2024 INSC 381

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C)No.251 of 2016

ABHIMEET SINHA & ORS. .....PETITIONER(S)

VERSUS

HIGH COURT OF JUDICATURE AT PATNA & ORS. .....RESPONDENT(S)

With

WRIT PETITION (C) No.663/2021,

WRIT PETITION (C) No.735/2021,

WRIT PETITION (C) No.1073/2022,

WRIT PETITION (C) No.1146/2022

and

WRIT PETITION (C) No.785/2023

JUDGMENT

Hrishikesh Roy, J.

1. The common challenge in these six writ petitions filed under Article 32 of the Constitution of India is to the constitutionality of the Rules stipulating minimum qualifying marks in the *viva voce* test as a part of the selection criteria for appointment to the District Judiciary in the States of Bihar and Gujarat respectively. The writ petitioners have approached this Court alleging a violation of their fundamental rights under Articles 14 and 16 contained in Part III of the Constitution of India. The specific consideration to be made in these matters is whether prescribing minimum qualifying marks for viva voce is in contravention of the law laid down by this Court in *All India Judges*

Association and Others vs. Union of India and Others[1] (for short "All India Judges (2002)) which accepted certain recommendations of Justice KJ Shetty Commission (for short "Shetty Commission"). The recruitment pertains to the selection of judicial officers of different ranks and respective selection cycles i.e. *District Judge (Entry Level)* by direct recruitment from the Bar (2015 Advertisement) for the State of Bihar and the post of *Civil Judge* (2019 and 2022 Advertisement) for the State of Gujarat. The Individual facts in the writ petitions may differ but the legal arguments broadly overlap. Wherever necessary, the individual facts and legal arguments will be dealt with separately.

I. FACTS

2. The writ petition i.e. WP(C) No.251 of 2016 (considered here as the lead case), relates to the recruitment of District Judge (Entry Level) direct from Bar Examination (2015), in the State of Bihar. The recruitment process is governed by the *Bihar Superior Judicial Service Rules, 1951* (for short "Bihar Rules, 1951") as amended, from time to time. The prayer in the writ petition is to strike down Clause 11 of Appendix "C" of *Bihar Superior Judicial (Amendment) Rules 2013* which is projected to be contrary to the recommendation of the Shetty Commission, as accepted by this Court in *All India Judges (2002)* in paragraphs 37 and 38. The second prayer in the writ petition is to set aside the selection for Bihar Superior Judicial Service, under the Advertisement No. 1/2015 as published vide notice dated 08.04.2016.

3. The connected matters i.e. WP(C) No.663/2021, WP(C) No.735/2021, WP(C) No.1073/2022, WP(C) No.1146/2022 and WP(C) No.785/2023 relate to

[1] (2002) 4 SCC 247

the recruitment to the post of Civil Judge in Gujarat. The writ petitioners therein challenged the vires of the amended Rule 8(3) of the *Gujarat State Judicial Service Rules, 2005* (for short "Gujarat Rules, 2005"), which was amended by notification dated 23.6.2011 as well as the corresponding clauses of the advertisement of the respective recruitment years. The ancillary prayer is to prepare a fresh select list based on the aggregate marks of written examination and interview, irrespective of the cut-off marks prescribed.

A) Bihar Selection Process (2015)

4. The main writ petition is filed by 46 unsuccessful candidates who participated in the District Judges (Direct from Bar) Examination in 2015. The *Bihar Rules,1951* came into force on 31.7.1951. The amendment to the *Bihar Rules, 1951* was brought by a notification dated 3.4.2013, which, *inter alia*, provided for a screening test, a written main test, and also an interview for selection to the Bihar Superior Judicial Service. The total marks in the main written examination and the interview were 250 and 50 marks respectively. To qualify, candidates had to secure a minimum of 150 marks out of 250 marks (60%) in the main written examination and at least 10 out of the total 50 marks (20%), in the viva voce segment.

4.1. Following the further amendment on 3.12.2014 of the *Bihar Rules, 1951*, a proviso was added to clause 10 of Appendix C, granting power to the High Court to relax the qualifying marks in aggregate. Clauses 10,11 and 12 of the appendix C of *Bihar Rules, 1951* provided as follows: -

> "10.A candidate will qualify for interview only if he secures minimum 45% marks in each paper and 55% marks in aggregate in the written test.

Provided that in case the number of qualified candidates are not adequate, the High Court may, in the interest of judiciary, relax the qualifying marks in aggregate as may be required but this relaxation will not be below 50% in aggregate.

11. The candidates must secure at least 10 marks out of 50 marks in the interview.

12. The candidate must pass both the written test and interview before he is considered for appointment."

4.2. With the above prescription of marks, the advertisement No. 1/2015 was issued in January 2015 by the Patna High Court to fill up 99 vacancies in the Bihar Superior Judicial Service. The advertisement provided in clauses 6(d) and (e) that the candidates will have to secure at least 10 out of 50 marks, in the interview segment.

4.3. Responding to the above advertisement in January 2015, around 6771 candidates appeared in the preliminary examination held on 22.03.2015. Those securing 176 marks or more in the screening test were cleared to participate in the main examination. Some unsuccessful candidates had filed writ petitions before the High Court alleging discrepancies in the framing of questions and revised model answers. Eventually, on the High Court's interim order, those with a reduced score of 173 or more marks in the screening test were also "provisionally" allowed to write the main examination. The main written test was held on 12.7.2015 where around 1000 candidates (qualifying in the preliminary examination) appeared.

4.4. However, only 3 candidates were found to have obtained the qualifying marks i.e. above 55 % in the written examination. Accordingly, the five Judges of the Selection and Appointment Committee of the Patna High Court proposed moderation of marks in their meeting dated 8.1.2016. This led to

adding of 4% marks in paper 1 and 6% marks in paper 2 in the respective scores of the individual candidates.

4.5. Despite the above moderation exercise, very few candidates could secure the notified 55% marks in aggregate. To address the issue, the Selection and Appointment Committee permitted a relaxation of 5% in the aggregate in the meeting held on 13.1.2016 by exercising options under the proviso to Clause 10 of Appendix – 'C' of the *Bihar Rules 1951*. The Full Court endorsed the relaxation of aggregate marks at 50% in the written test. With this, 81 candidates who had scored 50% in the written test qualified for the interview, and their results were declared on 22.1.2016.

4.6. In the meantime, the Patna High Court on 8.1.2016 dismissed the Writ Petition (CWJC No.11731/2015) of candidates who were earlier allowed by way of an ad-interim order, to appear in the main written exam with the declaration that candidates who had secured less than 176 marks in the screening test, are ineligible to take part in the main examination. Accordingly, 5 such candidates who scored less than 176 marks were disqualified on 1.2.2016. During the verification process, 3 other shortlisted candidates were found to be not practicing as lawyers and were thus found ineligible. Finally, 69 candidates were cleared for the interview which was conducted in February 2016, by a Committee of 5 Judges of the High Court. Following the viva voce test, after computing the average of the marks awarded by the individual members of the Board, it was found that only 9 candidates had secured the minimum 10 marks out of 50, in the interview segment. The Full Court of the Patna High Court in their meeting held on

5.4.2016 then approved the appointment of these 9 candidates and they were appointed on 17.5.2016.

4.7. Challenging the selection process in Bihar, 46 candidates who did not qualify for not securing the minimum 10 marks in the interview, moved this Court. As noted earlier, the validity of Clause 11 of Appendix – C of the *Bihar Rules 1951* (amended on 3.4.2013) is challenged in this writ petition. Notice was issued in the Writ Petition on 2.5.2016 by this Court.

4.8. When the reply was being prepared by the Patna High Court to respond to the writ petition, certain discrepancies were noticed during decoding, tabulation, and collation of marks in the main examination and the Registrar General of the High Court on 1.6.2016 apprised the Selection and Appointment Committee, about the errors. Then the Chairperson of the Committee in consultation with the Acting Chief Justice of the Patna High Court ordered for fresh tabulation. Following detailed verification of the records, it was found that 3 more candidates had obtained the qualifying marks in the written examination and as such were eligible to appear in the interview segment. It was simultaneously found that 4 candidates earlier shown to have qualified, had not actually obtained the qualifying marks. Following the resultant course corrections, 3 more candidates were allowed to participate in the interview and a corrigendum was issued for the 4 candidates, who were wrongly shown to have been qualified. Then the interview of the 3 candidates was held on 19.7.2016 but none of them secured the minimum 10 marks prescribed in the interview segment. Two serving judicial officers had applied under the 25% quota meant for Bar members and under a judicial order passed by the High Court on 9.8.2016,

both judicial officers were permitted to participate in the selection process, without requiring them to resign from their job. One of them had not secured the required minimum marks for appearing in the interview segment and accordingly, only one person (Sunil Kumar Singh) was called for the interview on 31.8.2016. But since the concerned candidate failed to secure the minimum 10 marks in the interview, he was also not selected.

B) Developments Post-2015 Selection in Bihar

5. In August 2016, the Patna High Court issued another advertisement for filling up posts for District Judge (Entry Level), for 98 vacancies (including 90 unfilled vacancies of 2015 examination). In the meantime, the proposal was made to amend the *Bihar Rules 1951* and delete the cut-off requirement of minimum 10 marks, for qualifying in the interview. The August 2016 advertisement did not provide for a minimum qualifying mark in the interview segment. The appropriate in-tune amendment of the Rules was approved by the Full Court on 22.6.2016. Thereafter, the *Bihar Rules 1951* was again amended on 16.2.2017 and Clauses 10,11 and 12 of Appendix-C of the Bihar Rules 1951 were substituted as follows: -

> "10. The ratio of marks of theory papers and viva-voce will be 80% and 20%.
> 11. A candidate will be called for viva-voce only if he secures at least 45% in each theory paper.
> 12. A candidate will qualify for appointment if the candidate secures at least 45% marks in each theory paper and 50% in aggregate in written test (theory papers) and viva-voce, taken together."

5.1. Following the aforesaid amendment, the 2016 recruitment process was conducted and 98 selected candidates were appointed in March 2018, against the advertised vacancies.

5.2. Further examinations were held under the aforenoted amended Rules through the advertisement in the year 2019 for 16 vacancies against which, 12 candidates were appointed. In the next examination conducted in 2020, 16 more candidates were selected and appointed.

5.3. After the above recruitment process in the years 2016, 2019 and 2020 respectively, on 6.1.2020 the *Bihar Rules 1951* were amended again by which Clause 12 of Appendix-C was substituted. The amended Clause 12 reads as under:-

> **"12.** A candidate will qualify for appointment if the candidate secures at least 45% marks in each theory paper, 30% marks in viva-voce/interview and 50% marks in aggregate in written test (theory papers) and viva-voce taken together."

5.4. With the above amendment carried out on 6.1.2020, a candidate aspiring for selection in the Bihar Superior Judicial Service is required to score 30% marks in the interview and 50% in the aggregate of written test and viva-voce test taken together, to qualify for recruitment.

