IN THE HIGH COURT OF JUDICATURE AT PATNA
CWJC No.8054 of 2008
MANISH KUMAR SHAHI
Versus
THE STATE OF BIHAR & ORS

For the Petitioner : Mr. Basant Kumar Choudhary, Senior Advocate

For the Respondents : Mr. Mahesh Prasad, Standing Counsel VIII

P R E S E N T

Hon'ble the Chief Justice
&
Hon'ble Mr. Justice Kishore K. Mandal

Dated, the 15th July, 2008.

We heard the senior counsel for the petitioner and Standing Counsel VIII for the State of Bihar.

2. The petitioner has prayed for the following reliefs:

"(i) For issuance of a writ of certiorari quashing the result of 26th Bihar Judicial Services Competitive Examination 2005 contained in Annexure -2 declaring the name of 264 general category candidates for the purpose of appointment on the post of munsif in the sub-ordinate judiciary and direct the respondents to hold fresh selection after reducing the proper percentage of marks in the viva-voce test.

(ii) For issuance of an appropriate writ declaring the provision for 200 marks (19.05%) for viva-voce out of total marks 1050 in the 26th Judicial service competitive examination in 2005 contained in Appendix – 6 to Bihar Civil Services (Judicial Branch) Recruitment Rules 1955 ultra- vires the Constitution of India being destructive of Article 14 of the same.

(iii) In the alternative of not allowing relief No. (i) for issuance of writ of mandamus/direction commanding/directing the respondents to appoint the

petitioner on one of the vacant posts of the munsif (junior grade civil judge)

(iv) For issuance of an ad-interim order during the pendency of this writ petition restraining the respondents from filing up vacant seats of munsif remaining vacant on account of non joining by successful candidate or leaving the jobs by some of the same."

3. Bihar Public Service Commission (for short, 'BPSC') issued an advertisement in the year 2005 bearing Advertisement no. 43/2005 inviting applications from eligible candidates for appointment in Bihar Judicial Services. For the sake of brevity and convenience we shall refer the process, '26th Judicial Competitive Examination, 2005'. The petitioner applied and appeared in the written examination held by the BPSC for that purpose. The result of successful candidates in the written examination is said to have been published on 30.6.2007. The petitioner was declared successful candidate having secured more than 40% marks in each paper and more than minimum prescribed aggregate marks of 492 as was fixed by the BPSC. Vide memo no. 945 dated 20.7.2007, the petitioner was informed to appear in the interview (viva-voce test) on 7th August, 2007. He did appear for viva-voce test on that date. The list of selected candidates was published by the BPSC on 24th August, 2007. The petitioner was not amongst successful candidates. After about nine months of the declaration of result, the present writ petition has been filed in the

challenge is sought to be made that the maximum marks of 200 for viva-voce test was excessive, which is not permissible. The standing counsel placed reliance upon the decision of the Supreme Court in the case of Dhananjay Malik & ors. Vs. State of Uttaranchal & ors. 2008(3) PLJR (SC) 271.

6. On the other hand, the senior counsel for the petitioner would [redacted] submit that plea of estoppel does not arise in the present case as the petitioner seeks to challenge the constitutional validity of the Rule that prescribes 200 marks for viva-voce test out of total marks 1050 being unreasonable and violative of Article 14 of the Constitution of India. In support of his submission, he relied upon the following decisions viz. - ***Ashok Kumar Yadav and ors. Vs State of Haryana and ors. A.I.R. 1987 SC 454; Mohinder Sen Garg Vs. State of Punjab and ors. (1991) 1 Supreme Court Cases 662; Ashok alias Somanna Gowda and anr. Vs. State of Karnataka (1992) 1 Supreme Court Cases 28; Raj Kumar and ors. Vs. Shakti Raj & ors. (1997) 9 Supreme Court Cases 527 and Vijay Syal and anr. Vs. State of Punjab and ors. A.I.R. 2003 Supreme Court 4023.***

7. It pains us to observe that although the petitioner has sought to put in issue the constitutionality of amended Appendix – 6 of Bihar Civil Services (Judicial Branch) Recruitment Rules 1955, which according to the petitioner, provides for 200 marks of

month of May, 2008 and as noticed above, the petitioner has sought to challenge the constitutionality of Appendix – 6 of Bihar Civil Services (Judicial Branch) Recruitment Rules 1955 which, according to the petitioner, provides for excessive marks for viva-voce test.

