

D.V. Bakshi And Others Etc. Etc. vs Union Of India And Others on 14 July, 1993

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Bench: A.M. Ahmadi, S. Mohan

ORDER

A.M. Ahmadi, J.

1. This batch of cases arises questions relating to interpretation of Regulations 8 & 9 of the Customs House Agents Licensing Regulations, 1984 (hereinafter called 'the Regulations') made by the Central Board of Excise & Customs under Sub-section (2) of Section 146 of the Customs Act, 1962. In the Writ Petitions filed under Article 32 of the Constitution, the petitioners have questioned the constitutional validity of the aforesaid Regulations which enjoin the securing of at least 50 marks out of 100 for the oral test on the ground that it gives arbitrary powers to the authorities to pick and choose the candidates. This contention is based on this Court's decision in *Ajay Hasia etc. v. Khalid Mujib Sehravardi and Ors. etc.* . Before we state the factual background it may be advantageous to read the relevant Regulations.

2. Regulation 2 defines the various expressions used in the Regulations. The expression "Customs House Agent" means a person licensed under the Regulations to act as agent for the transaction of any business relating to the entry or departure of conveyance or the import or export of goods at any customs station. Regulation 4 provides for inviting applications for the grant of a licence to act as a Customs House Agent. It says that the Collector may invite applications in the month of January every year for clearance work within the jurisdiction of the said collectorate. Regulation 5 prescribes the form in which the application shall be made. It is clear from this Regulation that the application can be in the name of an individual, a partnership firm or a company incorporated under the Companies Act. Regulation 6 lays down the conditions to be fulfilled by the applicant. One of the conditions to be satisfied is that the applicant has the experience of work relating to clearance of goods through the customs for a period of not less than one year and is financially viable. That brings us to Regulations 8 & 9 which we extract for ready reference:

8. Grant of temporary licence. -- Any applicant whose application is received with the last date specified in Reg.4 and who satisfied the requirements of Regs.5 and 6, shall be permitted to operate as Custom House Agent at the customs station for which the application is made initially for the period of one year against temporary licence granted by the Collector in this regard in Form B:

Provided that when evidence is produced to the Collector that the applicant has already availed of two chances for qualifying in the written or oral examination prescribed in these regulations and would like to avail of the third chance as soon as the next examination is held in terms of Reg.9 and that the applicant has been able to account for the minimum volume of work prescribed for such agents in the course of one year's working, the Collector may extend the aforesaid period of one year for which the temporary licence has been granted by another six months or such further period not exceeding one year to enable the applicant to avail of the third chance for qualifying in the examination in terms of Reg.9. While granting such extension, the Collector of Customs shall satisfy himself that the requirements of Regs.10(1)(a) and 10(1)(b) had been fully met by the applicant.

9. Examination of the applicant.- (1) The holder of a temporary licence in the case of an individual and the person or persons who will be actually engaged in the work of clearance of goods through customs on behalf of the firm or company holding a temporary licence, as the case may be, shall be required to qualify in examination at the earliest opportunity. Such person or persons shall be eligible to appear in the examination as soon as a temporary licence is granted and shall be permitted to avail of three chances within a period of 2 years from the date of issue of the temporary licence on payment of prescribed examination fee of Rs. 250 for each examination.

(2) The examination referred to in Sub-regulation (1) shall include a written and oral examination and will be conducted twice every year. Each applicant would be permitted to avail of maximum of three chances to qualify in the said examination but all such chances should be availed of within a maximum period of 2 years from the date of grant of temporary licence.

(3) xxx xxx xxx (4) xxx xxx xxx.

Regulation 10 provides for the grant of a regular licence. Regulation 10(3) says that the Collector may reject the application for the grant of a regular licence to act as Customs House Agent if the holder of the temporary licence fails to qualify in the examination in terms of Regulation 9, or the holder of temporary licence on evaluation of his performance in terms of Regulation 10 is not considered suitable due to any other reason to be stated in the order passed by the Collector.

