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HEMANI MALHOTRA

v.

HIGH COURT OF DELHI

(Writ Petition (Civil) No. 490 of 2007)

APRIL 3, 2008

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(K.G. BALAKRISHNAN, CJ AND J.M. PANCHAL, J.)

Service Law:

C *Direct recruitment to Delhi Higher Judicial Service – Prescribing of minimum qualifying marks for **viva voce** test after commencement of selection process by High Court – HELD: Illegal – Besides, total marks for written test being 250, prescribing 750 marks for **viva voce** test was on higher side – Respondent directed to add marks obtained by petitioners in*

D *written examination to marks obtained by them in **viva voce** test and to prepare a combined merit list along with other selected candidates – There being 16 vacancies notified and only five candidates including the petitioners having been found qualified for **viva voce** test, respondent directed to*

E *declare petitioners as selected – However, petitioners would neither be entitled to seniority nor to salary with retrospective effect – Prospective operation of judgment.*

F **The instant writ petitions were filed by two candidates who had appeared in written examination and interview for recruitment to Delhi Higher Judicial Service, but were not selected. The respondent-High Court of Delhi invited applications for filling up 16 posts in Delhi Higher Judicial Service by direct recruitment. It was notified that the selection process would be in two stages: (a) a written examination comprising one paper of 250 marks, and (b) interview/viva voce. Minimum qualifying marks in written examination were 55% for general candidates and 50% for Scheduled Castes and Scheduled Tribes candidates. The written examination was conducted on 12.3.2006. It**

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was stated that the High Court did not at all declare the result of written examination. But, five candidates including the two writ petitioners received letters dated 14.6.2006 for interview to be held on 12.7.2006. The interview was, however, deferred from time to time and ultimately *viva voce* test was conducted on 27.2.2007. Meanwhile, the Full Court in its meeting on 13.12.2006 prescribed minimum qualifying marks for *viva voce*, i.e., 55% for general candidates and 50% for Scheduled Castes and Scheduled Tribes candidates out of 750 marks. A notice dated 10.4.2007 was issued mentioning that only three candidates were selected. Names of the two petitioners did not figure in the said notice.

It was submitted for the petitioners that the Selection Committee did not draw the final merit list on the basis of the combined result of written examination and the interview, and had that been done, they would have obtained the fourth or the fifth position in the final merit list as only five candidates had qualified for the *viva voce* test. It was stated that according to the information supplied by the High Court, one petitioner secured 142 marks out of 250 marks in written examination and 363 marks out of 750 marks in *viva voce*; whereas the other secured 153.50 marks in written examination and 316 marks in *viva voce* test. It was contended that prescribing cut off marks for *viva voce* test after the process for selection had commenced was illegal. It was, therefore, prayed that a direction be issued to amend the selection list by including the names of the two petitioners therein.

The stand of the respondent-High Court was that the two petitioners belonged to the General category and they could not secure the minimum marks stipulated for the *viva voce* test and, therefore, their names were not recommended for appointment. It was also contended for the respondents that the Supreme Court while deciding *K. Manjusree* did not notice its earlier decisions and,

A therefore, the decision in *K. Manjusree* be regarded as *per incuriam* or should be referred to a larger Bench for reconsideration.

B The question for consideration before the Court was whether introduction of the requirement of minimum marks for interview/*viva voce*, after the entire selection process was completed, would amount to changing the rules of the game after the game was played.

Allowing the writ petitions in part, the Court

C HELD: 1.1 Prescribing minimum marks for *viva-voce* was not permissible at all after written test was conducted. 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*
 D *voce*, but if minimum marks are not prescribed for *viva-voce* before the commencement of selection process, the authority concerned cannot either during or after the
 E selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. [para 9] [1077-E-F]

K.Manjusree vs. State of A.P. & Anr. [2008] 2 SCR 1025 – relied on.

F *Lila Dhar vs. State of Rajasthan* AIR 1981 SC 1777 - cited.

