

A SUJASHA MUKHERJI

v.

B THE HON'BLE HIGH COURT OF CALCUTTA,
THR. REGISTRAR & ORS.

(Civil Appeal No. 2051 of 2015)

FEBRUARY 19, 2015

C [VIKRAMAJIT SEN AND C. NAGAPPAN, JJ.]

Service Law – Judicial Service – Selection – To the post of District Judge – One of the candidates (appellant) obtained highest marks in written test comprising of 5 papers – But on moderation of her marks in one of the papers from 55% to 37%, she was disqualified from further consideration i.e. appearing in interview/ viva voce on the ground that she did not obtain minimum marks of 40% in each paper – Held: The fundamental predications have not been followed for moderation – Instead of moderation, in fact a re-assessment of the answer-scripts of the appellant was done – Most of the candidates whose answer-scripts had been reassessed, the reduction of marks averages to 10 marks, hence deduction of 18 marks of the appellant was not justified – After deduction of 10 marks from 55 marks, the appellant would remain at second position in the merit list – The respondent-High Court directed to hold interview of the appellant.

Natural Justice – Litigation challenging selection

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process of the post of District Judge – Senior most examiner (Judge of High Court) was the judge in the case – Held: Such practice is alarmingly irregular and tantamount to being a judge in one’s own cause – It was imperative for the Judge to recuse himself from the adjudication – Judicial Propriety.

Allowing the appeal, the Court

HELD:1. The senior-most Judge of the three Judge/Examiners is the author of the impugned judgment. This is alarmingly irregular and tantamounts to being a Judge in one’s own cause. It was, therefore, imperative for the Judge to recuse himself from the adjudication; and this facet would ordinarily be sufficient to set aside the Impugned Judgment. However, keeping in perspective the gravity and urgency of the matters in issue, rather than remanding the dispute to the High Court, it is proper to proceed to decide the dispute on its merits. [Para 6] [487-D-G]

2.1 The keystone of the method of moderation postulates the existence of a Head Examiner who is usually the paper-setter also. In the present case the respondents have neither asseverated nor established that a Head Examiner had been appointed. A multi person Committee of the High Court was entrusted with this fundamental duty and that in all probabilities this Committee selected the questionnaire from the multitude of questions suggested for the subject. The fundamental predication of the paragraph 23(i) and (ii) of *Sanjay Singh case, therefore, does not

A exist. No meeting was convened in which the
examiners were present so as to discuss the
substance of the questions and reach a consensus
as regards suitable/model answers thereto. The
keystone on which the structure of **Sanjay Singh*
B had been painstakingly constructed, has been
removed with the result that the edifice has crumbled
down. It is not logical for the basic features to be
ignored and thereafter to follow other elements for
that will become an incorrect extrapolation.
C Furthermore, there is no justification for the junior-
most Judge/examiner to have been given the
formidable task of moderation. [Para 8] [493-B-H]

2.2 The avowed purpose behind moderation is to
D “to achieve uniformity”, to eradicate as far as
possible the ‘hawk-dove’ effect. If mistaking in the
valuation of answer-books are found to be rampant
in the opinion of the Head Examiner, a fresh
evaluation would have to be undertaken, since
E moderation by definition cannot remove widespread
mistakes. In the present case what has transpired in
actuality is a fresh assessment and not a moderation
of marks already awarded by an examiner. It appears
F that sub-para (iii) of **Sanjay Singh* case has been
misconstrued and hence misapplied in the impugned
judgment whilst it has been correctly applied by the
Single Judge. [Para 8] [494-H; 495-A-B]

2.3 So far as most of the candidates whose
G answer scripts had been reassessed afresh, the
reduction averages 10 marks which, therefore,
constitutes the mean. Therefore, the deduction of as
many as 18 marks so far as the appellant is
concerned is not logical or justified as a
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consequence of moderation. A moderator should give a long and serious thought to the correctness of assessment on the realization he finds that the top-most candidate stands disqualified by the purported exercise of moderation. A grave injustice has been caused to the appellant.[Para 9] [495-F-H; 496-A-B]

