

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2460 OF 2017

Vrushali Vilas Kuchekar, Age 31 years,
Occupation Residing at Plot No.31,
Anand Housing Society, Phaltan,
Taluka Phaltan, District Satara – 415 523. ...Petitioner

..Versus..

1. Maharashtra Public Service
Commission, Having office at 3rd Floor,
Bank of India Building, Fort,
Mumbai – 400 001.
2. State of Maharashtra
Through Secretary, Law & Judiciary,
Department.
3. The Registrar General,
Bombay High Court, Mumbai. ...Respondents

Dr.Uday P. Warunjikar with Ms.Vaishnavi Gujarathi for the Petitioner.

Mr.Vikas M. Mali, AGP for the State – Respondent Nos.1 and 2.

Mr.Rahul Nerlekar for the Respondent No.3.

**CORAM : R.D. DHANUKA &
V.G. BISHT, JJ.**

RESERVED ON : 3RD MARCH, 2021.
PRONOUNCED ON : 17TH MARCH, 2021.

JUDGMENT (Per R.D. Dhanuka, J.) :-

1. Rule. Learned counsel for the respondents waive service.

By consent of parties, the writ petition is heard finally.

2. The petitioner has prayed for quashing and setting aside the second proviso to Rule 6(2)(a) of the Maharashtra Judicial Service Rules, 2008 to the extent of putting a cut of mark 40% in *viva-voce* examination and also prays for quashing and setting aside the advertisement more particularly condition no.8.4 by holding that it is *ultra-vires* the Article 14 to the Constitution of India. The petitioner has also prayed for an order and direction against the respondents to consider the name of the petitioner for recommendation for appointment of the post of Judicial Magistrate First Class and Civil Judge, Junior Division. The petitioner has prayed for an order and direction against the respondents to produce the name of panels, who had conducted the interviews and the candidates who appeared before them in pursuance to the advertisement issued by the respondent no.1.

3. Some of the relevant facts for the purpose of deciding this petition are as under :

The petitioner, who is an advocate, has obtained degree of B.Sc. and later completed LL.B. course. The petitioner was enrolled as an advocate with the Bar Council of Maharashtra & Goa some time in the year 2009.

4. In the year 2015, the respondent no.1 issued an advertisement for holding a preliminary examination for the post of Judicial Magistrate First Class and Civil Judge Junior Division. The

petitioner had submitted her application pursuant to the said advertisement and was given an attempt card. The petitioner belongs to Scheduled Caste. The petitioner appeared for the written examination held on 4th October, 2015 and was declared as successful therein. It is the case of the petitioner that based on the performance of the petitioner in the written examination, the petitioner was eligible for the oral interview. The petitioner accordingly appeared for interview. The respondent no.1 declared the final result. It is the case of the petitioner that in the final result which was available in the month of March, 2016, the petitioner came to know that she had scored only 13 marks in the interview out of 50 marks and 120 marks out of 200 marks in the written examination.

5. On 4th April, 2016, the petitioner preferred an application under the provisions of Right to Information Act and applied for certain information including a list of recommend candidates for the said post of Judicial Magistrate First Class and Civil Judge, Junior Division. The petitioner was given the list of recommend candidates as well as the list of candidates who were though initially qualified but were not qualified after interview. The petitioner thereafter made a representation to the respondent no.2 on 2nd July, 2016 and also on 25th July, 2016. The petitioner did not receive any reply from the respondent no.2 in response to the said representations. It is the case of the petitioner that the petitioner personally went and met the

Desk Officer and was informed orally that the file of the petitioner had been closed. It is the case of the petitioner that in the list of candidates called for interviews for the said post, the name of the petitioner was shown at serial no.417. The petitioner secured 120 marks out of 200 marks in the written examination and 13 marks out of 50 marks in the interview. On 18th February, 2017 the petitioner filed this writ petition.

