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IN THE HIGH COURT OF DELHI AT NEW DELHI

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WP (C) No.4376/2011

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Date of Hearing: 20.01.2012

Date of Decision: 28.02.2012

Ms. Anvita Singh

.....Petitioner

Through: Mr. Maninder Singh,
Senior Advocate with
Ms.Pratibha M. Singh, Mr.Sushant
Singh, Mr. P.C. Arya, Mr. Praveen
and Mr. D. Bhattacharya

Versus

Union of India & Another

.....Respondent

Through Mr. A.S. Chandhiok,
Senior Advocate with
Mr.Ruchir Mishra

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, ACTING CHIEF JUSTICE

1. The petitioner herein is an M.Sc. which degree she has obtained from the Indian Institute of Technology (IIT), Delhi. The petitioner claims that she has been remained involved in the work related to patent, drafting, filing and prosecuting application for grant of patent registration by the Patent Office under the Patents Act, 1970 (hereinafter referred to as 'the Act') and has vast experience. However, she has not been able to get herself registered as Patent Agent under the Act because her repeated

attempts to pass qualifying examination for Patent Agents have remained unsuccessful. This qualifying exam is in two parts, namely, written test and viva voce examination. Though she has exhibited excellent performance in so far as written test is concerned, as she has not been able to secure minimum 50% marks in the viva voce examination, which is the requirement of Rule 110 of the Patents Rules, she is treated as unqualified. It is for this reason that by way of writ petition the petitioner has challenged the said provision of Rule 110 of the Patents Rules which mandates securing minimum 50% marks in viva voce examination.

2. Section 126 of the Act prescribes qualifications for registration as Patent Agent and reads as under:-

“Section 126 - Qualifications for registration as patent agents

(1) A person shall be qualified to have his name entered in the register of patent agents if he fulfils the following conditions, namely:-

(a) he is a citizen of India;

(b) he has completed the age of 21 years;

(c) he has obtained a¹[degree in science, engineering or technology from any University established under law for the time being in force] in the territory of India or possesses such other equivalent qualifications as the Central Government may specify in this behalf, and, in addition,-

(ii) has passed the qualifying examination prescribed for the purpose;

[(iii) has, for a total period of not less than ten years, functioned either as an examiner or discharged the functions of the Controller under section 73 or both, but ceased to hold any such capacity at the time of making the application for registration;

(d) he has paid such fee as may be prescribed.....”

3. One of the requirements for qualifying for registration as Patent Agent, thus, is passing the qualifying examination prescribed for the purpose. This is so prescribed in Rule 110, as indicated above, to have clearer view of this requirement. We reproduce here under Rule 110 of the Patent Rules. Written examination is in two papers followed by viva voce. All three have 100 marks each. Sub-Rule (3), which is the bone of contention, stipulates that in each of the written papers as well as viva voce examination a candidate is required to secure minimum 50% marks and aggregate of all three papers has to be 60%. The petitioner has no quarrel with the prescription of minimum 50% marks in papers I and II each. She also does not question the requirement of securing 60% marks in aggregate. Her grievance is limited to that part of the Rule which mandates securing 50% marks in viva voce as well. According to the petitioner, it is too high a prescription and gives arbitrary power to the interview board to fail a candidate even when he or she has done extraordinarily well in the written examination. Conversely, a candidate who has got more than 50% but less than 60% marks in the written test consisting of aforesaid two papers, can be given very high marks in viva

voce to ensure making overall 60% aggregate in his/her case and thereby qualifying such candidate. She has tried to demonstrate it by giving her own example vis-à-vis the cases of some other candidates. In the examination conducted in January, 2011, the petitioner had secured 61 marks in Paper I and 72 in paper II. Thus, her aggregate percentage in the written examination was 66.5%. However, she was assigned 40 marks in viva voce as a result whereof she was declared 'failed' in totality. As against this, the petitioner has given following examples where marks of other candidates whose performance was average, i.e., below 60% in the written examinations were declared 'passed' by giving very high marks in the viva voce. The candidates, who have marginally passed the written examination but have been declared successful due to abnormally high viva voce score. For example, candidate with Roll No. M0493 (appearing at Mumbai) who scored 59 and 50 in papers I and II but 80 in viva voce, candidate with Roll No. K001 (appearing in Kolkata) who has scored 57.5 and 54 in papers I and II respectively but scored 90 in viva voce. Similarly, candidate with Roll No. C0304 (appearing at Chennai) who has scored 54 and 50 in papers I and II respectively but scored 80 in viva voce. Failed candidates have also been awarded abnormally high marks in viva voce. For example, candidate with Roll No.M0507 (at Mumbai) scored 59 and 25 in papers I and II but 85 in viva voce, candidate with Roll No. M0006 (Mumbai) scored 40 and 36 in papers I and II but 80 in viva voce.

