

Joginder Singh vs. State of Haryana and others (P. C. Jain, C.J.)

Education Officer, Hoshiarpur by this letter of January 2, 1978 (Annexure P-7) that as per orders of the Director of Public Instruction of January 18, 1977, these instructions would be applicable only if a writ petition was filed by the petitioner. It is this communication that compelled the petitioner to file the present writ petition and so unnecessarily too.

(7) When it had been held by the Court that Government was duty bound to fix the pay of teachers of private schools in accordance with principles settled at the time they were taken over, it was incumbent upon the authorities concerned to fix the pay of all such teachers in the same manner. Those who had filed petitions under Article 226 of the Constitution of India in this behalf did not thereby form or constitute any special category warranting different treatment from those who though similarly placed had not approached this Court for this purpose. Compelling the petitioner to resort to legal proceedings in this situation, cannot but invite adverse comment.

(8) The petitioner is accordingly hereby granted the relief claimed, namely, a direction to the respondents to fix his pay in accordance with the memorandum of August 28, 1961. This writ petition is thus accepted with costs, which considering the circumstances here are assessed at Rs. 1,000.

H.S.B.

FULL BENCH

Before: P. C. Jain, C. J., S. S. Kang, and I. S. Tiwana, JJ.

JOGINDER SINGH,—Petitioner.

versus

STATE OF HARYANA AND OTHERS,—Respondents.

Civil Writ Petition No. 833 of 1986

July 17, 1986

Haryana Excise and Taxation Inspectorate (State Service Class III) Rules 1969—Appendix 'D'—Recruitment to the posts of taxation inspectors—Rules providing for competitive examination comprising

a written test and viva voce — Marks allocated for viva voce—Whether could not be more than 12.2 per cent of the total marks as directed by the Supreme Court in Ashok Kumar Yadav's case—Higher percentage of marks for viva voce—Whether invalidates the selection—Number of candidates called for interview much higher than the number of vacancies—This fact alone—Whether vitiates the entire selection.

Held, that the determination of the percentage of marks for a viva voce test at 12.2 per cent relates only to the Haryana Civil Services (Executive Branch) and other Allied Services as directed by the Supreme Court in *Ashok Kumar Yadav's case* and that the percentage for viva voce test cannot apply to the percentage of the viva voce test in other cases. By using the words 'other Allied Services' the Supreme Court never intended to lay down the percentage of viva voce test with regard to all Services in the State. The weight to be given to the viva voce test as against the written examination 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. Therefore, on the basis of the decision in *Ashok Kumar Yadav's case* it cannot be held that with regard to each and every Service including the posts of Taxation Inspectors in the State of Haryana where both written and viva voce examination is prescribed, only 12.2 per cent marks had to be assigned for the viva voce test and that being so, it was incumbent upon the petitioners to independently show that for the service in question providing of higher percentage of marks for viva voce test was excessive. Open competitive examination has come to be accepted almost universally as the gateway to public service and there cannot be any hard and fast rule regarding the precise weight to be given to the viva voce test as against the written examination. Since the petitioner has not placed any material on record to facilitate the recording of a finding that the percentage fixed for viva voce test is excessive it is not only difficult, but also improper to strike down the marks allocated for viva voce test by holding that they are excessive merely on the basis of conjectures.

(Para 12, 14 and 16)

Held, that even though calling of a very large number of candidates for interview was not the right course to follow, yet the suspicion in one's mind that some element of arbitrariness might have entered the assessment in the viva voce examination cannot take the place of proof and a selection cannot be struck down on the ground that the evaluation of the marks of the candidates in the viva voce examination might be arbitrary. It is for the petitioner to positively

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prove that the marking done by the Board was 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.

(Para 18)

Civil Writ Petition under Articles 226 of the Constitution of India praying that:—

- (i) the records of the case may be called for;
- (ii) filing of certified copies of annexure be dispensed with;
- (iii) a writ in the nature of certiorari be issued to quash the selection and appointment of Taxation Inspectors made by respondents Nos. 2 and 3;
- (iv) a writ in the nature of certiorari be issued to quash the regulation which provide 28.5 per cent marks for viva voce;
- (v) to issue any other writ, order or direction as this Hon'ble Court may deem fit in the peculiar circumstances of this case;
- (vi) costs of this petition be awarded to the petitioner.

