

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **WRIT PETITION (CIVIL) No. 953/2016**

% **Reserved on:** 27th January, 2017
Date of Decision: 1st March, 2017

SANJEEV KUMAR SAXENAPetitioner
Through Ms. Jyoti Singh, Sr. Advocate with Ms.Tinu
Bajwa & Mr. Amandeep Joshi, Advocates.

Versus

UNION OF INDIA & OTHERSRespondents
Through Mr. Dev P. Bhardwaj, Ms.Anubha
Bhardwaj & Ms. Meena Pathak, Advocates for UOI.
Mr. S. Rajappa, Dr. Puran Chand & Ms.Shalini A.P.,
Advocates for the respondent.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

Sanjeev Kumar Saxena in this writ petition impugns the orders dated 20th January, 2015 and 27th November, 2015 passed by the Principal Bench of the Central Administrative Tribunal (Tribunal, for short) dismissing OA No. 3889/2012 and RA NO. 23/2015, respectively.

2. The petitioner who is working as a Post-Graduate Teacher in Navodaya Vidyalaya Samiti since 1st July, 2008, had applied for selection to the post of Principal pursuant to the advertisement published in Employment News dated 02-08 June, 2012 by the Navodaya Vidyalaya Samiti, Department of School Education and Literacy, Ministry of Human Resource Development.

3. It is an undisputed position that the petitioner fulfils the eligibility criteria, i.e. he possesses the required educational qualifications and experience to be considered for selection for the post of Principal.

4. As the dispute relates to the mode of selection, as indicated in the advertisement/notification, we would like to reproduce the same:-

“MODE OF SELECTION

1. The Written Examination for the recruitment to the above posts will be held at Delhi on August 05, 2012.
2. Blind candidates will be allowed to take the assistance of scribes (to be arranged by the candidates) at the respective Examination Centre who will assist them in the examination process. Such candidate must write clearly about their disability in the application form. An extra time of 20 minutes per hour of examination will be given to such candidates.
3. Candidates will be required to download the call letter from Navodaya Vidyalaya Samiti's website i.e. www.navodaya.nic.in . Candidates will be intimated about the same by e-mail & SMS. No candidate will be permitted to appear in the examination hall without Admit card, along with information handout.
4. The Written test will consist of one paper as under:-

Assistant Commissioner (Admn.)					
S. No.	TEST TYPE	TEST	NO. OF QUES	MARKS	TIME
1.	Objective	General Knowledge	25	20	Composite time of 3 Hours
2.		Reasoning Ability	25	20	
3.		English & Hindi Knowledge	40	30	
4.		Quantitative Aptitude	40	30	
5.		Administrative and Financial Procedures/Rules	70	100	
TOTAL			200	200	

Principal					
S. No.	TEST TYPE	TEST	NO. OF	MARKS	TIME

			QUES		
1.	Objective	General Knowledge	25	20	Composite time of 3 hours
2.		Reasoning Ability	25	20	
3.		English & Hindi Knowledge	40	30	
4.		Quantitative Aptitude	40	30	
5.		(a) Contemporary Social, Economic and Cultural Issues, (b) Administrative and Financial Procedures/Rules	40 30	 100	
TOTAL			200	200	

The tests will be of Objective type with each question having five alternative choices out of which one will be the correct answer. Candidates have to find out the correct answer and indicate it by darkening appropriate oval on a separate computerised answer sheet using an HB pencil. The test will be bilingual (Hindi & English Version)

5. Written Exam for both the posts of Assistant Commissioner (Admn.) & Principal will be held simultaneously. In case any candidate applies for both the post, he will have to attempt paper 5 of the other post in the same sitting without any break, and will be allowed extra time of 75 minutes.

6. The decision of the Samiti about the mode of selection to the above posts and eligibility conditions of the applicants for interview shall be final and binding. No correspondence will be entertained in this regard.

The candidates were required to appear in an objective test of 200 marks comprising of questions relating to general knowledge, reasoning ability, English and Hindi knowledge, quantitative aptitude, contemporary social, economic and cultural issues, and administrative and financial procedures and rules and thereafter interviewed. The advertisement in clause 6 had stated that

the decision of the Samiti about the mode of selection to the posts and eligibility conditions of applicants for the interview shall be final and binding and no correspondence would be entertained in that regard.

5. Written examination was conducted on 5th August, 2012 and results were declared vide notification dated 14th September, 2012. The petitioner had secured 117 marks in the written examination and had stood first. In other words, he has secured the highest marks amongst all the candidates who had appeared for the written examination.

