

PETITIONER:
UMESH CHANDRA SHUKLA ETC. ETC.

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT 02/08/1985

BENCH:
VENKATARAMIAH, E.S. (J)
BENCH:
VENKATARAMIAH, E.S. (J)
MISRA, R.B. (J)

CITATION:
1985 AIR 1351 1985 SCR Supl. (2) 367
1985 SCC (3) 721 1985 SCALE (2)103
CITATOR INFO :
R 1987 SC2267 (11)
R 1988 SC 162 (17)

ACT:
Constitution of India 1950, Article 234 & Delhi
Judicial Service Rules, Rules 16, 17 and 18
Subordinate Judges - Recruitment of - Service Rules
providing for written examination and viva-voce test and
prescribing minimum marks for qualifying - High Court by
Full Court decision adding two marks to marks obtained in
each written paper of Candidate by way of moderation -
Selection Committee fixing minimum of 60% marks in aggregate
after viva voce test - Full Court and Selection Committee
decisions - Whether valid and proper.

HEADNOTE:

Recruitment to the Delhi Judicial Services was governed by the Delhi Judicial Service Rules 1970. Rule 13 thereof provided that after the initial recruitment, recruitments shall be made on the basis of a competitive examination to be held by the High Court. Rule 14 prescribed the minimum qualification for a candidate to be eligible to appear at the competitive examination viz. (a) citizen of India, (b) a person practising as an advocate or qualified to be admitted as an advocate; and (c) not more than 32 years of age. Rule 15 provided that the syllabus for the examination and the fee payable shall be as detailed in the Appendix to the Rules. The examination was to consist of five written papers and a viva voce test. Clause (b) of the Appendix dealt with viva voce, and provided that: "Only such candidates will be called for viva voce who have obtained 50% in each written paper and 60% in the aggregate except in the case of candidates belonging to the Scheduled Castes/Tribes in whose case the qualifying marks will be 40% in each written paper and 50% in the aggregate". The marks obtained in the viva voce was to be added to the marks obtained in the written papers and the candidates, rank depended on the aggregate of both. Rule 16 provided that after the written test the High Court was to arrange the names of candidates in order of merit and the names to be sent to the Selection Committee. Rules 17 and 18 provided that the Selection Committee shall call for the viva voce test only such

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candidates who qualified in the written test, and after the viva voce test the Selection Committee was to prepare a list of candidates in order of merit and to forward the same to the Administrator.

The Registrar of the Delhi High Court through a notification called for application from eligible persons for filing the posts in the Delhi Judicial Service. A large number of candidates who were eligible applied in response thereto. The examination in the written papers were held and after the answer books were valued, the names of 27 candidates who were eligible for the viva voce test under the Rules were published on the Notice Board. These candidates were admitted to the viva voce test by the Selection Committee. Before the final list of the candidates was published by the Selection Committee as required by Rule 18, the petitioners in the Writ Petition came to know that the names of certain candidates whose names had not been included in the above list of 27 qualified candidates were included in the final list by the Selection Committee and that the names of certain candidates who had been interviewed by the Selection Committee had been omitted from the said final list.

The petitioners in that writ petition question the validity of the procedure adopted by the High Court and the Selection Committee in the preparation of the final list of successful candidates and contended that it was not open to the High Court to include in the list prepared under Rule 16 names of the candidates who had not secured the minimum marks prescribed for eligibility to appear in the viva voce test and that it was not open to the Selection Committee or the High Court to omit the names of certain candidates who had appeared at the viva voce test from the final list.

The writ petitions were contested and opposed by the High Court, by contending that the petitioners had no right to maintain the writ petitions and that the High Court had treated all candidates equally. It was further contended that the results of the written examination were placed before the Full court for approval, and that the Full Court approved the initial list of 27 candidates who qualified at the written test. However, as a few candidates who had secured very high marks were kept out of the zone of consideration for final selection by reason of having secured one or two marks below the aggregate marks prescribed, moderation of two marks in each paper to every candidate was done, and on the basis of this moderation and as a result of

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reevaluation of one answer book of one candidate, a second list was prepared showing the names of 8 candidates who also qualified for the viva voce test.