It is further prayed that during the pendency of this writ petition further appointment of Taxation Inspectors be stayed in the interest of justice.

R. K. Malik, Advocate with S. S. Ahlawat, Advocate for the Petitioner.

H. L. Sibal, A.G. (Haryana) with B. L. Bishnoi, Additional A.G. (Haryana) for Respondent Nos. 1—3.

Kuldip Singh, Senior Advocate with S. S. Nijjar and G. C. Gupta, Advocate, for the added Respondents.

JUDGMENT

Prem Chand Jain, C.J.—

(1) This judgment of ours would dispose of this and the connected C.W.P. No. 554 of 1986 (*Virender Singh v. State of Haryana and others*) as common questions of law and fact arise in both these petitions.

(2) In order to appreciate the controversy, certain salient features may be noticed from this petition.

(3) Some time in July, 1982, Subordinate Services Selection Board (hereinafter referred to as 'Board') invited applications for recruitment to 20 posts of Taxation Inspectors. These posts of Taxation Inspectors are governed by the statutory rules called 'The Haryana Excise and Taxation Inspectorate (State Service, Class III) Rules, 1969 (hereinafter called 'the Rules'). Appendix 'D' to the Rules which makes provision relating to the subjects and standard of the competitive examination of candidates for the post of Inspectors, is in the following terms:—

"1. (1) The examination shall comprise four papers and a viva voce.

(2) The question papers of English and General Knowledge will be answered in English, while those of Hindi in Hindi.

(3) No candidate shall be deemed to have qualified for the viva-voce unless he obtains a minimum of 33 per cent marks in each subject and a minimum of 40 per cent in the aggregate. There shall, however, be no minimum for the viva voce. The total marks of the written papers and viva voce will determine the rank of the candidate.

(4) The following will be the subjects of the examination:

(1) English	... 100 marks
(2) Hindi (in Devnagri script)	... 50 marks
(3) General Knowledge	... 100 marks
(4) Viva Voce	... 100 marks

(4) The petitioner appeared in the written test and was declared successful and called for interview on 14th December, 1985, at New Delhi. The petitioner appeared before the Board. It is averred in the petition that the petitioner was interviewed for about 1½ minutes and only formal questions like name and father's name were asked. No other question of any type was asked. On the conclusion of the interview, in the first week of January, 1986, the Board recommended 49 persons for the post of Taxation Inspectors.

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(5) The petitioner through this petition has called in question the validity and legality of the selection on the allegations that the marks allocated for *viva voce* are 100 marks which comes to 28.5 per cent that in view of the judgment of the Supreme Court in *Ashok Kumar Yadav and others v. State of Haryana and others* (1), providing of 28.5 per cent marks for *viva voce* is on the higher side and the selection of the Taxation Inspectors is bad in law, that in spite of the direction issued by the Supreme Court in *Ashok Kumar Yadav's* case (*supra*) that the marks allocated for *viva voce* test shall not exceed 12.2 per cent of the total marks taken into account for the purpose of selection, the Board has acted improperly and committed patent illegality in keeping *viva voce* marks at 28.5 per cent, that the higher percentage of marks has been kept by the Board with a view of absorb the kith and kin, of the members, that in *Ashok Kumar Yadav's* case (*supra*) the Supreme Court has held that the number of candidates called shall not be more than thrice the number of vacancies, but in the instant case there were only 29 vacancies and the Board called 494 candidates for interview which was about 16 times of the vacancies, and that candidates were interviewed for only one or two minutes with the result that it was not possible for the Members to judge the suitability of the candidates in such a short time. On the basis of these allegations, the action of the Board has been challenged being arbitrary and violative of the judgment of the Supreme Court in *Ashok Kumar Yadav's* case (*supra*) and of Articles 14 and 16 of the Constitution.