6. As the notification dated 14th September, 2012 is of relevance and is relied upon, we would like to reproduce the same in entirety:-

“NAVODAYA VIDYALAYA SAMITI
An autonomous organisation of
Ministry of Human Resource Development
(Department of School Education & Literacy)
B-15, Sector-62, Institutional Area,
NOIDA-201307, U.P.

No. F.1-5/2012/NVS/(Pers.)779 Dated 14.09.2012

Sub:- Results of the Written Exam conducted on 05.08.2012 at New Delhi for the post of Principal for Direct Recruitment and Departmental Candidates.

The Results for the above Exams of all the candidates is given at Annexure-I for Direct Recruitment and Annexure-II for Departmental Exam in order of their Roll numbers.

1. The cut-off marks decided by NVS are as under:-

	CUT-OFF MARKS
DIRECT RECRUITMENT	45% for General and OBC candidates 40% for SC/ST candidates
DEPARTMENTAL CANDIDATES	38% for General and OBC candidates 35% for SC/ST candidates

2. Date of interview (October last week) for the shortlisted candidates (up to cut-off marks) is being intimated separately.”

The notification had thus indicated and prescribed a cut-off for the purpose of shortlisting candidates who would be called for the interview. The aforesaid notification had informed that the interview would be held in the last week of October and the shortlisted candidates, i.e. who had secured the cut-off marks, would be intimated separately.

7. The notification dated 14th September, 2014 did not stipulate that any specific cut-off or qualifying marks had been fixed in the interview.

8. The petitioner was interviewed and as per the respondents had scored 15 marks out of the total of 40 marks in the interview. Even with 15 marks in the interview, the petitioner had scored a cumulative total of 132 marks, i.e. 117 marks in the written examination plus 15 marks in the interview. This total or cumulative score of 132 marks, was the highest, scored by the petitioner and two other candidates.

9. The petitioner, inspite of scoring the highest total marks, was disqualified and denied offer of appointment as he had not scored the minimum cut off of 45% marks in the interview.

10. The short question, is whether the criteria and condition of minimum qualifying marks of 45% in the interview, was legal and valid?

11. The Tribunal, in the impugned order dated 20th January, 2015, has answered the said question in favour of the respondents holding that the respondents had fixed the cut-off/ qualifying marks as 45% separately for the interview and this was in terms and in accordance with the power reserved under Clause (6) of the advertisement/notification under the head “Mode of Selection” and, hence, the petitioner cannot question the prescribed cut-off

requirement in the interview. An additional reason given by the Tribunal was that the respondent Samiti had prescribed 45% as cut-off/qualifying marks in the written examination to be called for the interview, and this was done in terms of Clause (6) of the advertisement as aforesaid. By inference the said cut off marks would apply to qualify in the interview. The OA, it was observed, should be dismissed on the ground of non-joinder of necessary parties as the selected candidates were not impleaded and made parties. Lastly, it was held that parameters of selection could differ depending upon the job requirements and the nature of duties and responsibilities of the post. A candidate with the highest marks in the written examination was entitled to appointment in the clerical cadre posts, but for posts like that of the Principal, personal qualities matter. The Tribunal thus held that fixation of minimum qualifying marks in the interview for selection cannot be faulted.

12. The reason given by the Tribunal that selected candidates who had scored less than the petitioner were not impleaded as respondents, is factually incorrect. The petitioner had impleaded the affected persons, i.e. the selected candidates, 13 in number, as co-respondents 3 to 15 in the OA. This error and mistake in the original order of the Tribunal dated 20th January, 2015 was noticed and corrected in the review order dated 27th November, 2015 and the observations made in paragraph 15 of the original order, that the OA was liable to be dismissed as necessary parties were not impleaded, was deleted. However, the review application was dismissed recording that the respondents in the advertisement/notification had reserved their right to decide the mode of selection, and thereby the respondents had fixed qualifying marks of 45% separately for the written test. The Tribunal held that the respondents, in the similar manner, were justified and could have imposed the condition of minimum qualifying marks in the interview. As the petitioner only scored 15

out of 40 marks in the interview, he was not selected. The decisions relied upon by the petitioner before the Tribunal were not elucidated, being inapplicable as this was not a case where the rules of the game were changed after the selection had commenced. In the relied upon decisions, the authorities had not reserved their right to fix the modalities and the mode of selection, as was the stipulation in the present case. Reference was made to clause 6 of the advertisement dated 02-08 June, 2012.

