

A

ANZAR AHMED

v.

STATE OF BIHAR AND ORS.

OCTOBER 28, 1993

B

[KULDIP SINGH AND S.C. AGRAWAL, JJ.]

Service Law :

C

Bihar State Medical Service—Selection—Unani Medical Officer—No separate rules framed—Public Service Commission following consistent past practice—Giving 50% marks for academic achievement and 50% marks for interview—Whether amounts to taking policy decision—Procedure followed—Whether arbitrary and vitiates the selection.

D

Administrative Law—Policy decision—Consistent past practice—Following of—Whether amounts to taking policy decision.

E

The Respondent State Government sent a requisition to the State Public Service Commission for selection to the 22 vacant posts of Unani Medical Officers which were declared Gazetted Class-II. The requisition stated that the procedure of appointment would be the same as applicable to the incumbents of the State Service cadre. The Commission wrote to the Government that appointment to State Medical Service was done on the basis of competitive examination and so competitive examination for appointment to the post of Unani Medical Officers could be held after the relevant rules were made. The State Government replied that in the absence of rules the selection may be made on the basis of interview. It was also intimated that selection be made for 81 posts, instead of 22 as requested earlier.

F

G

The Public Service Commission advertised the posts and the applicants appeared for interview before two Boards presided by two members of the Commission. 100 marks were allotted for *viva voce* test and 100 marks for academic performance. 55 candidates were recommended for appointment. This was challenged in a writ petition filed before the High Court by two of the Respondents and during the pendency of the writ petition, the selected candidates were appointed.

H

The High Court quashed the recommendation of the Commission. It held that the question as to how much marks should be set apart or allocated for the *viva voce* vis-a-vis the marks for the academic qualifications related to a policy matter which went to the root of the recruitment process and a decision on the question could have been taken only by the Commission, i.e., the whole body, and not by the members comprising the interview Boards or the Chairman individually. It also held that allocation of 50 per cent marks for *viva voce* was unjustified and arbitrary. Hence these appeals.

On behalf of the Respondent Commission it was contended that since the recommendation was to be made only on the basis of interview the consistent past practice was followed viz. 50% marks for academic achievement and 50% marks for *viva voce*.

Allowing the appeals, this Court

HELD : 1.1. The consistent practice that has been followed by the Respondent Public Service Commission when selection is made on the basis of interview only is to allocate 50% marks for academic achievement and 50% marks for interview. This allocation was made by the Commission in the earlier selection also for the post of Unani Medical Officer. Since the selection in the present case was also to be made only on the basis of interview, as indicated by the State Government the practice which was being followed in the past was followed in this selection also and there was no need for the Commission to take a fresh decision for allocation of marks for this selection. It cannot, therefore, be said that the allocation of 50% marks for *viva voce*/interview for the selection has not been made by the Commission but was made by the members who headed the Interview Boards or by the Chairman individually. The High Court was, therefore, not justified in holding that the selection was vitiated on account of failure on the part of the Commission to decide the matter of allocation of marks for *viva voce* vis-a-vis academic qualifications. [439-G-H, 440-A-C]

1.2. The State Government in its letter dated September 20, 1990 has clearly stated that selection should be made on the basis of interview. On the basis of this letter the Commission could have made the selection wholly on the basis of marks obtained at the interview. But in accordance with the past practice, the Commission has made the selection on the basis of interview while keeping in view the academic performance and with that

A end in view the Commission has allocated 50% marks for academic performance and 50% marks for interview. It cannot be held that the said procedure adopted by the Commission suffers from the vice of arbitrariness. By giving equal weight to academic performance the Commission has rather reduced the possibility of arbitrariness. [445-C-D]

B *Ashok Kumar Yadav and Ors. etc. etc. v. State of Haryana and Ors. etc. etc.*, [1985] Suppl. 1 S.C.R. 657; *Mohinder Sain Garg v. State of Punjab*, [1991] 1 S.C.C. 662; *Munindra Kumar v. Rajiv Govil*, [1991] 3 S.C.C. 368 and *Ashok Alias Somannia Gowda and Anr. v. State of Karnataka and Ors.*, [1992] 1 S.C.C. 28, distinguished.