C) Gujarat Selection Process

6. For the batch of five writ petitions relating to the selection process in Gujarat, the relevant facts are taken from the WP(C) 663/2021. The salient facts on which the challenge is raised, are substantially similar in these cases. The *Gujarat Rules, 2005*, substituted the erstwhile *Gujarat Judicial Services Recruitment Rules,1961*. The *Gujarat Rules,2005* came to be amended firstly by the *Gujarat State Judicial Service (Amendment) Rules, 2011* dated 23.6.2011 and secondly by the *Gujarat State Judicial Service(Amendment Rule,2014)* dated 9.9.2014. As per the amendments, Rule 8 provided for competitive examination for recruitment to the respective cadres of District Judge and Civil Judge. The following was the prescription for the competitive examination:

"8. Competitive examination:-

(1) the competitive examination for direct recruitment to the cadre of District Judge or Civil Judges shall consist of:-
(i) a written examination of not less than two hours of duration with 200 maximum marks; and
(ii) viva voce test of maximum 50 marks.

(2) the candidates who obtain fifty percent (50%) or more marks in the competitive examination conducted for direct recruitment to the cadre of District Judge or Civil Judge, shall be eligible for being called for Viva-voce;

Provided that the candidates belonging to Schedule Castes and Scheduled Tribes who obtain forty five percent (45%) or above marks, in the written examination, conducted for direct recruitment to the cadre of Civil Judges, shall be eligible for being called for Viva-Voce.

(3) the minimum qualifying marks in the Viva-voce conducted for direct recruitment to the cadre of District Judge and Civil Judge, shall be forty percent (40%) of marks.

(4) merit list shall be prepared on the basis of total marks obtained in the written examination and Viva-Voce Test (interview).

(5) the object of the Viva-Voce Test (interview) is to assess the suitability of the candidate for the cadre by judging the mental alertness, knowledge of law, clear and logical exposition, balance of judgment, skills, attitude, ethics, power of assimilation, power of communication, character and intellectual depth and the like, of the candidate.

(6) all necessary procedure not provided for in these rules of recruitment shall be decided by the High Court."

6.1. With the Rules amended as above, an advertisement was issued on 26.8.2019, for recruitment of Civil Judges in Gujarat. The scheme of examination and syllabus was notified for the preliminary examination, main written examination, and the viva-voce test in the advertisement. Under Clause 5 (II) (B), it was specified that the viva-voce test shall be of 50 marks. Under sub-Clause (ii) of Clause 5 (II) (B) the object of the Viva-voce test was indicated as under:

"(II) (B) (i) **** ****

> (ii) The object of the Viva-voce Test is to assess the suitability of the Candidate for the cadre by judging the mental alertness, knowledge of law, clear and logical exposition, balance of judgment, skills, attitude, ethics, power of assimilation, power of communication, character and intellectual depth and the like, of the Candidate."

6.2. It was also specified in the advertisement under sub-Clause (iii) of Clause 5 (II) (B) that for being eligible to be included in the select list, the candidate must obtain a minimum of 40% marks in the viva-voce test.

6.3. On 8.9.2019, Kritika Bodha (WP(C) 663/2021), one of the candidates, submitted her application for selection to the post of Civil Judge. The results of the preliminary exam were declared on 18.12.2019. The main written examination was conducted on 19.1.2020 and the results thereof were published on 24.7.2020, declaring 132 candidates as successful for the interview round. The interview was conducted on 7.3.2021. The last candidate in the general category had 124 marks and the writ petitioner (because of the below 40% viva voce marks), despite getting 135.33 marks, was not selected. The prayer in all five writ petitions is to quash Rule 8(4) of *Gujarat Rules,2005* (as amended in 2011) specifying 40% qualifying marks for viva voce. The related prayers are to quash the selection list and conduct fresh interviews.

II. SUBMISSIONS

7. We have heard learned Senior Counsel, Mr. Ajit Kumar Sinha, Mr. Yatinder Singh, Mr. Rameshwar Singh Malik, and learned counsel, Ms. Shraddha Deshmukh, Mr. Pawanshree Agrawal and Mr. Rishabh Sancheti for the writ petitioners. Learned counsel, Mr. Gautam Narayan, and Mr. Purvish Jitendra Malkan, represented High Courts of Patna and Gujarat respectively.

8. The fundamental challenge in these cases is the prescription of the minimum cut-off in the viva voce segment i.e. 20 per cent for the recruitment

by the Patna High Court and 40 per cent for the recruitment under the Gujarat High Court respectively.

9. The learned counsel on behalf of the writ petitioners contend that the selection process is vitiated as the same is in contravention of the law laid down in *All India Judges (2002)* where a three Judges Bench after deliberating on the report dated 11.11.1999 submitted by Shetty Commission, inter alia, in the matter of direct recruitment of judicial officers, opined that subject to various modifications in the judgment, all other recommendations of the Commission are accepted. As because Shetty Commission while suggesting the procedure for selection of judicial officers had specifically indicated that the interview segment shall carry 50 marks without any minimum cut-off marks, the prescription of minimum marks in the viva-voce test is contended to be arbitrary and unreasonable.

10. According to the learned counsel, the writ petitioners have better aggregate score (written and viva-voce combined), but are deprived of selection only because they failed to secure the qualifying marks in the interview. It is additionally argued that the interview marks are arbitrarily awarded and that is why the Shetty Commission recommended doing away with the cut-off of marks, in the viva-voce segment.

11. Mr. Ajit Kumar Sinha, learned senior counsel appearing in the lead writ petition, highlights the discrepancies in the Bihar selection process. Commenting on the meandering nature of the selection process under the Patna High Court and the decision taken for the moderation of marks and granting further relaxation of 5% in aggregate marks in the written examination, Mr. Sinha argued that moderation of marks should have been

considered for the interview segment, as well for facilitating selection of those who scored high marks in the written examination but failed to qualify only for securing the below cut off marks in the interview segment. The learned counsel questions the fairness of the process which needed repeated course correction such as resorting to moderation and the relaxation of aggregate marks in the written test segment, as is clearly admitted in the additional affidavit of the Patna High Court. It is therefore argued that the Court should not only pass appropriate order on the faulty selection process but should also allow appointment on the basis of the aggregate score (written+viva) basis, without enforcing the cut-off marks bar, in the viva segment.

12. According to the petitioner's counsel, even after the declaration of the final result on 8.4.2016, the Selection and Appointment Committee, continued to act till September, 2016, by issuing corrigendum, publishing fresh result of the written examination, conducting interviews for a few candidates and publishing the ultimate result. It is then argued by Mr. Sinha that if the Patna High Court wanted to consider candidates from a larger pool, because of the large number of vacancies, the relaxation of qualifying marks in the interview segment should have been a natural option.

13. The learned counsel Mr. Pawanshree Agarwal in his turn submits that the interview board members in the Gujarat Selection Board had access to the written marks of the candidates and therefore it was possible for the interview board to arbitrarily disqualify a meritorious candidate, by awarding them less than the qualifying marks. It is also submitted that the Rules were amended in 2011 only with the consultation of the High Court of Gujarat but not the

Gujarat Public Service Commission. Therefore, such an amendment violates Article 234 of the Constitution of India.

14. In the same line, Mr. Rishabh Sancheti, learned counsel appearing in the WP(C) No.1146/2022 argued that denial of appointment because of below par score in the viva-voce segment, is discriminatory since such power can be selectively used for knocking out deserving candidates.

15. Projecting the contrary view, the learned counsel representing the High Court of Patna, Mr. Gautam Narayan argued that the High Court in order to make the best selection has the discretion to enforce a stricter criteria than what was prescribed by the Shetty Commission. According to Mr. Narayan, the procedure suggested by the Shetty Commission is only recommendatory. The recommendations of the Shetty Commission according to the learned counsel should be construed as guidelines only. It is submitted that the Patna High Court broadly adhered to the recruitment process for the District Judiciary and only made it slightly more stringent. The objective was to ensure the selection of meritorious judicial officers and ultimately maintain the standard of the District Judiciary. It is also submitted that the writ petitions at the instance of the unsuccessful candidates is not maintainable.

16. Mr. Purvish Malkan, learned counsel for the High Court of Gujarat while adopting the other submissions of Mr. Narayan, argues that the power is vested with the High Court to evolve its own procedure under Articles 233,234 and 235 of the Constitution. With this Mr. Malkan supports the amendment of the Rules by the High Court. The learned counsel refers to the High Court's counter affidavit to contend that the Internal Board members did

not have access to the marks in the written test while conducting the viva voce test.

III.ISSUES

17. The issues to be considered here are:

i) Whether the prescription of minimum marks for viva voce is in contravention of the law laid down by this Court in *All India Judges(2002*) which accepted certain recommendations of the Shetty Commission?

ii) Whether the prescription of minimum marks for viva voce is violative of Articles 14 and 16 of the Constitution of India?

iii) Whether the selection process in Bihar is vitiated given the moderation of marks and corrective steps, highlighted by the petitioners in the Bihar Selection process?

iv) Whether non-consultation with the Public Service Commission as required under Article 234 of the Constitution for selection to the post of *Civil Judge* in the State of Gujarat would render the *Gujarat Rules,2005*(as amended in 2011) void?

IV. MAINTAINABILITY

18. At the outset, it is apposite to address the issue of the maintainability of the writ petitions. It is argued by Mr. Gautam Narayan and Mr. Purvish Jitendra Malkan learned counsel that after having participated in the recruitment process, the writ petitioners having not succeeded, cannot turn around and challenge the recruitment process or the vires of the Recruitment Rules. It is submitted that all candidates knew about the prescription of minimum marks for viva voce, well before the selection process commenced and the principle of estoppel will operate against the unsuccessful challengers. On the other hand, the learned counsel representing the writ petitioners argued that the principle of estoppel would have no application when there are

glaring illegalities[2] in the selection process. Further, estoppel is not applicable when the arbitrariness affects fundamental rights under Articles 14 and 16 of the Constitution of India[3].

19. As argued by the learned counsel for the High Courts, the legal position is that after participating in the recruitment process, the unsuccessful candidates cannot turn around and challenge the recruitment process[4]. However, it is also settled that the principle of estoppel cannot override the law[5]. Such legal principle was reiterated by the Supreme Court in *Dr.(Major) Meeta Sahai Vs. Union of India*[6] where it was observed as under:

> "17. However, we must differentiate from this principle insofar as the candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. In a situation where a candidate alleges misconstruction of statutory rules and discriminating consequences arising therefrom, the same cannot be condoned merely because a candidate has partaken in it. The constitutional scheme is sacrosanct and its violation in any manner is impermissible. In fact, a candidate may not have locus to assail the incurable illegality or derogation of the provisions of the Constitution, unless he/she participates in the selection process."

20. Guided by the above ratio, in matters like this, to non-suit the writ petitioners at the threshold would hardly be reasonable particularly when the alleged deficiencies in the process could be gauged only by participation in the selection process.

21. The next question is whether the principle of res judicata is attracted in these cases. Mr. Purvish Malkan, learned counsel for the High Court of

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[2] Raj Kumar v Shakti Raj(1997) 9 SCC 527

[3] Basheshwar Nath v. Commr. of Income-tax, Delhi AIR 1959 SC 149; Olga Tellis v. Bombay Municipal Corporation AIR 1986 SC 180 ; Nar Singh Pal v. Union of India and others 2000 3 SCC 588.