(6) The petition came up for motion hearing on 20th February, 1986, when the Bench issued notice of motion. In response to that notice, Shri L. M. Mehta, Excise and Taxation Commissioner, respondent No. 2, has filed a detailed written statement in which the material allegations made in the petition have been controverted *inter alia* on the grounds that respondent No. 2 had sent a revised demand to respondent No. 3 on 4th July, 1985 for 79 candidates of different categories, which included the earlier demand for 29 candidates, that the Board had recommended 49 candidates in the month of January, 1986, that the observations of the Supreme Court in *Ashok Kumar Yadav's* case (*supra*), are relevant for the purpose of competitive examination in the case of selection to the Haryana Civil Service (Executive Branch) and other allied services and the same cannot, *ipso facto*, be made applicable in the case of selection to the post of Taxation Inspectors, that no exaggerated weight has

(1) (1983) 4 S.C.C. 417.

been given to the *viva voce* test in the case of selected candidates with proven or obvious oblique motives and, therefore, the selection is not tainted with any illegality whatsoever, that respondent No. 2 had sent a revised requisition for 79 posts and if large number of candidates are called for interview, that fact by itself does not vitiate the selection and that the selection made by the Board is in accordance with the rules and the advertisement made.

(7) After the filing of the written statement, the matter finally came up for hearing before the Bench on 12th March, 1986, when the following order was passed:—

“In this petition under Article 226 of the Constitution, the selection of the Taxation Inspectors by the Subordinate Services Selection Board, Haryana, has been challenged on the ground that out of the total marks of 350 for written and *viva voce* test, 100 marks were allotted to the letter which clothed the said Board with arbitrary powers. Support for this plea was sought from a recent decision of the Supreme Court in *Ashok Kumar Yadav and others v. State of Haryana and others* (2).

The petition has been opposed by the State as well as by the the persons who have been selected. Mr. Kuldip Singh, the learned counsel for some of the selected persons has brought to our notice a recent judgment of the Division Bench of this Court in Civil Writ Petition No. 4777 of 1985 (*Sukhdev Singh Nirwan and others v. The State of Punjab and others*) (3), wherein the attack sought to be made on the ground that 35 per cent marks were allotted for interview, was turned down. From the perusal of this judgment we find that the rule laid down by the Supreme Court in *Ashok Kumar Yadav's case* (supra) was not taken notice of by the Bench. In the case of fresh entrants to the service through competition, the Supreme Court had directed that marks for *viva voce* test shall not exceed more than 12.2 per cent for the general category and 25 per cent in the case of ex-service officers. The competitors in the present case were the first entrants to the service and in our view 28 per cent

(2) 1985 (2) S.L.J. 482.

(3) CW 4777/85 decided on 21st February, 1986.

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marks for the interview were highly excessive and clothed the Board with arbitrary power. Even if in a given case, the candidate who was ahead by 50 marks than the other candidate, the Board by allotting 80 marks to the latter and 20 marks to the former could select the person who was far below the other person in the written test. It was exactly such like arbitrary power of selection with the Board which was sought to be avoided by the Supreme Court in *Ashok Kumar Yadav's case* (supra). We are, therefore, of the view that the Division Bench decision in *Sukhdev Singh's case* (supra), needs reconsideration by a larger Bench. This case may be put up before the learned Chief Justice for referring the matter to a larger Bench."

This is how we are seized of the matter.

(8) The first contention raised by Mr. Malik, learned counsel for the petitioner, was that in comparison to the marks allocated to the written examination, the proportion of the marks allocated to the viva voce test was quite high and that introduced an irredeemable element of arbitrariness in the selection process so as to offend Articles 14 and 16 of the Constitution. In support of his contention, the learned counsel placed reliance on the judgment of the Supreme Court in *Ashok Kumar Yadav's case* (supra). In other words, the precise contention of the learned counsel for the petitioners was that in *Ashok Kumar Yadav's case* (supra), it has authoritatively been held that where the competitive examination consists of a written examination followed by a viva voce test, the marks allocated for the *viva voce* test shall not exceed 12.2 per cent of the total marks taken into account for the purpose of selection and as the viva voce marks in the instant case exceed 12.2 per cent of the total marks, the selection made by the Board being contrary to the decision of the Supreme Court in *Ashok Kumar Yadav's case* (supra), is illegal, arbitrary and offends Articles 14 and 16 of the Constitution. On the other hand, the learned Advocate-General, Haryana, and Shri Kuldip Snigh, Senior Advocate, submitted that the judgment in *Ashok Kumar Yadav's case* (supra), is not being properly read by the learned counsel for the petitioners, as no such rule has been laid down by the Supreme Court that in the case of each and every selection the marks allocated for the viva voce test shall not exceed 12.2 per cent of the total marks taken into account for the purpose of selection. According to the learned counsel,

it would be in each case that determination shall have to be made by the Court as to what should be the percentage of marks for interview.

