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Ms. Rita Yorung and Another Vs State of Arunachal Pradesh and Others

Court: Gauhati High Court

Date of Decision: Feb. 23, 2010

Acts Referred: Constitution of India, 1950 â€" Article 309
Tourist Information Officer Recruitment Rules, 1999 â€" Rule 3, 7

Citation: (2010) 2 GLD 849 : (2010) 2 GLT 276

Hon'ble Judges: J. Chelameswar, C.J; A.C. Upadhyay, J

Bench: Division Bench

Advocate: K.N. Choudhury, R. Dubey, M. Mahanta, A. Baruah and R. Kakati, for the Appellant; B. Banerjee, Sr. GA, I. Choudhury, M. Pertin, N.J. Khatanian, R.M. Deka, for the Respondent

Final Decision: Dismissed

Judgement

A.C. Upadhyay, J.
The appellants (respondent Nos. 9 and 10 in the writ petition) are aggrieved by the judgment and order dated

15.5.2008 passed in WP(C) No. 208(AP)/2007.

2. We have heard Mr. K.N. Choud-hury, learned senior counsel assisted by Mr. R. Dubey, learned Counsel appearing for the appellants, and Mr.

I. Choudhury, learned Counsel for the respondent No. 3.

3. The facts, admitted by the parties, which are essential for disposal of the writ appeal, may be stated as follows.

4. The writ petitioner i.e. respondent No. 3 herein, had challenged the legality and validity of the selection process of the appellants herein, for the

post of Tourist Information Officer, a Group "C non-Gazetted post, under the Government of Arunachal Pradesh. The writ petitioner/respondent

No. 3 herein, contended in his petition that the Tourist Information Officer Recruitment Rules, 1999, which was framed in exercise of powers

under proviso to Article 309 of the Constitution recommended the method of recruitment, age, qualifications etc., which however was silent as

regards the criteria for short-listing candidates for the viva voce test, pursuant to the written test examination. In order to fill up this gap in the

recruitment rules the State respondent issued an executive instruction by way of Office Memorandum on 28.8.2006 regarding recruitment

examination of various Government departments providing for a minimum qualifying marks of 45% in the written test and restricting the number of

candidates to be called for the viva voce test to 3 times the available number of vacancies for recruitment i.e. at the ratio of 1:3.

5. On 14.9.2006 the advertisement was issued by the state respondent, for recruitment of 8 posts of Tourist Information Officer. Pursuance to the

above advertisement the respondent No. 3, together with the appellants numbering about 2300 candidates appeared in the selection test

conducted for the aforesaid pots.

6. On 14th March 07, the respondent No. 2 by an advertisement published in the local newspaper, informed in all 51 candidates, who had

qualified for the viva voce test. The advertisement indicated only the Roll numbers of the candidates selected for viva voce test, directing them to

appear on 30/3/2007 before the Selection Board. The writ petitioner/respondent No. 3 who qualified for the viva voce test together with the

appellants, accordingly appeared before the Selection Board for viva voce test. Pursuant to the viva voce test conducted by the Section Board the

impugned select list was published on 3.4.2007 by the state respondent, wherein the writ petitioner/respondent No. 3 in spite of doing extremely

well in the examination was not selected and as such he immediately applied under Right to Information Act, 2005 to get hold of the marks

obtained by all the candidates selected and interviewed.

7. The writ petitioner/respondent No. 3 to his utter surprise discovered that instead of calling only 24 candidates in the ratio of 1:3, as per the

office memorandum dated 28.8.2006 for the viva voce test, for selection of 8 post, the respondent authorities had called in all 51 candidates in

violation of the norms set by the office memorandum aforesaid. The petitioner/respondent No. 3, immediately submitted representation on

24.5.2007 before the State respondent and before other State authorities alleging irregularities in the selection process, but to no avail. Thus having

failed in all fronts petitioner/respondent No. 3 filed the writ petition aforesaid seeking relief as indicated in the writ petition. The writ

petitioner/respondent No. 3 No. 3 also contended that very high marks were awarded to the appellants herein by the respondents, with a mala fide

intention of accommodating them in the list of final 8 candidates selected for the post.