[4] Madan Lal v. State of J&K (1995) 3 SCC 486; Dhananjay Malik v. State of Uttaranchal (2008) 4 SCC 171; Ramesh Chandra Shah v. Anil Joshi **(**2013) 11 SCC 309 ; Anupal Singh v State of Uttar Pradesh (2020) 2 SCC 173

[5] Krishna Rai v Banaras Hindu University (2022) 8 SCC 713

[6] (2019) 20 SCC 17

Gujarat brought to our notice that the validity of Rule 8(3) of the *Gujarat Rules,2005* (as amended on 23.6.2011) was earlier challenged before the Supreme Court in *WP(C) 291 of 2013*. This Court after completion of pleadings transferred the said writ petition to the Gujarat High Court. Thereafter, the Gujarat High Court in a detailed judgment in the Special Civil Application No.8793 of 2015, upheld the validity of the amendment prescribing 40% cut-off marks for interview. The Special Leave Petition arising from the said judgment was dismissed by this Court on 30.1.2017.

22. In the above context, a Constitution Bench of this Court in *Daryao v State of UP*[7] *(*for short "Daryao"*)* unanimously held that the principle of res judicata is one of universal application and since the final judgment is binding on the parties thereto, an applicant under Article 226 cannot apply on the same grounds under Article 32, without getting the adverse judgment set aside in appeal. However, a distinction was made between cases where the application under Article 226 has been dismissed on merits and cases where it is dismissed on a preliminary ground. It was further held that an Article 32 petition would not be maintainable on the same facts and the same grounds.

23. The above ratio cannot however be applied stricto sensu in the present facts. This is for the reason that it is not the same writ petitioner who has approached this Court under Article 32 of the Constitution. The Court here is confronted with a different set of facts, another set of litigants who have raised additional contentions. Therefore, the submission of Mr. Pawanshree Agrawal, learned counsel for the writ petitioner that the writ petition should not be dismissed on the ground of res-judicata, is found to be more reasonable.

[7] AIR 1961 SC 1457

In any case, the dismissal of a Special Leave Petition has no consequence on the question of law[8].

24. Let us now address the fundamental question as to whether prescribing minimum marks for interview contravenes the ratio in *All India Judges(2002)*. To do this, it is necessary to bear in mind the following contextual background.

V. GENESIS OF THE SHETTY COMMISSION

25. In 1989, the *All-India Judges' Association* and its working President filed a writ petition under Article 32 of the Constitution of India seeking various reliefs for members of the District Judiciary focusing on uniformity in service conditions. On 13.11.1991, a three-judge bench speaking through Ranganath Misra CJ disposed of the said writ petition in *All India Judges Association v Union of India*[9], after considering, *inter alia*, the issues relating to pay scales and service conditions of the District Judiciary. The Supreme Court directed States and Union Territories to separately examine and review the pay structure. Aggrieved by the aforesaid judgment, the Union of India and few State Governments filed review petitions before this Court. In *All India Judges Association v Union of India*[10] (for short "All India Judges(1993)), this Court on 24.8.1993, modified some of the reliefs in the original judgment but, *inter alia,* recommended that the service conditions of judicial officers should be reviewed periodically by an independent Commission exclusively constituted for the purpose. From 1993 onwards, this Court exercising its writ remedy of 'continuing mandamus' had issued multiple directions under the rubric of this case.

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[8] Inderjit Singh Sodhi v. Chairman, Punjab State Electricity Board, (2021) 1 SCC 198.
[9] (1992) 1 SCC 119
[10] (1993) 4 SCC 288

26. Pursuant to the aforementioned direction, the Union of India appointed the first National Judicial Pay Commission on 21.3.1996 under the chairmanship of Justice KJ Shetty. Justice Shetty Commission submitted a preliminary report on 31.1.1998 and a final report on 11.11.1999. The terms of reference of the Commission are extracted below:

> "(a) To evolve the principles which should govern the structure of pay and other emoluments of judicial officers belonging to the subordinate judiciary all over the country.
> (b) To examine the present structure of emoluments and conditions of service of judicial officers in the States, Union territories taking into account the total packet of benefits available to them and make suitable recommendations having regard, among other relevant factors, to the existing relativities in the pay structure between the officers belonging to subordinate judicial service vis-a-vis other civil servants.
> (c) To examine and recommend in respect of minimum qualifications, age of recruitment, *method of recruitment,* etc., for judicial officers. In this context, the relevant provisions of the Constitution and directions of the Supreme Court in All India Judges Association case and other cases may be kept in view.
> (d) To examine the work methods and work environment as also the variety of allowances and benefits in kind that are available to judicial officers in addition to pay and to suggest rationalization and simplification thereof with a view to promoting efficiency in judicial administration, optimizing the size of the judiciary etc."

27. The above would indicate that the terms of reference essentially focused on the evolution of principles that would govern the formulation of pay structure and emoluments of judicial officers. Suggestions were also expected on minimum qualifications, age, and "method of recruitment" etc. for judicial officers. The final report submitted on 11.11.1999 focused on the age of retirement, nomenclature for judicial officers, equation of posts, inter-se seniority, the age for direct recruitment, the establishment of *All India Judicial Service*, etc.

28. Before extracting the relevant portion of the Shetty Commission report which inter-alia, prescribed that no cut-off marks should be fixed for the interview segment, a reference to the context is apposite:

> "10.95 We have earlier set out the procedures followed by the High Courts for selecting candidates for direct recruitment. *Most of the High Courts are having only Viva Voce Test.*
> 10.96 High Courts of Andhra Pradesh, Allahabad, Jammu & Kashmir, Madhya Pradesh, Orissa, however, have prescribed written test in addition to viva-voce.
> 10.97 The Commission has received innumerable complaints that the selection by only viva-voce has more often led to arbitrariness if not whimsical selection, unjust if not unreasonable. With respect to High Courts, we do not want to carry any such impression. But we do feel that there is less transparency and objectivity in the selection process."

29. Since most of the High Courts were selecting candidates based only on the viva voce test without conducting the written test, the absence of transparency and objectivity in the interview process was noticed. The Commission therefore opined that accepting the viva voce as the sole selection mode could lead to arbitrariness. However, this by itself does not lend any clarity on how prescribing minimum cut-off marks for viva voce together with the written test, could possibly lead to arbitrariness in selection. In order to reduce subjectivity, the Shetty Commission in its subsequent recommendation, delineated the methodology for conducting viva voce as under:

> "10.97. ….We would, therefore, like to recommend the following procedure to reduce degrees of subjectivity and arbitrariness:
>
> (i)There shall be written examination followed by viva-voce.
> (ii) Written Examination must carry 200 marks on the subject/subjects prescribed by the High Court. The paper should be of a duration of minimum two hours.
> (iii) The cut off marks in the Written Examination should be 60% or corresponding grade for general candidates and 50% or corresponding grade for SC/ST candidates. Those who have secured the marks above the cut off marks shall be called for viva-voce Test.
> (iv) The viva-voce Test should be in a thorough and Scientific Manner and it should be taken anything between 25 and 30 minutes for each

candidate. The viva-voce shall carry 50 marks. *There shall be no cut off marks in viva-voce test.*
(v) The merit list will be prepared on the basis of marks/grades obtained both in the Written Examination and viva-voce."

30. At this point, the fundamental fallacy in the argument of the writ petitioners, as is pointed out by Mr. Gautam Narayan, the learned counsel for the High Court of Patna becomes distinctly discernible. If the above procedure recommended by the Shetty Commission is to be implemented *stricto sensu*, the cut-off marks even for the written examination can never be, below 60%. Therefore, if the recruitment process of the Patna High Court is to be tested on the recommended threshold marks of Shetty Commission i.e. 150 marks out of 250 marks for shortlisting general category candidates in the written exam, none of the writ petitioners would qualify for the viva-voce segment since they never secured the minimum 60% in the written marks aggregate. In the present case, the minimum cut-off as per the amended Rules was 55% and this was further lowered to 50% as per proviso to Clause 10 of *Bihar Rules, 1951.* The writ petitioners should not therefore be permitted to argue for selective implementation of the Shetty Commission recommendation, for doing away with the cut-off marks in the viva voce segment. In other words, the candidates cannot be allowed to "approbate and reprobate"[11] in the same breath. As such, it would be impermissible to seek dilution of the Shetty Commission recommended criteria, only for the viva voce segment.

31. The Shetty Commission recommended that the degree of subjectivity and arbitrariness should be reduced and the selection should be transparent. In clauses (vi) and (vii) of Para 10.99 of the Report, it was specifically noted as under:

[11] Pradeep Kumar Rai v Dinesh Kumar Pandey (2015) 11 SCC 493 (Para 17)

"(vi) Today, the viva voce examination can be more unfair than the written examination in view of the fact that it is decided on chance or impression in the shortest possible time. Rural candidates are generally at a disadvantage in this process. English-speaking candidates sometimes gain advantage without they being superior in skills for the job. A dominant member of the interview board may carry the day to the disadvantage of many deserving candidates. These things happen not necessarily because of any conscious bias or disposition of members of the Board. This is inherent in the process itself as it operates at present in many places. The judiciary cannot afford to lose opportunities to get the most outstanding candidate because of infirmities in the selection system. As such, an alternative procedure by and large modelled on the lines of the written examination is recommended for the viva voce as well.
(vii) The viva-voce Examination will adopt the following procedure:

(a) A proforma containing categories such as knowledge /Skills/ Attitude/ Ethics/Communication /Character, etc., be developed (this will depend on what are the qualities the judiciary is looking for in the prospective Judges being interviewed) in advance and each category may be given relative weightage (credits)in terms of marks. For example, if the total Viva marks are 100, one may assign 10 marks for knowledge /comprehension, 5 marks for ethics /attitude, 25 marks for skills of judging, 10 marks for communication abilities, 10 marks for general knowledge, etc
(b) Each member of the Board including the Chairman will be asked to assign marks for each category immediately after a candidate is interviewed and before the next candidate is called in. To strike some commonality or relative parity in approach of members, the board may have some general discussion before commencement of interview on range of marks to be given for a particular level of assessment. If necessary, some written guidelines may also be circulated to be adhered to in assigning marks at the time of interview.
(c) At the end of each day's interview, the tabulator will convert the numerical marks assigned to each category into grades and then to grade values. This will then be totalled up and the Cumulative Grade Value Average of each candidate interviewed will be obtained."

32. As rightly noted above, the English-speaking urban candidates could possibly be at an advantage compared to those from a rural background and those belonging to marginalized communities. It must however be seen that the Shetty Commission report was in the backdrop of High Courts selecting candidates simply on the basis of viva voce without conducting written test.

What is also essential to note is that the Shetty Commission recommended evaluation through grades instead of numerical marks, for the selection of judicial officers, whether in written exam or viva voce. It also suggested that there must be written guidelines for assigning marks at the time of the interview.

VI. ISSUE WISE DISCUSSION

Issue No.1) Whether the prescription of minimum marks for viva voce is in contravention of the law laid down by this Court in *All India Judges(2002*) which accepted certain recommendations of the Shetty Commission?