3. It is crystal clear on a plain reading of the Regulations that any individual firm or company can apply for a licence if the applicant fulfills the conditions laid down in Regulation 6. Under Regulation 8 before a regular licence is issued, a temporary licence may be issued to a person who satisfies the requirements of Regulations 5 & 6 to operate as a Custom House Agent initially for a

period of one year. During this period of one year he is required to qualify by passing both the written and oral examinations within two chances but if he has failed to so do and is desirous of availing of a third chance as soon as the next examination is held, the Collector may extend the period by another six months or such period not exceeding one year to enable the applicant to avail of the additional chance to clear the examination. In other words, ordinarily the applicant must qualify within the initial period of one year but if he fails to do so the Collector may extend the time by a maximum of one year to give the applicant an additional chance but in no case can the temporary licence be renewed beyond two years. The Regulations are silent on the question whether the applicant must first clear the-written test to qualify for the oral test. The High Court has, however, noted as a fact which has not been controverted before us that "the candidates are not allowed to appear for an oral examination unless they have passed the written examination". Each examination is of 100 marks, the passing marks being 50. Now under Regulation 8 since a candidate is ordinarily required to qualify within two chances in a year if the examination is held twice in one year and if he cannot appear for the oral examination unless he has passed the written examination, it follows that he will have only one chance for the oral examination even if he clears the written examination at the first attempt unless the oral test is held after the result of the written test is announced. It is, therefore, obvious that in the first year under Regulation 8(1) the candidate may not have two chances to appear for the oral examination. If he does not pass the written examination at the first attempt immediately after he has secured a temporary licence he would not get a single chance to appear for the oral examination in the first year unless the oral test is held after the result of the written test within that year. Therefore, when the proviso to Regulation 8(1) talks of the third chance it may perhaps be true for those who passed the written test at the first available opportunity but not for those who failed to do so. It was, therefore, contended by the learned Counsel for the petitioners that the third chance contemplated by the proviso would not be available to candidates who do not pass the written test at the first attempt in the year in which they are granted the temporary licence and two examinations are held in that very year. They, therefore, contend that the third chance contemplated by the proviso would not be available to those who pass the written examination at the second or the third attempt. For them, they contend, the proviso should be so construed as to give them the third chance to appear at the oral examination also.

4. The petitioners before us secured temporary licence on different dates but as they failed to pass the examination as required by Regulations ' 8 & 9, the temporary licences were terminated and they were refused a regular licence under Regulation 10 of the Regulations. A large number of writ petitions were filed by those who had failed to pass the examination and were refused a regular licence in the High Court of Bombay which came to be disposed of by the judgment impugned before us dated October 16, 1992. A table was produced before the Division Bench which showed the attempts made by each candidate to clear the written as well as oral examinations for securing the regular licence, wherefrom it appeared that certain candidates had passed the written examination and had appeared in three oral examinations but had failed to clear the same. The High Court, therefore, noticed that these candidates had actually availed of three chances under Regulation 9 and had yet failed to clear the examination. Such candidates, the High Court rightly observed, could have no grievance insofar as sufficiency of chances for clearing the examination was concerned. We were told at the Bar that such candidates have not challenged the High Court's order before us. All the other candidates had passed the written examination but had failed to clear the oral examination

within the maximum period of two years permitted by the Regulations. They had cleared the written examinations either at the first, second or third attempt but all of them had failed to pass the oral examination within the outer period of two years permitted by the Regulations. Nevertheless they were allowed to appear for the oral examination even after the period of their temporary licence expired but they failed to clear the examination and, therefore, the High Court did not see any substance in their grievance also. Before the High Court reliance was placed on a circular dated May 19, 1988 issued by the Central Board of Excise and Custom which granted an additional chance to the candidates to pass the oral examination pending amendment of Regulation 9. The relevant part of the circular extracted by the High Court reads as under:

...the temporary licence holders who have passed in the written examination within two years from the date of grant of temporary licence, but who have not been able to qualify in the oral examination may be granted two more chances for passing the oral examination. The first of these oral examinations will be held by the Collector of Customs concerned and the second by the DGI, C&CE.

5. Pursuant to this circular a public notice was issued and temporary licence holders who had passed the written examination within two years from the date of grant of temporary licence but who had failed to clear the oral examination were given two more chances for passing the same. Indeed it was made clear that the relaxation was confined to two additional chances for clearing the oral examination only. The High Court on a true construction of the circular read with the public notice issued pursuant thereto came to the conclusion that the relaxation was a one-time relaxation and this, observed the High Court, was clear from the subsequent circular of September 6, 1988 and the correspondence that had followed the issuance of the circular of May 19, 1988. The High Court came to the conclusion that the relaxation being a one-time relaxation to meet the special circumstance then obtaining in regard to the candidates covered under the circular, the petitioners could not avail of the benefit of the circular which had exhausted itself. Learned Counsel for the petitioners did not attempt to contend before us that this conclusion of the High Court was erroneous but submitted that a similar concession could be granted to candidates who did not have the opportunity of three chances to pass the oral examination.