Further, 18 out of 34 candidates declared pass in Chennai have scored marginal marks in the written examination but have passed purely due to high marks awarded in viva voce. Similarly, 22 out of 72 candidates declared pass in Delhi have scored marginal marks in the written examination but have passed purely due to high marks awarded in viva voce. Similarly, 1 out of 6 candidates declared pass in Kolkata has scored marginal marks in the written examination but has passed purely due to high marks awarded in viva voce. Similarly, 14 out of 89 candidates declared pass in Mumbai have scored marginal marks in the written examination but have passed purely due to high marks awarded in viva voce.

4. It is her submission that the aforesaid provision stipulating minimum 50% marks in the viva voce is discriminatory, arbitrary and violative of Articles 14, 16 and 19(1)(g) of the Constitution. Mr. Maninder Singh, learned senior counsel, who argued for the petitioner paraphrased his propositions of law focusing the aforesaid aspect as follows:-

“This Court in its judgments in:-

Dr. A.M.V.R. Narendra v. UOI & Anr., dated 22.1.2003 in WP (C) No.3951/2002 and *AIIMS v. Dr. A.M.V.R. Narendra* dated 11.6.2004 in W.A. No.127/2003 has, *inter alia*, held that any minimum stipulation for weightage for viva voce in any evaluation/selection process is not

permissible and specially when such minimum stipulation virtually amounts to 100% weightage to be given to viva voce and the same is not permissible under law and would be unsustainable. Weightage to viva voce in admissions in educational courses etc. beyond 15% would not be permissible. Similarly, even in the case of employment, higher weightage to viva voce would not be permissible and in any case, it would indeed be unsustainable in all those cases where the weightage to viva voce virtually becomes the only determinative factor in any selection process undertaken by any authority. He also referred to judgment in this Court the case of *L.R. Nath v. Delhi University*, AIR 2002 Delhi 393, wherein this Court had held that the action of Delhi University in completely eliminating any weightage to the viva voce was rejected by this Court.

5. It is further submitted that the weightage to viva voce which otherwise appears to be 33% has virtually become the sole / only determinative factor inasmuch as it is only on the basis of the marks given in the viva voce that the petitioner despite having obtained more than 60% marks in the written examination has been declared to be unsuccessful. In other words, the weightage to viva voce, in the present case has virtually become 100% and the only determinative factor in relation to the result of the entire process.

6. According to the learned counsel, such a situation has been held to be unsustainable in law in view of the law laid down in *L.R. Nath v. Delhi University* (supra) in the following manner:-

“8A. in the present instance, the University of Delhi has reached the conclusion that the interview test can be dispensed with for a super speciality course such as D.M./M.Ch. The same cannot be called arbitrary or irrational. The University authorities have also produced the results of entrance examination held by them for the year 2000. From a perusal of the results produced, it is seen that the maximum marks for written test were 240 and 60 for the interview. A perusal of the results as produced reveal that a topper in the written examination due to poor marks in the interview/viva voce may not even make the grade for admission as the number of seats for M.CH. and D.M. Course being limited. For instance a candidate secured 136 marks out of 240 in the written test but was awarded 48 marks out of 60 in the viva voce/interview making it a total of 184 marks. As against this, the topper in the written examination got 155 marks but was awarded only 14 in the viva voce/interview thus making a total of 169 in all. This brings into focus, the possible abuse, arbitrariness and subjectivity of selection by interview. Instances of a favorable pre-disposition of those conducting the interview towards candidates known to them or associated with them during the latter's pursuit of MBBS/MD Courses are not uncommon. While utility of the interview/viva voce test as an aid in assessment of the candidates, practical expertise and clinical assessment has to be recognised at the same time a system has to be developed with appropriate safeguards so as to eliminate abuse or reduce to minimal factors, such as, favorable dispositions, favoritism, nepotism during the interviews or viva voce tests. The results as produced tend to show that the marks obtained in the viva voce test/interview could be a determinative factor, especially when there is tough competition in the written examination.