2.4 Since an effort of moderation has been carried out it is held that a deduction of 10 marks being the appropriate mean arrived at, be deducted from the initial marks of 55 obtained by the appellant in Paper II. Despite this deduction the Appellant will remain at second position in the merit list. In fact, the position would be identical even if the appellant were to be awarded the minimum marks of 40% i.e., by deducting 15 marks from the original marks obtained by her. The respondent-High Court is directed to interview the appellant. The Chief Justice shall ensure that the Interview Committee does not comprise any of the three Examiners. [Para 11] [496-E-H; 497-A]

**Sanjay Singh v. U.P. Public Service Commission, Allahabad, (2007) 3 SCC 720 = 2007 (1) SCR 235 – referred to*

Case Law Reference

2007 (1) SCR 235 Referred to Para 3

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2051 of 2015

From the Judgment and Order dated 04.07.2014 of the High Court at Calcutta in F. M. A. No. 2538 of 2013.

Sanjiv Sen, Dev Roy, Abhishek Sarkar, Partha

A Sil for the Appellant.

Jaideep Gupta, Raja Chatterjee, Runa Bhuyan, M. Parmar, G. S. Chatterjee for the Respondents.

B The Judgment of the Court was delivered by

VIKRAMAJIT SEN, J. 1. Leave granted.

2. Succinctly stated the significant and singular facts
C of the case are that the Writ Petitioner/Appellant was
placed in the second position of the Written Test for
recruitment to the cadre of the District Judge (Entry Level)
through Direct Recruitment from the Bar-2012. Had her
D marks not been moderated from 55 per cent to 37 per
cent in Paper No.II her aggregate marks would have
been 307 which is higher than the candidate at Serial
No.1 by 6.5 marks; in other words, she was the topper
E in the Written Test comprising 5 papers. After moderation
was carried out, [which it appears was conducted only in
respect of Paper No. II], she stood disqualified from
further consideration, i.e. appearing for the final stage of
F selection, viz., the Interview/viva voce for the reason that
obtainment of minimum marks of 40 per cent in each
paper was the pre-requisite for being called for the
Interview. These facts have struck us as extremely
G significant for the reason that a candidate who stood
First in the Written Examination (in five papers) has not
been found suitable for even being called for the final
H step in recruitment, i.e. the Interview. It has been asserted
by the Writ Petitioner/Appellant that she is a position-
holder in the Calcutta University; she quite obviously also

possesses extraordinarily high academic and A
scholastic merit. It has been vehemently contended
before us, as also before the learned Single Judge
and the learned Division Bench of the Calcutta
High Court, that the moderation exercise has been B
undertaken even though it had not been notified or
clarified at any stage that the examination would
be subject to this scrutiny. Whilst the 2006
Guidelines were placed before and were duly
approved by the Full Court, it appears that the C
2012 Guidelines had not been placed before the
Full Court but were followed by the three Judge
Committee.

3. Learned Senior Counsel for the High Court D
of Calcutta has strenuously submitted that
moderation has been carried out strictly in
conformity with the decision of this Court in **Sanjay**
Singh v. U.P. Public Service Commission, Allahabad
(2007) 3 SCC 720. It deserves to be immediately E
underscored that the Rules for that examination
envisaged a moderation exercise whereas this
feature is absent so far as the subject examination
is concerned. We must immediately express the
view that this argument has no merit since F
Moderation is merely a method to ensure that the
marking or valuation is free from even unintended
discrimination or inequality.

4. Learned Single Judge was of the opinion G
that the ratio of **Sanjay Singh** had not been
comprehensively followed, in that neither was a
Head Examiner appointed, nor was a meeting held
for the purpose of discussing the question paper
and the possible/model answer thereto. The learned H

A Single Judge, therefore, found in favour of the Writ Petitioner/Appellant. The learned Single Judge had also noted that of the three examiners the junior-most judge have been appointed as the moderator. It was also emphasised by the learned Single Judge that instead of moderation, in fact a re-assessment of the answer book of the Writ Petitioner/Appellant of Paper No.II has been carried out. Noting that if the Appellant had received three marks more in Paper II even after moderation (i.e. a deduction of 15 marks instead of 18 marks) she would have qualified to participate in the viva voce/Interview, the learned Single Judge held that the Appellant was unjustifiably excluded from the zone of consideration and was, therefore, entitled to the relief as claimed in the petition. The direction that was issued was to award the Appellant 55 marks in Paper II (i.e. without any moderation whatsoever) and to recast her position in the merit list accordingly; and further that the Selection Board should take her interview within the least possible time and if the Appellant did not qualify after the Interview the candidate who would be otherwise entitled as per her/his merit panel should be appointed.

