

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION ST.NO. 9929 OF 2018**

Krantikumar Kishanrao Kolvar & Ors

..Petitioners

Vs.

The State of Maharashtra & Ors

..Respondents

Mr. S. B. Talekar a/w Ms Madhuri Ayyappan i/b Talekar & Associates for the Petitioners

Mr. A. I. Patel Addl GP for the Respondent Nos.1 and 2 State

Mr. A. B. Borkar for the Respondent No.3

Mr. S. R. Ganbavale for the Respondent No.2

CORAM :R. M. SAVANT, &

M. S. KARNIK, JJ

DATE : 19th SEPTEMBER, 2018

P.C.

1 The above Writ Petition has been filed challenging the constitutional validity of the fourth proviso to Rule 6(1)(e) of the Maharashtra Judicial Services Rules 2008 prescribing atleast 40% marks in viva-voce test to be eligible for selection process to the post of CJJD and JMFC as being ultra vires of Articles 14 and 16 of the Constitution of India and the Judgment of the Apex Court in **All India Judges Association (3) Vs. The Union of India & Ors.**¹ The Petitioners also seek a direction that the Respondent No.3 be directed to frame a scheme of examination for the candidates for the post of CJJD and JMFC.

¹ (2002) 4 SCC 247

2 The Petitioners abovenamed are the candidates who applied for the said post of CJJD and JMFC pursuant to the advertisement which was issued on 15-3-2017 which advertisement appeared on the website of the High Court of Bombay as also in leading newspapers. The Petitioners having gone through the gamut of the selection process, have not been selected for the said post of CJJD and JMFC. It is after participating in the selection process that the Petitioners have chosen to file the above Writ Petition.

3 In so far as the said Rule 6(1)(e) is concerned, the same reads thus:

6(1)(e) (i) The candidate applying for being appointed for the post of Civil Judge Junior Division who secures not less than 50 marks in each paper shall be eligible for viva-voce carrying 50 marks.

(ii) The candidate applying for being appointed by nomination for the post of District Judge who secures not less than 50% marks, provided if there is more than one paper, then candidate who secures not less than 50% marks in each paper, shall be eligible for viva-voce carrying 50% marks.

Provided that the candidates belonging to communities recognized as backward by the Government for the purpose of recruitment who secure not less than 45% marks as aforesaid shall be eligible for the viva-voce.

Provided further that the Recruiting Authority shall call the candidates for viva-voce in the ratio of 1:3 of the available vacancies to the successful candidates.

Provided also that if there are more than one candidates who have secured identical cut-off marks as

fixed by the Recruiting Authority for maintaining the ratio 1:3, all such candidates shall be called upon to appear for viva-voce.

Provided also that only such candidate who obtain at least 40% of marks in viva-voce test shall be eligible for selection.

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4 The challenge to the said Rule though in the prayer clauses it is mentioned that the same is violative of Articles 14 and 16 of the Constitution of India, is principally on the ground that the said Rule is in violation of the Judgment of the Apex court in All India Judges' Association (3). The Learned Counsel appearing on behalf of the Petitioners Mr. Talekar relied upon the observations made by the Apex Court in All India Judges' Association (3) (supra) and especially paragraph 37 thereof which reads thus”

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

Hence the recommendations of the Shetty Commission in so far as the post of CJJD and JMFC would be material. However, the Learned Counsel appearing for the Petitioners when the matter was argued day before yesterday i.e. on 17-9-2018 placed reliance and drew our attention to the recommendations made by the Shetty Commission in respect of the post of District Judge, in respect of which post the recommendations of the Shetty Commission in so far as viva-voce were as follows:

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 test shall carry 50 marks. There shall be no cut-off marks in viva voce test.

The Learned Counsel therefore laid emphasis on the fact that there could be no cut-off marks in so far as the viva-voce test is concerned. Based on the said recommendations in respect of the post of District Judge that the Learned Counsel submitted that Rule 6(1)(e) to the extent that it prescribes minimum qualifying marks in the viva-voce test is violative of the judgment of the Apex Court in All India Judges' Association (3) (supra). On 17-9-2018 we deferred the hearing of the above Petition till today, so as to enable us to go through the Shetty Commission recommendations.

5 We have carefully gone through the recommendations of the Shetty Commission and on such scrutiny we have found that in respect of the post of the CJJD and JMFC there are separate recommendations of the Shetty Commission which can be found in Volume-II of the report. In the context of the written examination and the viva-voce test, the recommendation of the Shetty Commission on the said aspect reads thus:

We suggest that written examination followed by viva voce test should be essential for selection of the Civil Judges (Jr. Divn.). However, we emphasis that the written examination should be oriented more to test the candidate's practical acquaintance with law and procedure with special reference to his ability to draft pleadings, appreciate evidence and write judgments. It is left to the selecting authority to prescribe appropriate marks for the written examination and viva voce test.

But, it should be scrupulously observed that the marks allowed for the viva voce test should be less than 1/3rd of the marks prescribed for the written examination. We recommend that the method of “Evaluation by Grading System” be followed.