8. The State respondent supporting the stand of the appellants filed affidavit admitting the fact of selecting candidates beyond 3 times the number of

vacancies on the pretext of having several candidates who had secured identical percentage of marks. The State respondent further stated that the

exercise was carried out with "no manipulative intention, but to give fair chance to other candidates who had also the same scoring of marks in the

written test by restricting the rank holders up to 24 on the basis 1:3 ratio."

9. The learned single Judge by the impugned order held that the State respondents were not justified in permitting the appellants to appear in the

viva voce test, since the rank secured by them in the written test was much beyond the ratio of 1:3 prescribed by the Office Memorandum dated

28.8.2006.

10. The learned single Judge further held that the appellants were awarded very high marks in the viva voce test in an arbitrary manner, for which

the writ petitioner/respondent No. 3 could not come within the 8 selected candidates and therefore, interfered with the process of selection made

by the respondent authorities. In the result, the learned single Judge by the impugned judgment and order in the writ petition set aside the selection

of the appellants and directed the respondent authorities to prepare a fresh select list in terms of the said Office Memorandum, by enlisting the

names of only such candidates, who come within the first 24 ranks in order of merit. However, the learned single Judge did not disturb the

selection of those candidates, who had secured marks in the written test, which enabled them to secure rank within first 24 positions.

11. Mr. K.N. Choudhury, learned senior counsel, assailing the judgment and order of the learned single Judge contended that the writ

petitioner/respondent No. 3 having unsuccessfully participated in the process of selection without any demur, can not be permitted to challenge the

selection criteria. If at all, the petitioner had any valid objection to make, either he ought to have challenged the advertisement and selection

process without participating in it or should have submitted objection before the concerned authority regarding such irregular selection of

candidates for the viva-voce test. In support of his contention, learned Counsel relied on the decision of the Hon''ble Supreme Court reported in

Dhananjay Malik and Others Vs. State of Uttaranchal and Others, wherein it has been held as follows:

7. It is not disputed that the respondent-writ petitioners herein participated in the process of selection knowing fully well that the educational

qualification was clearly indicated in the advertisement itself as BPE or graduate with diploma in Physical Education. Having unsuccessfully

participated in the process of selection without any demur they are estopped from challenging the selection criterion inter alia that the advertisement

and selection with regard to requisite educational qualifications were contrary to the Rules.

... ...

9. In the present case, as already pointed out, the respondent-writ petitioners herein participated in the selection process without any demur; they

are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection

process were not in accordance with the Rules they could have challenged the advertisement and selection process without participating in the

selection process. This has not-been done.

12. Learned Counsel for the appellant also pointed out that it has been laid down by the Hon''ble Supreme Court in Madan Lal and Others Vs.

State of Jammu and Kashmir and Others, that if a candidate takes a calculated chance and appears at the interview, then, only because the result

of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection

Committee was not properly constituted. The relevant extract of the observations made by the Hon''ble Supreme Court in Madan Lal''s case

(supra) relied on by the learned Counsel for the appellant reads as follows:

9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being

respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview.

Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned

of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get

themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined

performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance

and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend

that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla Vs. Akhilesh

Kumar Shukla and Others, it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the

examination without protest and when he found that he would not succeed in the examination he filed a petition challenging the said examination,

the High Court should not have granted any relief to such a petitioner.

13. Learned senior counsel for the appellants relying on the decision of the Hon''ble Supreme Court reported in K.H. Siraj Vs. High Court of

Kerala and Others, submitted that there is nothing in the Rule barring respondent authorities from calling candidates, who have secured lesser

marks. He further submitted that the Executive instructions could always supplement the Rules, which may not deal with every aspect of the matter.

