

MEHMOOD ALAM TARIQ AND ORS. ETC.

v.

STATE OF RAJASTHAN & ORS. ETC.

MAY 11, 1988

[RANGANATH MISRA AND M.N. VENKATACHALIAH, JJ.]

*Rajasthan State and Subordinate Service (Direct Recruitment by combined Competition Examination) Rules 1962/Rajasthan Police Service Rules 1954/Rajasthan Forest Services Rules 1962/Rajasthan Forest Subordinate Service Rules, 1963: Rule 15(1) Proviso/Rule 25—Proviso (i)—Recruitment rule prescribing minimum qualifying marks in the viva voce test—Such rule whether incurs constitutional infirmity.*

*Statutory Interpretation: Validity of Statutory provision—To be tested with reference to its operation and efficacy in generality of cases—Not by freaks or exceptions that its applications might in some rare cases possibly produce.*

The Rajasthan Public Service Commission conducted an examination in 1985 for appointments to State Services. The recruitment rules contained a provision that candidates should secure a minimum of 33% marks in the *viva-voce* test. Some of the candidates who failed to secure the minimum marks in *viva-voce* challenged before the High Court the constitutionality of the provision in the Rules stipulating such minimum cut-off marks. The High Court declared the provision unconstitutional.

Before this Court, it was urged on behalf of the selected candidates and the State of Rajasthan, that (1) the High Court fell into a serious error in importing into the present case principles . . . which pertained to the proposition whether the setting apart of an excessive and disproportionately high percentage of marks for *viva-voce* in comparison with the marks of the written-examination would be arbitrary; and (2) the prescription of minimum qualifying marks for the *viva-voce* test would not violate any constitutional principle or limitation, but was on the contrary a salutary and desirable provision.

On the other hand, it was urged that (1) the principles laid down by this Court, which the High Court had accepted, were sound and had acquired an added dimension in the context of the increasingly denuded standards of probity and rectitude in the discharge of public offices, and (2) the real thrust of the principles was that any marking-procedure that made the oral test determinative of the fate of a candidate was, in itself, arbitrary, and if this test was applied to this case, the decision reached by the High Court would be unexceptionable.

A Allowing the appeals, it was,

HELD: (1) A sensitive, devoted and professionally competent administrative set-up could alone undertake the ever-expanding social and economic roles of a welfare state. [387A-B]

B (2) The 'interview' was now an accepted aid to selection and was designed to give the selectors some evidence of the personality and character of the candidates, which qualities were necessary and useful to public-servants. [388G-H]

C (3) Academic excellence was one thing. Ability to deal with the public with tact and imagination was another. Both were necessary for an officer. The dose that was demanded may vary according to the nature of the service. Administrative and Police Services constituted the cutting edge of the administrative machinery and the requirement of higher traits of personality was not an unreasonable expectation. [391D]

*Lila Dhar v. State of Rajasthan*, [1982] 1 SCR 320 referred to.

D (4) The observations made by this Court in *Ashok Kumar Yadav* were in the context where the spread of marks for the *viva-voce* was so enormous, compared with the spread of marks for the written examination, that the *viva-voce* test 'tended to become the determining factor'. The reference was to the possibility of a candidate undeservedly being allotted high marks at the interview. That was a very different thing from the question whether a candidate should acquire at least a certain minimum percentage of marks at the *viva-voce*. [394B-C]

*Ashok Kumar Yadav v. State of Haryana*, [1985] Supp. 1 SCR 657 explained.

F *State of U.P. v. Rafiquddin & Ors.*, (Judgment Today (1987) 4 SC 257 referred to.

(5) The prescription of minimum qualifying marks of 60 (33%) out of the maximum of 180 set apart for the *viva-voce* examination did not, by itself, incur any constitutional infirmity. The principles laid down by this Court in the case of *Ajay Hasia Lila Dhar* and *Ashok Kumar Yadav* did not militate against or render impermissible such a prescription. [391B]

G *Ajay Hasia v. Khalid Mujib Sehravardi & Ors.*, [1981] 2 SCR 79; *Lila Dhar v. State of Rajasthan & Ors.*, and *Ashok Kumar Yadav v. State of Haryana*, distinguished.

