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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (L) NO. 1440 OF 2017

Surekha Abhay Sinha

.... Petitioner.

V/s

State of Maharashtra and Others

.... Respondents.

Mr. Ravi Gadagkar a/w Mr. Aniket Ransubhe i/b Mr. Ajay Basutkar for the Petitioner.

Mr. Himanshu Takke, Asstt. Govt. Pleader for Respondent Nos. 1 and 2.

Mr. A.A. Kumbhakoni, Advocate General a/w Mr. Rahul Nerlekar for Respondent No.3.

**CORAM: B. R. GAVAI &
M.S. KARNIK, JJ.**

DATE: 4th September, 2017

P.C.:-

1] Petitioner has approached this Court, praying for calling for the record pertaining to her claim for the post of District Judge and for Ad-hoc District Judge by regular promotion for the year 2016.

2] Petitioner is a Judicial Officer. She was selected as Civil Judge Junior Division in 1999. She came to be promoted as Civil Judge, Senior Division in 2011. She came in the zone of consideration for promotion to the post of District Judge and Ad-hoc District Judge in the year 2016. Accordingly, judgments of the Petitioner came to be called for evaluation. In the selection process, which also includes oral viva, Petitioner was shown not to be selected. It appears that being aggrieved, Petitioner made a representation to the Hon'ble Chief Justice on the administrative side. However, the same was rejected. Hence, the Petitioner has approached this Court by way of the present Petition.

3] Mr. Gadagkar, learned Counsel appearing on behalf of the Petitioner, submitted that the Petitioner has been denied promotion on erroneous interpretation of the Rules governing promotions. He submitted that if the Rules are interpreted properly then the conclusion which could be arrived at, would be that the candidate should get 60% of the marks granted on evaluation of judgments, annual confidential reports, vigilance reports, disposal remarks and

special reports. He submitted that the interpretation would also lead to a conclusion that the candidate should get 40% of the marks in the oral viva for being eligible to be selected.

4] Mr. Gadagkar further submitted that sub-rule 3(i) of Rule 11 itself postulates two different words i.e. “evaluation” and “examination”. Relying on dictionary meaning of the word “evaluation”, learned Counsel submitted that evaluation would mean finding of numerical expression or calculation. He submitted that this can be done only of the marks which are determined on the basis of record of the Petitioner. He further submitted that, as against this, the word “examination” would postulate the formal test of knowledge or proficiency. He further relies on clause (f) of sub-rule (1) of Rule 6, which reads thus:-

“6(1)(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.”

He submits that the object of viva-voce examination is to assess the suitability of the candidate for the cadre by judging his/her 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. Relying on aforesaid provision, he submitted that since the viva provides for detailed examination as provided in the aforesaid clause, sub-rule 3(i) of Rule 11 will have to be held to mean that insofar as evaluation is concerned, it will have to be restricted to the earlier part i.e. evaluation of judgments, annual confidential reports, vigilance reports, disposal remarks, special reports wherein the candidate should get 60% of the mark i.e. 60 marks out of 100 marks and examination part would be only restricted insofar as viva is concerned wherein the candidate should get 40% i.e. 20 marks out of 50 marks.

5] Learned Counsel for the Petitioner submitted that, however, Respondent No.3 has erroneously interpreted that the candidate must get 60% of total 150 marks. Learned Counsel therefore submitted that the Petitioner, having secured 65 marks on the basis of evaluation of judgments etc and 23.67 marks in oral viva, will have to be held to have been qualified in the process and, as such, eligible to be promoted as District Judge.

6] Promotion to the post of Ad-hoc District Judge is governed by sub-rule 3(i) of Rule 11 of the Maharashtra Judicial Services Rules, 2008. The relevant part of the said Rule reads thus:-

11(3)(i)“The suitability for promotion of Senior Civil Judges to the cadre of District Judges under this Rule shall be considered on the basis of evaluation of their judgments carrying 50 marks, evaluation of Annual Confidential Reports carrying 20 marks, Vigilance reports carrying 10 marks, disposal remarks carrying 10 marks and special reports of the heads of the departments

under whom the Judicial Officer has worked during three years preceding the year of selection carrying 10 marks and viva-voce examination carrying 50 marks.

Subject to clause (iii) of sub-rule (3), the Recruiting Authority Shall draw up a list of officers from the zone of consideration out of those Senior Civil Judges, who have obtained at least 60% marks in the evaluation referred to in the preceding clause, provided the selection committee does not entertain any doubt about the integrity of the concerned Judicial Officer. If the number of officers who have obtained 60% marks or more is more than the number of vacancies to be filled up in the next one year, they shall be picked up in the order of their seniority in the cadre of Senior Civil Judges and their names in the select list shall be arranged in accordance with their seniority in the cadre of Senior Civil Judges. Appointments shall be made from the list so prepared.

(ii)(a).....

(b).....

(c).....

(iii) Only such Judicial Officer, who obtains at least 40% of marks in viva-voce test shall be eligible for being promoted under Rule 5(1)(a) or 5(1)(b)."

7] It would thus be seen from perusal of the aforesaid provision that suitability for promotion is to be considered on the basis of evaluation of the judgments carrying 50 marks, evaluation of Annual Confidential Reports carrying 20 marks, Vigilance reports carrying 10 marks, disposal remarks carrying 10 marks and special reports of the heads of Department under whom Judicial Officer has worked during three years preceding the year of selection carrying 10 marks and viva-voce examination carrying 50 marks. It would further reveal that the Rule specifically provides that subject to clause (iii) of sub-rule (3), the Recruiting Authority is required to draw up a list of Officers from the zone of consideration out of those Senior Civil Judges, who have obtained atleast 60% marks in the evaluation referred to in the preceding clause.