4. On behalf of the State government, a counter affidavit has been filed. Inter alia, it is stated therein that after completion of examination and selection process of 26th Judicial Competitive Examination, 2005, the BPSC recommended the names of 318 successful candidates to the Personnel and Administrative Reforms Department, Government of Bihar, Patna and the candidates recommended by the BPSC already been appointed to the post of Civil Judge, Junior Division. It is stated that as per Circular no. 11018 dated 17th June, 1977 issued by Personnel & Administrative Reforms Department, the unfilled vacancies due to non-joining on the post by the candidates for any other reason are required to be carried forward to the next year.

5. At the outset, Mr. Mahesh Prasad, the Standing counsel submitted that the petitioner is estopped from challenging the selection criterion including the constitutional validity of Appendix – 6 of Bihar Civil Services (Judicial Branch) Recruitment Rules 1955 now since he participated in the selection process without demur and having remained unsuccessful, the

viva-voce test out of total marks but despite our repeated query, the amended provision under challenge has not been shown by the senior counsel for the petitioner.

8. The question that falls for our consideration is: whether in a fact situation like this where the petitioner appeared in 26th Judicial Competitive Examination 2005, without demur, knowing it full well that out of the total marks of 1050, the maximum marks of written examination were 850 and the viva-voce test was of 200 marks and the entire selection process has been over long back, should the court consider the petitioner's grievance on merit after he was unsuccessful in the said competitive examination ?

9. Relying upon the case of Ashok Kumar Yadav (supra), the senior counsel referred to paragraphs 26 and 27 of the report which read thus :

> "26. We may now, in the background of this discussion, proceed to consider whether the allocation of as high a percentage of marks as 33.3% in case of ex service officers and 22.2 percent in case of other candidates for the viva voce test renders the selection process arbitrary. So far as ex service officers are concerned, there can be no doubt that the percentage of marks allocated for the viva voce test in their case is unduly high and it does suffer from the vice of arbitrariness. It has been pointed out by the Division Bench in a fairly elaborate discussion that so far as the present selections in the category of ex service officers are concerned, the spread of marks in the viva voce test was inordinately high compared to the spread of marks in the written examination. The minimum marks required to be obtained in the written examination for eligibility for the viva voce test are 180

and as against these minimum 180 marks, the highest marks obtained in the written examination in the category of ex service officers were 270, the spread of marks in the written examination thus being only 90 marks which works out to a ratio of 22.2%. But when we turn to the marks obtained in the viva voce test, we find that in case of ex service officers the lowest marks obtained were 20 while the higher marks secured were 171 and the spread of marks in the viva voce test was thus as wide as 151 in a total of 200 marks, which worked out to an inordinately high percentage of 76. The spread of marks in the viva voce test being enormously large compared to the spread of marks in the written examination, the viva voce test tended to become a determining factor in the selection process because even if a candidate secured the highest marks in the written examination, he could be easily knocked out of the race by awarding him the lowest marks in the viva voce test and correspondingly, a candidate who obtained the lowest marks in the written examination could be raised to top most position in the merit list by an inordinately high marking in the viva voce test. It is therefore obvious that the allocation of such a high percentage of marks as 33.3% opens the door wide for arbitrariness and in order to diminish, if not eliminate, the risk of arbitrariness, this percentage needs to be reduced. But while considering what percentage of marks may legitimately be allocated for the viva voce test without incurring the reproach of arbitrariness, it must be remembered that ex service officers would ordinarily be middle aged persons of mature personality and it would be hard on them at that age to go through along written examination involving eight subjects and hence it would not be unfair to require them to go through a shorter written examination in only 5 subjects and submit to a viva voce test carrying a higher percentage of marks than what might be prescribed in case of younger candidates. The personalities of these ex service officers being fully mature and developed, it would not be difficult to arrive at a fair assessment of their merits on the basis of searching and incisive viva voce test and therefore in their case, the viva voce test may be accorded relatively greater weight. But in any event the marks allocated for the viva voce test cannot be as high as 33.3%.

