

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. 389
XXXXXX

1999

DATE OF DECISION 22-03-1991

K. Yesodharan

Applicant (s)

Mr. P.V. Mohanan

Advocate for the Applicant (s)

Versus

The General Manager, Respondent (s)
Southern Railway, Madras and 6 others

Smt. Sumathi Dandapani for Advocate for the Respondent (s)
R 1 and 2 and M/s V. Ramachandran and T. Ravikumar
CORAM: for R 3 to 6

The Hon'ble Mr. S.P. Mukerji, Vice Chairman

The Hon'ble Mr. N. Dharmadan, Member (Judicial)

1. Whether Reporters of local papers may be allowed to see the Judgement? *Yes*
2. To be referred to the Reporter or not? *Yes*
3. Whether their Lordships wish to see the fair copy of the Judgement? *Yes*
4. To be circulated to all Benches of the Tribunal? *No*

JUDGEMENT

N. Dharmadan, M(J)

The grading of marks particularly for
viva - voce test under para 205 of the Indian
Railway Establishment Manual, Chapter-II, for the
selection post of Assistant Personnel Officer (for
short APO) in Group 'B' service of the Railway is
attacked as arbitrary, illegal and violative of Article
14 and 16 of the Constitution of India.

2. The material facts of the case are not in
dispute. The applicant is a Senior Stenographer in

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the Railways. Annexure-III to VIII prove his meritorious service. He volunteered for selection as APO pursuant to Annexure-I, a notification dated 11-8-88 issued by the second respondent, Chief Personnel Officer, calling for volunteers from Group 'C' staff. He was allowed to appear for written test held on 28-1-89 and he passed. Before the examination he objected the letter Annexure IX passed by the second respondent permitting the ineligible persons in the test like respondents 3 to 6. This was not disposed of. The applicant's name was included in the list (Annexure X) of persons qualified for viva-voce examination, which was conducted on 9-5-89 and 10-5-89. The second respondent, who has some prejudice against the applicant was the Chairman of the Selection Committee. He attended ~~xx~~ two telephone calls in the course of about 10 minutes while the interview of the applicant was in progress at 18-30 hrs. on 9.5.89. According to the applicant, though he performed well in the viva-voce test, he was given only 13 marks out of 25, which is below the minimum of 15 marks. Hence he failed in-spite of his high marks both in written test and valuation of service records. Thus, according to the applicant his failure is solely due to personal aggrandisement of the selection committee headed by the second respondent.

3. Under these circumstances, the applicant filed this application challenging Annexure XI list of selected

candidates issued by the second respondent on 15-6-89.

Later he amended the application incorporating the following additional reliefs also:

"(v) ..to call for the records leading to Annexure -2 (recruitment rules) and set aside clause 205(a)(iii) in so far as it fixes a minimum marks of 15 for viva voce test (personality, address, leadership and academic technical qualifications).

(vi) declare that the percentage of marks fixed for viva voce in the selection process unreasonable and arbitrary and violative of Article 14 of the Constitution of India...."

4. The applicant's case is simple and precise.

Admittedly, he is meritorious candidate eligible for promotion to the post of APO for the past about 10 years. He has 31 years of unblemished service and only five years to retire. It appears that he is appearing for the promotion test successfully from 1983, but so far he could not pass through the hurdle because the minimum of/percentage of marks fixed for viva - voce test. Even in the present test he was able to get more marks than the minimum required for a pass, but the minimum percentage pushed him down. of the marks fixed for the viva voce test. He scored 64 out of 100; - 30 out of 50 for written test, 13 out of 25 for viva-voce and 21 out of 25 for service records.

Persons ~~xx~~ who scored less marks in the written test were selected and about 10 persons placed below him in Annexure-X list of persons who were qualified for the viva-voce test were also selected, (rank Nos. 13, 14 to 16 17, 18, 21, 24 to 27) indicating that award of marks in viva-voce enabled many to pass. In fact serial Nos. 1

to 3 in Annexure XI could score only 61.25, 61.00 and 62.25 marks respectively as aggregate total. They were selected but the applicant did not get selection. So he attacks para 205 of Chapter II of the Railway Establishment Manual.