8] We are unable to accept the interpretation as placed by the

learned Counsel for the Petitioner. Paragraph prior to “subject to clause (iii) of sub-rule 3...” specifically includes the evaluation of judgments i.e. 50 marks on the basis of judgments, 20 marks on the basis of evaluation of Annual Confidential Reports, 10 marks for Vigilance reports, 10 marks for disposal remarks and 10 marks for special reports of the heads of the Department under whom the Judicial Officer has worked during three years preceding the year of selection and 50 marks for viva-voce examination. If the interpretation as placed by the learned Counsel for the Petitioner is to be accepted then the words used in the subsequent para i.e. “in the evaluation referred to in the preceding clause” will be rendered meaningless. It is a settled principle of law that there is a presumption that each and every word used in the enactment is with purpose and if we accept the contention as raised by the Petitioner, the aforesaid words would be rendered otiose.

9] Further, upon conjoint reading of the unnumbered paragraphs cited above from sub-rule 3(i) of Rule 11, it would reveal that the requirement is two fold. Firstly, the candidate should get 60% out of

total evaluation from 150 marks together and 40% of oral viva i.e. minimum 20 marks out of 50 meant for viva-voce.

10] We are therefore not inclined to accept the contention as raised by the Petitioner. However, while rejecting the contention of the Petitioner, we may note that the Rules, as they exist, do not appear to be in orderly manner. It appears that even after amendments, there are certain paragraphs in the Rules which are not even numbered. It is therefore difficult to refer to the provisions by referring to them as sub-rule, or sub-clause etc.

11] It is further to be noted that the present case appears to be an unfortunate one. Though the record of the Petitioner reveals that her Annual Confidential Reports are excellent throughout and that her disposal is also good and further that she got good marks in the Vigilance reports and further that she has also got good marks in the special reports, she has failed to make it to the gate way of the marks of 90, on account of lesser number of marks secured by her in judgment rating and viva-voce. On the basis of 50 marks provided for

Annual Confidential Reports, Vigilance reports, disposal remarks, special reports of the heads of the Department, Petitioner has got 40 out of 50 i.e. almost 80%. However, insofar as judgment rating is concerned, Petitioner has got 25 marks out of 50 and insofar as viva-voce is concerned, Petitioner has got 23.67 marks out of 50. Total marks granted to the Petitioner are 88.77. It could thus be seen that the Petitioner has missed the bus by only 1.23 marks. Though on the one hand, on the basis of objective assessment, as could be depicted from the record of the Petitioner, she has got 80% of the marks, on the other hand on the basis of marks allotted subjectively by evaluating her judgments and her performance in viva-voce, she has got 50% or less than 50% of the marks.

12] No doubt that the judgments are evaluated and interviews are conducted by the Hon'ble Judges of this Court. As such, the assessment of the judgments of the candidate as well as assessment of the performance of the candidate in viva-voce would be presumed to be on objective basis. However, by now, it is a settled principle of law that merely because there is no possibility of discretion being not

exercised properly, that by itself cannot be a ground for granting wider discretion howsoever high the authority may be. We may also gainfully refer to the Judgment of the Apex Court in *Ajay Hasia vs. Khalid Mujib*¹. In the said case, selection process included 33.33 percentage marks for oral interview. Their Lordships held that allocation of a high percentage of marks for the oral interview as compared to the marks allocated for the written test, cannot be accepted by the Court as free from the vice of arbitrariness. After discussing the entire legal position, Their Lordships observed that allocation of more than 15% of the marks out of the total marks for the oral interview would be arbitrary and unreasonable and was liable to be struck down as constitutionally invalid. In the Rules that fall for consideration before us more than twice permissible limit of 15% i.e. 33.33% of the marks are allocated on the basis of oral interview. Not only that even 33.33 % of the marks which are to be allocated on the basis of evaluation of the judgment are also on the basis of subjective evaluation which may differ from a judge to judge.

13] We are therefore of the prima facie view that award of only

1 AIR 1981 SC 487

33% of marks on the basis of objective assessment and 66.66 % of marks on the basis of subjective assessment i.e. evaluation of judgments and oral viva appears to be an issue which needs to be looked into.

14] We may clarify that we do not propose to encroach upon the rule making powers of the High Court on the Administrative Side. However, as already discussed hereinabove, we may also observe that it is high time that the Rules which govern the promotions of high office of District Judge need to be re-framed in a proper format. We may also prima facie observe that the selection process for the promotion should not have more than 50% of the marks to be determined on the basis of subjective assessment i.e. evaluation of judgment and granting of marks for viva-voce. We therefore feel that rule making authority i.e. High Court on the Administrative Side will address the issue and find out a system of selection which has more weightage on the objective assessment than the subjective assessment of the candidate.

15] Petition is rejected.

16] However, we request the learned Advocate General to send copy of this order to the High Court on its administrative side with a request to have a re-look at the Rules governing an important issue regarding promotions of the Judicial Officers in the light of what has been observed by us hereinabove.

(M. S. KARNIK, J.)

(B. R. GAVAI, J.)