(9) On the contention of the learned counsel for the parties what has to be first found out is — whether the Supreme Court in *Ashok Kumar Yadav's case* (supra), has ruled that in every service where the examination consists of a written examination followed by a viva voce test, the marks for viva voce shall in no case exceed 12.2 per cent of the total marks taken into account for the purpose of selection. In order to find out a correct answer, it would be appropriate to make a detailed reference to the judgment in *Ashok Kumar Yadav's case* (supra).

(10) The facts of that case were that sometime in October, 1980, the Haryana Public Service Commission invited applications for recruitment to 61 posts in Haryana Civil Service (Executive) and other Allied Services. The procedure for recruitment was governed by the Punjab Civil Service (Executive Branch) Rules, 1930, as applicable to the State of Haryana. Rule 9(1) of those Rules provided that a competitive examination shall be held at any place in Haryana in each year in or about the month of January, for the purpose of selection by competition of as many candidates for the Haryana Civil Service (Executive) and other Allied Services as the Governor of Haryana may determine and such competitive examination shall be held in accordance with the regulation contained in Appendix I to the Rules. Rule 10 laid down the conditions for eligibility to appear at the competitive examination. Regulation 1 in Appendix-I provided that the competitive examination shall include compulsory and optional subjects and every candidate shall take all the compulsory subjects and not more than three of the optional subjects provided that ex-servicemen shall not be required to appear in the optional subjects. The compulsory subjects included English essay, Hindi, Hindi essay and General Knowledge carrying in the aggregate 400 marks and there was also viva voce examination which was compulsory and each carried 200 marks and each optional subject carried 100 marks. In response to the advertisement issued by the Haryana Public Service Commission about 6000 candidates applied for recruitment and appeared in the written examination held by the Commission. Out of about 600 candidates who appeared in the written examination, over 1300 obtained more than 45 per cent marks and

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thus qualified for being called for interview for the viva voce examination. The Commission invited all the 1300 and more candidates who qualified for the viva voce test, for interview. It seems that though originally applications were invited for recruitment to 61 posts, the number of vacancies rose during the time taken up in the written examination and the viva voce test and ultimately 119 post became available for being filled and on the basis of the total marks obtained in the written examination as well as viva voce test 119 candidates were selected and recommended by the Commission to the State Government. It seems that there were some candidates who had obtained very high marks at the written examination but owing to rather poor marks obtained by them in the viva voce test, they could not come within the first 119 candidates and they were consequently not selected. They were aggrieved by the selection made by the Commission and some out of them challenged the validity of the selection by filing a writ petition in this Court on several grounds. One of the points raised in that case was that in comparison to the marks allocated to the written examination, the proportion of the marks allocated to the viva voce test was excessively high and that introduced an irredeemable element of arbitrariness in the selection process so as to offend Articles 14 and 16 of the Constitution of India. While dealing with this question, Bhagwati, J. (as his Lordship then was) now Chief Justice, first made reference to certain observations made in the judgment of the Supreme Court in *Lila Dhar v. State of Rajasthan* (4) thus :

'23. This Court speaking through Chinnappa Reddy, J. pointed out in *Lila Dhar v. State of Rajasthan* that the object of any process of selection for entry into public service is to secure the best and the most suitable person for the job, avoiding patronage and favouritism. Selection based on merit, tested impartially and objectively is the essential foundation of any useful and efficient public service. So open competitive examination has come to be accepted almost universally as the gateway to public services. But the question is, how should be competitive examination be devised? The competitive examination may be based exclusively on written examination or it may be based exclusively on oral interview or it may be a mixture of both. It is entirely for the Government to decide what kind of

