

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 508 OF 2007.

Shri Shailesh Kothawale,
resident of House No. 70,
Arobo, Dhargal, Pernem – Goa. ... Petitioner.

Versus

- 1 State of Goa, through
its Chief Secretary,
having office at
Secretariat, Porvorim
Bardez – Goa.
- 2 The Commissioner of
Excise, Government of
Goa, Panaji- Goa.
- 3 Shri Durgesh Naik,
resident of House No.
305, near P.W.D.
Office, behind Lydia
Garden, St. Inez,
Panaji-Goa.
- 4 Shri Durgadas Sachit
Naik, resident of
House No. 60,
Bobrumoddi, Quepem,
Goa.
- 5 Shri Nilesh Tulshidas
Padolkar, resident of
House No. 19/1, Narva,
Marmawada, Bicholim,
Goa. ... Respondents.

Mr. J. P. Supekar, Advocate for the Petitioner.

Mr. P. Dangui, Additional Government Advocate for

respondents no. 1 and 2.

Mr. Mahesh Amonkar, Advocate for respondents no. 3, 4 and 5.

**CORAM : RANJIT MORE &
U. V. BAKRE, JJ.**

RESERVED ON : 10th June, 2014.

PRONOUNCED ON : 30th June, 2014.

J U D G M E N T :

Heard Mr. Supekar, learned Counsel appearing on behalf of the petitioner, Mr. Dangui, learned Additional Government Advocate appearing for respondents no. 1 and 2 and Mr. Amonkar, learned Counsel appearing on behalf of respondents no. 3, 4 and 5.

2. By this petition, the petitioner has sought following reliefs :

(a) This Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, commanding the Respondents No. 1 and 2 to revoke/withdraw cancel the selection/appointment of the Respondents No. 3 to 5 to the posts of Excise Inspector;

(b) This Hon'ble Court also be pleased to issue an

appropriate writ, order or direction, quashing and setting aside the selection/appointment of the Respondents No. 3 to 5 for the posts of Excise Inspector.

3. Respondent no. 2 issued an advertisement dated 22/02/2007 inviting applications for the posts of Excise Inspector, whereby, inter alia, the educational qualification prescribed was degree of a recognized University either in Science, Arts or Commerce. There were altogether 16 posts: one reserved for ST Category; three for OBC category and remaining twelve for General Category. The petitioner, belonging to OBC Category, possessed all the requirements, mentioned in the said advertisement and thus he applied for the said post. On 07/03/2007, a list of candidates was displayed on the notice board of respondent no. 2 and they were given respective roll numbers for the purpose of written test. Accordingly, written test was conducted on 11/03/2007. The respondent no. 2 did not short list any of the candidates who had answered the written test and all were invited for oral interview which was conducted from 15/03/2007 to 23/03/2007. There were almost 1000 candidates who were interviewed within a period of one week by respondent no. 2.

Somewhere in the end of March, 2007 the respondent no. 2 displayed the select list of the candidates wherein the name of the petitioner did not figure whereas the names of respondents no. 3 to 5 were shown amongst the selected candidates against the OBC Category.

4. The petitioner alleged that he or for that matter, the candidates were not aware, as to what would be the mode of selection and what criteria the Selection Committee would be adopting for making selection. The petitioner, vide application dated 02/04/2007, applied to the respondent no. 2, under the Right to Information Act, and sought information as regards the criteria adopted by the respondent no. 2 while making selection to the post of Excise Inspector and vide letter dated 20/04/2007 the information as demanded was given to the petitioner. The said information given to the petitioner revealed as follows:

(a) 50 marks were allocated for the educational qualification i.e. if a candidate had secured Pass Class and Second Class at graduation level, he will get 45 marks and the candidate who secured First Class and Distinction would get 50 marks.

(b) 25 marks (50% weightage of the written test

consisting of 50 marks) were allocated for written test.

(c) 5 marks for Higher Education, namely 2 marks for Post Graduation and 3 marks for PHD were allocated.

(d) 5 marks for Extra Curriculum activities (Sports/Cultural) i.e. 1 mark was allocated for the candidate representing the State whereas 4 marks for the candidate representing at the National level.