6. Dr.Warunjikar, learned counsel for the petitioner invited our attention to various exhibits annexed to the writ petition. He placed reliance on condition no.8.4 of the advertisement issued by the respondent no.1 and also on the second proviso to Rule 6(2)(a) of the Maharashtra Judicial Service Rules, 2008. He submits that the said Rule 6 contemplated recruitment by nomination and fixed a limit of 15 marks of *viva-voce* examination. He submits that under the first proviso to Rule 6(2)(a), relaxation of marks in the written examination to Scheduled Caste and Scheduled Tribe candidates is provided. However, there is no such relaxation provided to the candidates belonging to Scheduled Caste and Scheduled Tribe at the stage of *viva-voce* examination which amounted to act of discrimination.

7. It is submitted that fixing of 40% marks in *viva-voce* examination is arbitrary and unreasonable and did not have any nexus with the object to be achieved. Though while considering the skill under written examination, proviso is meant for relaxation in

qualifying marks for Scheduled Caste candidate, however, while evaluating the *viva-voce* examination, there is no relaxation for Scheduled Candidate. In view of the fact that the Scheduled Caste candidates have been provided reservation, in view of their peculiar problem, denial of benefit of relaxation in *viva-voce* amounts to discrimination. The benefits which were granted in respect of the written examination to the Scheduled Caste candidates ought to have been extended also in case of *viva-voce*. He submits that second proviso to Rule 6 (2)(a) is *ultra-vires* Article 14 of the Constitution of India.

8. The next submission of the learned counsel is that though in the advertisement issued by the respondent no.1, there was no provision made for the appointment of two panels for conducting interviews of the candidates, the respondent no.1 constituted two panels. In the affidavit in reply of the respondent no.1, there is no denial to this submission of the petitioner. The respondents did not produce any mark sheet in the affidavit in reply.

9. It is submitted that the criteria for assessment of performance in *viva-voce* is not placed on record by the respondent no.1 before this Court and has been withheld from perusal of this Court. The constitution of two panels for conducting *viva-voce* was without any provision made in Rule and without informing the candidates in the advertisement. There was arbitrariness and

unreasonableness in conducting viva-voce examination of two panels. He submits that Rule is that once the candidate participates in the selection process, he should not be allowed to raise the question about the selection process. However such Rule is not applicable to the facts of the present case as in the advertisement issued no such information was provided to the candidates that there would be more than one panel and there would be separate assessment among the candidates at viva-voce stage.

10. It is submitted that the petitioner came to know about such multiple panels only at the time of appearing for the interview for such viva-voce post. The respondents have not produced the names of the panel members of both the panels and marks allotted to them. The respondents have withheld this important information from this Court and also from the petitioner. Most of the candidates who appeared before the panel who conducted viva-voce of the petitioner got less marks as compared to another panel who gave substantial marks. Such discrimination is violative of basic principles of rule of law as well as foul play in selection process.

11. Learned counsel for the petitioner placed reliance on the unreported judgment of this Court delivered on 19th September, 2018 in case of **Krantikumar Kishanrao Kolvar & Ors. vs. The State of Maharashtra & Ors. in Writ Petition (Stamp) No.9929 of 2018,** judgment of this Court in case of **Manoj Arvindrao Sable & Ors.**

vs. State of Maharashtra & Ors. 2011(2) ALL MR 325, judgment of the Hon'ble Supreme Court in case of Ramesh Kumar vs. High Court of Delhi & Anr., (2010) 3 SCC 104, judgment of the Hon'ble Supreme Court in case of K.H. Siraj vs. High Court of Kerala & Ors., (2006) 6 SCC 395, judgment of the Hon'ble Supreme Court in case of All India Judges' Association & Ors. vs. Union of India & Ors., (2002) 4 SCC 247 and would submit that all these judgments are against the petitioner.

12. Mr. Rahul Nerlekar, learned counsel for the respondent no.3 i.e. The Registrar General, Bombay High Court, Mumbai submits that the entire recruitment process pursuant to the said advertisement issued by the respondent no.1 in the month of May, 2015 has been already completed. Two more recruitment process have been completed thereafter. Nothing survives in this writ petition and on this ground itself the petition shall be dismissed. He submits that in any event, there is no substance in any of the grounds raised by the petitioner in this writ petition.