5. The relevant portion of para 205 reads as follows:

"Para 205: Procedure to be adopted by selection Boards:-

Selection should be made primarily on the basis of overall merit, but for the guidance of selection Boards the factors to be taken into account and their relative weight are laid down below:

		Maximum marks	Qualifying marks
(a) (i)	Professional ability	50	30
(ii)	Record of service	25	15
(iii)	Personality, address, leadership and academic technical qualifications	25	15
)	
		100	60

6. The matter was argued at length and the learned counsel appearing on behalf of the parties have cited a number of decisions at the bar. But in the nature of controversy arising in this case it is not necessary for us to consider all the grounds urged and the decisions cited by the learned counsel.

7. We think that the case of the applicant can be disposed of in the light of the admitted facts whether

there is any rationale or sustainable reason for the fixation of minimum percentage of 15 for pass in the test. But for the fixation of minimum marks the applicant would have passed in the test held in 1989. It is only when we hold that fixation of minimum marks for viva voce is reasonable and valid that we go further and consider the validity of the fixation of upper limit of 25% marks for the viva voce. We are guided by the Supreme Court. It was held in M.M. Pathak and another v. Workmen Tata Chemicals, AIR 1978 SC 803 that "it is a settled practice of this Court to decide not more than what is absolutely necessary for decision of a case..."

8. The purpose of test in this selection process is to assess the 'over all merits' of the candidates.

'What is merit which must govern the process of selection'?

It undoubtedly consists of a high degree of intelligence coupled with a keen and incisive mind, sound knowledge of the basic subject and infinite capacity for hard work, but that is not enough, it also calls for a sense of social commitment and dedications to the cause of the poor..." (See Pardeep Jain and other v. Union of

India and others, (1984) 3 SCC 654). For the over all

assessment of the merit of a candidate, a written test, valuation of service record and viva voce are fixed, circumscribing the upper limit and lower limit of marks. It may perhaps be reasonable to fix a lower limit as qualifying line in both the written test and the evaluation of service records because they are based on materials available as tangible records. If any candidate doubt the bonafides of the evaluation of the examiner a revaluation on a fresh look ever again is possible for the verification of the original assessment. But in the case of viva voce test the Supreme Court held in Miss Nishi Maghu and other V. State of J & K and others (1980) 4 SCC 95 that it is a fact to be noted that in the interview many uncertain factors are likely to affect the result. So, we are of the view that a fixation of minimum limit may act as a potential weapon in the hands of an Examiner for pushing a candidate out of the zone by giving one mark less than the minimum even if he had scored very high percentage of marks in written test and service record particularly when the Supreme Court in Ajay Hasia case (1981) 1 SCC 722, the Supreme Court observed that "oral interview test is undoubtedly not a very satisfactory test for assessing and evaluating the capacity and calibre

of candidates". The possibility of arbitrariness in the award of marks is very high in such cases as contended by the applicant particularly when the Selection Committee has some axe to grind against the particular candidate (See A.K. Sonaini V. State Bank of Travancore and others, ILR 1984 (1) Ker. 351).

9. In the instant case the applicant has laid down some basis for the allegation of bias and malafides against the second respondent indicating that the second respondent has some grouse against him because of his objection to Annexure IX letter issued by the second respondent on 13.2.88 directing permission to some candidates for sitting in the written test, who according to the applicant are ineligible persons. He was also alleged to have conducted the viva voce of the applicant ~~as~~ in a casual manner without the seriousness to be maintained for such test because of the indifferent attitude in having diverted his attention by attending to telephone calls during the interview of the applicant. These circumstances lead to the inference that the minimum marks fixed for Viva Voce could have been ^{purposely used} h with the intention of seeing that he may not succeed in the selection for the

promotion inspite of his aggregate marks xx above the qualifying limits. Thus the individual minimum marks fixed for the viva voce test caused gross injustice to the applicant and it really deprived his promotion as APO.