On the question: (1) whether the High Court had the power to add two marks to the marks obtaining in each paper by way of moderation, and (2) whether the High Court had power to eliminate the names of the candidates who have secured less than the 60% marks in the aggregate after the viva voce test.

Allowing the writ petitions,

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HELD: 1.(a) The list prepared by the High Court after adding the moderation marks is liable to be struck down. [382 D]

(b) Rule 16 of the Rules merely laid down that after the written examination the High Court shall arrange the names in order of merit of candidates who had obtained the

qualifying marks and these names shall be sent to the Selection Committee. The High Court had therefore no power to include the names of candidates who had not initially secured the minimum qualifying marks in the written papers by resorting to the devise of moderation, particularly when there was no complaint either about the question papers or about the mode of valuation. Exercise of such power of moderation is likely to create a feeling of distrust in the process of public appointments which is intended to be fair and impartial. It may also result in the violation of the principle of equality and may lead to arbitrariness. [382 B-C]

(c) The mandatory character of clause (6) in the Appendix to the Rules provides that only such candidates will be called for viva voce who have obtained 50% marks in the written paper and 60% in the aggregate except in the case of candidates belonging to the Scheduled Castes/Tribes in whose case the qualifying marks will be 40% in each written paper and 50% in the aggregate. Addition of any was by way of moderation to the marks obtained in any written paper or to the aggregate of the marks, in order to make a candidate eligible to appear in the viva voce test would indirectly amount to an amendment of clause (6) of the Appendix. [381 B-C]

2.(a) There is no power reserved under Rule 18 of the Rules for the High Court to fix its own minimum marks in order to include candidates in the final list. [382 G]
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(b) No fresh disqualification or bar may be created by the High Court or the Selection Committee merely on the basis of the marks obtained at the examination, because clause (6) of the Appendix itself has laid down the minimum marks which a candidate should obtain in the written papers or in the aggregate in order to qualify himself to become member of the Judicial Service. The prescription of the minimum of 600 marks in the aggregate by the Selection Committee as an additional requirement which the candidate has to satisfy amounts to an amendment of what is prescribed by clause (6) of the Appendix. [383 B-C]

In the instant case, the decision that a candidate should have secured minimum of 600 marks in order to be included in the final select list is not even taken by the High Court but by the Selection Committee. [383 D]

(c) The exclusion of the names of certain candidates who have not secured 600 marks in the aggregate from the list prepared under Rule 18 of the Rules is not legal. The list is quashed and it is directed that a fresh list shall be prepared in order of merit on the basis of the aggregate of the marks obtained by the candidates at the written examination and at the viva voce test without taking into consideration the moderation marks added by the High Court, and without reference to the decision of the Selection Committee that candidates who had obtained less than 600 marks in the aggregate should not be included in that list. The appointing authority is directed to treat the final list so prepared as the list forwarded to it under Rule 18 of the Rules. [382 F-383B]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition Nos. 3805 and 3850 of 1985 etc.

Y.S. Chitale, P.P. Rao, M.K. Ramamurthi, R.K. Garg,
F.S. Nariman, K. Parasaran, Attorney General, S.M. Ashri,

Petitioner-in-person, Rakesh K. Khanna, Jaspal Singh, S.K. Verma, Miss Asha Rani Jain, P.H. Parekh, S.K. Verma, C.M. Nayar, K. Swamy, S.S. Khanduja, Yashpal Dhingra, Miss Rani Jethmalani, A.K. Ganguli, M.A. Krishnamoorthy, R.N. Poddar, S.K. Bisaria, Jank Raj Joshi, Kailash Vasdev, Mrs. Vinod Arya, K. Swami, V.K. Maheshwari, U.R. Lalit and Mrs. Indira Sawhney for the appearing parties.

The Judgment of the Court was delivered by

VENKATARAMIAH, J. In these petitions filed under Article 32 of the Constitution the petitioners have challenged the validity of the proceedings relating to the competitive examination held

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by the High Court of Delhi for the purpose of recruiting candidates for filling the posts in the Delhi Judicial Service in the year 1984 and of the final list of selected candidates at that examination. The petitioner in Transfer Case No. 61 of 1985, which was also heard along with the above petitions, had filed earlier a writ petition under Article 226 of the Constitution before the High Court of Delhi for the very same relief. That writ petition was withdrawn by an order made under Article 139A of the Constitution for being disposed of along with the writ petitions filed in this court.