33. The judgment in *All India Judges (2002),* will now have to be analyzed in the above prefatory context. The Court therein accepted certain recommendations made by the Shetty Commission while modifying or rejecting a few others. In paragraph 27, the 3-judge bench speaking through Justice B.N. Kirpal specifically noted thus:

> **"27.** … At the same time, we are of the opinion that there has to be certain minimum standard, *objectively adjudged,* for officers who are to enter the Higher Judicial Service as Additional District Judges and District Judges. While we agree with the Shetty Commission that the recruitment to the Higher Judicial Service i.e. the District Judge cadre from amongst the advocates should be 25 per cent and the process of recruitment is to be by a competitive examination, *both written and viva voce*, we are of the opinion that there should be an objective method of testing the suitability of the subordinate judicial officers for promotion to the Higher Judicial Service."
>
> [emphasis supplied]

34. The above would show that while dealing with the method of recruitment, this Court stressed the importance of an objective standard for recruitment and emphasized that the process of direct recruitment should be through a written and viva-voce examination. A careful reading of the entire judgment would show that there is no direct discussion on the aspect of viva

voce except the remark in paragraph 27 that there should be an objective method of testing suitability. The issue as to whether there should be minimum qualifying marks for viva-voce, did not engage the Court's attention. Moreover, even the Shetty Commission report did not provide any specific reasoning as to why there should be no minimum marks for *viva voce*. For this discussion, we may benefit by referring to the recent decision of this Court in *Dr.Kavita Kamboj v. High Court of Punjab and Haryana and Others*[12](for short "Kavita Khamboj"). Chief Justice, DY Chandrachud writing for the three-judge bench adverted to the earlier judgment in *All India Judges (2002)* and specifically noted that the Court did not make any observation about the desirability or otherwise of a minimum cut-off generally. The following passage from the judgment is relevant here:-

> "41. Now, it is true that certain recommendations of the Shetty Commission in regard to the improvement of the pay scales of the judicial officers were accepted by this Court in the decision of this Court in All India Judges' Association (supra). However, *there was no specific finding in paragraphs 27 and 28 of the All India Judges' Association (supra) in regard to whether a cut-off should be imposed for recruitment by way of regular promotion*. The Court had merely remarked that "there should be an objective method of testing the suitability of the subordinate judiciary", without making any observation about the desirability or otherwise of minimum cutoffs for viva voce generally."
>
> [emphasis supplied]

35. Also in the aforementioned judgment, the bench noted that the High Court cannot be precluded from framing Rules prescribing a minimum cut-off based on the exigencies of the Service in the State.

36. In the present case, the writ petitioners additionally argued that by virtue of paragraph 37 in *All India Judges(2002),* the Court accepted even those

[12] 2024 SCC OnLine SC 254

recommendations which were not otherwise discussed in the judgment. The said paragraph reads as under:

> "37. Subject to the various modifications in this judgment, all other recommendations of the Shetty Commission are accepted."

37. The above paragraph cannot persuade us to conclude that this Court accepted the recommendation of the Shetty Commission to do away with minimum marks for the interview. This is simply because in the preceding paragraphs, the Court listed various recommendations of the Shetty Commission. Dispensing with minimum marks for interview however finds no mention in the said list. Without such specific mention, it would be logical to say that the judgment in *All India Judges (2002)* is sub-silentio, on the aspect of minimum marks for interview. Therefore, this judgment cannot be considered as having authoritatively pronounced on doing away with minimum cut-off marks in the interview segment.

38. Let us now turn to the other cases where this Court had the occasion to interpret the recommendations of the Shetty Commission in situations where the recruitment rules were inconsistent with the recommendations:

i) In *Syed T.A. Naqshbandi v. State of J&K*[13], while giving primacy to the Rules framed by the High Court *vis-a-vis* policy decisions and Full Court Resolutions, the Supreme Court made the following pertinent observations:

> **"**8. Reliance placed upon the recommendations of Justice Jagannatha Shetty Commission or the decision reported in All India Judges' Assn. v. Union of India [(2002) 4 SCC 247 : 2002 SCC (L&S) 508] or even the resolution of the Full Court of the High Court dated 27-4-2002 is not only inappropriate but a misplaced one and the grievances espoused based on this assumption deserve a mere mention only to be rejected. The conditions of service of members of any service for that matter are governed by statutory rules and orders, lawfully made in the absence of rules

[13] (2003) 9 SCC 592

> to cover the area which has not been specifically covered by such rules, and so long as they are not replaced or amended in the manner known to law, it would be futile for anyone to claim for those existing rules/orders being ignored yielding place to certain policy decisions taken even to alter, amend or modify them."

ii) In *Rakhi Ray v. High Court of Delhi*[14], the Supreme Court concluded that the recommendations of the Commission even if accepted by this Court were required to be incorporated in the statutory Rules governing the service conditions of the Judicial Officers. However, in the absence of statutory Rule to deal with a particular issue, the High Courts are bound to give effect to the decisions of the Supreme Court.

iii) Likewise in *Mahinder Kumar v High Court of Madhya Pradesh*[15] (for short "Mahinder Kumar"), the challenge was to the procedure adopted by the High Court of Madhya Pradesh for recruitment of District Judge (entry level). While discussing paragraph 10.97 of the Shetty Commission, the 3 judge Bench speaking through Justice FM Ibrahim Kalifulla, clarified as under:

> "71. Sub-paras (i) to (v) of Para 10.97 of the Shetty Commission Report have been set out to show how while holding a written examination and a viva voce examination, prescription of marks and other aspects are to be followed. In fact those sub-paragraphs, contained in Para 10.97 of the Shetty Commission Report, can at best be stated to be a guideline, which any High Court should keep in mind, while resorting to selection for filling up the posts in the Higher Judicial Service. In this context, in para 28 of All India Judges Assn. (3) [(2002) 4 SCC 247 : 2002 SCC (L&S) 508] , this Court while prescribing the extent to which direct recruitment to the Higher Judicial Service for the post of Higher Judicial Service for the District Judges can be made, also said that appropriate rules should be framed by the High Courts at the earliest possible time. Therefore, once the rules come into place it will have to held that what all that can be expected of the High Court, would be to follow the said rules. We have in this judgment held that by virtue of Rule 7 and Para 9(iv), the 1st respondent High Court had every authority to prescribe the procedure, while making the selection to the post of Higher

[14] (2010) 2 SCC 637
[15] (2013) 11 SCC 87

> Judicial Service and that such procedure followed was also rational."

In the above paragraph, the Court specifically noted that the Shetty Commission recommendations can at best be considered a guideline and that the High Court is vested with the required power to evolve its own procedure for selection of judicial officers. We must reiterate that a reference was also made to paragraph 28 of *All India Judges (2002)* which provided for the High Court to frame appropriate Rules. Moreover, the Shetty Commission itself mentioned that the recommendation was subject to the prescription of Rules by the High Court.

iv) In like manner, this Court in *Sasidhar Reddy v State of AP*[16], observed that the recommendations of the Shetty Commission would have to be supported by the Rules for implementation. It was clarified that when recommendations and the Rules are at variance, the statutory Rules should be followed. The grievance of the appellant therein was that it was not necessary to complete 35 years for being appointed to the post of District and Sessions Judge (Entry Level) in the AP State Judicial Service. In this context, the Court analysed the recommendations of the Shetty Commission as under:

> **"14.** The said concept, with regard to the minimum age, has been brought in only from the report of the Commission. For the reasons recorded in the report of the Commission, the Commission was of the view that the post of a District and Sessions Judge, being an important post, which not only requires integrity and intelligence but also requires maturity, the Commission was of the view that a person not having completed 35 years of age should not be appointed to the said post. It is pertinent to note that this was merely a recommendation or suggestion made by the Commission. The recommendation or suggestion, if not supported by the Rules, cannot be implemented. In the instant case, the Rules are silent with regard to the minimum age. It only speaks about the maximum age. In the circumstances, one cannot read provisions incorporated in the report of the Commission into the Rules. The Rules are

[16] (2014) 2 SCC 158

> statutory and framed under the provisions of Article 309 of the Constitution of India. In our opinion, if the recommendations made by the Commission and the statutory rules are at variance, the provisions incorporated in the recruitment rules have to be followed. It is pertinent to note that when such a question had been raised before this Court, in Syed T.A. Naqshbandi case [Syed T.A. Naqshbandi v. State of J&K, (2003) 9 SCC 592 : 2003 SCC (L&S) 1151] , this Court had also observed that till relevant recruitment rules are suitably amended so as to incorporate the recommendations made by the Commission, provisions of the statutory rules must be followed.
>
> **17.** In our opinion, the High Court was in error while giving undue weightage to the recommendations made by the Shetty Commission, especially when the Rules do not provide for any minimum age for the appointment to the post in question. Moreover, even Article 233 of the Constitution of India is also silent about the minimum age for being appointed as a District Judge."

39. With the above pronouncements on the inter-play between the Shetty Commission recommendations and the prevalent Rules, the following logical deduction can be laid down: -

(i) In case of inconsistency between the recommendations and the Rules, primacy should be given to the *existing* statutory Rules.

(ii) In the absence of *existing* Rules, the High Court should follow the directions of this Court.

40. For the sake of completeness, we may however clarify that even though the statutory Rules can be supplemented to fill in gaps[17], the High Court cannot act contrary to the Rules[18].

41. With the above understanding, let us now examine the contention that the judgments in *Hemani Malhotra v. High Court of Delhi*[19](for short "Hemani Malhotra"), and *Ramesh Kumar v. High Court of Delhi*[20] (for short "Ramesh

[17] Dr. Kavita Khamboj v High Court of Punjab and Haryana, 2024 SCC OnLine SC 254
[18] Sivananda CT v High Court of Kerala (2024) 3 SCC 799
[19] (2008) 7 SCC 11
[20] (2010) 3 SCC 104

Kumar"), are authorities for the proposition that there can be no minimum marks for viva voce since the recommendations of the Shetty Commission were *accepted* in *All India Judges(2002)*. Mr. Rishabh Sancheti, the learned counsel for the writ petitioners would additionally argue that the judgment in *Mahinder Kumar(supra*) is *per incuriam* because despite being a subsequent decision, it does not refer or consider the earlier relevant observations in *Ramesh Kumar(supra)*. Mr. Pawanshree Agarwal, the learned counsel would submit that there is a dichotomy between the decisions in *Mahender Kumar(supra)* and *Ramesh Kumar(supra)*. While *Mahender Kumar(supra)* endorses the Shetty Commission recommendations to be a guideline, *Ramesh Kumar(supra)* notes that the recommendations were accepted by this Court in *All India Judges (2002)*.

