Yogesh Yadav vs Union Of India And Ors on 16 August, 2013

Equivalent citations: AIR 2013 SUPREME COURT 3372, 2013 (14) SCC 623, 2013 AIR SCW 4804, 2013 LAB. I. C. 3854, 2013 (5) ABR 1042, 2013 (4) AJR 79, (2013) 4 ESC 601, (2013) 6 ALL WC 5676, (2013) 4 JCR 1 (SC), 2013 (3) SERVLJ 378 SC, 2013 (10) SCALE 333, (2013) 4 SCT 772, (2013) 139 FACLR 481, (2013) 5 SERVLR 429, (2013) 10 SCALE 333, (2013) 4 CGLJ 180

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Bench: A.K.Sikri, Anil R. Dave

[REPORTABLE]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.6799/2013
(arising out of S.L.P.(Civil) No. 34427/2011)

Yogesh Yadav
…..Appellant

Versus

Union of India & Ors.
….Respondents

WITH

C.A.No.6800/2013 (@ SLP(civil) Nos.6988/2012

C.A.No.6801/2013 (@ SLP(civil) Nos.9556/2012

J U D G M E N T

A.K.SIKRI,J.

1. Leave granted.

2. Counsel for the parties were heard at length on the issue involved in these cases. We now proceed to decide the same by this order.

3. Matter pertains to appointment to the post of Deputy Director (Law) in the Other Backward Class (OBC Category). Appointments to the vacancies in the aforesaid post were to be made in the office of Competition Commission of India (CCI). The three appellants in these three appeals were also the candidates who appeared in the written test. After qualifying the written test, they also faced the interview. However, their names did not appear in the list of candidates finally selected. According to the appellants, their non- selection was the result of altering the prescribed mode of selection

-mid-way i.e. after the initiation of recruitment process which was impermissible. This contention has not found favour with either the learned Single Judge in the Writ Petitions filed by them or the Division Bench of the High Court in the appeals filed by them challenging the order of the learned Single Judge. Bone of contention, before us also, remains the same. Therefore, the issue which needs to be decided is as to whether there was any change in the mode of selection after the process of selection had started.

4. Seminal facts which are necessitated to understand the controversy are recapitulated herein below.

5. CCI had issued the notification through public notice dated 11th November, 2009 inviting applications for various posts. We are concerned with the post of Deputy Director (Law) for which 13 vacancies were notified - 9 were in General category, 1 in SC Category and 3 posts were reserved for OBC category. Clause 7 of the notification stipulated the mode of selection in the following manner:

> "7. Mode of Selection All the applications received by the due date will be screened with reference to the minimum qualification criteria. From amongst the eligible candidates, suitable candidates will be short listed through a transparent mechanism and the short listed candidates will be called for interview before final selection. Mere fulfilling of minimum qualifications by itself would not entitle any applicant for being called for interview."

6. The eligibility / qualification /experience required for this post was also provided in the advertisement. It is undisputed that the appellants fulfilled the eligibility condition, being holder of degree of Bachelor of Law (Professional) as well as 3 years' experience in the relevant field including in the Corporate Sector. Written test for this post was held on 14th February, 2010 for short listing of candidates for interview. Admit card was also issued to the appellants for appearing in the written test along with the detailed instructions including the scheme of examination. Paragraphs 4 and 9 of the Instruction which were given to the examinees/candidates are relevant for our purposes and therefore we reproduce the same hereunder:

> "4. The selection to all the positions advertised will be based on a written test followed by an interview. The written test will carry 80% of the marks and interview will have 20% of the marks. The written test will be in two parts. The first part will be based on multiple choice questions for 50 marks. There is no negative marking in this multiple choice questions. The second part carrying 30 marks will be distributed to

the descriptive questions on the subject of your specialization within the broad outline of the subject of specialization as indicated in the advertisement.

Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

9. Candidates who do not secure 50% of the marks in the test will not be called for the interview. However, for candidates belonging to the reserved categories, the cut off marks will be 40% of the total marks."

7. Written examination was of 80 marks and the appellants secured more than 50% marks therein. They were called for the interview which was held on 19th March 2010 and the result of which was published on the website of the CCI. Finally, only 5 candidates, that too from the General category, were selected. Nobody from the OBC category, to which category the appellants belonged, emerged successful. On obtaining the information from the respondents under the Right to Information Act 2005, the appellant in CA____/2013 (@SLP(C) No. 34427 of 2011) came to know that he had secured only 2 marks out of 20 marks in the interview. In this manner, total marks secured by him were 53 out of 100 marks. He also learnt that the respondents had fixed the benchmark of 70 marks for the General Category and 65 marks for the Reserved Category candidates. Since the total marks obtained by all these appellants were less than 65, that was the reason for their non selection. It is this fixation of benchmark which has agitated the appellants and according to them it amounts to changing the selection procedure mid-way, which is illegal.