Hence the Shetty Commission left it to the selecting authority to prescribe proper marks for the written examination and the viva-voce test. Hence the recommendations of the Shetty Commission in respect of the post of CJJD and JMFC stand in contradistinction to the recommendations for the post of the District Judge and there is no such recommendation in respect of the viva-voce as is in respect of the post of District Judge. In our view therefore, the submission based on the violation of the judgment of the Apex Court in All India Judges' Association (3) (Supra), does not stand to scrutiny.

6 The Learned Counsel to get over the fact that the Petitioners having appeared in the said selection process, have thereafter called in question the Rules, sought to place reliance on the judgment of the Apex Court in the matter of **Rajkumar & Ors. Vs. Shakti Raj & Ors.**² The said judgment would have no application as in the said case the Apex Court had found glaring illegalities having been committed and therefore the Apex Court held that even if the Appellants had participated in the selection process the principle of estoppel by conduct would not apply. In the instant case such is not the case, as in fixing the cut-off marks for the viva-voce test we do not find

² (1997) 9 Supreme Court Cases 527

violation of the judgment of the Apex Court in All India Judges' Association (3) (supra). We have already observed as to how the recommendation in respect of the post of District Judge in the matter of the viva-voce test was sought to be relied upon to contend that no cut-off marks could be prescribed for the post of the CJJD and JMFC when there are independent recommendations in respect of the said post, wherein there are no such directions.

7 The Learned Counsel then sought to place reliance on the judgment of the Apex Court reported in the matter of **Salam Samarjeet Singh Vs. High Court of Manipur at Imphal & Anr.**³, wherein there was a divergence of views between the Learned Judges on the aspect whether qualifying marks in the viva-voce could be prescribed. In our view, the said judgment would also have no application as in the said case also the recruitment was to the post of the District Judge (lower level) in the higher judiciary in the State of Manipur. Hence the judgments (supra) relied upon by the Learned Counsel for the Petitioners to buttress his contention that the said Rule 6(1)(e) is violative of the judgment of the Apex Court in All India Judge's Association 3 (supra) or that the Petitioners are not estopped from challenging the selection process though having participated in the same, are of no avail.

8 It would be necessary at this stage to refer to the judgment of the Apex Court in the matter of **Taniya Malik Vs. The Registrar General of the**

3 (2016) 10 Supreme Court Cases 484

High Court of Delhi⁴, on which reliance was placed on behalf of the Respondents. In the said case before the Apex Court the fixation of the minimum passing marks in the interview was challenged on the ground that the same was unreasonable. The Apex Court after referring to the objects of viva-voce test in paragraph 17 of the said judgment has held that it is desirable to have the interview and fix the minimum passing marks when the appointment is to be made in the higher judiciary to the post of District Judge. The Apex Court further observed that the minimum passing marks are required to be fixed so as to weed out the unworthy elements so as to segregate the grain from the chaff. The Apex Court therefore affirmed the fixing of minimum marks for the viva-voce test and thereby repelled the contention which was urged on behalf of the aggrieved parties therein. The Apex Court has recognised the need of fixing the minimum marks for the viva-voce test so that there is a process of weeding out the unsuitable candidates so as to segregate the grain from the chaff. No doubt the judgment in Taniya Malik's case also concerns the post of District Judge. However, the judgment in Taniya Malik's case is useful for the proposition that the interview or viva-voce constitutes an important component of the selection process and that the cut-off marks fixed results in weeding out the unsuitable candidates.

9 The next contention of the Learned Counsel for the Petitioners was that in terms of the Rule 6((2)(a) of the Rules it is mandated that a scheme of

⁴ 2018(3) SCALE 64

examination of the candidate including written and viva-voce shall be framed by the High Court in consultation with the Commission. It was the submission of the Learned Counsel that inspite of the Rules having come into force in the year 2008 such a Scheme has not been framed and the selection process has been held without there being any such scheme in place. In our view, the said submission is misconceived and misfounded, what the Rule mandates is a scheme of examination to be framed. The scheme of examination has undoubtedly been framed as can be seen from the advertisement for the post of CJJD and JMFC which appears on the website as well as in the news papers. The scheme inter alia comprises the qualifications which are prescribed for the post to be eligible, thereafter a written examination and lastly the viva-voce. The scheme need not be in the nature of a written document which is required to be published by the Respondent No.1 from time to time, which probably appears to be the contention of the Learned Counsel for the Petitioner. The advertisement inviting the applications for the post of CJJD and JMFC which comprises the scheme is given a wide publicity as it appears on the website as also in the newspapers. In our view therefore there is no merit in the said contention also.

10 In so far as challenge to the Rule based on Articles 14 and 16 are concerned, the said challenge in our view is based on a priori reasoning and is not based on any material placed before the Court by way of any scientific

analysis. The party calling in question the constitutionality of a provision has to place and produce evidence to prima facie sustain such a challenge as there is a presumption as regards the constitutionality of a provision. In our view having regard to the challenge raised in the instant case the same fails to satisfy the aforesaid test.

That apart the said challenge also cannot be entertained at the behest of the Petitioners who as indicated above have participated in the selection process and having failed thereafter have sought to call in question the Rules and raise the constitutional challenge. In our view such a challenge on behalf of unsuccessful candidates cannot be countenanced.

11 In that view of the matter no case for interference in the Writ Jurisdiction of this Court is made out. The Writ Petition is accordingly dismissed.

[M. S. KARNIK, J]

[R.M.SAVANT, J]

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