H (6) A mere possibility of abuse of a provision, did not, by itself, justify its invalidation. The validity of a provision must be tested with reference to its operation and efficiency in the generality of cases and not

by the freaks or exceptions that its application might in some rare cases possibly produce. [394F-G]

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 741 of 1987.

From the Judgment and Order dated 6.2.1987 of the Rajasthan High Court in D.B. Civil Writ Petition No. 1632, 1758, 1826, 340, 1723, 344, 342, 343, 1755, 1756, 1757, 1982 of 1986, 170/87 and S.A. No. 341 of 1986

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V.M. Tarkunde, Mrs. M. Karanjawala and Ezaz Maqbool for the Appellant in C.A. No. 741/87

Dushyant Dava, Ezaz Maqbool, Mrs. Manik Karanjawala for the Petitioners in W.P. No. 286/87.

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C.M. Lodha, P.P. Rao, Badri Das Sharma, Raj Kumar Gupta and P.C. Kapur for the Respondents.

P.K. Jain for the Intervener in W.P. No. 286/1987.

The Judgment of the Court was delivered by

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VENKATACHALIAH, J. These appeals by Special Leave, arise out of the judgment, dated, February 6, 1987 of the Division Bench of High Court of Rajasthan, disposing of by a common judgment a batch of writ-appeals and writ petitions, in which was involved the question of the validity of certain provisions of the Recruitment Rules made and promulgated under the proviso to Article 309 of the Constitution by which, in respect of the scheme of competitive examinations to be conducted by the Public Service Commission for recruitment to certain branches of the civil services under the state, certain minimum qualifying marks in the *viva-voce* test were prescribed.

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The Division Bench, by its judgment under appeal, declared as arbitrary and unconstitutional this prescription in the rules which required that the candidates for selection to Administrative Service, the Police Service, and the Forest Service of the State should secure a minimum of 33% of the marks prescribed for the *viva-voce* examination. In these appeals the correctness of the High Court's view is questioned by the State of Rajasthan, its Public Service Commission and the successful candidates whose selections were, in consequence of invalidation of the rule, quashed by the High Court.

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The Writ-Petition No. 286 of 1987 before us, is by another batch of candidates selected by the Public Service Commission for issue of a writ of mandamus, directing the State to effectuate the selection and

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A issue orders of appointment. By an inter-locutory order, dated 13.3.1987 the operation of the judgment under appeal was stayed by this court. The result of this stay is that there was no impediment to effectuate the Select-List dated 17.7.1986.

B 2. The Rajasthan State and Subordinate Services (Direct Recruitment by Combined Competitive Examinations) Rules 1962, ('1962 Rules for Short'); the Rajasthan Administrative Service Rules 1954, the Rajasthan Police Service Rules 1954, the Rajasthan Forest Service Rules 1962 contain a provision, special to the said three services, and not applicable to other services, that candidates, other than those belonging to Scheduled Castes and Scheduled Tribes, should secure a minimum of 33% of marks in the *viva-voce* test. It is this Rule which is the centre of controversy. The Rules also stipulate that candidates for these three services must also secure 50% in the written examinations; but that is not in the area of controversy.

