtra Judicial Services Rules, 2008.

5) Therefore, whether the petitioner was eligible in terms of these Rules or not is the issue raised before us.

6) Mr. Anturkar learned Senior Counsel appearing for the petitioner, at the outset, does not dispute the factual aspects. However, he would submit that the word “attempt” in the subject Rule should take its colour and meaning not from a narrow or a restricted view point, namely, “non-appearance”. The word “attempt” must denote preparation, study and thoroughly for appearance at an examination and thereafter attempting it. That should be the meaning of the word in true and real sense. The Rule has not been understood in this manner by the concerned authorities and the impugned communication based on the Rule cannot be supported.

7) Mr. Anturkar was fair enough to point out that the legality and validity of the Rule is not under challenge. However, the purpose of the Rule has not been understood and it is applied mechanically is the grievance.

8) Mr. Borkar learned counsel appearing for the respondents on notice, however, would submit that this Rule is not being interpreted or under consideration for the first time. This Rule or similar such stipulation fell for consideration of a Division Bench judgment of this court in the case of *Dr. Rajkumar Shantilal Gandhi vs. State of Maharashtra and Ors.*¹. He relies upon the findings and conclusions from paras 6, 7 and portion of para 9 of this judgment to submit that the only interpretation that can be placed on this term or word is the one placed by the Division Bench. Therefore, reasons for non appearance may be genuine or for not being able to clear the examination on account of ailment or illness, but so long as the word “attempt” or the words “first attempt” are used, then, what is postulated is clearance or passing in that attempt. It should not be a repeated action nor it should be a deferred one. For such reasons, he would submit that the interpretation placed by the respondents on the Rule can in no way be termed as perverse or arbitrary or of such nature as no reasonable person placed in that position would arrive at in the given facts and circumstances. Consequently, the petition be dismissed.

9) With the assistance of the learned counsel appearing for both sides, we have perused the writ petition and all

¹ 1988 Mh. L. J.1022

annexures thereto. The subject rule and to the extent relevant reads thus:-

3	Civil Judge Junior Division	(A) By nomination on the basis of aggregate marks obtained in a competitive examination conducted by the Commission in terms of the Examination Scheme as may be framed by the High Court.	(a) Educational Qualification- Must hold a degree in Law. (b) Experience - Must have practised as an Advocate in the High Court or Courts subordinate thereto for not less than three years on the date of publication of Advertisement; or Must be a fresh Law Graduate who,- (i) has secured the degree in law by passing all the examinations leading to the degree in the first attempt; (ii) has secured in the final year examination of the degree in Law or in the case of candidates holding Master's Degree in Law in final year exam, not less than fifty five percent marks; or Must be working or must have worked as Public Prosecutor or Government Advocate for not less than three years in the post or posts. In computing the period of three years, the period during which the candidate has worked as an Advocate shall also be included; or Must be a member of Ministerial Staff- (i) of High Court or Courts subordinate thereto; or (ii) of Offices of the Government Pleaders attached to those Courts; or (iii) working as Legal Assistant and above in the Legal Section of Law and Judiciary Department in Mantralaya provided such employee has put in minimum three years of service after obtaining Degree in Law.
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10) A bare perusal of this Rule would indicate that it specifies educational qualification, namely, degree in law, the experience

that a person gains after the degree in law is practice as an advocate in the High Court or courts subordinate thereto for not less than three years on the date of publication of advertisement. Even a fresh law graduate is eligible and can qualify provided he has secured the degree in law by passing all the examinations leading to the degree in the first attempt.

11) The facts being admitted, it is clear that the petitioner did not take the examination of the first semester held in December, 2008. She did not secure the law degree by passing all the examinations leading to that degree in first attempt. It may be that the university or the college permits for academic reasons and allows the candidates like the petitioner or students otherwise eligible to keep terms and take the examination in a combined manner for the first and second semester subsequently or simultaneously. As far as recruitment to the judicial post is concerned, that is by nomination on the basis of aggregate marks obtained in a competitive examination conducted by the Commission in terms of the examination scheme as may be framed by this court. The educational qualification and experience that is required, is enlisted therein. As far as fresh law graduate is concerned, the candidate must have secured the degree in law by passing all the examinations leading to the

degree in the first attempt.

12) Once the legality and validity of this Rule or such a stipulation is not under challenge, then, the only question that requires consideration is what meaning is to be assigned to the word “first attempt”.