8. The appellants approached the High Court of Delhi by filing a Writ Petitions challenging their non- selection primarily on the ground that the selection criteria was changed arbitrarily that too after the advertisement and the law did not permit the respondents to change the rules of the game after the game had started. The precise contention in this behalf was that the benchmark which was fixed at 70 and 65 marks or above in the General and Reserved category respectively for the purposes of selection was not mentioned earlier i.e. before the start of selection process, either in the advertisement or otherwise.

9. The Writ petitions were contested by the respondents. In the counter affidavit filed by the CCI, it was explained that there was an overwhelming response received from the candidates for selection to the aforesaid post and having regard to the large number of applications received, the CCI decided to undertake the selection to all posts notified in the advertisement on the basis of written test followed by interview and accordingly it was determined that written test would be for 80 marks while 20 marks were attributed to interview. Further, candidates who secured minimum of 50 marks in the written test in the General category and minimum of 40 marks in the reserved category were called for interview in the ratio of three times of the number of vacancies where the number of vacancies were more than 10 and 5 times of the number of the vacancies for less than the 10. The marks obtained in the written test were not disclosed to the interview committee and the committee independently and without being influenced by the marks obtained in the written test adjudged the candidates on the basis of Viva Voce test and awarded the marks. The marks of the written test, which were kept in the sealed cover, were opened after the marks given to candidates in the interview by the interview board and tabulated merit list was prepared accordingly. The CCI,

keeping in view the nature and purpose of the post, decided to fix the percentage for final selection were 70 marks out of 100 for unreserved Category and minimum 65 marks out of 100 for reserved category for professional categories in which category the post of Deputy Director (Law) falls. It was argued that such a course of action was permissible and it was not a case where the mode of selection, at any time was changed and in so far as fixation of benchmark is concerned that was prerogative of the employer.

10. The learned Single Judge of the High Court accepted the plea of the respondents as he did not perceive this to be the change in criteria in the selection procedure, holding that fixation of the benchmark was legal and justified. As pointed out above, Letter Patent Appeals filed by the appellants against the learned Single Judge have also met the same fate.

11. In the aforesaid backdrop, the question that falls for consideration is as to whether fixation of benchmark would amount to change in the criteria of selection in the midstream when there was no such stipulation in that regard in the advertisement.

12. Mr. Jayant Bhushan, the learned senior counsel appearing for one of the appellants submitted that the case is squarely covered by the ratio of judgment of this Court in Himani Malhotra vs. High Court of Delhi (2008) 7 SCC 11. That case pertained to recruitment to the Higher Judicial Service in Delhi. The mode of selection was written test and viva voce. 250 marks were assigned for written test and 750 marks prescribed for viva voce test. When the advertisement was given there was no stipulation prescribing minimum marks/cut off marks at viva voce test after the written test was held. The persons who qualified the written test were called for interview. Interview was, however, postponed by the interview committee and it felt that it was desirable to prescribe minimum marks for the viva voce test as well. The matter was placed before the Full Court and Full Court resolved to fix minimum qualifying marks in viva voce which were 55% for general category, 50% for SC/ST candidates. After this change was effected in the criteria thereby prescribing fixation of minimum qualifying marks, the interviews were held. The petitioners in that case were not selected as they secured less than 55 % marks. Those two petitioners filed the Writ Petition submitting that prescribing minimum cut off marks in the viva voce test, after the selection process had started, when there was no such stipulation at the time of initiation of recruitment process, was unwarranted and impermissible. The Court, taking notice of its earlier judgments in Lila Dhar vs. State of Rajasthan (1981) 4 SCC 159 and K.Manjusree vs. State of A.P. (2008) 3 SCC 512 held that when the previous procedure prescribing minimum marks was not permissible at all after the written test was conducted, the ratio of the case is summed up in paragraph 15 of the Judgment, as under:

> "15. There is no manner of doubt that the authority making rules regulating the selection 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."

13. This very argument based on the aforesaid judgment was taken in the LPAs before the High Court as well. However, the High Court took the view that the aforesaid judgment was not applicable in the instant case as the factual scenario was altogether different. Since we are agreeing with the view of the High Court, it would be apposite to take notice of the relevant discussion on this aspect:

> "18. From the aforesaid pronouncement of law, it is vivid that an amended rule cannot affect the right of a candidate who has qualified as per the terms stipulated in the advertisement and is entitled to claim a selection in accordance with the rules as they existed on the date of the advertisement; that the selection can be regulated by stipulating a provision in the rule or laying a postulate in the advertisement for obtaining minimum marks are not prescribed for viva voce before the commencement of the selection process, the authority, during the selection process or after the selection process, cannot add an additional requirement/qualification that the candidate should also secure minimum marks in the interview; that the norms or rules as existing on the date when the process of selection begins will control such selection and that revisiting the merit list by adopting a minimum percentage of marks for interview is impermissible.
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> 19. The factual scenario in the present case has a different backdrop. The advertisement stipulated that the short listed candidates would be called for interview before the final selection and mere fulfilling of minimum qualifications by itself would not entitle any applicant for being called for interview. Thereafter, in the instruction, the marks were divided. Regard being had to the level of the post and the technical legal aspects which are required to be dealt with, a concise decision was taken to fix 65% marks for OBC category in toto, i.e., marks obtained in the written examination and marks secured in the interview. It is not a situation where securing of minimum marks was introduced which was not stipulated in the advertisement. A standard was fixed for the purpose of selection."