(e) For oral interviews, 15 marks were allocated.

5. The petitioner further alleged as follows:

The petitioner had following certificates namely: (1)- Certificate from the Goa University being member of Winning College Team in Inter-Collegiate Volleyball Tournament held by the Goa University in 2002-2003; (2) Participation certificate in Inter-University Volleyball (West Zone) Tournament held at Ajmer in the year 2002-2003; (3) Participation Certificate in Inter-University Volleyball Tournament held at Saswad in the year 2003-2004; (4) Certificate from the Institute of Road Traffic Education for participating in Training Programme in Traffic Control & Hand Signaling held in May 2002. But he was not allocated any marks for extra Curriculum activities. The minimum educational qualification for the post of Excise Inspector, was graduation (Bachelor Degree). Thus, every

candidate who had applied for the post would straight away get 45 marks. Thereafter, what was left, was 55 marks out of which 15 marks were allocated for oral interview. Thus, effectively out of 55 marks, 15 marks, i.e. almost 30% of the marks were allocated for oral interview and this was an ingenious method adopted by the respondents no. 1 and 2 by giving weightage of 30% of the marks to the oral interview but by showing on the paper that only 15% of the marks were allocated for oral interview. This method of the respondents no. 1 and 2 was obviously to defeat the ratio laid down by the various judgments of this Court as well as the Hon'ble Supreme Court holding that not more than 15% of the marks should be allocated for oral interview, for such posts. The allocation of 30% marks for oral interview was illegal, arbitrary and unconstitutional and this criteria had given an undue discretion for the selection panel for selecting the candidates. This was apparent from the fact that the petitioner got 13 of the marks in the written test, whereas, for the oral interview he was given only two marks. The respondent no. 4 had secured 8 marks for the written test and 13 marks had been allotted to him for oral interview. There is complete objectivity in so far as written examinations are concerned but in the farcical oral interview there is total subjectivity. If proper

criteria were to be adopted, the petitioner would have been in the select list in place of Shri Durgadas S. Naik, the respondent no. 4. Hence, the petition.

6. Rule was issued on 11/02/2008 and it was directed that any appointment made in terms of the impugned order, herein after in relation to the post in question, shall be subject to the final decision in this writ petition and this shall be brought to the notice of every incumbent in such post. No reply came to be filed by respondents though several opportunities were given. On 16/01/2013, this Court even made it clear that if no reply is filed the petition will be heard on the basis of uncontroverted averments made in the petition. In spite of the said directions no reply has been filed by the respondents.

7. Mr. Supekar, learned Counsel appearing on behalf of the petitioner pointed out that as per the recruitment rules, the minimum qualification prescribed for the post of Excise Inspector was a degree of a recognized University either in Science, Arts or Commerce. He, therefore, submitted that the question of giving 45 marks for such minimum qualification did not arise. He pointed out that from the remaining 55 marks, only 25 marks were kept for written test and 15 marks for oral

interview, which means that about 30% marks were kept for oral interview. According to him, the above criteria of keeping 30% marks for oral interview is arbitrary and illegal since that gives a chance for favouritism. Learned Counsel submitted that no marks were given to the petitioner for extra Curriculum activities though he had required certificates. He, thus, submitted that the appointment of the respondents no. 3, 4 and 5 was illegal and ought to be canceled. He, therefore, urged that the petition be allowed and the selection/appointment of respondents no. 3 to 5 be quashed and set aside.

8. The learned Counsel appearing on behalf of the petitioner relied upon following Judgments:

(a) ***Mohinder Sain Garg V/s. State of Punjab and others***
[(1991) 1 SCC 662]

(b) ***Ashok Kumar Yadav and Others v/s. State of Haryana and others*** [(1985) 4 SCC 417]

9. On the other hand, Mr. Dangui, learned Additional Government Advocate pointed out that the prayer in the Writ Petition is only to cancel the selection/appointment of the respondents no. 3 to 5 to the post of Excise Inspector and it is

not known as to in what manner the said relief would benefit the petitioner. He submitted that 15 marks for oral interview were allocated as per the Circular No.1/6/83-PER(Vol.II) Pt.(a) dated 15/11/2006. He submitted that the petitioner has not challenged the said circular issued by the Department of Personnel, Government of Goa. He further submitted that the petitioner quietly participated in the selection process and only after he was not selected has challenged the selection process. According to the learned Additional Government Advocate, such a challenge cannot be allowed. He also submitted that even if it is taken for granted that about 30% marks were fixed for oral interview, the same cannot be termed as arbitrary and illegal. He thus urged that the petition be dismissed.