42. The learned counsel for the writ petitioners have relied on the following paragraph from *Hemani Malhotra(supra)*:

> **"18.** This Court notices that in *All India Judges' Assn.* v. *Union of India* [(2002) 4 SCC 247 : 2002 SCC (L&S) 508] subject to the various modifications indicated in the said decision, the other recommendations of the Shetty Commission were accepted by this Court. It means that prescription of cut-off marks at viva voce test by the respondent was not in accordance with the decision of this Court. It is an admitted position that both the petitioners had cleared written examination and therefore after adding marks obtained by them in the written examination to the marks obtained in the viva voce test, the result of the petitioners should have been declared. As noticed earlier 16 vacant posts were notified to be filled up and only five candidates had cleared the written test. Therefore, if the marks obtained by the petitioners at viva voce test had been added to the marks obtained by them in the written test then the names of the petitioners would have found place in the merit list prepared by the respondent. Under the circumstances, this Court is of the opinion that the petitions filed by the petitioners will have to be accepted in part."

43. The factual backdrop of the aforementioned case was that there was no prescription of minimum cut-off marks or viva voce in the *Delhi Higher Judicial Service Examination, 2006*. Therefore, the issue before the Court was whether the introduction of the requirement of minimum marks for interview, *after* the

selection process was completed, would amount to changing the rules of the game after the game was played. It is noteworthy that the Court in paragraph 15 of *Hemani Malhotra(supra)* itself notes that:

> "**15.** There is no manner of doubt that the authority making rules regulating the selection **can prescribe** by rules the minimum marks both for written examination and viva voce, but if minimum marks are not prescribed for viva voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at viva voce test was illegal."
>
> [emphasis supplied]

44. The above findings in *Hemani Malhotra(supra*) were in the absence of rules prescribing minimum marks for interview. The facts here are significantly different since the qualifying marks in the interview segment was notified before commencement of the recruitment process. In line with the settled principle of law as discussed above, in case of inconsistency of the existing Rules with the recommendations, the Rules will prevail.

45. Similarly in the other cited cases i.e., *Ramesh Kumar(supra*), the Court noted that in the absence of any contrary provision in relevant Rules, the competent authority can fix minimum qualifying marks, both for the written and viva voce. It was held that if specific Rules provide for minimum marks for viva voce, strict adherence to the same is mandatory. Significantly, the judgment also elucidates the importance of the viva voce test in bringing out a candidate's overall intellectual and personal qualities. Importantly in *Hemani Malhotra(supra)* and *Ramesh Kumar(supra),* the fundamental issue was whether the rules of the game could be changed midway through the selection process. However, in the present matters, the writ petitioners were

aware of the rules of the game i.e. the prescription of minimum marks, well before the selection process commenced. This distinguishing feature cannot be overlooked. At this point, we may also note that the present writ petitions were de-tagged from the five-judge Constitution Bench matter[21] concerning the issue of changing the rules of the game which is currently reserved for judgment. This has been fairly conceded by the learned senior counsel for the petitioners, Mr. Ajit Kumar Sinha. Therefore, the challenge here is not w.r.t. changing the rules of the game but the implication of the Shetty Commission recommendations and the law laid down in *All India Judges (2002)*.

46. On the contention relating to the decision in *Mahender Kumar(supra)* being per incuriam, it is plausible in the present facts to reconcile both decisions i.e. *Mahender Kumar(supra)* and *Ramesh Kumar(supra).* Crucially in both the decisions, it is emphasized that primacy must be given to the *existing* statutory rules. The relevant passage in *Ramesh Kumar(supra)* is extracted below:

> **"15.** Thus, the 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 benchmarks for written test as well as for viva voce."

47. The above paragraph explicitly provides that the Courts can fix minimum qualifying marks for viva voce. In the present cases, the Rules provided for the qualifying marks and as such the cited judgments can be of no assistance for the writ petitioners.

[21] Tej Prakash Pathak And Ors. v. Rajasthan High Court And Ors. C.A. No. 2634/2013 & batch

48. The implications of the split judgment in *Salam Samarjeet Singh* vs. *High Court of Manipur at Imphal*[22] will next bear consideration. Justice *Banumathi* in her judgment noticed that *All India Judges (2002)* is *sub silentio* on the aspect of minimum cut off marks for the viva-voce test. In his dissenting judgment, Justice *Shiva Kirti Singh* had not expressed any disagreement on the said *sub silentio* observation but left it open for determination in a future case. There again, the dissent of Justice Singh was based on the fact that minimum cut off was not prescribed in the recruitment Rules and were brought in midway through the recruitment process, just prior to the stage of interview, by resolution of the Court. Here however the prescription of minimum cut-off in the recruitment process was notified for information of the candidates well before the commencement of the selection process under the Patna High Court and also under the Gujarat High Court and this distinguishing feature will have to be borne in mind.

49. The Justice Shetty Commission was constituted to bring about uniformity in service conditions of judicial officers. The recommendations made by the Commission are in the nature of guidelines and those will have to be seen in the context of the Rules governing recruitment of judicial officers. By virtue of the decision in *All India Judges (2002)*, it cannot be said that adequate elbow room was not available to prescribe qualifying marks in the interview segment to ensure the selection of the best possible person. Therefore, the prescription of minimum marks in the Rules is not found to be in contravention of the judgment in the *All-India Judges (2002)*.

[22] (2016) 10 SCC 484

Issue No. ii) Whether the prescription of minimum marks for viva voce violates Articles 14 and 16 of the Constitution of India?

50. The learned counsel for the writ petitioners argued that the prescription of minimum marks for viva voce is violative of Articles 14 and 16 of the Constitution of India for being manifestly arbitrary. Reliance has been placed on decisions of this Court which have expanded the scope of examination under Article 14.[23] In this context, we must recall the oft-quoted passage from the five-judge bench decision in *E.P. Royappa v. State of T.N*[24], where the Court while dealing with an allegedly discriminatory transfer order noted as under:

> "**85**.....From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

[23] Shayara Bano v Union of India 2017(9) SCC 1; Joseph Shine v Union of India (2019) 3 SCC 39; Lok Prahari v State of UP[Para 30,35,36,39] (2016) 8 SCC 389
[24] (1974) 4 SCC 3

51. Commenting on the principle of non-arbitrariness in the words of Article 14, another five-judge bench speaking through P.N. Bhagwati J. in *Ajay Hasia v. Khalid Mujib Sehravardi*[25], (for short "Ajay Hasia") made the following pertinent observations:

> "16. …It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because any [Under Article 32 of the Constitution] action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

52. In *Shayara Bano v Union of India*[26], after examining a long line of precedents, the Supreme Court noted that a legislation can also be struck down for being manifestly arbitrary, if it is "*irrational, capricious and/or without an adequate determining principle*". This principle of manifest arbitrariness has been highlighted in other decisions of this Court[27]. The issue to be examined now is whether the vice of arbitrariness is attracted for the Rules prescribing qualifying marks for the viva voce test.

53. The challenge raised on behalf of the writ petitioners to the prescription of minimum marks for viva voce is not uncommon and the precedents suggest

[25] (1981) 1 SCC 722
[26] 2017(9) SCC 1
[27] Association for Democratic Reforms v Union of India; 2024 INSC 113; Joseph Shine v Union of India 2019(3) SCC 39; Lok Prahari v Union of India 2018(6) SCC 1; Shayara Bano v Union of India 2017(9) SCC 1

that much turns on the nature of the post and the extent of weightage given to viva voce. For the present matters, the distinction between the *Bihar Rules, 1951* governing the selection process for higher judiciary, specifically District Judges, and Rule 8(3) of the *Gujarat Rules, 2005* which pertains to the recruitment of both Civil and District Judges would need careful consideration.

54. The relevant clauses of *Bihar Rules,1951* dealing with the appointment to the Higher judiciary are extracted below for ready reference:

> "10. candidate will qualify for interview only if he secures minimum 45% marks in each paper and 55% marks in aggregate in the written test.
>
> Provided that in case the number of qualified candidates are not adequate, the High Court may, in the interest of judiciary, relax the qualifying marks in aggregate as may be required but this relaxation will not be below 50% in aggregate.
>
> 11. The candidates must secure at least 10 marks out of 50 marks in the interview.
>
> 12. The candidate must pass both the written test and interview before he is considered for appointment."

55. The significance of interview for selection in judicial service can be best understood from the opinion of Justice O Chinappa Reddy J in *Lila Dhar v State of Rajasthan*[28]*:*

> "5. …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."

[28] (1981) 4 SCC 159

56. The above view has been consistently endorsed by later decisions of this Court[29]. Notably in *Tanya Malik v Registrar General of High Court*[30], in the context of recruitment to the post of District Judge, it was held that prescribing minimum marks for interview is not only desirable but also necessary. More recently in *Kavita Khamboj(supra*), a 3-judge bench upheld the requirement of 50% minimum marks in interview for promotion as District Judges. Making a succinct distinction between judicial appointments at the junior level and higher levels of judiciary, this Court speaking through Chief Justice DY Chandrachud observed the following:

> "44....the interview in such cases is not being held at the very threshold of the service, while making recruitments at the junior-most level. Rather, the interview is being held to fill up a senior position in the District Judiciary, that of an Additional District and Sessions Judge. Such officers, based on their prior experience, must be expected to demonstrate a proficiency in judicial work borne from their long years of service. The purpose of the interview for officers in that class is to assess the officer in terms of the ability to meet the duties required for performing the role of an Additional District and Sessions Judge. Consequently, there would be a reasonable and valid basis, if the High Court were to do so, to impose a requirement of a minimum eligibility or cut-off both in the written test and in the viva voce separately."

57. The recruitment procedure should not only test the candidate's intellect but also their personality, for appointment to posts in the higher judiciary. The writ petitioners have placed great reliance on the judgment in *Ajay Hasia(supra)* where it is canvassed that providing for more than 15% of the total marks for interview, is arbitrary and constitutionally invalid. In *Ajay Hasia(supra)* the challenge was to the validity of admissions made to the

[29] KH Siraj v High Court of Kerela (2006) 6 SCC 395; State of UP v Rafiquiddin, 1987 Supp SCC 410; Taniya Malik v Registrar General of the High Court of Delhi,(2018) 14 SCC 129; Pranav Verma v The Registrar General of High Court (2020) 15 SCC 377
[30] (2018) 14 SCC 129

Regional Engineering College for the academic year 1979-80. Out of 150 total marks, 50 marks were earmarked for interview. Commenting on the validity of viva voce as a permissible test, the Court observed thus:

> "But, despite all this criticism, the oral interview method continues to be very much in vogue as a supplementary test for assessing the suitability of candidates wherever test of personal traits is considered essential. Its relevance as a test for determining suitability based on personal characteristics has been recognised in a number of decisions of this Court which are binding upon us."

58. It was further noted that:

> "The oral interview test is undoubtedly not a very satisfactory test for assessing and evaluating the capacity and calibre of candidates, but in the absence of any better test for measuring personal characteristics and traits, the oral interview test must, at the present stage, be regarded as not irrational or irrelevant though it is subjective and based on first impression, its result is influenced by many uncertain factors and it is capable of abuse. 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."