G 1.2 The decision rendered by this Court in *K.Manjusree* can neither be regarded as Judgment *per incuriam*, nor a good case is made out by the respondent for referring the matter to larger Bench for reconsidering
 H the said decision. While deciding *K. Manjushree*, the Court noticed the earlier decisions* and thereafter laid down the proposition. What is laid down in the decisions** relied upon by the respondent is that it is always open to the authority making the rules regulating the selection to

prescribe the minimum marks both for written examination and interview. The question whether introduction of the requirement of minimum marks for interview after the entire selection process was completed was valid or not, which was involved in *K. Manjushree*, never fell for consideration of this Court in the said decisions**. [para 10] [1077-G-H; 1078-A]

**P.K.Ramachandra Iyer v. Union of India (1984) 2 SCC 141; Umesh Chandra Shukla v. Union of India (1985) 3 SCC 721; and Durgacharan Misra v. State of Orissa (1987) 4 SCC 646 – referred to.*

***Ashok Kumar Yadav v. State of Haryana (1985) 4 SCC 417; K.H.Siraj v. High Court of Kerala and Others (2006) 6 SCC 395 – cited.*

2.1 In the instant case, as per the advertisement, minimum qualifying marks in the written examination were specified to be 55% for General candidates and 50% for Scheduled Castes and Scheduled Tribes candidates; but no cut off marks were prescribed for *viva voce* test at all. The averments made in the petitions which are not effectively controverted by the respondent would indicate that oral interview was postponed by the respondent on six occasions and was finally conducted by the Selection Committee only on February 27, 2007. However, before that date criteria of cut off marks for *viva voce* test was introduced by the respondent. It is an admitted position that at the beginning of the selection process, no minimum cut off marks for *viva voce* were prescribed for Delhi Higher Judicial Service Examination, 2006. Thus, prescription of cut off marks at *viva voce* test by the respondent was illegal. Besides, prescribing 750 marks for *viva voce* test is on higher side. [para 8, 9 and 11] [1076-A-D; 1077-F; 1078-F, G]

All-India Judges Association and ors. V. Union of India and Ors. (2002) 4 SCC 247 – referred to.

A 2.2 It is an admitted position that both the petitioners
had cleared written examination and, therefore, after
adding marks obtained by them in the written examination
to the marks obtained in the *viva voce* test, the result of
the petitioners should have been declared. Admittedly, 16
B vacant posts were notified to be filled up and only five
candidates had cleared the written test. Therefore, if the
marks obtained by the petitioners at *viva voce* test had
been added to the marks obtained by them in the written
test then the names of the petitioners would have found
C place in the merit list prepared by the respondent. [para 9
and 11] [1079-B, C, D]

2.3 The respondent is directed to add the marks
obtained by the petitioners in the written examination to
the marks obtained by them in the *viva voce* test and
D prepare a combined merit list along with the other selected
candidates. The respondent is directed to amend the
notice dated April 10, 2007 issued by the Registrar (Vig.),
High Court of Delhi, New Delhi and declare the petitioners
as selected for being recommended for appointment to
E the post in Delhi Higher Judicial Service. It is clarified that
the petitioners would neither be entitled to, seniority nor
salary with retrospective effect. Their seniority shall be
reckoned from the date of their appointment and salary
as allowable be paid from that date only. [para 12]
F [1079-E, F, G]

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No.
490 of 2007.

Under Article 32 of The Constitution of India.

G P.S. Patwalia, Ranjit Kumar, Pradeep Dahiya, Veenita
Goyal, Hemani Malhotra and Bharat Sangal for the Petitioner.

P.P. Rao, A. Mariarputham and Aruna Mathur (for
Mariarputham, Aruna & Co.) for the Respondent.

H The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. These petitions are filed under Article A
32 of the Constitution wherein the common prayer made, is to
issue a writ of *mandamus* or any other appropriate writ or order
to direct the respondent i.e. the High Court of Delhi at New Delhi
to amend notice dated April 10, 2007 issued by Registrar (Vig.), B
High Court of Delhi to the effect that the petitioner of each petition,
is also declared as selected for being recommended for
appointment to the vacant post in Delhi Higher Judicial Service
and prepare a combined merit list on the basis of total marks
obtained in written examination as well as proportionate marks
of the interview, as if, the vive-voce test was of 75 marks instead C
of 750 marks or by adding marks obtained in written examination
and the marks given to the petitioner in the interview out of 750
marks without cut off.

2. In order to resolve the controversy raised by the D
petitioners in the petitions it would be advantageous to refer to
certain basic facts.