9. Moreover, the assessment of personality traits is critical for recruitment to Civil Services or other positions where initiative, self confidence, resource fullness and leadership qualities are an absolute pre-requisite. While this may not be so, in case of admissions to Post Doctoral super-specialty Courses, where aptitude of the candidates towards medicine, their academic performance and capacity to work hard stand more or less established during their pursuit of MBBS and MD. Accordingly, it is not essential to follow the same pattern as is required in the case of civil services for assessment of personality traits. In view of the foregoing discussion, I am of the view that the decision taken by the University of Delhi to dispense with interview/viva voce test is a bona fide exercise of their power and discretion to make the selection process objective and to remove elements of subjectivity and arbitrariness to the extent possible.”

7. Mr. Maninder Singh also placed strong reliance upon the following dicta laid down in the judgment rendered by a Single Judge of this Court in ***Dr. A.M.V.R. Narendra v. Union of India & Another***, WP(C) No.3951/2002 decided on 22.1.2003:-

“13. The pleas of the petitioner and the respondent No.2 AIIMS are, therefore, required to be considered in the light of the above finding by me that the admission sought by the petitioner is to an academic course. It is thus evident that the tests laid down by the Hon’ble Supreme Court for an appointment to a post where a larger interplay in the interview/via voce marks is permitted, cannot apply. In so far as admission to academic course are concerned, courts have consistently restricted the marks allocable for the interview. The observations of the Hon’ble Supreme Court in Lila Dhar’s case (supra) qua Ajay Hasia’s case (supra) being per incuriam were made only in the context of appointments to posts. The observations were not made in any other context. In so far as admission to academic courses are concerned, there is no departure from the

law laid down by Hon'ble Supreme Court in Ajay Hasia's case (supra) restricting the impact of viva voce/interview. Even the decision in Ashok Kumar Yadav's case (supra) where higher marks in viva voce tests have been permitted by the Hon'ble Supreme Court for a higher degree course, cannot apply to the present case in view of the foregoing discussion. In any case, Ashok Kumar Yadav's case (supra) while permitting higher percentage of marks for interview does not permit that the interview performance can be the sole determinative factor. In the present case, it is significant that there is no dispute that the procedure prescribed and impugned is such that since the marks obtained at the first stage of written test plus the second stage of Departmental Clinical Assessment are not clubbed at all with the interview stage marks, even after clearing of both the first stage of written exam and second stage of departmental clinical assessment by the candidate, the sole determinative factor is the performance in the interview irrespective of the score in written and departmental clinical assessment tests which in my view, therefore, acquires a hundred per cent weightage. Even in Ashok Kumar Yadav's case (supra) which was relied upon by respondent, highest percentage of marks permitted for interview/viva voce was 25 per cent and that too for ex-servicemen officer. Furthermore, this was in case an appointment where the Hon'ble Supreme Court has permitted a larger weightage for interview and viva voce. Since I have already found that interview test in the present case has already acquired 100 per cent weightage, Ashok Yadav's (supra) case judgment supports the plea of the petitioner rather than that of the respondent. It is very clear that whatever be the degree of weightage of interview for higher degree course, it cannot in any event exceed the percentage found to be permissible for appointment by the Hon'ble Supreme Court. No decision has been cited by the counsel for AIIMS which has permitted the interview to be the sole determining factor in selection for an educational institution's course. In this view of the matter, the procedure prescribed by the AIIMS in which there is no real credence given to the written exam as well as the

departmental clinical assessment except to treat them as qualifying tests, shows that these tests are merely treated as eligibility/qualifying tests and the performance in these tests of 90 marks each are totally irrelevant and inconsequential when it comes to the 20 marks for the interview test contrary to the well settled position of law. I have no hesitation in holding that the non-clubbing of the three tests gives a 100 per cent weightage to the interview test. In fact the overriding importance given to the interview in the present context is even more glaring as the candidate for admission to the course has not only undergone a written test but has also successfully cleared the departmental clinical assessment. In such a situation where the petitioner has successfully cleared a two-tier system of evaluation, to permit the interview result to be sole determinative factor is wholly arbitrary and contrary to the position of law laid down by the Hon'ble Supreme Court, particularly when the results of written and departmental assessment are not added to the result. I have no doubt that if the results of all the three tests were combined, the procedure prescribed by the AIIMS would be perfectly legal and valid and in such a situation, the courts would not interfere with such a procedure. In my view, it is the interpretation put on the procedure by the respondent No.2, AIIMS by not giving any credence/weightage in the final assessment to the marks secured in the written test and the departmental clinical assessment test which makes it arbitrary and unreasonable.”