C *R. Chitralekha & Anr. v. State of Mysore & Ors.*, [1964] 6 S.C.R. 368; *A. Peeriakaruppan etc. v. State of Tamil Nadu & Ors.*, [1971] 2 S.C.R. 430; *Nishi Maghu etc. v. State of Jammu & Kashmir & Ors.*, [1980] 3 S.C.R. 1253; *Ajay Hasia etc. v. Khalid Mujib Sehravardi & Ors. etc.*, [1981] 2 S.C.R. 79; *Koshal Kumar Gupta & Ors. v. State of Jammu & Kashmir and Ors.*, [1984] 3 S.C.R. 407; *Lila Dhar v. State of Rajasthan & Ors.*, [1982] 1 S.C.R. 320; *State of U.P. etc. v. Refiquddin & Ors. etc.*, [1988] 1 S.C.R. 794 and *Mehmood Alam Tariq and Ors. etc. v. State of Rajasthan & Ors. etc.*, [1988] Suppl. 1 S.C.R. 379, referred to.

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5520 of 1993.

From the Judgment and order dated 12.3.93 of the Patna High Court in C.W.J.C. No. 7475/92.

F With

I.A. No. 1 of 1993 and Civil Appeal No. 5521 of 1993.

P.P. Rao, Dr. Sumant Bhardwaj, M.D. Adkar And Ejaz Maqbool for the appellants.

G B.B. Singh (N.P.), L.R. Singh and Uma Datta for the respondents.

The Judgment of the Court was delivered by

S.C. AGRAWAL, J. SLP (Civil) No. 8444 of 1993

H I.A. No. 1 of 1993 allowed. Special leave granted.

SLP. (Civil) No. 7415 of 1993

Special leave granted.

Both these appeals arising out of the judgment of the High Court of Patna dated March 12, 1993 in C.W.J.C. No. 7475 of 1992, raise the question whether the law laid down by this Court regarding fixation of marks for interview in a selection would apply to a case where there is no written test and the selection is made on the basis of academic performance and interview.

The selection in the present case was for appointment on the post of Unani Medical Officer.

The post of Unani Medical Officer was declared a Gazetted (Class II) post by the resolution of the Government dated April 1, 1979. On November 25, 1989, the Government of Bihar sent a requisition to the Bihar Public Service Commission (hereinafter referred to as 'the Commission') regarding appointment on 22 vacant posts of Unani Medical Officers. In the letter of requisition it was stated that the procedure of appointment etc. on these posts will be the same which applies to the incumbents of the State Service cadre. The maximum age of the candidates on January 1, 1989 was prescribed as 35 years. The Secretary of the Commission by his letter dated April 18, 1990 pointed out that appointment on the post of initial cadre in the State Medical Service was being done on the basis of competitive examination conducted by the Commission and that competitive examination for appointment to the post of Unani Medical Officer could only be held after the relevant rules are made. Thereupon the State Government by letter dated September 20, 1990 informed the Commission that rules relating to the post of Unani Medical Officer have neither been modified nor any rule for competitive examination has been framed, and therefore, as in earlier cases, the candidates for this post may be selected on the basis of interview. In the said letter it was stated that for the said post of Unani Medical Officer degree of B.U.M.S. or G.U.M.S. from any recognised university is essential and in addition resident/inter-ship training working of 6 months from any recognised institution is necessary. By letter dated January 22, 1991 the State Government intimated to the Commission that selection be made for 81 posts of Unani Medical Officers and the Commission was requested to send its recommendation for appointment of 81 posts. Thereafter the Commission issued advertise-

A ment on September 15, 1991 inviting applications for 81 posts of Unani
Medical Officers. The applicants appeared for interview before two Boards
presided by two members of the Commission. The selection was made on
the basis of marks given for *viva voce* and for academic performance. 100
marks were allotted for *viva voce* test and 100 marks for academic perfor-
B mance. By letter dated June 14, 1992, the Commission recommended the
names of 55 candidates for appointment on the post of Unani Medical
Officer. The said recommendation of the Commission was challenged by
Dr. Sadra Alam and Dr. Syed Wasim Asraf (respondents Nos. 6 and 7
respectively) in the High Court in a writ petition filed under Article 226 of
the Constitution. During the pendency of the said writ petition the 55
C selected candidates were appointed on the post of Unani Medical Officer
by order of the State Government dated March 2, 1993.