59. It was ultimately concluded that providing for as high a percentage as 33.5% for the interview segment, was infecting the admission procedure with the vice of arbitrariness. For the facts of the present case, the writ petitioners' contention on violation of the aforementioned dictum in *Ajay Hasia(supra)* is adequately answered in *Lila Dhar(supra)* where the three-judge bench considered the issue of selection of Munsifs for Rajasthan Judicial Service. The selection was to be made through written examination as well as interview where 25% marks were earmarked for the viva voce segment. Distinguishing the judgement in *Ajay Hasia(supra)* which was in the context of college admissions, the Court in *Lila Dhar(supra)* pertinently opined as under:

> "The observations of the Court were made, primarily in connection with the problem of admission to colleges, where naturally, academic

> performance must be given prime importance. The words "or even in the matter of public employment" occurring in the first extracted passage and the reference to the marks allocated for the interview test in the Indian Administrative Service examination were not intended to lay down any wide, general rule that the same principle that applied in the matter of admission to colleges also applied in the matter of recruitment to public services. The observation relating to public employment was per incuriam since the matter did not fall for the consideration of the Court in 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. Ordinarily recruitment to public services is regulated by rules made under the proviso to Art. 309 of the Constitution and we would be usurping a function which is not ours, if we try to redetermine the appropriate method of selection and the relative weight to be attached to the various tests."

60. The above opinion in *Lila Dhar(supra)* makes it clear that the ratio in *Ajay Hasia(supra),* in the context of college admission, may not have much bearing on recruitment for judicial vacancies where oral interviews play an important role to test the personality and caliber of the aspirant to judicial posts.

61. Let us now examine the specific challenge questioning the constitutionality of Rule 8(3) of *Gujarat Rules,2005* which deals with both District Judges and Civil Judges. The Rule 8(3) reads as under:

> "The minimum qualifying marks in the Viva-voce conducted for recruitment to the cadre of District Judge and Civil Judge, shall be forty percent {40%) of marks."

62. To strike down Rule 8(3) of *Gujarat Rules,2005* under Article 14, the argument of the petitioners is that a classification is sought to be created between meritorious and non-meritorious candidates since meritorious candidates who have worked hard to score good marks in the written test may not succeed since the interviewing committee can award below par marks to a candidate, based on their subjective evaluation. The second argument is on the issue of the absence of a level playing field for those from a marginalized

background suggesting that such candidates will be at a disadvantage. In response the learned counsel for the High Court of Gujarat submits that the objective is to select the best possible candidates and the High Court Judges who are conducting the interviews can certainly test the real potential of a candidate, irrespective of their background.

63. A relevant question here is whether those who had high marks in the written test can by itself be considered in the "meritorious" category? This is a debatable issue since the high scores for the written test by itself do not determine the merit and suitability of an aspirant. The performance would also depend on the social, economic, and cultural capital of the candidate. Access to resources such as coaching institutes, quality school education, financial stability, time and flexibility, networking opportunities, mentorship, and access to relevant study materials, are vital factors which also manifestly contribute to the performance in the written test. In the context, the observations of this Court in a case relating to reservation in promotion in *B.K. Pavitra v Union of India*[31] is illuminating where the aspects of "merit" and "efficiency" was discussed in the following passage:-

> "134. It is well settled that existing inequalities in society can lead to a seemingly ―neutral system discriminating in favour of privileged candidates. As Marc Galanter notes, three broad kinds of resources are necessary to produce the results in competitive exams that qualify as indicators of ―merit.
> These are: ―…
> (a) *economic resources* (for prior education, training, materials, freedom from work, etc.);
> (b) *social and cultural resources* (networks of contacts, confidence, guidance and advice, information, etc.); and
> (c) *intrinsic ability and hard work…*‖ [Galanter M., Competing Equalities : Law and the Backward Classes in India, (Oxford University Press, New Delhi 1984), cited by Deshpande S., Inclusion versus excellence : Caste and the framing of fair access in Indian higher education, 40 : 1 South African Review of Sociology 127-147.]

[31] (2019) 16 SCC 129

> 135. The first two criteria are evidently not the products of a candidate's own efforts but rather the structural conditions into which they are borne."

64. As can be seen from above, the reliance on competitive exams or written tests as the sole determinant of merit is increasingly being frowned upon. To borrow the phrase from philosopher Michael Sandel's book, "The Tyranny of Merit", successful candidates often feel a sense of "*meritocratic hubris*"[32], overlooking how factors such as socio-economic background, caste, gender, and other structural inequalities can shape opportunities and outcomes.

65. The written test cannot possibly capture the full spectrum of the individual's abilities and potential. An interview can also provide a medium for marginalized candidates to showcase their talents in ways which a written test may not possibly allow. However, a caveat may be necessary here that candidates hailing from English-speaking urban environments might possess linguistic fluency and familiarity with cultural norms typically associated with interviews and therefore are likely to navigate the viva voce segment with relative ease. Conversely, candidates from marginalized communities may face challenges due to their lack of exposure to urban settings. This is further exacerbated by conscious and unconscious bias on grounds of gender, religion, caste etc. But can we ignore the intrinsic ability of the members of the interview panel constituted by the High Court judges to separate the grain from the chaff? This Court would like to believe that the members of the interview board can provide a level-playing field during the interview process for those who come from a disadvantaged background, to assess the true merit and potential of the interviewees. The solution lies in the interviewing

[32] Michael J Sandel, The Tyranny of Merit: What's become of the Common Good? (Allen Lane,2020)

members being aware and sensitive to alleviate bias in the process of Interview. However, the apprehension of bias cannot be the sole ground to strike down a Rule.

66. As is seen from the precedents, only the overriding weightage to the viva-voce segment has been frowned upon by this Court but the prescription of reasonable qualifying cut-off marks[33] is not considered discriminatory. In any case, administrative law remedies are always available to secure relief in cases where abuse of power is seen. When the minimum cut-off of 20% for the Bihar recruitment and 40% for the Gujarat recruitment are taken into account, those cannot be considered to provide a high threshold if one keeps in mind that the recruitment is for selection of judicial officers. In the context, the object of viva voce set out in Rule 8(5) of *Gujarat Rules, 2005* deserves attention and is extracted:

> "(5) the object of the Viva-Voce Test (interview) is to assess the suitability of the candidate for the cadre by judging the mental alertness, knowledge of law, clear and logical exposition, balance of judgment, skills, attitude, ethics, power of assimilation, power of communication, character and intellectual depth and the like, of the candidate."

67. The above would show that there is a reasonable and direct nexus with the object sought to be achieved i.e. the appointment of well-rounded judicial officers. The prescription of minimum cut off is also not perceived to be of such a nature that it reeks of irrationality, or was capricious and/or without any adequate determining principle. It does not appear to be disproportionate so as to adversely affect "meritorious" candidates, as has been argued. It is certainly not manifestly arbitrary, or irrational or violative of Article 14 of the Constitution of India. For recruitment of judicial officers, ideally the effort

[33] Manish Kumar Shahi v State of Bihar(2010) 12 SCC 576

should be to not only test the candidate's intellect but also their personality. An interview unveils the essence of a candidate— their personality, passion, and potential. While the written exam measures knowledge, the interview reveals character and capability. Therefore, a person seeking a responsible position particularly as a judicial officer should not be shortlisted only by their performance on paper, but also by their ability to articulate and engage which will demonstrate their suitability for the role of a presiding officer in a court. In other words, the capability and potential of the candidate, to preside in Court to adjudicate adversarial litigation must also be carefully assessed during the interview.

68. On the above parameters, it can't be said that the concerned recruitment Rules are unconstitutional. It may also be observed here that there is no violation of the legitimate expectation of the writ petitioners so as to fail the test under Article 14. In *Sivananda CT v High Court of Kerala*[34] which is cited, the factual backdrop was different. The *Kerala State Higher Judicial Services Rules 1961* stipulated that the direct recruitment from the Bar shall be "*on the basis of aggregate marks/grade* obtained in a competitive examination and viva voce conducted by the High Court." It was only after the conduct of viva voce that the High Court decided to have a minimum cut off, as a qualifying criterion. The distinguishing feature is that neither the provisions of the *Kerala State Higher Judicial Services Special Rules,1961* nor the exam scheme or recruitment notification therein stipulated any cut-off for the viva voce. Therefore, it was in that context that the Court held that the minimum cut-off marks was manifestly arbitrary for frustrating the

[34] (2024) 3 SCC 799

substantive legitimate expectation of the candidates under Article 14 of the Constitution. Therefore, the cited case can have no application in the present matters where the cut off marks in the viva voce was notified before commencement of the selection process.

Issue No.iii) Whether the selection process in Bihar is vitiated given the moderation of marks and corrective steps, highlighted by the petitioners in the Bihar Selection process?

69. For this, it needs to be seen whether there are proven allegations of violations of statutory Rules, bias, *malafide* or fraud[35]. In this regard, the four-judge bench in *Ashok Kumar Yadav v. State of Haryana*[36], discussed the threshold for invalidating the entire selection process as under:

> "21. …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."

70. Guided by the above principle, the steps taken by the High Court after the issuance of advertisement as mentioned in the additional affidavit of Patna High Court summarized below, would bear consideration.

> i) The preliminary examination was held on 22.3.2015. 6,771 candidates appeared for the same.
>
> ii) The main exam was held on 12.7.2015 and over 1000 candidates appeared for the same.

[35] K.H. Siraj v. High Court of Kerala, (2006) 6 SCC 395; Inderpreet Singh Kahlon v. State of Punjab, (2006) 11 SCC 356
[36] (1985) 4 SCC 417

iii) The affidavit notes that only 15 candidates obtained qualifying marks in the written exam i.e. above 55%. However, Mr. Gautam Narayan, learned counsel for the Patna High Court has clarified that this is a typographical error and only 3 candidates had, in fact, obtained qualifying marks. This is in consonance with the RTI Reply dated 10.2.2017.

iv) In order to fill up vacancies, the Selection and Appointment Committee of the High Court examined 20 answer sheets of each paper at random. It was decided that there was a need for moderation. Accordingly, the Selection and Appointment Committee comprising of 5 judges of the High Court in its meeting dated 8.1.2016 proposed for moderation by adding 4% marks in Paper I & 6% marks in Paper II.

v) Despite moderation, only few candidates secured above 55% marks in aggregate. Thereafter, the Full Court decided to permit relaxation of 5% in the aggregate marks under proviso to Clause 10 of Appendix C of the 1951 Rules.

vi) After relaxation of marks to 50%, 81 candidates were found qualified in the written examination and results were uploaded on 22.1.2016.

vii) The interviews for those who scored 50% in the written, were conducted on 19.2.2016, 20.2.2016,22.2.2016 and 23.2.2016 by a Board of 5 judges of the High Court. Eventually, only 9 candidates could secure 10 marks or more out of 50 total marks in the interview. The said 9 persons upon Full Court approval were appointed by the Bihar Government on 17.5.2016.

71. After issuance of notice in the Bihar writ petition, the concerned High Court officials while preparing the response, noticed discrepancies during decoding, tabulation and collation of marks and arranged for re-verification of the selection data. Thereafter, the following directions were issued by the Chairperson of the Committee in consultation with the Acting Chief Justice of the Patna High Court:

"In view of summer vacations, the Committee is not available. Discussed the matter with Hon'ble ACJ on phone. Being a serious lapse, the following steps need be taken immediately:

1) Under personal supervision of Registrar (App), Sr. Programmer, Nitesh will undertake the entire exercise of decoding, collation, and tabulation a fresh. In case of any assistance required Registrar General will be consulted. Prepare fresh tabulation, identifying lapses, submit report.