13. Learned counsel placed reliance on an unreported judgment of this Court delivered on 18th April, 2018 in case of Maroti Prakash Pavade vs. State of Maharashtra & Anr. and in particular paragraph 5 thereof and would submit that this Court held that in view of further selection process having been undertaken for the selection process pursuant to the advertisement in question, prayer

of the petitioner that the direction be given to the respondents to appoint the petitioner on any of the vacant post could not be considered. There was no question of maintaining vacant post from the selection process undertaken pursuant to the original advertisement.

14. Learned counsel for the respondent no.3 strongly placed reliance on the judgment of this Court in case of **Aarti Madhukar Gaikwad & Ors. vs. State of Maharashtra & Ors.** delivered on 12th September, 2011 in Writ Petition No.1364 of 2010 and would submit that this Court in the said judgment has rejected the contention of the petitioner that the candidate belonging to the Scheduled Caste / Scheduled Tribe were also entitled to the benefit of concession of 5% mark also in case of viva-voce. The petitioner was not in a position to substantiate the said contention. He submits that in this case also the pleadings filed by the petitioner are totally vague and does not point out as to how there was discrimination in not providing relaxation to the Scheduled Caste / Scheduled Tribe candidates of 5% in marks in viva-voce examination.

15. Learned counsel for the respondent no.3 also strongly placed reliance on an unreported judgment delivered on 9th July, 2013 in Writ Petition No.1259 of 2012 in case of **Miss Nivedita Vitthal Kharatmal vs. The State of Maharashtra & Ors.** and would submit that the Division Bench of this Court in the said judgment has

followed the judgment in case of **Aarti Madhukar Gaikwad & Ors.** (supra) and rejected the challenge to 4th proviso to clause (e) of the Sub-rule (1) if Rule (6) of the Maharashtra Judicial Service Rules, 2008 which was identical to the proviso in question.

16. It is submitted by the learned counsel that the petitioner admittedly having participated in the selection process cannot be allowed to raise any objection about validity or legality of any of the provisions prescribed in the selection procedure at this stage after having failed in the selection procedure. He relied upon the judgment of the Hon'ble Supreme Court in case of **Taniya Malik vs. Registrar General of High Court of Delhi, AIR 2018 SC 1245** and in particularly paragraphs 16 to 19 in support of this submission. He submits that the petitioner having failed in the viva-voce test, cannot be allowed to challenge the selection procedure. He also placed reliance on the judgments brought to our notice by Dr.Warunjikar in case of **Krantikumar Kishanrao Kolvar & Ors.** (supra),**Manoj Arvindrao Sable & Ors.** (supra), **Ramesh Kumar** (supra), **K.H. Siraj** supra), **All India Judges" Association & Ors.** (supra) in support of his submission that the petitioner having participated in the selection procedure and having failed, cannot be allowed to challenge the selection procedure subsequently.

17. Insofar as the submission of Dr.Warunjikar, learned counsel for the petitioner that the respondent no.1 could not have

constituted multiple panels for taking interviews is concerned, it is submitted that the said submission is based on presumption. When the respondent no.1 had invited applications by issuing an advertisement, number of candidates who would be participating in response to such interview was not known. He submits that considering the number of applicants having applied in response to the said advertisement, it was not possible for one panel to take interview of all the candidates. Two panels were thus appointed to take interview of large number of applicants.

18. It is submitted by the learned counsel that in Rule 6 (2)(a), it was clearly provided that the candidate who secures not less than 50% marks in each paper in written examination shall be eligible for the *viva-voce* examination for appointment to the concerned post. 2nd proviso to the said Rule provided that candidate who obtains 40% marks in *viva-voce* examination shall be eligible for selection. The *viva-voce* examination was for 50 marks. Admittedly the petitioner secured only 13 marks out of 50 marks earmarked for *viva-voce* examination. He submits that even if 5% relaxation would have been considered in case of the petitioner who belongs to the Scheduled Caste category for considering passing marks in *viva-voce*, the petitioner would yet not be eligible for selection.

19. Dr.Warunjikar, learned counsel for the petitioner in rejoinder would submit that the judgment of this Court in case of

Maroti Prakash Pavade (supra) and more particularly in paragraph 5 thereof would not be a proposition of law. He submits that the respondent no.1 could not have constituted more than one panel. Learned counsel lastly submitted that the petitioner has already crossed the age bar now.