8. This judgment was upheld by the Division Bench vide its decision dated 11.6.2004 in Writ Appeal No.127/2002. In para-8 of the judgment the Court formulated the following question, which arose for consideration:-

“The principal question which falls for consideration in these appeals is whether admission to the DM [CH] course is an admission to a course or it is selection to a post.”

9. The method of selection was explained in para 11 as under:-

“11. The method of selection is divided into three stages. The first stage is the written examination. The second stage is a departmental clinical assessment, i.e., practical examination and viva voce, and the third stage is the interview. All these three stages have minimum qualifying marks of 50%. The candidate who secures at least 50% marks in one stage of the course can move to another stage. The candidate who clears the first two stages would alone becomes eligible to appear in the third stage, i.e., the stage of interview. Any candidate getting even one mark short then the minimum prescribed marks would be ineligible for admission. This type of procedure is designed for admission to a course and not selection to a post (employment in the service).”

10. After holding that it was an admission to course and not selection to a post, the Division Bench adverted to the next question, namely, “Whether interview can be sole determining factor for a DM [CH] course?” After referring to various judgments of the Supreme Court the Division Bench held that it was impermissible. The Division bench first took note of the fact that with the prescription of minimum qualifying marks in the interview, for all intent and purposes it had led to 100% weightage being given to viva voce, which could not be countenanced, ruled the DB, *inter alia*, observed as under:-

“The Apex Court in number of cases have clearly laid down that interview alone ought not to be the sole determining factor for selection. We have to take into consideration pragmatic realities. Arbitrariness in action for extraneous consideration is prevalent all over. According to the respondent, to

minimize arbitrariness, favouritism and nepotism it is absolutely imperative that the interview should never become sole determining factor for admission to a course.

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61. On careful scrutiny of the judgments of the Apex Court it is abundantly clear that for selection to a post, both written examination and oral interview are absolutely imperative. The percentage of marks to be allocated for written test and the interview should depend on the nature of service, assignment or the course. This can vary from service to service. While acknowledging the importance of oral test and interview in the selection process, in our considered view, the interview itself cannot be the sole determining factor for selection. In other words, there cannot be 100% weightage to interview in the selection process. Their Lordships of the Supreme Court in the case of K. Prabhakar Rao (supra) observed that even in a case of admission to service prescription of minimum marks for viva voce was illegal. In the instant case as held by us DM [CH] is an admission to a course. Therefore, there cannot be prescription of minimum marks for viva voce or interview.”

11. Mr. Maninder Singh also pointed out that in the present case as well it could not be called appointment to a post as it was a case of self-employment. On qualifying the examinations, the respondents were only granting registration as Patent Agent which could entitle a person to have his/her practice as Patent Agent as such Patent Agent acquires certain rights stipulated in Section 127 of the Act, which is to the following effect:-

“Section 127 - Rights of patent agents

Subject to the provisions contained in this Act and in any rules made thereunder, every patent agent whose name is entered in the register shall be entitled—

(a) to practice before the Controller; and

(b) to prepare all documents, transact all business and discharge such other functions as may be prescribed in connection with any proceeding before the Controller under this Act.”

12. He, thus, submitted that if a person is not good, he will not get work from the prospective client as the Patent Agent was required to generate his/her own work depending upon his own efficiency and capability and by generating faith in his/her client/prospective client. On this basis it was submitted that the principles laid down in the aforesaid judgment relating to admission to a course would be applicable and not the principles for appointment to a post, in so far as viva voce is concerned. He also submitted that in a large number of developed countries where the importance and significance of rights in relation to a patent agent are well recognized for decades, there is no viva voce at all in this evaluation process for grant of registration at Patent Agents. In other words, the proficiency of any candidate to be given registration as Patent Agent can easily and advisedly be governed by the performance in the written examination itself. For example, neither in U.S. nor in Canada, U.K. and

in the European Union office etc. there is no weightage for viva voce for grant of registration as Patent Agents.