13. We have quoted clause (6) under the heading “Mode of Selection” of the advertisement/notification dated 02-08, June, 2012. The said clause had permitted the respondent Samiti to fix eligibility conditions for the interview, i.e. to stipulate and lay down criteria to shortlist eligible candidates, post the written examination, for the interview. The decision of the respondent Samiti in this regard was stipulated as binding and final and no correspondence would be entertained. The aforesaid clause had not stipulated or postulated that the candidate must secure minimum qualifying marks in the interview. We cannot read the clause, as worded, had permitted the respondent Samiti to fix a minimum qualifying mark in the interview at a later date. We do not find any such stipulation in clause (6) of the aforesaid notification/advertisement. The clause had permitted the Samiti to shortlist the candidates to appear for the interview, and not fix or stipulate a minimum qualifying mark in the interview. This difference is distinct and apparent.

14. We had called for the original file of the respondents and examined the same. We would like to reproduce the file notings dated 26th October, 2012, which read as under:-

“**Sub:-**Interview for the post of Principal, deciding the marks for Interview-Regarding.

As approved at pre-page, intimation to all the Members of the Selection Committee has been issued vide this office letter of even number dated 23.10.2012 for the Interview to the post of Principal to be held on 30-31 October, 2012.

In this regard, it is submitted that a Written Exam for recruitment of Principals was conducted by M/s. IBPS, Mumbai for 200 marks. The cut off marks decided by the Samiti was as under:-

For Direct	-	General candidates 45%
Recruitment	-	SC/ST candidates 40%
For Departmental	-	General candidates 38%
candidates	-	SC/ST candidates 35%

No SC/ST candidate in the direct/departmental Exam have qualified the test as per the cut off marks decided by the Samiti.

The Interview may be decided for 40 marks. As per the practice followed by us in previous recruitment and also informed to various Courts, we may consider the same qualifying cut off marks as decided in the Written Exam, in the interview also. It means a candidate will be declared qualified if he or she attains the cut off marks separately in the Written Exam as well as in the Interview.

Submitted for approval please.

A.C. (Estt.III)
26.10.2012 ”

The aforesaid file noting by Assistant Commissioner (Estt.III) was thereafter approved by the senior officers in the hierarchy. The aforesaid noting states that the interviews for the post of Principal were to be held on 30th-31st October, 2012. It refers to the criteria to shortlist candidates for the interview based upon their results in the written examination. It was decided the interview would be for 40 marks. The note then records and stipulates that as per past practice and policy informed to various courts, it was decided that minimum qualifying marks should be fixed for the interview, as in the written

exam. This meant that candidates would not qualify unless they attain the qualifying marks in both the written examination and the interview. In other words, the minimum qualifying marks for the interview were stipulated for the first time, vide this note dated 26.10.2012. The stipulation was made in view of “the practice followed...in previous recruitment and also informed to various Courts...”

15. This, according to us, is a case wherein rules of the game were changed after the selection process had commenced. The prescription of minimum qualifying marks in the interview was not postulated or stated in the advertisement/notification quoted above. A new condition was imposed for the first time just before the interview was to be conducted, requiring the candidates to secure the minimum cut-off marks in the interview. Thus, notwithstanding the aggregate marks secured, i.e. the cumulative or total marks secured in the written examination and the interview, the candidate would not be selected unless he had scored and was awarded 45% or more marks in the interview. The aforesaid interdict of the respondents, is contrary to law and falls foul of the decision of the Supreme Court in ***Hemani Malhotra versus High Court of Delhi***, (2008) 7 SCC 11. This case relates to selection under the Delhi Higher Judicial Service Examination, which consisted of a two-stage selection process comprising of the written examination of 250 marks and interview/viva-voce. The minimum qualifying marks in the written examination were 55% for General category candidates and 50% for Scheduled Caste and Scheduled Tribe candidates. The advertisement had not stipulated minimum cut-off marks in viva-voce/interview, which requirement was introduced vide the Full Court Resolution specifying that each candidate, as in the case of the written examination, would qualify only if they secure minimum qualifying marks of

55% for General category candidates and 50% for Scheduled Caste and Scheduled Tribe candidates, in the interview. The Supreme Court referring to their earlier decisions in *Lila Dhar versus State of Rajasthan*, (1981) 4 SCC 159 and *K. Manjusree versus State of A.P.*, (2008) 3 SCC 512 held that it was impermissible to prescribe and fix minimum cut-off marks in the interview after the written examination or test. Paragraph 15 in the case of *Hemani Malhotra* (supra), observes:-

“15. There is no manner of doubt that the authority making rules regulating the section can prescribe by rules the minimum marks both for written examination and viva voce, but if minimum marks are not prescribed for viva voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at viva voce test was illegal.”