The petitioners in the above petitions were applicants for the posts of Subordinate Judges in the Delhi Judicial Service. Recruitment to the Delhi Judicial Service is governed by the Delhi Judicial Service Rules, 1970 (hereinafter referred to as 'the Rules') made by the Lt. Governor of Delhi in exercise of the powers conferred by the proviso to Article 309 of the Constitution read with Article 234 of the Constitution, in consultation with the High Court of Delhi. The initial recruitment to the Delhi Judicial Service was made in accordance with Part III of the Rules. 'Initial recruitment' means the first recruitment and appointment made to the Delhi Judicial Service after the commencement of the Rules. Any recruitment to the Delhi Judicial Service after the initial recruitment is required to be made in accordance with the rules contained in Part IV of the Rules. We are concerned in these cases mainly with Rules 13 to 18 of the Rules and the Appendix attached thereto. Rule 13 of the Rules provides that recruitment after the initial recruitment, shall be made on the basis of a competitive examination to be held by the High Court at such intervals as the Administrator may in consultation with the High Court determine. The Administrator is not other than the Lt. Governor of Delhi. The dates on which and the place at which the examination is to be held are required to be fixed by the Administrator. Rule 14 prescribes the minimum qualifications for a candidate which he should satisfy in order to be eligible to appear at the competitive examination. A candidate is eligible to appear at the examination if he is (a) a citizen of India; (b) a person practising as an advocate in India or a person qualified to be admitted as an advocate under the Advocates Act, 1961; and (c) not more than 32 years of age on the 1st day of January following the date of commencement of the examination. Rule 15 of the Rules provides that the syllabus for the examination and the fees payable shall be as detailed in the Appendix attached to the Rules. The examination includes the following subjects and each subject carries the number of marks shown against it:

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|---------------------------------|-----|
| (1) Essay and General Knowledge | 150 |
| (2) Language | 100 |

- (3) Law Paper (I) and Civil Law 200
- (4) Law Paper (II) Civil Law 200
- (5) Paper (III) Criminal Law 200
- (6) Viva Voce 150

The first five papers are called written papers. In clauses (1) to (5) of the Appendix the topics or subjects of each of the above written papers are set-out. Clause (6) of the Appendix which deals with Viva Voce reads as under:-

"(6) Viva Voce:- Only such candidates will be called for Viva Voce who have obtained 50% in each written paper and 60 per cent in the aggregate except in the case of candidates belonging to the Scheduled Castes/Tribes, in whose case the qualifying marks will be 40% in each written paper and 50% in the aggregate."

The marks obtained in the Viva Voce have to be added to the marks obtained in the written papers and the candidate's rank depends on the aggregate of both. Rule 16 of the Rules provides that after the written test, the High Court shall arrange the names of the candidates in order of merit and these names shall be sent to the Selection Committee. The constitution of the Selection Committee is described by rule 5 of the Rules. It provides that for purposes of recruitment to the Delhi Judicial Service there shall be a Selection Committee consisting of the following:-

"(1) Chief Justice or a Judge of the High Court deputed by him.

(2) Two Judges of the High Court nominated by the Chief Justice.

(3) Chief Secretary, Delhi Administration, Delhi.

(4) A Secretary of the Delhi Administration nominated by the Administrator."

The Registrar of the High Court is the ex officio Secretary to the Committee. The Selection Committee is required to call for Viva Voce test only such candidates who have qualified at the

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written test as provided in the Appendix. The duties and functions of the Selection Committee are set out in rules 17 and 18 of the Rules. They read:

"17. The Selection Committee shall call for viva voce test only such candidates, who have qualified at the written test as provided in the appendix.

18. The Selection Committee shall prepare a list of candidates in order of merit. Such list will be forwarded to the Administrator for filling the vacancies then existing or any vacancy that may occur within a period of one year of the preparation of the list."