6. From the Regulations it seems clear to us that the Collector is expected to invite applications for the grant of licence in the months of January every year. Such an application has to be made in the prescribed Form A. Regulation 6(a) suggests that the applicant must inter alia prove to the satisfaction of the Collector that he has the experience of work relating to clearance of conveyance and goods through the custom for a period of not less than one year. This means that prior experience is a sine qua non. Regulation 8 provides that an applicant who has applied in response to an advertisement under Regulation 4 and who has satisfied the requirements of Regulations 5 & 6 shall be permitted to operate as a custom house agent initially for a period of one year against a temporary licence granted in prescribed Form B. Now under Regulation 9, the holder of such a temporary licence must qualify in examination at the earliest opportunity. He must appear at the examination held immediately after the grant of the temporary licence. The said Regulation provides that he shall be permitted to avail of three chances within the maximum period of two years from the date of issue of the temporary licence. A conjoint reading of the proviso to Regulation

8 and Clauses (1) and (2) of Regulation 9 leaves no room for doubt that an examination shall be conducted twice every year. If a candidate has availed of two chances and has failed to clear the examination he may request the Collector to permit him to avail of a third chance by extending the duration of the temporary licence for a period not exceeding one year. If the period is extended by a year, as in the case of the petitioners herein, he would have further two opportunities to clear the examination. Thus he would have four opportunities to appear at the examinations to be held over a period of two years. Even if we assume that the candidate must pass the written examination before he appears in the oral one, he would have in all four opportunities for clearing the written test and three opportunities for clearing the oral test. If he does not appear or does not pass the written test at the first available opportunity, the number of opportunities to pass the oral test would shrink depending on at which attempt he has cleared the written test. His inability to clear the written test at the earliest available opportunity cannot operate to his advantage by a corresponding increase in the number of opportunities to clear the oral test. Such a construction of the scheme of the Regulations would result in placing premium on incompetency and inefficiency. It is, therefore, clear on a plain reading of Regulations 8 & 9 that they offer more than three opportunities for passing the written test and at least three opportunities for passing the oral test even if we assume that the result of the first written test is announced after the first oral test. In any view of the matter, it is, therefore, difficult to agree with the learned Counsel for the petitioners that the scheme of the Regulations do not in reality afford three chances for passing the examination to qualify for the grant of a regular licence.

7. A feeble attempt was made to contend that Regulations 8 & 9 were bad in law, in that, they afford an opportunity to the authorities to eliminate certain candidates with a view to accommodating their favourites. This submission is based on the ratio of the decision in *Ajay Hasia (supra)* and *Ashok Kumar Yadav and Ors. v. State of Haryana and Ors.*, wherein this Court struck down the rule prescribing the high percentage of marks for oral test as offending Article 14 of the Constitution. It is indeed true that the examination, in the instant case, comprises a written paper of 100 marks and an oral test of 100 marks, i.e., 200 marks in all. The passing marks for each test is 50. Thus the oral test of 100 marks out of the aggregate of 200 marks works out to 50 percent. Counsel for the petitioners, therefore, contended that the marks reserved for clearing the oral test were excessive thereby affording the examiners an opportunity to arbitrarily eliminate candidates and accommodate their favourites. Now licence to act as a Custom House Agent in a custom station requires special knowledge relating to the clearance of conveyance and goods through customs. This becomes immediately clear if we peruse the subjects enumerated in Regulation 9(3), for the examination. The candidate is expected not only to have knowledge regarding the actual working at a custom station but also in regard to the provisions in the Customs Act and allied statutes mentioned in Clause (o) of the said Regulation. While the written test may ascertain the candidate's knowledge in regard to the laws, both substantive and procedural, the oral test may help the examiner to assess the candidate's method of working at the custom station. It must be realised that the agents have to deal with large sums of money and valuable articles. That is why one of the conditions required to be satisfied is in regard to the financial viability of the applicant. This is clear from Regulations 6(b) of the Regulations. Besides as pointed out earlier, before a candidate can apply for the grant of a licence, he must satisfy the Collector that he has experience of work relating to clearance of goods through the customs for a period of not less than one year which means that he must have worked as an

