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CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

Original Application No: 462/89

Transfer Application No: --

DATE OF DECISION: 16-9-94

N.K.Bansal Petitioner

Mr.M.S.Ramamurthy Advocats for the Petitioners

Versus

Union of India & Ors.

-----Respondent

Mr.S.C.Dhawan Advocate for the Respondent

CORAM :

The Hon'ble Shri B.S.Hegde, Member(J)

The Hon'ble Shri M.R.Kolhatkar, Member(A)

1. To be referred to the Reporter or not ? ✓
2. Whether it needs to be circulated to other Benches of the Tribunal ?

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M.R.Kolhatkar
(M.R.KOLHATKAR)
Member(A)

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

O.A. 462/89

N.K. Bansal

.. Applicant

-versus-

Union of India & another

.. Respondents

Coram: Hon'ble Shri B.S. Hegde, Member(J)

Hon'ble Shri M.R. Kolhatkar, Member(A)

Appearances:

1. Mr. M.S. Ramamurthy
Counsel for the
Applicant.
2. Mr. S.C. Dhawan
Counsel for the
Respondents.

JUDGMENT:

(Per M.R. Kolhatkar, Member(A)) Date: 16-9-1994

This is an application under section 19 of the A.T. Act 1985. The case of the applicant is that he joined the Railways as Apprentice Mechanic in 1966 and at the material time was working as Chargeman Grade 'A' and was a candidate for selection for the post of Assistant Shop Superintendent (Diesel) Parel. Vide Ex. 'D' page 15, letter dated 16-2-79 from Headquarters Office, Personnel Branch, Bombay V.T. which contained the list of 14 candidates ^{including the applicant} ~~who were~~ ^{therein} called for the written test. It was stated ^{that} the candidates who will pass in the written test would be called for viva-voce test which is likely to be held on 15-3-79. At Ex. 'F' is the panel dated 16-1-1980 for the post of Asstt. Shop Superintendent in which the names of S/Shri K.S. Verma and Shri V.G. Dhamangaonkar are shown as having been selected against

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unreserved posts under the heading "other than outstanding." Since Shri Dhamangaonkar was junior to the applicant and still shown in the panel, the applicant represented against the same. Thereafter the applicant was as a matter of fact promoted to the post of Asstt. Shop Superintendent on 1-1-84 but the applicant represented on 12-4-1989 vide Ex. 'H' for back dating of his promotion as from 16-1-80 i.e. the date of finalisation of the panel dated 16-1-80 to which a reply was sent on (Exhibit-I) 9-6-89/ stating that though the applicant qualified in written test he was not found suitable for placement on the panel by the duly constituted Selection Board. It is this letter, Ex. I, which is impugned by the applicant. The non selection of the applicant is stated to be illegal and arbitrary against the provisions of statutory rules and discriminatory being violative of guarantee of equality under Article 14 and 16 of the Constitution. The relief claimed is to set aside the panel declared and to direct the Railway administration to include the name of the applicant in the panel and to promote him from the date viz. 16-1-80 and for consequential reliefs.

2. So far the facts are concerned the marks scored by the applicant and his rival Dhamangaonkar are as below:

Name	Professional ability		Total	Personal- Record of Service		Seniority	Suitable or unsuitable
	W.T.	V.V. Test		lity etc.	Service		
Maximum Marks	35	15	50	20	15	15	
N.K.Bansal	21	5	26	8	13	13	unsuitable
V.G.Dhamangaonkar	29	10	39	12	15	12	suitable
* Grand Total: N.K.Bansal 60 V.G.Dhamangaonkar 78							

3. It is the ~~basic~~ contention of the applicant that he has secured 60 marks out of 100 which is all that ^{is} required by the Rules. Mr. Dhamangaonkar has secured 78 marks out of 100 but since he is senior to Dhamangaonkar he ought to have been placed in the panel as per rules rather than Shri Dhamangaonkar. He states that he arrives at this result by reference to rules as well as by relying on certain case law. Respondents also relied for non selection of the applicant on their own interpretation of rules. According to them the applicant might have got 60 marks on an overall basis but he ought to have secured 30 out of 50 i.e. to say 60% of the marks under the heading of Professional ability. He has secured only 26 marks under professional ability and therefore although he might have ~~been~~ secured 60% of the marks on overall basis since securing 60% of the marks in professional ability is a pre-condition for selection, he has not been selected.

4. Learned counsel for the applicant has taken us through the relevant rules of the Indian Railway Establishment Manual, 1968 edition. He first of all referred to Rule 205 which deals with the procedure to be adopted by the Selection Boards. As the counsel for the applicant has placed considerable stress on the wording, the same is reproduced in full.