C Proviso (1) to Rule 15 of the '1962 rules' which is the relevant Rule brings out the point. It provides:

D "15. Recommendations of the Commission-(1) The Commission shall prepare for each Service, a list of the candidates arranged in order of merit of the candidates as disclosed by the aggregate marks finally awarded to each candidate. If two or more of such candidates obtain equal marks in the aggregate, the Commission shall arrange their names in the order of merit on the basis of their general suitability for the service:

Provided that:

F (i) *the Commission shall not recommend any candidate for the R.A.S./R.P.S. who has failed to obtain a minimum of 33% marks in the personality and viva-voce examination and a minimum of 50% marks in the aggregate. It shall also not recommend any candidate for other services who has failed to obtain a minimum of 45% marks in the aggregate.*

G (ii) \_\_\_\_\_

H (2) Notwithstanding anything contained in proviso (i), *the Commission shall in case of candidates belonging to the Scheduled Castes or Scheduled Tribes recommend the names of such candidates, upto the*

number of vacancies reserved for them for amongst those who have qualified for interview, *even if they fail to obtain the minimum marks in viva voce or the aggregate prescribed under proviso (i) above.*"

(emphasis supplied)

Similar is the purport of Proviso (i) to Rule 25 of the Rajasthan Administrative Service Rules 1954; the Rajasthan Police Service Rules 1954; the Rajasthan Forest Service Rules 1962 and the Rajasthan Forest Subordinate Service Rules 1963. The Rajasthan Public Service Commission conducts the competitive examination for selection for appointment to these and several other services under the State. The maximum marks for the written-examination is 1400 and for the *viva-voce* and personality test is 180, which constitutes 11.9% of the aggregate marks. Rules in relation to the Administrative Police and Forest Services require that candidates should secure 33% as minimum qualifying marks in the *viva-voce*. The High Court has struck down these provisions stipulating the minimum cut-off marks at the *viva-voce*.

3. In the year 1985 the Rajasthan Public Service Commission initiated proceedings for selection to 16 services including the said three services. The written examinations were conducted in October, 1985 the results of which were published in April, 1986. The *viva-voce* examinations and personality test were conducted between June 11 & July 11, 1986. The final Select-List was published on 17.7.1986. The five appellants in CA 741 of 1987 secured, respectively, 19th 23rd, 20th, 12th and 11th places. The 5 petitioners in WP 286 of 1987 secured 10th, 13th, 14th, 17th and 18th places respectively in the Select-List.

Some of the candidates who failed to secure the requisite minimum of 60 marks out of the 180 marks prescribed for the *viva-voce* and could not, therefore, make the grade in the said three services challenged before the High Court. The Select-List on the ground of the unconstitutionality of the provision in the Rules stipulating such minimum cut-off marks. They filed Writ-Petitions 1632 of 1986, 1723 of 1986, 1826 of 1986, 1842 of 1986, 1982 of 1986 and 170 of 1987 in the High Court. The petitions were referred to and came before a Division Bench and were heard along with the special Appeals 340 to 344 of 1986 which had been preferred against an earlier decision on the same question by a single judge of the High Court.

4. We have heard Sri C.M. Lodha, Sri Tarkunde, and Sri Shanti Bhushan, learned Senior Advocates respectively, for the State of

- A. Rajasthan, the Public Service Commission and the selected-candidates; and Shri P.P. Rao Learned Senior Advocate for the unsuccessful candidates at whose instance the Select-List was quashed by the High Court.