13) In the case of *Dr. Rajkumar Shantilal Gandhi* (supra), which is the case directly on the point, petitioner Rajkumar filled in the requisite form, paid the fees and had been allotted seat number at the examination, but could not appear on account of heart ailment. Thus, he could not take the examination scheduled in October, 1984. He passed the examination in May, 1985 and applied for registration for the post-graduate course in surgery. While making the merit list, the authorities concluded that the petitioner had failed to appear at the October 1984 examination which was considered as an attempt and deducted 5% of his marks under Rule 8(d) of the Rules for selection of candidates for admission to post-graduate course. He contended that since he did not appear at the examination, it could not be said that he made any attempt to pass the examination held in October, 1984 and the conclusion that he passed the examination at the second attempt was erroneous. While dealing with this argument, the Division Bench in paras 6, 7 and 9 held as under:-

“7. It is the argument of Mr. Pradhan on behalf of Dr. Gandhi that unless Dr. Gandhi actually appears for the examination, he cannot be said to have “attempted” that examination. In civil cases an “attempt” means and intent combined with an act falling short of execution of the thing intended. It is an endeavour to do an act, carried beyond mere preparation, but short of execution. *Black's Law Dictionary, Fifth Edition.*

Dr. Gandhi had prepared himself to appear for the examination, submitted the requisite form and was possessed of seat number and the hall ticket. In *Dr. Shashikant Langade vs. Dean, Medical College, Miraj and others, Writ petition No. 3162 of 1985*, a division bench of this Court, in identical circumstances held that the application for appearing for the examination, payment of fees and inclusion of the name in the list of examinees, are steps taken by the examinee which travel beyond mere preparation and constitute “attempt”. We are in agreement with this view. The view propounded by Mr. Pradhan, Learned Counsel for Dr. Gandhi is opposed to the principle on which the rule of deduction is founded.

8. In our opinion, Dr. Gandhi did not appear for the examination when he was in normal course due to appear. His endeavour to pass the M.B.B.S. Examination did not stop at the stage of preparation. He submitted the requisite form, paid the fees and was listed as an examinee. This conduct which was much more than mere preparation was an “attempt” at the M.B.B.S. Examination. Therefore, the deduction of 5% of marks for determining the corrected marks was valid.

9. But the failure to appear on account of this ailment or for any other reason does not take the case out of the meaning of the word “attempt”. The meaning of the word “attempt” does not admit of exceptions dependent upon the individual circumstances. A person who makes an application for appearing for the examination, fills in the requisite form and is enrolled as an examinee, must be taken to have taken steps which travel beyond mere preparation for the examination. These steps take the case of the candidate beyond the stage of preparation and constitutes an attempt to pass the examination. The causes or reasons for refraining from appearing for the examination or the failure to appear at the examination are irrelevant. The essence of the matter is that the candidate should have not only prepared for the examination but taken steps like filling

in the forms, payment of fees and having his name listed in the list of examinees. It is these facts that transformed the endeavour of Dr. Gandhi into an attempt.

14) Thus, the Division Bench held that though sickness prevented the petitioner from appearing at the examination held in October, 1984, his failure to appear on account of the ailment or for any other reason did not take the case out of the meaning of the word “attempt”. The meaning of the word does not admit of exceptions dependent upon individual circumstances.

15) We do not see as to how a different view can be taken. In any event, a view similar to *Rajkumar Gandhi* (supra) has been taken by this court consistently. For a complete reference, we point out the judgments in the case of *Lata Prabhuappa Warad vs. State of Maharashtra and Ors.*², *Bharat Sharad Kulkarni vs. State of Maharashtra and Ors.*³ and *Ansari vs. M. G. V. S. P. H. College of Pharmacy*⁴. Once the petitioner had a complete opportunity to appear for the examination in December, 2008, then, refraining from appearance at that examination on account of some other reason, which may be genuine and bonafide, would mean that the examinations leading to the degree in law have not been cleared in the first attempt. The petitioner was aware it is a five year law course. At the end of the fifth year, the degree would be awarded.

² 1994 Mh. L. J. 68

³ 2000(4) Mh. L. J. 684

⁴ 2010(5) Mh. L. J. 165

The requirement in the Rule is all the examinations leading to the degree have to be cleared in first attempt. Once the petitioner did not clear them in the first attempt, but cleared one of the exams later in point, then, the interpretation placed by the authorities and the respondents in this case that the petitioner has not fulfilled the requirement of the Rules cannot be said to be arbitrary or perverse. The Rule as it stands is plain, unambiguous and clear. There is no scope for any interpretation. In any event, the authoritative pronouncement of the Division Bench and with which we respectfully agree supports the view of the respondents in this case.

16) Once we reach the above conclusion and since no larger issue is required to be addressed, we need not refer to the other decisions, namely, Division Bench judgments of this court in the case of *Prashant P. Giri and Ors. vs. State of Maharashtra*⁵ and *Dipti Dipak Kolapkar vs. Maharashtra Public Service Commission and Anr.*⁶.

17) As a result of the above discussion, the writ petition fails. Rule is discharged. There would be no order as to costs.

(DR. SHALINI PHANSALKAR-JOSHI, J.) (S.C.DHARMADHIKARI, J.)

⁵ 2010 (5) Mh. L. J. 206

⁶ 2009(4) Bom. C. R. 59