12. Taking cue from the observations of the Division Bench in *AIIMS v. Dr. A.M.V.R. Narendra* (supra), Mr. Maninder Singh has gone to the extent of submitting that directions be given that exercise of evaluation by means of viva voce should be undertaken by an expert authority such as UPSC etc. where the experts can be obtained from science background from other reputed institutes and universities so as to meet the objectives of the Act. According to Mr. Maninder Singh the Patent Office does not possess the expertise or wherewithal for undertaking the process of evaluation/selection of grant of Patent Agents which is resulting into manifest anomalies as pointed out by him.

13. Learned counsel for the respondent, per contra, argued that Rule 110 of the Patent Rules stipulating minimum qualifying marks in viva voce was perfectly justified as it was not a case of admission to a course in university. Highlighting the rights which a qualifying Patent Agent gets as per Section 127 of the Act, he submitted that theoretical knowledge in the subject of patents, which is judged by the written examination, was not sufficient. A Patent Agent was to be judged on other parameters as well, particularly when he or she is in a position to assist the patent authorities properly while dealing with the cases of that registration of patents. Such attributes of a particular candidate could only be judged/evaluated by

means of viva voce examination which was aimed at achieving higher standards of the practitioners. Therefore, argued the learned counsel, prescribing minimum 50% marks in all three papers unanimously, was not bad in law and such matters were to be left to the rule making authorities and should not be interfered with by the courts. He particularly laid emphasis on the following discussion contained in the Constitution Bench judgment of the Supreme Court in *Ajay Hasia and Others v. Khalid Mujib Sehravardi and Others*, (1981) 1 SCC 722:-

“The oral interview test is undoubtedly not a very satisfactory test for assessing and evaluating the capacity and calibre of candidates, but in the absence of any better test for measuring personal characteristics and traits, the oral interview test must, at the present stage, be regarded as not irrational or irrelevant though it is subjective and based on first impression, its result is influenced by many uncertain factors and it is capable of abuse. We would, however, like to point out that in the matter of admission to college or even in the matter of public employment, the oral interview test as presently held should not be relied upon as an exclusive test, but it may be resorted to only as an additional or supplementary test and, moreover, great care must be taken to see that persons who are appointed to conduct the oral interview test are men of high integrity, calibre and qualification.”

14. Learned counsel also relied upon another judgment of the Apex Court in *Madan Lal and Another v. State of J & K and Others*, (1995) 3 SCC 486 where similar contention advanced was repelled, namely, those who secured very good marks in written test had questioned the manner and method of conducting viva voce test. His submission was that in the

aforesaid case the Court held that after a candidate had taken chance to get selected at the interview and appeared therein. He/she could not thereafter question the said method of selection and principle of estoppel would apply. Even on merits the Court held that the assessment of the interview board could not be challenged on the ground that same was not proper or justified as the Courts could not sit over the judgment of the expert committee. He referred to the following discussion in the said judgment in this behalf:-

“10. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition we cannot sit as a court of appeal and try to reassess the relative merits of the candidates concerned who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst other consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed, in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a court of appeal over the assessment made by such an expert committee.

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17. In the light of what is stated above, while dealing with Contention 1, this contention also must fail. The petitioners subjectively feel that as they had fared better in the written test and had got more marks therein as compared to the selected respondents concerned, they

should have been given more marks also at the oral interview. But that is in the realm of assessment of relative merits of candidates concerned by the expert committee before whom these candidates appeared for the viva voce test. Merely on the basis of petitioners' apprehension or suspicion that they were deliberately given less marks at the oral interview as compared to the rival candidates, it cannot be said that the process of assessment was vitiated. This contention is in the realm of mere suspicion having no factual basis. It has to be kept in view that there is not even a whisper in the petition about any personal bias of the Members of the Interview Committee against the petitioners.”

15. On estoppel, learned counsel also referred to the judgment of the Supreme Court in *Chander Prakash Tiwari and Others v. Shakuntala Shukla and Others*, (2002) 6 SCC 127.