competitive examination would be appropriate in a given case. To quote the words of Chinnappa Reddy, J. "In the very nature of things it would not be within the province or even the competence of the Court and the Court would not venture into such exclusive thickets to discover ways out when the matters are more appropriately left" to the wisdom of the experts. It is not for the Court to lay down whether interview test should be held at all or how many marks must be minimal so as to avoid charges of arbitrariness, but not necessarily always. There may be posts and appointments where the only proper method of selection may be by a viva voce test. Even in the case of admission to higher degree courses, it may sometimes be necessary to allow a fairly high percentage of marks for the viva voce test. That is why rigid rules cannot be laid down in these matters by courts. The expert bodies are generally the best judges. The Government aided by experts in the field may appropriately decide to have a written examination followed by a viva voce test."

Thereafter, reference has been made to the book 'Public Personnel Administration' by Glenn Stahl and also the judgement of the Supreme Court in *Ajay Hasia v. Khalid, Mujib*, (5) for the purpose of elucidating the advantages and disadvantages of a viva voce test. Thereafter the learned Judge proceeded to consider whether the allocation of as high a percentage of marks as 33.3 per cent in case of ex-service officers and 22.2 per cent in the case of other candidates for the viva voce test renders the selection process arbitrary. Again, while considering this aspect, reference was made to the Kothari Committee Report and also the fact that on the basis of that report the percentage of marks allocated to 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 per cent. In the light of this discussion, it was ultimately found that the allocation of 22.2 per cent of the total marks for the viva voce test infected the selection process with the vice of arbitrariness.

(11) After arriving at the aforesaid finding, the next question that was posed for consideration was as to what should be proper percentage of marks to be allocated for the viva voce test in both these cases i.e. in case of ex-service officers and in case of other

(5) AIR 1981 S.C. 487.

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candidates. Taking into consideration the percentage adopted by the Union Public Service Commission in case of selections to the Indian Administrative Service and other Allied Services, a direction was issued that hereafter in case of selections to be made to the Haryana Civil Services (Executive Branch) and other Allied Services where the competitive examination consists of a written examination followed by a viva voce test, the marks allocated for the viva voce test shall not exceed 12.2 per cent of the total marks taken into account for the purpose of selection. It was further suggested that this percentage should also be adopted by the Public Service Commissions in other States because it is desirable that there should be uniformity in the selection process throughout the country and the practice followed by the Union Public Service Commission should be taken as a guide for the State Public Service Commission to adopt and follow. The percentage of marks allocated for the viva voce test in case of ex-service officers was kept at 25 per cent.

(12) Now, as I look at the judgement of the Supreme Court in *Ashok Kumar Yadav's case* (supra) I find that the determination of the percentage of marks for a viva voce test at 12.2 per cent relates only to the Haryana Civil Services (Executive Branch) and other Allied Services and that percentage for viva voce test cannot apply to the percentage of the viva voce test in the instant case. Reference to 'other Allied Services' in the judgment means those services for which the examination was held by the Commission on the basis of the Punjab Civil Service (Executive Branch) Rules, 1930. I do not agree with Mr. Malik, learned counsel for the petitioners, that by using the words 'other Allied Services' their Lordships of the Supreme Court were intending to lay down the percentage of viva voce test with regard to all Services in the State. In para 25 of *Ashok Kumar Yadav's case* (supra) Bhagwati, J. (now the learned Chief Justice) speaking for the Court, has observed thus:

"There cannot be any hard and fast rule regarding the precise weight to be given to the viva voce test as against the written examination. It must vary from service to service according to the requirement of the service, the minimum qualification prescribed, the age-group from which the selection is to be made, the body to which the task of holding the viva voce test is proposed to be entrusted and a host of other factors. It is essentially a matter for determination by experts. The Court does not possess the necessary equipment and it would not be right for the

Court to pronounce upon it, unless to use the words of Chinnappa Reddy, J. in *Lila Dhar* case "exaggerated weight has been given with proven or obvious oblique motives".

From the aforesaid observations our view finds full support that the percentage of marks determined for viva voce test was only for the examination held by the Commission on the basis of the Punjab Civil Service (Executive Branch) Rules, 1930, otherwise the aforesaid observation would become meaningless. To emphasize on the basis of the aforesaid observations, the weight to be given to the viva voce test as against the written examination, 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.