14. Instant is not a case where no minimum marks prescribed for viva voce and this is sought to be done after the written test. As noted above, the instructions to the examinees provided that written test will carry 80% marks and 20% marks were assigned for the interview. It was also provided that candidates who secured minimum 50% marks in the general category and minimum 40% marks in the reserved categories in the written test would qualify for the interview. Entire selection was undertaken in accordance with the aforesaid criterion which was laid down at the time of recruitment process. After conducting the interview, marks of the written test and viva voce were to be added. However, since benchmark was not stipulated for giving the appointment. What is done in the instant case is that a decision is taken to give appointments only to those persons who have secured 70% marks or above marks in the unreserved category and 65% or above marks in the reserved category. In the absence of any rule on this aspect in the first instance, this does not amount to changing the "rules of the game". The High Court has rightly held that it is not a situation where securing of minimum marks was introduced which was not stipulated in the advertisement, standard was fixed for the purpose of selection. Therefore, it is not a case of changing the rules of game. On the contrary in the instant case a decision is taken to give appointment to only those who

fulfilled the benchmark prescribed. Fixation of such a benchmark is permissible in law. This is an altogether different situation not covered by Hemani Malhotra case.

15. The decision taken in the instant case amounts to short listing of candidates for the purpose of selection/appointment which is always permissible. For this course of action of the CCI, justification is found by the High Court noticing the judgment of this Court in the State of Haryana vs. Subash Chander Marwaha & Ors. (1974) 3 SCC 220. In that case, Rule 8 of the Punjab Civil Service (Judicial Branch) Service Rules was the subject matter of interpretation. This rule stipulated consideration of candidates who secured 45% marks in aggregate. Notwithstanding the same, the High Court recommended the names of candidates who had secured 55% marks and the Government accepted the same. However, later on it changed its mind and High Court issued Mandamus directing appointment to be given to those who had secured 45% and above marks instead of 55% marks. In appeal, the judgment of the High Court was set aside holding as under:

> "It is contended that the State Government have acted arbitrarily in fixing 55 per cent as the minimum for selection and this is contrary to the rule referred to above. The argument has no force. Rule 8 is a step in the preparation of a list of eligible candidates with minimum qualifications who may be considered for appointment. The list is prepared in order of merit. The one higher in rank is deemed to be more meritorious than the one who is lower in rank. It could never be said that one who tops the list is equal in merit to the one who is at the bottom of the list. Except that they are all mentioned in one list, each one of them stands on a separate level of competence as compared with another. That is why Rule 10(ii), Part C speaks of "selection for appointment". Even as there is no constraint on the State Government in respect of the number of appointment to be made, there is no constraint on the State Government in respect of the number of appointments to be made, there is no constraint on the Government fixing a higher score of marks for the purpose of selection. In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high-standards of competence to fix a score which is much higher than the one required for mere eligibility."

16. Another weighty reason given by the High Court in the instant case, while approving the aforesaid action of the CCI, is that the intention of the CCI was to get more meritorious candidates. There was no change of norm or procedure and no mandate was fixed that a candidate should secure minimum marks in the interview. In order to have meritorious persons for those posts, fixation of minimum 65% marks for selecting a person from the OBC category and minimum 70% for general category, was legitimate giving a demarcating choice to the employer. In the words of the High Court:

> "In the case at hand, as we perceive, the intention of the Commission was to get more meritorious candidates. There has been no change of norm or procedure. No mandate was fixed that a candidate should secure minimum marks in the interview. Obtaining of 65% marks was thought as a guidelines for selecting the candidate from

> the OBC category. The objective is to have the best hands in the field of law. According to us, fixation of such marks is legitimate and gives a demarcating choice to the employer. It has to be borne in mind that the requirement of the job in a Competition Commission demands a well structured selection process. Such a selection would advance the cause of efficiency. Thus scrutinized, we do not perceive any error in the fixation of marks at 65% by the Commission which has been uniformly applied. The said action of the Commission cannot be treated to be illegal, irrational or illegitimate."

17. It is stated at the cost of repetition that there is no change in the criteria of selection which remained of 80 marks for written test and 20 marks for interview without any subsequent introduction of minimum cut off marks in the interview. It is the short listing which is done by fixing the benchmark, to recruit best candidates on rational and reasonable basis. That is clearly permissible under the law.(M.P.Public Service Commission vs. Navnit Kumar Potdar & Anr. (1994) 6 SCC 293).

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18. The result of the aforesaid discussion would be to dismiss the appeals as bereft of any merit. No costs.

.....J. (Anil R. Dave) .....J. (A.K.Sikri) New Delhi Dated: 16th August, 2013