20. Mr.Mali, learned AGP submits that no case is made out by the petitioner for grant of any relief as prayed or otherwise. He relied upon the submissions made by the respondent no.1 in the affidavit filed before this Court on 18th November, 2017.

REASONS & CONCLUSION :-

21. The petitioner who is a practicing advocate had submitted an application for the post of Judicial Magistrate, First Class and Civil Judge, Junior Division pursuant to the advertisement issued by the respondent no.1. The petitioner belongs to the Scheduled Caste. The petitioner has secured 120 marks out of 200 marks in the written examination and 13 marks out of 50 marks in interview and thus was not declared as a successful candidate for the said post. The petitioner has challenged the constitutional validity of 2nd proviso of the Rule 6(2) (a) of the Maharashtra Judicial Service Rules, 2008 to the extent of putting a cut of marks of 40% in viva-voce exam as ultra virus Article 14 of the Constitution of India.

22. Rule 6(2)(a) of the said Service Rules reads thus :-

(6) Recruitment by Nomination :-

(2)(a) Candidate who secures not less than fifty percent of marks in each paper in written examination shall be eligible for the viva-voca examination for appointment to the post of District Judge under 1(b) and 1(c) and Civil Judge, Junior Division under 3(A) of the table 'c' under rule 5 and by nomination;

Provided that Scheduled Caste or Scheduled Tribe candidates who obtain fifty-five percent or more marks in the written examination shall be eligible for the viva voce examination ;

Provided further that the candidate who obtains 40% marks in viva-voce examination shall be eligible for selection.

23. The petitioner does not dispute that before submitting an application form for the said post, the petitioner never raised any objection in respect of the second proviso of the said Service Rules at any point of time and voluntarily participated in the selection process for the said post. The grievance now raised in the writ petition is that though under the first proviso to Rule 6(2)(a) 5% relaxation in marks in the written examination is given to the Scheduled Caste or Scheduled Tribe candidates, in the second

proviso to the said Rule, no such relaxation of 5% is given to the Scheduled Caste or Scheduled Tribe candidates. Insofar as marks for *viva-voce* examination for the purpose of eligibility of the person is concerned, the validity of the said second proviso to Rule 2(6)(a) is challenged on the ground of alleged discrimination and *ultra virus* Article 14 of the Constitution of India.

24. Learned counsel for the petitioner does not dispute that even if the petitioner would have granted 5% relaxation in respect of *viva-voce* examination candidates belonging to the Scheduled Caste, the petitioner had not secured even 35% marks i.e. 17.5 marks in *viva-voce* examination. It is an admitted position that the petitioner has secured 13 marks out of 50 marks and was thus even otherwise not eligible for selection for the said post of Chief Judicial Magistrate, First Class and Civil Judge Junior Division. The petitioner thus cannot challenge the validity of the said proviso of Rule 6(2)(a) of the said Service Rules having no cause of action to challenge the said provision.

25. Be that as it may, the petitioner having participated in the selection procedure without any protest and having failed in the selection procedure cannot be allowed to challenge the selection process or to challenge the validity of the proviso to Rule 6(2)(a) of the said Service Rules. Dr.Warunjikar, learned counsel invited our attention to four judgments of this Court and one judgment of the

Hon'ble Supreme Court and would submit that these judgments are against the petitioner.

26. This Court in case of **Krantikumar Kishanrao Kolvar & Ors.** (supra) has considered the challenge to the constitutional validity of Rule 6(1)(e) of the Maharashtra Judicial Service Rules, 2008 prescribing atleast 40% marks in *viva-voce* test to be eligible for selection process to the post of Civil Judge, Junior Division and Judicial Magistrate, First Class as being ultra virus of Articles 14 and 16 of the Constitution of India. This Court considered the recommendation of the Shetty Commission in the said judgment and after adverting to the judgment of the Hon'ble Supreme Court in case of **Taniya Malik vs. The Registrar General of the High Court of Delhi, 2018(3) SCALE 64** and various other judgments held that 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. This Court also considered the Rule 6(2)(a) of the said Service Rules and rejected the contentions of the petitioner therein that under the said Rule, it is mandated that a scheme of examination of the candidate including written and *viva-voce* shall be framed by the High Court in consultation with the Commission.