"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 :-

Factors	Max. 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
Total :	100	60

(b) (i) Professional ability shall normally be adjudged through a written test which should form part of the selections.

(ii) In the case of Medical Department a practical test should also be held. The marks for professional ability being divided equally between this test and the written test. The candidate should qualify separately in the written and practical tests, the qualifying marks in either case being 15. "

The counsel for the applicant emphasized the fact that the rule state that professional ability is normally adjudged through a written test. It is only in the case of medical department that a practical test is also held but the practical test is quite different from the viva voce test to which the applicant was subjected. Therefore, the contention of the applicant is that no practical test having been held, the professional ability of the applicant ought to have been judged by the written test and there can be no dispute that the applicant has secured 21 out of 35 i.e. the 60% of the marks in the same. Counsel for the applicant has taken us through Rule 216 and in particular Rule (e) thereof. However, Rule (f) also is relevant and therefore we reproduce below Rule 216 (e) and (f).

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"216. Procedure to be adopted by Selection Board:

- (a)
- (b)
- (c)
- (d)
- (e) 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 :-

	<u>Maximum marks</u>	<u>Qualifying marks</u>
(i) Professional ability.	50	30
(ii) Personality, address, leadership and academic/technical qualifications	25	-
(iii) Record of service	25	-

Note:(1) The item "Record of service" should also take into consideration "Seniority" of the employees but no separate allotment of marks need be made on this account.

(2) Candidates must obtain a minimum of 30 marks in professional ability and 60% marks on the aggregate for being placed on the panel.

- (f) The importance of an adequate standard of professional ability and capacity to do the job must be kept in mind and a candidate who does not secure 60% marks in professional ability shall not be placed on the panel even if on the total marks secured he qualifies for place. Good work and a sense of public duty among the conscientious staff should be recognised by awarding more marks both for record of service and for professional ability."

Learned counsel for the applicant emphasised the reference in this rule^{esp. (e)} to selection being made

primarily on the basis of overall merit.

5. As there is some divergence between Rules 205 and 216, we asked the learned counsels as to which rules were specifically applicable to the instant case. Although we were not able to get assistance from the counsel, we referred to the Chapter headings from which it is clear that Rule 206 relates to promotion for Class-II post whereas Rule 216 relates to Rules governing the promotion of subordinate staff. Therefore it is Rule 216 ~~which~~ which is the relevant rule because it is an admitted position that the promotion involved is not to Class II but it is a promotion within Class-III. If Rule 216 ^{Rule} applies and not ~~205~~, then it is clear that it is only under the professional ability that there is a reference to qualifying marks. There is no such reference to qualifying marks under the other heads namely record of service and personality etc. Note No.2 also specifically states that candidates must obtain a minimum of 30 marks in professional ability and 60% marks on the aggregate for being placed on the panel. Moreover Rule 216(f) contains a pre-condition that a candidate who does not secure 60% marks in professional ability shall not be placed on the panel even if on the total marks secured he qualifies for place. Therefore Rule 216(e) which states that selection should be made primarily on the basis of overall merit has to be read harmoniously with Rule 216(f) ^{it is} keeping in view of the fact that ~~only~~ the heading professional ability ^{which} has qualifying marks being prescribed ^{as} ~~xxx~~ in Rule 216(e).

6. The learned counsel for the applicant however states that these rules have specifically been revised as is seen from the enclosures attached to the reply of the respondents and he has taken us through these amendments. First of all we refer to a small mix up. The Ex.1 which reproduces Railway Board letter dated 5.10.64 gives the break up of maximum marks under various headings as below :

	<u>Maximum Marks.</u>	<u>Qualifying Marks</u>
Professional ability	50	30
Personality, address, leadership and academic/ technical qualifications	20	-
Record of Service	15	-
Seniority	15	-

Counsel for the applicant states that this breakup wrongly reproduced and the correct break up should have been :

Professional ability	50	30
Personality, address, leadership and academic/ technical qualifications	25	-
Record of service	25	-

He has also produced a copy of the original circular No.E(NG)62PMI/22 dated 5-10-64 under the signature of Shri B.N.Soni, Asstt. Director, Establishment, Railway Board. We also note this is the breakup which appears in the Rule 216 of IREM 1966 edition. Therefore the breakup given in the Annexure 1 of the reply dated 8-11-89 is clearly wrong and the respondents ought not to have produced such misleading circular. Apparently they have taken into account ~~of~~ subsequent amendment but then they

could not have called the circular as a circular dated 5-10-64.