3. The respondent i.e. the High Court of Delhi at New Delhi
through Registrar General issued an advertisement inviting
applications from eligible candidates for 16 vacant posts to be E
filled up by direct recruitment to Delhi Higher Judicial Service.
Detailed information was given in the instructions annexed with
the Application Form. The relevant particulars stated in the
advertisement were as under:-

"Delhi Higher Judicial Service Examination shall be a two F
stage selection process comprising the following:

(a) There shall be a written examination comprising of
one paper only of 250 marks. It shall have two parts. Part
I shall be objective and Part II shall be descriptive. Syllabus
for written examination shall comprise General Knowledge, G
Current Affairs, English Language and topics on
Constitution of India, Evidence Act, Limitation Act, Code
of Civil Procedure, Criminal Procedure Code, Indian Penal
Code, Contract Act, Partnership Act, Principles governing
Arbitration Law, Specific Relief Act, Hindu Marriage Act, H

A Hindu Succession Act, Transfer or Property Act and Negotiable Instrument Act.

(b) Interview/Viva-Voce.

B Minimum qualifying marks in the written examination shall be 55% for General Candidates and 50% for Scheduled Castes and Scheduled Tribes candidates. ”

4. The petitioner of each petition submitted application in the prescribed form. They were allotted relevant Roll Nos. A written examination was conducted on March 12, 2006 wherein the petitioners appeared. The written examination was of three hours' duration and comprised both multiple questions as well as questions with descriptive answers. The respondent High Court did not declare the result of the written examination at all. However, the petitioners received letter dated June 14, 2006 from the respondent asking them to appear for interview on July 12, 2006. Since the result of the written examination conducted by the respondent was not declared, no merit list of the successful candidates who passed the written test was displayed and therefore it is the case of the petitioners that they were not in a position to find out details about the number of candidates who were declared successful in the written examination or for that matter, the number of candidates who had qualified for viva- voce test. According to the petitioners, the Registrar General of Delhi High Court verified testimonials and other documents submitted by them and informed them that the interview had been deferred and that the next date would be intimated in due course. What is averred by the petitioners is that the respondent issued letter dated September 4, 2006 directing the petitioners to appear for interview on September 20, 2006 at 2.30 P.M., but on September 19, 2006 another letter was issued intimating the petitioners that the interview fixed on September 20, 2006 was deferred. It may be mentioned that no next date of interview was intimated to the petitioners. The respondent High Court issued letter dated November 9, 2006 intimating the petitioners that the interview was fixed on November 29, 2006. but again on November 28, 2006 another

letter was issued intimating the petitioners that the interview fixed A
November 29, 2006 was deferred. This last letter of November
28, 2006 specified that the interviews were to take place on
December 7, 2006. According to the petitioners on December
7, 2006 five candidates who had cleared written test gathered B
in the Office of Registrar General of Delhi High Court for
appearing at viva- voce test and all the five candidates were
collectively called in a Chamber by the Selection Committee
comprising five Hon'ble Judges of Delhi High Court to be
informed that the interview had been postponed. Meanwhile, C
the Selection Committee met and resolved that as it was
desirable to prescribe minimum marks for the viva-voce the
matter be placed before the Full Court. Accordingly, the matter
was placed before the Full Court for considering the question
whether minimum marks should be prescribed for vive-voce test.
The Full Court, in its meeting held on December 13, 2006, D
resolved as under:-

“Considered. It was resolved that for recruitment to Delhi
Higher Judicial Service from Bar, the minimum qualifying
marks in viva-voce will be 55% for General candidates
and 50% for Scheduled Castes and Scheduled Tribes
Candidates” E

The respondent High Court thereafter issued letter dated
January 17, 2007 intimating the petitioners that the vive-voce
was fixed on January 23, 2007, but on January 22, 2007 another
letter was issued intimating that the interview fixed on January F
23, 2007 was postponed. Again by letter dated February 2, 2007
the petitioners were intimated that they were required to appear
for interview on February 5, 2007, but even on that day also, no
interview could be held.

5. The respondent High Court issued letter dated February G
23, 2007 fixing the oral interview on February 27, 2007 and on
that day viva- voce test was finally conducted by the Selection
Committee. Thereafter, the Registrar (Vig.) issued a notice
dated April 10, 2007 mentioning that only three candidates were
selected and the petitioners had not been selected. This notice H