- B It was contended for the appellants that the High Court, in reaching such conclusions as it did on the constitutionality of Proviso (i) to Rule 15 of the "1962 rules" and of the corresponding Provisions in the Rules pertaining to the other services wholly misconceived the thrust and emphasis of the pronouncements of this court in *Ajay Hasia v. Khalid Mujib Sehravardi & Ors. etc.*, [1981] 2 SCR 79; *Lila Dhar v. State of Rajasthan & Ors.*, [1982] 1 SCR 320 and *Ashok Kumar Yadav v. State of Haryana and Ors. etc.*, [1985] Suppl. 1 SCR 657. It was
- C urged that the High Court fell into a serious error in importing into the present case, principles laid down in a wholly different context and that in the said three decisions the question whether a minimum qualifying marks could be prescribed for a *viva-voce* examination or not, did not fall for consideration much less decided, by this court. What was
- D considered in those cases, counsel say, pertained to the proposition whether the setting apart of an excessive and disproportionately high percentage of marks for the *viva-voce* in comparison with the marks of the written-examination would be arbitrary. Learned Counsel further submitted that reliance by the High Court on the Report of the Kothari Commission on the basis of which the prescription of minimum qualifying marks for the *viva-voce* was done away with in the Competitive Examinations for the Indian Administrative Service, Police Service and other central-services was erroneous as that report was merely an indication of a policy-trend. It was submitted that even the Kothari Commission had itself advised further evaluation of the matter. It was
- E further submitted for the appellants that the prescription of minimum qualifying-marks for the written-examination or the *viva-voce* or for both, is a well recognised aspect of recruitment procedures and that a prescription of a maximum of 11.9% of the total marks for the *viva-voce* examination, with a condition that the candidate must get at least, 33% out of these marks for selection to the three key-services would not violate any constitutional principle or limitation; but on the
- F contrary would, indeed, be a salutary and desirable prescription, particularly having regard to the nature of the services to which recruitment is envisaged. It was submitted that personnel recruited to the high echelons of Administrative, Police and Forest services with the prospect, with the passage of time, of having to assume higher responsibilities of administration in these three vital departments of
- G Government, should be tried men with dynamism and special attain-
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ments of personality. It was pointed out that though the pay-scale of the Accounts Service and Insurance Service are the same as that of the Administrative Service, such a prescription is not attracted to the selection to these other services.

5. Shri P.P. Rao, learned Senior Advocate, appearing for the candidates who had failed to secure the minimum at the *viva-voce* and whose challenge to the selection had been accepted by the High Court, submitted that the principles which the High Court had accepted were sound and that the decision under appeal would require to be upheld. Sri Rao submitted that the principles enunciated in the *Ajay Hasia*, *Lila Dhar* and *Ashok Kumar Yadav* acquire an added dimension in the context of the increasingly denuded standards of probity and rectitude in the discharge of public offices—and that attempts to vest a wide discretion in the selectors should not be too readily approved. According to Sri Rao, the real thrust of the principle laid down in these cases is that any marking-procedure that make the oral test determinative of the fate of a candidate is, in itself, arbitrary. Shri Rao relied upon the following passage in *Ashok Kumar Yadav's* case [1985] Suppl. 1 SCR 657 at 697-98):

“... 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 the 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 per cent opens the door wide for arbitrariness, and in order to diminish, if not eliminate the risk of arbitrariness, this percentage need to be reduced...”

(emphasis supplied)

Shri Rao submitted that the correct test, flowing from the earlier decisions, is to ask whether the *viva-voce* tended to become the determining factor in the selection process. If so, it would be bad. If this test is applied to the present case Sri Rao says, the requirement of minimum, cut-off marks in the *viva-voce* makes that *viva-voce* a “de-

- A termining factor" in the selection-process and falls within the dictum of the earlier cases and the decision reached by the High Court accordingly is unexceptionable. Sri Rao, sought to demonstrate how the Rule operated in practice and as to how candidates at the top of the results in written-examination had failed even to secure the minimum in the *viva-voce*, particularly in the Interview Board presided over by a certain Sri Khan. He showed with reference to several instances how the performance in the written-examination and the *viva-voce* bear almost an inverse proportion.
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The High Court accepted those grounds urged in invalidation of the impugned rule and held:

- C " . . . The question before us is slightly different and relates to the essential requirement of obtaining the prescribed minimum qualifying one third marks out of those allotted for the *viva-voce* test, since the percentage of marks allotted for the *viva-voce* test as compared to the written test is within the permissible limit. The test of arbitrariness even in such a case is however, indicated by the ratio decidendi of *Ashok Kumar Yadav* case (supra).
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- E It was clearly held by the Supreme Court in *Ashok Kumar Yadav's* case (supra) that any method which makes the *viva-voce* test a determining factor in the selection process resulting in a candidate securing high marks in the written examination being easily knocked out in the race by awarding him low marks in the *viva-voce* test and *vice versa* is arbitrary and is liable to be struck down on that ground . . ."
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6. We may now examine the merits of the rival contentions. The modern state has moved far away from its concept as the 'Leviathan' with its traditional role symbolised by the two swords it wielded—one of war and the other of justice. The modern, pluralist, social-welfare state with its ever-expanding social and economic roles as wide-ranging as that of an Economic-Regulator, Industrial Producer and Manager, Arbitrator, Educationist, Provider of Health and Social-Welfare services etc., has become a colossal service-corporation. The bureaucracy, through which the executive organ of the state gives itself expression, cannot escape both the excitement and the responsibility of this immense social commitment of the Welfare-State. Today the bureaucracy in this country carries with it, in a measure never before dreamt
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of, the privilege and the burden of participation in a great social and economic transformation, in tune with the ethos and promise of the constitution for the emergence of a new egalitarian and eclectic social and economic order—a national commitment which a sensitive, devoted and professionally competent administrative set-up alone can undertake. A cadre comprised of men inducted through patronage, nepotism and corruption cannot, morally, be higher than the methods that produced it and be free from the sins of its own origin. Wrong methods have never produced right results.

What, therefore, should impart an added dimension and urgency to the Recruitment to the services is the awareness of the extraordinary vitality and durability of wrong selections. With the constitutional guarantee of security, the machinery for removal of a Government-Servant on grounds of in-efficiency and lack of devotion remains mostly unused. The authors of a work on "Britain's Ruling Class"\*\*\* say:

"ONE OF THE MAIN ATTRACTIONS of working for the Civil Service is job security. Once they let you in, you have to do something spectacularly improper to get kicked out. In 1978 out of 5,67,000 non-industrial civil servants, just 55 were sacked for disciplinary reasons; 57 were retired early 'on grounds of inefficiency or limited efficiency'; 123 were retired early on grounds of redundancy'. In practice, a modest dose of common sense and propriety allows you to stay a civil servant until you retire. In the middle and senior administration grades many do just that. 82 per cent of permanent Secretaries have been in the Civil Service for 25 years or more; so have 79 per cent of Deputy Secretaries, 62 per cent of Under Secretaries and 70 per cent of Senior Executive Officers."

"... Recruiting civil servants means picking as many potential high flyers as possible—and at the same time as few potential albatrosses. It is a task carried out by the Civil Service Commission—with scrupulous honesty, but questionable efficiency."

The history of the evolution of the civil services in some countries is in itself study in contrasts as fascinating as it is disquieting.

\*\*\* The Civil Servants; An Inquiry into Britain's Ruling Class: Peter Kellnor and Lord Crowther-Hunt at page 103.

A In France, until the Revolution, almost every office, central or local, excepting the dozen or so of the highest offices were attainable only by private purchase, gift or inheritance. All Public Officer were treated as a species of private property and voluminous jurisprudence governed their transmission. Of this spectacle, a learned authority on Public Administration says:

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“Prices rose, but there was a frantic buying. Ministers made the most of their financial discovery. As it soon became too difficult to invent new offices, the old ones were doubled or trebled—that is, divided up among several holders, who exercise their functions in rotation, or who did what the seventeenth and eighteenth centuries were too fond of doing, employed a humble subordinate to carry them out . . . .”

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“Offices were sought, then, with a frenzied energy, and they were created with synicism Desmarets, one of Louis XIV’s Comptroller-Generals, had proposed to the King the establishment of some quite futile offices, and the latter asked who would ever consent to buy such situation? ‘Your Majesty’ replied Desmarets, ‘is forgetting one of the most splendid of the prerogatives of the Kings of France—that when the King creates a job God immediately creates an idiot to buy it.”