7. We next refer to the letter dated 23-1-67 from the C.P.O. Central Railway which gives ~~the~~ reference to the Railway Board's letter dated 29-10-66 conveying the decision that the present practice of holding oral and written test for adjudging the 'Professional ability' should continue and ~~then~~ that when both oral and written tests are held, the marks for written test should not less than 35. On the basis of this Railway Board circular, decision of the zonal railway was communicated to the following effect:

"3. In order to have uniformity it has been decided that in all selections for promotion to selection posts 'Professional ability' should be adjudged both written and Viva-Voce Tests and the maximum 50 marks allotted for 'Professional Ability' should be split up as under :-

- | | |
|-------------------|----|
| 1. Written Test | 35 |
| 2. Viva-Voce Test | 15 |

An employee who obtains less than 30 out of 50 the total maximum marks of 50 should not be placed on the panel."

We have then the circular dated 18-9-69 which has the effect of modifying Rule 216(e). The effect of this modification is that while retaining maximum marks for professional ability ^{are} as 50 of which 30 marks/qualifying marks, the marks for remaining headings have been split up as below :

(ii) Personality, address, leadership and academic/technical qualification } 20

(iii) Record of service 15

(iv) Seniority 15

A new category of selected employees who obtained 80% of the marks to be classified as "outstanding" is also introduced. The effect of this circular which is issued as a correction slip to para 216(e) & (f) is that notes (i) and (ii) to the original circular dt. 5-10-64 have been deleted. As we note, since Note(2) states that candidates must obtain a minimum of 30 marks in professional ability and 60% marks on the aggregate for being placed on the panel the counsel for the applicant stated that this amendment comes in his favour inasmuch as the condition regarding obtaining minimum of 30 marks in the professional ability has been removed. However, the applicant mainly relies on the circular dated 12-12-1973. Para-1 thereof on which the applicant relies is reproduced below :

"In terms of Board's letter No.E(NG) 62PM/22 dated 5-10-1964 a candidate must obtain a minimum of 30 marks out of 50 marks in "professional ability" and 60% marks on the aggregate for being placed on the panel for a selection post. According to Board's letter No.E(NG)65PM1/5 dated 29-10-66, where both oral and written tests are held for ~~adjudging~~ adjudging the "professional ability", the marks for the written examination should not be less than 35. The Board have decided that a candidate must secure

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a minimum of 60% marks in the written test for the purpose of ~~being~~ called in the viva-voce. "

The learned counsel for the applicant states that this circular has the effect that there are now only two conditions for a candidate being placed on the panel. These conditions are (i) he must obtain 60% marks in the written test so that he can be called for the viva-voce test and (ii) he must get 60% of the marks on the aggregate. The learned counsel for the applicant states that the subsequent circular dt. 16-4-1974 again supports his case because it states that for unreserved candidates the minimum qualifying marks in the written test should be 21 out of 35 marks which the applicant has already obtained.

8. As we see the rules, it is difficult for to agree with the counsel ~~for~~ the applicant that there are only two conditions for being placed in the panel. A plain reading of the rules clearly brings out the third condition namely that the candidate must obtain 30 out of 50 i.e. 60% under the head of professional ability. According to the learned counsel for the applicant this condition should be deemed to have been deleted by virtue of circular dated 12-12-1973, because in that circular, after enumerating the instructions in the circular dated 5-10-64 the Board has not reiterated the condition for the professional ability, which seems to have been deleted. We are unable to agree with the applicant.

9. The applicant next contended that considering the Rule 205, although not applicable, for purposes of comparison along with Rule 216, we must hold that the viva-voce test as held by the respondents is not a test contemplated by rules because the rule contemplates only a practical test in the case of medical department and if there is a viva-voce test, that can only ^{be} for testing personality and the record of candidate but that cannot test professional ability. The counsel for the applicant submits that viva-voce test was administered by a committee which consisted of a Civil Engineer and a Personnel Officer and did not consist ^{of} any expert on the mechanical side. Such a committee could not have administered ^{for a mechanical man like applicant.} a practical test. Such a committee could administer viva-voce test but that viva-voce test could not conceivably judge the professional ability. For this proposition the learned counsel for the applicant relies on the judgment of the Jabalpur Bench of the CAT viz. S.P. Swamy v. U.O.I., O.A. 165 & 194/87 and Uday Ram Jatav v. U.O.I., O.A. 228/87 delivered on 22-11-1988 which is an unreported judgment and a subsequent judgment on the similar point viz. which is a reported judgment ^{viz.} Annam Raju Sharma v. Union of India & Ors. ATR 1989(1)CAT 537. Learned counsel for the applicant contends that the case of S.P. Swamy relates to Class-II. But the reasoning in Swamy's case has been followed in Jatav's case which is relating to subordinate staff which is similar to the present case. The reasoning of the Jabalpur Bench