The foregoing is in brief the summary of the rules governing the recruitment of persons to the Delhi Judicial Service after the initial recruitment. On July 5, 1984 a notification was published in the local newspapers by the Registrar of Delhi High Court calling for applications from eligible persons for filling the posts in the Delhi Judicial Service. A large number of candidates who were eligible under the Rules applied in response to the said notification. The examination in the written papers, i.e., Essay and General Knowledge, Language, Law Paper (I) and Civil Law, Law Paper (II) Civil Law and Paper (III) Criminal law was held in October, 1984. After the answer books at the written examination were valued, the names of 27 candidates, who were eligible for the viva voce test under the Rules, i.e., the candidates who had obtained not less than 50 per cent marks in each written paper and not less than 60 per

cent in the aggregate amongst candidates not belonging to the Scheduled Castes/Tribes and the candidates belonging to Scheduled Castes/Tribes who had obtained not less than 40 per cent marks in each written paper and not less than 50% in the aggregate, were published on the Notice Board of the Delhi High Court in the early part of January, 1985. The names of the said candidates were arranged in accordance with their Roll Numbers and not in the order of merit. The following is the list of 27 candidates:-

Sl. No.	Roll No.	Name
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1.	20	Sh. Naresh Kumar Kaushik
2.	30	Miss Sangita Dhingra
3.	35	Sh. Pradeep Chaddha
4.	36	Sh. Narender Kumar

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5.	57	Miss Ravinder Kaur
6.	58	Sh. Kunda Singh Mohi
7.	61	Sh. Padam Kant Saxena
8.	103	Sh. Teeka Ram
9.	112	Miss Anu Prem Shanker Kapoor
10.	170	Sh. Vinod Kumar Maheshwari
11.	180	Sh. Brijesh Sethi
12.	220	Miss Asha Menon
13.	258	Sh. Rakesh Garg
14.	287	Sh. A.K. Chaturvedi
15.	311	Sh. Sukhdev Singh
16.	342	Sh. Sudip Ahluwalia
17.	404	Sh. Pawan Kumar
18.	416	Sh. Dimpy Kumar Malhotra
19.	442	Sh. R. Kiran Nath
20.	526	Sh. Dilbagh Singh Punia
21.	715	Sh. Satish Kumar Minocha
22.	962	Sh. Jaipal Singh Malik
23.	996	Sh. Suraj Bhan
24.	1081	Sh. Narindar Pal Kaushik
25.	1510	Miss Rekha Rani
26.	1566	Sh. Kamlesh Kumar
27.	1883	Sh. Kamlesh Chander Agarwal

These candidates were admitted to the Viva Voce test by the Selection Committee. Before the final list of candidates was published by the Selection Committee, as required by rule 18 of the Rules, the petitioners came to know that names of certain candidates who names had not been included in the above list of 27 qualified candidates had been included in the final list by the Selection Committee and that the names of certain candidates who had been interviewed by the Selection Committee had been omitted from the said final list. Immediately thereafter the petitioners filed those petitions questioning the validity of the procedure adopted by the High Court and the Selection Committee in the preparation of the final list of successful candidates. It is not necessary to refer to all the allegations made in the petitions for the purpose of deciding these cases. We propose to deal with only two contentions raised by the petitioners, namely:-

(1) Whether it was open to the High Court to include in the list prepared under rule 16 of the Rules names of the candidates who had not secured the minimum marks prescribed in the Appendix of the Rules for being eligible to appear at the Viva Voce test; and

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(2) Whether it was open to the Selection Committee

or the High Court to omit the names of certain candidates who had appeared at the Viva Voce examination from the final list.

In order to appreciate the above contentions, it is necessary to set out what the Deputy Registrar of the High Court of Delhi has stated in his counter-affidavit filed on behalf of the High court in answer to the allegations made by the petitioners. In the counter-affidavit dated 12.4.1985 filed in Writ Petition No. 3805 of 1985, the Deputy Registrar has stated as under:-

II (a)

- (b) The petitioner in any event has no right to maintain the present petition.

I state that on the basis of the written competitive examination held in October, 1984 for recruitment to the Delhi Judicial Service, the High Court of Delhi had prepared a list of 27 candidates who qualified at the written test. Subsequently, by reason of a Full Court decision of the High Court, the marks obtained by the candidates at the written test were moderated by granting two marks to each of the candidates in each paper for the reasons detailed herein below. On the basis of this moderation and as a result of re-valuation of papers of one candidate (details of which are given below) a second list was prepared showing the names of 8 candidates who also qualified for the Viva Voce test.....