10. The learned Additional Government Advocate relied upon following judgments:

(a) ***Madan Lal and others v/s. State of J & K and others*** [(1995) 3 SCC 486].

(b) ***Kiran Gupta and others V/s. State of U.P. and others*** [(2000) 7 SCC 719].

(c) ***Vijendra Kumar Verma V/s. Public Service Commission, Uttarakhand and others*** [(2011) 1 SCC 150].

(d) Judgment dated 18/04/2005 of the Division Bench of the High Court of Bombay at Goa in Writ Petition No. 75 of 2001 (*Anil Damu Murgaonkar V/s. State of Goa and others*) along with other Writ Petitions.

(e) *Anzar Ahmad V/s. State of Bihar* [(1994)1 SCC 151].

11. Mr. Amonkar, learned Counsel appearing on behalf of the respondents no. 3, 4 and 5 contended that the said respondents have been appointed as Excise Inspector long back and even confirmed in the said posts and, therefore, their services now cannot be terminated.

12. We have perused the material on record, considered the submissions made on behalf of the parties and the judgments relied upon by them.

13. Let us at the outset see whether the petition should be rejected on the ground that the petitioner participated in the selection process and took opportunity of being selected and only after he failed to get selected, approached the Court, by challenging the selection. In the case of "*Madan Lal*" (supra),

relied upon by the learned Additional Government Advocate, the Hon'ble Apex Court has held thus :

“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, in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the concerned Members of the Commission who interviewed the petitioners as well as the concerned 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 Selection Committee was not properly constituted. In the case of “Om Prakash Shukla v. Akhilesh Kumar Shukla” (AIR 1986 SC 1043), 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.”

14. In Writ Petition 75 of 2002 (supra), by judgment dated 18/04/2005, the Hon'ble Division Bench of this Court has held that the consistent legal position as crystallized in the cases of the Apex Court, is that any candidate who appears in the examination or interview without protest, later on cannot be permitted to turn round and assail the entire selection process. In case of ***“Vijendra Kumar Verma”*** (supra), it has been held by the Apex Court that the candidate who participated in the selection process cannot challenge the validity of the said selection process after appearing in the said selection process and taking opportunity of being selected. In the case supra, all the candidates knew the requirements of the selection process and were also fully aware that they must possess the basic knowledge of computer operation meaning thereby Microsoft Operating System and Microsoft Office Operation. The appellant appeared knowing the said criteria and had taken a chance and opportunity therein without any protest at any stage. It was observed that the appellant cannot thereafter

turn back to state that the aforesaid procedure adopted was wrong and without jurisdiction.

15. In the present case, the advertisement which was known to the candidates prior to taking part in the selection process, only mentioned the criteria needed for making an application for the post whereas the uncontroverted averments in the petition reveal that the petitioners, or for that matter the candidates, were not aware as to what would be the mode of selection and what criteria would be adopted by the selection committee for making appointment to the said post. The facts of the cases relied upon by the learned Additional Government Advocate and referred to in paragraphs 13 and 14 above are different and hence the said cases are not applicable to the present case. The case of the petitioner cannot be rejected on the ground of their having taken part in the oral interview, without protest.

16. Let us now consider whether the criteria adopted for selection was arbitrary and illegal. In the case of *"Ashok Kumar Yadav"* (supra), relied upon by the learned Counsel for the petitioner, the question of selection to the posts for Haryana Civil Service (Executive) and other Allied services was involved.