5. In the Impugned Judgment the endeavour of the learned Division Bench was palpably to decide the matter within the confines of **Sanjay Singh**. However, they have pointedly clarified the Judgment is not to be read and interpreted like a statute, which is the ratio of judgment of this Court. Quite palpably, this clarification was necessitated by the fact that the High Court had not ordained a

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selection procedure which was completely in sync with **Sanjay Singh**. In contrast to the Single Judge the learned Division Bench has played down and discounted the fact that a Head Examiner had not been appointed and that the Committee had not thought it essential to hold a meeting to discuss the questionnaire as well as agree on the acceptable/suitable/model answers thereto. It is also not controverted that the candidates had not been notified that any or all of the papers may be subjected to moderation which also is a distinguished feature to the examinations process in **Sanjay Singh**.

6. We note that the senior-most Judge of the three Judge/Examiners is the author of the Impugned Judgment. It requires to be immediately stated that this is alarmingly irregular and tantamounts to being a Judge in one's own cause. It was, therefore, imperative for the learned Judge to recuse himself from the adjudication; and this facet would ordinarily be sufficient to set aside the Impugned Judgment. However, keeping in perspective the gravity and urgency of the matters in issue before us, rather than remand the dispute to the High Court for a fresh determination by a Division Bench comprising learned Judges who are not connected in any manner to the subject selection, we think it proper to proceed to decide the dispute on its merits.

7. The ratio of **Sanjay Singh**, which is the fulcrum of the discussion of every aspect of this case, is discernable from the following extract:

A “23. When a large number of candidates
appear for an examination, it is necessary
to have uniformity and consistency in
valuation of the answer-scripts. Where the
number of candidates taking the examination
B are limited and only one examiner
(preferably the paper-setter himself)
evaluates the answer-scripts, it is to be
assumed that there will be uniformity in the
valuation. But where a large number of
C candidates take the examination, it will not
be possible to get all the answer-scripts
evaluated by the same examiner. It,
therefore, becomes necessary to distribute
D the answer-scripts among several examiners
for valuation with the paper-setter (or other
senior person) acting as the Head Examiner.
When more than one examiners evaluate
the answer-scripts relating to a subject, the
E subjectivity of the respective examiner will
creep into the marks awarded by him to the
answer-scripts allotted to him for valuation.
Each examiner will apply his own yardstick
to assess the answer-scripts. Inevitably
F therefore, even when experienced examiners
receive equal batches of answer-scripts,
there is difference in average marks and
the range of marks awarded, thereby
affecting the merit of individual candidates.
G This apart, there is “hawk-dove” effect.
Some examiners are liberal in valuation and
tend to award more marks. Some examiners
are strict and tend to give less marks. Some
may be moderate and balanced in awarding
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marks. Even among those who are liberal or those who are strict, there may be variance in the degree of strictness or liberality. This means that if the same answer-script is given to different examiners, there is all likelihood of different marks being assigned. If a very well-written answer-script goes to a strict examiner and a mediocre answer-script goes to a liberal examiner, the mediocre answer-script may be awarded more marks than the excellent answer-script. In other words, there is "reduced valuation" by a strict examiner and "enhanced valuation" by a liberal examiner. This is known as "examiner variability" or "hawk-dove effect". Therefore, there is a need to evolve a procedure to ensure uniformity inter se the examiners so that the effect of "examiner subjectivity" or "examiner variability" is minimised. The procedure adopted to reduce examiner subjectivity or variability is known as moderation. The classic method of moderation is as follows:

(i) The paper-setter of the subject normally acts as the Head Examiner for the subject. He is selected from amongst senior academicians/scholars/senior civil servants/judges. Where the case is of a large number of candidates, more than one examiner is appointed and each of them is allotted around 300 answer-scripts for valuation.