(c) High Court has treated each candidate equally. I state that as a general practice, after the written examinations are held for recruitment to the Delhi Judicial Service, the results of the same are placed before the Full Court for their Lordships approval. The results of the written examination held in 1984 for recruitment to the Delhi Judicial Service were also placed before the Full Court. The Full Court approved the initial list of 27 candidates who qualified at the said written test. However, the Hon'ble

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Judges of the High Court having appreciated that a few candidates who had otherwise scored very high marks would have to be kept out of the zone of consideration for final selection by reason of their having secured one or two marks below the aggregate or the qualifying marks prescribed for the particular paper, decided that "moderation of two marks in each paper to every candidate of the 1984, Delhi Judicial Service be done". Moderation has been done on several occasions in the past also. Accordingly, a second list was also prepared by the High Court and was put on the notice board for information of all the candidates. The said two lists of candidates who qualified at the written test, both before and after the moderation/revaluation, are annexed hereto and marked as 'annexure 'B' and 'C', respectively. A list of the candidates who had otherwise scored good marks in individual papers but could not secure 60% in the aggregate is annexed hereto and marked as Annexure 'D'. There was yet another candidate, namely, Shri Raj Kamal Gaur who had scored very good marks in all the law papers viz. in Criminal Law 178 out of 200; in Civil Law (I)

144 out of 200 , in Civil Law (II) 133 out of 200 and in language 50 out of 100 but secured 73 marks out of 150 in the Essay and General Knowledge paper and thus disqualified himself for lack of only 2 marks in the Essay and General Knowledge paper. This case was also taken into consideration by the Full Court for deciding to grant two additional marks to each candidate in each subject. This candidate if had only secured 75% marks out of 150 in Essay and General Knowledge paper would have obtained No.2 position in the merit list even without the addition of two marks in other papers which were subsequently awarded to him as well as to others by reasons of the Full Court decision. Shri Raj Kumar Gaur is an advocate practising at Bhiwani (Haryana) and the other candidates mentioned in annexure 'D' above are neither related nor in any way connected with the staff of the High Court or the Judges of the High Court."

In the counter-affidavit filed in Writ Petition No. 4363 of 1985 in paragraph 7 the Deputy Registrar stated:-

"In reply to para 7 of the writ petition it is admitted to be correct that it is provided in Rule 18

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that the Selection Committee shall prepare a list of candidates in order of merit, and that such list may be forwarded to the Administrator for filing the vacancies then existing or any vacancy that may occur within a period of one year of the preparation of the list. It is submitted that if this rule is interpreted to mean that the Selection Committee shall even if it considers in the Viva voce test - a candidate to be not suitable for appointment to the Delhi Judicial Service then too it shall recommend his name for appointment to the Service it will render the purpose of viva voce test to be farce and mere empty formality. In the viva voce test the Selection Committee has to judge the suitability of the candidates for appointment to the Service from various aspects. The process of selection of suitable candidates to any responsible post involves by itself a minimum standard to be crossed by candidates and that has to be subjectively determined by the Selection Committee itself. This requirement is all the more important in recruitment to subordinate judiciary. It is submitted that in the present case the Selection Committee has considered only those general candidates, who have secured 600 or more marks in aggregate, and only the first two Scheduled Castes candidates to be suitable for appointment to the Delhi Judicial Service. The Selection Committee in its recommendations dated 1.2.1985 observed that it selects and recommends for appointment only 21 candidates to the service. A copy of the complete list together with a copy of the order passed by Selection Committee in this behalf is enclosed for perusal and marked as Annexure E-1."