16. Justifying the minimum marks in viva voce on the ground that interview was the best mode of assessing the suitability of the candidate, the learned counsel also referred to the judgment of the Supreme Court in *K.H. Siraj v. High Court of Kerala & Others*, AIR 2006 2339. This was a case of appointment to judicial service wherein selection procedure prescribed, holding of examination, written as well as oral and further stipulation of minimum passing marks in both written as well as viva voce tests was discussed. The Court upheld the prescription of minimum passing marks in the interview pointing out the importance of viva voce test in the following manner:-

“54. In our opinion, the interview is the best mode of assessing the suitability of a candidate for a particular position. While the written

examination will testify the candidate's academic knowledge, oral test alone can bring out or disclose his overall intellectual and personal qualities like alertness, resourcefulness, dependability, capacity for discussion, ability to take decisions, qualities of leadership etc. which are also essential for a judicial officer.

55. We may usefully refer to a decision of this Court in *Sahkari Ganna Vikas Samiti Ltd. v. Mahabir Sugar Mills (P) Ltd.*, (1981) 4 SCC 149 in which this Court observed:

“The object of any process of selection for entry into a public service is to secure the best and the most suitable person for the job, avoiding patronage and favouritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So, open competitive examination has come to be accepted almost universally as the gateway to public services. The ideal in recruitment is to do away with unfairness.

...

A system of recruitment almost totally dependent on assessment of a person's academic knowledge and skills, as distinct from ability to deal with pressing problems of economic and social development, with people, and with novel situations cannot serve the needs of today, much less of tomorrow...We venture to suggest that our recruitment procedures should be such that we can select candidates who cannot only assimilate knowledge and sift material to understand the ramifications of a situation or a problem but have the potential to develop an original or innovative approach to the solution of problems.

It is now well recognised that while a written examination assesses a candidate's knowledge and

intellectual ability, an interview test is valuable to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantage over the interview-test there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity....

While we do feel that the marks allotted for interview are on the high side and it may be appropriate for the Government to re-examine the question, we are unable to uphold the contention that it was not within the power of the Government to provide such high marks for interview or that there was any arbitrary exercise of power.”

17. The Court thereafter scanned through a number of earlier pronouncements wherein the importance of viva voce test had been highlighted and accepting such importance in the case of Judicial Officers the Court remarked:-

“57. The qualities which a Judicial Officer would possess are delineated by this Court in *Delhi Bar Association v. Union of India and Ors.*, (2002) 10 SCC159. A Judicial Officer must, apart from academic knowledge, have the capacity to communicate his thoughts, he must be tactful, he must be diplomatic, he must have a sense of humour, he must have the ability to defuse situations, to control the examination of witnesses and also lengthy irrelevant arguments and the like. Existence of such capacities can be brought out only in an oral interview. It is imperative that only persons with a minimum of such capacities should be selected for the judiciary as otherwise the standards would get diluted and substandard stuff may be getting into the judiciary. Acceptance of the contention of the appellants/petitioners can even lead to a postulate that a candidate who scores high in the written examination but is totally inadequate for the job as evident from the

oral interview and gets 0 marks may still find it a place in the judiciary. It will spell disaster to the standards to be maintained by the subordinate judiciary. It is, therefore, the High Court has set a bench mark for the oral interview, a bench mark which is actually low as it requires 30% for a pass. The total marks for the interview are only 50 out of a total of 450. The prescription is, therefore, kept to the bare minimum and if a candidate fails to secure even this bare minimum, it cannot be postulated that he is suitable for the job of Munsif Magistrate, as assessed by five experienced Judges of the High Court.”

18. There cannot be any quarrel about the principles of law which can be culled out from the judgments cited by the learned counsel for both the parties as they are crystalised and firmly established in those judgments. What is to be seen in all these judgments is that while examining the rule giving weightage to the interview viva voce marks, the courts have made distinction between those cases which pertain to admission to educational institutions from the cases which deal with the appointment to a post. When it comes to admission in academic courses in educational institutions, the law laid down by the Apex Court in *Ajay Hasia* (supra) is restricting the marks of viva voce has been consistently followed and the principle which is laid down is that in such cases, normally the weightage to be given to the viva voce marks should normally be 15 per cent and should not be in any case not more than 15 to 20 per cent. However, when it comes to admission, the higher degree courses, little higher per centage of marks is permitted. On the other hand, when it comes to appointment to a