16. Faced with the aforesaid position, counsel for the respondents had submitted that the ratio in *Hemani Malhotra* (supra) would not be applicable, and the ratio in *Yogesh Yadav versus Union of India and Others*, (2013) 14 SCC 623 was apposite. We do not agree. In *Yogesh Yadav* (supra), the Supreme Court had distinguished the ratio in *Hemani Malhotra* (supra), in a different context. In *Yogesh Yadav* (supra) the applicable instructions had provided that the written test and interview would carry 80 marks and 20 marks, respectively. General and reserved category candidates were required to score 50% or 40% marks in the written examination, respectively, to qualify for the interview. The entire selection was in accordance with the said criterion laid down. After conducting the interviews, marks obtained in the written test and the interview/viva-voce were added. Thereafter, the candidates who had

secured 70% or more marks in the unreserved category and 65% or more marks in the reserved category were selected. This, the Supreme Court has held, would not amount to changing the rules of the game, after the selection process has started. This new stipulation of 70/65% marks for selection, it was held, was not contrary to law and was altogether different and would not violate the ratio covered by **Hemani Malhotra** (supra). Fixation of 70% or more marks for unreserved category and 65% or more marks for reserved category as the criteria for the purpose of selection/appointment was permissible. This criteria could be fixed even after the result or final total score had been compiled. It would not matter that the notification/advertisement had no such stipulation, which was introduced at the final stage. The authorities have the right to decide whether or not to appoint the selected candidate. Objective and fair exercise of the said discretionary right to appoint the best candidates would not be contrary to law.

17. The decision in the case of **Yogesh Yadav** (supra) would not be applicable for the simple reason that in the present case the respondents have not fixed a criteria for issue of selection/appointment letter, as is being urged by them. Applying the yardstick approved in **Yogesh Yadav** (supra), the petitioner would have qualified. The respondent Samiti, in fact, had prescribed a cut-off/minimum qualifying marks in the interview and candidates not securing the said cut-off in the interview have been disqualified. The said stipulation, which was introduced after the written examination was conducted and before the interview, would be squarely hit and covered by the situation commented upon and rejected in the case of **Hemani Malhotra** (supra).

18. The aggregate marks secured by the petitioner and other candidates, who were called for the interview, are on record. The petitioner, who had secured 117 marks out of 200 in the written examination, and 15 marks out of

40 in the interview, had 132 marks in total or aggregate. 132 marks were the highest combined or aggregate marks secured by any candidate. Two other candidates, namely, Pradeep Kumar Singh and Dr. Rajiv Kumar Singh had secured identical aggregate/total marks and were selected. However, the petitioner was disqualified and not selected, as he had not secured minimum qualifying marks in the interview. This is clearly mentioned in the remark column of the consolidated list of marks provided to the petitioner in response to the RTI application filed by him. This being the undisputed position, the petitioner must succeed and the stand of the respondents being contrary to law has to be rejected.

19. The selected candidates have been impleaded as respondent Nos. 3 to 15 in the present writ petition. However, the selected candidates have not entered appearance or contested the writ petition. It is also learnt that some of the successful candidates did not join or have resigned. In other words, there are vacant posts of Principal. In any case and in light of the given facts, we would have required the respondents to create a supernumerary post or asked the last selected candidate to vacate/leave.

20. Lastly, we have to deal with the question of seniority and back wages. We would not direct payment of back wages (the petitioner is working), but the petitioner must be given his seniority, i.e., the first position and notional appointment from the date the next lower successful candidate was appointed. The petitioner's pay would be accordingly fixed by giving benefit of increments due to him from the date of notional appointment. The date of notional appointment would be also counted for the purpose of all other benefits, like pension (if applicable) and years of service as Principal for further promotion, etc.

The respondents would comply with the aforesaid directions within a period of one month from the date a copy of this order is received by them. The petitioner would be entitled to salary as a Principal, computed in the manner indicated above, after one month from the date a copy of this order is received by them. In the facts of the case, there would be no order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

MARCH 1st, 2017
VKR/ssn