(13) Moreover, if the contention of the learned counsel for the petitioners is accepted to be correct, then *a fortiori* it would have to be held that the view enunciated by the Supreme Court in *Lila Dhar's* case (supra) is not correct. In that case, the service in question was Rajasthan Judicial Service. In pursuant to the Rules of that Service, competitive examination for recruitment of Munsifs was held. The competitive examination consisted of a written examination with two papers in Law carrying 100 marks each and two papers one in Hindi and the other in English each carrying 50 marks and a viva voce examination carrying 100 marks. After the declaration of the result of the competitive examination, a writ petition was filed by an unsuccessful candidate who had obtained a total of 189 marks, 159 in the written test and 30 in the viva voce, and one of the points raised in that writ petition was that the entire selection was vitiated by the allocation of 25 per cent of the total marks for the viva voce examination. The learned Judges dealt with that point in depth on the basis of the judicial decisions the report of the Kothari Committee and the book by Glenn Stahl on 'Public Personnel Administration' and found that the marks allocated for interview were not excessive. Now this decision in *Lila Dhar's* case (supra) has been referred to in *Ashok Kumar Yadav's* case (supra) and has neither been distinguished nor dissented from.

If the percentage for all Services has to be taken at 12.2 per cent, as was sought to be urged in the light of *Ashok Kumar Yadav's* case

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(supra), then certainly the view enunciated in *Lila Dhar's case* (supra) had to be overruled, but this was not done; rather quotations from that judgment have approvingly been quoted and as earlier observed in para 25 of the report it has clearly been held that no hard and fast rule can be laid down and that the precise weight to be given to the viva voce test as against the written examination must vary from service to service. At this stage, I may advert to the unreported decision of this Court in (*Sukhdev Singh Nirman and others v. The State of Punjab and others* (supra), the correctness of which was doubted by the Bench while making the present reference. It may straightaway be observed that an argument about allotting 35 per cent marks for interview was casually raised and the same was disposed of without much discussion. Hence that judgment has to be confined only to the facts of that case and cannot be taken as a precedent on the point raised before us.

(14) In view of the aforesaid discussion, the only conclusion that can be arrived at is that on the basis of the decision in *Ashok Kumar Yadav's case* (supra), it cannot be held that with regard to each and every Service including the posts of Taxation Inspectors in the State of Haryana where both written and viva voce examination is prescribed, only 12.2 per cent marks had to be assigned for the viva voce test.

(15) This brings us to the next question whether the marks allocated for viva voce which came to 28.5 per cent are on the higher side? What had been argued by Mr. Malik, learned counsel for the petitioners, was that in comparison to the marks allocated to the written examination, the proportion of the marks allocated to the viva voce test was excessively high and that introduced an irredeemable element of arbitrariness in the selection process.

(16) We have heard the learned counsel for the parties and find that in the instant case the petitioners have not supplied any material nor have furnished any data in support of this plea. As would be evident from the tenor of the petition, the whole case of the petitioners is based mainly on the plea that in *Ashok Kumar Yadav's case* (supra), a direction had been given by the Supreme Court to keep the percentage of viva voce marks at 12.2; but in spite of that direction a higher percentage at 28.5 has been kept, with a view to accommodate those candidates in whom the Board members were interested. On this aspect, we have already held that *Ashok Kumar Yadav's case* cannot be read to mean that the percentage of viva voce marks indicated therein is to apply to all the services in

the State of Haryana. That being so, it was incumbent upon the petitioners to independently show that for the service in question providing of 28.5 per cent marks for viva voce test was excessive. Open competitive examination has come to be accepted almost universally as the gateway to public service. As to how should the competitive examination be devised, Bhagwati, J., (now the learned Chief Justice) in *Ashok Kumar Yadav's case* (supra) has analysed the matter thus:—

“The competitive examination may be based exclusively on written examination or it may be based exclusively on oral interview or it may be a mixture of both. It is entirely for the Government to decide what kind of competitive examination would be appropriate in a given case. To quote the words of Chinnappa Reddy, J. ‘In the very nature of things it would not be within the province or even the competence of the Court and the Court would not venture into such exclusive thickets to discover ways out, when the matters are more appropriately left’ to the wisdom of the experts. It is not for the Court to lay down whether interview test should be held at all or how many marks should be allowed for the interview test. Of course the marks must be minimal so as to avoid charges of arbitrariness, but not necessarily always. There may be posts and appointments where the only proper method of selection may be by a viva voce test. Even in the case of admission to higher degree courses, it may sometimes be necessary to allow a fairly high percentage of marks for the viva voce test. That is why rigid rules cannot be laid down in these matters by Courts. The expert bodies are generally the best judges. The Government aided by experts in the field may appropriately decide to have a written examination followed by a viva voce test.”