The High Court, by its judgment dated March 12, 1993, has allowed
the said Writ Petition and has quashed the recommendation made by the
D Commission as contained in letter dated June 14, 1992 and the State has
been commanded not to issue any notification of appointment pursuant to
the said recommendation and if any appointment had been made on the
post in the meanwhile the same shall be deemed to be null and void. The
High Court has held that it had not been shown that any policy decision
had been taken by the Commission on the question of allocation of 100
E marks for *viva voce* and that the two members of the Commission who
headed two Boards for interviewing the candidates either themselves took
the decision in regard to the allocation of marks or they were told by
someone to evaluate the merit on the basis of the impugned allocation of
marks. According to the High Court, the question as to how much marks
F should be set apart or allocated for the *viva voce* vis-a-vis the marks for
the academic qualifications relates to a policy matter which goes to the
root of the recruitment process and a decision on the question could be
taken only by the Commission, i.e., the whole body, and not by the members
comprising the Interview Boards or the Chairman individually. The High
Court was of the view that this finding was sufficient to render the whole
G selection process as illegal. The High Court has, however, dealt with the
question as to what should be the percentage of marks for the *viva voce*
and has held that in view of the decisions of this Court allocation of 50 per
cent marks for *viva voce* was unjustified and arbitrary and that Respon-
dents Nos. 6 and 7, (petitioners in the Writ Petition) had suffered prejudice
H on account of such wrong and arbitrary allocation of marks and that the

whole recruitment process has been vitiated on that account.

As regards the allocation of marks for *viva voce* and academic performance for the impugned selection it has been pointed out before us by the learned counsel appearing for the Commission that in the Counter Affidavit filed on behalf of the Commission before the High Court it was categorically stated that in all cases where the recommendation is made only on the basis of interview conducted by the Commission and no written qualifying examination is conducted, it has always been the practice of the Commission to fix 50% marks for academic achievement/educational qualifications and 50% marks for interview/*viva voce* and only in cases where written examination is also conducted by the Commission for screening the candidates, 100 marks are reserved for performance of the candidates in such qualifying examination and 20 marks are reserved for interview/*viva voce*. It has been submitted that since in the instant case the recommendation was to be made only on the basis of interview and hence in accordance with the past practice which is being followed consistently and for a number of years, 50% marks were reserved for academic achievements/educational qualifications and 50% marks were reserved for interview/*viva voce* and selection and the recommendation was made by the Commission on that basis. It has also been asserted in the Counter Affidavit filed on behalf of the Commission before this Court that the Commission has never in the past prescribed 100 marks for academic achievement and 20 marks for interview in cases where recommendation is made solely on the basis of interview. Annexure 'A' to the said Counter Affidavit contains the names of the posts for which selection was made by the Commission during the period 1985-93 on the basis of interview and in all such selections the Commission had allocated 50% marks for academic achievement and 50% marks for interview. Among the posts mentioned in the said Annexure is the post of Unani Medical Officer for which interview was held on January 10, 1985 in pursuance of advertisement No. 54/83 and at the time also 50% marks were allocated for academic achievement and 50% for interview. This shows that the consistent practice that has been followed by the Commission when selection is made on the basis of interview only is to allocate 50% marks for academic achievement and 50% marks for interview. This allocation was made by the Commission in the selection for the post of Unani Medical Officer held in 1985, which was made on the basis of interview only. Since the selection for the post of Unani Medical Officer in the present case was also to be made only on the

A basis of interview, as indicated by the State Government in its letter dated September 20, 1990, the practice which was being followed in the past was followed in this selection also and there was no need for the Commission to take a fresh decision for allocation of marks for this selection. It cannot, therefore, be said that the allocation of 50% marks for *viva voce*/interview for the selection has not been made by the Commission but was made by B the members who headed the Interview Boards or by the Chairman individually. The High Court, in our opinion, was not justified in holding that the impugned selection was vitiated on account of the failure on the part of the Commission to decide the matter of allocation of marks for *viva voce* vis-a-vis academic qualifications.

C We may now examine the question regarding the validity of the fixation of 100 marks, i.e., 50%, for the interview. The High Court has held the same to be arbitrary and has placed reliance on the decisions of this Court. In this context it may be mentioned that the decisions of this Court with regard to the fixation of marks for interview in a selection broadly fall D in two categories:

(i) Selection for admission to educational institutions; and

(ii) Selection for employment in service.

