

**Central Administrative Tribunal
Principal Bench**

OA No.213/2013

New Delhi, this the 2nd day of December, 2016

**Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Mr. Shekhar Agarwal, Member (A)**

Mukesh Kumar Rohila
S/o Shri Chiranjilal, Aged about 36 years
R/o Mohalla Moti Jheel, Ward No.5
Town Bawal, Tehsil Bawal
District Rewari, Haryana ...Applicants

(By Advocate: Shri Shish Pal and Shri Sonit Sinhmar)

Versus

1. Union Public Service Commission
Dholpur House, Shahjahan Road
New Delhi through its Secretary
2. Union of India through Secretary
Ministry of Home Affairs and Personnel
Grievances, North Block, New Delhi.
3. Kulwinder Singh Roll NO. 2126
Now posted as Assistant District Attorney (ADA)
Office of District Attorney (DA)
Judicial Complex
Fatehgarh Sahib, Punjab. ...Respondents

(By Advocate: Shri J B Mudgil and Dr. Ch. Shamsuddin Khan)

ORDER (ORAL)

Justice Permod Kohli, Chairman :-

The applicant is a law graduate having passed five years L.L.B. integrated course from Maharshi Dayanand University, Rohtak. He secured degree of Bachelor of Arts (Law) on

01.02.2001 and Professional degree on 30.09.2002. He was enrolled as an advocate under the Advocates Act, 1961 with the Bar Council of Punjab and Haryana at Chandigarh under enrollment No.P/358/2002 on 02.04.2002. He became Member of District Bar Association, Rewari, Haryana where he started his practice in law on the criminal side in April, 2002.

2. Vide Advertisement No.SPL 51/2010 published in Rozgar Samachar in its issue dated 26.06.2010-02.07.2010, applications were invited for various posts including Senior Public Prosecutor as also Public Prosecutor in CBI in the Physical Handicap category. The selection process included a written test followed by interview. The applicant being eligible for both the posts applied for both the posts. The applicant was allotted Roll No.002683 and Delhi Center for the written examination. The written examination was held on 26.09.2010 and the result thereof was declared by the UPSC on 10.02.2011 by notifying roll numbers of the successful candidates. The applicant was declared successful in the said examination in the result declared on 10.02.2011. After having successfully qualified the written test, the applicant was called for the interview vide letter dated 03.05.2011. He was also asked to produce on record experience certificate in conducting criminal cases and P.H. Certificate in prescribed proforma. The date of interview was fixed on 16.05.2011 at

9.30 a.m. in U.P.S.C. Office, Dholpur House, Shahjahan Road, New Delhi.

3. The Physical disability of the applicant as per medical certificate issued by the Civil Surgeon Rewari, was 75% at the time of his interview. However, UPSC directed the applicant to obtain a latest and fresh disability certificate under the prescribed proforma. The applicant obtained disability certificate dated 11.05.2011 which was submitted at the time of interview. The result of the selection was declared by the UPSC on 08.06.2011 and 16 candidates were recommended for appointment to the post of Senior Public Prosecutor and 11 were recommended for appointment to the post of Public Prosecutor in the CBI. On declaration of the result, the applicant's name did not figure in the list of the selected candidates. The applicant continued to make inquiries and thereafter a written application dated 31.03.2012 was submitted to the Commission for providing the status report regarding appointment of Senior Public Prosecutor and Public Prosecutor under the PH category. His request was, however, declined vide letter dated 09.08.2012. The applicant thereafter, approached the Central Public Information Officer in the office of UPSC under the Right to Information Act, 2005 vide application dated 06.08.2012. In response to the said application, he was provided information

vide letter dated 13.09.2012 whereby the information regarding the names of the candidates selected for the post of Senior Public Prosecutor and Public Prosecutor were disclosed. From the information supplied by the aforesaid letter on 13.09.2012, it appears that the applicant secured 99 marks for the post of Public Prosecutor but not recommended for appointment whereas one Shri Kulwinder Singh who secured 87 marks for the post of Public Prosecutor was recommended for appointment. The same information supplied to the applicant in para 2.d also reveal that the minimum level of suitability of marks in PH category for Public Prosecutor is 87 out of 200. Thereafter, the applicant made a representation dated 25.09.2012 and also served a legal notice dated 17.10.2012. Since no decision was taken thereon, the applicant has filed the present OA seeking the following reliefs:-

“(i) quash and set aside the selection of the candidates who are lower in merit than the Applicant, if necessary, and to issue order or direction to recommend and appoint the Applicant on the post of Senior Public Prosecutor or in the alternative on the post of Public Prosecutor, Central Bureau of Investigation, with all consequential benefits and interest etc., from the date lower in merit to him was offered appointment.

(ii) It is further prayed before the Hon’ble Principal Bench, that the one post which left vacant due to the non-joining of Ravi Kumar Roll

No.003960, marks obtained 99 i.e. equal to that of Applicant, be filled-up by the way of appointment of the Applicant on account of his maximum marks i.e. equal to that of Ravi Kumar Roll No.003960.”