In order to get the best available talent, it is open to the concerned authority to supplement the rules with a view to implement them by prescribing

relevant standards. The relevant observation made in K.H. Siraj v. High Court of Kerala, (supra) reads as follows:

62. Thus it is seen that apart from the amplitude of the power under Rule 7 it is clearly open for the High Court to prescribe benchmarks for the

written test and oral test in order to achieve the purpose of getting the best available talent. There is nothing in the Rules barring such a procedure

from being adopted. It may also be mentioned that executive instructions can always supplement the Rules which may not deal with every aspect of

a matter. Even assuming that Rule 7 did not prescribe any particular minimum, it was open to the High Court to supplement the rule with a view to

implement them by prescribing relevant standards in the advertisement for selection. Reference may be made to the decision of this Court in State

of Gujarat Vs. Akhilesh C. Bhargav and Others,

14. It is also contended on behalf of the appellants that merely because of the fact that a large number of candidates were called for interview itself

would not vitiate the selection process for arbitrariness. These large figures may create a suspicion in one''s mind that some element of arbitrariness

might have entered the assessment in the viva voce examination, but s,uch suspicion cannot take the place of proof and it is not possible to strike

down the selections made, on the ground that the evaluation of the merits of the candidates in the viva voce examination might be arbitrary. In

support of his contention learned Counsel relied on the decision of the Apex Court reported in Ashok Kumar Yadav and Others Vs. State of

Haryana and Others, the relevant observation of which reads as follows:

21. ...It is also true that out of the first 16 candidates who topped the list on the basis of the combined marks obtained in the written examination

and the viva voce test, 12 could come in the list only on account of high marks obtained by them at the viva voce test, though the marks obtained

by them in the written examination were not of sufficiently high order. These figures relied upon by the Division Bench may create a suspicion in

one''s mind that some element of arbitrariness might have entered the assessment in the viva voce examination. But suspicion cannot take the place

of proof and we cannot strike down the selections made on the ground that the evaluation of the merits of the candidates in the viva voce

examination might be arbitrary. It is necessary to point out that the Court cannot sit in judgment over the marks awarded by interviewing bodies

unless it is proved or obvious that the marking is plainly and indubitably arbitrary or affected by oblique motives. It is only if the assessment is

patently arbitrary or the risk of arbitrariness is so high that a reasonable person would regard arbitrariness as inevitable, that the assessment of

marks at the viva voce test may be regarded as suffering from the vice of arbitrariness.

15. Learned Counsel for the appellant assailing the findings of the learned Single Judge submitted that allegations of awarding high marks to the

three candidates including the appellants in the viva voce test, to compensate the low marks secured by them in order to surpass candidates like

the writ petitioner, who had performed far better in the written test being not based on facts, are not acceptable before a writ Court. He also

contended that selection has been done taking into account the marks obtained in the written test as well as the viva voce test and therefore, there

is no infirmity in the selection process and the appellants also were not far behind the respondent No. 3/writ petitioner, in term of percentage of

marks obtained by them. Merely because the appellants got high marks in viva voce, would not in itself render the selection process arbitrary.

16. As a matter of fact a writ Court cannot sit in judgment over the marks awarded by interviewing bodies unless it is proved or evident from the

materials on record that the marking was plainly and indubitably arbitrary or affected by oblique motives. In our view, simply because of awarding

high marks would not be sufficient to establish arbitrariness in the action. From the materials on record the finding of the learned single Judge

branding arbitrariness in awarding marks to the appellants without sufficient materials on record would not be valid and acceptable.