E The decisions of this Court in *R. Chitrallekha & Anr. v. State of Mysore & Ors.*, [1964] 6 SCR 368, *A. Peeriakaruppan, Etc. v. State of Tamil Nadu & Ors.*, [1971] 2 SCR 430, *Nishi Maghu Etc. v. State of Jammu & Kashmir and Ors.*, [1980] 3 SCR 1253, *Ajay Hasia Etc. v. Khalid Mujid Sehravardi & Ors. Etc.*, [1981] 2 SCR 79 and *Koshal Kumar Gupta & Ors. v. State of F Jammu & Kashmir and Ors.*, [1984] 3 SCR 407, relate to admission to educational institutions and fall in the first category. In *Ajay Hasia's* case (supra) it has been laid down that where selection is made on the basis of written test followed by interview, allocation of more than 15% of the total marks for interview would be arbitrary and unreasonable and would be liable to be struck down as constitutionally invalid. Although in that case G the Court was dealing with admission to an educational institution viz., Regional Engineering College, a passing reference has been made to "public employment" in the following observation :

H "We would, however, like to point out that in the matter of admission to college or even in the matter of public employment,

the oral interview test as presently held should not be relied upon as an exclusive test, but it may be resorted to only as an additional or supplementary test and, moreover, great care must be taken to see that persons who are appointed to conduct the oral interview test are men of high integrity, calibre and qualification" (p.106)

In the context of selection for appointment to Public Service, viz., Rajasthan Judicial Service, the question was considered by this Court in *Lila Dhar v. State of Rajasthan & Ors.* [1982] 1 SCR 320. Under the relevant rules selection was to be made on the basis of a written examination carrying 300 marks and *viva voce* examination carrying 100 marks. There was thus allocation of 25% of the total marks for *viva voce* examination. The said allocation was upheld as valid. Making a distinction between selection for the purpose of admission to a college and selection for appointment to service, this Court (Chinnappa Reddy, J.) has observed :

"If both written examination and interview test are to be essential features of proper selection, the question may arise as to the weight to be attached respectively to them. In the case of admission to a college, for instance, where the candidate's personality is yet to develop and it is too early to identify the personal qualities for which greater importance may have to be attached in later life, greater weight has per force to be given to performance in the written examination. The importance to be attached to the interview test must be minimal. That was what was decided by this Court in *Periakaruppan v. State of Tamilnadu, Ajay Hasia etc. v. Khalid Mujib Sehravardi & Ors. etc.*, (supra) and other cases. On the other hand, in the case of services to which recruitment has necessarily to be made from persons of mature personality, interview test may be the only way, subject to basic and essential academic and professional requirements being satisfied. To subject such persons to a written examination may yield unfruitful and negative results, apart from its being an act of cruelty to those persons. (pp. 326-27)"

Referring to the words "or even in the matter of public employment" in the above quoted observation in *Ajay Hasia's* case (supra) it was stated:

"The observation relating to public employment was *per incuriam* since the matter did not fall for the consideration of the Court in

A that case. Nor do we think that the Court intended any wide construction of their observation. As already observed by us the weight to be given to the interview test should depend on the requirement of the service to which recruitment is made, the source material available for recruitment, the composition of the interview Board and several like factors. (p.330)"

B

It was further observed in the said decision :

C

"It is now well recognised that while a written examination assesses a candidate's knowledge and intellectual ability, an interview test is valuable to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantage over the interview test there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness, in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity. Some of these qualities may be evaluated, perhaps with some degree of error, by an interview test, much depending on the constitution of the interview Board. (p.325)"

D

E

In *Ashok Kumar Yadav and Ors. Etc. Etc. v. State of Haryana and Ors. Etc. Etc.*, [1985] Suppl. 1 SCR 657 the selection for the Haryana Civil Service (Executive) and Allied Services was made on the basis of written examination and interview. The allocation of marks for interview was 33.3% in the case of ex-service officers and 22.2% in the case of other candidates. After quoting the observations of Chinnappa Reddy, J. in *Liladhar's case* (supra), it has been observed by the Court :

F

G

"The competitive examination may be based exclusively on written examination or it may be exclusively on interview or it may be a mixture of both. It is entirely for the Government to decide what kind of competitive examination would be appropriate in a given case It is not for the Court to lay down whether interview test should be held at all or how many marks should be allowed for the interview test. Of course the marks must be minimal so as to avoid charges of arbitrariness, but not necessarily always. There may be posts and appointments where the only proper method of selection may be by a *viva voce* test." (p. 695)

H

"Now if both written examination and *viva voce* test are accepted as essential features of proper selection in a given case, the question may arise as to the weight to be attached respectively to them. There cannot be any hard and fast rule regarding the precise weight to be given to the *viva voce* test as against the written examination. It must vary from service to service according to the requirement of the service, the minimum qualification prescribed, the age group from which the selection is to be made, the body to which the task of holding the *viva voce* test is proposed to be entrusted and a host of other factors. It is essentially a matter for determination by experts. The Court does not possess the necessary equipment and it would not be right for the Court to pronounce upon it, unless to use the words of Chinnappa Reddy, J. in *Liladhar's case* "exaggerated weight has been given with proven or obvious oblique motives." (pp.696-697)