27. This Court held that 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 this case also, the petitioner has not substantiated ground on which the constitutional validity of the second proviso of the Rule 6(2)(a) of the Service Rules nor has produced any evidence to prima facie sustain such a challenge as there is a presumption as regards the constitutionality of the provision. The principles laid down by this Court in case of **Krantikumar Kishanrao Kolvar & Ors.** (supra) squarely applies to the facts of this case. We are respectfully bound by the said judgment.

28. Division Bench of this Court in case of **Manoj s/o. Arvindrao Sable & Ors.** (supra) after adverting to the judgment of Hon'ble Supreme Court in case of **K.H.Siraj vs. High Court of Kerala, AIR 2006 SC 395** and after considering the same rule held that the Shetty Commission recommendations would indicate that the candidate getting less than 40% marks in viva-voca is to be given "F" grade with zero grade value. The Hon'ble Supreme Court held that for any employment the candidate must not only have what is called "the hard skills" i.e. the knowledge about the subject, but he must also possess "the soft skills" i.e. the manner in which the knowledge is to be put into practice. In our view, the percentage prescribed in the first and second proviso of Rule 6(2)(a) is in conformity with the principles laid down by the Hon'ble Supreme Court in case of

K.H.Siraj (supra). There is thus no substance in the challenge to the constitutional validity of the second proviso of the Rule 6(2)(a) of the said Service Rules even on merits.

29. Hon'ble Supreme Court in case of **Ramesh Kumar** (supra) has held that in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum Bench Marks for written test as well as for viva-voce. The Hon'ble Supreme Court in All India Judges' Association's case has accepted Justice Shetty Commission's Report. The principles laid down by the Hon'ble Supreme Court applies to the facts of this case. We are respectfully bound by the said judgment.

30. Hon'ble Supreme Court in case of **K.H.Siraj** (supra) held that candidate who participated in the interview with knowledge that for selection they had to secure prescribed minimum pass marks on being unsuccessful in interview could not turn around and challenge that the said provision of minimum marks was improper. The Hon'ble Supreme Court in the said judgment considered the Kerala Judicial Service Rules, 1991 which were similar and rejected the challenge to the said rules made by the candidate. It is held that it is not open for the High Court to prescribe bench marks for the written examination

and oral test in order to achieve the purpose of getting the best available talent.

31. Hon'ble Supreme Court in the said judgment considered its earlier judgment in case of **Delhi Bar Association v. Union of India and Ors., (2002) 10 SCC 159** and held that if a candidate fails to secure even this bare minimum, it cannot be postulated that he is suitable for the job of Munsif Magistrate, as assessed by five experienced Judges of the High Court. The principles laid down by the Hon'ble Supreme Court in the said judgment would apply to the facts of this case. Hon'ble Supreme Court in case of **All India Judges' Association and others** (supra) accepted Justice Shetty Commission recommendation and more particular in respect of the marking pattern for selecting any candidate for the post of judicial officer.

32. Hon'ble Supreme Court in case of **Taniya Malik** (supra) held that interview is the best method to assess the ability of the candidate and to judge the capacity and minimum marks can also be prescribed. In case a candidate fails in an interview it cannot be said that he is suitable for the job of a Munsif Magistrate. The Hon'ble Supreme Court in the said judgment reiterated the principles laid down in the case of **K.S.Siraj** (supra). In the said judgment of **Taniya Malik** (supra) Hon'ble Supreme Court held that in written exam, even the person with no caliber who takes decision by

cramming may obtain better marks. When the Judges of the High Court too are appointed by adjudging the performance and intellect, an interview would be indispensable for judicial post.

33. It is held that criteria of experience of practice for direct recruitment of 7 years whether actually gained can be adjudged only by interview, communicating skills and by elucidation of certain aspects which would not be possible by written exam alone. In paragraphs (19) of the judgment it is held by the Hon'ble Supreme Court that the Petitioners have undertaken the exam with the stipulation of minimum cut off marks in written and oral examination and then having failed, they cannot turn round and are estopped to contend to the contrary.