It has already been noticed earlier that there cannot be any hard and fast rule regarding the precise weight to be given to the viva voce test against the written examination. It must vary from service to service according to the requirements 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. As earlier observed, the petitioners have not placed any material on the record to facilitate the recording of a finding in their favour. On the basis

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of conjectures, it is not only difficult, but would also be improper to strike down the marks allocated for viva voce test by holding that they are excessive. Consequently, the contention of the learned counsel is negatived.

(17) It was lastly contended by Mr. Malik that in *Ashok Kumar Yadav's case* (supra), it has been ruled that where there is a composite test consisting of a written examination followed by viva voce test, the number of candidates to be called for interview in order of the marks obtained in the written examination, should not exceed twice or at the highest thrice the number of vacancies to be filled, that in the instant case there were only 29 vacancies and the Board called for interview 494 candidates, which came to 16 times of the vacancies to be filled and that the selection being contrary to the direction of the Supreme Court, was liable to be quashed.

(18) On giving our thoughtful consideration to the entire matter, in the circumstances of the case, we find no merit in this contention of the learned counsel. In the petition, it is stated that the candidates were called for 29 vacancies. In the written statement, it has been averred that respondent No. 2 had sent a revised demand to respondent No. 3 on 4th July, 1985 for 79 candidates of different categories, that against this demand the Board had recommended 49 candidates in the month of January, 1986, that a large number of candidates were called for interview and that fact by itself does not vitiate the selection. There can be no gainsaying that if the original demand is kept in view then the number of candidates called for interview comes to 16 times and if the revised demand is kept in view then it comes to 6 times. Be that as it may, the fact remains that the number of candidates called for interview was much higher than the standard laid in *Ashok Kumar Yadav's case* (supra). In this view of the matter, the question that arises for determination is whether this fact alone should invalidate the entire selection made by the Board. A similar situation had arisen in *Ashok Kumar Yadav's case*, where candidates representing more than 20 times the number of available vacancies were called for interview. But after going into the merits of the case, it was observed that suspicion in one's mind that some element of arbitrariness might have entered the assessment in the viva voce examination cannot take the place of proof and a selection cannot be struck down on the ground that the evaluation of the marks of the candidates in the viva voce examination might be arbitrary. In view of this finding, the selection was not struck down irrespective of the fact that a firm finding was

recorded that calling of such a high number was not the right course to follow. Therefore, the petitioner in the instant case had positively to prove that the marking done by the Board was 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. But again the petitioners have miserably failed to supply any material or furnish a convincing data in support of their case. In this view of the matter, the contention of the learned counsel, as earlier observed, merits rejection.

(19) No other point arises for consideration.

(20) For the reasons recorded above, the writ petitions being without any merit, fail and are dismissed. In the circumstances of the case, we make no order as to costs.

N.K.S.

FULL BENCH

Before P. C. Jain, C.J., S. P. Goyal and S. S. Kang, JJ.

RAKESH KUMAR AND OTHERS,—Appellants.

versus

SAT PAL,—Respondent.

Regular Second Appeal No. 1203 of 1985

April 14, 1986

Specific Relief Act (XLVII of 1963)—Section 12(3)—Agreement to sell—Suit for specific performance—Specific performance—Whether could be ordered for lesser share of property than agreed upon to be sold.

Held, that sub-section (3) of section 12 of the Specific Relief Act, 1963 provides that where a party to a contract is unable to perform the whole of his part of it, he is not entitled to obtain a decree for specific performance if the part which must be left unperformed forms a considerable part of the whole, though admitting of compensation in money, or if the part which must be left unperformed does