which had directed constitution of review selection board for reappraising the applicants for the purpose of viva-voce test so far as it can be gathered is that while coming to the conclusion ^{they} noted that no rule ~~has~~ been shown to indicate that it is mandatory for a candidate to qualify separately in the 25 marks assigned for 'personality' & 'leadership' and as to why for the interview test the marks based on record of service and 'personality' & 'leadership' qualities should not be totalled together out of 50 marks which are not provided for the written test. In that view of the matter the total marks out of 100 obtained by them in the case of applicant Swamy is 59.5% and in the case of Jatav is 61.6%. The Tribunal further held that under IREM 205 the mandatory condition of passing the test separately is only mentioned in respect of the written and practical test and not in the interview test and there is nothing to show that the factors (a)(ii) and (a)(iii) relating to record of service, personality and leadership and academic qualifications have not to be assessed together in the interview test. In our view, this judgment relates to Rule 205 and in particular the factors relating to personality, record of service and seniority and does not consider the issue of assessment of professional ability with which we are concerned. So far as the case of Annam Raju is concerned, that case also related to IREM 205(b) and relies on Swamy's judgment. That judgment is

also^{is} not applicable to the facts of the present case.

10. Learned counsel for the applicant contends that any assessment of the professional ability through a viva-voce test is not contemplated by the rules and his assessment on professional ability through viva-voce test should be held as non mandatory for the same reasons as in the case of Swamy. According to him a mandatory test is one in which all applicants can equally participate. A viva-voce test to test professional ability is not in that sense is mandatory test because universal participation is not assured. These contentions, in our view, are without substance. We are concerned here not with Rule 205 but with Rule 216 as modified by the subsequent Railway Board circular dated 29-10-66, which envisages oral test for adjudging professional ability carrying 15 marks. Oral test is not a practical test as envisaged in Rule 205 and ^{is} equivalent to viva-voce test. When the professional ability is to be adjudged both by oral test and written test, there is no reason why the interview board while assessing personality and other factors cannot also award marks for professional ability under the heading professional ability as part of oral test.

11. The respondents apart from relying on the interpretation of rules in question namely ^{Rule} 216 of the Indian Railway Establishment Manual, have also relied on the Supreme Court case of State of U.P. v. Rafiquddin, (1987) 5 ATC 257.

~~In the head note it is stated that where~~

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That was a case on the interpretation of U.P. Civil Service (Judicial Branch) Rules, 1951 in which securing minimum marks in the viva voce was, inter alia, a pre-condition. In para 9 of the Judgment the Supreme Court has observed as below:

"That is the clear meaning of the words in the proviso to Rule 19 "provided that in making their recommendation the Commission shall satisfy themselves that the candidate (i)... (ii) has obtained in the viva voce test such sufficiently high marks that he is suitable for the service". Commission is required to judge the suitability of a candidate on the basis of sufficiently high marks obtained by a candidate in the viva voce test, it has to fix some percentage of marks which in its opinion may be sufficient to assess the suitability of a candidate. In the absence of a fixed norm, there could be no uniformity in assessing suitability of candidates in the viva voce test. The Commission had therefore power to fix the norm and in the instant case it had fixed 35 per cent minimum marks for viva voce test. The viva voce test is a well recognised method of judging the suitability of a candidate for appointment to public services and this method had almost universally been followed in making selection for appointment to public services. Where selection is made on the basis of written as well as viva voce test, the final result is determined on the basis of the aggregate marks. If any minimum marks either in the written test or in viva voce test are fixed to determine the suitability of a candidate the same has to be respected. Clause (ii) of the proviso to Rule 19 clearly confers power on the Commission to fix minimum marks for viva voce test for judging the suitability of a candidate for the service. We do not find any constitutional/legal infirmity in the provision."

12. In view of the Judgment of the Supreme Court and in the light of the discussion in the earlier paragraphs we are of the view that the rules relating to obtaining qualifying marks of 30 out of 50 under the head of professional ability is a mandatory rule and there is nothing illegal in the Railway Administration laying down in the Circular dt. 29.10.1966 that the professional ability

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would be judged under the two heads viz. written test and oral test and we hold that a candidate who does not get a total of 30 out of 50 marks under the professional ability is not entitled to be selected even if he is senior. There is thus no merit in the case of the applicant.

13. We, therefore, dispose of this case by passing the following order :

O R D E R

The Original Application is dismissed.

No order as to costs.

M.R. Kolhatkar

(M.R.KOLHATKAR)
MEMBER (A)

B.S. Hegde

(B.S.HEGDE)
MEMBER (J)

M.