A was posted on the web-site of Delhi High Court. What is claimed by the petitioners is that the Selection Committee had not drawn final merit list on the basis of combined result of written examination and interview because if the merit list had been drawn on this basis, the petitioners would have obtained fourth
B or fifth position in the final merit list as only five candidates had qualified for the viva- voce test, and no cut-off marks were prescribed for viva- voce test. The petitioners claim that they filed an application under Right to Information Act before the Public Information Officer of High Court of Delhi on April 28,
C 2007 seeking information about the result etc. of Delhi Higher Judicial Service Examination 2006. According to the petitioners the Public Information Officer of the High Court did not supply most of the information demanded by them on the pretext of confidentiality, but in reply dated June 20, 2007 only a part of
D the information was given to the petitioner in Writ Petition No. 490 of 2007 that out of 250 marks for which written test was conducted, she had secured 141 marks and 363 marks out of 750 marks for which viva- voce test, was conducted. The petitioner in Writ Petition Civil No. 491 of 2007 was informed by intimation dated June 20, 2007 that she had obtained 153.50
E marks out of 250 marks for which written test was conducted and 316 marks out of 750 marks for which viva- voce test was conducted. What is maintained by the petitioners is that the petitioners have been excluded from being considered for appointment to the post of Higher Judicial Services exclusively
F on the basis of cut off marks prescribed at the stage of viva-voce test, which is illegal and contrary to the principle laid down by the Supreme Court in **Lila Dhar vs. State of Rajasthan AIR 1981 SC 1777**. According to the petitioners what weightage should be attached to written test and interview depends upon
G the requirement of service for which selection is being made, but minimum cut off marks could not have been prescribed for viva- voce test, after process for selection had commenced. It is stressed that the oral interview was the only criteria adopted by the respondent for selection to the posts in question which is
H illegal and therefore the notice dated April 10, 2007 issued by

the Registrar (Vig.), High Court of Delhi should be directed to be amended to include names of the petitioners also as selected candidates for appointment to the posts in question. Under the circumstances the petitioners have invoked extra ordinary jurisdiction of this Court under Article 32 of the Constitution and claimed the reliefs to which reference is made earlier.

6. On service of notice, Mr. Ramesh Chand, Deputy Registrar, Delhi High Court has filed reply affidavit controverting the averments made in the petition. In the reply it is stated that the writ petitions filed against prescription of minimum percentage of marks for qualifying at the viva- voce test, is not maintainable and therefore should be dismissed. It is mentioned in the reply that as far as selection made in the year 2000 was concerned, a candidate was required to get minimum of 55% marks if he belonged to the General Category and 50% marks if he belonged to the Scheduled Castes and Scheduled Tribes category for passing the vive-voce test and as the petitioners who belong to the General Category did not secure the minimum marks stipulated for the vive-voce, but failed, their names were not recommended for appointment. It is mentioned in the reply that another advertisement dated May 19, 2007 was issued for recruitment to the vacant posts in the Delhi Higher Judicial Service wherein the petitioners had appeared but failed and therefore also they are not entitled to the reliefs claimed in the petitions. What is pointed out in the reply is that a candidate is required to secure the stipulated minimum marks in the written examination in order to qualify for the next stage i.e. vive-voce test and therefore the respondent was justified in prescribing cut off marks at the vive-voce test. By filing the reply the respondent has demanded dismissal of the petitions.

7. This Court has heard the learned Counsel for the parties at length and in great detail. This Court has also considered the documents forming part of the petitions.

8. From the record of the case it is evident that the public advertisement was issued by the respondent for direct recruitment to Delhi Higher Judicial Services. As per the said

- A advertisement written examination was to be held on March 12, 2006. The selection process was of two stages: stage one was written examination comprising one paper only of 250 marks, whereas stage two included interview/vive-voce. As per the advertisement minimum qualifying marks in the written examination were specified to be 55% for General candidates and 50% for Scheduled Castes and Scheduled Tribes candidates but no cut off marks were prescribed for vive-voce test at all. The averments made in the petitions which are not effectively controverted by the respondent would indicate that oral interview was postponed by the respondent on six occasions and was finally conducted by the Selection Committee only on February 27, 2007. However, before that date criteria of cut off marks for vive-voce test was introduced by the respondent. It is an admitted position that at the beginning of the selection process, no minimum cut off marks for vive-voce were prescribed for Delhi Higher Judicial Service Examination, 2006. The question, therefore, which arises for consideration of the Court is whether introduction of the requirement of minimum marks for interview, after the entire selection process was completed would amount to changing the rules of the game after the game was played. This Court notices that in **Civil Appeal No. 1313 of 2008 filed by K.Manjusree against the State of A.P. & Anr.** decided on February 15, 2008, the question posed for consideration of this Court in the instant petitions was considered and answered in the following terms:-
- F "The resolution dated 30.11.2004 merely adopted the procedure prescribed earlier. The previous procedure was not to have any minimum marks for interview. Therefore, extending the minimum marks prescribed for written examination, to interviews, in the selection process is impermissible. We may clarify that prescription of minimum marks for any interview is not illegal. We have no doubt that the authority making rules regulating the selection, can prescribe by rules, the minimum marks both for written examination and interviews, or prescribe minimum marks for written examination but not for
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interview, or may not prescribe any minimum marks for either written examination or interview. Where the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee want to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the selection committee prescribed minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview.”