apprentice to a licensed agent. The extent of knowledge which he must possess to qualify for the licence can be gathered from the various subjects enumerated in Sub-clauses (a) to (p) of Clause (3) of Regulations 9. Regulation 10 which relates to grant of regular licence stipulates that temporary licence holder must not only have qualified in the examination referred to in Regulation 9 but his performance must also be found to be satisfactory with reference, inter alia, to (a) quantity of value of cargo cleared by such licence holder conforming to norms as prescribed by the Collector and (b) absence of instances of delay either in the clearance of goods or in the payment of duty for any reason attributable to such licence holder or any complaint of misconduct including non-compliance of any of the obligations specified in Regulation 14. It would, therefore, appear that the performance of each applicant prior to the grant of the temporary licence and during the period he works as a temporary licence holder are subject matter of scrutiny and this can only be done effectively at the oral interview. The importance of the oral interview lies in the fact that the examiners have an opportunity to assess his performance as a temporary licence holder and also seek his clarification in regard to certain matter which might have come to their knowledge during the period he worked as a temporary licence holder. The Regulations have, therefore, taken care to ensure that he has experience of at least one year as an apprentice to an agent before he applies for the grant of licence. In order to assess his work he is given a temporary licence before he qualifies by clearing the prescribed examination. The authorities have the opportunity of assessing his knowledge regarding the laws and procedure through the written examination. It must be remembered that the custom station is a place of work. Observance of Regulations is absolutely essential as movement of very valuable goods takes place and only sufficiently experienced hands can be permitted to act as agents. He must satisfy the authorities that he has adequate knowledge regarding the laws and the procedure connected with the clearance of goods and that he actually is in a position to handle the work from the moment he is licensed. The assessment of his work during the period he holds the licence is, therefore, of great relevance and that can be done at the oral test only. The assessment has to be made on the basis of his performance as a temporary licence holder and his capacity to handle goods as an agent at the custom station. The curriculum for the examination is, therefore, extensive, vide Regulation 9(3), to test his knowledge regarding the laws relating to the arrival, entry and clearance of goods at the custom station and his actual handling during the period he held the temporary licence. That is why Regulation 10 also provides that besides passing the examination his work must be found to be satisfactory with reference to the quantity or valuable of cargo cleared, fulfillment of the prescribed norms, absence of delay in the clearance of goods and the payment of duty and avoidance of complaints in regard to misconduct including non-compliance of the obligations set out in Regulation 14. The factors to be assessed at the interview relate to his temperament, managerial ability, communication ability, interpersonal skills, ability to interact with colleagues and officials, general awareness in regard to his functional responsibilities and professional norms as well as norms of behaviour, etc. Therefore, the area of the enquiry in regard to actual working is equally wide and important and there is justification for an oral test prescribing 100 marks with 50 per cent as passing marks. This is so because the authorities have to assess the candidate's personality, his temperament and his capacity to interact with others concerned with the movement of highly valuable goods, etc. In *Lila Dhar v. State of Rajasthan and Ors.*, this Court while highlighting the need for an interview test in certain selections clarified that the test which may be valid for admission to medical colleges may, not hold good where it concerns entry into public services. The test evolved in the case of *Ajay Hasia & Ashok Kumar Yadav*, (supra) cannot,

therefore, apply with equal force in the matter of grant of licence as a Custom House Agent. This has been further clarified in a recent decision in *Indian Airlines Corporation v. Capt. K.C. Shukla and Ors.* [1993] 1 SCC 17. In that case this Court after referring to the decisions in *Ajay Hasia*, *Ashok Kumar Yadav* and *Lila Dliai*, (supra) observed that the distinction appears to have been drawn in interviews held for competitive examination or admission to educational institutions and selection for higher posts. In the case of educational institutions the distinction has relevance for the reason that the candidates are young and their personality has yet to develop and, therefore, greater weight has to be given to their performance at the written examination rather at the oral examination. It is, therefore, clear that no hard and fast rule can be laid down in this behalf as much would depend on the nature of performance expected for the responsibility to be handled by a candidate after his selection and entry into the establishment. The method of evaluation would, therefore, vary and cannot be a matter of any strait-jacket formula. The weight to be given to the performance at the interview would depend on the nature of duties, responsibilities and functions to be handled after selection. The duties, responsibilities and functions of a Customs House Agent are very special demanding not only a high degree of probity and integrity but also intellectual skills, adaptability, judgment and capacity to take prompt decisions in conformity with the law, rules and regulations. The selection is, therefore, done through those conversant with the working of custom stations and the nature of an agent's job. We are, therefore, of the opinion that the submission based on the decisions in *Ajay Hasia & Ashok Kumar Yadav*, (supra) cannot be accepted. It may also be mentioned that before the High Court the validity of Regulation 9 was not challenged. The High Court further observed as under:

Learned advocates who appeared before us on behalf of the petitioners cited certain judgments of the Supreme Court in order to suggest that undue importance was being given to the oral examination and/or that allocation of 100 marks for an oral examination is not proper. The petitioners have not raised any legal contentions or made submission in this connection in those petitions.