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A (ii) To achieve uniformity in
valuation, where more than one
examiner is involved, a meeting of the
Head Examiner with all the examiners
is held soon after the examination. They
B discuss thoroughly the question paper,
the possible answers and the weightage
to be given to various aspects of the
answers. They also carry out a sample
valuation in the light of their discussions.
C The sample valuation of scripts by each
of them is reviewed by the Head
Examiner and variations in assigning
marks are further discussed. After such
D discussions, a consensus is arrived at
in regard to the norms of valuation to
be adopted. On that basis, the
examiners are required to complete the
valuation of answer-scripts. But this by
E itself, does not bring about uniformity of
assessment inter se the examiners. In
spite of the norms agreed, many
examiners tend to deviate from the
expected or agreed norms, as their
F caution is overtaken by their propensity
for strictness or liberality or erraticism
or carelessness during the course of
valuation. Therefore, certain further
corrective steps become necessary.

G (iii) After the valuation is completed
by the examiners, the Head Examiner
conducts a random sample survey of
the corrected answer-scripts to verify

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whether the norms evolved in the meetings of examiner have actually been followed by the examiners. The process of random sampling usually consists of scrutiny of some top level answer-scripts and some answer books selected at random from the batches of answer-scripts valued by each examiner. The top level answer books of each examiner are revalued by the Head Examiner who carries out such corrections or alterations in the award of marks as he, in his judgment, considers best, to achieve uniformity. (For this purpose, if necessary certain statistics like distribution of candidates in various marks ranges, the average percentage of marks, the highest and lowest award of marks, etc. may also be prepared in respect of the valuation of each examiner.)

(iv) After ascertaining or assessing the standards adopted by each examiner, the Head Examiner may confirm the award of marks without any change if the examiner has followed the agreed norms, or suggests upward or downward moderation, the quantum of moderation varying according to the degree of liberality or strictness in marking. In regard to the top level answer books revalued by the Head Examiner, his award of marks is

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A accepted as final. As regards the other
answer books below the top level, to
achieve maximum measure of uniformity
inter se the examiners, the awards are
B moderated as per the recommendations
made by the Head Examiner.

(v) If in the opinion of the Head
Examiner there has been erratic or
careless marking by any examiner, for
C which it is not feasible to have any
standard moderation, the answer-scripts
valued by such examiner are revalued
either by the Head Examiner or any
other examiner who is found to have
D followed the agreed norms.

(vi) Where the number of candidates
is very large and the examiners are
numerous, it may be difficult for one
E Head Examiner to assess the work of
all the examiners. In such a situation,
one more level of examiners is
introduced. For every ten or twenty
examiners, there will be a Head
F Examiner who checks the random
samples as above. The work of the
Head Examiners, in turn, is checked by
a Chief Examiner to ensure proper
G results.

The above procedure of "moderation"
would bring in considerable uniformity and
consistency. It should be noted that absolute
uniformity or consistency in valuation is

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impossible to achieve where there are A
several examiners and the effort is only to
achieve maximum uniformity”.

8. It appears to us to be uncontrovertibly B
comprehensible that the cornerstone, nay keystone,
of the method of moderation enunciated by this
Court in **Sanjay Singh** postulates the existence of
a Head Examiner who is usually the paper-setter
also. In this case the Respondents have neither C
asseverated nor established that a Head Examiner
had been appointed. Learned Senior Counsel had
adumbrated that a multi person Committee of the
High Court was entrusted with this fundamental
duty and that in all probabilities this Committee D
selected the questionnaire from the multitude of
questions suggested for the subject. The
fundamental predication of the paragraph 23(i) and
(ii) of **Sanjay Singh**, therefore, does not exist.
Even if that were to be overlooked, no meeting E
was convened in which the examiners were present
so as to discuss the substance of the questions
and reach a consensus as regards suitable/model
answers thereto. Quite evidently, the keystone on
which the structure of **Sanjay Singh** had been F
painstakingly constructed, has been removed with
the result that the edifice has crumbled down. It is
not logical for the basic features to be ignored and
thereafter to follow other elements for that will
become an incorrect extrapolation. Furthermore, we G
find no justification for the junior-most Judge/
examiner to have been given the formidable task
of moderation. In the course of argument, we had
requested learned Senior Counsel for the High