27. The position is no different when we examine the question in regard to the percentage of marks allocated for the viva voce test in case of persons belonging to the

general category. The percentage in the case of these candidates is less than that in the case of ex-service officers, but even so it is quite high at the figure of 22.2. Here also it has been pointed out by the Division Bench by giving facts and figures as to who in the case of present selection from the general category the spread of marks in the viva voce test was inordinately high compared to the spread of marks in the written examination so that a candidate receiving low marks in the written examination could be pulled up to a high position in the merit list by inordinately high marking in the viva voce test. The viva voce test in the general category, too, would consequently tend to become a determining factor in the process of selection, tilting the scales in favour of one candidate for the other according to the marks awarded to him in the viva voce test. This is amply borne out by the observations of the Kothari Committee in the Report made by it in regard to the selections to the Indian Administrative Service and other allied services. The competitive examination in the Indian Administrative Service and other allied services also consists of a written examination followed by a viva voce test. Earlier in 1948 the percentage of marks allocated for the viva voce test was 22 and it was marginally brought down to 21.60 in 1951 and then again in 1964, it was scaled down to 17.11. The Kothari Committee in its Report made in 1976 pleaded for further reduction of the percentage of marks allocated for the viva voce test and strongly recommended that the viva voce test should carry only 300 out of a total of 3000 marks. The Kothari Committee pointed out that even where the percentage of marks allocated for the viva voce test was 17.11, nearly 1/4th of the candidates selected owed their success to the marks obtained by them at the viva voce test. This proportion was regarded by the Kothari Committee as "somewhat on the high side". It is significant to note that consequent upon the Kothari Committee Report, the percentage of marks allocated for the viva voce test in the competitive examination for the Indian Administrative Service and other allied services was brought down still further to 12.2. The result is that since the last few years, even for selection of candidates in the Indian Administrative Service and other allied services where the personality of the candidate and his personal characteristics and traits are extremely relevant for the purpose of selection, the marks allocated for the

viva voce test constitute only 12.2% of the total marks. Now if it was found in the case of selection to the Indian Administrative Service and other allied services that the allocation of even 17.11% marks for the viva voce test was on the higher side and it was responsible for nearly 1/4th of the selected candidates securing a place in the select list owing to the marks obtained by them at the viva voce test, the allocation of 22.2% marks for the viva voce test would certainly be likely to create a wider scope for arbitrariness. When the Kothari Committee, admittedly an Expert Committee, constituted for the purpose of examining recruitment policy and selection methods for the Indian Administrative Service and other allied services took the view that the allocation of 17.11% marks for the viva voce test was on the higher side and required to be reduced, it would be legitimate to hold that in case of selections to the Haryana Civil Services (Executive Branch) and other allied services, which are services of similar nature in the State, the allocation of 22.2% marks for the viva voce test was unreasonable . We must therefore regard the allocation of 22.2% of the total marks for the viva voce test as infecting the selection process with the vice of arbitrariness."

10. It is pertinent to notice that in the case of Ashok Kumar Yadav, the Supreme Court observed that there could not be any hard and fast rule regarding the precise weight to be given to the viva voce test as against the written examination. It must vary from service to service according to the requirement of the service, the minimum qualification prescribed, the age group from which the selection is to be made, the body to which the task of holding the viva voce test is proposed to be entrusted and a host of other factors. It is essentially a matter for determination by experts. The court said that the court did not possess the necessary equipment and it

would not be right for the court to pronounce upon it, unless to use the words of Chinnappa Reddy, J in Liladhar's case "exaggerated weight has been given with proven or obvious oblique motives".

11. While referring to the case of Mohinder Sain Garg, the senior counsel for the petitioner relied upon paragraph 35 of the report which is as follows –

> "35. The question which now falls for consideration is as to what direction can be given in these cases. Petitioners Charanjit Singh and Davinder Prithpal Singh belong to the category of backward classes. Charanjit Singh had secured 143.5 and Davinder Prithpal Singh had secured 129 marks in the written papers. A perusal of the marks sheet made available to us at the time of hearing shows that Charanjit Singh had applied for being considered for both posts of Excise Inspector as well as Taxation Inspector. He was however disqualified for the post of Excise Inspector due to non- fulfilment of physical standard as stated in the advertisement. Davinder Prithpal Singh had applied for the post of Taxation Inspector only and both these petitioners could lay claim for the post of Taxation Inspector only. It may be noted that only one post was reserved in the category of backward classes for the post of Taxation Inspector. 95 candidates belonging to the backward classes had qualified in the written examination and as such called for interview. According to the respondents one post reserved in the category of backward classes had gone to Bhupinder Pal Singh who had secured 183 marks in the written papers and 50 marks in viva voce test, thus in all 233. It has been contended on behalf of these petitioners that Bhupinder Pal Singh having secured 233 marks was even entitled to have been selected in the general category itself as the last candidate selected in the general category had secured much less marks than 233 secured by Bhupinder Pal Singh. We see no force in the above contention. The respondents have selected Bhupinder Pal Singh against the seat reserved backward class. That apart a large number of candidates belonging to backward class had secured very high marks in written papers in comparison to the two petitioners Charanjit Singh and Devinder