It would, therefore, appear that the contention was not seriously urged before the High Court nor was it seriously pressed before us but we have thought it necessary to deal with the same as certain writ petitions have been filed challenging the validity of the Regulations on this said count. We, therefore, thought it proper to examine the same and put a lid thereon.

8. The submission that the provision for clearing the oral test with atleast 50 per cent marks is susceptible to misuse, namely, to eliminate some and to accommodate others needs closer scrutiny. The submission is general in nature and would be true in all such cases where passing of an oral test is a 'must' to qualify for entry. The oral test being a highly subjective one such an allegation may be easy to make. But as pointed out earlier in certain situations a written examination alone may not suffice to assess the overall qualities of an individual and an oral test becomes necessary to evaluate his performance from certain other angles to make an integrated assessment of the candidate. As observed in *Lila Dhar's*, case (supra) a written examination assesses the man's intellect and the interview test the man himself and "the twain shall meet" for a proper selection. If an oral test is, therefore, a 'must' as in this case, a heavy responsibility is cast on the examiners to maintain a

proper record of the oral test in respect of each candidate and marks must preferably be assigned under each head considered relevant to evaluate the candidate. Once this care is taken the element of subjectivity will be largely checked and the marks assigned under different heads at the oral test will more or less faithfully reflect the fitness of the candidate. In the matter of evaluation some degree of honest error must be countenanced. However, if there is any allegation of nepotism or favouritism, the same can be checked with reference to the record so maintained. Since the oral test is a highly subjective one and is susceptible to misuse, the degree of proof required for bringing home the charge of nepotism or favouritism may be light. But that is not to say that a mere allegation based on the fact that passing of an oral test is a 'must' or that the marks reserved for the oral test are excessive will per se, without anything more, set the Court, probing into the records or the oral test. But if the allegation is supported by some dependable proof, the Court will satisfy itself whether or not the charge is well-founded. That is why we have said that a heavy responsibility lies on those examining the candidates at the interview to ensure that proper record is maintained so that there is no room for suspicion in the minds of the unsuccessful candidates that the result of the oral test is tainted with bias for or against any candidate because even light proof in support of the charge may upset the result of the oral test as a whole or qua a candidate, as the case may be. In the present case, however, the allegation is of a general nature and is not supported by even light proof to infer, even *prima facie*, that the result of the oral test was tainted because of bias. We, therefore, do not see any merit in the contention raised by the petitioners.

9. The petitioners fall in two groups, namely, (i) those who passed the written examination at the third opportunity but failed in the only available oral test and (ii) those who passed the written test at the second opportunity but failed in the oral test at both the available opportunities. Candidates belonging to both the groups, therefore, had as many as four opportunities to clear the examination. Certain candidates failed to avail of the opportunity and they must thank themselves for the same. Those who failed to avail of the opportunity and those who were unsuccessful at the written test after availing of the opportunity fall in the same category because once the opportunity is available it is for the candidate to avail of it and if he fails to avail of it he cannot be heard to say that he did not have that opportunity. It will, therefore, be seen that all the petitioners in the present group of cases had four opportunities to clear the written as well as the oral test but they failed to do so. In the circumstances, we think the view taken by the High Court is unassailable. In this connection, the High Court's observation is as under:

All the other petitioners and persons working under them had the opportunity of appearing in written and oral examinations thrice during the period of subsistence of their temporary licences. They have, however, not cleared the oral examination, although all have cleared their written examination - either at first, second or third attempt.

This will show that the petitioners had the required opportunities to pass the examination written as well as oral but they failed to do so in the available opportunities.

10. A fervent appeal was made by the learned Counsel for the petitioners that having regard to the fact that all the petitioners have passed the written examination and that some of them had only one opportunity to appear at the oral examination since they passed the written examination at the third attempt, one further chance to appear at the oral examination should be accorded to them as was done in the past under the circular dated May 19, 1988. The would be a matter on which the concerned authorities would have to take a decision if the circumstances so permit but it would not be proper for this Court to issue a mandate once it is found as a fact that the petitioners had the requisite opportunities under the regulations for clearing the written as well as oral tests. We may add by way of caution and to avoid any litigation in future if the authorities decide to give one further opportunity to the petitioners to clear the oral test it will be by way of grace only and will not confer any right whatsoever on the petitioners and if the authorities insist on any undertaking to be filed by the candidates permitted to avail of that extra chance in the present proceedings that they will accept the result as final and conclusive and will not make it a ground for further litigation, they will be well within their rights to so insist. If such undertaking are filed in the present proceedings, the Registry will accept the same.

11. For the above reasons, we see no merit in these petitions and dismiss the same with costs. All interim orders in force will lapse forthwith.