2) Registrar General will conduct enquiry to find out where was the lapses and consequently who was responsible. On this report being submitted, to initiate disciplinary proceedings against the person responsible for these lapses. Registrar General will issue show cause and Brother Ajay Kumar Tripathi will conduct the disciplinary

proceedings. Put up before Hon'ble ACJ no sooner he is available. Matters to be dealt with utmost urgency and confidentiality."

72. After detailed verification of the record, it was found that 3 more candidates had obtained qualifying marks in the written examination for the purpose of viva voce having roll nos. 1111006603, 1111006636 and 1111006667 respectively. It was also found that 4 candidates had not obtained the qualifying marks in the written examination, though they were earlier shown to be qualified. Therefore, a corrigendum was issued on 30.6.2016 by which the High Court cancelled the candidatures of 4 unqualified candidates and also called the 3 other candidates for the viva-voce, who had obtained qualifying marks. The interview of the 3 candidates was held on 19.7.2016. However, none of them could qualify.

73. Mr. Ajit Sinha, learned Senior Counsel had argued that these irregularities are so egregious that it would vitiate the entire selection process. While conceding that moderation did benefit the writ petitioners, it is still argued that the defective procedure must persuade this Court to set aside the selection process in Bihar. Per Contra, Mr. Gautam Narayan, learned counsel for the High Court of Patna argues that the discrepancies in Roll Numbers were due to the mistake of the candidates themselves. As regards moderation, Mr. Narayan, produced a chart before us containing the marks obtained by the candidates before and after moderation to show that it enured to the benefit of the writ petitioners.

74. Whether moderation of marks was legally permissible, would require a reference to the relevant Rules and Advertisement. The relevant Clause 13 of Appendix C of *Bihar Rules,1951* is extracted below: -

"13. The Standing committee of the High Court, Patna may issue orders/directions in case of any doubt and difficulty"

The Para 10 of the 2015 Advertisement reads as under:

> "10. The High Court shall have the power to make any relaxation in or exemption from the aforesaid terms and condition in the interest of Judiciary."

75. The above makes it clear that the High Court has been vested with requisite powers to provide clarification, relaxation and even exemption in the interest of the Judiciary. The words "relaxation" as also the general power to issue orders/directions in case of any "difficulty", would in our view permit the process of moderation in order to provide for the adequate number of candidates for the interview test. The Clause 13 of Appendix C of the Bihar Rules read with Para 10 of the Advertisement provide adequate elbow room to the High Court to overcome difficulties in the selection process. It is nobody's case that the corrective measures were not bonafide. Moreover, the process adopted is consistent with the Rules.

76. In a moderation exercise, addition of marks and/or deduction of marks is envisaged. This Court in *Sanjay Singh v UP Public Service Commission*[37], laid down certain guidelines for moderation of marks in judicial services examination. Preferring the method of "moderation" over "scaling", it was noted that moderation is a more viable technique to reduce the variability of the examiners.

77. In the same context, it would be useful to refer to the judgment in *Pranav Verma & Ors. v. Registrar General of the High Court of Punjab & Haryana*[38] where this Court underscored the option of using moderation or normalization of marks, to ensure the selection of adequate number of candidates. In the said

[37] (2007) 3 SCC 720
[38] (2020) 15 SCC 377

case, this Court had appointed Justice (Retd.) A.K. Sikri, a former Supreme Court judge to examine the selection process in a recruitment exercise where adequate number of candidates had not qualified. The learned judge verified the selection process but found no fundamental flaws. However, deficiencies were found in the evaluation of the Civil Law-I paper as only 8.5 minutes were available to the candidates to answer for each question. This was noted to be insufficient for the descriptive type questions and the lengthy paper. It was also noticed that marking in the Civil Law-II paper was too stringent, with the highest score being 95 out of 200 (47.5%) and the evaluators, as can be noticed, expected lengthy answers for each question without considering the limited time available for the candidates. Despite noting these facts, the Supreme Court held that the selection process need not be invalidated. Instead to save the selection, the Court directed that grace marks be awarded to all examinees.

78. The above would show that if certain resolvable deficiencies are noticed in the selection process, the High Court has the elbow room to take corrective measures. The process of moderation can always be exercised bona fide if it uniformly benefits all the candidates. In the context, the chart produced by the learned counsel for the High Court makes it clear that moderation, in fact, benefited the present writ petitioners to facilitate their participation in the Interview round. The reduction of aggregate marks from 55% to 50% is traceable to the proviso to Clause 10 of Appendix – 'C' of the *Bihar Rules 1951*. A modest variation in the sequence of events narrated in the RTI Reply is shown but even in such situation the additional affidavit makes it clear that following

the moderation exercise, the aggregate marks were reduced to 50%, in accordance with the Rules.

79. The argument that for the interview also the qualifying marks should have been reduced just like in the written test is not acceptable since the Rules itself provided for a reduction in the aggregate marks in the written test. The proviso concerning relaxation is contained in Clause 10 which deals only with the written test. The Court in any case should not step into the shoes of the Selection Committee. The assessment and evaluation of the candidates appearing before the Selection Committee/Interview Board should best be left to the members of the Committee unless it is violative of the statutory Rules or tainted with ill motive. The decision of the Selection Committee was approved by the Full Court for increasing the number of candidates available for final selection.

80. On examination of the subsequent steps taken by the High Court after conducting the exam, we do not find any *mala fide* or statutory violation so as to vitiate the entire selection process in Bihar. Similarly, in the Gujarat cases, besides making vague allegations, the petitioners have not presented any material to demonstrate any malicious intent or bias on the part of the selection Committee in the interview process. Thus, the selection process is not found to be tainted.

Issue No. iv) Whether non-consultation with the Public Service Commission as required under Article 234 of the Constitution for amending the selection Rules stipulating minimum viva voce marks is rendered void?

81. Mr. Pawanshree Agarwal, the learned counsel for the writ petitioner has argued that in IA 20279 of 2022 in WP(C) 663 of 2021, an additional challenge on account of violation of Article 234 has been raised. It is argued that the prescription of minimum qualifying marks in the viva-voce under Rule 8(3) as amended in 2011 was only in consultation with the High Court of Gujarat but not with the Gujarat Public Service Commission. Therefore, in view of the mandatory requirement of Article 234, the Rules must be declared to be void. On the other hand, Mr. Malkan on behalf of the Gujarat High Court contended that the Public Service Commission itself requested for exemption as per the *Gujarat Public Service Commission (Exemption from Consultation) Regulations,1960* framed under the proviso to Article 320(3) of the Constitution of India. Additionally, Ms. Deepanwita Priyanka who appeared through video conferencing for the State of Gujarat, read out the contents of a letter dated 10.6.2005 written by the Gujarat Public Service Commission stating that the proposed post of "Civil Judge", does not fall within its jurisdiction.

82. To appreciate the above contentions, it would be helpful to note the relevant portion of the *Gujarat Rules,2005* prior to the 2011 amendment:

> "In exercise of the powers conferred by the proviso to Article 309 read with Article 234 of the Constitution of India, the Governor of Gujarat, after consultation with the High Court of Gujarat and the Gujarat Public Service Commission, and in supersession of the Gujarat Judicial Services Recruitment Rules, 1961 hereby makes the following Rules regulating the Recruitment to the Gujarat State Judicial) Service."

83. The relevant portion of Gujarat Rules,2005(as amended in 2011) is next extracted:

> "In exercise of the powers conferred by the proviso to article a) read with Articles 233 and 234 of the Constitution of India, the Governor of Gujarat after consultation with the High Court of Gujarat hereby makes the following rules further to amend the Gujarat State Judicial Service Rules, 2005."

84. The omission of the words "and the Gujarat Public Service Commission" in the 2011 Rules is a relevant aspect, that requires attention. Articles 233, Article 234 and 235 in the Constitution which deals with "Subordinate Courts" would bear consideration here. Article 233 provides for the appointment of District Judges without requirement of consultation with Public Service Commission. The Article 234 empowers the Governor of a State to make appointments of persons other than District Judges to the judicial service of a State in accordance with the Rules after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. Article 235 provides for the control of the High Court over the Subordinate Courts. Article 234 is relevant for our purpose:

> "Appointment of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State"

85. Since the Rules were framed as per the proviso to Article 309, it is also extracted below for ready reference:

> "309. Recruitment and conditions of service of persons serving the Union or a State
>
> Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

86. This Court has had the occasion to examine the aforementioned provisions in the Articles in multiple decisions. While it is true that Article 234 mandates consultation with the Public Service Commission and the High Court, the five-judge Constitution Bench of this Court in *State of Bihar v. Bal Mukund Sah*[39](for short "Bal Mukund"), noted that there is a fine distinction in the nature of consultation between the two:

> **"51.** As seen earlier, consultation with the High Court as envisaged by Article 234 is for fructifying the constitutional mandate of preserving the independence of the Judiciary, which is its basic structure. The Public Service Commission has no such constitutional imperative to be fulfilled. The scope of the examining body's consultation can never be equated with that of consultation with the appointing body whose agent is the former. It is also pertinent to note that the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice which in turn depends on sufficient information and time being given to the party concerned to enable it to tender useful advice. It is difficult to appreciate how the Governor while consulting the Public Service Commission before promulgating the rules of recruitment under Article 234 has to solicit similar type of advice as he would solicit from the High Court on due consultation. The advice which in the process of consultation can be tendered by the Public Service Commission will confine itself to the constitutional requirements of Article 320. They are entirely different from the nature of consultation and advice to be solicited from the High Court which is having full control over the Subordinate Judiciary under Article 235 of the Constitution and is directly concerned with the drafting of efficient judicial appointments so that appropriate material will be available to it through the process of selection both at the grass-root level and at the apex level of the District Judiciary. Consultation, keeping in view the role of the High Court under Article 234 read with Article 235, stands on an entirely different footing as compared to the consultation with the Public Service Commission which has to discharge its functions of an entirely different type as envisaged by Article 320 of the Constitution."

87. It is well-settled that the consultation with the High Court as envisaged in Article 234 is to preserve the constitutional mandate of the Independence

[39] (2000) 4 SCC 640

of the judiciary which forms part of the basic structure of the Constitution of India. The consultation with the High Court must be given primacy in matters of judicial recruitment as compared to the consultation with the Public Service Commission.