17. Mr. Indira Choudhury, learned Counsel appearing on behalf of writ petitioner/respondent No. 3, refuting the arguments advanced by the

learned Counsel for the appellants, contended that Tourist Information Officer Recruitment Rules, 1999 was framed by the State Government in

exercise of powers under proviso to Article 309 of the Constitution. The method of recruitment, age, qualifications etc. are provided in Rule 3,

thereof, except the criteria for short-listing candidates for the viva voce test pursuant to the written examination. It is not disputed that executive

instruction issued, vide Office Memorandum dated 8th August 06, which provided for a minimum qualifying mark of 45% in the written test and

restricting the number of candidates to be called for the viva voce test to 3 times the number of vacancies only supplemented the aforesaid Service

Rules.

18. Pursuant to the viva voce test, the impugned selection list was published by the State respondents, wherein the names of the appellants found

place and the name of the respondent No. 3/writ petitioner, however, in spite of having fared well was conspicuously absent.

Immediately, thereafter the respondent No. 3/writ petitioner submitted an application under Right to Information Act, 2005 and consequently he

was furnished with information regarding the marks obtained by the candidates. The marks obtained by the appellants, respondent No. 3/writ

petitioner and the respondent No. 11 are as follows:

Written Test Viva Voce Test

Respondent No. 3/writ 192 13

petitioner

Appellant No. 1/Res- 170 38

pondent No. 9

Appellant No. 2/Res- 169 38

pondent No. 10

Respondent No. 11 172 24

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19. Learned Counsel for respondent No. 3 pointed out that in view of the above development, since the respondent No. 3 did not have

appropriate information regarding the low marks and ranks secured by the appellants in the written test any time prior to the holding of the viva

voce test, the respondent No. 3 cannot be attributed with any kind of prior knowledge to apply the principle of estoppels as laid in Dhananjay

Malik (supra and Madan Lal''s case (supra).

20. From the facts contended by the writ petitioner/respondent No. 3 herein, which are not in dispute, it is apparent that till obtaining of the

information through R.T.I. application regarding marks secured by the candidates selected in viva voce tests, the writ petitioner had no knowledge

of the alleged aberrations in the selection process. The writ petitioner/respondent No. 3 was in total darkness till the results were published.

Admittedly, the respondent No. 3 could not have known the ranks secured by other candidates selected for viva voce tests at any time before

obtaining the mark sheets of the written test examination.

21. Evidently, the writ petitioner/respondent No. 3 participated in the selection process without any demur together with other candidates, sans the

knowledge of attending irregularities perpetrated in the selection process in selecting candidates, for viva voce tests, who had secured 42st, 42nd

and 31st position in the merit list, i.e. far beyond the norms set by the State respondents. Therefore, in the facts and circumstances of the present

case the principles of estoppel from challenging the selection criteria after having unsuccessfully participated in the selection process as enunciated

in Dhananjay Malik (supra) cannot be applied in the facts and circumstances of the present case.

22. On the other hand in Madan Lal''s case (supra) unlike the instant case, petitioners as well as the contesting successful candidates were all found

eligible to be called for oral interview in the light of marks obtained in the written test. However, in the instant case the bone of contention is

irregular selection of unqualified candidates for viva voce tests by exceeding the ratio specifically prescribed for the purpose in the Office

Memorandum. Over and above, in the instant case, the writ petitioner/respondent No. 3 could gather such information only after the declaration of

the result of the examination. Therefore, in the facts and circumstances of the present case, the ratio of Madan Lal''s case (supra) also cannot be

applied in the present appeal under consideration before us.

23. The documents at Annexure-3, which depicts the marks obtained by the selected candidates in the written test has belied the stand that has

been taken by the State respondents in the writ petition on the issue pertaining to calling candidates beyond 3 times the number of vacancies (8 x 3