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(See Theory and Practice of Modern Government—Herman Finer—page 751)

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The much desired transformation from patronage to open competition is later développement, to which, now, all civilised governments profess commitment. However, though there is agreement in principle that there should be a search for the best talent particularly in relation to higher posts, however, as to the methods of assessment of efficiency, promise and aptitude, ideas and policies widely vary, though it has now come to be accepted that selection is an informed professional exercise which is best left to agencies independent of the services to which recruitment is made. The ‘interview’ is now an accepted aid to selection and is designed to give the selectors some evidence of the personality and character of the candidates. Macaulay had earlier clearly declared that a youngmen who in competition with his fellow-men of the same age had shown superiority in studies might well be

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regarded as having shown character also since he could not have pre-

pared himself for the success attained without showing character in eschewing sensual pleasures. But the interview came to be recognised as an essential part of the process of selection on the belief that some qualities necessary and useful to public-servants which cannot be found out in a written test would be revealed in a *viva-voce* examination. In justification of the value and utility of the *viva-voce*, the committee on Class I examinations in Britain said:

“ . . . . It is sometimes urged that a candidate, otherwise well qualified, may be prevented by nervousness from doing himself justice *viva-voce*. We are not sure that such lack of nervous control is not in itself a serious defect, nor that the presence of mind and nervous equipoise which enables a candidate to marshal all of his resources in such conditions is not a valuable quality. Further, there are undoubtedly some candidates who can never do themselves justice in written examinations, just as there are others who under the excitement of written competition do better than on ordinary occasions . . . . We consider that the *viva-voce* can be made a test of the candidate’s alertness, intelligence and intellectual outlook, and as such is better than any other . . . . ”

As to the promise as well as the limitations of the *viva-voce*, Herman Finer says:

“If we really care about the efficiency of the civil service as an instrument of government, rather than as a heaven-sent opportunity to find careers for our brilliant students, these principles should be adopted. The interview should last at least half an hour on each of two separate occasions. It should be almost entirely devoted to a discussion ranging over the academic interests of the candidate as shown in his examination syllabus; and a short verbal report could be required on such a subject, the scope of which would be announced at the interview. As now, the interview should be a supplementary test and not a decisive selective test. The interviewing board should include a business administrator and a university administrator. The interview should come after and not before the written examination, and if this means some inconvenience to candidates and examiners, then they must remember that they are helping to select the government of a great state, and a little inconvenience

A is not to be weighed against such a public duty . . . .”

(See Theory and Practice of Modern Government—Herman Finer at page 779)

B The problems of assessment of personality are indeed, complicated. On the promise as well as dangers of the purely ‘personal-interview’ method, Pfiffner-Presthus in his ‘Public Administration’ at page 305 says:

C “Pencil-and-paper tests that measure some aspects of personality are now available. Notable among these are the so-called temperament or personality inventories. These consist of questions in which the applicant is asked to evaluate himself relative to certain aspects of psychiatry and abnormal psychology. Such tests are subject to a great deal of controversy however, and there is a school of experimental psychologists which condemns them, mainly on two grounds. First, individuals will not give honest answers in a competitive test that asks them to describe their abnormal and intimate behaviour or beliefs. Second, it is maintained that the value of these tests lies in their use as the repеutic or clinical aids rather than as vehicles for competition . . .”

E “ . . . . Appointing officers are afraid that examining procedures will fail to give proper attention to such qualifications. The result is that they often feel they could do a better job of selection using only the personal interview. There are at least two reasons why this cannot be allowed. F The first relates to the protective tendency of civil service; appointing officers may appoint brothers-in-law or personal favourites. In addition, psychological research has shown that the interview is of questionable validity, even in the hands of an experienced executive.”

G 7. The arguments in the case on the legality of the prescription of minimum qualifying marks in the *viva-voce* turned more on the undesirability of such a condition in the background of the increasing public suspicion of abuse of such situations by the repositories of the power. The standards of conduct in public-life, over the years, have, unfortunately, not helped to lessen these suspicions. Tests of this kind H owing to be repeated on sloughts on the sensibilities of the public in the

past, tend themselves too readily to the speculation that on such occasions considerations other than those that are relevant prevail.