post in service, large interplay in the interview/viva voce marks is held permissible. In such cases, how much weightage is to be given to the interview marks depends upon the nature of post to which the appointment is made. In *Ashok Kumar Yadav* (supra), which was a case of ex-servicemen officer, 25 per cent marks allotted for interview was held to be justified. On the other hand, when it comes to appointment to a post which is of high ranking and/or is of the nature where personal tests are also important which can be judged only in viva voce test, not only a very high per centage assigned to the interview is upheld, even when selection to such post is solely on the basis of interview, even that is held to be permissible. This was so highlighted by the Supreme Court in *K.H. Siraj* (supra). In the cases of selection for entry into public service or such post, the object is to secure the post and most suitable person for the job avoiding patronage and favouritism.

19. We, however, feel in the present case neither we can apply the test applicable for admission to an academic course in an educational institution nor can we apply, *stricto sensu*, the test laid down by the Supreme Court giving less weightage to viva voce examination for appointment to a post/service. The case here is of slightly different nature which does not fall either in the aforesaid category. It is a case of self employment namely a person who gets registration as patent agent has to fend for himself/herself. The registration qualifies such a person to act as patent

agent and gives certain rights stipulated in Section 127 of the Act which include entitlement to practice before the Controller as well as to prepare all documents, transact all business and discharge such other functions as may be prescribed under the Patents Act. It is thus right to practice under the Patents Act before a particular authority namely the Controller. In that sense, the concerned patent agent becomes a professional. Whether such a person is able to generate work and do well in the profession would depend his/her caliber and other attributes enabling him to generate such professional work. By making him/her a patent agent no monetary or other benefits are accorded to that agent by the State or the patent office. At the same time, the purpose is to lay down the minimum professional standards for these patent agents so that they are in a position to discharge their duties effectively and are able to assist the Controller in dealing with and taking decision on the matters brought before the Controller by the patent agents. This expectation is legitimate and is necessary for the dispensation of all statutory duties the Controller is required to discharge. In that limited position of patent agent can be to that of an Advocate appearing before the Court and assisting the Court in a meaningful manner.

20. It hardly needs to be emphasised that lawyers play an important role in the administration of justice. Judges cannot perform their task of dispensing justice effectively, without the support of lawyers. It is often

said that judges and lawyers are the two sides of the same coin. In perform his task the advocate is expected to act without fear or favour and to conduct himself with dignity and decorum showing due respect and courtesy to the Court. His main concern is to present to the court all that can be properly said on behalf of his client's case and in so doing he is not to cater to the opinions and prejudices of the litigant. The better the case is argued on each side the more likely the judge will reach a correct conclusion. That is why it is said that a strong bar makes a strong bench. It is, therefore, by contributing an essential aid to the process of the administration of justice that the advocate discharges a public duty of the highest utility.

21. M.C. Desai, former Chief Justice of Allahabad High Court has observed in one of his writings:

“I always have a great respect for the lawyer's profession because there is no profession higher than that of law. It is one of Ruskin's five great intellectual professions relating to daily necessities of life. A Judge and a lawyer both participate in the administration of justice. A Judge administers the law and the lawyer guides him in doing it. They are both set on a common purpose and the administration of justice is their joint responsibility, that is why cooperation between them is essential for the achievement of the common purpose. Without a strong and independent Bar it is not easy for the Court to receive the guidance which is essential in the administration of justice.”

With the aforesaid role of an advocate from whom expectations are much higher, his competence cannot be judged merely by any interview or viva voce. Prescribing this condition with minimum 50% marks for a Patent Agent appears to be a tall order.

22. For this reason, this provision prescribes minimum educational qualification which a patent agent is required to possess is contained in Section 126 (1) (c) of the Act namely the a degree in science, engineering or technology from any University established under the law for time being in force or other equivalent qualifications as the Central Government may specify in this behalf. In addition, the minimum experience of 10 years either as an examiner or as Controller under Section 73 or both as prescribed. To top it all, this provision also calls for passing the qualifying examination as prescribed for the purpose. This qualification as prescribed under Rule 110 again puts to test the knowledge of prospective agent in theory which is examined through two written papers.