4. Learned counsel appearing for the applicant submits that there has been violation of the mandate of Articles 14 and 16 inasmuch as the meritorious candidate like the applicant has been denied appointment whereas a person with lower merit has been selected for the post of Public Prosecutor in CBI.

5. The Union Public Service Commission has filed its reply. The only ground which is urged in the reply in para 4.7 and 4.8 is that the Commission fixes a weightage in the written test and interview for all recruitment tests held in the Commission on case to case basis. The Commission prescribed minimum qualifying marks for interview for the post of Senior Public Prosecutor for PH category as 40. The said para of the reply is reproduced hereunder:-

“4.7 & 4.8 That it is reiterated that the Commission fixes a weightage in the Written Test and Interview for all Recruitment Tests held in the Commission on case to case basis. Besides, the Commission also fixes minimum qualifying marks for each category of candidates for the interview. A candidate who fails to secure such minimum qualifying marks in the interview would not be placed in the consideration zone for not qualifying the interview. Accordingly, in the instant recruitment to 15 posts of Public Prosecutor & 17 posts of Sr. Public Prosecutor in CBI also,

the Commission had fixed minimum qualifying marks i.e. marks secured in Recruitment Test plus marks obtained in interview. Minimum qualifying marks prescribed for interview for the post of Senior Public Prosecutor for PH Candidates are 40.”

6. From the entire counter affidavit, we find that no minimum qualifying marks for interview were fixed so far as the post of Public Prosecutor is concerned.

7. The applicant has filed rejoinder to the counter affidavit annexing thereto the details of the marks secured by the candidates for the post of Senior Public Prosecutor and Public Prosecutor both in the written test as also in the interview. The name of the applicant figures at Sl. No.48 with roll No. 2683. He has secured 61 marks in the written test and 38 marks in the interview total 99 which seems to be highest as is evident from the entire result of the selection process placed at Annexure Rej-3 in the category of Physically Handicapped placed on record with the rejoinder. Whereas, the respondent No.3, namely, Shri Kulwinder Singh whose name figures at Sl. No.35 secured 46 marks in the written test and 41 in the interview total 87.

8. We have heard the learned counsel for the parties at length. It is not disputed that the merit of the applicant in the combined selection process i.e. written test and interview is

much higher than respondent No.3. The applicant has secured 61 marks in the written test and 38 marks in interview. Whereas the private respondent has secured 46 marks in the written test and 41 in the interview. Despite the higher merit of the applicant, he has been denied appointment whereas the Respondent No.3 with much lower merit, has been given offer of appointment. Applicant, appearing in person, submits that despite offer of appointment to Respondent No.3, he has not joined. This position is neither confirmed nor denied by learned counsel appearing for the respondents.

9. Be that as it may, the fact remains that the applicant with higher merit in the selection process has been denied appointment. The only ground for denying the appointment to the applicant as raised in the counter affidavit and argued during the course of hearing by the learned counsel for the respondent-UPSC is that the Commission is entitled to fix minimum qualifying marks for interview on case to case basis. On a specific query from the Tribunal to the learned counsel as to whether there are any specific rules or written norms whereunder the Commission is entitled to fix minimum qualifying marks for interview from case to case basis, he has not been able to apprise the Tribunal of any such Rule or laid down norm. Assuming there is any norm empowering the

Commission to fix minimum qualifying marks, if such a norm is in respect to specified kind of selection based upon nature of the job, one can still appreciate such norm. However, where the Commission claims an absolute discretion to fix the minimum qualifying marks from case to case basis, it confers unbridled, unchecked authority and power to fix the norms from case to case basis, and one may not be surprised if in the same nature of selection different norms are fixed for different selection. Such a discretion is capable of being misused and definitely amounts to arbitrary exercise of power. Thus, it becomes imperative even for the Commission, or for that matter, any other selection body, to record reasons for fixing minimum qualifying marks in absence of any prescribed norms so as to repel the accusation of arbitrary and unfair exercise of jurisdiction. In the present case, no norms have been brought to our notice nor anything is stated as to what are the kinds of selection where the minimum bench mark for interview is fixed, and in this case particularly nothing is mentioned justifying fixing of minimum marks in the interview, that too, in absence of any statutory rules or norms laid down prior to initiation of the selection process, and put to public domain. The Commission which is a Constitutional body and has been entrusted with the responsibility of making employment to the public services

has to act fairly and on the basis of laid down norms. We do not know whether the minimum qualifying marks were fixed by the Commission before the advertisement or during the course of the selection. In any case, from the advertisement, we do not find that such a procedure has been notified and was in public domain. Any secretive action even on the part of a Constitutional body has to be deprecated. The Commission cannot change the rules of the game during the process of selection. Otherwise also even if such a norm has been laid down which gives absolute and arbitrary discretion to the Commission, same is in contravention of the mandate of Articles 14 and 16 of the Constitution of India. The issue is no more *res integra*. Hon'ble Supreme Court in **K. Manjusree v. State of Andhra Pradesh and Anr.** (2008) 3 SCC 512 held that selection criteria has to be adopted and declared at the time of commencement of the recruitment process. The rules of the game cannot be changed afterwards. The competent authority, if the statutory rules do not restrain, is fully competent to prescribe the minimum qualifying marks for written examination as well as for interview. But such prescription must be done at the time of initiation of selection process. Change of criteria of selection in the midst of selection process is not permissible.