A Court to provide us with the *curriculum vitae* of the learned Judges in order to appreciate this decision; it could have been that he possessed an academic background or previous experience with regard to the conduct of Examination which made him the most suitable amongst the three Examiners to perform the task of moderation, but we could not find any additional criteria to support his candidature as the Moderator. Furthermore, we find that the marks awarded by the 1st Examiner have been left unchanged, except of cosmetic alterations. In fact, there mostly appears to be a variation of nil or 0.5 marks after the moderation whereas large scale changes have been effected so far as the 2nd Examiner is concerned. Assessment of answer books by an examiner is intrinsically a subjective exercise making it a rarity for two of them award the same percentage or marks out of 100. It is, therefore, surprising to note that the Moderator's subjectivity is almost identical to that of the 1st Examiner, but drastically different to the 2nd Examiner. This has persuaded us to conclude that what has transpired in actuality is a fresh assessment and not a moderation of marks already awarded by an examiner. This is not the purpose or objective behind moderation. As has been clearly spelt out in **Sanjay Singh**, where there are numerous examiners it is but to be expected that one may be more liberal when compared to another, who may even be strict, giving birth to the 'hawk-dove' effect, which has so perspicuously and graphically been explained in **Sanjay Singh**. The avowed purpose behind moderation is to "to achieve uniformity", to eradicate as far as possible the

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'hawk-dove' effect. If mistaking in the valuation of Answer-books are found to be rampant in the opinion of the Head Examiner, a fresh evaluation would have to be undertaken, since moderation by definition cannot remove widespread mistakes. It appears to us that sub-para (iii) of **Sanjay Singh** has been misconstrued and hence misapplied in the Impugned Judgment whilst it has been correctly applied by the learned Single Judge.

9. Revaluation as envisaged in the paragraph 23 of **Sanjay Singh** has to be undertaken by the Head Examiner/Paper Setter who, as has already been noted, is non-existent in the present case. The effort would be to eradicate the 'hawk-dove' syndrome, and this is achieved by computing the 'mean' and, thereafter, to add or deduct, across the board, in all the Answer-sheets. It cannot be disputed that this is not what has transpired in the present case since quite apparently moderation has been carried out in respect of the assessment/ marking of the 2nd Examiner and that too in Paper No. II. So far as most of the candidates whose answer scripts had been reassessed afresh, the reduction averages 10 marks which, therefore, constitutes the mean. Therefore, the deduction of as many as 18 marks so far as the Appellant is concerned is not logical or justified as a consequence of moderation. We also think that a moderator should give a long and serious thought to the correctness of his assessment on the realization he finds that the top-most candidate stands disqualified by the purported exercise of moderation. As we have already noted above,

A instead of deducting 18 marks if even 15 marks
had been deducted, the Appellant who has scored
the highest marks before moderation and the
second highest marks even after moderation, would
have qualified for being called to the Interview/viva
B voce. A grave injustice has been caused to the
Appellant. The learned Division Bench should have
been alive to this injustice since it had before it
the judicial determination of the learned Single
Judge. We shall abjure from making any further
C observation.

10. On the first hearing of this matter, we had
been informed by Mr. Gopal Subramaniam, learned
Senior Counsel that one vacancy has been
D preserved during the pendency of the Writ Petition
as well as the Appeal, which position we had
ordered should continue.

11. The Appeal is allowed and the Impugned
E Judgment is set aside. Since an effort of moderation
has been carried out we hold that a deduction of
10 marks being the appropriate mean arrived at be
deducted from the initial marks of 55 obtained by
the Appellant in Paper II. Despite this deduction
F the Appellant will remain at second position in the
merit list. In fact, the position would be identical
even if the Appellant were to be awarded the
minimum marks of 40 per cent, i.e., by deducting
15 marks from the original marks obtained by her.
G We direct the Respondent-High Court to interview
the Appellant within one week from its receiving
knowledge of this Judgment. The result thereof must
be declared within one week thereafter. The Hon'ble
H Chief Justice shall ensure that the Interview

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Committee does not comprise any of the three A
Examiners. If the result remains unfavourable to
the Appellant the post shall remain unfilled for a
period of 30 days therefrom.

12. There will be no orders as to costs. B

Kalpana K. Tripathy

Appeal allowed.