The Hon'ble Supreme Court held that where there is a composite test consisting of a written examination followed by a viva voce test, the allocation of high percentage of marks of 33.3 per cent in case of ex-service officers and 22.2 per cent in case of other candidates, for the viva voce test renders the selection of Haryana Civil Services (Executive Branch) and other Allied Services unreasonable and renders the selection process arbitrary. Since the marks allotted for the viva voce test by the Union Public Service Commission, in case of selection of the Indian Administrative Services and other Allied Services was 12.2% and that was found to be fair and just, as striking a proper balance between the written examination and the viva voce test, it was directed 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. The Apex Court 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 Commissions to adopt and follow.

17. In the case of *"Mohinder Sain Garg"* (supra), relied upon by the learned Counsel for the petitioner, the subject-matter was appointments to the posts of Excise and Taxation Inspectors and total marks for written test were kept at 300 and for oral interview 100 i.e. 75% for written test and 25% for oral interview. One of the grounds urged before the Apex Court was that keeping 25% marks for oral interview gave arbitrary powers to the selection Committee. Relying upon the case of *"Ashok Kumar Yadav "* (supra), which related to public employment, the Hon'ble Supreme Court held that it would not be reasonable to have the percentage of viva voce marks more than 15% of the total marks in the selection of the candidates fresh from college/school for public employment by direct recruitment where the rules provided for a composite process of selection namely written examination and interview.

18. In both the cases mentioned in paragraphs 16 and 17 above, there were rules which provided for viva voce followed by written test. No marks were provided for academic performance or extra curricular activities in the above cases. In

the present case, the rules did not prescribe for such criteria. In the present case, marks were given for academic performance; extra curricular activities; written test; and oral interview. Fifty five marks were reserved for performance in educational qualifications in the manner as follows: 45 marks were given for candidates getting pass class and second class in graduation whereas 5 more marks (i.e. 50 marks) were given for those getting first class and distinction in graduation, further 2 marks were kept for Post graduation and 3 marks were kept for PHD; 35 marks were kept for written test; 1 mark was kept for representing the State and 4 marks for National representation in extra curriculum activities; and lastly 15 marks were kept for oral interview. The ratio laid down in the cases of *"Ashok Kumar Yadav"* and *"Mohinder Sain Garg"* (supra), in our considered view, is not applicable to the present case.

19. In the case of *"Jasvinder Singh and Ors Vs. State of J & K and Ors"*, [(2003) 2 SCC 132], the subject-matter in issue pertained to a challenge to the selections made for the appointment of Sub-Inspectors of Police. The marks allocated for viva Voce at 25 in comparison to the marks earmarked for written test at 100, worked out to 20% and thus were in excess

of 12½%. The Hon'ble Apex Court held that the Division Bench of the High Court committed no error in upholding the allocation of 20% marks for viva voce as against 80% marks for written test. The Apex Court observed that the very observations in *"Ashok Kumar Yadav"* case (supra), show that there cannot be any hard-and-fast rule of universal application for allocating the marks for viva voce vis-a-vis the marks for written examination and consequently the percentage indicated therein alone cannot be the touchstone in all cases. It is further observed that what ultimately is required to be ensured is as to whether the allocation, as such is with an oblique intention and whether it is so arbitrary as capable of being abused and misused in its exercise.

20. No doubt, as contended by learned Counsel for the petitioner, in view of 45 marks being allotted for pass class and second class in graduation, which is the minimum requirement for applying for the post, each candidate had obtained 45 marks. This ought not to have been done. But it cannot be lost sight of the fact that the candidates who were more qualified that is those who obtained first class and distinction in graduation obtained higher marks i.e. 50 marks and further those who had done Post graduation got 2 more marks and