= 24) for viva voce. Thus the statement made by the State respondents to the effect that several candidates obtained identical percentage of marks

in the written examination, do not appear to be correct. On the other hand, the documents at Annexure-3 and Annexure-5, which show the actual

break-up of marks obtained by the selected candidates in written examination and viva voce reveals the actual picture, which reflects that

candidates from 41st, 42rd and 31st rank, on the basis of marks obtained in the written test, were selected for viva voce tests. If the above

statement made by the state respondent in the affidavit is believed, the only conclusion would be that the State respondents failed to correctly

identify and select the candidates for viva voce tests due to oversight, slip or failure to notice the ranks. In the alternative, the reason for such a

remiss in selecting candidates beyond the prescribed norm would be obviously intentional with oblique motive to suit some unfair design to favour

such selectee. In any view of the matter such exercise carried out by the State respondents cannot be understood to be ''no manipulative intention,

but to give fair chance to other candidates...." as has been indicated in the affidavit. Such irregularity would only mean to have been adopted to

give undue benefit to candidates, who would not have qualified in terms of the norms of selection notified in the Office Memorandum by the State

respondents.

24. In the above factual backdrop the decision of the Hon''ble Supreme Court in K.H. Siraj v. High Court of Kerala (supra), which held that it is

open to the concerned authority to supplement the rules with a view to implement them by prescribing relevant standards cannot be applied to

interpret and protect the remiss committed by the respondent State Authority by violating their own Office Memorandum.

25. Mr. Indira Choudhury, further contended that even if it is held that there is no arbitrariness in the process of selection there is no explanation on

behalf of the respondents, as to why 51 candidates were called for interview, whereas Rule provides for calling only 24 candidates for the same

purpose and submitted that the learned single Judge was justified in holding that more than 24 candidates were called for interview beyond the

scheme of the office memorandum, which is not in accordance with law. In support of his contention learned Counsel has referred to the decision

of the Hon''ble Supreme Court reported in Ashok Kumar Yadav v. State of Haryana, (supra), wherein it is held that ""we are of the view that

where there is a composite test consisting of a written examination followed by viva voce test, the number of candidates to be called for interview

in order of the marks obtained in the written examination, should not exceed twice or at the highest, thrice the number of vacancies to be filled.

The relevant extract of the observation in Ashok Kumar Yadav v. State of Haryana, (supra) reads as follows:

20. ...Otherwise the written examination which is definitely more objective in its assessment than the viva voce test will lose all meaning and

incredibility and the viva voce test which is to some extent subjective and discretionary in its evaluation will become the decisive factor in the

process of selection. We are therefore of the view that where there is a composite test consisting of a written examination followed by a viva voce

test, the number of candidates to be called for interview in order of the marks obtained in the written examination, should not exceed twice or to

the highest, thrice the number of vacancies to be filed. The Haryana Public Service Commission in the present case called for interview all

candidates numbering over 1300 who satisfied the minimum eligibility requirement by securing a minimum of 45% marks in the written examination

and this was certainly not right, but we may point out that in doing so, the Haryana Public Service Commission could not be said to be actuated by

any mala fide or oblique motive, because it was common ground between the parties that this was the practice which was being consistently

followed by the Haryana Public Service Commission over the years and what was done in this case was nothing exceptional. The only question is

whether this had any invalidating effect on the selections made by the Haryana Public Service Commission.

26. After having heard elaborate arguments advanced by the learned Counsel for both the parties we are not in agreement with the learned single

Judge, as regards alleged arbitrariness in awarding high marks by the Interview Board to the appellants, as the allegations for such remiss were not

substantiated by producing any reliable materials before the Court. There were, of course, general allegations of favouritism made against the State

respondents, which alone is not sufficient to impute arbitrariness in the selection process and to attribute any motive for manipulation of the marks

obtained by the candidates at the viva voce examination.

27. However, the violation of Office Memorandum restricting selection of the rank holders up to 24 on the basis 1:3 ratio, for 8 vacancies

advertised, either by mistake as admitted in the affidavit or carried out with ulterior motive by picking up candidates, who were far below in the

rank, in violation of the Office Memorandum dated 28.8.2006, is not in accordance with law.