10. Now we will examine the decisions. The Kerala High Court after considering various Supreme Court decisions in Soumini's case, ILR 1984(1) Ker 351 held quoting from Ajya Hasia's case "there are three disadvantages from which the oral test method suffers, namely '(1) the difficulty of developing valid and reliable oral tests (2) the difficulty of securing a renewable record on an oral test and (3) public suspicion of the oral test as a channel for the execution of political influence"

The Court came to the conclusion 'therefore, I have no doubt in a case where the oral test, the interview plays an over-whelmingly important part the decisive factor as in this case as to disqualify a candidate when he does not get a minimum fixed there, the whole selection would be vitiated' (emphasis supplied). The appeal filed against the this judgment before the Division Bench

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stating
was dismissed upholding the above view. 'We are of the
opinion that the reasoning given by the learned judge
is sound and is in keeping with the spirit of guide-
lines given by the Supreme Court in the various decisions'.

(See State Bank of Travancore v. Soumini, 1984 KLT 135).

The Kerala High Court followed this in a subsequent case
reported in Geetha v. Director, Rashtriya Sanskrit Sansthan,
1988 (2) KLT 577, in which ~~there was~~ no ascertainable standard
was fixed for awarding marks/grading/ranking of the
candidate and observed 'Elimination of eligible and
qualified candidates can be justified only if it is
manifest from the records, that the committee adverted to
the relevant facts and circumstances and that an assessment
was made in bonafide exercise of power with reference
to the relevant and ascertainable standards'. In this
case no records are available to satisfy us that the
selection Committee had exercised the power bonafide
after taking into consideration the over all circumstances
and assessed the merit of the applicant in the light of
certain fixed, xxxx uniform and ascertainable standards and
awarded 13 marks to him.

11. Again, the Supreme Court in P.K. Ramachandran
Iyer v. Union of India, AIR 1984 SC 541 frown at the

fixation of minimum of 40 percentage for viva vice test and observed 'Once an additional qualification of obtaining minimum marks at the viva voce test is adhered to, a candidate who may figure high-up in the merit was likely to be rejected on the ground that he has not obtained minimum qualifying marks at viva voce test. To illustrate, a candidate who has obtained 400 marks at the written test and obtained 38 marks at the viva voce test, if considered on the aggregate of marks being 438 was likely to come within the zone of selection, but would be eliminated by the ASRB on the ground that he has not obtained qualifying marks at viva voce test. This was impermissible and contrary to rules and the merit list prepared in contravention of Rules cannot be sustained."

12. In State of U.P. v. Rafiuddin, AIR 1988 SC 162, the Supreme Court while considering fixation of minimum marks for viva voce under Rule 19 of U.P. Civil service (Judicial Branch Rules) 1951 xxxxxxxxxxxxxxxxx
xx under the circumstances when the request of the State Government to the P.S.C. to consider the cases of certain

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unsuccessful candidates in 1970 Examination in view of the shortage of Munisiffs irrespective of their low marks in the viva voce was rejected. and xxxxxx held that 'if any minimum marks either in written test or in viva voce test are fixed to determine the suitability of the candidate the same has to be respected." This case is distinguishable on facts. The specific issue of fixation of minimum mark did not arise for consideration in this case. The request of the Govt. was turned down by the P.S.C. and the Court was examining the legality of that order. There was no injustice to the candidates concerned and that aspect was not considered by the Court. Here in the instant case, the applicant has been victimised and harrassed because of the minimum marks in the viva voce for a long period and on the facts of this case, it has been made out that the second respondent used the fixation as a weapon against him because of the objection raised by the applicant against Annexure IX. Under these circumstances the reasoning adopted by the Supreme Court in Ramachandran Iyers case apply here and we are of the view that the fixation of minimum percentage of marks for the viva voce test under para 205 of the Indian Railway Establishment Manual cannot be

supported. It seems unreasonable and arbitrary.