The final select list prepared by the Selection Committee is annexed to the counter-affidavit filed in Writ Petition 4365 of 1985. It contains the following names which are arranged in the order of merit:-

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- | Sl. No. | Name |
|------------------------------|-----------------------------|
| --- | ---- |
| 1. | Miss Sangita Dhingra |
| 2. | Sh. Dimpy Kumar Malhotra |
| 3. | Ms. Anu Prem Shanker |
| 4. | Smt. R. Kiran Nath |
| 5. | Ms. Ravinder Kaur |
| 6. | Sh. Kamlesh Chandra Agarwal |
| 7. | Sh. Rajan Sharma |
| 8. | Sh. Satish Km. Manocha |
| 9. | Sh. Narender Paul Kaushik |
| 10. | Sh. Raj Kamal Gaur |
| 11. | Ms. Asha Menon |
| 12. | Sh. Pawan Kumar |
| 13. | Sh. Pradeep Chaddah |
| 14. | Sh. Narender Kumar |
| 15. | Sh. Naresh Kumar Kaushik |
| 16. | Sh. Padam Kant Saxena |
| 17. | Sh. Brijesh Sethi |
| 18. | Miss Rekha Rani |
| 19. | Miss Punam Jai |
| 20. | Sh. A.K. Chaturvedi |
| 21. | Sh. Sudip Ahluwalia |
| 22. | Sh. Dilbag Singh |
| 23. | Sh. Kamlesh Kumar |
| 24. | Sh. V.K. Maheshwari |
| 25. | Sh. Rakesh Garg |
| 26. | Sh. J.S. Malik |
| 27. | Sh. Raj Kumar Jain |
| 28. | Sh. Suman Kr. Khanna |
| 29. | Sh. Rajinder Kumar Grover |
| 30. | Sh. Vijay Kumar |
| Scheduled Caste Candidates:- | |
| 1. | Sh. Sukhdev Singh |
| 2. | Sh. Teeka Ram |
| 3. | Sh. Kunda Singh Mohi |
| 4. | Sh. Gian Chand |
| 5. | Sh. Suraj Bhan" |

It is seen from the extract of the counter-affidavit filed in Writ Petition No. 3805 of 1985 that the results at the written examination were placed before the Full Court Meeting of the Delhi High Court for its approval on January 25, 1985. The true copy of the minutes of the Full Court Meeting held on January 25, 1985 is produced before us. It reads:

	"Agenda	Minutes
379	To consider the question whether High Court has the power to re-check and revalue the answer book of an examinee of the Delhi Judicial service.	The Full Court considered the question and decided as follows:- (i) Re-checking is always possible. (ii) If there is to be revaluation, it must be by the same examiner (iii) Revaluation may be ordered by the Hon'ble the Chief Justice where he thinks it is a deserving case for sufficient reasons. (iv) Moderation of 2 marks in each paper to every candidate of the 1984 Delhi Judicial Service Examination be done."

It is seen from the above minutes that the subject for consideration at the meeting was whether the "High Court has the power to recheck and revalue the answer book of an examinee of the Delhi Judicial Service." It may be stated here that one of the candidates had submitted a petition to the High Court requesting it to get some of his answer books revalued before the above Full Court Meeting was held. Resolutions (i) to (iii) passed at the Full Court Meeting relate to the said petition for revaluation. We are not concerned in these cases with the question whether the High Court has the power to get the answer books revalued since the case of the candidate who had prayed for revaluation of his answer books has already been disposed of by a separate order on July 26, 1985 made in Writ Petition No. 3805 of 1985 by which he was permitted to withdraw from the contest. We are concerned, therefore, only with Resolution No. (iv) passed at the Full Court Meeting deciding to add two marks to the marks obtained by a candidate in each paper. On this question the Deputy Registrar has stated in the course of his counter affidavit thus:-

The Full Court approved the initial list of 27 candidates who qualified at the said written test. However, the Hon'ble Judges of the High Court having appreciated that a few candidates who had otherwise scored very high marks would have to be kept out of the zone of consideration for final selection by reason of their having secured one or two marks below the aggregate or the qualifying marks prescribed for the particular paper, decided that moderation of two

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marks in each paper to every candidate of the 1984 Delhi Judicial Service be done. Moderation has been done on several occasions in the past also."