88. With the above understanding of the law, let us now refer to Article 320 of the Constitution of India which is extracted below:

> "**Functions of Public Service Commission**
> (1)It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.
> (2)It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.
> **(3)**The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted—
>
> a. on all matters relating to methods of recruitment to civil services and for civil posts;
> b. on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;
> c. on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;
> d. on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;
> e. on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award,
> and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the

President, or, as the case may be, the Governor of the State, may refer to them:
Provided that the President as respects the all- India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.
Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of article 16 may be made or as respects the manner in which effect may be given to the provisions of article 335.
All regulations made under the proviso to clause (3) by the President or the Governor of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid."
[emphasis supplied]

89. The source for the consultation with the "Public Service Commission" under Article 234 of the Constitution of India is to be traced from Article 320 of the Constitution which deals with the "Functions of Public Service Commission". In this regard, Justice Hidayatullah in Constitutional Law of India[40] had this to say on the nature of consultation:

> "The Consultation with the High Court is imperative. The insistence on the consultation with the High Court is obviously attributable to the recognition of that source as one from which the most useful advice is obtainable on a matter concerning a service under its own control. Requirement to consult the Public Service Commission is equally understandable for the reason that the Commission is enjoined by Article 320 to conduct examinations for appointment to the Services under the State."

[40] M. Hidayatullah(Ed), Constitutional law of India (The Bar Council of India Trust in association with Arnold-Heinemann Publishers, 1984) Vol. 2,147

90. This Court has consistently held[41] that the High Court should be assigned primacy in the process of consultation and the Rules framed without such consultation would be void. The same however is not true for absence of consultation, with the Public Service Commission. In *State of U.P. v. Manbodhan Lal Srivastava*[42], this Court while interpreting Article 320(3) of the Constitution had noted that the word "shall" though generally taken in a mandatory sense, must be interpreted as "may", leading to the conclusion that the consultation under Article 320(3), is not mandatory. Tracing the power of the High Court under Article 235 of the Constitution of India, in *Rajendra Singh Verma v. Lt. Governor (NCT of Delhi)*[43], in the context of compulsory retirement, the Court pertinently noted that:

> "*36.* The Governor could not have passed any order on the advice of the Public Service Commission in this case. The advice should be of no other authority than the High Court in the matter of judicial officers. This is the plain implication of Article 235. Article 320(3)(*c*) is entirely out of place so far as the High Court is concerned dealing with judicial officers. To give any other interpretation to Article 320(3)(*c*) will be to defeat the supreme object underlying Article 235 of the Constitution specially intended for the protection of the judicial officers and necessarily the independence of the subordinate judiciary. It is absolutely clear that the Governor cannot consult the Public Service Commission in the case of judicial officers and accept its advice and act according to it. There is no room for any outside body between the Governor and the High Court."

91. At this stage, it needs to be clarified that this Court is not tasked to authoritatively decide whether consultation with Public Service Commission should be "mandatory" or "directory" under Article 234 of the Constitution of India. The question that needs to be answered in these matters is whether the Rules would be rendered void, in case the Public Service Commission itself

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[41] AC Thalwal v High Court of Himachal Pradesh, (2000) 7 SCC 1; Supreme Court Advocates-on-Record Association v Union of India (1993) 4 SCC 441; Hari Dutt Kainthla v State of Himachal Pradesh 1980 3 SCC 189

[42] AIR 1957 SC 912

[43] (2011) 10 SCC 1

didn't wish to be consulted? The letter dated 10.6.2005, written by the Joint Secretary of the Public Service Commission is relevant and is extracted as follows: -

> "Sir,
> With reference to the subject noted above, vide the Notification No. GK-2005-5-JSR-1982-994-D, dated 9/05/2005 of the Legal Department, the recruitment rules of instant post have been issued. In pursuance of the details of the letter dated 6/06/2005 of the Commission, it is requested to remove the provision of "and the GPSC" from third line of the first paragraph of aforementioned rules. As the proposed posts under the recruitment rules do not fall within the purview of the Commission, it is requested to initiate the procedure to remove aforementioned words from aforesaid published recruitment rules."

92. The learned counsel for the Gujarat High Court has relied on Entry 11B in the Schedule to the *Gujarat Public Service Commission (Exemption from Consultation) Regulations,1960* framed under the proviso to Article 320(3) of the Constitution which mentions the post of "The Civil Judge (Junior Division) and Judicial Magistrate of First Class."

93. The above discussion persuades us to say that the Governor is under no compulsion to consult the Public Service Commission in case the Commission does not wish to be consulted. Such a course would be in consonance with the proviso to Article 320(3) of the Constitution. The concerned Gujarat Rules cannot, therefore, be declared to be void on this count.

94. For the Writ Petitioner, reliance has been placed by Mr. Pawanshree Agarwal on the decision of the Bombay High Court in *Goa Judicial Officer's Association v State of Goa*[44] to argue that the consultation with Public Service Commission is mandatory. While it is true that the Bombay High Court

[44] 1997(4) BOM CR 372

decided that the consultation is mandatory, a careful reading of the judgment would show that the Court refused to grant any relief to the petitioner therein noting that this was an issue between the Government and the PSC and the petitioner could not claim any cause of action. The High Court specifically noted as under:

> "20. This controversy, however, need not detain us for long, because even assuming that there was no consultation at all, whether the petitioner is entitled to get any relief in this petition on that score is to be examined. The consultation or non-consultation is a matter between the Public Service Commission and the Government and that too at the stage of framing rules. Therefore, individual candidates are not very much concerned with that. Their rights are not dependent upon or decided upon the consultation or non-consultation with either the High Court or with the Public Service Commission. Therefore, non-consultation with the Public Service Commission will not give any cause of action to the petitioner or any one of the members of the petitioner's Association to maintain this writ petition."

95. Similarly, reliance by the petitioners counsel on the judgment of the Madras High Court in *N. Devasahayam v. State of Madras*[45] as regards the mandatory nature of the Consultation which is argued to have been endorsed by the Constitution Bench of this Court in *Bal Mukund(supra),* is found to be misplaced. In *Bal Mukund(supra),* the Court endorsed the finding in *N. Devasahayam (supra),* but the judgment would also show that there is no authoritative finding on the 'mandatory' or 'directory' nature of Article 234.

96. Likewise, the judgment of the Supreme Court in *AC Thalwal v High Court of HP*[46] would also be of no assistance for the petitioners as in that case, the *Ex-Servicemen (Reservation of Vacancies in the Himachal Pradesh Judicial Service) Rules, 1981* was declared ultra vires the Constitution and hence void

[45] AIR 1958 Mad 53
[46] (2000) 7 SCC 1

in the context of non-consultation with the High Court but not with the Public Service Commission under Article 234 of the Constitution of India. As discussed earlier, the Court noted that "the status which the High Court as an institution enjoys in the constitutional scheme and the expertise and the experience which it possesses of judicial services, justify a place of primacy being assigned to the High Court in the process of consultation." It is undoubtedly mandatory to consult the High Court for framing Rules and any Rule enacted by the State Government without such consultation is considered ultra vires. The rationale is to safeguard the judicial service from executive influence which is rooted in the constitutional objective of establishing an independent judiciary.

97. In Gujarat, when the Public Service Commission did not wish to be consulted under the proviso to Article 320(3) of the Constitution of India, in the absence of such consultation, it cannot be held that the *Gujarat Rules, 2005* suffers from any legal or constitutional invalidity particularly when the Rules were framed with due consultation with the High Court.

VII. CONCLUSION AND DIRECTIONS

98. Before reaching our final conclusion in these matters, reference to *Malik Mazhar v. U.P Public Service Commission*[47] would be in order where the Supreme Court emphasised the importance of having a prescribed time-schedule for conducting the judicial service examinations. The need for having a fixed timeline for each step of the examination process was also suggested in this case. Recently, taking note of the judicial vacancies in District

[47] (2006) 9 SCC 507

Judiciary, this Court had taken suo moto cognizance[48] and directed the High Courts and State governments to report on whether the judicial vacancies will be filled in a timely fashion, as prescribed in *Malik Mazhar(supra)* . A report of the Supreme Court's Centre for Research and Planning[49] notes that despite the judgment in *Malik Mazhar(supra)* prescribing timelines for recruitment, only 9 out of 25 states completed the recruitment of Civil Judge (Judge Division), within the stipulated time frame. The report notes that the State of Bihar took 945 days to complete the recruitment process computed from the date of advertisement (March 9,2020) to the date of final result (October 10,2022).

99. As can also be seen in the matters before us, for the Bihar selection process, the advertisement was issued in January, 2015; the final selection was made on 17.5.2016, and because of the need to do a few course corrections, the last candidate was called for the interview only in August, 2016. Similarly, for the selection of Civil Judges in Gujarat, while the advertisement was issued in 2019, the selection process could be completed only in 2021.

100. To avoid the meandering process noticed in the recruitment in the State of Bihar and to ensure more clarity and certainty with the process, we deem it necessary to declare that processes such as moderation should be preferably set out in the Rules to ensure transparency and avoid dilemmas in the selection process. The moderation of marks for bonafide reasons should be permitted when the authority needs to do so, to address the issue of non-

[48] Filling up of Vacancies, In re, 2018 SCC OnLine SC 3648
[49] Centre for Research and Planning, Supreme Court of India, *State of the Judiciary, A Report on Infrastructure, Budgeting, Human Resources and ICT*(November 2023)

availability of adequate number of candidates for consideration in the interview segment. As a confidence building measure, the designation of those in the interview panel, could also be provided for appropriately, in the Rules. It would be apposite at this stage to note a few of the recommendations flagged in the December,2018 Report of Vidhi Centre for Legal Policy titled "Discretion & Delay- Challenges of Becoming a District & Civil Judge"[50] which examined the judicial Service Rules of 29 States. The absence of a designated authority that can be approached by the candidates is flagged in the said report. As this appears to be a valid concern, the concerned High Court should notify a designated authority for a given recruitment process with clearly defined roles, functions and responsibilities. The candidates can approach such a designated authority to seek clarification in case of any doubt and this would assuage the anxiety of the candidates to a considerable extent. Another such suggestion of providing a basic outline of the syllabus for the proposed test will also help candidates from diverse backgrounds to plan and prepare for the proposed examination even before the examination notification is released. The recruitment process must adhere to the timeline but if there is any special and unavoidable exigency, the stakeholders should be kept informed with due promptitude.

101. To enable all the stakeholders to take consequential steps pursuant to the above directions, this judgment should be brought to the notice of the Hon'ble Chief Justices of all the High Courts in India.

[50] Diksha Sanyal and Shriyam Gupta, "Discretion and Delay: Challenges in Becoming a District and Civil Judge" (December 2018)< https://vidhilegalpolicy.in/research/2019-1-7-discretion-and-delaychallenges-of-becoming-a-district-and-civil-judge/> accessed 3rd May,2024

102. With the foregoing discussion, the following conclusions are reached for the cases under consideration: -

i) The Prescription of minimum qualifying marks for interview is permissible and this is not in violation of *All India Judges (2002)* which accepted certain recommendations of the Shetty Commission.

ii) The validity challenge to Clause 11 of the *Bihar Rules, 1951* and Rule 8(3) of the Gujarat Rules, 2005 (as amended in 2011) prescribing minimum marks for interview are repelled.

iii) The impugned selection process in the State of Bihar and Gujarat are found to be legally valid and are upheld.

iv) The non-consultation with the Public Service Commission would not render the Gujarat Rules, 2005 (as amended in 2011) void.

The Writ petitions are, accordingly, dismissed without any order on cost.

.....J.
[HRISHIKESH ROY]

.....J
[PRASHANT KUMAR MISHRA]

NEW DELHI;
MAY 06, 2024