23. In this background, we have to examine the appropriateness of the weightage given to the viva voce which is again of 100 marks, like other two papers of 100 marks each. There may not even be any dispute of application of 100 marks each to three papers or securing 60 per cent marks in aggregate in these papers. The only dispute is on prescribing minimum 50 per cent marks in viva voce and this aspect is to be seen in the aforesaid

background given by us which background we summed up again as follows.

24. The patent agent is neither an admission to educational institution or appointment to a post. It is in the nature of self employment and status of professional attached to such a patent agent, minimum educational qualification in order to become patent agent, a person has to have the minimum qualification as well as experience, he has to pass the qualifying examination wherein he/she is again tested about his/her knowledge in the subject. When a person is able to meet all the aforesaid test, can such a candidate be failed only because of failure to secure minimum 50 per cent marks in viva voce.

25. No doubt, as explained by the learned counsel for the respondent, theoretical knowledge is not sufficient and a patent agent is to be judged on other parameters as well. It is to be seen as to whether he/she is in a position to assist patent authorities appropriately while dealing with the cases of the registration of patents and some of these attributes, particularly is/her manner of presentation can be judged at the time of interview. This is to be balanced with other factors, pointed out above, namely on the registration as patent agent, the patent agent only gets the right to appear before the Controller and present certain papers etc. and it is for the patent agent to generate work for himself/herself. For generating this work, it is

the relationship between the patent agent and the client who needs services of such a patent agent. It is the confidence which said client reposes in the patent agent that matters the most. If a particular patent agent is not good enough, he/she may not get much work. When we examine the matter from this angle, we are of the view that the aforesaid provision, the minimum 50 per cent marks which acquires 100 percent weightage may not be appropriate. The rational given by this Court in *Dr. A.M.V.R. Narendra* (supra) would clearly be applicable wherein almost similar kinds of selection process was commented upon to hold that the interview had become the sole determinative factor for appointment to a course. Here also even if a particular candidate had done well in his next degree course (educational qualification) or had extra ordinary experience and had also performed well in two written qualifying examination, still even with one mark less than the minimum 50 per cent marks required in interview, he/she would be treated as disqualified. This, according to us, may result in some kind of arbitrariness. Some of the examples given by the petitioner in the present writ petition itself give an impression that such things can happen. We are, therefore, of the opinion that prescribing minimum 50 per cent marks in the interview may not be appropriate more so when the rule mandates securing 60 per cent marks in aggregate in all three papers i.e. two written and one viva voce test. This rule is therefore arbitrary and becomes violative of Article 14 of the constitution. To this extent namely

prescribing minimum 50 per cent marks in the viva voce is struck down. We, however, leave it to the rule making authority to either give less weightage by prescribing lesser minimum marks which should not be more than 25 per cent.

26. Having examined the validity of the Rule in the aforesaid manner, we revert back to the case of the petitioner before us. As already pointed out above, the petitioner has appeared thrice in the selection process. While in the selection process in the year 2008, the petitioner secured aggregate of 60.44% but was not selected for failure to secure minimum of 50 marks in Paper II – in that year, she was awarded 79.33% in the viva-voce; in the exam held in 2010, she was disqualified for failure to secure 50 marks in viva-voce; in the last exam though in the two written papers she has secured 61% and 72% marks respectively but was given only 40% in viva-voce. Thus, though in the last exam she has secured 133 marks out of 200 marks i.e. 66.5% in the written exam but has still remained unsuccessful for the reason of not securing 50% marks in the interview. In the given case, we feel that marks secured by her in the *viva voce* do not reflect her actual merit, when adjudged in the light of her performance in the written papers and her qualifications i.e. post graduation in Science (M.Sc.) from Indian Institute of Technology, Delhi. We are therefore of the view that the marks of *viva voce* be ignored altogether. Once we find that in other papers the

petitioner has secured more than 60% marks, which are the qualifying marks, she has to be declared pass in the examination and which entitles her to get registered as the Patent Agent. We may clarify that the aforesaid approach is restricted to the case of the petitioner in order to find the solution of the case at hand. What course of action is to be adopted by the respondents in future would depend on the nature of amendment that shall be made to the Rule in question.

27. We thus issue mandamus to the respondents to register the petitioner as the patent agent.

28. This writ petition is allowed in the aforesaid terms.

29. There shall be no order as to costs.

ACTING CHIEF JUSTICE

February 28, 2012
hp/skb.

**(RAJIV SAHAI ENDLAW)
JUDGE**