These observations would indicate that the matter of weight to be attached to interview and the allocation of marks for interview vis-a-vis marks for written examination can arise when written examination as well as *viva voce* test are both accepted as essential features of proper selection and there also no hard and fast rule regarding the precise weight to be given to the *viva voce* test as against written examination, can be laid down and the said weight must vary from service to service according to the requirement of the Service. The question of weight to be attached to *viva voce* would not arise where the selection is to be made on the basis of interview only. In *Ashok Kumar Yadav's case* (supra), this Court has held that in the case of ex-Service Officers *viva voce* test may be attached relatively greater weight because the personalities of such officers being fully mature and developed it would not be difficult to arrive at a fair assessment of their merits on the basis of searching and incisive *viva voce* test. But at the same time the Court felt that the allocation of 33.3% marks for *viva voce* test for ex-Service Officers and 22.2% for other candidates was excessive and that the same should not exceed 25% for ex-service officers and 12.2% for other candidates.

Applying the aforesaid decision in *Ashok Kumar Yadav's case* (supra) this Court has held that in the matter of selection for two posts of Excise and Taxation Inspectors on the basis of written test and *viva voce* test where candidates are fresh from college/school the allocation of marks

- A for *viva voce* test should not exceed 15 per cent. [See : *Mohinder Sain Garg v. State of Punjab*, [1991] 1 SCC 662].

- B In *Munindra Kumar v. Rajiv Govil*, [1991] 3 SCC 368, the said percentage was maintained for interview and group discussion. It was held that allocation of marks for interview and group discussion should not exceed 10% and 5% respectively.

- C In *State of U.P. Etc. v. Rafiquddin & Ors. Etc.*, [1988] 1 SCR 794, this Court has upheld the fixation of 35 per cent marks as the minimum marks for qualifying in the *viva voce* test for selection for recruitment to the post of Munsif. It was observed :

- D "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." (p. 816)

- E Similarly in *Mehmood Alam Tariq and Ors. Etc. v. State of Rajasthan & Ors. etc.*, [1988] Supp. 1 SCR 379, the Court has upheld fixation of 33% marks as minimum qualifying marks for *viva voce* test.

- F The High Court has placed reliance on the decision of this Court in *Ashok alias Somanna Gowda and Another v. State of Karnataka and Ors.*, [1992] 1 SCC 28. In that case selection was made for the post of Assistant Engineer (Civil) and (Mech.) for the Public Works Department and the said selection was made on the basis of the marks obtained in the qualifying examination and the marks secured in the interview. 100 marks were allocated for qualifying examination and 50 marks for interview. Relying on the decisions in *Mohinder Sain Garg's* case (supra) and *Ashok Kumar Yadav's* case (supra) this Court held that allocation of 50 marks for interview was high and only 15 per cent of total marks be allocated for interview. In that case, however, this Court did not quash the selection that had been made and did not also quash the rules on the basis of which the
- G
- H impugned selection had been made but only directed that the appellants

be appointed in case they were found suitable in all other respects according to the rules. The said decision appears to have been given in the particular facts of that case and it cannot be said to have laid down a law different from that laid down in the earlier decisions of this Court referred to above. We are unable to construe the said decision to mean that the principles which govern the allocation of marks for interview in a selection based on written and *viva voce* test would also apply to a selection where no written test is held and the selection is based on interview only.

In the instant case, we find that the State Government in its letter dated September 20, 1990 has clearly stated that selection should be made on the basis of interview. On the basis of this letter the Commission could have made the selection wholly on the basis of marks obtained at the interview. But in accordance with the past practice, the Commission has made the selection on the basis of interview while keeping in view the academic performance and with that end in view the Commission has allocated 50% marks for academic performance and 50% marks for interview. It cannot be held that the said procedure adopted by the Commission suffers from the vice of arbitrariness. By giving equal weight to academic performance the Commission has rather reduced the possibility of arbitrariness.

For the reasons aforesaid we are unable to uphold the judgment of the High Court setting aside the recommendation made by the Commission in its letter dated June 14, 1992 as well as the appointments made in pursuance of said recommendations. The appeals are, therefore, allowed, the judgment of the High Court dated March 12, 1993 is set aside and the Writ Petition filed by Respondents Nos. 6 and 7 is dismissed. The parties are left to bear their own costs.

G.N.

Appeals allowed.