> Prithpal Singh who had secured 143.5 and 129 marks in the written papers. The original marks sheet shows that at least seven candidates of backward class had secured 170 to 176 marks in written papers but were not selected in merit. Thus, even if we had quashed the entire selections and would have given a direction to hold the viva voce test afresh by reducing the percentage of marks, it would have been a futile exercise so far as these two petitioners are concerned as they stood no chance of being selected even remotely. Even if for argument's sake Bhupinder Pal Singh was given a post out of general category and then fill one post of Taxation Inspector out of 95 candidates belonging to the category of backward class. It was well nigh impossible for the above mentioned two petitioners to lay any claim for the said one post reserved for backward class. According to Ashok Kumar Yadav case candidate should be called only three times the number of seats available for appointment. If that criteria was applied then the above mentioned two petitioners had even no chance of being called for interview for one post of Taxation Inspector in the category of backward class. Thus we find no force in the appeal filed by Devinder Prithpal Singh and the writ petition filed by Charanjit Singh."

12. In the case of Mohinder Sain Garg also, despite holding that the selection was vitiated on the ground of allocation of high marks in viva voce test, the selection already made was not set aside. The Supreme Court held that it was not in the interest of justice to cancel the appointment and to give a direction to hold a fresh selection after reducing the percentage of marks in the viva voce test.

13. The Supreme Court in the case of Ashok alias Somanna Gowda & anr. having held that the allotment of 33.3 per cent of total marks for viva voce test was excessive and arbitrary,

did not quash the selections on that ground. The following observations are relevant for the purpose ---

> "Thus it is an admitted position that if the marks for interview were kept even at 15 per cent of the total marks and merit list is prepared accordingly then both the appellants were bound to be selected and a large number of selected candidates would have gone much lower in the merit list than the appellants. In view of the fact that the result of the impugned selection was declared in 1987 and the selected candidates have already joined the posts, we do not consider it just and proper to quash the selections on the above grounds. Further the selections were made according to the Rules of 1973 and this practice is being consistently followed for the last 17 years and there is no allegation of any mala fides in the matter of the impugned selections. However, the rules are clearly in violation of the dictum laid down by this Court in the above referred cases and in case the marks for viva voce would have been kept say at 15 per cent of the total marks, the appellants before us were bound to be selected on the basis of marks secured by them in interview, calculated on the basis of converting the same to 15 percent of total marks".

14. In the case of Madan Lal & ors. Vs. State of J & K and ors. (1995) 3 Supreme Court Cases 486, the Supreme Court made the following weighty observations in paragraph 9:

> "Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their

combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla Vs. Akhilesh Kumar Shukla it has been clearly laid down by a bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."

15. It is pertinent to notice that the Supreme Court considered its previous decision in the case of Akhilesh Kumar Shukla (AIR 1986 SC 1043) and held that the petitioners took a chance to get themselves selected at the oral interview and only because they did not find themselves to be successful as a result of their combined performance; both in oral interview and written test, they have filed this petition. It was reiterated that if a candidate takes a calculated chance and appears in the interview, then only because the result of interview is not palatable to him he cannot turn around and subsequently contend that the process of interview was unfair or the selection committee was not properly constituted.

16. The Supreme Court made the following observations in the case of Raj Kumar (supra) in paragraph 16 of the report –

" Yet another circumstance is that the Government had

not taken out the posts from the purview of the Board, but after the examinations were conducted under the 1955 Rules and after the results were announced, it exercised the power under the proviso to para 6 of 1970 Notification and the posts were taken out from the purview thereof. Thereafter the Selection Committee was constituted for selection of the candidates. The entire procedure is also obviously illegal. It is true, as contended by Shri Madhava Reddy, that this Court in *Madan Lal V. State of J & K2* and other decisions referred therein had held that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge either the constitution of the Selection Board or the method of selection as being illegal; he is estopped to question the correctness of the selection. But in his case, the Government have committed glaring illegalities in the procedure to get the candidates for examination under the 1955 Rules, so also in the method of selection and exercise of the power in taking out from the purview of the Board and also conduct of the selection in accordance with the Rules. Therefore, the principle of estoppel by conduct or acquiescence has no application to the facts in this case. Thus, we consider that the procedure offered under the 1955 Rules adopted by the Government or the Committee as well as the action taken by the Government are not correct in law."