34. In this case also, the petitioner has participated in the written examination and also in *viva-voce* examination fully knowing well the said Rule 6(2)(a) including the proviso thereto to the said Service Rules and having failed cannot be allowed to challenge the constitutional validity of the said second proviso to the said Rule 6(2) (a) of Service Rules now. The petitioner is estopped from challenging the validity of the said Rule. The principles laid down by the Hon'ble Supreme Court in case of **Taniya Malik** (supra) applies to the facts of this case. We are respectfully bound by the said judgment. In our view, considering the importance of the interview in the process of appointment of a candidate on any judicial post, not granting the

relaxation in marks as granted to a schedule caste or schedule tribe candidate in written examination while passing viva-voce examination is intentional and justified.

35. Division Bench of this Court in the judgment delivered on 12th September, 2011 in case of **Aarti Madhukar Gaikwad & Ors. vs. State of Maharashtra & Ors. Writ Petition No.1364 of 2010** after adverting to various judgments and also to the recommendations made in Justice Shetty Commission, considered the constitutional validity of the Rule 6(2)(a) of the said Service Rules and held that the petitioner who has challenged the validity of the Rule 6(a) and belongs to the Scheduled Caste was not in position to substantiate the said contention. In this case also the pleadings of the petitioner are totally vague. The petitioner has totally failed to substantiate the challenge to the constitutional validity of the second proviso of Rule 6(2)(a). The said judgment of Division Bench of this Court in case of **Aarti Madhukar Gaikwad & Ors.** (supra) applies to the facts of this case. We are respectfully bound by the said judgment. Even otherwise, we do not propose to take different view in the matter.

36. The Division Bench of this Court in the judgment delivered in case of **Miss Nivedita Vitthal Kharatmal** (supra) has adverted to the judgment of this Court in case of **Manoj s/o. Arvindrao Sable & Ors. vs. State of Maharashtra & Ors. 2011 (2) All MR 325** and in

case of **Aarti Madhukar Gaikwad & Ors.** (supra) and has reiterated the said principles of law laid down by this Court in the said judgment. In our view there is no merit in the challenge to the constitutional validity of the second proviso to Rule 6(2)(a) as ultra virus of the Article 14 of the Constitution of India or otherwise.

37. Insofar as the submission of the learned counsel for the petitioner that the respondent no.1 having constituted two interview panel subsequently and no such information was disclosed in the advertisement issued by the respondent no.1 or in the Service Rules is concerned, in our view, Mr.Nerlekar, learned counsel for the respondent no.3 is right in his submission that when the advertisement was issued, the respondent no.1 was not expected to know the number of applications that would be received in response to the said advertisement. We have perused the Service Rules and do not find any bar under those Service Rules or any provision preventing the number of panels for having viva-voce examination.

38. In this case, there were large number of applications received in response to the advertisement issued by the respondent no.1 and thus the respondent no.1 had constituted two interview panels. The submissions made by the learned counsel that out of two panels, one panel was very liberal in granting marks whereas the other panel which interviewed the petitioner as well as some other candidates gave less marks is out of frustration. No candidate has

any option to be interviewed by any particular panel. This Court cannot go into the issue as to how the candidates who had appeared before one or the other panel had fared. There is thus no merit in this submission of the learned counsel for the petitioner.

39. Be that as it may, the petitioner has even otherwise completed the age bar and thus cannot be considered for appointment to the said post of Civil Judge, Junior Division and Junior Magistrate, First Class. After completion of the selection procedure in question, two more selection procedure had been already completed. The petitioner did not participate in those two selection procedure and thus cannot be granted any relief as at this stage even if there is any vacancy having arisen for any post under the selection procedure which was subject matter of this petition or conducted thereafter. The petitioner thus cannot be allowed to challenge the selection procedure or the terms and conditions prescribed for appointing a candidate.

40. The petition is totally devoid of merit and is accordingly dismissed. Rule is discharged. No order as to costs.

(V.G. BISHT, J.)

(R.D. DHANUKA, J.)