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9. From the proposition of law laid down by this Court in the above mentioned case it is evident that previous procedure was not to have any minimum marks for vive-voce. Therefore, prescribing minimum marks for vive-voce was not permissible at all after written test was conducted. 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 vive-voce, but if minimum marks are not prescribed for vive-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 vive-voce, test was illegal.

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10. The contention raised by the learned Counsel for the respondent that the decision rendered in *K.Manjusree (Supra)* did not notice the decisions in *Ashok Kumar Yadav v. State of Haryana (1985) 4 SCC 417* as well as *K.H.Siraj v. High Court of Kerala and Others (2006) 6 SCC 395* and therefore

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A should be regarded either as decision *per incuriam* or should be referred to Larger Bench for reconsideration, cannot be accepted. What is laid down in the decisions relied upon by the learned Counsel for the respondent is that it is always open to the authority making the rules regulating the selection to prescribe the minimum marks both for written examination and interview. The question whether introduction of the requirement of minimum marks for interview after the entire selection process was completed was valid or not, never fell for consideration of this Court in the decisions referred to by the learned Counsel for the respondent. While deciding the case of **K.Manjusree (Supra)** the Court noticed the decisions in (1) **P.K.Ramachandra Iyer v. Union of India (1984) 2 SCC 141**; (2) **Umesh Chandra Shukla v. Union of India (1985) 3 SCC 721**; and (3) **Durgacharan Misra v. State of Orissa (1987) 4 SCC 646**, and has thereafter laid down the proposition of law which is quoted above. On the facts and in the circumstances of the case this Court is of the opinion that the decision rendered by this Court in **K.Manjusree (Supra)** can neither be regarded as Judgment *per incuriam* nor good case is made out by the respondent for referring the matter to the Larger Bench for reconsidering the said decision.

11. At this stage this Court notices that as per the information supplied by the respondent to the petitioners under the provisions of Right to Information Act, the petitioner in Writ Petition Civil No. 490/2007 had secured 142 marks out of 250 prescribed for the written test and 363 marks out of 750 marks in vive-voce test, whereas the petitioner in Writ Petition No. 491/2007 had secured 153.50 marks out of 250 marks in the written test and 316 marks out of 750 marks in vive-voce test. There is no manner of doubt that the prescription of 750 marks for vive-voce test is on higher side. This Court further notices that **Hon'ble Justice Shetty Commission** has recommended in its Report that "The vive-voce test should be in a thorough and scientific manner and it should be taken anything between 25 to 30 minutes for each candidate. What is recommended by the Commission is that the vive-voce test shall carry 50 marks

and there shall be no cut off marks in vive-voce test." This Court notices that in **All-India Judges Association and ors. V. Union of India and Ors. (2002) 4 SCC 247**, subject to the various modifications indicated in the said decision, the other recommendations of the **Shetty Commission (supra)** were accepted by this Court. It means that prescription of cut off marks at vive-voce test by the respondent was not in accordance with the decision of this Court. It is an admitted position that both the petitioners had cleared written examination and therefore after adding marks obtained by them in the written examination to the marks obtained in the vive-voce test, the result of the petitioners should have been declared. As noticed earlier 16 vacant posts were notified to be filled up and only five candidates had cleared the written test. Therefore, if the marks obtained by the petitioners at vive-voce test had been added to the marks obtained by them in the written test then the names of the petitioners would have found place in the merit list prepared by the respondent. Under the circumstances, this Court is of the opinion that the petitions filed by the petitioners will have to be accepted in part.

12. For the foregoing reasons both the petitions succeed. The respondent is directed to add the marks obtained by the petitioners in the written examination to the marks obtained by them in the vive-voce test and prepare a combined merit list along with the other selected candidates. The respondent is directed to amend the notice dated April 10, 2007 issued by the Registrar (Vig.), High Court of Delhi, New Delhi and declare the petitioners as selected for being recommended for appointment to the post in Delhi Higher Judicial Service. It is clarified that the petitioners would neither be entitled to, seniority or salary with retrospective effect. Their seniority shall be reckoned from the date of their appointment and salary as allowable be paid from that date only. Rule is made absolute accordingly in each petition. There shall be no order as to cost.

R.P.

Writ Petition partly allowed.