17. The case of Madan Lal was distinguished by observing - *"Therefore, the principle of estoppel by conduct or acquiescence has no application to the facts in this case."*

18. In the case of Vijay Syal (supra), upon which reliance was placed by the senior counsel for the petitioner, the Supreme Court held thus:

"12. As can be seen from the difference of marks secured by the candidates in interview, it does not appear abnormal or *per se* does not smell of any foul play or does not appear patently arbitrary. The lowest of the marks given in the interview are 11.5 and the highest are

22.87. Further marks secured in the interviews and the marks secured in written test are also not grossly disproportionate. This apart, out of total marks of 240, only 25 marks were earmarked for interview. So 25 marks for interview out of 240 as against 200 for written test and 15 marks for qualification and other activities do not admit an element of arbitrariness or give scope for use of discretion recklessly or designedly in giving more marks to show favour in interview so as to give an advantage or march to an undeserving candidate of their over others who had show extraordinary merit in written test. From the chart, we find among the candidates, marks secured in the written test were between 119 to 128 except in one case belonging to Scheduled Castes were 114. This apart, the marks secured in the interview are based on the assessment of the Interview Committee. Normally, it is not for the court to sit in judgment over such assessment and particularly in the absence of any *mala fides* or extraneous considerations attributed and established. The interview marks of 25 as against total marks of 240, 10.4 % . Possibly the selection would have been vitiated if the marks for interview were 100, as against 150 marks for written test as sought to be made out. Unfortunately, for the appellants, their misrepresentation in this regard, is unfolded very clearly as already stated above. Further, the appellants, knowing the criteria fixed for selection and allocation of marks, did participate in the interview; when they are not successful, it is not open to them to turn around and attack the very criteria. The High Court in the impugned order has found that the criteria contained in Annexure-R-1 file in the writ petition was published and that such criteria was adopted earlier also in respect of other selections."

19. It is pertinent to notice here that the Supreme Court reiterated what was said in the case of Madan Lal that the appellants knowing the criterion fixed for selection and allocation of marks, did participate in the interview; when they are not successful, it is not open to them to turn around and attack the very criteria.

20. In the light of the aforesaid legal position, it has to be held and we do hold that the petitioner by his conduct has disentitled himself to any relief in the high prerogative jurisdiction of this Court. He was well aware when he applied to appear in 26th Judicial Competitive Examination 2005 that out of combined written test and viva-voce test of total marks of 1050, 200 marks have been provided for viva-voce test. The petitioner had no grievance about that criteria when he applied nor he had any grievance when he appeared in the written test and the viva-voce test. Had he been successful, he would have no grievance at all about the provision of maximum 200 marks for interview. Had he secured higher marks in the viva-voce test, he would have been happy with the provision made in the Rules. It is only after the entire selection process has been over and he remained unsuccessful that he thought of raising grievance about unreasonableness of maximum 200 marks fixed for viva-voce test. He approached the court much after the entire selection process was over. BPSC had recommended the names of 318 candidates for selection and the Personnel and Administrative Reforms Department, Government of Bihar appointed the selected candidates. The entire selection process has been over. In our view the same cannot be undone or upturned at the instance of the petitioner who approached the court only after he remained unsuccessful in the examination on the plea that the

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provision of maximum 200 marks for viva –voce out of total marks 1050 was unreasonable. If out of 318 candidates who were recommended by the BPSC to the State Government for appointment, any candidate did not join, that vacancy has to be carried forward to the next year. There is no challenge to the circular issued by the Personnel and Administrative Reforms Department way back in the year 1977 that any vacancy having remained unfilled due to non- joining of the selected candidates will be carried forward to the next year.

21. All in all, in what we have discussed above, we find no justification to admit this petition. It is dismissed *in limine*.

Sd/- R. N. Lodha, J.

Sd/- Kishore K. Mandal, J.

Anil/

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For Joint Registrar (J)
Patna High Court
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