28. Now a question arises if two view are possible, can the order of the learned single Judge impugned in the Writ Appeal be set aside if one of

the two views adopted by the learned single Judge is found to be acceptable, reasonable and logical.

29. Mr. I. Choudhury, learned Counsel for the writ petitioner/respondent No. 3 relying on a decision of this Court in 2004 (1) GLT 117 : Tractor

and Farm Equipment Ltd. v. Secretary to the Government of Assam, Dept. of Agriculture and Ors. has rightly appraised us that this Court as an

appellate Court cannot set aside the judgment of the learned single Judge unlike an appeal in an ordinary sense, in view of the established and

settled principles of law that if two views are possible and if a reasonable and logical view has been adopted by the learned single Judge, the other

view, howsoever, appealing it may be to the Division Bench, it is the view adopted by the single Judge, which should, normally, be allowed to

prevail. The relevant extract of the decision in Tractor and Farm Equipment Lid"s case (supra) reads as follows:

26. While dealing with the present appeal; one has to bear in mind that a writ appeal is really not a statutory appeal preferred against the judgment

and order of an inferior Court to the superior Court. The appeal inter se in a High Court from one Court to another is really an appeal from one

coordinate Bench to another coordinate Bench and it is for this reason that a writ cannot be issued by one Bench of the High Court to another

Bench of the High Court nor can even the Supreme Court issue writ to a High Court. Thus, unlike an appeal, in general, a writ appeal is an appeal

on principle and that is why, unlike an appeal, in an ordinary sense, such as a criminal appeal, where the whole evidence on record is examined a,

new by the appellate Court, what is really examined, in a writ appeal, is the legality and validity of the judgment and/or order of the Single Judge

and it can be set aside or should be set aside only when there is a patent error on the face of the record or the judgment is against the established

or settled principle of law. It two views are possible and a view, which is reasonable and logical, has been adopted by a Single Judge, the other

view, howsoever appealing such a view may be to the Division Bench, it is the view adopted by the single Judge, which should, normally, be

allowed to prevail. Hence, the impugned judgment of the learned Single Judge cannot be completely ignored and this Court has to consider the

judgment and order in its proper perspective and if this Bench, sitting as an appellate Bench, is of the view that the decision has been arrived at by

the learned Single Judge without any material error of fact or law, then, the judgment, in question, should be allowed to prevail. The reference

made, in this regard, by Mr. Dutta to the case of Ramendra Nath Dey (supra) is not misplaced. (State of Tripura v. Ramendra Nath Dey (2001) 1

GLR 54).

30. Drawing analogy from the above principle laid in Tractor and Farm Equipment Ltd."s case (supra), even if we hold that the decision of the

learned single Judge is not acceptable to us regarding awarding of higher marks in the viva voce tests to the appellants as well as general allegations

of favouritism made against the State respondents, nevertheless, the other view of the learned single Judge as regards flouting of the Office

Memorandum in selecting and calling candidates for viva voce tests, beyond 3 times the number of available vacancies (8 x 3 = 24) being ex-facie

illegal and arbitrary, cannot be overlooked.

The executive instructions aforesaid, notified by the State Government to supplement the service rules, framed in terms of the provisions of Art 309

of the Constitution, which do not offend or supplant the scheme of the Service Rules, should not have been flouted by the State respondent.

At the same time, as ascertained by the learned single Judge in the impugned order, the deviation or violation of such Executive Instructions, in its

application by the State authority itself, devoid of fairness, reasonableness and transparency would invite interference by the writ Court. Thus, as

has been rightly held by the learned single Judge, the respondent authorities were not justified in selecting the appellants, for viva voce tests, in

violation of office memorandum dated 28.8.2006, and such action of the State respondents resulted in arbitrariness warranting interference by the

Court.

In view of the above discussion we are of the considered opinion that there is no scope to interfere with the impugned judgment of the learned

single Judge in this appeal. In the result, this writ appeal stands dismissed. However, we pass no order as to costs.