13. The learned counsel for the respondent relying on Om Prakash V. Akhilesh Kumar, AIR 1986 SC 1043 and V.R. Gopinathan V. Union of India, 1989(11) ATC 178, raised the plea of waiver and estoppel against the applicant on the ground that the applicant attended the viva voce test without raising any protest. Waiver cannot be assumed. It should be proved on the facts of each case that the concerned person has consciously abandoned his legal right. There is no such plea and proof in this case. This being a case of gross injustice caused to the applicant on account of the action of the second respondent exercising his power in the viva voce test under the para 205 of the Indian Railway Establishment Manual in an oblique manner by making full use of his minimum marks fixed for the viva voce test, waiver cannot be put against the applicant particularly when the operation of the granting of marks becomes unpredictable and not within the comprehension of the applicant. In P.N. Kohli V. Union of India, ATR 1987(2) CAT 172, the Principal Bench of the Tribunal held that the petitioner therein was not estopped from

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questioning the vires of the Rules under which the examination was held, ^{merely} mainly because he had appeared in that examination and failed. Mr. Justice K. Madhava Reddy, the Chairman as he then was, speaking for the Division Bench in that case, distinguished the case from the case of Omprakash V. Akhilesh Kumar referred to above and observed as follows:

"....In that case (Om Prakash case) no rule was challenged as invalid, ultravires or void as being violative of fundamental right and the Supreme Court did not lay down that if a Rule is challenged on any of the above grounds either waiver or estoppel would operate so as to preclude an aggrieved party from questioning the ~~invalidity~~ validity. The Supreme Court only held that a person who had appeared for an examination without protest under valid rule, finding that he would not succeed in the examination could not be allowed to move the High Court for setting aside the results of the examination. The objection as to the locus standi of the petitioner and the contention that they are estopped from challenging the validity of the 1982 Rules cannot be sustained and we accordingly reject it.."

14. In the present case also the applicant has challenged the validity of the Rules which provide for qualifying marks in the viva voce test as violative of Article 14 and 16 of the Constitution. Hence, the ruling of the Principal Bench of the Tribunal quoted above will apply and the applicant cannot be held to be subject to waiver or estoppel ^{merely} mainly because he had appeared in the test. So, there is no substance in the contention of the learned counsel for the respondent based on waiver and we reject it.

15. Having considered the matter in detail in the light of the available records and materials we are of the view that the fixation of 15 marks as minimum for a pass in the viva voce test in this case is unnecessary and arbitrary and unreasonable. The test for selection to the post of APO could be proceeded without giving any room for doubt or dubious action in the exercise of power by the Selection Committee in viva voce test if no minimum percentage of marks was fixed for such viva voce test. In this view of the matter we hold that the above fixation of minimum marks of 15 for viva voce test is illegal and we hereby quash the same.

16. According to the applicant the total vacancies of APO notified are 26 and the respondents have filled up only 19 of them. There are five more vacancies yet to be filled up.

17. Under these circumstances, we allow the application and direct the respondents 1 and 2 to consider the promotion of the applicant for the post of APO pursuant to the selection test conducted as per the notification, Annexure-I as if there is no individual minimum marks for the viva voce test in Annexure-II, para 205 of the IREM Chapter-II. If he is found eligible

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for promotion in terms of the rules he should be promoted to the post of APO along with the persons included in Annexure-X list giving him appropriate place in accordance with his marks with all consequential benefits. This shall be done within a period of three months from the date of receipt of this copy of the judgment.

There will be no order as to costs.


(N. Dharmadan)

Member (Judicial)


22-3-91

(S.P. Mukerji)
Vice Chairman

22-3-1991

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