10. A similar view has been held by the Hon'ble Supreme Court in the case of ***Hemani Malhotra v. High Court of Delhi*** (2008) 7 SCC 11 and ***Ramesh Kumar Vs. High Court of Delhi & Anr.*** (2010) 3 SCC 104. The relevant observations of the judgment in **Ramesh Kumar's** case are reproduced herein under:-

"13. In *Shri Durgacharan Misra v. State of Orissa & Ors.* AIR 1987 SC 2267, this Court considered the Orissa Judicial Service Rules which did not provide for prescribing the minimum cut-off marks in interview for the purpose of selection. This Court held that in absence of the enabling provision for fixation of minimum marks in interview would amount to amending the rules itself. While deciding the said case, the Court placed reliance upon its earlier judgments in *B.S. Yadav & Ors. v. State of Haryana & Ors.* AIR 1981 SC 561; *P.K. Ramachandra Iyer & Ors. v Union of India & Ors.* AIR 1984 SC 541; and *Umesh Chandra Shukla v. Union of India & Ors.* AIR 1985 SC 1351, wherein it had been held that there was no "inherent jurisdiction" of the Selection Committee/Authority to lay down such norms for selection in addition to the procedure prescribed by the Rules. Selection is to be made giving strict adherence to the statutory provisions and if such power i.e. "inherent jurisdiction" is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reason that such deviation from the rules is likely to cause irreparable and irreversible harm.

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15. Thus, law on the issue can be summarised to the effect that in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum Bench Marks for written test as well as for viva-voce.

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18. These cases are squarely covered by the judgment of this Court in Hemani Malhotra v. High Court of Delhi AIR 2008 SC 2103, wherein it has been held that it was not permissible for the High Court to change the criteria of selection in the midst of selection process. This Court in All India Judges' case (supra) had accepted Justice Shetty Commission's Report in this respect i.e. that there should be no requirement of securing the minimum marks in interview, thus, this ought to have been given effect to. The Court had issued directions to offer the appointment to candidates who had secured the requisite marks in aggregate in the written examination as well as in interview, ignoring the requirement of securing minimum marks in interview. In pursuance of those directions, the Delhi High Court offered the appointment to such candidates. Selection to the post involved herein has not been completed in any subsequent years to the selection process under challenge. Therefore, in the instant case, in absence of any statutory requirement of securing minimum marks in interview, the High Court ought to have followed the same principle. In such a fact-situation, the question of acquiescence would not arise."

In the ultimate para of the aforesaid judgment, the Hon'ble Supreme Court set aside the selection based upon minimum bench mark in interview and directed admissions on the basis of aggregate marks secured in written test and interview.

11. Admittedly, in the information furnished to the applicant under the Right to Information Act, the respondents have only mentioned that the minimum level of the marks for selection was 87 i.e. combined for written test and oral interview. No segregation or separate minimum marks have been prescribed in the information furnished to the applicant.

Even in the counter affidavit filed by the respondents and reproduced herein above, the minimum qualifying marks for interview have been fixed by the Commission only for the post of Senior Public Prosecutor whereas no minimum qualifying marks in interview have been fixed by the Commission so far as the post of Public Prosecutor is concerned. Under such circumstances, the action of the Commission is totally illegal, unjustified, unwarranted, unconstitutional and in contravention of mandate of Articles 14 and 16 of the Constitution. The selection of Respondent No.3, having lesser merit, is thus liable to be set aside. Notice was issued to him vide order dated 21.08.2015. He has chosen not to contest. For the reasons stated herein above this OA is allowed with the following directions:-

- (i) Selection/appointment of Respondent No.3 is hereby set aside;
- (ii) Respondent No.1 is directed to make recommendations in favour of the applicant for appointment to the post of Public Prosecutor within a period of one month provided there is no other candidate having more marks than him;
- (iii) On receipt of recommendation from respondent No.1, respondent No.2 shall offer the

appointment to the applicant for the post of Public Prosecutor in CBI within a period of one month thereafter and if the petitioner accepts the appointment as the learned counsel for the applicant submits that he is ready and willing to join the post, he will be appointed to the post of Public Prosecutor subject to completion of the requisite formalities. Needless to say that his seniority shall be fixed from the date the other similarly situated candidates were appointed on the basis of the same selection. He will also be entitled to consequential benefits except salary. However, the emoluments shall be fixed by taking into consideration his initial appointment from the date other candidates were so appointed.

(Shekhar Agarwal)
Member(A)

(Justice Permod Kohli)
Chairman

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