8. On a careful consideration of the matter, we are persuaded to the view that the prescription of minimum qualifying marks of 60 (33%) out of the maximum marks of 180 set apart for the *viva-voce* examination does not, by itself, incur any constitutional infirmity. The principles laid down in the cases of *Ajay Hasia*, *Lila Dhar*, *Ashok Kumar Yadav*, do not militate against or render impermissible such a prescription. There is nothing unreasonable or arbitrary in the stipulation that officers to be selected for higher services and who are, with the passage of time, expected to man increasingly responsible position in the core services such as the Administrative Services and the Police Services should be men endowed with personality traits conducive to the levels of performance expected in such services. There are features that, distinguish, for instance, Accounts Service from the Police Service—a distinction that draws upon and is accentuated by the personal qualities of the officer. Academic excellence is one thing. Ability to deal with the public with tact and imagination is another. Both are necessary for an officer. \*\*Administrative and Police Services constitute the cutting edge of the administrative machinery and the requirement of higher traits of personality is not an unreasonable expectation.

Indeed in *Lila Dhar v. State of Rajasthan*, [1982] 1 SCR 320, this Court observed:

“Thus, the written examination assesses the man’s intellect and the interview test the man himself and ‘the twain shall meet’ for a proper selection. If both written examination and interview test are to be essential feature of proper selection the question may arise as to the weight to be attached respectively to them. *In the case of admission to a college, for instance, where the candidates personality is yet to develop and it is too early to identify the personal qualities for which greater importance may have to be attached in later life, greater weight has per force to be given to performance in the written examination.* The importance to be attached to the interview test must be minimal. That was what was decided by this Court in *Periakaruppan v. State of Tamil Nadu*; *Ajay Hasia etc. v. Khalid Mujib Sehravardi &*

\*\* The dose that is demanded may vary according to the nature of the service.

A *Ors. etc. and other cases. On the other hand, in the case of service to which recruitment has necessarily to be made from persons of mature personality, interview test may be the only way, subject to basic and essential academic and professional requirements being satisfied . . . .*"  
(emphasis supplied)

B "... There are, of course, many services to which recruitment is made from younger candidates whose personalities are on the threshold of development and who show signs of great promise, and the discerning may in an interview test, catch a glimpse of the future personality in the case of such services, where sound selection must combine academic ability with personality promise, some weight has to be given, though not much too great weight, to the interview test. There cannot be any rule of thumb regarding the precise weight to be given. It must vary from service to service according to the requirement of the service, the minimum qualifications prescribed, the age group from which the selection is to be made, the body to which the task of holding the interview test is proposed to be entrusted and host of other factors. *It is a matter for determination by experts. It is a matter for research. It is not for courts to pronounce upon it unless exaggerated weight has been given with proven or obvious oblique motives.* The Kothari Committee also suggested that in view of the obvious importance of the subject, it may be examined in detail by the Research Unit of the Union Public Service Commission."

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(emphasis supplied)

F This Court indicated that in matters such as these, which reflect matters of policy, judicial wisdom is judicial restraint. Generally matters of policy have little adjudicative disposition.

9. Indeed, the point raised in the appeals admits of the answer found in the pronouncement of this court in *State of U.P. v. Rafiquddin & Ors.*, Judgments Today 1987 (4) SC 257 where this Court considered the permissibility of the prescription of minimum qualifying or cut-off marks in *viva-voce* examination, while dealing with clause (ii) of the proviso to Rule 19 (as it stood prior to the 1972 amendment) of the U.P. Civil Service (Judicial Branch) Rules 1951. The provision required the selection committee, *inter alia*, to ensure that persons

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H who did not secure sufficiently high marks in the interview were not

recommended for the posts. Pursuant to the power thus reserved to it, the selection committee, prescribed certain minimum cut-off marks for the interview. This court upholding the validity of the prescription observed at page 264 and 265:

“... Aggregate marks obtained by a candidate determined his position in the list, but the proviso of the rule required the Commission to satisfy itself that the candidate had obtained such aggregate marks in the written test as to qualify him for appointment to service and further he had obtained such sufficiently high marks in *viva-voce* which would show his suitability for the service. The scheme underlying Rule 19 and the proviso made it apparent that obtaining of the minimum aggregate marks in the written test and also the minimum in the *viva-voce* was the *sine-qua-non* before the Commission could proceed to make its recommendation in favour of a candidate for appointment to the service. The Commission in view of clause (ii) of the proviso had power to fix the minimum marks for *viva-voce* for judging the suitability of a candidate for service. Thus a candidate who had merely secured the minimum of the aggregate marks or above was not entitled to be included in the list of successful candidates unless he had also secured the minimum marks which had been prescribed for the *viva-voce* test ....”

“... The Commission had, therefore, power to fix the norm and in the instant case it had fixed 35 per cent minimum marks for *viva-voce* test. The *viva-voce* test is a well-recognised method of judging the suitability of a candidate for appointment to public services and this method had almost universally been followed in making selection for appointment to public services. Where selection is made on the basis of written as well as *viva-voce* test, the final result is determined on the basis of the aggregate marks. If any minimum marks either in the written test or in *viva voce* test are fixed to determine the suitability of a candidate the same has to be respected. Clause (ii) of the proviso to Rule 19 clearly confers power on the Commission to fix minimum marks for *viva-voce* test for judging the suitability of a candidate for the service. We do not find any constitutional legal infirmity in the provision.”

(emphasis supplied)

- A This should, in our opinion, conclude the present controversy in favour of the appellants.

10. Shri Rao's reference to and reliance upon the observations in *Yadav's* case is somewhat out of context. The context in which the observations were made was that the spread of marks for the *viva-voce* was so enormous, compared with spread of marks for the written examination, that the *viva-voce* test 'tender to become the determining factor'. The reference was to the possibility of a candidate underservedly being allotted high marks at the interview. That is a very different thing from the question whether a candidate should acquire at least a certain minimum percentage of marks at the *viva-voce*. The distinction in the two sets of situations is brought out in the words of an administrator Sir Ross Barket:
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- D "My experience, which has been chiefly confined to cases in which the number of candidates was not so large, is that the whole process is dangerous and infinitely hazardous. I think most selection committees on which I have served have been very doubtful about the results of what they had done. They have done their best on insufficient materials. *The process is I think fairly successful in weeding out the worst candidates . . .*"
- (emphasis supplied)

- E (See 'Union Public Service Commission—M.A. Muttalib—page 135)

11. It is important to keep in mind that in his case the results of the *viva-voce* examination are not assailed on grounds of *mala fides* or bias etc. The challenge to the results of the *viva-voce* is purely as a consequence and incident of the challenge to the vires of the rule. It is also necessary to reiterate that a mere possibility of abuse of a provision, does not, by itself, justify its invalidation. The validity of a provision must be tested with reference to its operation and efficacy in the generality of cases and not by the freaks or exceptions that its application might in some rare cases possibly produce. The affairs of Government cannot be conducted on principles of distrust. If the selectors had acted *mala fide* or with oblique motives, there are, administrative law remedies to secure reliefs against such abuse of powers. Abuse vitiates any power.
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- H We think that on a consideration of the matter, the High Court was in error in striking down the impugned rules. Accordingly, these



appeals are allowed and the Judgement dated 6.2.1987 of the Division Bench of the High Court is set aside and the writ-petitions filed before it challenging the validity of the impugned rules are dismissed. It is not necessary to issue express directions in W.P. 286 of 1987 in view of the fact that pursuant to the orders of stay dated 13.3.1987, the select-list dated 17.7.1986 became amenable to be acted upon. With the setting aside of the Judgment of the High Court under appeal, the impediment in the effectuation of select-list dated 17.7.1986 stands removed. In the circumstances of these cases, there will be no order as to costs.

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R.S.S.

Appeals allowed.