The question for consideration is whether the High Court in the circumstances of this case had the power to add two marks to the marks obtained in each paper by way of moderation. It is no doubt, true that the High Court is entrusted with the duty of conducting the competitive examination under rule 13 of the Rules. It is argued on behalf of the High Court that the power to conduct an examination includes the power to add marks either by way of moderation or by way of grace marks if it feels that it is necessary to do so, and reliance is placed by the High Court on its own past practice, and the practice prevailing in a number of universities in India, where marks are awarded either as moderation marks or as grace marks. It is true that in some educational institutions marks are awarded by way of moderation at an examination if the examining body finds any defect in the examination conducted by it such as inclusion of questions in the question papers which are outside the syllabus, extremely stiff valuation of the answer books by an examiner or any other reason relevant to the question papers or the valuation of the answer books. The reason given by the High Court for adding the moderation marks has nothing to do either with the question papers or with the mode of valuation. The High Court approved the list of 27 candidates who had secured the required qualifying marks which would enable them to appear at the viva voce test as prescribed in the Appendix. Thereafter the High Court resolved to add two marks to be marks obtained in each paper by way of moderation on the ground that a few candidates who had otherwise secured very high marks may have to be kept out of the zone of consideration for final selection by reason of their having secured one or two marks

below the aggregate or the qualifying marks prescribed in the particular paper. The resolution does not show the names of the particular candidates considered at the meeting in whose case such a concession had to be shown. The affidavit filed on behalf of the High Court, of course, refers to certain hard cases which persuaded the High Court to add additional marks by way of moderation. The question for decision is whether such a resolution can be passed by the High Court which is entrusted with the duty of conducting the examination. The High Court had not found any defect in the question papers or any irregularities in the valuation of the answer books. It may be that some candidates had obtained high marks in some papers and by reason of their not obtaining the required marks in the other papers or 60% and above

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in the aggregate they may not have become qualified for the viva voce test. In our opinion this alone would not be sufficient to add any marks by way of moderation. It is relevant to note the mandatory character of clause (6) in the Appendix to the Rules which says only such candidates will be called for viva voce who have obtained 50% marks in each written paper and 60% in the aggregate except in the case of candidates belonging to the Scheduled Castes/Tribes in whose case the qualifying marks will be 40% in each written paper and 50% in the aggregate. Addition of any marks by way of moderation to the marks obtained in any written paper or to the aggregate of the marks in order to make a candidate eligible to appear in the viva voce test would indirectly amount to an amendment of clause (6) of the Appendix. Such amendment to the Rules can be made under Article 234 only by the Lt. Governor (Administrator) after consulting the High Court in that regard. In the instant case by resolving to add two marks to the marks obtained in each answer book by a candidate has virtually amended the Rules by substituting 48% in the place of 50% which is required to be secured in each written paper and 58% in the place of 60% which is required to be secured in the aggregate in the case of candidates not belonging to Scheduled Caste/Tribes and 38% in the place of 40% in each written paper and 48% in the place of 50% in the aggregate in the case of candidate belonging to Scheduled Castes/Tribes. The adverse effect of the moderation on the candidates who had secured the required qualifying marks at the examination in question is quite obvious, since four candidates whose names were not in the list of 27 candidates published on the first occasion have been included in the first list of candidates chosen for appointment from out of the final list of successful candidates in preference to some of the candidates who had obtained the qualifying marks in the written papers and they would have been appointed as Sub-Judges but for the interim order made by this Court. These four candidates were able to get in to the list of persons to be appointed as Sub-Judges because of the high marks they were able to secure at the viva voce test for which they were not eligible but for the moderation marks. The area of competition which the 27 candidates who had been declared as candidates eligible to appear at the viva voce examination before such moderation had to face became enlarged as they had to compete also against those who had not been so qualified according to the Rules. The candidates who appear at the examination under the Delhi Judicial Service Rules acquire a right immediately after their names are included in the list prepared under rule 16 of the Rules which limits the scope of competition and that right cannot

be defeated by

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enlarging the said list by inclusion of certain other candidates who were otherwise ineligible, by adding extra marks by way of moderation. In a competitive examination of this nature the aggregate of the marks obtained in the written papers and at the viva voce test should be the basis for selection. On reading rule 16 of the Rules which merely lays down that after the written test the High Court shall arrange the names in order of merit and these names shall be sent to the Selection Committee, we are of the view that the High Court has no power to include the names of candidates who had not initially secured the minimum qualifying marks by resorting to the device of moderation, particularly when there was no complaint either about the question papers or about the mode of valuation. Exercise of such power of moderation is likely to create a feeling of distrust in the process of selection to public appointments which is intended to be fair and impartial. It may also result in the violation of the principle of equality and may lead to arbitrariness. The cases pointed out by the High Court are no doubt hard cases, but hard cases cannot be allowed to make bad law. In the circumstances, we lean in favour of a strict construction of the Rules and hold that the High Court had no such power under the Rules. We are of the opinion that the list prepared by the High Court after adding the moderation marks is liable to be struck down. The first contention urged on behalf of the petitioner has, therefore, to be upheld. We, however, make it clear that the error committed by the High Court in this case following its past practice is a bona fide one and is not prompted by any sinister consideration.