those who did PHD got 3 more marks. Thus, the candidates with merits got an edge over those having no merits. Accordingly, though the petitioner and respondents no. 3 and 4 secured 45 marks towards academic performance, however, the respondent no. 4 secured 50 marks for the same. Besides the above, 5 marks were also allotted for extra Curricular activities: 1 mark was allocated for the candidate representing the State whereas 4 marks for the candidate representing at the National level. In Writ Petition No. 78 of 2013 (*Shri Umesh K. Naik and others Vs. State of Goa and another*) and other connected Writ Petitions, 65 to 75 marks were allotted for educational qualification. The minimum eligibility criteria was passing of Standard VIII. Five additional marks were to be given for passing Standard X. Five further marks were to be given for passing Standard XII. Five extra marks were to be given to co-curricular activities and sports and 5 marks were allotted for experience. The viva voce was given 15 marks. There was no written examination. It was argued that everybody got 65 marks and in view of no written test, it was understood that the marks allotted for the interview were more than 15%, a condition that would breed arbitrariness and favouritism. By judgment dated 25/03/2014, the Hon'ble Division Bench of this Court held that even if a large part of the classification of

marks would be for the minimum qualification and each candidate would obtain those marks, the candidates who were more qualified would obtain higher marks and hence *per se* the classification was not wholly erroneous. It has been held that such classification cannot therefore be termed as erroneous or arbitrary, in view of the judgments laying down that there can be no straight jacket formula for percentage of marks reserved for interview and that it may vary from case to case.

21. In the case of ***"Anzar Ahmed Vs. State of Bihar and others"*** reported in MANU/SC/0045/1994 : AIR 1994 SC 141, for the post of Unani Medical Officer, degree of B.U.M.S. or G.U.M.S. from any recognized university was essential and in addition resident/internship training working of 6 months from any recognized institution was necessary. The selection was made on the basis of marks given for viva voce and for academic performance. 100 marks were allotted for viva voce test and 100 marks for academic performance. The Hon'ble Supreme Court observed that it could not be held that the said procedure adopted by the Commission suffered from arbitrariness and that by giving equal weight to academic performance, the Commission had rather reduced the possibility of arbitrariness.

22. In case of "*Kiran Gupta*" (supra), it has been held that selection solely based on interview is per se not illegal. The Apex Court has observed that there can be no rule of universal application with regard to allotment of percentage of marks for interview, which depends on several factors and the permissible percentage has to be decided on facts of each case.

23. From various judgments of the Apex Court, It can be said that there is no strait-jacket formula for percentage of marks for oral interview and the same varies from case to case, depending upon various factors. Thus, it cannot be said that allotting marks in the manner as done in the present case, is so arbitrary or illegal, as to vitiate the selection process.

24. There is no allegation made in the petition that there has been discrimination or manipulation of the interview marks. The petitioner secured $60\frac{3}{4}$ marks, the respondent no. 3 secured $66\frac{3}{4}$ marks and the respondents no. 4 and 5 secured 66 marks respectively. Even if one mark is added to the petitioner on account of his alleged representation in extra curriculum activity at State level, that does not make any difference to the respondents no. 3 to 5.

25. In the petition, the prayer is only for canceling the selection/appointment of the respondents no. 3 to 5 but there is no prayer for getting any relief for the petitioner, himself. Though, the criteria for selection process was known to the petitioner on 20/04/2007, under the Right to information Act 2005, however, the petitioner approached this Court on 16/10/2007. Prayer is for cancellation of appointments of respondents no. 3 to 5. Same selection process was followed in respect of the ST Category and General Category candidates, but their appointments are not challenged. No doubt, this Court by order dated 11/02/2008 directed that any appointment made in terms of the impugned order, hereafter, in relation to the post in question, shall be subject to the final decision in this writ petition. But according to Mr. Amonkar, learned counsel for the respondents no. 3 to 5, by now the said respondents have been confirmed in their posts. Even otherwise, the learned Counsel appearing on behalf of the petitioner made a statement across the bar that the petitioner is now appointed and working as Awal Karkun and that the post of Awal Karkun has higher scale and is higher post as compared to that of Excise Inspector. He, however, added that the petitioner apprehends a challenge to the appointment of the petitioner to the post of Awal Karkun and, therefore, wants the present

petition to be decided on merits. Admittedly, the appointment of the petitioner as Awal Karkun is not yet challenged by anyone. In all the circumstances above, we do not see any ground for exercise of the writ jurisdiction in favour of the petitioner.

26. In the result, the petition stands dismissed. Rule is discharged with no order as to costs.

U.V. BAKRE, J.

RANJIT MORE, J.

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