With regard to the second contention, namely, that the High Court had no power to eliminate the names of candidates who had secured less than 600 marks in the aggregate after the viva voce test, reference has to be made to Rules 17 and 18 of the Rules which provide that the Selection Committee shall call for viva voce test only such candidates who are qualified at the written test as provided in the Appendix and that the Selection Committee shall prepare the list of candidates in order of merit after the viva voce test. There is no power reserved under rule 18 of the Rules for the High Court to fix its own minimum marks in order to include candidates in the final list. It is stated in paragraph 7 of the counter-affidavit filed in Writ Petition No. 4363 of 1985 that the Selection Committee has inherent power to select candidates who according to it are suitable for appointment by prescribing the minimum marks which a candidate should obtain in the aggregate in order to get into the Delhi Judicial Service.

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It is not necessary to consider in this case whether any other reason such as character, antecedents, physical fitness which may disqualify a candidate from being appointed to the Delhi Judicial Service may be taken into consideration by the Selection Committee while preparing the final list. But on going through the Rules, we are of the view that no fresh disqualification or bar may be created by the High Court or the Selection Committee merely on the basis of the marks obtained at the examination because clause (6) of the Appendix itself has laid down the minimum marks which a candidate should obtain in the written papers or in the aggregate in order to qualify himself to become a member of the Judicial Service. The prescription of the minimum of 600 marks in the aggregate by the Selection

Committee as an additional requirement which the candidate has to satisfy amounts to an amendment of what is prescribed by clause (6) of the Appendix. The question whether a candidate included in the final list prepared and forwarded by the Selection Committee may be appointed or not is a matter to be considered by the appointing authority. In the instant case the decision that a candidate should have secured a minimum of 600 marks in the aggregate in order to be included in the final select list is not even taken by the High Court but by the Selection Committee. Moreover recruitment of persons other than District Judges to the Judicial Service is required to be made under Article 234 of the Constitution in accordance with the Rules made by the Governor as provided therein, in consultation with the High Court. Article 235 which vests in the High Court the control over the District Courts and Courts subordinate thereto, cannot include the power of making rules with regard to recruitment of person other than District Judges to the judicial service as it has been expressly dealt with in Article 234 of the Constitution. We are of the view that the Selection Committee has no power to prescribe the minimum marks which a candidate should obtain in the aggregate different from the minimum already prescribed by the Rules in its Appendix. We are, therefore, of the view that the exclusion of the names of certain candidates, who had not secured 600 marks in the aggregate including marks obtained at the viva voce test from the list prepared under rule 18 of the Rules is not legal. We, therefore, quash the list prepared by the Selection Committee and direct that a fresh list shall be prepared in order of merit on the basis of the aggregate of the marks obtained by the candidates at the written examination and at the viva voce test without taking into consideration the moderation marks added by the High Court and without reference to the decision of the Selection Committee that candidates who had obtained less than 600 marks in

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the aggregate should not be included in that list. It follows that the said list should contain only the names of the 27 candidates who had secured the minimum marks prescribed by the Appendix to the Rules for appearing at the viva voce test. The appointing authorities directed to treat the final list so prepared as the list forwarded to it under rule 18 of the Rules. On the basis of the said list appointments will now have to be made in accordance with law and relevant Government orders providing for reservation of posts to candidates belonging to Scheduled Castes/ Scheduled Tribes and other backward classes. If in accordance with the interim order made by this Court any candidate has been appointed as a member of the Delhi Judicial Service his continuance in the service or his seniority shall be governed by the list to be prepared in accordance with the directions issued above. These petitions are accordingly allowed. There shall be no order as to costs.

N.V.K.

Petitions allowed.

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